

# **The state, legal reform and decentralisation: consequences for the commons in Lesotho**

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## **Introduction**

The southern African commons are in decline, for two reasons. The first is privatisation. By legal or extra-legal means, individuals and households are taking direct control of parcels of land and resources, excising them from community ownership and management. (Occasionally, as in South African land reform, a new form of commons is created on the basis of private ownership by a legal entity set up to represent a group or community.) The second cause of decline is the degradation or collapse of group governance. Controls on resource access are weakened, or cease to function. What were once commons become areas of open access, regardless of their formal status as communal areas or state land. Meanwhile, as I argued at the last IASCP conference, debate about a ‘crisis’ in community-based natural resource management (CBNRM) has failed to focus on the real challenge, and potential, of ‘everyday’ CBNRM by rural people and their leadership structures, far from the often introspective concerns of projects and protected areas (Turner, 2004a, b).

Privatisation of the commons is not necessarily a bad thing, if its opportunities and benefits are widely accessible and adverse side effects on the livelihoods of the poor can be averted. The second kind of conversion, from common property to open access, is bound to be bad for all those who live in and use the resources of communal areas. It is this second kind of change that threatens the kingdom of Lesotho. Three years ago, in a review of range

management there, I said that Lesotho is one of the best places in Africa to try and answer the question whether rangelands can be managed successfully as common property resources in the 21<sup>st</sup> century. I concluded that “the answer... has to be negative, in this country at least” (Turner, 2003: 1565). The present paper reviews the prospects of Lesotho’s commons from the broader perspectives of tenure and governance; outlines some significant new developments; and concludes by returning to the question I raised in 2003.

### **Land tenure and legal dualism**

In the southern African context, Lesotho’s land history in the 19<sup>th</sup> and 20<sup>th</sup> centuries is both typical and unique. Typically, the kingdom lost much of its territory to European settlement through conquest and one-sided treaties in the 19<sup>th</sup> century. Extensive, fertile areas were lost to what is now South Africa’s Free State province. Uniquely, there was no white settlement (barring a few traders and missionaries), and no individual title to land, in the diminished territory of Basutoland that came under British protection in 1868. Having condoned the theft of much of Lesotho before that date, the British thereafter supported Basotho’s<sup>1</sup> desire to exclude settlers and freehold title from the land they had left. The crowded communal area that thus remained served similar economic purposes to those of the communal areas that South Africa retained in its ‘homelands’ or Bantustans, such as Transkei and kwaZulu. Benefiting British as well as South African capital, Lesotho’s commons partially sustained a work force who gained the rest of their impoverished livelihoods from the sub-subsistence wages paid by South African mines.

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<sup>1</sup> Basotho are the people of Lesotho.

Indigenous concepts and systems of land tenure have been unusually prominent in Lesotho's colonial and post-colonial history. Its legal experience has been much more typical, however. The British authorities imported systems of common and statute law but sustained the operation of Sesotho<sup>2</sup> customary law in a structure of legal dualism (Adams and Turner, 2005). As there were no settlers and no private or freehold tenure in the country, this legal dualism was not matched by any form of tenure dualism. Outside the authorities' administrative settlements, customary law governed the administration of land rights and land use and sustained the concept and management of the commons.

Lesotho's independence in 1966 did not alter these legal and tenure arrangements. For an initial period after independence, chiefs continued their full customary role in allocating land rights and administering the commons on behalf of the king. As in most indigenous southern African tenure systems, rights in residential and arable land were individually allocated to household heads, with arable rights conditional on regular use and communal access for grazing each year after harvest. The rest of the landscape, with its pasture, fuel, food and medicinal resources, was administered and used as a commons through a complex, often contested, system of nested membership in which local chiefs' subjects had defined rights to most areas but senior chiefs controlled access and management in high summer grazing areas for much broader groups of users.

Later, a series of administrative and legal amendments introduced community committees to share common property management tasks with the traditional authorities, whose role was gradually diminished. The Land Act of 1979 introduced a system of leases, some of which

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<sup>2</sup> Sesotho is the language of Lesotho, and the way Basotho do things.

were registrable and could be used as security for loans. It formally converted all rural residential title to leasehold, but this made no practical difference on the ground. The Act officially unified and expanded Lesotho's land tenure system under one statute law, but recognised the continuing role of customary law (while asserting that the Act would prevail in the case of inconsistencies with it).

