Designing durable land administration institutions for recording current land rights in tenure contexts that fall outside of the existing formal cadastre and off the deeds registration system

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Abstract

Using Land Administration (or land governance) as a prism to examine land tenure, the paper argues that repurposing the national land administration system as a whole could vastly strengthen tenure security in the former homelands, where land administration has collapsed. Tenure security should be understood in broader terms than rights, access, allocation or title, but in terms of the entire spectrum of functions that enable and enforce tenure rights. Rights are made real by a range of functions, mostly carried out by the private sector. These include adjudication; land information systems and data management; planning; surveying; valuation and taxation. It is the totality of these functions articulating in a coherent manner that makes rights real. These functions, however, often contradict the complex manner in which customary and local off-register systems of rights work. What is needed is the redesign of land administration that allows for new ways of documenting and adjudicating off-register rights to make them visible, predictable and justiciable, and to work in unison with the dominant system of land registration.

Research Project on Employment, Income Distribution & Inclusive Growth
Towards an integrated response to unemployment, inequality and poverty

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This paper summarises and synthesises four other papers (three of which have been published by REDI3x3), all part of a larger project. It articulates or repeats the key argument that is being made by the researchers. The nub of the argument is:

- Contra to those who emphasise the tenure insecurity of households, tenure-related issues are an important but not the sole factor in explaining the underdevelopment of the former Bantustans of the Eastern Cape;

- One reason for saying this is that there is a wide range of other issues that have hobbled development (not the least of which are wider problems of governance in the region). Another is that tenure is not as insecure as is sometimes believed: in the rural areas, customary law, social norms and local systems of access and control offer some protection, while the towns are generally proclaimed and have formal systems of titling. The latter may well be hobbled by collapsed/collapsing systems of land administration, which does constrain the supply of commercial properties.

- Nevertheless the level of tenure insecurity is sufficient for this to pose a risk that some households might be arbitrarily deprived of their existing rights by powerful elites.

- The solution, however, is not to impose a system of formal, cadastre-based titling in the rural areas because such a system is ill-suited to the complex manner in which rights to use land are actually understood, would deprive most people of rights to use land that they currently enjoy, would generate enormous conflict, and would lack all social legitimacy (so it would, in any event, fail). What is needed, instead, is a bottom-up approach to identifying, documenting and (in the process) protecting existing rights by making them visible, explicit, predictable and justiciable.

- Although the implementation of a cadastral titling system is inappropriate, improving land administration that recognises existing rights is critical. But this requires considerable legal and institutional reform because existing systems in the Eastern Cape are an incoherent mess of past systems, post-apartheid reforms, and failing administration. To this end, the authors argue that, because the basic social unit that manages access rights is the extended family, while control vests in multiple layers of communal/collective oversight, a functioning system of land administration needs to recognise these existing channels of power and social networks, but also ensure that basic rights are protected according to constitutional law, and at the same time adhere to land use management frameworks. What is needed is a strong constitutionally-based framework for legally recognising customary rights in their own right, to reflect "living customary law"; but at the same time provide a framework of regulation to protect rights and prevent abuse of rights by elites, be they business elites or traditional elites. The foundation upon which to build a sound system of land administration should be normative standards that resonate with people's understandings and social practices, which express the way people access, hold and control their land (and how they understand these relationships), but which are held to account according to constitutional values.

- Similar considerations suggest that it is not just in the former Bantustans in which this system might be appropriate, but in a wide range of settlements in both urban and rural contexts, the history of which has left them with very poor land administration systems coupled with land access practices that are not easily matched with the logic of formal titling systems in which all use rights vest with a single owner.

Designing durable land administration institutions for recording current land rights in tenure contexts that fall outside of the existing formal cadastre and off the deeds registration system

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PART ONE

1. Defining the scope of Land Administration

The paper uses Land Administration as a focal point for strengthening property rights. We argue in favour of remodelling land administration so that the areas formerly dubbed 'reserves', 'homelands' or 'communal areas' may be brought into a single overarching holistic system of land administration and property rights for the country as a whole. The papers in the collection as a whole are concerned with the implications of the absence of a coherent and inclusive land administration (LA) system in communal areas. However, the concern applies to all rights in the country, and the design of a durable Land Administration system is in the interests of the entire property system in South Africa, to make it sustainable, and would include all off-register rights and their relationship to the system of registered rights.

When speaking of an LA system we are not implying a solid bureaucratic rule-bound structure, but a set of moving parts that articulate with each other in a coordinated way, and where the social and 'living' norms are congruent with the legal and administrative institutions. In other words, the component parts of an LA system should be well synchronised, for which the normative bases of the institutions that make up the overall framework must correspond. An inclusive LA system must be able to accommodate both customary norms and common law norms, not as separate or dichotomous systems, but within a single broad overarching framework for the country as a whole, and which is increasingly integrated over time.

We follow the following broad definitions of Land Administration within an overall framework of 'land management':

Land Management is defined as the overarching process of decision-making around land resources, including responsibility for the implementation of the decisions. From an institutional perspective it includes the formulation of land policy, the preparation of land development and land use plans, and the sub-systems for the administration of a variety of land related programmes.

Land Administration defines the activities that "actualise" these policies and plans. These include the functions involved in administering tenure arrangements, resolving conflicts concerning the ownership and use of the land, regulating the development and use of the

land, gathering revenue from the land (e.g. through taxation, leasing, sale, etc.) and enforcement mechanisms for these.

Increasingly, these activities are supported by formal *planning processes*. Planning and development functions occur in a variety of contexts in support of, or for the purposes of, both land management and land administration, and these functions mostly occur at the local level.

At a general level, a land management system is concerned with land as a resource and includes the processes for making decisions about who can do what where. The decision-making realm can be centralised, decentralised, localized or a combination of all or some of these. Hence land management generates a set of land policies at different levels of government and civil society. In regions of rapid change there is seldom a land policy at the centre that holds for the country at large. Land policies – hence governance - can even be localized at community level and operate unofficially or extra-legally, e.g. in informal settlements, or according to customary principles that may or may not be endorsed by government, e.g. in rural communal areas.

In the official or formal system in South Africa currently, decisions about land ownership are centralised, while questions about land use management are increasingly seen as provincial and local level functions with the actual execution thereof taking place at municipal level. The extent of local government discretion for decision-making is still being tested. Thus, in South Africa today, the question of "who decides" takes place at different levels, with greater or lesser co-ordination of these decisions across the formal and informal systems divides. In this sense, there is no overarching Land Management System in South Africa today. Over the course of the past two decades the various aspects of land administration in the communal areas has become increasingly incoherent and localised, and in some areas, contested.

There is a tendency to conflate LA with land tenure. Land tenure is determined by national policy that defines the parameters of defined rights, whereas land administration is an infrastructure that supports and actualises the rights or makes them operational and enforceable. There was a focus on 'rights' in post-apartheid land tenure reforms to address the history of land rights dispossession. The focus was on defining, restoring and reforming rights and amending laws, which centred 'rights' and legal reforms, but without developing the infrastructure to manage the rights. To address land tenure reforms and strengthen property rights in a holistic way, we must start with the entire institutional framework that defines, manages and enforces land tenure and land use. This must cut across all the different tenure forms and allow for the development of standardised norms to allocate and adjudicate land rights and their transfer, frameworks to assess land use planning, valuation, revenue, and enforcement mechanisms.

This excerpt from Rohan Bennetta, Abbas Rajabifard, Ian Williamson, Jude Wallace (2012) 'On the need for national land administration infrastructures' attempts an overarching rationale:

> The administration of land is an essential component of any nation's administrative portfolios. Here, land administration is defined as the management of land tenure, land valuation, land-use, and land development … A land administration infrastructure is defined as the policy instruments, legal frameworks, institutional design, and

technical tools that underpin the delivery of these four functions. The four broad functions are increasingly relevant to a nation's ability to organize itself. In the contemporary context, land administration will be relevant to the management of the macro-economy, levying of taxes, the provision of services and building of new infrastructure, and the protection of the environment and allocation of water rights. Without a national land administration infrastructure a nation will struggle to be governed holistically. Contemporary land administration literature supports this view.

Figure 1 The elements of Land Administration

Juridical/administrative/ technical	*Allocation of rights to land* (e.g., grants, sales, donations, inheritances, prescription, expropriation, reversion, servitudes, leases, mortgages) *Delimitation of the parcel* (e.g., definition of the parcel, demarcation of boundaries on the ground, delimitation of the parcel on a plan) *Adjudication* (e.g., confirming rights and resolving doubt and dispute regarding rights and boundaries) *Registration* (e.g., official recording of information of rights and parcels)
Regulatory	*Land use controls* (e.g., zoning, environmental regulations, etc. that restrict rights)
Fiscal	*Property assessment* (e.g., valuation of the parcel land and improvements) *Property taxation* (e.g., computation and collection of taxes) *Compensation* (e.g. when land is expropriated by the state)
Information management	e.g., collection, storage, retrieval, dissemination and use of land information
Enforcement	e.g., defence of person's rights against those without the rights, enforcement of land use controls

Source: MXA 2002. Investigation into Land Administration Systems in the Eastern Cape Province: Analysis of the Status Quo Position. Project OPSC001/01, Office Of The Public Service Commission, Republic of South Africa

PART TWO: Synthesis of the study and summary of papers

2. Synthesis

This paper (number 5 in the project) provides an overview of the project as a whole, but is most directly related to the issues arising in paper 3 (Manona 2016) and the data files in Volume Two[1] of the project. In general the papers collectively argue for a shift in thinking about land tenure away from linear approaches that suggest that, individualised systems of tenure are an ideal or 'silver bullet' to induce more efficient economic behaviour. The papers as a whole argue that this approach is simplistic and unrealistic, and that legislative interventions alone are unlikely to change people's economic and social behaviour.

We argue for an alternative approach that rests on the 'development' of legal frameworks from local norms and customary law in line with social and democratic values, rather than seeking for a top-down legal replacement. On balance, scholarship suggests strongly that legal changes to tenure do not change practices on the ground, and do not necessarily bring about direct changes to economic behaviour (Kennedy 2011; Bruce 2012; Haldar & Stiglitz 2013; Abegaz 2013; Henley 2013; Mattingly 2013; Van Leeuwen 2014, Barry &Augustinus 2015; Lawry et al 2016; Stein et al 2016). Rather, the equation is the other way around: tenure *responds to* economic, social and political changes over time.

We argue in this paper that, under the current conditions of fluidity, it would be more apposite to tackle the surrounding institutional framework in a holistic fashion rather than tinkering with specific tenure legislation. The latter approach inevitably empowers a small minority at the expense of others, which at this stage of extreme inequality in this country, we can ill afford. Fingering legislation in an ad hoc manner also potentially disrupts more than it clarifies. It is the broader framework of land governance that affects the ability of the various actors to enforce and exercise existing tenure rights. In a well-functioning land management environment, the land administration system as a whole should pull together the component parts of land management in a coherent and co-ordinated manner, i.e. the framework of land-related legislation and regulation coupled with appropriately staffed and skilled bureaucracy. The component parts include governance of land rights, land rights adjudication, spatial planning, land use management, revenue-related issues, land development, mechanisms or institutions for conflict resolution and most importantly, enforcement of rights, all of which require reliable land information. These are the components of land administration that currently support formal property rights. We argue these should be brought to bear on situations where customary systems are being integrated into a coherent LA framework.

Paper 3 (Manona 2016) sets out some of the parameters of alternative approaches that are being developed elsewhere in Africa, and discusses the processes involved in providing greater legal recognition to customary rights, primarily through new forms of information gathering, records and data infrastructures. A critical facet of this process is designing a methodology to record the existing land rights of rights holders using digital technology to create land records. The records are designed in such a way as to record (i) the access rights of all family members to family plots by tracking familial relationships in households; and (ii) access rights of families

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[1] For more information on the data, contact the author or the author of Paper 3 (Manona 2018).

to shared common property resources defined by community relationships in a particular resource area.

The most critical element of paper 3 is the concept of 'data infrastructure', which implies a complete overhaul of the land information management system in the country. At the moment information is fragmented across sectors, across government departments, across private sector platforms and across spatial and land tenure divides which coincide with racially defined or segmented spaces. Thus a reformed and integrated land information system would contribute to the reform of the institutions that recognise, or do not currently recognise, property rights.

We argue that digital technology is available to develop a credible and inclusive system of land administration that is capable of recording customary rights, but the South African state has been slow to adopt these approaches. We make a plea for a commitment to designing and implementing a coherent land administration system in the country as a whole, integrating the former homeland regions on the basis of proposed test sites or pilots in the interests of (i) laying the political ground for the recognition of property rights, constitutional rights and citizenship; (ii) firming up certainty in land administration systems and procedures in the long-term interests of economic development.

We categorise customary rights as off-register rights, including rights with certification that were historically created by statute, such as Permission to Occupy certificates (PTOs). Many of the regulatory features of PTOs designed by colonial officials were draconian and 'invented custom' which solidified previously kinship-based organisation of authority based on male authority, but twisted this to work with new forms of land occupation based, not on territorial control but on fixed spatial definition under male authority. These new forms of land access and control were not part of the pre-colonial customary repertoire. For example, the colonial government, in collaboration with key male authority figures who felt threatened by the potential loss of power over people, agreed on a format of legal access and control of land by men though the allocation of plots, land records such as PTOs or quitrent title and succession to the latter by way of male primogeniture. PTOs were not heritable in law, but in practice followed the principles of male primogeniture.

This new structuring of authority through PTOs has created a lasting negative association with these kinds of records, which were rejected in post-apartheid tenure policies as being 'permit-based' tenure rights. The passage of time has nevertheless revealed that in practice, customary principles were adapted to particular aspects of the PTO system into a hybridised tenure model. An example is the concept of 'use rights'. PTOs are essentially use rights, where the 'use' is defined by the tenure right itself (e.g. a right to an arable plot, or a school site) contrary to the way that use rights are allocated in the formal registration system by spatial and zoning regulations that are regulated at the local sphere of government in terms of the formal land use management and associated regulatory system. This concept of use rights could well be adapted to a modern system of rights that accommodate well-understood local or 'customary' principles. Another example from the hybridised model of PTOs, which is not legitimated by law, but has become a *de facto* practice (or social convention) is the custom of tradability of top structures. Buildings, crops, trees, fences, etc. can be, and are, sold and transacted, whilst the land itself remains inalienable.

