

From Illegality to Legality: Illegal Urban Development and the Transformation of Urban Property Rights in Lesotho.

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1.0 Introduction

Most scholars indicate that a majority of urban residents in the cities of the developing countries are excluded from the legal and regular processes of access to urban land and have to "step outside the law in order to gain access to land for housing" (Fernandes and Varley, 1998: 3; also Simon, 1992; Durand-Lasserve, 1996; Fernandes, 1997; McAuslan, 1985; 1998) or to 'invent' their own space and their own place in urban society ..." (Fernandes, 1997: 7). Although their nature varies from place to place, such invented spaces have been given various labels; irregular, illegal, informal, unofficial, customary, and so forth. Implicit in these labels is the notion that 'invented spaces' are, in some way, occurring outside "legal and urban development standards recognised by public authorities" (Durand-Lasserve, 1996:1). However, contrary to this received wisdom, there is compelling evidence that illegal settlements do not function entirely outside the influence of formal state rules, but that extensive borrowing from state law and the image of state agents in reality shape property relations between actors involved in the development of such settlements (Benton, 1994; Razzaz, 1994; 1998; Kombe, 1994; 2000; Kironde, 2000; UCLAS/IRPUD, 2000). Evidence also exists to suggest that illegality is not a sole characteristic of the urban poor and their settlements, nor is legality an intrinsic virtue only of the wealthy and their environments, because illegality is often essential to the survival of different categories of actors - land owners, middlepersons, landlords, politicians and state officials (Fernandes and Varley, 1998; Santos, 1992; Varley, 1998; Bolivar and Perdomo, 1998; Kombe, 1994; van Western, 1990).

Although much is known about the morphology of settlements that occur outside formal state rules and the characteristics of their population, knowledge of how formal rules and state enforcement methods might encourage and enable the development and transformation of property relations in such settlements, especially in Sub-Saharan African cities, is sketchy. Drawing on recent research on the enforcement of the Land Act of 1979 in Lesotho, this paper aims to accomplish two purposes. First, it will show that illegal settlements occur under the shadow of formal state rules, from which social actors borrow selectively and in opportunistic ways to acquire urban property rights, and that this is possible because of inconsistencies and contradictions in state rules and enforcement methods. Secondly, it will show that although formal state rules may appear to exclude ordinary urban residents from access to urban housing land, in reality, the contradictions and the contingency nature of the rules may support access to urban property rights by a majority of urban residents, including the urban poor. Three conclusions are drawn from the paper: first, legality and illegality are intrinsic features of urban settlements, irrespective of the rules that regulate their development. Second, the illegality of illegal settlements is a contingent and transient event. Third, inconsistencies and contradictions in formal

state rules provide urban residents with opportunities for exit from and re-entry into the realm of state rules, as and when it is expedient to do so.

The paper is structured around seven sections, including this introduction. Section 2.0 is a brief account of the legislative policy context. In Section 3.0, a brief statement of data collection methods is provided, followed by discussion of the implementation of the Land Act of 1979 (LA 1979) in Section 4.0. Illegal access to housing land through informal rules is the subject of Section 5.0, while in Section 6.0, the transition from illegality to legality is illustrated and discussed in some detail. Section 7.0 summarises and concludes the paper.

2.0 Policy Context

Many of the areas that are today called towns in Lesotho are of colonial origin and were meant to house the headquarters of magistracies and the police for purposes of maintaining law and order. These areas were set apart from the rest of the countryside as colonial government reserves controlled by district commissioners, where land could be privately owned. In the surrounding indigenous villages, use rights under customary tenure, which was defined to mean a form of tenure that emphasised the communality of land ownership under the trusteeship of traditional authorities (the King and his Chiefs), prevailed.

Despite increasing rates of urbanisation in the past twenty years, the population of Lesotho is still essentially rural. For instance, in 1976, 11 per cent of a population of 1.2 million was urban, in 1986 this proportion had increased to 15 per cent of a national population of 1.6 million and in 1996, 17 per cent of a population of 1.8 million was urban (Bureau of Statistics, 1996). Although these figures appear to indicate a low urban population growth rate by African standards, they conceal the gravity of the problem posed by the growth of peri-urban settlements, which are officially classified as rural. It is difficult to provide reasonable estimates of the actual numbers of people living there. Nonetheless, an example may suffice to illustrate the extent of such growth. The 1992 Planning Study for the town of Maputsoe indicates that, in 1986, the town had 11 200 people within gazetted (legal) urban boundaries and a peri-urban population functionally dependent on the town of about 18 000, thereby showing that in reality the town had over 29 000 people. Similar situations where peri-urban population was found to exceed legal urban population have been reported for other towns as well (Leduka, 1995).

A significant proportion of recent population increase is, therefore, accommodated within peri-urban settlements, where agricultural land is privately subdivided into plots for sale under the hand of customary authorities. Given the general scarcity of cultivable land in Lesotho (9% of total area) and the location of the most attractive urban centres on what is considered to be prime agricultural land, the need to 'do something' to preserve this resource has been widely acknowledged by government policy-makers. Other concerns relate to the perceived lack of a market in land; the unattractive structure and form of the built environment resulting from the sub-divisions sanctioned by the customary chiefs: un-serviced, inarticulate and low-density urban sprawl due to allocation of large (+1 000m²) irregularly shaped plots.