### **The concept of the commons**

A new constitution reaffirmed in 1993 that all land is vested in the Basotho nation, and that the power to allocate rights in land is vested in the king in trust for the nation. The concept of the commons thus retains its powerful, nested meanings for Basotho. There is a strong national sense of the whole national territory as a national asset, within which customary law remains powerful in the definition, allocation and governance of residential and arable rights. At the political level, the concept of freehold remains anathema, and any perceived government weakness in negotiations with South Africa or other outside powers tends to lead to accusations of 'selling the country'.

Nevertheless, residential and arable land rights are increasingly individualised. There is a thriving, mostly extra-legal land market in the rapidly expanding urban and peri-urban areas. In the countryside, the suspension of individual arable rights to allow communal grazing of fields in the post-harvest winter season is now widely rejected. Although rural Lesotho remains largely the 'land without fences' that it was often labelled in the past, most field holders now assert exclusive rights to their crop residues, which they take to their homesteads for feeding to their livestock or sale to others.

In the popular national view, the whole kingdom is a commons. In daily livelihoods, individual rights to residential and arable land are growing steadily stronger. Less has changed in the rest of the landscape, which most Basotho still assume to be owned and governed as common property.

### **Governance of the commons**

In Lesotho, the governance of the commons has always been integral to broader local government structures and processes. Traditionally, the chief who administered local justice, authorised livestock movements and applied his rubber stamp to passport applications was also responsible for the management of rangelands, the control of tree felling and the administration of the individual resource rights nested within the overall social concept of the kingdom as a commons. As Village Development Committees (later Councils) came to play a stronger role in supposed collaboration with the chiefs, they too administered the commons as part of the general business of local government.

The quality of the governance of the commons thus remains dependent on the quality of local governance as a whole. That quality is in decline, for institutional and social reasons that are closely related. Always variable, the aggregate performance of the chieftainship has deteriorated, not least because these leaders saw their power and status threatened by modern institutions. Chiefs ceased to be *ex officio* chairs of Village Development Councils (VDCs) in 1994, which often led to tension, confusion and acrimony at community level (Land Policy Review Commission, 2000: 52). Modern local government institutions, notably the VDCs, have been poorly resourced and trained. They, and the nation's governance as a whole, have been riven and sometimes incapacitated by party politics. Periodically, they have been

undermined by a lack of clarity from the centre about how local government policy was to evolve. Local and high level corruption have sapped political morale at all levels. Against this background, society's willingness to accept regulation and govern itself has diminished. The word of the chief is no longer respected as it was in earlier generations. Formal law enforcement is often ineffective. People perceive fewer reasons to comply with local or national regulation of their behaviour. Stock theft, and the theft of any other moveable property, are rampant in rural Lesotho.

As the quality of local governance has declined, governance of the commons has become less effective too. In many (though certainly not all) rural areas, livestock owners say that customary range management arrangements have broken down, and people now take their herds and flocks to graze when and where they like. Poor range management is widely cited as a cause of the perceived acceleration in land degradation. Following the Local Government Act of 1997, the governance of the commons became weaker still. The new law introduced a totally restructured system of local government, of which democratically elected Community Councils were the fundamental units. These Councils were to take over responsibility for land administration and natural resource management. Traditional authorities no longer have any formal role in these matters, although each Community Council includes two chiefs chosen by all chiefs in its area. The Act was followed by years of administrative uncertainty. In fact, VDCs continued to operate until central government closed them down in 2001. After a further delay, the Minister of Local Government appointed interim local authorities to fulfil the functions of Community Councils. Nominated rather than elected, poorly trained and minimally resourced, these bodies were largely ineffective in the governance of the commons – a role that some chiefs continued to fulfil despite their lack of legal authority to do so.

It was not until April 2005 that democratic (but very poorly attended) elections voted the first Community Councils into office under the 1997 Act. In fulfilling their legal mandate to govern Lesotho's commons, these 128 authorities (and the ten District Councils under which they fall) must contend with the general decline in local governance and the specific problems brought about by the preceding years of institutional uncertainty about land administration and natural resource management.