In a modern system of recordal such as proposed in paper 3 (Manona 2016) and this paper, it is not suggested that the model of recording the right of a single (almost always male) individual identified as the 'household head' should be replicated, and obviously not the succession model of male primogeniture that has been ruled unconstitutional. It should also be self-evident that we do not suggest that records should replicate the old system of only licencing a particular possessor, which, when the owner died, expired, and in theory had to be re-issued.[2] This approach to PTOs could be equated with a 'personal right' that attaches only to an individual in his or her (but always 'his' in the case of PTOs) lifetime, but this was not how families interpreted the right practice. In practice rights were transmissible to family members over generations, and even the white magistrates tacitly acknowledged this. Hence a 'living law' developed that enabled sons to inherit from fathers. The gendered principle is of course challenged by women and is challengeable in terms of constitutional law. Nevertheless the principle of succession was established through practice.

The system had limitations in not being able to accommodate the reality of *relative rights* held by members of families to family land, and by families to common property resources across generations. No system that records a single person in a one-to-one relationship to a demarcated parcel of land is able to record relative rights without considerable modification.

The approach advocated in the papers as a whole in the collection departs in certain key respects from existing models inherited from the colonial and apartheid eras, but also from the Deeds Registry. The latter, in its current form, registers the names of identified individuals or legal entities as owners of surveyed parcels of land. In order for land to be registerable according to the Deeds Registry standards, it has to be professionally surveyed into parcels. The Deeds Registry is a prototypical example of a one-to-one register, where both the ownership (the social unit with registered rights) and the object of property relations (the registered surveyed spatial unit) correspond in a direct one-to-one relationship. In communal contexts, with myriad unconsolidated small plots and commonage, the introduction of a one-to-one register would result in land enclosures that would dispossess large numbers of people from access to familial and common land, an approach that is, and would continue to be, strenuously resisted.

The design of a land records system discussed in paper 3 attempts to reproduce the practices adopted in 'living law'. This means that the normative basis of the customary system has to be considered in order to maximise its local relevance and appeal by reflecting lived, known and familiar processes of rights allocations. There is a great deal of evidence to show that top-down tenure reform models that attempt to introduce property concepts and procedures that are do not reflect living social relationships and modes of holding a passing property to succeeding generations will not be durable and sustainable. Nevertheless, in acknowledgement that some of these processes would not pass constitutional muster, it is recommended that adjudicatory principles be developed within a regulatory and enforcement system.

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[2] There were also PTOs for trading sites or public utilities and facilities, sometimes also referred to as reservation certificates for the latter.

The most common reason cited for aversion by many policy makers to reproducing customary principles in tenure is that "communal tenure" or customary systems discourage economic development, particularly investment in agriculture. Other common objections include the presumed inability of customary systems to meet Constitutional standards and values, particularly women's access. The argument we put forward is that interventions that aim to increase constitutional consistency or economic expansion need to be addressed within the parameters of well understood local norms through adaptation and modification, and not by radical shifts or complete replacement in the first instance (Hornby, Kingwill, Royston & Cousins 2017).

Critics argue that a system that protects existing occupiers and users of land makes it impossible for those who could use assets (in this case, land) most productively to acquire those assets, will inevitably mean sub-optimal uses of those assets. A system, in other words, that entrenches existing use rights and practices, but which does nothing to create a more dynamic market in land will help protect existing users (all of whom are poor), but at the cost of inhibiting the use of land in more and more productive ways and fundamentally shifting the developmental trajectory of the region. This is indeed a critical trade-off, which in the first instance may be impossible to avoid making. There is some truth in the fact that family-controlled property systems constrain investment and production. As has shown, "[o]ngoing investment in proliferating and fluid social institutions may generate contradictory economic returns by constraining the development of productive capacity, but may at the same time mask processes of privatisation and concentration, as well as social differentiation within as well as across kin groups" (1989: 51; 1993: 132-3, 155-8) and Peters argues the latter point even more forcefully (Peters). She provides evidence of increasing concentration, inequality and competition from below, processes that develop under the cloak of customary tenure, which she sees as incipient class formation (Peters 2002, 2004, 2006, 2013).

There is indeed a welfarist and redistributionist argument implicit in the papers that focus on tenure, but overall the argument rests on several inter-related propositions:

(a) The legacies of distorted spatial patterns of land use has resulted in extreme poverty and inequality which the principles of family custodianship ameliorate, and adding more tenure insecurity by introducing a conventional individual cadastral property structure will result in enclosures and elite capture (which is already happening) and cause irreparable suffering and landlessness which will cost the country dearly.

(b) A positive system of tenure recognition and national land administration can be developed with the purpose of developing an integrated property system over time, and where hybridised systems are nationally regulated to improve the efficiency of market transactions; in other words, the implications of the arguments are that improving land governance will improve the functioning of market transactions, which are not so much non-existent in off-register contexts, as unregulated and therefore, localised. Localisation means that rights cannot be defended 'against the world at large', and it is this aspect that must be addressed in institutional property reforms.

(c) Research evidence is mounting, indicating quite conclusively that there is rapid 'informalisation' of records of those who do hold title deeds. This does need to be better

understood, but it does suggest that, in addition to the state's obligation to provide tenure security for all in terms of section 25(6) of the Constitution, the fragmentation and disintegration of rights regulation potentially undermines the credibility of the existing property system of registered rights. It is no longer satisfactory to categorise these systems as 'informal' as there is widespread evidence that people follow quite standardised procedures and well understood local social conventions in holding and transacting rights in these contexts. There is not an absence of markets, investment, borrowing and land transactions in this segment of the population, but the conundrum is that rights recognition, markets, credit and succession operate off-register and outside the formal economy legal frameworks (e.g. tax registration, company registration etc) *whether or not people have title deeds*. These rights are configured in a way that differs from the how deeds information is assembled and rights transferred, which renders them invisible and beyond the reach of state land information systems, planning and regulatory frameworks. Thus property cannot be counted in as a real asset in the formal economic framework.

The papers in the study as a whole, specifically Papers 1 and 2, acknowledge that legalisation or formalisation of land tenure, or the absence thereof, will not in themselves determine economic outcomes. There are many variables that impact on economic development in addition to land tenure, such as capital, labour and governance. In most cases land tenure is not the fundamental constraining feature. On the other side of the equation, counter-intuitive as it may appear, formalisation does not automatically guarantee tenure security, and indeed, formalisation can actually increase tenure insecurity during and after conversion. Conversely, the absence of formalisation does not necessarily imply tenure insecurity (Cousins et al 2008).

The yawning gap is not so much tenure insecurity in the communal areas, as the absence of linkages between tenure and other processes in government and society that increase households' vulnerability in the face of more powerful forces that monopolise resources. These broader governance issues and processes contribute to paralysis in tenure development, e.g. by reducing people's ability to enforce their tenure rights against third parties, or by reducing the clarity surrounding third parties' limitations and powers. The loss of systemic processes and procedures in land management *in general* following the dismantlement of the apartheid LA system does appear to have contributed substantially, and some would say decisively, to the poor performance of economic development in post-apartheid ex-homeland areas, certainly in the former Transkei on which we base our study.

The fragmentation and dislocation of land management are symptoms of a failure of rural governance and policy more than of land tenure *per se* in the former reserve areas of the Eastern Cape. In compliance with Constitutional injunctions associated with post-1994 reforms, the systems of inter-governmental authority and jurisdiction had to be completely overhauled and restructured. In the process, the old magisterial system that previously defined the Eastern Cape's homeland administrations was dismantled. The restructuring involved radical spatial reorganisation of provincial, regional and municipal boundaries, which further disrupted historical patterns of administration. For example, 78 magisterial districts were initially replaced by 39 local municipalities across the province. In this process, land administration slipped through the net. No system of governance in land administration replaced the old order systems, leaving an official vacuum in communal land administration

in the wake of this massive institutional transformation of space and jurisdiction. Paradoxically, the only boundaries in the Eastern Cape that were retained were the apartheid Traditional Authority boundaries (now Traditional Council (TC) areas), and it is thus no surprise or coincidence that traditional authorities have stepped into the void, but without sufficient legal regulatory mechanisms for land administration that would hold them to account to their constituents or the Constitution. The allocation of land administration to TCs has contributed to the fragmentation in land governance and spatial inequality of the country as a whole.

The spatial and jurisdictional restructuring, in addition to the negative impact on local land administration, has had a devastating impact on the small towns that were the centres of the old magisterial districts in the former homelands of the Eastern Cape. These towns used to be the centres of both land administration and economic exchanges of various kinds, though much of the latter were historically channelled through local trading stores. With the growth of the taxi industry and improvement in some of the road networks, these towns have become even more accessible as rural service centres and economic hubs at present, particularly as rural trading stores no longer function as rural exchange centres and local markets. However, the land administration functions and offices, along with other administrative apparatuses, have shifted in an un-integrated, fragmented and ad hoc manner to the larger scales of local and district municipalities, or even to provincial and national spheres. There appears to be a lack of comprehension by policy and law-makers of the dynamics of economic activity in the former homelands, particularly the dynamic role small towns play as local economic hubs and embryonic rural service centres, as argued in paper 1 (Aliber et al. 2018). Small towns provide services and consumer goods, and, with more backing, their role as constructive centres of trade, business and administration could be enhanced to encourage local business development and stimulate rural production by sourcing local goods.

We argue that the extent to which small towns can live up to this important role has been diminished by the current state of land administration in general, exacerbated by the fragmentation and dissolution of land administration and its bureaucratic structures. With the spatial and jurisdictional shifts from more localised centres of power to more distant and unfamiliar municipal, provincial and national centres of power, with land administration fragmented between and across them, the management of land has become paradoxically both more localised and 'informal' and more distant and inaccessible. The magisterial system of governance was not a decentralised function but was an example of 'deconcentrated' power that allowed for local engagement, which is a consideration for future development.

The growth of commercial outlets in small towns is constrained by the absence of clear procedures for accessing land or rental stock, which favours the politically or financially well-connected and discourages a range of other potential investors, including local entrepreneurs who do not have the necessary credentials to tap into the networks of power and patronage (see paper 1: Aliber et al. 2018)).

In the communal areas, it is not surprising that the vacuum in official systems of land administration has resulted in increasingly localised governance arrangements on communal land. While local-level decision-making is to be welcomed, it needs to be situated within a national system with clear legal regulatory frameworks within which local decisions are made and enforced to prevent arbitrary outcomes. This is an argument against decentralisation of

land administration, favouring national regulation with deconcentrated powers that can accommodate diversity. Local arrangements lack legal substance, authoritative control and systems of accountability, which encourage unscrupulous practices and lead to the concentration of power in the hands of local elites, including traditional leaders. The interest by outside investors in natural resource-related economic development, such as forestry, mining and eco-tourism, necessitates highly accountable systems of control over access to land and to manage land use changes.

So far national policy-making, which should provide the national-level parameters of policy and regulation, has failed to provide a viable framework of land administration to replace the systems that were dismantled. Enforceable national guidelines are needed to guide land-related decision-making and ensure compliance with constitutional values and policy and planning frameworks. There were some useful guidelines in the White Paper on South African Land Reform (1996) that appear to have been side-lined. There is very little likelihood, judging by former and current drafts of the Communal Land Tenure Bill, that new legislation will fulfil the requirements needed.

The emphasis on land administration should be interpreted to mean that land administration development should proceed alongside land tenure reform, and not to suggest it should be instead of it. The very purpose of the study as a whole is to argue that the restoration of a robust land tenure regime is crucially important from multiple points of view. It is a crucial aspect of land administration, and both are a foundation for sound economic development. While we do not think that reforming land tenure on its own will directly or immediately stimulate production (e.g. agricultural production), increased certainty about land rights would certainly be a crucial complementary factor in economic activity. It is no co-incidence that not a single wind-turbine project has been implemented east of the Kei River, and this is a direct result of the lack of certainty of land tenure.

There is a need to protect primary and third-party rights, as well as increase the visibility of land rights within families, where there are unequal power and gender relationships, of which unpaid family labour and succession rights are two examples. Greater visibility and clarity will thus potentially strengthening women's bargaining power. Legally secure tenure rights are also critically important as rights protected in the Constitution, and are an element in people's sense of citizenship, belonging and identity. It has been argued (and, as seen in the recent local government elections in South Africa) that having an address is a vital component of citizenship in a modern system of parliamentary democracy, and not a 'nice-to-have'. A unanimous judgment in the Constitutional court penned by Wallis AJ, in the matter *Xolile David Kham and Others v Electoral Commission and Others,* held that the every voter must have an address for the healthy operation of our democracy at local government level.

Paper 2 (Aliber & Popoola 2018) looks at the relationship between economic development and land rights — long contested in the literature for over a century — suggesting that a range of factors is needed to stimulate economic development. Land tenure remains one of the crucial variables, but is not the only one. New research based on surveys of empirically-based literature concludes that strengthening land tenure rights is critically important in underpinning productivity, but shows that there is no single formula for this and that formalisation (particularly titling) is not a silver bullet for unleashing economic development.

The idea that there is only one linear process of formalisation of customary and 'informal' rights through titling has been more or less thoroughly discredited, if by titling is meant individual titling (Cousins et al 2008). Regional and local contexts should dictate what reforms are most appropriate (Kennedy 2011; Haldar & Stiglitz 2013; Lawry et al 2016; Van Leeuwen 2014; Stein et al 2016), and some models of formalisation may be disastrous for the poor (Lawry et al 2016). We argue, however, that there are ways of formalising, legalising land tenure through certification and land records without a blind adherence to western-law models of titling.

Among the concerns that do legitimately arise from lack of formalisation is that inadequate legal recognition inhibits land rental arrangements. If there is insufficient protection of rights, the owners fear that they will lose their rights to tenants who may claim occupational rights (that are protected in new laws). In paper 2 (Aliber & Popoola 2018), some rights holders are quoted as arguing that renting out land is evidence that the owner does not 'need' the land. Since 'need' defines some of the imperatives of land allocation, need may trump security of tenure if land is not used. From the point of view of stimulating local economic development, an important imperative therefore becomes how to set legal parameters that may strengthen customary rights to stimulate sufficient security to encourage land rental arrangements without threatening the social basis of the local tenure arrangements. Where one local resident is wishing to rent land from another local resident it should be possible to provide a socially and legally credible route that will not lead to stigmatisation. Land holders fear that tenants may claim the rented land as their own by dint of occupation, a fear that is lent credence by legal reforms that (rightly) attempt to break down the dominance of the concept of absolute ownership. In living, i.e. current, customary systems, there is a real basis to believing that use may trump prior rights. Some local land laws endorse the concept that need trumps unclaimed or unused rights. Where such customs prevail, land that has been left unploughed for a certain length of time is considered eligible for reversion to common property for redistribution[3]. This custom is, however, contentious and likely to become more so over time. These and other tensions that arise from social and economic changes indicate the need for conflict resolution mechanisms embedded in land management systems, as well as principles of flexibility to allow for some degree of local nuance providing there is sufficient local consensus.