In order to address these problems, the Lesotho government has, on various occasions in the past, attempted to introduce legislative instruments aimed at regulating and regularising the conversion of peri-urban agricultural land into housing plots. The most drastic legislative measure was put in place in 1980 with the enactment of the Land Act of 1979 (LA 1979). In very general terms, the LA 1979 introduced three forms of tenure: *leasehold* held from the state, with provision for

creation of minor interests by way of sub-leaseholds; a *licence*¹ for agricultural land within legally gazetted urban area boundaries, which was purposely meant to be an insecure form of tenure that could be terminated on three months notice without compensation; and, an *allocation* for rural agricultural (arable) land, which guaranteed only use rights in perpetuity, a meaning similar to tenure under customary law, although the Act altered the conditions under which allocations are made. In brief, the LA 1979 effectively nationalised land, with rights to be leased from the state, as well as transferring authority over land delivery to the state bureaucracy.

The Act also made provision for the designation of *Selected Development Areas*² (SDAs) for the purpose of facilitating acquisition of land for new planned residential, commercial and industrial development, as well as to facilitate upgrading of unplanned urban settlements. The effect of SDA declaration is to cancel existing rights and interests in land pending direct grant of substitute rights by way of leaseholds by the Minister responsible for Lands. The Act further provided for the extension of urban area boundaries to cover the problem of peri-urban growth, as well as the declaration of new towns for a similar purpose. It was hoped that the Act would effectively streamline the land delivery system, reduce the loss of agricultural land to urban development and promote orderly urban growth. However, the anticipated regulation did not occur, as a result of various forms of subversion by the state itself, customary authorities and the owners of use rights to peri-urban cropland (field-owners).

3.0 Methodological Brief

The data on which this paper is based was collected between January and April 1999 in Maseru³, Lesotho, as part of a study that aimed at analysing and explaining social actor experiences, opinions and response strategies to the enforcement of rules that govern access to urban housing land. The data collection strategy involved the use of multiple methods: secondary data search from published and unpublished documents, primary data from focus groups, semi-structured interviews and a questionnaire survey. Although each method was used as a primary tool for collecting specific data sets, in practice they were used as part of a multi-method strategy developed to ensure data triangulation across methods.

The semi-structured interviews were carried out with over fifteen individuals, consisting of state office bearers (including those who had retired), local traditional authorities in the former peri-urban areas and individuals who were known to be interested in land policy issues, as well as those identified during fieldwork.⁴ The questionnaire survey was administered to a total of 213 households, drawn from three neighbourhoods of Hills View, White City and Maseru East in the former government reserves, and two traditional urban villages of Ha Thetsane and Ha Matala in the

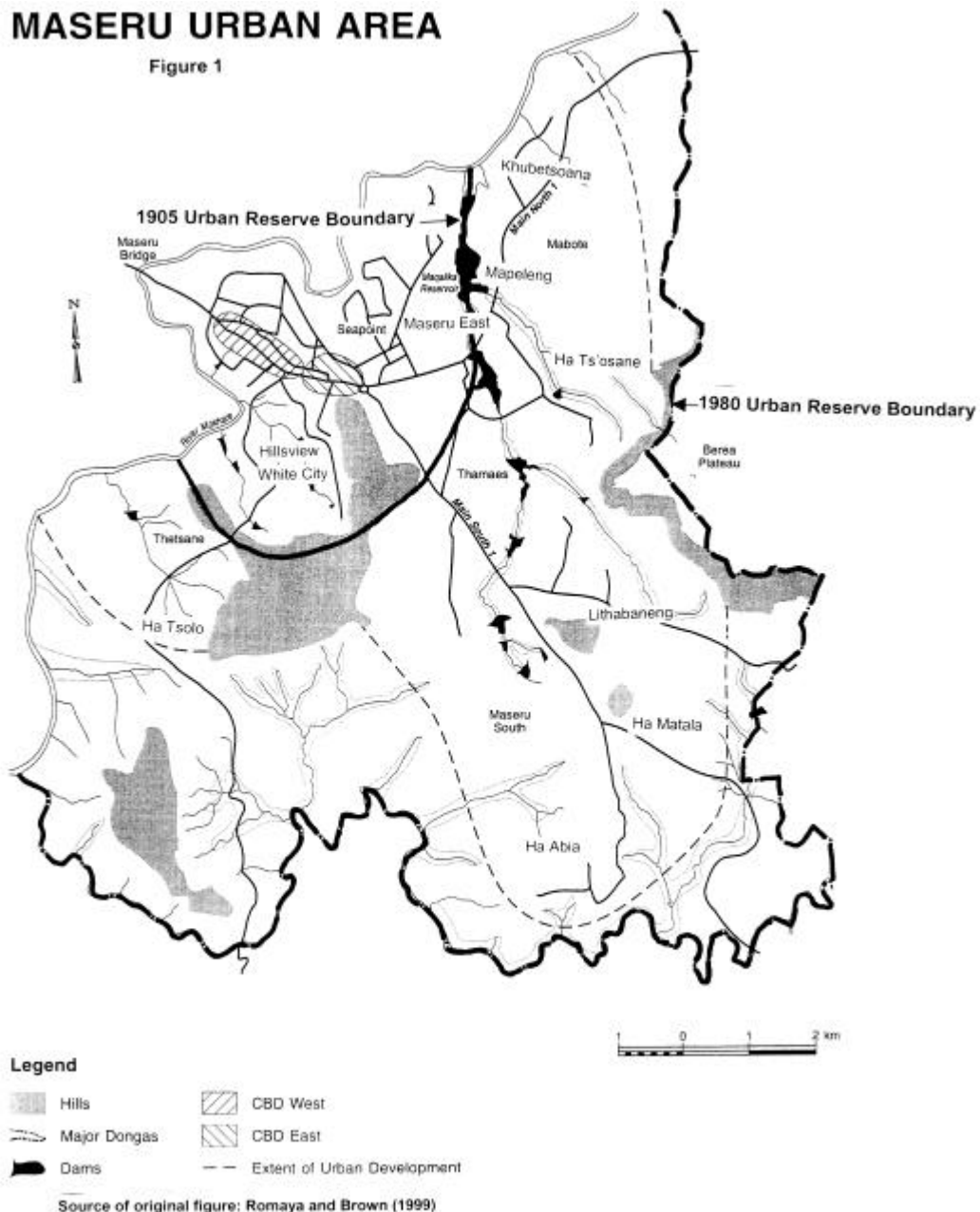
¹ The licence as title to urban agricultural land was repealed in 1986 [cf. Land (Amendment) Order, 1986, Order No. 27 of 1986, Supplement No. 3 to Gazette No. 12 of 6th March 1987. Commencement date as of 20th January, 1986]

