

# **HIV/AIDS and its Impacts on Land Tenure and Livelihoods in Lesotho Comments on Lesotho Country Study<sup>1</sup>**

**Martin Adams<sup>2</sup>**

## **1. Introduction**

The TOR for discussants for this session ask for a critical assessment of the Country Study under four headings:

- methodology,
- conceptual framework,
- policy recommendations
- and other issues.

The discussants have been asked to focus on the core issues in 15 minutes. My brief comments are offered with the aim of adding value to an important piece of field research. I conclude that there is some tidying to be done before it is finalised.

The study is crucial to obtaining an understanding of the impact of the pandemic on land tenure and livelihoods in southern Africa, especially in rural areas under systems of customary tenure. Over 90 per cent of the land in Lesotho is under customary tenure.

Lesotho is one of the countries most seriously affected by HIV/AIDS. If recent estimates of HIV/AIDS levels are accurate, about one-third of the adult population may be infected; far more males are infected than females.

Lesotho is a home for some of the poorest and most vulnerable communities in the sub region. Because of the mountainous conditions, the harshness of the climate, the erodability of the soils and the scarcity of cultivable land, the population is greatly dependent on income from migrant labour. The national economy has been hard hit in recent years by the slow down in the South African economy and retrenchment in the mining industry.

## **2. Methodology**

The Country Study describes investigations at the national, local, community and household level. The most significant level for obtaining an understanding of the interaction of the pandemic and land tenure and livelihoods is of course the community and household level. Consultations took place in two chosen rural communities, Ha Poli and Matsatsaneng. The report explains that they were conducted 'through their respective chiefs' (p. 4): one in the lowlands, the other in the highlands.

The densely settled urban or per-urban zone of Maseru was not included, an issue to which I shall return later.

---

<sup>1</sup> By Matšelisso M. Mphale, Emmanuel G. Rwambali and Mokhantšo G. Makoe

<sup>2</sup> Currently attached to the National Land Policy study, Botswana, [landolicy@botsnet.bw](mailto:landolicy@botsnet.bw)

Fieldwork of this nature is highly sensitive and calls for very great patience and tact. As the report describes, it was necessary to approach the topic of HIV/AIDS and its impact on land tenure and livelihoods with some circumspection, especially within affected communities.

The approach adopted at the community level and the valuable insights obtained indicate that the work was conducted with sensitivity. However, one would have liked to see more detail on dates and places visited, number of interviews conducted and so on. Such information is important if the conclusions of the study are to receive credence and if the work is ever to be followed up. This information is essential for placing the results of a qualitative and exploratory study in context. The authors' assessment of the methodological problems encountered would be useful in planning any follow up investigations.

The description of the policy, legal and administrative framework is extremely threadbare in the Country Study. Vague references are made to 'land administrators' (presumably government land administrators), but it is not clear where they fit into the picture and what laws they are administering. In the description of the field results, much is made of the negative impact of a clause in the Land Act of 1979 relating to the revocation of land left fallow for more than two years and the efforts of the chiefs to circumvent it. But I have not been able to find that clause, either in the initial Act or in subsequent amendments. Nor do the comments relating to leases in customary areas seem relevant. It is generally only in urban areas that the 'grant in title' is in the form of a lease. A summary of the Land Act 1979 is attached to these comments in Box 2.

Several references are made to the Land Policy Review Commission, which reported in late 2000. It would have been interesting to have an assessment of the recommendations of the LPRC on customary tenure in the light of the findings of the Country Study. While the LPRC proposals on women's land rights are well formulated, other recommendations of the LPRC were less helpful. For example the LPRC stated:

*For the avoidance of doubt, (the) customary land tenure system must be abolished forthwith as it is not conducive to efficient land administration, security of land tenure, high productivity and development. All land that was formerly held under customary tenure shall now be held on leasehold tenure. (page 42)*

Throughout 2001, the Department of Land, Surveys and Physical Planning in the Ministry of Local Government worked on a draft land policy White Paper, which attempted to make sense of the LPRC. The draft White Paper was reviewed by Cabinet in December last year but held over until after the elections in May. This might have been mentioned in the Country Study. Again an assessment of the preliminary draft White Paper would be useful in the light of the Country Study.

The Country Study makes references to the LPRC Commission's proposal for "centralised" Land Boards on the Botswana model. I believe that Government has not

accepted this proposal. It is likely that, under the Local Government Act 1997, the land-related work of the Village Development Councils will be taken over by land committees of the local Community Councils (or by the Community Councils themselves, reconvened as land standing committees). As is currently the case with the VDCs, Community Councils can be expected to have chiefs among their members. However, the Local Government Act (Section 4) requires that no more than two gazetted chiefs shall be elected to Community Councils, which shall consist of between 9 and 15 elected members.