We argue that the focus should be on increasing *clarity* and *visibility* rather than exclusivity of rights through titling. Clear rights and procedural pathways would improve predictability and increase confidence in the economic outlook of these areas by both local residents and potential outside investors or developers. Land rights holders should have clearer *parameters* within which to assess the value of their own investments in production and labour, as well as the economic returns on rental arrangements and the value of outside developments, whether state or private initiatives. A clear set of procedures for land developments would

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[3] A field in use is called "*intsimi*", but once it ceases to be used it falls in a new category "*ifusi / amafusi*", to refer to disserted arable land. When the land becomes *ifusi* it does not automatically revert to commonage, largely because of the lack of certainty about whether the withdrawal is temporary or not. Once grass and trees have grown over a former arable allotment, it is no longer called *ifusi* and is considered to be *idlelo* (grazing land) or part of the commonage (personal email communication, Siyabulela Manona to author, 12 July 2016).

undoubtedly improve the confidence of outside developers, whilst at the same time clearly define the parameters of their third-party access to, and control over, rights in land.

Suggestions of formalisation ring alarm bells among scholars who believe that, while customary rights should be statutorily recognised and protected, interventions should not be aimed at internal formalisation (e.g. through land records), arguing that this would threaten the very essence of flexibility that keeps the system alive. Most people do not articulate their rights as being 'insecure' and there certainly is credence to the notion that customary systems require a certain level of elasticity to maintain their socially-based coherence. Some argue that *any* intervention inevitably results in the displacement of some rights by others, as new prescriptions lead to the replacement of one set of powerholders with a new set of power-holders (Amanor, Lawry et al; Amanor 2016). The strategic goals therefore have to be clear to minimise unforeseen and unwanted side-effects. There is increasing evidence, however, that rights have become increasingly vulnerable to alienation due to changes in national and global markets, a trend that justifies cause for concern and the need for intervention. Customary lands are in demand for capital-intensive projects, such as mining, large-scale agriculture, forestry, marine projects, tourism. The state wants land for roads and public infrastructure. There is also evidence of the growth of networks of patronage that empower elites who disregard the unrecorded rights of the majority when business interests and a trajectory of accumulation begin to penetrate customary areas. There are numerous examples of traditional leaders striking deals with outside investors, especially in the mining industry, in disregard of the rights of the community rights holders (see cases available at http://www.customcontested.co.za). Of further critical importance to any justification for recording rights is the fact that internally, rights within households/families are vulnerable to the more powerful members of the family, who tend to ignore the rights of those considered to have lower status. These situations are usually gendered and generational, affecting certain categories of women more than men, or older over younger.

In the South African context of land tenure reform, our argument suggests that what is important is to define the *legal parameters* of customary tenures in terms of relationships and categories of eligible rights holders defined in terms of family custodianship, rather than attempting to generate one-to-one relationships defined in records according to the western-law model. We argue that force-fitting rights into the one-to-one model is ill conceived, but at the same time rights holders increasingly desire records of their land rights (paper #3). The puzzle is how to design a flexible system that fulfils the needs of protection without destroying the social basis of the rights.

Advocating for strengthening local or customary rights in terms of our arguments suggest that these should be recognised in their own right, with adjudicatory and regulatory systems build around them and in a way that articulates with the existing system. We propose the use of innovative legal tools that take on board local norms, social relationships, kinship and other socially relevant organising principles that play a central role in local understandings of customary property relations. We argue that the design must match the normative basis of local relationships and practices in order to be durable. At the same time, the design must conform to constitutional values, and thus aim to balance local values with the Constitution. The end result will be a balance between over-formalisation and under-formalisation.

In summary, we argue the case for redesigning a land administration and land tenure system based on observations that deep-seated problems have emerged from the lack of land administration and tenure rights legislation on the ground. We base many of our remedies on the techniques local people employ to self-administer tenure rights in the absence of centralising forces. Paper 3 (Manona 2016), which refers to data filed separately in Volume Two of the overall project, looks at what it would take to develop a clearer structure for the administration of customary rights and strengthening of national land information systems as viewed from below, and discusses ways of doing this using new legal tools based on international and local innovations and experiments. Our case rests on evidence drawn from the former Transkei in particular, where the problem is acute. Similar problems, however, manifest in all the former homeland areas, but not necessarily in exactly the same way.

We argue that stronger rights cannot be fully realised or exercised without a coherent land administration system. Land administration is critical in ensuring that the various institutional elements are aligned to enable fair and positive social, economic and environmental impacts when changes in land rights or land use are proposed, whether large or small, public or private. A functioning land administration system pulls together spatial planning, land use management and economic development, whilst protecting property rights. Where customary relationships shape people's relationship to land, land may not be an asset in the sense of a capital asset, but it is a social asset that channels social and property relationships between members of households, families and wider social networks, and is the base from which all economic activities and livelihoods are pursued. Good governance of land rights and land use is crucial for further accumulation, and in the case of the poor, for survival. For investors, both local and external, a clear *framework* within which transactions can take place is critically important, not least of which is to encourage transparency.

A proper functioning land administration system would set out clear procedures from the spatial planning, environmental and management side, and ensure that rights on all sides are protected. In other words, a land administration system ensures that all the various parts of the processes work effectively and efficiently together, which is why we refer to it as a 'system'. At the current time, the very opposite is happening. Land procedures are mired in obfuscation, competing jurisdictions and sources of authority, lack of legal definition of rights and lengthy processes of adjudication or negotiation resulting from ongoing contestations.

3. Summary of the papers

The five papers that constitute the larger study may be read as discrete papers, but together they attempt to paint a more holistic picture of a very complicated policy, rights, governance and economic environment.

Paper 1 (Aliber et al. 2018) argues that dynamic developments are indeed present in the former homelands, but are centred on the small and not-so-small towns as significant consumer service centres. The availability of social grants and the rise of the taxi industry has led to a massive change over the past three decades in expenditure and shopping patterns, with the construction sector also appearing to assume a more prominent role. However, the economic relationship between towns and villages appears largely one-way, with missed opportunities for town development to create new or deeper markets for rural producers, e.g.

farmers. The expansion or extension of the commercial sector in towns, moreover, is constrained by lack of affordable commercial property to rent or purchase, which encourages the domination of national food chains. More research is needed on how and why this pattern is being reproduced and maintained, and who wins and who loses. Many substantial buildings in the commercial parts of small towns are crumbling. Anecdotal evidence suggests that land/property is tied up in obscure government processes and/or only available to those who are well-off, well-connected, or corrupt. The key lesson for policy is how to encourage and stimulate the dynamic quality to spontaneous small town development and how to redress the evident imbalance between towns and their rural environs. There should be: i) a concerted effort to improve the supply of affordable commercial properties in towns, and ii) more effort devoted to bridging the gap between town-based food retailers and local smallholder farmers.

Paper 2 (Aliber & Popoola 2018) argues that although tenure security can make a significant contribution to economic development, improved tenure security (which should not be confused with formalisation via title deeds) is never a sufficient condition for such development. Other things must happen as well, including well-structured state policies and interventions. Generally, immediate and dramatic impacts on development (e.g. investment in agriculture) should not be counted on as a result of improved tenure, although there is reason to suppose that improved tenure security (which in part depends on an effective land administration system) could unlock significant forms of 'external' investment, such as in renewable energy (e.g. wind turbines and solar panels). The fact that rural households do not perceive their tenure rights to be immediately insecure is no argument to neglect the importance of building a coherent land management system that improves certainty and coherence between land tenure, land use (including environmental and commercial concerns), planning and land administration. These are crucial for strengthening the value of property rights in both local and outside investor eyes.

Paper 3 (Manona 2016) is a set of guidelines for remodelling land administration, and is linked to Data Report/files in Volume 2 of the overall study. The guidelines have been developed from international best practice and principles that are coming to the fore as a result of the field pilot study site in Shixini, Willowvale, now in the Mbhashe Municipality of the former Transkei. Paper 3 should be read in conjunction with the data and commentary contained in the Data Infrastructure Project reports and files in Volume 2, which together comprise a case study. This section of the REDI project could be viewed as the empirical examination of land tenure and land administration based on field research. The guidelines and study illustrate the issues and problems that manifest on the ground in designing a reformed, reconstructed land administration system for the 'communal' areas and offer some solutions.

The data generated during the course of the study are filed in Volume 2 under the headings (i) Main Report; (ii) Draft set of local rules; (iii) Mapping and Shape files; and (iv) Field Data from questionnaires captured on Excel spreadsheets. The nature and dimensions of collapse of land administration is clearly demonstrated in these files, which makes a strong case for rebuilding the systems and institutions of land administration.

The inclusion of the guidelines that comprise paper 3 is justified by the need to provide government with a draft set of established best practices, norms and standards for development of bottom up land administration systems. The purpose of the guideline is to

raise key practical and methodological lessons learnt from a combination of international literature and the lessons from four local land administration initiatives: Shixini, Sterkspruit and St Marks in the Eastern Cape and Taba Nchu in the Free State. The guidelines are primarily targeted at land administration policy makers and practitioners in all spheres of government, including traditional leadership institutions that play a *de facto* role in land administration; non-governmental organisations that are active in land administration in practice; and local communities. The guidelines provide a basic 'fool's guide' to set up a local land administration system, pointing out what to consider, what to avoid and suggesting best practice. The guidelines provide the building blocks of new policy and practice with regard to rebuilding an innovative and reformed land administration system in the country's 'customary' areas.

The study as a whole, comprising paper 3 and the field data, illustrates many of the issues discussed in the other papers. The socio-spatial scale of the pilot site study is too small to develop a 'system' of administering land rights, but the evidence nevertheless presents lessons for what such a system might look like. The findings provide key lessons and guidelines for the development of a records-based land administration system in the former homelands, which has wider implications for land management. The study identified a number of key constraints to the development of a functional land management system. The study also examines how the breakdown in land administration is impacting on local economic development, focusing on a local macadamia project.

The first set of constraints relate to boundaries. There are a number of incongruent boundary delineations for different levels of authority. These different layers of boundaries, such as for traditional councils, administrative areas of the old magisterial districts, new municipal boundaries, etc, do not match up. In some cases social or political units straddle boundaries of affiliation. This phenomenon threatens to undermine whatever authority structure is relevant for a specific function; and secondly, it reveals longstanding, simmering, potential or recently active disputes in communities that are extremely difficult to resolve by simply drawing boundary lines. This calls for some process of rationalization to be implemented systematically over a period of time.

The second set of constraints relate to the lack of uniformity of land records and the difficulties involved in building up a land records system from oral and historical evidence. From the colonial era, the familiar 'PTO' certificates were never issued in Shixini, thus old order legislation was never been implemented fully. The legal basis of all historical rights must thus be sought elsewhere. Records such as tax payment records with livestock ownership numbers and maps drawn up at different scales, which were not dated, are held by the department of Rural Development and Agrarian Reform. Furthermore, the former Department of Agriculture and Forestry created their own village demarcation and naming systems, and these do not correspond to the other official records and hence there is a high degree of dissonance. The future of these records could only be resolved by means of high- level political processes.

The methods for capturing rights in a proposed record system are different from those used to register individual rights, since rights do not conform neatly to a paradigm of individual rights or follow the boundaries of discrete land parcels. Rights are nested in layers of social units and are triggered by familial and other social relationships. Spatially rights overlap across parcels and common property, and sometimes shift and change. Such rights cannot be

captured in the system of Deeds Registration. The study has thus captured land records using a different methodology that draws on a wider range of social data in each family, and recorded the information on Excel spread sheets. The intention is to import the data to the "social tenure domain model' or STDM, which is a customised system for recording land rights in circumstances where title deeds are not advised in the short term. The STDM has been developed by UN-Habitat based in Nairobi, Kenya, through its specialised unit, the Global Land Tools Network (GLTN).

The third set of constraints relate to the negative implications of crosscutting and sometimes overlapping institutional mandates between national, provincial and local government, as well as severe weaknesses in local, provincial and national government in relation to rural planning and land administration. The study concludes that the development of a coherent land management system requires a multi-faceted approach comprising policy, legal, organizational and human capacity building, and both formal and non-formal training. These are not merely technical questions, but involve developing institutions that depend on understanding social organisational issues and local understandings of land rights, land use and local authority, both in communities and in family structures. The study makes a strong case for the development of local rules, founded on principles of customary law, as part of a broader process of finding common ground between common law and customary law. This is a far more complex and challenging process than addressing land tenure as if it were a set of technical issues. The challenges require a re-examination of property law, while professionals and social and environmental scientists with different backgrounds and disciplines need to co-operate to find workable solutions. The financial implications of such a large undertaking should be viewed in relation to the substantial funding provided by the state to support the formal property and land administration system.

Paper 4 (Kenyon & Coleman 2018) argues that there has been a significant breakdown of familiar systems of land tenure and administration in the post-1994 former homeland areas of the Eastern Cape, focusing on evidence in the Transkei region, and specifically the Wild Coast. The paper shows that there has been no clear replacement of old systems, leaving both long term local residents and potential developers in a web of legal uncertainties, absent (or at best sporadic) and uneven public administration, and disputes, some headed or heading to the law courts. The coastal area of the Transkei, on which the paper focuses, has had a particularly disappointing trajectory of development, broken promises and lost expectations. The promises of land tenure reform and the restitution of land rights since 1994 raised local expectations of change and material improvements, such as significant tourist development and related employment opportunities as well as rental income on local land and shares in dividends from tourist enterprises. The failure of the post-apartheid to clarify access to, and control of land and encourage sustainable development thus follows in the footsteps of a long history of dispossession of indigenous land rights including and especially in coastal areas and in the name of conservation or tourist/recreational development.