² The rural opposite of SDAs are called Selected Agricultural Areas (SAAs) defined as an area of land set aside for the development of agriculture by modern farming methods.

³ Maseru was founded in March 1869 as a police camp and British colonial capital until independence in 1966, when it became the capital of the Kingdom of Lesotho. Administrative boundaries for the town were formally drawn in 1905 and were extended in 1980 to incorporate adjacent peri-urban villages. The town currently covers an area of approximately 138km² (Figure 1).

⁴ In order to ensure confidentiality, the names of all interviewees have been withheld, but their full identities are available with the author.

erstwhile peri-urban areas (Figure 1). Focus group discussions were carried out in three former peri-urban areas of Ha Thetsane, Ha Matala and Ha Ts'osane. These three urban villages differed substantially in terms of residents' encounters with formal rules. Residents in the former peri-urban areas of Ha Thetsane and Ha Matala had had close encounters with formal rules as a result of land appropriation by the state, while in Ha Ts'osane, residents had experienced virtually none. The latter area was, therefore, characterised almost entirely by illegal sub-divisions. This paper draws primarily on information collected from secondary sources and the semi-structured interviews, with corroborating evidence from the focus group discussions and the



household survey used at relevant points in the discussion.

4.0 Formal Rules: The Implementation Process

Drawing on information that was gleaned from the archives of the Directorate of Lands, Surveys and Physical Planning (LSPP), the implementation of the LA 1979 can be divided into two phases: Phase I, which begins from June 1980 to January 1986 when Lesotho was under civilian (albeit illegitimate) government, and Phase II, which stretches from 1986 to 1992 when Lesotho was under military rule. The distinguishing feature between these two phases is the method that was predominantly used for making new urban land grants (plots) between the committee system and by the Minister responsible for lands as direct grants. These phases are discussed in detail below.

4.1 Phase I - The Committee System⁵ (June 1980 – December 1985)

In order to monitor the progress of implementation of the new law, Cabinet issued instructions to the Minister responsible for Lands to submit periodic progress reports. The first of such reports was presented to Cabinet on the 25th August 1980, and alluded only to partial implementation of the Act and a series of activities that had been put together into a programme of action. In the main, the programme covered activities relating to new land grants, title conversions for applicants who intended to transact in land, specifically those who had prior arrangements for loans or mortgage finance, followed by any other transactions, and the designation of areas for selected development (SDAs). Another major policy decision was that, for new land grants by committees, land would first be serviced and thereafter advertised. The aim was to give every individual an equal opportunity to apply for a grant, as well as to make prospective applicants aware of their expected contribution towards the costs of land servicing.

In the first two years of implementation for which records were kept, about 400 plots were potentially⁶ available per year for new grants under the LA 1979. During the same period, the urban population grew by an addition of about 6 500 people, which would have converted to approximately 1 350 households given a household size of 4.8 persons (Leduka, 1995). Therefore, an average annual supply of 400 plots would have met about 30 per cent of this potential demand for urban housing land. However, this estimate should be treated with caution, since it implicitly assumes that, when the LA 1979 came into force, there was no backlog of demand for urban housing land.

In terms of the registration of titles to new land grants, it is a statutory requirement that, once a grant has been made, a registered leasehold title has to be issued. Over the period 1980 and 1991 for which information was available, the LSPP was able to prepare registered titles to only 28 per cent of new grants. In terms of the processing of applications for title conversions made between 1980 and 1991, it had

⁵ Although official policy was to create democratic structures of allocation, this appears not to have informed the decision on the composition of urban land committees as indicated by their membership committees, namely:

- a) the Principal Chief within whose jurisdiction an urban area falls, who is to act as chairman (sic);
- b) the District Administrator or Town Clerk as secretary to the Committee;
- c) three persons appointed by the Minister (LA 1979, Section 24[2]).