### **3. Conceptual framework**

I assume that the ‘conceptual framework’ (mentioned in the discussants’ TOR) refers to the study objectives and the testing of assumptions made by the authors about the impact of the HIV/AIDS pandemic, the land tenure system and the nature of rural livelihoods. Some of these assumptions appear on page 1 of the Country Study. The objectives of the study were:

- To identify the coping strategies that households affected by HIV/AIDS adopt in order to survive.
- To assess how these coping strategies are related to land tenure provisions and their implications for food security and sustainable livelihoods.
- To document the experiences of affected families regarding protection of the land rights of widows and orphans.
- To find out the extent to which the provision for leases has provided opportunities for households affected by HIV/AIDS.
- To determine the link between the problem of HIV/AIDS and increasing land sales and conversions.

Several of these objectives, e.g. on coping strategies, the experiences of affected families regarding the protection of land rights (e.g. an increase in share cropping and mafisa arrangements) seem to have been identified. There is some doubt about the achievement of other objectives. The authors perhaps made the assumption that there would be a connection between the ‘land tenure provisions’, i.e. the prescribed system of land administration and management and the land tenure system in place. This may be a reasonable assumption in some countries, but not in Lesotho because of the vast gap between law and practice in Lesotho. This state of affairs warrants some attention in the text. Statements in the report about provisions for leases and the revocation of rights after two years fallow certainly need clarification, where appropriate, referring to the relevant legislation – chapter and verse. If this is a not legal provisions but emerging policy, this should be made clear.

The formal land administration arrangements should be described, even if they are ignored because this would be relevant to the conclusions reached by the Country Study.

Until well into the 1970s, a hierarchy of chiefs administered the land with powers of land allocation and revocation of rights over the areas within their jurisdiction. Principal, Ward, Area, Village Chiefs and headmen are directly answerable to the King. Under the Laws of Lerotholi, every chief and every headman is responsible within his area of jurisdiction for the fair and impartial allocation of land to his subjects. Land may be allocated for several purposes, e.g. residential, business, planting of trees, growing of crops, kraals, and burial of the dead.

In law, at least this was changed by the Land Act 1979. It is the basic law governing non-customary land tenure in Lesotho, although it provides that where customary law is inconsistent with the Act, the Act shall prevail. Under the Act, The Commissioner of Lands is meant to be in charge of day-to-day land administration. A number of divisions under various ministries provide the basic land management services. These include the Department of Lands, Surveys and Physical Planning (Local Government and Home Affairs), Land Use Planning (Agriculture and Co-operatives), Deeds Registry (Justice and Human Rights, Law, Constitutional Affairs and Rehabilitation), Urban Councils and Village Development Councils.

The transition to land administration by Village Development Councils under the Land Act of 1979 has not been smooth. In Lesotho, the authority to allocate land is strongly contested (see Box 1). It would be helpful if the authors of the paper had described this background and perhaps explained why the Land Act of 1979 is such a toothless tiger. It would also help us to assess some of the findings relating to the role of traditional leaders.

#### **4. Policy recommendations**

The policy recommendations relating to the amelioration of the impact of aids on land tenure and livelihoods are somewhat sparse in the report. Most of the authors' recommendations relate to policy aspects covering community support and welfare for those infected and affected by HIV/AIDS. If it is the case, which it may be, that there are few useful land-related proposals emerging from the study, this is an important finding and should be clearly stated.

They are principally three recommendations:

- *Land administrators should be fully informed about the epidemic and various legislations that govern the rights of the affected households. This will help to ensure uniform implementation of measures to support affected households.*
- *The importance of land to communities calls for concerted efforts to make the public aware of current Land Acts and proposed changes to land policy. Particular attention should be paid to provisions likely to affect households affected by HIV/AIDS. Provisions likely to have negative impacts should be removed or reformulated and those likely to have positive impacts should be strengthened. This should include a review of the likely impacts of the present trend towards*

*concentration and commercialisation of land holding and agriculture on HIV/AIDS affected households and suitable action to secure their livelihoods.*

- *Mechanisms already being used by communities to make land policies suit their present circumstances should be examined and where possible adopted in current or proposed land policy and legislation. This should include mechanisms to ensure that sharecropping can continue to support the food security of affected households.*

These recommendations need to be taken seriously by Government. Land policy development could be at a critical stage in Lesotho. The release of the draft White Paper on Lesotho's National Land Policy has yet to be approved by Cabinet. It is not clear whether it is on the priority list for action or on the back burner. The impact of HIV/AIDS on land tenure and rural livelihoods was ignored in the LPRC document and probably given inadequate attention in the draft White Paper.

### **5. Other issues**

An issue that needs to be raised is the impact of HIV/AIDS on land tenure and livelihoods in peri-urban areas in Lesotho, particularly in the environs of Maseru. There is not time to examine this issue in the workshop, but I believe that it needs to be raised and noted. It is in the urban land context, that the consequences of HIV/AIDS are more likely to include distress sales of property to finance medical care, land grabbing with the collapse of the social order and the possible arrival of tens of thousands of orphans in urban areas. If even one-quarter of the caregivers die in the short to medium term, then approximately 200,000 children will be orphaned. A proportion of orphans will have to fend for themselves. Many could be drawn to the urban area, with severe social and economic consequences and increasing demands on the social welfare budget of Maseru City Council.