That said, land tenure arrangements are not the key limitation on external investment, but rather one amongst many such limitations. The lack of co-ordination and alignment and general inaccessibility of all three spheres of governance in the Wild Coast is perhaps the greatest problem. It is generally acknowledged that local land rental agreements are the preferable manner in which to secure and safeguard business investment, provided these are

organised in a socially responsible manner. Examples of investors providing additional social support to the communities in which they operate include a range of profit sharing arrangements and/or the provision of local support services, where, for example, rental income and dividends may be used for the provision of physical infrastructure for schools and crèches and potable water.

The paper makes the point that it nevertheless a mistake to overestimate the ability of the Wild Coast to attract external investment (as noted in official reports over the years). There may be an inherent contradiction between the concept of "Wild Coast" and conventional notions of "development". Perhaps part of the answer lies in developing far more realistic plans and expectations that match both local needs and acknowledge respect for local land rights by developing tourism (by way of example) modestly to ensure protection of the natural environment.

Paper 5 (this paper) makes a case for the statutory recognition of off-register or 'customary' land rights in manner that is sensitive to local understandings and practices. The paper puts forward an argument for the development of a land administration system that complements the existing formal system, with some conceptual and practical detail on design. The paper emphasises the importance of a system that is sensitive to the legal, spatial and social complexities of customary tenure rights, which presents significant challenges and constraints in terms of formalisation possibilities and how record-building could be accomplished without radically destabilising land tenure in contexts where rights are held off-register and woven together by social norms.

In any process of formalisation or legalisation, there is always the potential danger of unintended consequences, including dislodging other valid rights, which may lead to social displacement of a range of potential claimants. The availability of new legal tools and modern digital technology, however, presents substantial opportunities to design a framework that mirrors local understandings and practices and more flexible rules; and which can accommodate spatial units and boundaries that are not in all cases fixed, and in some instances overlap. The 'spaghetti-like' quality of boundaries implies that these they are not easily surveyed by conventional means. Such a system has to be able to recognise the socially complex networks that operate within and between social units, moving between different levels in families and graduating upwards to the level of communities and, in some cases, traditional authorities. The paper makes a strong case for strengthening customary rights through certification in such a way that customary rights can eventually take centre stage on a par with title deeds, but are not forced into the freehold title mould in its present form.

4. Institutional changes and constraints

In grappling with the challenges of legal, institutional and administrative reform, it is important to have a grasp of the broader backdrop against which these problems have emerged. The advent of constitutional democratic government in South Africa ushered in a decade of high expectations for the reform of grossly inequitable land tenure systems that were a legacy of the colonial and apartheid era. The new dispensation inherited a system of property law that was structured hierarchically to secure and protect largely white property interests, while the tenure of the majority of the population was subject for the most part to

administrative controls with minimal legal protection and recognition. During the first decade of reform during the nineties, a number of significant legal reforms resulted in a spate of amendments, repeals and new laws aimed at recognising various occupational rights that applied on state, trust and private land, and strengthening these rights to make them less vulnerable.

Most tenures thus fall within a national legislative framework that was designed to be 'back-to-back' to cover commercial farmland, labour tenancy, urban settlements and communal areas; as well to provide a new collective model for holding land transferred through restitution or redistribution. The Extension of Security of Land Rights Act, 62, 1997 (ESTA) applies to commercial farmland; the Land Reform (Labour Tenants) Act, 3, 1996 applies to labour tenants; the Interim Protection of Informal Land Rights Act, 31, 1996 (IPILRA) applies to communal areas, and the Prevention of Illegal Eviction from or Unlawful Occupation of Land Act, 19, 1998 (PIE) applies mostly to urban land. The Communal Property Associations Act (CPA) 28 of 1996 was designed to provide a legal vehicle for the collective ownership of land through title.

With the exception of the CPA Act, these statutes are, however, generally a 'negative' form of recognition to prevent alienation or deprivation of rights, rather than a positive recognition of a defined right that corresponds to an appropriate landowning social unit. The laws were regarded as a means by which to bring immediate relief in the belief that the rights would become positively recognised over time. The laws nevertheless form the backbone of a system that begins to transform the idea of customary, communal or informal rights as being of 'lesser' stature, to the potential to be recognised as property rights.

There was less success in passing permanent legislation applying to the 'communal' areas. There was an expectation that new legislation would replace the Interim Protection of Informal Land Rights Act. Various attempts were made. The first attempt (the Land Rights Bill) aimed to place decision-making, control and choice of local authority structures in the hands of local communities. This Bill was scrapped due to differences of approach between the first post-apartheid ministry responsible for land affairs, and a new ministry. A second attempt aimed to centralise controls and authority in the hands of traditional authorities and the state. The Act was struck down by the Constitutional Court, but on procedural grounds. The replacement, the Communal Tenure

The lack of positive tenure legislation has been mirrored in, or we would argue partly resulted from the almost complete vacuum in land administration, and hence absence of enforcement mechanisms. The historic system of land administration that developed over the course of the twentieth century in the former homelands was problematic in a number of ways, not least that the system of land rights was subordinate and subservient to the rights of the system of 'ownership' as construed by South African property law, largely to serve the interests of white society. African land rights were secluded from property law and subject to proclamations drawn up by the Department of Native Affairs (later Bantu Affairs). Nevertheless, there was some coherence in how the various parts fitted together under a system of largely administrative rule, as well as some features of the rights that continue to resonate with practices on the ground.

Quite ironically, more by accident than design, the legally limited use rights that were conferred by proclamation, principally Permission to Occupy (PTO) certificates, found some resonance with local land users. The administration was accessible and affordable via local land registers in the magisterial offices in the small towns. The highly localised level of administration and allocation accorded, to some extent, with local practices. Thus access and control of these rights were managed at a local level and matched the need for some flexibility. PTOs were essentially use rights. We argue that the concept of 'use rights' is an appropriate base from which to build a legally recognised form of customary tenure, incorporating some elements of the old legislation, while discarding some unwanted aspects (e.g. that certification be in a single man's name; transmission to men only). While existing PTOs are protected by IPILRA, PTOs ceased to be recognised as a valid form of tenure in terms of post-apartheid legal reforms. We would argue for an adaptation that recognises the functionally and socially credible elements of 'use rights'; but fills in the weak aspects, counters the gender bias and provides stronger legal content of the rights determined through national legislation.

As mentioned, in compliance with South Africa's new constitutional mandate, this old system was dismantled during the course of the spatial, jurisdictional, administrative and juridical restructuring of South Africa's governance frameworks, including spatial jurisdictions. The institutions that had propped up the former bantustan governments had to be stripped away to make way for new provincial and municipal government demarcations intended to de-racialise the spatially and racially skewed regional boundaries of the apartheid past. In the process, the component parts of the former land administration systems in the homelands were split asunder. PTO rights were categorised as 'second class rights' under the new constitutional dispensation. With no new law to replace the old land tenure systems of the past, however, nothing has replaced these old forms of rights, and in many cases PTOs continue to be issued by various government departments with no legal authority whatsoever, and a number of old order laws float about with without any coherence.

The former district magisterial system that formed the basis of the former homeland administrative systems for allocating use rights to residential and arable land, and trading, church and school sites through District Commissioners and headmen (in some regions Chiefs and headmen) ceased to function, as magisterial boundaries ceased to have any jurisdictional significance, and magistrates were no longer associated with district administration. There had been an expectation that land administration would be harmonised with new municipal, provincial and national jurisdictions in conformity with the designated Constitutional schedules and functions. The Deeds system was relatively unaffected (from a structural point of view), since the Deeds Registries were, and still are, national institutions. Land administration in the communal areas, on the other hand, were highly dependent on the structures of the former department of 'Native' Affairs (later Bantu Affairs), and in particular, the offices of the district or 'Native' Commissioners (later Bantu Commissioners) who were also magistrates operating out of the small magisterial town centres. When they were stripped of their administrative roles, the authoritative bases necessary for co-ordinated decision-making and enforcement were removed and their functions were fragmented across a range of other institutions. The 70 magisterial districts were reduced to 38 local municipalities. The problem was that no new co-ordinating institutions took their place.

Some institutions survived, such as the Townships Boards that assessed land development applications, but these only had jurisdiction over towns on the cadastre, which means that even small coastal towns like Coffee Bay are not subject to statutory land use controls, but are considered to be 'communal land', in theory subject to community oversight. All land developments and applications for trading sites, public utility sites, infrastructure, etc, in communal areas are left to the workings of weakly applied laws that require consultation and 'community resolutions', including IPILRA, but these mechanisms are inadequately applied if at all as they lack enforcement mechanisms. Trading stores, tourist developments, state infrastructure and public utilities are thus wide open to abuse of land rights. Natural resource management and extraction (mining, forestry, etc.) are subject to national legislation, but local land rights are notoriously weak against powerful corporations. As mentioned, in the past the land tenure mechanisms for many of these developments, as well as the expansion of human settlements, took the form of Permission to Occupy rights (PTOs), which were issued by the old district magistracies that no longer perform these functions.

Meanwhile, other institutional changes were creating their own new dynamics of power, filling the vacuum left by the previous system in a somewhat haphazard manner. Two somewhat opposing institutions were given constitutional recognition. Unelected chiefs and traditional leaders were recognised in accordance with a political compromise, and new wall-to-wall municipalities were created on the basis of party-based elections. The advent of municipal governance was supposed to herald a new locus of power for modernised approaches to spatial planning and land use management. District and local municipalities were expected to take over significant functions in terms of planning and settlement upgrading in rural areas. However, severe incapacities in municipal governance over the two decades since these institutions were established, combined with significant political support in the ANC for bolstering the power of chiefs in rural land administration have led to localised control moving to traditional authorities, but in a highly unsystematic fashion. The result has been both power and jurisdictional struggles between municipal and traditional authorities; an absence of authoritative decision-making; institutional paralysis and inertia; unresolved local contestations, and very little evidence of co-ordinated planning and development. There is also evidence of abuse of powers and corruption in all these local authority structures and system. While there have been significant gains in terms of improvements in access to potable water, land administration remains drifting in the doldrums.

The "Communal Land Tenure Policy" currently on the table proposes a formula for double-title: surveying 'outer boundaries' and subdividing inner plots, with the conflicting approaches of transferring the outside parcel to traditional authorities and possibly inner plots to owners. The model is without coherence and is a thin disguise for transferring control to the traditional authorities. Besides, the cost of implementing and surveying the myriad small plots with the multiple ownership and interweaving rights to common property renders the entire proposal politically and legally questionable, and certainly unsustainable. The attempts to survey and consolidate plots in ownership in Kenya have been well documented as a failure, and resulted in transfer of control to male clan heads, rather than succeeding in the goal of transferring rights of individual ownership as intended (Berry 1989, 1993; Haugerud 1989, Mackenzie 1989, 1993). If the CLTP were to be enacted, it will almost certainly be challenged in Court, and end up in the Constitutional Court, further prolonging the limbo into which communal

tenure has been wedged. There will likely be another 10-20 years of stagnation allowing elites to further consolidate their powers and insert themselves into the administrative vacuum.

There has been some hope the Spatial Planning and Land Use Management Act, No 16 of 2013 would fill an important gap in land management, but the reality is that SPLUMA is hardly cognisant of these areas and municipalities have much more pressing concerns than roll out SPLUMA in communal areas unless for specific land development projects. SPLUMA is founded on a three-tier architecture constituting of (i) SPLUMA and regulations, (ii) some provincial planning laws and (iii) municipal by-laws. The Spatial Development Frameworks (SDFs, part of the municipal planning architecture) do not create or give rights, but the schemes do. It is unfortunate that the drafters of SPLUMA did not incorporate a creative and innovative clause that was included in the former Development Facilitation Act, No 67 of 1995 (now repealed) that accommodated a concept of 'initial ownership' prior to survey, and was conceptually designed to tackle spatial inequality based on race. This mechanism allowed for a 'fast track' process of land development in off-register tenure contexts. The DFA had built-in mechanisms to trump any other laws such as the Subdivision of Agricultural Land Act, or others that impeded rationalized and fast-track land development for the poor. SPLUMA repealed the DFA, and does not include this provision. It was hardly used, however, and now the Act and the concept have disappeared from the legal map. SPLUMA places a lot of emphasis on incremental upgrading, which has a number of inbuilt problems that this report has attempted to make visible.

The combination of 'background law' (Van der Walt 1999) in the form of the Deeds Registry, Land survey Act, Deeds Registries Act, legal conveyancing, Land Use Schemes, zoning by-laws, valuation of land, etc., all support the formal system of land registration, and do not operate in a context that is pro-poor. The implications of SPLUMAs emphasis on upgrading rather than recognition means that SPLUMA will not be able to address or reduce spatial inequality directly. What needs to be thought through carefully is how the rights that are regulated through the land use planning schemes can be made to interface with customary rights. Based on current trends, it is likely that the schemes, which require survey and registration, will trump customary rights. Thus planning law, instead of addressing and easing spatial inequality, may inadvertently reinforce it[4].

In short, the absence for 20 years of any sustained public policy on land administration and tenure reform in the former bantustan areas has resulted in the reality that land administration and land tenure arrangements are not regulated by the state but have become highly localised, with a diversity of outcomes at local level. The contestation of approaches to land tenure reform in these areas has meant that no legal reforms have yet gained traction, and land administration has disintegrated into incoherent and un-coordinated fragments.

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[4] Personal communication with Siyabulela Manona regarding SPLUMA. 25 August 2016.

PART THREE: Rationale for a Land Records System

This section provides rationale, context, advocacy and theory for:

- The institutional development of a system of land records that is able to store (in digital format), maintain and administer land rights that are currently off-register and off-record.
- Recommendations for the development of adjudicatory principles and a 'hierarchy of evidence' according to which evidence will be weighted and accepted for the purpose of recognising customary rights and generating land rights records.
- Development of procedural principles to adjudicate rights according to appropriate normative criteria.
- Recommendations for the development of appropriate succession law to reflect the normative approaches to the transmission of land.
- A commitment to seeking the means by which the proposed Land Records System could articulate with, and be legible to, the Deeds Registry and the spatial records of the Surveyor General's Office, so as to prevent entrenching a new dualism and to ensure the legal content of the rights in the Records system are on a par with the Deeds registration system.
- Theoretical and legal coherence to support policy proposals to record and adjudicate local land rights, drawing from international experience.
- Recommendations for legislative reform to provide statutory recognition for customary land rights, including, initially at least, the strengthening of the Interim Protection of Informal Land Rights Act, No 31 of 1996 (IPILRA) by (i) as a matter of urgency generating a set of regulations to accompany the Act, and (ii) filling a number of other gaps in the Act, whilst retaining its overall focus, in order to provide an immediate basis for framing customary rights.