⁶ Plots were 'potentially' available for committee allocation because some plots were set aside for direct allocation by the Minister responsible for lands.

dealt with 45 per cent, with an equivalent proportion of applications awaiting cadastral survey or held up by some bureaucratic requirement of one sort or another. The slow progress in issuing titles for new land grants, the conversion of old titles into registered leaseholds and the backlog on survey work, would seem to demonstrate that the LSPP had limited capacity to handle land administration work that was generated by the LA 1979. Indeed, from the first day of implementation, the Minister for Lands and the Commissioner of Lands (head of the LSPP) repeatedly appealed to Cabinet to release funds for the purpose of enhancing the capacity of the LSPP to handle its added responsibilities. However, Cabinet responded by suspending the requirement for advertising only pre-serviced plots, but no additional financial commitments were made. In 1993, the LSPP sombrely admitted to the incoming democratic regime that it had failed to fulfil its mandate, due to financial and manpower constraints (for details see Leduka, 2000b).

4.2 Phase II: Direct Ministerial Grants (1986-1992)

The declaration of certain areas for selected development using SDA⁷ powers was meant to fulfil specific policy objectives, such as the acquisition of land for new urban development, the implementation of settlement upgrading schemes, and the readjustment of urban administrative boundaries for town planning purposes. However, shortly after the coming into force of the LA 1979, the SDA clause was found to be a convenient tool that the Minister for Lands could use to effect new land grants to virtually anybody, as long as a 'public interest' declaration was made at his discretion.

The land that was allocated by the Minister largely took the form of in-fill plots, which were predominantly in the old colonial urban reserves and on land that, legally speaking, already belonged to the state. Although no formal records were kept on direct Ministerial grants, a survey of plot allocation carried out in 1994 shows that, between 1980 and 1985, when Lesotho was under a civilian (albeit illegitimate) regime, about 24 per cent of plots were allocated by the Minister for Lands as direct grants and 76 per cent by urban committees. However, between 1986 and 1991, when Lesotho was under military rule, nearly 77 per cent were allocated directly by the Minister for Lands, against 23 per cent that were advertised for allocation by urban committees, and over 60 per cent of these direct grants were in Maseru alone. This was appeared to be a reversal of the land allocation process under a civilian regime (Leduka, 1995). The data on which this paper is based revealed a similar pattern. In the old urban reserve, urban committees and the Minister for Lands allocated 46 and 27 per cent of plots respectively, between 1980 and 1985. In contrast, between 1986 and 1991, committees allocated 10 per cent of plots, while over 70 per cent was allocated by the Minister for Lands (Leduka, 2000b).

⁷ Section 44 provides that,

Where it appears to the Minister in the public interest so to do for purposes of selected development, the Minister may, by notice in the Gazette declare any area of land to be a selected development area and, thereupon all titles to land within the area shall be extinguished but substitute rights.

Section 49 provides further that,

Titles to land within a selected development area shall be granted by the Minister and shall be evidenced by a lease, which shall be prepared by the Commissioner and executed in the manner prescribed (for detailed discussion, see Leduka, 2000a)

In brief, therefore, during Phases I and II of the implementation of the LA 1979, the allocation of urban plots through the system of advertisement by land committees and direct grants by the Minister for Lands failed to deliver enough housing land to meet demand, not only because few plots were available at any given moment in time, but also because the committees' and the Minister's grants were open only to a privileged minority of individuals (for details see Leduka, 2000b). Ultimately, the capacity of the LSPP to deliver land as required was not only hampered by deficient resources, but also by the exclusionary nature of formal distributive systems. The inability of land delivery systems established under formal rules to meet popular demand for urban housing land was, therefore, seen by most respondents as the principal factor behind illegal land sub-division in the former peri-urban areas.

5.0 Informal Rules and the Illegal Peri-Urban Land Subdivision Process

In the old urban reserve, land sub-division has mainly been on the basis of formal rules, as discussed in detail in the previous section. This purpose of this section, therefore, is to provide a descriptive account of the illegal land sub-division process in the erstwhile peri-urban areas, and because there is no known documentation on the land sub-division process in these areas, the section draws from interviews and small student surveys in similar areas in Maseru.

A majority of respondents argued that in peri-urban areas, individual field owners were encouraged by their chiefs to subdivide and sell their agricultural land holdings or face state appropriation without compensation, since they only held licence rights to the land. Even after 1985, when compensation for urban agricultural land became payable, it was widely intimated that it was too low to discourage field owners from sub-dividing privately (Pers. Comm. March 1999). In turn, chiefs issued certificates of allocation to plot buyers, the Form Cs,⁸ backdated to periods prior to June 1980. This service was, however, not rendered free, as traditionally should have been the case.

One respondent, a retired Chief Physical Planner who had also acted as Commissioner of Lands on numerous occasions, ably narrated this process and its transformations over time.⁹ He indicated that, in the initial stages of the sub-division process, field owners would approach a chief and ask him/her to allocate land to their children and relatives, who in reality would be prospective clients disguised as dependants. The balance of the land from the field, sometimes a substantial area,¹⁰ would then go to the chief, as a reward for approving and authenticating the sub-divisions. The respondent indicated, however, that, this was the case in the very early stages of the emergence of private land sub-division, when people were still reluctant to acknowledge openly that they were selling land, but that it did not take long for this arrangement to change; first to half-shares, with the chief taking 50 per cent of the proceeds and the field-owner the other 50 per cent. Thereafter the practice was to

⁸ A Form C is a certificate of land allocation that was issued by chiefs with respect to land in rural areas under provisions of the Land Act of 1973, which was repealed on by the LA 1979 in June 1980. Separate purchase of Form Cs was also the predominant arrangement observed during my fieldwork in January –April 1999 in Maseru.