### **Abolition of the commons?**

Meanwhile, the whole conceptual and legal basis of Lesotho's land tenure had been under review. Despite its importance in the nation's self-image, the concept of the commons is not without its detractors. A Commission was appointed in 1999 to formulate a new land policy for the kingdom. Its 2000 report recommended the abolition of customary land law and land tenure, and the conversion of all land rights to freehold or leasehold. The commons, it said, should be held under leasehold as Range Management Areas (RMAs) by Grazing Associations (GAs), which should be established throughout Lesotho.

The Commission's recommendations would have ended Lesotho's legal dualism with regard to land rights and would have strengthened modes of private tenure in the interests of facilitating the orderly development of a legal land market. With its continued insistence that "all land in Lesotho shall vest in the Basotho Nation and be held by the State through [a new] National Land Council as the representative of the Nation", the Commission, while proposing the removal of the king from the apex of the nation's tenure system, presumably did not mean to alter the fundamental concepts of Lesotho's land as a national asset, and of its rangelands as a commons. The idea of RMAs managed (but not owned) by GAs had been introduced 20

years earlier as a means of strengthening user management rights and incentives on defined units of the commons, blending indigenous management approaches with tighter specification of group membership under the continuing purview of the chiefs (Turner, 2003). The Land Policy Review Commission's recommendations were just one instance of sustained policy commitment to RMAs and GAs over the last quarter century.

### **Decentralisation and local government reform**

As already indicated, the land policy review had been preceded by a fundamental reform of local government through the Local Government Act of 1997. Due to the delays in implementation that were outlined above, the land debate took place while the local government reform still existed only on paper. Only over the last 12 months has this reform taken practical effect as Community Councils and District Councils took office for the first time. Linked to these changes is a major decentralisation process, in which most field and district-level services of government are being placed under the authority of these local bodies. Staff are being transferred to a Local Government Service Commission; budgets are being redirected via the Ministry of Local Government to the local authorities. New community-based development planning procedures are being developed and should in future provide the building blocks for national development planning and management.

These are challenging times for all aspects of local governance in Lesotho – governance that is being more explicitly linked to national systems and structures and that offers the prospect of stronger democracy and public participation. Not surprisingly, most of the new system's potential for enhanced governance remains only potential at this early stage. During much of their first year, the new local authorities had little to do, as the necessary systems, training



and resources were not yet in place. Although Community Councils now have legal authority for the allocation of residential and arable land rights and for the management of common grazing lands and related natural resources, there was at first little clarity as to how they should proceed, particularly as the fundamental land reform presaged by the 2000 Commission has yet to take effect. Decentralisation and local government reform have not yet filled the governance gap on Lesotho's commons.

### **Land reform: new rights to the commons?**

Part of the challenge for the new local authorities, and for the architects of the system in the Ministry of Local Government, has been how Community Councils should fulfil their statutory land administration and natural resource management functions. The two reform processes – of land tenure and local government – have not been synchronised, and each has suffered from the lags in implementation of the other. The Land Policy Review Commission led to the drafting of a Land Bill and related legislation in 2003. This Bill gave key land administration responsibilities to Community Councils, as envisaged by the Local Government Act, but did not abolish customary land law in the ways envisaged by the Commission. Instead, it aimed to embrace tenure dualism in ways that would enable those who sought more clearly defined leasehold rights to secure these simply, without disrupting existing communal tenure. Nor did the Bill introduce freehold, as the Commission had proposed (although, technically, freehold is unknown in the Roman Dutch common law that Lesotho imported in the 19<sup>th</sup> century). All existing allocations of residential and arable land would be converted to primary leases and would thus immediately be eligible for upgrading to demarcated and mortgageable forms of lease if the holder wished. Primary leases would also be marketable, subject to the approval of the Community Council. The day to day

administration of primary leases, however, would still be subject to the principles of customary law within the overall framework of the new Land Act.

In this way, holders of residential and arable land rights would wake up the day after enactment of the Land Bill to find everything the same, but everything different. Nothing would have changed in the constitutional character of their individual rights to the nation's common land heritage, or in the application of customary law to their daily land use. Officially, however, they would now be holders of primary leases defined in statute law under a completely revised system.