1. Rationale

The absence of 20 years of any sustained public policy on national land administration and failure to develop sustainable tenure reform means that much of the substance of land administration and land tenure arrangements in the former bantustan areas (as well as other informal settlements) means that rights are held and transacted outside of any formal administrative system. This should not suggest that the administrative arrangements of land use and tenure in these situations are necessarily 'informal', since at a local level the processes of accessing and using land are subject to local customary norms and well understood and practices social conventions that are in some respects standardised, consistent and predictable. Their official administration is, however, at best highly localised, and at worst non-existent, unsystematic or inconsistent. The deficiencies in official support for land administration result in highly discretionary administrative arrangements when it comes to land use developments that involve commercial goals, investment and generation of surpluses (e.g. agricultural production schemes, mining and tourism); or in changes to land access and/or governance structures, such as occasioned by restitution awards, or new municipal boundaries.

The absence of a consistent legal and policy framework lends strength to unaccountable traditional or local governance practices and confounds efforts to develop the full economic potential of these areas. The cracks in accountable systems and structures increases the ability of local elites to cream off the surpluses generated from commercial developments, and seriously threatens the constitutional rights to land of those on whose land these developments

occur. These deficiencies suggest that an important point of departure would be record the rights of ordinary people so that a clear and statutorily confirmed set of accounting practices and procedures around land rights and land uses may be developed.

How prevalent is this phenomenon? The problem applies —in somewhat different ways — to: (a) rural areas in the former homelands; (b) the former 'coloured' rural areas; (c) rural and urban informal settlements. These are densely settled areas and comprise the majority of South Africans, even if the land coverage is closer to a third of the country's land surface. All of these areas are characterised by the absence of cadastral coverage, meaning that the boundaries of settlements and plots are generally not surveyed, and land is not registered in private ownership (though a minority are). The most frequently proposed solution by government officials and market-oriented policy advocates is to survey and register the land in individual ownership. This paper suggests why this solution will not provide the 'silver bullet' for reform for a variety of reasons, principally a poor normative fit. Were an individualised system to be introduced, there is strong reason to believe it would weaken the legal rights of the majority for at least several generations, and with possible permanent damage. Proposals of this nature would in any case be strenuously resisted, which in itself is good reason to take the objections seriously.

The inability to produce robust land tenure institutions in the rural and urban-edges of the former homelands has meant that most land rights in these areas have no substantial recognition in law, and attempts to 'upgrade' rights run into labyrinthine entanglements with the requirements of formal planning and tenure law. The argument in this paper is that it is possible to fill this gap in governance in the former bantustan areas, using the former Transkei as an example. The paper provides a rationale for strengthening land rights in such contexts, and in ways that do not further entrench the dualism inherent in the Deeds Registry/Traditional Authority binary, but provide a means of bridging these divides in future by recognising the customary norms.

The point of departure is that the negative implications of the current state of collapse of land administration in South Africa in the areas off the cadastre (focusing on the former Transkei region) are so severe as to warrant high-level intervention and investment by government and Treasury.

The paper:
- Argues for a major conceptual shift in thinking about solutions away from single-solution models that entrench the dualistic structure of land ownership represented by either the Deeds Registry on the one hand, or Traditional authorities on the other.
- Motivates for a concerted drive to undertake a process of systematic reformulation of land administration by combining the resources and expertise of the relevant state institutions, NGOs and international partners where appropriate.
- Suggests that an alternative system of Land Administration can be conceptualised and designed, not by formal one-to-one cadastral survey and registration, but by means of an alternative official repository that accommodates customary law norms and standards, and provides full legal protection for familial land rights by statutory means in compliance with the constitution.

The paper presents a strong plea to adopt a bottom-up approach to transformation, and to move away from 'silver bullet' solutions that attempt to impose predetermined single-solution models to solve complex land tenure challenges, irrespective of whether the model is the western-law individual registration model, or extends powers over land to chiefs and traditional leaders, or both. A reconstruction process should involve developing a set of principles around which to design a holistic and integrated land administration system in South Africa. The principles should embrace constitutional principles as well as socially credible customary norms and values that do not clash with the constitution. A new institutional design will not aim to eliminate current local practices and concepts by attempting to replace them with new principles and practices, but will find means of accommodating and adapting them. The aim is to connect the various components of land administration into a more coherent, integrated system that is able to articulate with the national Deeds Registry on the one hand, and tap into local systems on the other. The institutional inter-connectivity should be adaptive to local norms and thus cater for the diverse needs of the population, moving decisively away from the current search in policy circles for a one-size-fits-all model that would have no hope of sustainability. Diversity is arguably notoriously difficult to accommodate, but, like constitutions, can be accommodated by the adoption of applicable norms and principles, not by a multiplicity of 'systems'.

From a resource and budgetary allocation point of view, the argument proceeds from the current reality that the formal land administration system extends substantial legal and administrative support to private property rights, as well as to public property and state property, but provides negligible legal or administrative support to rights that are off the cadastral grid. The formal land administration infrastructure includes the Deeds Office and the Office of the Surveyor General, as well as private sector land surveyors, conveyancers and planners whose functions are circumscribed by statutory regulations and standards. These institutions are geared towards underpinning the property concerns of the asset-holding section of the population, including private or public developers and investors. The system offers very little by way of support to the large percentage of the country's population with fragile asset bases, who are arguably the largest proportion of the population.

The conventional solutions put forward by most officials and economic lobbyists follow an evolutionary interpretation of the root problem, arguing that the answer lies in simply 'scaling up' the so-called informal rights into the formal system by means of extending the cadastre through surveying and titling. In other words, you move the so-called 'informal' into the 'formal' institutions. The argument rests on the assumption that tenure progresses naturally from tribal/communal/collective typologies towards individual private property. This paper argues that this solution is based on flawed interpretations and understandings of the so-called 'informal' sector. The elements that comprise the tenures that are off-cadastre, and therefore off-register, are not best described as 'informal' but are made up of a diverse set of tenure arrangements that are locally administered and follow sets of norms that differ in many key respects from the principles that drive the cadastral system. The assumption that these locally administered 'social tenures' (as we call them in this report, see below) will find traction in the formal system has been shown to be, for the most part, simply incorrect (there are exceptions), since the assumption is based on some fundamental misunderstandings of the different logic that drives many of the off-grid tenures. Individual cases may indeed shift towards more individualised systems over time, but this cannot be assumed to be a general

trend. A vast literature on the controversial subject of titling has amassed over the years, with a growing number of empirically-based research suggesting that titling is not the answer, or 'an answer' (Kennedy 2011; Bruce 2012; Haldar & Stiglitz 2013; Abegaz 2013; Henley 2013; Mattingly 2013; Van Leeuwen 2014, Barry & Augustinus 2015; Lawry et al 2016; Stein et al 2016). The literature is has grown so large that a full review is not possible here, but one of the turning points in the debate was when the World Bank commissioned research in Africa to test for correlations between tenure insecurity, productivity and investments. These well-known arguments are summarized in World Bank (2003), Feder and Nishio (1999), Firmen-Sellers and Sellers (1999), Bruce and Migot-Adholla (1997), Atwood (1990), and Migot-Adholla et al (1991). According to Hanan Jacoby and Bart Minten, the later authors are among those who point out that sub-Saharan Africa lacks the infrastructure, factor market development, and other prerequisites for land tenure reform to promote agricultural intensification and productivity growth, and they cite other authors who have introduced more complex variables than those used in earlier studies. See for example, Lawry et al; Migot-Adholla, Hazell, Blarel & Place1991; Bruce & Migot-Adholla 1994; Migot-Adholla & Bruce 1994; Migot-Adholla, Place & Oluoch-Kosura1994.

In addition to the scholarship that questions titling on the grounds that it does not correlate positively to economic development or greater efficiency of land use, empirical research in South Africa has shown that the social tenures that fall outside the cadastre in many cases follow their own patterns and logic that could be understood in terms of their underlying social norms and mores, many of which derive their value systems from customary law. These concepts and practices do not conform to the one-to-one principles of property ownership that drive the western liberal system of registration and titling, where the property owners and property objects are directly connected in a quantifiable manner, i.e. both owners and objects are identified, named and boundaried (Kingwill 2014 a & b, Kingwill 2015, Kingwill 2016). In the latter model, even where property is shared, property apportionments are mathematically calculated and subtracted from the whole. Social tenures, by way of contrast, do not measure rights of access in terms of divisibility, or a 'zero-sum' equation, but in terms of social criteria, e.g. kinship or need, which are not generally quantified, but are categorised. This does not mean that access is open-ended, but that access is measured within socially defined parameters, and not economic value alone. (Kingwill 2014a; Cousins, Hornby, Kingwill & Royston, forthcoming; Peters 1997: 138)

Rights categorised as 'communal' or 'customary' are not recognised by a similar degree of statutory definition and regulation, and are abandoned to the localised administration of customary authorities, some of whom are dangerously unaccountable. The policy approach by government that encourages this trend is disturbingly associated with political objectives of appeasing the traditional leadership lobby by proposing that the land is actually *transferred* in ownership to traditional authorities. There are paradoxical elements within this policy paradigm. Some of the government proposals are for a dual system traditional ownership and control, with individual title carved up within, and therefore doubtful coherence. There seems to be a high level of disconnection between these two elements of the model, which in fact clash in fundamental ways. The proposal provides a framework that jumps radically between two differing sets of principles, neither of which are based on an adequate appreciation of the social norms that come into play in tenure relationships.

The paper attempts to show that the issues are far more complex than the reductionist arguments that see the answer as simply extending the rules and norms of private property to African customary tenures; or in simply allowing traditional leaders, who are unaccountable to national-democratic governance norms and standards, to hold sway over communal land rights. These solutions entrench the existing dualism and do little to provide legally recognised, statutorily regulated rights to people at the household/family level that live under community governance structures of one sort or another.

While the idea of social tenures suggests diversity and complexity, much of the complexity would be easier to accommodate if it were not for the hierarchical structure of the property system that places individual private property at the top of the legal hierarchy, while social tenures are not generally seen to confer property rights, and thus occupy a lowly status in the hierarchy. One of the key distinguishing features of social tenures in African customary law contexts is the continued importance of African family values and reliance on social networks, which provide a framework of norms that define a set of graduating relationships between various layers of kin, clan, neighbours, village settlement and traditional community. These interweaving relationships do allow for exclusionary principles (which are a defining feature of 'property') but defy the mechanisms of registering single owners or legal entities in a national Deeds Register, linked in a one-to-one relationship to unique, surveyed parcels of land. In these contexts, individuals and families would not benefit from a simple extension of the cadastre in its current form. The concepts and practices that inform customary systems require a reformulation of institutional models in order to actively support off-register rights by developing an alternative record system in 'communal' and informal settlements contexts, in order to give legal substance to the content of these rights, considering existing practices.

One of the key solutions proposed in this paper is to develop a system for recording African customary rights (or other off-register rights that may not be informed by African customary law but by different sets of customs). A records system, as opposed to the deeds registration system, is conceived as a means by which the socially and spatially flexible aspects of customary rights may be identified and recorded. There is a dearth of research in South Africa on the design of alternative systems for recording land rights in spite of significant progress on alternative, innovative institutional design to record land rights in other post-colonial contexts including many African countries. The research in Africa has been supported by organisations such as UN-Habitat under its land tenure unit, Global Land Tools Network (GLTN) as well as by a variety of international NGOs and academic institutions. The innovation in Namibia in the form of the Flexible Land Tenure Act, 2012, is a very positive step in the right direction, since it recognises the need to provide tenure before parcelling and registering the land. The example is briefly explained in Appendix 2 below.

For complex reasons, very little progress has been made in this regard in South Africa. The gap in alternative design in South Africa arises from the unique legacies of the past that engendered a strong moral imperative to (a) repeal old order laws and (b) design new laws in conformance with the Constitution; but in so doing neglected to build up the *administrative infrastructure* in the form of an integrated and coherent Land Administration system to support the new legal bases. The problem was exacerbated by a policy switch around 2000, when the new ministry of the former Department of Land Affairs (now the Department of Rural

Development and Land Reform) moved the policy debates in the direction of support for traditional authorities. The result of these weakly conceptualised policies and the policy impasses that have bedevilled land tenure reform is that the post-apartheid regime has been unable to produce a viable statutory or administrative framework to replace the old order laws.

2. Context and principles for reform

The impact of colonial and apartheid legacies on the post-colonial context in South Africa has been profound when it comes to the land rights question. On the one hand, there is a strong Constitution, which promises land tenure security and tenure parity for all South Africans. On the other hand, there has been inability to match the ideal with actualisation, partly due to complex colonial legacies, and partly due to the particular trajectory of post-apartheid land tenure reform. The former bantustan or 'communal' context in the Eastern Cape is enormously complex. There have been numerous overlays of laws, authorities and land rights over the past one hundred and fifty years, leading to webs of overlapping and layered rights that are difficult to resolve by any simplistic models of 'upgrading of rights', which was the approach suggested by the land tenure reforms immediately prior to transition to democratic rule, e.g. the Upgrading of Land tenure Rights Act, 112 of 1991 that has proved to be unenforceable. As suggested throughout this paper, these rights resist parcellation and hence are ill-suited to a simple model of extending the cadastre and Deeds Registry. The solutions lie in innovative legislative and administrative design.

The legacies of the Eastern Cape's former bantustan areas are complicated by overlaying quitrent rights (and even in some limited cases, freehold rights) that were issued to a limited number of rights holders over a limited period of time in history, but these titled plots now exist side-by-side with, or underlie, Permission To Occupy (PTO) rights and other customary forms of tenure. There are also various layers of customary rights, many of which are further complicated by restitution claims.

Research as well as project-level facilitation reveal that in spite of the political illegitimacy of most of the 'old-order' legislation, some aspects of the historic land administration arrangements that reflect locally credible social norms may constructively inform a newly designed institutional framework, as suggested in Part One. For this reason, a thorough review of legislation would encompass an examination of the old legislation as well as new legislation.

In summary, the current land administration context is dogged by: (1) overlays of rights and authority which cannot be resolved using existing mechanisms in law and land administration and (2) the removal or reassignment of most of the pre-1994 land administration mechanisms which have not been replaced by new institutions. Among the reasons for the impasse are contestations of power at local levels regarding control of land, and management of land rights. There are also reasons relating to the particular trajectory of land tenure reform, which has been heavily influenced in the direction of group or collective titling at a very large scale, at present recommended for Traditional Councils (using the apartheid tribal authority boundaries). The only alternative is individual titling according to Deeds registry standards.