⁹ A good deal of this narrative, especially its latest version, was corroborated by similar evidence from other respondents, from the focus groups, as well as from small student surveys in various areas in Maseru (see for example, Leisanyane, 1992; Seeko, 1996 and Ts'iu, 1998).

¹⁰ Average field size in Lesotho is estimated to be about 2 hectares (UNDP, 1983). At an average plot size of 1 200m² in areas of informal rules (see Leduka, 2000b), a typical field can produce an average of 17 plots, or more where plots are smaller.

allocate a plot of land to the chief from every field under his/her jurisdiction that was sub-divided, with the balance remaining with the field-owner.¹¹ Subsequently things quickly turned against the chiefs, and currently no shares of sub-divided land are given to chiefs. Instead, their dues now come exclusively from the sale of Form C documents, which are often arranged separately from actual land sales. However, the field-owner receives no payment or is not paid the full price of a plot until s/he has assisted the buyer with the purchase of a certificate from a local chief or a chief's official stamp, where the certificate has not already been provided by the chief. This means that plot buyers now have to pay two separate fees, one for a plot of land from a field owner and the other for a certificate from the chief (Pers. Comm. Maseru, April 1999; also Ts'iu, 1998).

Given these recent changes in the sub-division process, some respondents argued that it was no longer correct to think of chiefs as the principal actors, because in practice the people who actually sub-divided their land were the field-owners themselves, with the chief's role being only to issue certificates and get paid for this, and in a majority of cases the chiefs did not even know the actual location of the land that was being sub-divided (Pers. Comm. Maseru, April 1999). Ts'iu (1998) refers to this method as 'indirect allocation', through which 80 per cent of her survey population obtained access to housing land. She also alludes to 'direct allocations', where the chief made allocations in person, either for free or for a cash consideration, a method through which 6 per cent of her respondents obtained housing plots, with the other 14 per cent having inherited or obtained plots as gifts from family land.

Another interesting observation by Ts'iu (1998) is that, similar to chiefs, village development committees, which have been established by the state to assist chiefs in upholding formal state rules, were, instead, assisting in illegal sub-divisions and preparation of false affidavits for individuals who intended to surrender their old Form Cs for new revalidated Form CC2s.¹² Sources within the Maseru City Council also attested to similar behaviour by the village committees (Pers. Comm. Maseru 1999; LPRC, 2000).

The foregoing section has provided some background information on the process of illegal land sub-division in the erstwhile peri-urban areas, drawing on interviews and small student surveys in similar neighbourhoods in Maseru. The remainder of the paper is devoted to the discussion of actors' use of informal and formal rules-of-the-game in the transformation of urban property rights, especially the registration of illegally acquired housing land in the erstwhile peri-urban areas by way of applications for title registration, with a view to demonstrating the dynamics and outcomes of the process of bridging the legal/illegal divide.

6.0 Bridging the Legal/Illegal Divide

As indicated earlier, the LA 1979 may be used for three principal purposes: acquisition of an urban plot; registration or conversion of old titles to land and application for state consent to transactions in land, such as land transfers, creation of subsidiary interests through sub-letting, or application for bank loans or mortgage finance. This section discusses the use of the LA 1979 for the purpose of acquiring a state registered leasehold title on land that has been acquired (illegally) through informal rules in erstwhile peri-urban areas.

¹¹ This arrangement has previously been noted by several researchers, for example, Leduka, 1987; Leisanyane, 1992; Seeko, 1996; Ts'iu, 1997.

¹² Form CC2s are said to be revalidated Form Cs and were introduced as part of the 1992 amendment of the LA 1979 (see Land [Amendment] Order, No. 6 of 1992).

From the household survey, it emerged that 94 per cent of plot-owners who had acquired plots through the system of formal rules and 65 per cent of those who had obtained plots through informal rules had some form of ownership documents. In the former group, the registered leasehold, which is the principal form of title under the LA 1979, was reported by over four-fifths (83%) of those who had documents, followed by a deed of title, which was reported by 9 per cent of plot-owners. In the latter group, 68 per cent of all those with ownership documents reported an unregistered Form C, followed by those who had a registered leasehold (14%) and a letter from a local chief (13%).

The relevant group of plot-owners for the purpose of this paper is the 14 per cent of plot-owners¹³ who had acquired plots through informal rules, and yet had formal registered leasehold titles. Half of this group had acquired plots prior to June 1980 and the other half after June 1980. This group is interesting for three reasons: firstly, because urban land allocation under the authority of local chiefs should have legally ceased on the eve of June 16th 1980 when the LA 1979 came into force; secondly, because an appreciation of the process of converting illegal Form C certificates into registered leaseholds brings into sharp relief the contradictions of formal state rules and illustrates how social actors might have taken advantage of "... areas ... of inconsistency, contradiction, conflict, ambiguity, or open areas that are normatively indeterminate [in state rules] ..." (Moore in Razzaz, 1994: 11) to acquire urban property rights and to transform property relations; and thirdly, because the group illuminates the realities of the articulation of formal and informal rules, from which various socio-legal and spatial outcomes might emerge, as discussed in detail below.