Nor would anything have changed with regard to their grazing and resource extraction rights on the commons. The Bill would transfer ownership of all land not held individually (under primary or other lease) to Community Councils, each of which would hold all such land in its area of jurisdiction under a primary lease, in perpetuity. In a sense this would parallel the allocation of full private title (again, not technically 'freehold') to legal entities representing groups of land reform beneficiaries in South Africa. In day to day practice, customary law would still govern resource users on the commons – but the right to enforce it has passed, under the Local Government Act, to the new local authorities.

Significant areas of the commons remain outside the jurisdiction of the Community Councils and would therefore not be subject to their primary leasehold. The high summer grazing areas, or cattle posts, in this predominantly mountainous kingdom have been managed directly by Lesotho's 22 Principal Chiefs since the Basotho first colonised the mountains under pressure from white settlement of their lowland territories. Under a traditional system of transhumance that is now much less practised, stock owners from widely scattered areas

could use these cattle posts if they fell under the authority of the responsible Principal Chief. Residents of a Community Council area therefore cannot claim sole rights to an adjacent cattle post area, whose users may come from much further afield. The new governance map of Lesotho's commons is therefore sprinkled with areas where Principal Chiefs, rather than Community Councils, have jurisdiction.

The theory of the Land Bill has yet to be put into practice. Although drafted in 2003 and revised several times since, the proposed law has not yet been approved by Cabinet for presentation to Parliament. At the heart of the delay is controversy over the Bill's innovative provisions for clarifying and legalising the confused and mostly extra-legal tenure of residential sites in Lesotho's booming urban areas. As drafted, the Bill states that all such allocations, however obtained, would be converted to interim primary leases that would then be subject to a relatively simple validation procedure. This is anathema to those in government who believe that the majority of the urban population who were forced by bureaucracy and corruption to obtain their land through extra-legal channels should be punished for flouting the law. There has been no controversy about the Bill's provisions for the rangelands and the conversion of most of the commons to primary leasehold by Community Councils. Meanwhile, Community Councils are being trained in how to administer residential and arable land under the existing Land Act of 1979. Rural progress is effectively being delayed by controversy over urban land issues.

### **How local is local?**

This controversy over primary leases for urban and peri-urban holdings need not delay progress by Community Councils in governing the grazing commons and their related natural

resources. Two challenges do face them in this regard. The first concerns the development of some vision or plan as to how they want to manage their local landscapes. To some extent, the local authorities' indigenous knowledge and customary management practices can serve as a foundation in this regard. The still experimental procedures of participatory planning by Community Councils will be able to make a stronger contribution when they have been fully tested and developed.

The second challenge is more fundamental. There are only 128 Community Councils in Lesotho. Many are therefore responsible for areas of several hundred square kilometres that contain dozens of villages. In terms of the Local Government Act, a Community Council has between nine and 15 members. In other words, the new local government authorities are not very local. They cannot undertake the detailed tasks of land administration and natural resource management for each village and valley in their constituencies. For all its strengths, Lesotho's new local government structure has a built-in governance gap as far as the commons are concerned.

One possible solution to this problem is that traditional authorities operate on behalf of the Community Councils at the level of individual village land administration or the management of small sections of the range resource complex. While some chiefs and headmen have the knowledge, experience, local stature and goodwill to fulfil this role, this is certainly not true of them all, and some competent chiefs would presumably be reluctant to work on behalf of new bodies that have usurped their own authority.

Another potential solution lies in the concept of user groups, as developed through Grazing Associations for the governance of Range Management Areas. The dozen or so GAs

established over the last quarter century have faced many institutional and operational difficulties, but have been repeatedly endorsed by government (notably in the 2004 Poverty Reduction Strategy) as the best way forward for range management in Lesotho. In 2005 the Maloti-Drakensberg Transfrontier Conservation Project (MDTP, funded by the Global Environment Facility) began to pilot the concept of broadening GAs so that they represent all users of commons resources (not just livestock owners) and formally establishing them as the local resource management agents of Community Councils. In this model, a Managed Resources Association (to use the MDTP's term) would undertake the detailed work of monitoring natural resource condition and controlling natural resource access and use on the commons, in the name of the Community Council, under whose legal authority it would operate through a formal agency agreement. If, as the Local Government Act provides, a Community Council enacts natural resource management byelaws, the Association could be empowered by the Council to enforce the byelaws on its behalf.