Such policies are based on ideological aspirations put forward by political, traditional and business interests, rather than being thoroughly grounded in existing reality and practices. Such

ideologically-orientated proposals undermine rights holders' current understandings and desires about how to regulate access to land, and control its use and management, which means that if enacted, they will have very little chance of gaining any credible traction on the ground, and would simply be a veneer to cover deep-seated power imbalances. According to empirical research findings, families who were historically issued with western-law inspired rights in the nineteenth century, such as quitrent and freehold titles, do not adhere to the letter of the law, precisely because there is a disjunction between the structure and nature of the rights created, and people's own interpretations and family forms and norms (Kingwill 2014a & b, Kingwill 2015; Kingwill 2016).

Research suggests that the basic social unit that manages access rights is the family (but not the nuclear family), while control rests at various layered levels in the community to provide collective oversight of common property. In order to be effective, a functioning system of land administration needs to recognise these existing channels of power and social networks, but also ensure that basic rights are protected according to constitutional law, and at the same time adhere to land use management frameworks. What is needed is a strong constitutionally-based framework for legally recognising customary rights in their own right, to reflect "living customary law"; but at the same time provide a framework of regulation to protect rights and prevent abuse of rights by elites, be they business elites or traditional elites. The foundation upon which to build a sound system of land administration should be normative standards that resonate with people's understandings and social practices, which express the way people access, hold and control their land (and how they understand these relationships), but which are held to account according to constitutional values.

A starting point for law and administrative reform should be recognition that there is a problem with the current legal-administrative options that provide only for a dualistic structure for land management (and hence land tenure) viz.

- In some of the off-cadastre localities there are individuals/families with freehold and quitrent rights that have been 'upgraded' (in theory); or Permission To Occupy certificates(PTOs); or other locally 'registered' (i.e. recorded) rights such as in the coloured rural areas[5] which are upgradeable to Deeds registration level. However, these legal rights overlap with larger numbers of unrecorded and unregistrable rights within the same localities or communities. A similar problem exists between members of families and extended families whose names are not recorded. It is therefore misleading to characterise these areas as 'quitrent' or 'PTO' areas in toto, since the reality is that the majority of occupiers are not officially recognised as holders of these rights, though they are socially recognised as having access rights. The phenomenon of overlapping rights is precisely the demonstrable consequence of registering single names (or even names of married couples), which creates a form of officially 'landless' category of occupiers in these areas. This is what is likely to happen by any system of individual recording or registration. The approach creates a situation of long-term paralysis in any attempts to develop a coherent and legally recognisable system of rights in these areas.

- CPAs and trusts that are recognised as collective land owning structures, but problems have emerged that mirror the same kinds of problems discussed above, in that the rights of families and individuals within the broad collective ownership are not statutorily recognised

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[5] ... that fall under the Transformation of Certain Rural Areas Act 1998 (Act No. 94 of 1998) (TRANCRAA)

leading to tension between the interests of the individual families and the group (CPA/Trust).

The implications are that most rights that fall into these categories are not fully recognised, and are vulnerable and weakly administered. Rights are subject to highly discretionary and potentially arbitrary powers of farm owners, traditional leaders, community power brokers, municipal authorities, national and provincial government officials and other power-holders and formal property owners who may wittingly or unwittingly protect and promote the rights of elites and investors at the expense of occupiers and *de facto* rights holders. State policies regarding commercial or public interests such as mining, forestry, commercial agriculture and conservation do little to protect rights in spite of their stated intentions.

In townships, particularly urban settlements, the assumption is that rights should automatically be registered as freehold title in the Deeds registration system. The obsession with freehold titling has the paradoxical result of paralysis, since the complexities of extending the system to informal settlements results in failure to extend *any* form of land administration to these localities. Rights are simply not registrable unless they are formally surveyed, and formal survey presupposes that the internal spatial and social apportionments are fully resolved and adjudicated. In other words, the right cannot be converted to freehold until settlements are fully formalised, which is usually an endless process, leading to a vacuum in land administration for long periods of time (in many cases interminably).

Freehold paradoxically threatens to weaken the rights of family members. The registered 'owners' get rights of 'ownership' by means of registration, and hence powers of alienation, as there are no means by which to enforce obligations towards other family members and kin who have primary or secondary access rights or interests; and all the control is placed in the hands of those registered on the deed. As a consequence, those who do have registered freehold rights tend not to register the subsequent transfers, and the deeds registers lose currency fast (as research has shown, see Kingwill 2014). Individual registration, for the same reasons, also tends to encourage family disputes.

The result of these complex dynamics around tenure is that the **majority** of people in South Africa have extremely weakly enforced and administered land rights, contrary their constitutional rights.

The solution, according to the argument in this paper, lies in developing the means by which to strengthen off-register rights in South Africa. We refer to approach we recommend as a 'Land Records system' to distinguish it from the Deeds Registry. The justification for an alternative institutional model is based on the arguments in Part One above, viz. that customary rights are ill-suited for registration in a western-law based Registration of Deeds (ROD) system that is only capable of recording one-to-one property relationships with proprietary consequences for the registered 'owner/s'.

The arguments advanced in this paper go much further than a simple ideological rejection of freehold tenure, which is not the basis of the motivation for a Land Records system. The motivation rests on evidence that customary rights are conceptualised, organised, allocated and arranged differently from freehold rights. Each requires a system of legal recognition and

system of governance administration that retains the coherence of the underlying normative basis of the rights and their transmission. Furthermore, given that a great majority of rights holders who hold customary rights are poor, the system must be affordable, simple to maintain and allow for incremental adaptation without sacrificing the legal authority of the rights.

3. Recommendations

The issues discussed in the context of the former Transkei are in fact emerging all over the country, including coloured rural areas and peri-urban contexts. A body of expertise is emerging to take the challenges forward. For example, a number of NGOs and NPOs are in the process of forming a network to combine expertise and capacity, and in order to foster co-operation around the issues discussed and the following objectives, recommendations and methods.

The following objectives are advanced:
- Promote the development of a Land Administration (LA) system in South Africa, to be regulated by a Land Administration Act, that recognises and accommodates currently weak rights that are constitutionally legitimate, but cannot be actualised in terms of current legal frameworks.
- Advocate for a *national* land tenure and administration system that addresses people who are 'untitled' and off the grid in urban and rural areas, using innovative approaches to developing an adaptive national framework of Land Administration that is enabling of adaptation and incremental options outside formal title — NOT in terms of 'evolutionary' models that rest on the assumption that tenure systems can simply be 'scaled up', OR by top-down, one-size-fits-all models that fail to reflect property relations on the ground.
- Promote the development of a coherent LA system as a particular focus of land tenure reform in preference to a narrower focus on land tenure legislation, believing that an LA focus is more likely to provide a holistic set of correctives that are necessary to move away from the unjust and exclusionary systems of the past.
- Promote an LA focus in the belief that focusing on the broad framework of administration and planning has more chance of gaining traction than focusing on purely legal forms of tenure, since LA includes other crucial aspects of land management which contextualise land tenure in a broader set of imperatives, such as land information systems, spatial planning and land use management, systems of succession and inheritance, development of administrative and technological infrastructure, etc, all of which contribute to actualising rights in land.
- Promote the commonalities between urban and rural tenure and LA problems and solutions.
- Promote the idea of developing local modalities in urban and rural areas in order to inform the overall design of a national framework, i.e. building a new system from the bottom up.

- Promote the development of a LA system that is capable of recording rights that are currently off-register in a 'land records system' developed from local piloting, including urban and rural rights.
- Promote the concept of a 'land records system' in both urban and rural areas as an alternative repository to the Deeds Registry, but with equal status, and which articulates closely with the Deeds Registry, on the basis that both "registered" and "recorded" land rights

should be equally recognised and protected within South Africa's institutional and legal framework; and, furthermore, should be recognised as property rights.

- Enhance the capacity of support networks to engage at a national level; and actively encourage engagement and debates about emerging issues (nationally and internationally) in Land Administration, sharing alternative models and discussing joint advocacy.
- Enhance the capacity of the network to engage with government (and other powerholders) at local, regional and national levels to promote the emerging ideas, concepts and models of LA based on local experience and piloting, as well as international best practices.
- Strengthen the capacity of LA-oriented institutions to tap into a wide range of learning and research initiatives, and thereby promote both the conceptual and theoretical development of ideas and modalities of LA, as well as enhance the physical and technological capability to implement innovative LA.

4. Methods

The following methods for realising these objectives are proposed:

- Forming partnerships to increase capacity, learning and implementation. A credible institutional driver is essential, but somewhat difficult in circumstances of uncertainty in national political arena and hence the need for forming partnerships.
- Piloting in selected local contexts and evaluating the capacity for scaling up the pilots to municipal level implementation.
- Undertake a costing of administrative overheads. It is important to know what a local LA system will cost and what the possibility is of generating some income from the process through small recording/transaction fees etc. Evaluate the feasibility of a link to municipal services and cost recovery. What will substitute for rates? In the past, issuing a PTO cost the equivalent of R100 today. It is vitally important that the system is affordable.
- Constructively engaging with government and interested government officials by selectively identifying the potential for co-operative platforms.
- Encouraging partnerships between national and international like-minded institutions for conceptual and 'learning' support and sharing; or funding, or both.
- Building capacity in state institutions to implement LA.
- Sharing methodologies for conducting pilots, e.g. theoretical underpinnings; collecting oral and documentary evidence, using new tenure domain models for recording rights; participatory action research; using modern technology and mapping, etc; and also for developing physical capability through acquisition of appropriate hardware and equipment and digital software systems, maps, etc; as well as contributing to the development of local all-purpose administrative centres or local 'property shops'.

5. Conclusion

In conclusion, we recapitulate the underlying legal, constitutional and institutional arguments made in this paper in a logical framework to why an alternative system of land administration is needed.

We have made a case for the legal strengthening of local or customary rights, not by forcing their registration in the Deeds Registry system of title deeds, but in their own right. The

development of a national LA platform is a recognition that the entire formal management system (comprising the juridical rights and the linked systems of spatial planning and land use management) cannot provide a durable and sustainable framework for the administration of customary rights, and is thus not able to underpin the legal recognition of customary rights. An alternative design is needed which embraces a recognition of these rights in themselves, and not with reference to the centralised Deeds Registry system, and therefore, by implication, not with reference to a paradigm of 'upgrading' which has been found to be unsustainable. The shaping of a new approach needs to take its cue from concepts and practices of customary law, many of which we have touched on. In support of the arguments made in this paper, we have appended extracts from two other reports to the Housing Development Agency (HDA), 2016, and the Eastern Cape Provincial Planning Commission, 2013, that underscore the arguments used in this report, and provide more detailed recommendations.

The following factors must be considered:

A feature of customary land use arrangements is that rights are usually overlapping and layered. Access to, and control of the various land uses are regulated by social relationships within and between social units. Not all the land units are fixed, and the social units are generationally linked, and therefore neither is quantifiable. Hence the arrangements in many, if not all, cases preclude the parcellation of holdings in single blocks of ownership by individuals. The implications are that you cannot match a parcel of land with an owner (singular or plural). This means that these rights cannot be registered in the Deeds Office in its current form.

Rights are not considered alienable in the conventional sense of the term. This feature is related to the more technical features outlined above. The Deeds system in its present form was itself a development in response to the increasing commodification of land in the west. The system is designed to ensure 'clean title' when transactions and transfers occur. The survey and registration system, as mentioned, matches a parcel to an owner, which reflects "one-on-one" property relationships which a feature of western immovable property law. This formula facilitates the passage or transfer of land from one to another owner, where rights are examined and 'conveyed' by legal professionals. In Africa, in spite of increasing levels of commercialisation and land changing hands, social relationships and networks around land access have remained resilient and proved to be outlive the changes in economic and social relationships that have in many other respects moved in the direction of contractual relationships, rather than status-based relationships. This is the reality we maintain must be acknowledged (Okoth-Ogendo 1989 & 2008).

From the broad perspective of constitutional property law, a transformed model should move away from entrenching the hierarchical model of the Registration of Deeds system, which confers a system of 'ownership' rights through title deeds in a way that attempts to maximise exclusivity, though in practice exclusive rights are balanced by various other entitlements and obligations). All the other rights cascade from the summit of the hierarchy downwards, with those of the poor at the very bottom of the hierarchy. There is currently one route out of it, i.e. through formal titling (see van der Walt, 1989). We propose that this conceptual model of 'upgrading' in reality results in status quo and paralysis, since, as we have argued, rights do

not in fact move in a linear direction from customary rights to title. Thus the rights that are at the bottom of the hierarchy are not statutorily recognised, though they are protected.

The significant problem seems to be that there is currently no 'middle way' in South African property law between 'ownership' that confers highly exclusionary powers of control in the hands of a single or identifiable 'legal person' (i.e. the system that issues title deeds), and the so-called 'communal' system that in its current shape has overly porous boundaries of access and control (even if the label 'communal' is somewhat misleading). Both of these models preclude the development of a more flexible system that allows for concurrent rights. Customary systems are characterised by overlapping and interlocking rights, and a legal model that accommodates the reality is (or should be) possible, it has just not been sufficiently explored. A legal model that allows for separation of ownership of improvements of land from ownership of land would be another legal development that would be highly relevant to the conditions in the former homeland communal areas, where local understandings and practices follow this very trajectory.

In the common law equivalent, what is needed is a system that allows for rights of different orders (i.e. not necessarily the same strength) to be simultaneously held by different interests. It is worth mentioning in this regard that prior to the radical shift towards individualisation and commodification of land in the west, western property systems allowed for simultaneous interests in land: earlier Roman and Dutch property law accommodated a phenomenon known as 'divided ownership' (duplex dominium) (van der Walt & Kleyn 1989, 248-9) and English property law is known for its accommodation of fragmented rights. The notion of property as a 'bundle of rights' rather than a fusion of ownership of a 'thing' originates in common law systems and English property scholarship in the nineteenth century in the writings of Sir Henry Maine and in the writings of the American legal realists.