It transpired from focus group discussions in Ha Matala and Ha Thetsane that no participant had used the LA 1979 for any purpose, while three participants in Ha Ts'osane had used or had attempted to use the Act for purposes of title registration/conversion. Two of these participants had not been successful or had not received any response from the LSPP since the time of their applications, one in 1987 and the other in 1988. A third successful participant had applied in November 1998, and received a registered title (leasehold) in April 1999. The successful participant narrated his experience as follows:

I was asked to bring my Form C and a letter from the chief that indicated that he [the chief] knew me and had given me that plot. I did so. Then I went to the Lands and Survey people, the surveyors. They came to survey my plot After that I went to Lands and Survey again. I was given a letter showing my plot number and that they (LSPP) agreed that I had been lawfully allocated that plot. I was then given a plot number and was told to come back again to sign for my number and the papers for the plot. I did so. I signed the papers and also gave my fingerprints. The day before yesterday [24th April 1999] I received their papers in my mail showing that I had been given a lease under the Land Act of 1979. Those papers indicated conditions like how to use my plot over a period of 99 years and that I now had all the rights on that land. (Participant, Ha Ts'osane Focus Group, April 1999)

According to the participant, he was allocated the plot in question in November 1988, eight years after the LA 1979 came into force. However, he indicated that his Form C had been officially stamped as though the allocation was made in November 1978. Although the narrative is undeniably a rough synopsis of the

¹³ It is likely that some people could have concealed the actual date of plot allocation because they had falsified Form Cs.

title conversion process, it is significant in other respects.¹⁴ First, it exposes the contradictions in formal state rules, in this case the LA 1979. Many respondents argued that it was easy to obtain a plot of land from a field-owner and a Form C from a local chief and to thereafter apply for a formal registered title, if one wished to do so. In this way, the frustration of the allocation process under formal rules would be avoided. In the particular case of the above participant, the registering authority (LSPP) would have been aware of the possibility that the Form C, similar to many others, might have been a forgery and the chief's letter a misrepresentation. However, a Form C and chief's letter are specified by the LA 1979 as required evidence of lawful allocation and occupation of land when an application for registered title is made.¹⁵

In view of this apparent contradiction, the issue of the legality of Form C rights and Form C plots, as well as the failure to challenge the legality or otherwise of Form C certificates at the stage of application for formal title, was pursued at some length with respondents who were known by the author to have been an integral part of the enforcement and title registration machinery. To some respondents, although it was known that many Form C certificates were illegal, their illegality was difficult to prove and, therefore, could not ordinarily be challenged (see for example, Box 1). However, there were equally revealing responses from some other respondents, which helped to bring into sharp relief the contradictions that have been alluded to above (see for example, Box 2).

Box 1

Extract From a Conversation with the Former Chief Physical Planner, Maseru, 15th April 1999

Researcher: How would you consider, in official or legal terms, the sub-division of urban agricultural land under the authority of chiefs: legal or illegal?

Response: It is clearly illegal and is similar to stealing. However, it is a long and meandering process with different facets to it. Illegality begins with the person who asks for a site [plot] and the one who allocates, either having informed or deliberately not informing the buyer that he has no power to allocate land, but that he could assist the buyer to acquire a site [plot] from

¹⁴ For a concise description of title registration process, see Franklin, 1995.

¹⁵ Applications for title conversion require proof of lawful allocation or occupation of land and any of the following documents is considered by law as adequate:

- a. a registered certificate of title issued by the Registrar of Deeds under the Deeds Registry Act 1967.
- b. a registered deed of transfer or a certified copy thereof if the registered deed is lost.
- c. the original (or a certified copy thereof if the original is lost) of a valid certificate of allocation of land or any document (including a certified copy of a Chief's register kept under the Land Act of 1973) evidencing any allocation lawfully made. [The 1992 amendment replaces the Land Act 1973 certificates, the Form Cs with new certificates, the Form CC2s or so-called re-validated Form Cs).
- d. an affidavit by the Chief or other proper authority that the applicant lawfully uses or occupies the land.
- e. an affidavit by three persons resident for over 30 years in the locality in which the land is situated to the effect that it is to their personal knowledge that the applicant and his predecessors have been occupying and using the land for a period of at least 30 years.
- f. any other official document evidencing that the applicant is in lawful occupation of the land. (Land Act 1979, Section 29 (1) (c))

someone. These three immediately become accomplices: the buyer, the field-owner and the chief or committee. If you look closely, even state servants involved in the process of tenure regularisation or registration could, on closer scrutiny, be accomplices too. The entire chain. If the process were to become very technical or strictly legalistic, you are likely to find that the state is in effect breaking its own laws in allowing the process to go to its conclusion. The entire process in strict legal terms actually renders all of us accomplices, not the chief alone, or the one asking for a site or the one who sub-divides a field. So the field owner, in giving a plot, commits an illegal act, the chief, by providing a forged certificate, commits an illegal act, and you the buyer pay for an illegal product, knowingly or otherwise. But when you take the product for legalisation and it gets legalised, who then is to shoulder the blame for illegality?

Researcher: Is the illegality of Form Cs ever challenged during application for registration or conversion into legal or registered title?

Response: Er, it is difficult to challenge. In the first instance we demand that the chief should testify. Where we tried to refuse, especially in areas that were meant for projects, people simply went to the Minister. And once you allow one, then you would not have reason not to allow the rest. And especially because we found out that our Ministers had a history of breaking the law themselves. So it becomes difficult to just refuse one person when you know that eight have gone through. Initially the cases were taken to court, but the courts were not sympathetic.

Source: Leduca, 2000b

Box 2

Extracts From a Conversation with the Commissioner of Lands, Maseru, 9th April 1999

Researcher: Most of the questions have already been answered, but to confirm the responses you have provided so far, how would you consider, in official or legal terms the sub-division of urban agricultural land under the authority of chiefs: legal or illegal?