This user group approach was welcomed in the eastern mountain districts where the MDTP works. Members of existing GAs, and the newly elected Community Councils, have all indicated their willingness to develop it. Some Principal Chiefs have even said that they would authorise such user groups and their Community Councils to manage adjacent high altitude cattle post areas on their behalf. However, it remains to be seen how much more progress the MDTP will make with the concept before the project terminates in 2007. Meanwhile, the Ministry of Forestry and Land Reclamation, which is responsible for range management, has recently proposed a new project for Global Environment Facility funding. This project would take MDTP's pilot further by developing user group-Community Council collaboration in the governance of the commons by local authorities in seven additional Community Council areas.

### **The consequences for the commons**

So far, there are still fundamental problems in the governance of Lesotho's commons, and in the very retention of these areas as commons rather than their decline into open access. The quality of this governance has been deteriorating. Local people in some areas say that their common grazing lands and related resources are now open for access by all, without any effective control. The restructuring of local government and the new disposition of most natural resource management authority under Community Councils has made no difference on the ground yet. It may never make much difference unless the fundamental governance gap between these not very local authorities and the daily detail of resource use and management is filled by some competent, truly local agent. The best prospect so far in this regard is to develop user groups, on the model of the existing Grazing Associations, for this purpose, and to place them under the legal authority of Community Councils.

This approach has only been piloted on a very small scale to date. Does it mean that the Lesotho commons have a future in the 21<sup>st</sup> century after all, contrary to my assertion in 2003? I gave two broad reasons for that assertion. First, affirming Lawry's arguments on the basis of his detailed research in Lesotho's first Range Management Area in the early 1980s (Lawry, 1988), I argued that Basotho's livelihood and livestock management strategies, and their degree of dependence on rangeland resources, are too diverse for them to feel the shared commitment to the condition of these resources that successful common property management would require. Secondly, I said that "modern systems of local government, and for that matter the chieftainship, are in such disarray that there is currently no way to blend

any elements of old and new governance into a workable framework for common property resource management” (Turner, 2003: 1565).

There has been no major change since 2003 with regard to Basotho’s livelihoods and livestock management strategies. Earlier trends continue. The proportion of the population depending on livestock, and the aggregate contribution of livestock to rural livelihoods, are slowly declining. The dependence of the poorest rural people on resource harvesting from the commons is gradually growing. The factors that Lawry adduced for ineffective governance of the commons – diversity in strategies and resource dependence, coupled with low interdependence of livelihood strategies, particularly between commoners and the elite – are still in place. However, it could be argued that dependence on the rangeland resource complex is increasingly polarised between a dwindling minority of livestock owners and a possibly growing minority of very poor resource collectors. At the same time, both these groups’ dependence on the resource base is growing, although there is no evidence of any stronger livelihood interdependence between them, or between the two groups and the governing elites who have authority over the commons.

Who those elites actually are became harder to define in the decades following Lawry’s research, as this paper has shown. But there has been an important, if so far nominal change in this regard since 2003, potentially making a major difference to the second argument I advanced then. In practical terms, local government of the commons is still in disarray. Officially speaking, however, the lines of authority are now clearly drawn, although they remain to be reinforced by new land legislation. It has also been clearly recognised that the new authority structure does not reach effectively enough to the truly local levels at which the practical business of governing the commons must be done. The emerging concept of

building user groups to complement the formal resource management authority of Community Councils means that there is now a real prospect of a way “to blend any elements of old and new governance into a workable framework for common property resource management”.

On balance, the consequences for the Lesotho commons are positive. Their future is still far from assured. But the new decentralised disposition of state authority in the country, the legal reforms achieved through the Local Government Act and the envisaged redeployment of customary and statute law in the Land Bill combine to reaffirm Basotho’s social concept of their kingdom as a commons. If the new challenges of building resource user groups to govern those commons on behalf of local government authorities can be successfully tackled, there will be scope for more optimism than I expressed three years ago.

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