When faced with the choice, however, South African property law followed a different route, that is, it opted for the fusion of the most exclusive powers possible to be held by the 'owner' (Chanock, 2001, 376-377; van der Walt 1999; van der Walt & Kleyn 1989, 248-9) in order to insulate 'ownership' from other rights. This model has exacerbated the distinctions between colonial and indigenous systems of property, and has established a binary between 'ownership' by title and 'communal' or 'customary rights. Clearly such a dualistic model poses extreme challenges to resolving land rights in situations where land developments are proposed, and reduces the choices for splitting rights other than by means of rental or servitudes. These stark choices are unsatisfactory in conditions such in the former Transkei where two different understandings of ownership intersect very starkly

The general approach that was followed in the decade of reform during the nineties, was to allow for the evolution of insecure tenures to fully secure tenures on a par with 'ownership', or for their 'upgrading' to 'full ownership'. The trajectories of upgrading processes were never very clear, mainly because the complexities of what these processes would entail were not well understood. It was assumed by many of policy makers and law drafters that upgrading was a purely legal and technical conversion from a weak right to a registerable right following a linear path from informality to formality. The implication was that the process, once complete, would involve a relatively simple set of procedures for transferring title to people via

registration in the Deeds Office. However, the inability to implement the Upgrading of Land Rights Act 112 of 1991 is proof of the unenforceability of this approach.

The insights from detailed empirical and ethnographic research reveal that off-register rights almost invariably reside within layers of social relationships, networks and levels of authority. Rights are associated with membership in a social unit, ranging from family to neighbourhood to 'community' and involve the co-existence of various levels of rights over overlapping layers of land that may shift spatially and temporally. Members of extended families and not individuals make claims to allotments and thus it is not possible to register one or two names on title deeds. Common property is shared according to local norms and practices and may shift according to land use changes that are both seasonal and affected by land developments, including new allotments or community projects (e.g. agricultural, educational or tourist). To further complicate matters, spatial boundaries of various jurisdictions, for example, municipal government, old administrative units and traditional authorities, many of which clash, impact on how rights are exercised in practice (Cousins 2008).

These circumstances militate against one-to-one property rights. The widely acknowledged phenomenon of 'overlapping rights' within and across families, villages and communities means that adjudicating 'owners' is a socially, legally and politically complex matter. Firstly there are *spatially overlapping* rights which means it is not possible to identify a discrete parcel of land that has no other subordinate or concurrent claims to it; and secondly, there are *temporally overlapping rights* when, for example, fields are opened up to communal grazing during the dormant season; and thirdly, *juridically overlappi*ng rights of access claimed by family members who are spatially spread out and live in other urban or rural centres. There may also be subsidiary users or tenants without formal rental agreements. All these 'shifting' rights would be jeopardised if the transfer of a property is effected into the name of a single 'household head' or even a married couple. Kingwill 2012, 2014 & forthcoming; Hornby forthcoming.

In other words, the land cannot be parcelled off in a straightforward manner, and attempts at enclosure generally result in social conflict or dysfunctional registration records. The current system of registration of title is thus poorly matched to absorb these social realities. In spite of the passage of nearly three decades, these rights thus remain in the margins of property law and land administration. The socio-spatial mismatches are still poorly understood by officials and bureaucrats, as well as many practitioners/NGOs.

For purposes of conceptual convenience, we refer to these off-register, customary or 'informal' rights as 'social tenures', since they derive their legitimacy from social recognition, and are regulated by social relationships at various levels of the interlayered social units that comprise 'communities'.[6] However, we do acknowledge that these tenures are not unique in this, in that legal rights are highly abstracted social compacts in the form of legalised social contracts.

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[6] We have borrowed this term used also in Cousins, Hornby, Kingwill & Royston (forthcoming), Untitled: Securing Land Tenure in Urban and Rural South Africa and adopted also in Eglin, Kenyon, Kingwill & Manona 'HDA Communal Land Tenure Project', report prepared for the Housing Development Association, Nov 2015.

In spite of these constraints, current government policy is set on surveying and dividing the land up into various units that will seemingly be registered with the Surveyor General and in the Deeds Office. There will be larger units surveyed, 'owned' and controlled by the traditional councils (based on apartheid spatial boundaries) and smaller surveyed household units with use rights issued to households with titles of some sort. The 2013 Communal Land Tenure Policy of the DRDLR provides for the transfer of "outer boundary" title (p19) to traditional councils as defined in the 1951 Bantu Authorities Act and 2003 Traditional Leadership & Governance Framework Act. These approaches suggest the elimination of CPAs in areas under traditional councils (p29 & 32). Individuals and families residing is these areas will get 'institutional use rights' to part of the land within them (p21). These use rights are restricted to areas such as household plots, gardens and arable fields, while the traditional council manages all development related to common property areas such as grazing land and forests, including projects such as mining and tourism. The proposal appears to rest on the Deeds Registry system where General Plans (i.e. subdivision plans) that generate the opening of township registers for the use rights (Department of Rural Development and Land Reform 2013; Eglin, Kenyon, Kingwill & Manona 2015).

There is no mention in any land tenure policy documents on the composition of the social units who will be accorded the use rights. Empirical research reveals that an important level at which land tenure rights are exercised is at the level of family units. The model that is generally practiced combines strong familial rights to allocated plots and community oversight over common property, and allows for applications for land allocations, and changes in land use. There is a growing awareness of the importance of the extended family unit in controlling and exercising rights of access, use and transmission of family plots, and it is therefore this social unit that should be accorded powers of access and control of demarcated land at the local level, while community oversight of common property and communal interests vest in structures at a larger community scale, the detail of which differs according to local conditions. In some cases, traditional leaders continue to enjoy local legitimacy for purposes of local-level governance and management, while in others they do not.

Practices such as those do not fit into a projection of a linear path of 'development' or 'evolution' from supposed informality through a simple process of upgrading or formalisation to the point of ultimate registration in the Deeds Office. This trajectory, in fact, is inevitably met by failure and any attempt to initiate an approach such as that would be heavily contested. To register one (or two, or three) persons in the family, results in the dispossession of a range of other claimants inside the family or in the broader community. Disputes and contestations tend to erupt if such attempts are made. These rights simply cannot be 'captured' as individually registered rights in accordance with Deeds Registry requirements, since the technical requirements do not match the reality on the ground.

Where attempts at registration or titling were made historically, the administrative systems tended to unravel quite dramatically over time. Research reveals that the rights associated with titles evolved into customised systems that adopted aspects of formal title, basically, the land parcel itself, to principles of customary rights of access and transmission by the lineage or clan. Title deeds are not designed to capture kinship-based social units, and fast lost their currency as family composition changes, and transfers to successors are not registered or legally validated through registration procedures. The titles continue to be associated with the

landowning family, but the records of ownership on the titles usually reflect deceased members of the lineage or clan (Kingwill 2014, Cheater 1987; Haugerud 1989; Mackenzie 1989, 1993). In other cases properties pass hands to new owners without transfers being effected. These tendencies are being witnessed in urban low-cost housing schemes in South Africa at present, where title deeds are issued and similar 'unravelling' occurs.

Officials and professionals tend to be intransigent in their determination to follow the survey and registration route despite the evidence of persistent disjuncture. There is an enduring assumption that these problems can be plugged by various mechanisms, such as 'educating' title holders; making larger subsidies available to cover transfer costs; registering married couples rather than individual household heads; 'fixing' and 'updating' the registers; and/or conducting mass titling programmes. These attempts have so far only occurred in urban areas, with varied results, but in most African low-income housing areas the outcomes are not promising. "Fixing" the registers generally bring about short-term changes only.

The objective reality is that there are differing spatial, social and juridical concepts of property between western-style law and African customary law (Okoth-Ogendo 1998; Kingwill 2014). Officials, economists and land professionals trained in the western traditions are, however, slow to comprehend these nuances, and hence there is little political will to explore alternative models through rigorous research.

Assuming that the social patterns and practices are understood and embraced is it possible to formalise these without the disruptive affects discussed above? There is continued and continual debate as to the appropriateness of attempting to formalise customary tenures by those who recognise the saliency of customary law (Cousins et al 2008), with a massive body of literature on the subject, as mentioned. For those who regard formalisation as desirable and inevitable, and wish to do so in a sensitive and apposite manner, the challenge is what methodologies to use to understand local practices, what processes to adopt to conceptualise such a new approach, what technologies to use to capture information and at what scale, and what institutions to construct to maintain the system. It would be a mistake to underestimate the complexity of designing new land-legal tools. Registration systems are generally not conceived of in terms of customary systems and socially-held rights, or what we call 'social tenures'.

The normative basis of social tenures would need to be objectively understood before their component parts are translated into meaningful concepts of property in such a way that they resonate with people's own understandings. Once the rationale and conceptual basis of property is understood, the rights can in turn be translated into a legally recognisable format and a corresponding institutional framework designed. Fortunately, new principles, methodologies and techniques are being honed by the Global Land Tool Network (GLTN) under the aegis of UN-Habitat based on Nairobi. There have been significant attempts made in other African countries to apply various forms of certification of rights short of Deeds registration. We have not reviewed all of them, but have specifically highlighted an innovative approach in Namibia in the form of the Flexible Land Tenure Act (see Annex 2 below). South Africa would do well to learn from its neighbours in Sub-Saharan Africa before embarking on costly and unsustainable policies that have been tried elsewhere, and failed.

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APPENDICES

Annex 1. Extract from Report for the HDA on Land Administration by R. Eglin, M. Kenyon, R. Kingwill & S. Manona 2016

Excerpt from 'Rethinking Communal Land Administration: Unlocking Human Settlement Development In Communal Land Areas' Report prepared for the Housing Development Agency 2016 by Ronald Eglin, Mike Kenyon, Rosalie Kingwill and Siyabulela Manona.

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Recommendations

Broad recommendation

The starting point to dealing with land administration in communal areas is to understand the nature of existing social tenure arrangements, which we term 'social tenures'. The task is to strengthen these social tenures, or 'off-register rights', and bring them into a coherent institutional and administrative framework. This requires the establishment of a locally administered land record system to complement the land registration system that exists and create legal parity with registered rights.

This approach leaves options open into the future as to how particular communities would like to deal with tenure in their localities over time. In certain instances some communities and households are more likely to gravitate towards more individual tenure arrangements whereas in other contexts locally specific social forms of tenure will continue to predominate.

The administrative act of providing a public record and acknowledgement of rural land tenure rights will provide security of tenure for the needs of most people and households. It will facilitate the emergence of rental markets of land rights and respective land parcels, for arable and residential land in particular. It will facilitate the extension of both land use planning as required by SPLUMA and the collection of local rates and service charges as per the *Municipal Property Rates Act No.6 of 2006*. Finally the provision of security of tenure will promote a sense of equality and full citizenship for all rural residents. Practically it will also give them a geo-spatial reference or in common language, an address, with which to negotiate many administrative requirements including obtaining birth certificates and driving licences.

Recommended intervention per challenge

For each of the challenges highlighted in section 3.1 corresponding recommendations are made (see table 5) for how to address each challenge.

Table 5: recommendations per challenge

Challenge	Recommended intervention	Timeframes
Administrative		
1. There is confusion as to who is responsible for land administration when land and land related issues are transversal across all spheres and many functional areas	HDA and/or DHS to initiate the establishment of a technical committee with relevant national departments to begin a process of streamlining the institutional and legislative environment and the range of procedures relating to land and land development. This collaborative effort must include directly interested national departments including Treasury, COGTA and DRDLR as to institutionalise these collaborative arrangements within the present Constitutional architecture. These arrangements also need to be aligned with those of other spheres and departments such as environment, water, forestry, agriculture, minerals, etc.	Starting in the short term and ongoing. 12 months for detailed proposals including assignments and delegations of legislative authority
2. There is no effective national legislation underpinning land tenure for communal areas.	DRDLR/COGTA to introduce a nationally constituted but locally administered land administration system. This must be based on a clear programme over the short, medium and long-term plan to revitalise land administration in communal areas. The plan should start with a programme to save and record existing and valid PTO records, while a new land record system is piloted and rolled out. This will require amendments to IPILRA and/or the provision of regulations that outline the procedures for a locally administered land record system for communal areas (and other areas like informal settlements). This system must be coordinated and not incompatible with the national land registration system (the Surveyor General offices and the Deeds Registries) and with municipal SDF process and land use schemes. Land administration including records of land rights should remain a national competency as per current Constitutional architecture	Within 12 months 6 months for any draft amendment Bill, 6 months for publication of draft regulations
3. There is a shortage of and inappropriate allocation of staff and resources for land administration.	A new land administration system will need to be designed and staffed under the leadership of the DRDLR and COGTA. Where possible staff with a historical understanding of previous PTO systems should be retained. National programme for training and capacity building of staff would need to be put in place. The DRDLR, in collaboration with COGTA and DHS and other government departments needs to initiate discussions with academic institutions to explore how, as a country, we can develop the human capacities to implement the locally administered land-records system.	Within 12 months put in place a human resource development plan

4. There are no institutional systems in place to administer communal land as previous administration systems have been dismantled or allowed to collapse	Between DRDLR and COGTA, establish provincial land administration support offices to establish and support local land administration offices at local municipal level including magisterial district level (where similar functions were previously performed) and oversee and manage the locally administered land record system. This will include the following: • Day-to-day administration– capture of records, recording of transfers of land rights, recording new land rights – on a national data system. • This requires staffing by delegated officials of the national or provincial sphere. Staff and functions with appropriate delegations could be transferred to municipalities later. • Provincial land support offices to assist local land offices to deal with challenging cases and disputes. • National land monitoring and evaluation function to reflect on, draw lessons and share experiences to improve the locally administered land record system. • National land administration and record support office to ensure that the local land record offices operate within the national framework and in line with policy and legislation. • National and provincial capacity building programmes to systematically build capacity of provincial and local offices and municipalities to manage the locally administered land record system.	Within short to medium term. Start with 'pilot' projects including where there is public investment such as in housing projects and grow the programme over time.
5. There is uncertainty as to how to deal with land use management and spatial planning in communal areas. SPLUMA does not go into detail on this matter and leaves it up to provinces and municipalities to deal with.	The fact that SPLUMA provides framework legislation and does not go into detail relating to land use management in communal areas presents an opportunity to align the land tenure administration and the land use planning and management systems. Develop specific national, provincial and local laws to fill gaps in SPLUMA and related regulations and by-laws to deal with land use management within communal areas. This should include appropriate land use or purpose categories for communal areas with more flexible rules governing what type of activities and improvements can be undertaken. These purpose categories should be kept broad, and could include examples such as the: • Rural settlement zone (for villages with definable settlement edges) within which one can allow the full range of uses they currently contain as primary rights, or get agreement from residents/leadership on what uses they feel they want to have to consent to before it is permitted. • Agricultural settlement zone (for low density, small-holder agricultural settlement such as	The Green Paper process on Spatial Planning and Land Use Management underway in Eastern Cape in 2015 and the recommendations from this report need to be incorporated into this and other provincial planning and land use management legislative processes