Commissioner: No, no, no, no, no! First of all, it is no longer here nor there, whether it is urban or rural, because it has all converted to or deemed to have been converted to a lease, all agricultural land. Now, in as far as the Land Act provides for procedures for change of user of land where agricultural land is sub-divided for another purpose, a ministerial consent is required and any sub-division becomes illegal without such a consent.

Researcher: Can allocations by chiefs be converted to registered titles, the leasehold?

Commissioner: Well, er, er, it is possible to convert any title to land, er, any formal title to land or an illegal title to land, er, into a legal title. The 1992 amendments to the Act put in place mechanisms to legalise these titles. It is called revalidation by way of the urban land committee verifying the original allocation and then making a new grant.

Researcher: Is the illegality of Form Cs ever challenged during application for registration or conversion into legal title?

Commissioner: No, it is not ordinarily challenged, except, except er, where there could be some kind of dispute and one party happens to know that the other party is applying for a lease [leasehold]. Then there is provision for adverse claims.

Researcher: So are you saying that challenges to applications for registration come from parties who may claim similar interests on the land the subject of registration and not from your office?

Commissioner: Yes. Most challenges come by way of adverse claims and not from the office [LSPP].

Researcher: I see. So it is possible to begin with an illegal condition in the form of an illegal Form C, but to end up with a perfectly legal condition, in the form of a registered leasehold?

Commissioner: Yes. In fact a majority of registration of titles is by people who acquired land illegally or informally and are legalising their titles. This is because the rate of land delivery in the informal sector is higher than that in the formal sector. Unlike the informal sector, the state has to first acquire land before delivery, while the informal sector owns the land and delivers it directly. So we cannot outcompete (sic) them.

Researcher: Where then are we to draw a line between legality and illegality or formality and informality?

Commissioner: Maybe a distinction should be made between informality and illegality in that we may end up legalising something that is still informal. Er, take a case where someone is registering a plot and it becomes legal, but the settlement in its form is still informal in that it is not in the normal way that an urban settlement would look like; it is not configured in the formal manner where you have streets, well-defined, er, with room for vehicles, carriage ways, pavements, drainage, way-leaves for various utility services and so on. These are all characteristics of a formal settlement or planned settlement. Mind you, planning is a formal discipline. This is why I am saying you can have a legal title by convention (sic) within an informal settlement. That is why I am saying we should make a distinction between 'formal' and 'legal'. We should separate them. What I mean then is that formal legalisation does not formalise, it legalises, but does not render the thing [Form C plot] formal. If it does not come out as a result of formal procedures, it is an informal product.

Researcher: I see. So it is possible to begin with a perfectly illegal product in all forms, evidenced by an illegal Form C or even a simple letter from a chief, or whatever, but the formal system is such that it allows an unimpeded legalisation of the illegal product?

Commissioner: Maybe you can extend this by saying it is legally formal in terms of tenure, but it does not render it, er in terms of planning, it does not render it formal, because a formal settlement has attributes which are documented, which can be passed on, even in an abstract manner from one person to another or from one institution to another. They can be copied. Formality should not only be a matter of title, but a lot more. When you [author] elaborate on the concept of 'informality' or 'formality', make sure you go beyond the simple matter of 'tenure'. There is a lot more to the definition of formality than a simple question of tenure.

Source: Leduka, 2000b

It is obvious from Boxes 1 and 2 that, although the illegality of Form C rights was generally acknowledged, a direct question on the issue invited a variety of often elusive responses, even from individuals who were known to the author to have unreservedly denounced certain Form C rights as illegal in official discourse (see Leduka, 2000b). The response by the Commissioner of Lands was a typical example of some of the answers that this question provoked. Rarely were answers to this question as direct as that by the former Chief Physical Planner (Box 1).

From Box 1, a number of observations can be made. Firstly, it is clearly difficult to prove the illegality of a Form C because the same individual who issues it, the chief, is considered by the LA 1979 the primary witness that a Form C is in fact legal. Secondly, the chief is also the primary source of evidence (letter or affidavit), should the registration authority require such additional evidence. Thirdly, where a chief is unable or unwilling to provide a Form C or a sworn affidavit to prove lawful allocation or occupation of land, or where the Form C certificate has been lost, the LA 1979 provides that a sworn affidavit by any three persons with at least 30 years of continuous residence in the area in question is acceptable and lawful evidence. The irony here is that a majority of individuals with that length of time of continuous residence are none other than the field owners themselves. Lastly, it emerges that administrative discretion may be used to overrule the law, such as when the Minister

directs that title registration be effected even where the law might have prescribed otherwise.

Similarly, from Box 2, two perspectives seem to emerge: what could be called a planning perspective on the one hand, and a legal perspective on the other, with an interesting set of processes and conditions that accompany each of these perspectives, as well as different categories of plots when these two perspectives are combined (Table 1 below). From what could be considered a legal perspective, it seems possible to make a distinction between forms of urban plots, depending on the manner through which a plot was acquired or allocated. On the one hand, there could be a *legal urban* plot (Type I), being one that has been acquired through a system of formal rules and a *legalised urban* plot (Type II), being one that is initially acquired through an informal system of rules, but which is subsequently legalised by way of registration. From a planning perspective, Type I plots would be *formal*, because they are a product of a formal set of planning procedures, whereby planners plan the sub-division of land, surveyors map the sub-division and allocations thereafter follow. However, although Type II plots may over time become legal in terms of tenure, from a planning point of view, they are *informal* and, by implication, they are forever condemned to informality because they are not a product of a formal planning process. Type III plots would be both *illegal* and *informal* and would seem to include all those plots that have been acquired from peri-urban private sub-divisions and are still to be regularised or legalised.