### **Box 1 Tensions between the modern state and Traditional Authorities**

**Article 107** of the 1993 constitution denotes that all land in Lesotho is vested in the Basotho Nation.

**Article 108 (1) states:**

*The power to allocate land that is vested in the Basotho Nation to make grants of interests or rights in or over land to revoke or derogate from any allocation or grant that has been made or otherwise to terminate or restrict any interest or right that has been granted is vested in the King in trust for the Basotho Nation.*

However, article 108 (2) provides that *the power that is vested in the King by subsection (1) of this section shall be exercised in accordance with this constitution and any other law.*

Article 108 (2) above appears arbitrary and ambiguous. Lands in Lesotho have not been formally nationalized. Neither is there any express law beyond the constitution that has vested the land in the Government of the day. This is the bone of contention between the modern state and the traditional authorities.

Though generally progressive in laying the foundations for an active land market, the statutory interventions introduced since independence also sowed the seeds of conflict in land resources management. Whereas customary law gave the Traditional Authorities absolute power, the modern state has in theory relegated them to the background with little or no power over land. In practice, however, strong and influential Traditional Authorities do what they like with little accountability to the modern state.

Source: Kasanga, K. (1999) 'Land Policy and Land Management in Lesotho, Part 1: Land Policy', August 1999, on behalf of GTZ for Agricultural Policy and Capacity Building Programme in Lesotho. (pp 12 –13)

## **Box 2 The Land Act 1979**

The Land Act, 1979 is the basic law governing non-customary land tenure (although it provides that where customary law is inconsistent with the Act, the Act shall prevail). It reiterates the constitutional position that land in Lesotho is absolutely and irrevocably vested in the Basotho Nation and no person, other than the Head of State may hold any title to land except as provided by customary law or under the Act. No person other than a citizen of Lesotho who is a Mosotho or a company the majority shareholding of which is held by citizens of Lesotho who are Basotho or a partnership of which the majority of partners are citizens of Lesotho who are Basotho or bodies registered under the Societies Act, 1966 may hold a title, i.e., a lease, to land in Lesotho.

In rural areas, the Act provides for a 'grant of title' to be made to a legal person or an individual. This entitles the allottee to use and occupy the land but not to transfer it. A legal person may hold the allocation for an indefinite period but an individual may only obtain a life interest. The Act provides that the life interest will, on the death of the allottee, pass first to the widow and then to the person designated by the deceased allottee, then to the heir nominated by surviving members of the family. An allottee who is using the land for agricultural or residential purposes may on application to the Commissioner of Lands convert his holding of land to a lease. An allocating authority - presently a VDC - may revoke an allocation. Revocation on the grounds of the need to set the land aside for public purposes in the public interest is exercised by the Minister. Compensation is not payable for revocation by an allocating authority.

The grant of a title to land in urban areas is in the form of a lease. Plots in urban areas are advertised and members of the public lodge applications with the ULCs which determine the applications. ULCs consist of Principal Chiefs as chairman, the Commissioner or his representative, the District Administrator or Town Clerk and three other persons appointed by the Minister. In certain circumstances applicants may be invited to tender for plots. Persons claiming a title to land, which has been advertised as available for leasing, have one month to lodge a claim to the land with the Land Tribunal. Such persons are likely to be persons claiming rights to the land under customary law.

Lessees are entitled to exclusive possession and may, subject to the consent of the Minister, undertake normal commercial transactions. A general consent applicable to all transactions may be published by the Commissioner in the Gazette. A set of statutory conditions for leases other than agricultural leases are set out in the First Schedule to the Act. Lessees, other than citizens of Lesotho who are Basotho, occupying leased land for residential purposes pay such ground rent as the Minister may prescribe. The Minister may also prescribe development charges to be paid by lessees.

The Minister may, where it appears to him to be in the public interest or in the interests of the development of agriculture, declare an area of agricultural land to be a selected agricultural area. Persons having existing titles to the land are deemed to have received three months notice of termination of their interest from the date of the publication of the selected area notice in the Gazette. All existing titles to land in such areas are thereupon extinguished but substitute titles in the form of a lease may be granted or where that is not possible compensation is payable for the deprivation of the existing title. Land in a selected area may be leased to a private developer for development.

The Minister may, after consultation with the Principal Chief having jurisdiction within the area and obtaining the King's consent, declare (by notice in the Gazette) that land is set-aside for a public purpose. Public purposes as defined in the Act include use of land by the government, a local authority or a statutory corporation for communications, infrastructure, utilities, provision of social services such as low income housing, water and land conservation, provision of public offices and other services, and furthering sport, culture and tourism. Persons claiming an interest in the land may claim compensation. In assessing compensation regard is had only to the value of the property as certified by the Government.