Table 1 Urban Plots: Planning and Legal Perspectives

Type of Plot	Allocation Rules	Perspective		Planning & Legal Perspectives
		Legal	Planning	
I	Formal	Legal	Formal	Legal Formal
II	Informal	Legalised	Informal	Legal Informal
III	Informal	Illegal	Informal	Illegal Informal
IV	Formal	Illegal	Formal	Illegal Formal

Source: Leduka, 2000b

If the Commissioner’s argument is pursued to its logical conclusion, it is possible to develop a Type IV category of urban plots. Such plots would seem to be those resulting from a formal set of planning procedures and acquired through formal rules, but which, from the legal perspective, could be considered as either illegal or illegitimate. SDA plots, where a government Minister alienates public and private property by use of Section 44 (SDA) powers of the LA 1979, with a view to making direct grants to individuals with access to the Minister’s office, would seem to fall under this category. Undoubtedly, Type IV plots would be a by-product of formal planning procedures and formal rules, but in law, their distribution would have been illegal. Alienating state property ‘in the public interest’ in order to give it to a selected set of individuals is, according to one legal practitioner in Maseru, “ a corrupt and illicit act and using the law for corrupt ends is illegal and immoral, politically or otherwise” (Pers. Comm. Maseru, April 1999).

If the two (legal and planning) perspectives are put together, then four groups of plots are possible: *legal formal* plots, being plots that have been acquired from urban committees in state-planned sub-division layouts; *illegal informal* plots, plots acquired through informal rules in private sub-divisions in the erstwhile peri-urban areas which are still to be legalised; *legal informal* plots, which would be those

acquired through informal rules in private sub-divisions in the former peri-urban areas but which have subsequently been transformed into legally registered properties; and, *illegal formal* plots, being plots acquired through formal rules in state-planned sub-divisions but where the use of formal rules has been irregular, illegitimate or outright illegal, as in the case of direct grants.

According to the CoL, a significant proportion of LSPP's work, which Mosaase (1984) estimated at between 70-80 per cent, involved dealing with applications for the conversion of Form C rights to formal registered leaseholds (see also Box 2). The bulk of LSPP's work, therefore, would seem to deal with the legalisation of illegality, and this may suggest that, far from being an 'evil' (LARC, 1987) or 'a national threat' (LSPP Archives, File Ref: HA/LS/9/17), which had to be eradicated by 'prosecuting violators' (LARC, 1987), illegal private sub-division provides gainful employment to a significant number of people, both in and outside the state bureaucracy.¹⁶

The foregoing discussion, therefore, shows that there was ample room in which to manoeuvre and to subvert the system imposed by formal rules and, as indicated, chiefs, landowners and land buyers have all taken advantage of these numerous loopholes. It is significant that a Form C certificate can easily be transformed into a formal title and thereafter, a supposedly illegal bundle of Form C rights immediately becomes perfectly legal, with benefits similar to those deriving from property rights acquired through formal state rules, because once legalised, Form C plots can equally be mortgaged, used as security for collateral finance, sub-let, transferred, and so forth.

7.0 Conclusions

The paper has shown that, due to restricted access to land through formal state rules, most people in Maseru, as indeed in other urban areas in Lesotho, resort to private illegal sub-divisions in order to acquire housing land. This is because access to land in delivery systems established through formal rules is uncertain, frustrating and clearly discriminatory, compared to access to land through informal rule systems. Informal rule systems are also attractive because they are not only quick, but a transition from illegal Form C rights to legal leasehold rights is almost certain if an application for title conversion is made. This is possible because, although most Form C rights are known to be illegal, it has been demonstrated that their illegality is difficult to ascertain because of the widespread inconsistencies in formal rules and state ambivalence towards such rights.

Two conclusions emerge from the paper. First, although the informality of settlements may persist indefinitely in terms of official planning standards, their illegality is contingent on the process of land acquisition, including, for example, plots that had been acquired through formal rule systems, such as direct grants by Minister for Lands. Illegality is also transient, because once registered, the illegality of the Form C plots and over time, entire Form C settlements, disappear. It seems legitimate, therefore, to conclude that, despite their eternal informality, as areas of informal rules mature and consolidate, their illegality gradually disappear and they will eventually become part of the urban fabric, subject to similar rules and benefits.

¹⁶ It is interesting in this regard to note that most of the retired senior officers of the LSPP and those who left through resignation were private consultants in work that was related to the LA 1979 and other associated legislation, as land surveyors, property lawyers and real estate agents.

Second, inconsistencies and indeterminacies in formal rules, which render the title conversion process possible, appear to be functional, because they provide actors with options to 'exit' the regime of state rules, such as the acquisition of housing plots from illegal private subdivisions, while also ensuring that 're-entry' into the realm of formal state rules remains open, such as the formal registration of Form C rights. Therefore, although formal rules might appear, at face value, to exclude a majority of urban residents from access to land, contradictions and inconsistencies in the rules may, in practice, work to support wider access to urban real estate, even by the urban poor.

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