	Mbizana coastal areas in the Eastern Cape that were never affected by betterment).	
	• Agricultural zone (for arable and grazing areas)	
	• Conservation zone (for sensate river/ wetland/ forest or coastal areas recognised and agreed to as such by community members and structures). Resource harvesting can by all means be permitted, but that is where rules are needed as to what is appropriate.	
	• Cultural / Sacred/ Heritage/Resort etc. zones	
	For many communal areas get agreement for and apply a set of rules/ principles that can be applied on an activity-to-activity basis in pre-determined zones so as to achieve sustainable development / resource use practices.	
	Link with and utilise the SDF planning process to identify special areas where more flexible approaches to land use management can be accommodated and to identify conservation, agricultural and other areas that can help inform decision makers when making land use change decisions.	
6. Most municipalities do not have the capacity to implement SPLUMA on a wall-to-wall basis, including communal areas.	The various government departments including DRDLR, COGTA, DHS and others need to collaborate in order to develop and implement a programme to build capacity of municipalities to implement SPLUMA and the proposed local land-records system	Immediately and on going
7. Given that there is no to very weak legislation governing land administration within communal areas, there are no clear procedures for enforcing compliance to this legislation	Include procedures and penalties for phased enforcement of the laws and regulations developed for the spatial planning, land use management and land tenure administration in new legislation and regulations developed through IPILRA and SPLUMA	These should be introduced simultaneously with land use management and land administration, area by area
8. Land taxation for local revenue has broken down in communal areas	Link the locally administered land record system to the municipal rates and services system. Historically land transaction fees for issuing and transfer of PTOs accrued to local revenue accounts	Simultaneous with extension of *Municipal Property Rates Act*
9. Due to the lack of land tenure and land use administration in communal areas, environmental and resource management legislation (e.g. conversion of good agricultural land to settlement) has not been coordinated within a broader land administration system	Align the land tenure and land use administration system with environmental legislation, spatial, planning and land use management. This is in effect how it used to work in the past, with the departments of agriculture advising on which land was suitable for residential and arable purposes	Ongoing

10. Boundaries of local Administrative Areas do not align with municipal ward boundaries, at least in the Eastern Cape	The Demarcation Board must be urged to realign municipal ward boundaries with administrative area boundaries. The process will require a consultative process because the match cannot always be full congruence	Once local land administration offices are ready to assist with the process
11. In many areas there are tension between traditional institutions and elected structures over governance and administration of land use and land tenure and development in communal areas	Use the SPLUMA rollout process as a basis for the DRDLR and provincial planning counterparts to clarify the roles of traditional and elected leadership as well as the administrative responsibilities of municipalities. Roles and functions must be based on local practices read with the Constitution which promotes democracy and accountability. Draw on the concept of living customary law, to help find appropriate roles for traditional structures and municipalities, where customary law is able to adapt to changing circumstances. There is also an opportunity to draw on IPILRA principles as a mechanism of developing local rules.	With SPLUMA roll-out
Conceptual		
12. Communal land tenure systems are often viewed as a second-class form of tenure compared to the high standards set by the formal property titling system	Recognise that there is a continuum of tenure forms, some providing more secure tenure compared to others. Establish a legislative framework that allows for the movement (conversion or transfer) from one form of tenure to another in any direction under strict conditions to prevent dispossession, land speculation and value capture	Immediately promote the record system within state departments and other stakeholders; in medium term develop legislation that can underpin this record system.
13. There are challenges with dealing with the transmission of land from one generation to another, especially when it comes to land rights for women - e.g. succession law	Explore the full implications of promoting family and household property rights (including family title) for how these rights are held, managed and transmitted inter-generationally	Include this exploration for family property rights within the process of developing legislation for introducing a land record system. In medium term also explore the implications of family title within the conventional land registration system
14. There is a groundswell of opposition to recent attempts to develop communal land tenure legislation, leading to uncertainty of how to deal with land administration in communal areas.	Counterbalance this uncertainty by administrative steps including the development of a land administration framework that is public, neutral and removed from the heart of these contests, yet which satisfies the demands of the existing social tenures.	Immediately promote the record system within state departments and with other stakeholders; in medium term develop legislation that can underpin this record system.

15. There are a multitude of differing local contexts and differing views on possible solutions to how to deal with land administration in communal areas. This often leads to confusion and paralysis on how to proceed in finding solutions to land administration challenges.	Conduct more research on how to develop a policy which accommodates locally appropriate solutions within a wider framework. Normative principles applied properly are a possible way out of this. Undertake pilot projects to test various solutions and learn from this experience. Share these lessons with others so as to continually improve legislation and practice.	Conduct research in short term, and conduct pilot projects in short to medium term.
Location specific		
16. There is a lack of any formal control of land development in areas where there is an influx of new residents such as in communal areas next to growing urban centres.	Differentiate and prioritise the requirements of the land administration system based on the intensity of land tenure and use changes occurring in the area: For example: (1) stable areas which require less rigorous land administration systems • Land tenure – names recorded within administered area or against geo-referenced point • Land use - use broad mixed land use purpose (zone) (2) dynamic areas which require more rigorous land administration systems: • Land tenure – names recorded against plots • Land use – more specific land use purpose recorded against plot (3) Areas which are immediate targets for development should also be prioritised	Incorporate these differentiations in the promotion and development of a locally administered system in the short and medium term.
17. Public and private developers are unable to secure land tenure security on communal land. There is uncertainty as to how to deal with business and enterprise development in communal areas in a way that benefits the local community and business interests.	Consider immediately developing regulations for IPILRA that will provide for a local land-records system, and aligning these with other legislation that impacts on land use, such as NEMA, Mineral and Petroleum Resources Development Act No.28 of 2002 (MPRDA) and SPLUMA. Investigate options for how business developments can be accommodated on communal land, with special attention given to the ownership and decision-making structures and systems; and how income, profits and other benefits from such businesses can be shared and distributed	In the short term as part of the process of developing a land-records system
18. Conflict over who should benefit from the proceeds of mining in communal areas in situations where mineral resources are found	Engagement with Department of Mineral Resources on clear policy development within the framework of current legislation: "South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof" – preamble to *Mineral and Petroleum Resources Development Act No.28 of 2002*	Commence immediately
19. There is uncertainty as to what procedures to use for the recording and administration of	Make use of way-leave agreements as an interim mechanism to record the position of infrastructure investments and to obtain the necessary approvals for such interventions. Way-leave agreements should be	In short term pilot the use of way leaves, and expropriation.

public infrastructure projects; and for community facilities (clinics, schools, police stations, post offices, etc.) in communal areas.	recorded and be publicly available from the land information system. Expropriation of rights in land is permissible in terms of IPILRA and desirable for public infrastructure. This is currently being done in Sterkspruit in the Eastern Cape. Allow Occupation and Use Rights (OUR) certificates, that form part of a locally administered land record system, to be used as evidence of tenure security for such facilities as an alternative to the more complex and expensive requirement of land survey and registration	In medium term after developing legislation for a locally administered land record system, use this system in the context of rural development projects.
20. There is uncertainty as to what the implications of a locally administered land record system would be for who is eligible for housing subsidy approvals.	Review the "Rural Housing: communal land" chapter of the housing code, considering implications for such a programme as a result of the new locally administered land record system. Use OUR certificates as evidence of tenure. The implications of 'family' title in relation to qualifications for housing subsidies will need to be investigated and guidelines developed and tested	Undertake the review in short term, incorporating the findings in the medium term into any review process for the housing code.
21. It may be unlawful for the state to continue building housing without any public land administration system in place to enable accounting for public expenditure	Introduce locally administered land records systems in all new state funded 'rural housing' projects or any housing project undertaken on communal land.	Immediately and on-going
22. Some subsidised rural housing projects are criticised for being built in areas where housing is not a community priority and where there are limited socio-economic opportunities for the people living there.	Ensure that new rural housing subsidised (or any other housing subsidised projects) in communal areas are only approved if such projects form part of the Municipalities SDF, housing sector plans and Integrated Development Plans. Develop guidelines for municipalities that assist them in the production of these plans to determine where rural housing and settlement projects should be located. Introduce proactive land identification and land assembly programmes in communal areas as part of a broader land assembly strategy of Municipalities that is linked to SDF's and IDP's, so as to get ahead of the demand for land and ensure development occurs in appropriate locations. Allow for more incremental settlement approaches on this land, such as Managed Land Settlement that has been motivated by Afesis-Corplan and others.[7]	Immediately and on-going
23. Land claims in communal areas often lead to confusion and uncertainty around development in communal areas	This requires engagement with the Chief Land Claims Commissioner as to case by case approaches and solutions, and so building a set of precedents	On an on-going basis highlight the need to not allow restitution claims to hamper land record processes.

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[7] See http://www.incrementalsettlement.org.za/ accessed 6 November 2015

24. When communal land is privatised, private land owners are able to capture the full value of any land value increase due to rezoning etc with limited benefits accruing to the original communal land owners	Conduct more research into how any increases in the land value could benefit land rights holders and the general public and/or fiscus. There is precedent in existing legislation such as the Cape Provincial Ordinance No.33 of 1934 which is still applicable in the towns in the Transkei	Conduct research in short to medium term and in medium to long term feed the findings into broader planning and land finance legislation.
25. The Ingonyama Trust Board has or is considering issuing residential leases to households living on ITB land, which can be argued is a weaker form of tenure then that found under IPOILRA.	The Ingonyama Trust Board must be engaged and be part of a process of formulating a uniform national framework for land administration. There appears to be a backlash against the Board for extracting and consuming rental incomes.	Starting as soon as possible
26. In many areas where quitrent applies PTO's have been issued over quitrent title. The records of quitrent title have not been kept up to date.	Given the complexity of the problems with quitrent, a set of specific recommendations would need to be formulated with respect to districts/localities where quitrent rights exist in communal land areas. The recommendations would be in addition to, but not necessarily different from, the recommendations in this report. This is an outstanding issue which is largely specific to the Eastern Cape.	Once basic land record systems are established in an area, skills and capacity must be developed to investigate and resolve such conflicts
27. There is a complex array of legislation governing development and resource use in coastal and forestry areas. Enforcement of this legislation is very weak	The only sustainable control method for forestry and coastal areas is if communities are supported to help manage and control these areas themselves. Local environmental management must be encouraged within national frameworks and linked to the extension of SPLUMA	With roll-out of SPLUMA
28. Government sometimes erroneously uses the state land release policy in communal land	Raise awareness within government that communal land is state trust land and is not subject to the procedures as outlined in the state land release policy but subject to *IPILRA* and the *Interim Procedures*	Immediately and on-going

Addressing land administration in communal areas in phased manner

The recommendations outlined in the previous section cannot all be implemented at once but will need to be introduced in a phased manner.

Phase 1: immediate – up to 1 year

Bring stakeholders affected by the challenges in communal areas together to share information on these challenges and open up space for them to agree on a way forward. This conversation should focus on short, medium and long-term national goals for land administration on communal land and should also be translated into provincial goals.

The core challenge that needs to be addressed is to deal with the administrative void by agreeing to the implementation of a locally administered land record system. A political agreement within government is needed to urgently address this core challenge.

Conduct an appraisal of the location and the state of land records in each municipal area. Once the appraisal is available, develop a strategy and a plan to rescue existing land records in various ways, including safe storage and or digitisation of data.

Undertake research on how to augment IPILRA and ways for alignment with other land use legislation. The process of augmenting IPILRA should be two pronged. The first thrust should focus on the main legislation (IPILRA) drawing on United Nations Food and Agricultural Organisations Voluntary Guidelines on Responsible Governance of Tenure[8] which South Africa has endorsed. The second thrust should be geared at developing a set of regulations that use the *Interim Procedures Governing Land Development Decisions* as a basis.

Identify the full spectrum of old order legislation and undertake in-depth research to identify elements of those that need to be repealed and elements of those that need or should be carried forward into new legislation.

Undertake preliminary research and planning for a range of pilots in different provinces. Mechanisms should be put in place for coordination of pilots between different provinces.

National and provincial workshops and conferences should be called involving government, rural communities, traditional leaders, civil society, academics and development practitioners to reflect on and learn from past local and international experiences with locally administered land record systems.

Phase 2: short term – 1 to 2 years

Adopt amendments to and a set of regulations to the IPILRA that introduce a locally administered land record system.

Undertake a series of geographically limited land administration pilot projects that highlight the linkages between IPILRA, SPLUMA, NEMA, Mineral and Petroleum Resources Development Act (MPRDA) in dealing with:
- simpler or standard cases
- difficult or special cases
- stable situations
- fast changing situations

Develop a capacity building and training programme for land administration personnel through partnerships with institutions of higher learning.

Draw lessons from these pilots and share and replicate best practice.

Phase 3: Medium term – 2 to 5 years

Initiate the process of consolidation of lessons from the pilots and step up the rollout the pilots incrementally.

Step up the training of new land administration personnel.

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[8] see http://www.fao.org/nr/tenure/voluntary-guidelines/en/ accessed 28 October 2015

Based on the pilot projects roll-out further phases of the locally administered land record system.

Work on further laws and legislation as required such as, for example, a more comprehensive communal tenure act if this is seen as necessary that can be more tailored towards more social forms of tenure.

Develop adjudicatory capacity from pilots: what evidence are people using to define their rights within and across families. Extrapolate principles from these and develop a set of adjudicatory principles (ideally to inform an Adjudication law) to guide both land rights holders and land administration officers in weighing up rights.

Phase 4: long term – greater than 5 years

Step up implementation to universalise implementation of the locally administered land record system.

Continue to implement the laws and regulations as outlined in IPILRA and SPLUMA, decentralising many of the functions associated with the locally administered land record system to municipalities.

Implement any new social tenure or other acts as developed by new legislation.

Conclusions

In conclusion and summary, what we are proposing is a mind-shift in thinking from key decision makers and informers involved in communal land administration from one where government is expected to exclusively focus on attempts to transfer communal land mainly to traditional leaders but also to a lesser extent to Common Property Institutions and to private individuals, to a mind-set in thinking that recognises that government is able to recognise and accommodate existing forms of social tenure.

This is achieved by introducing a nationally constituted and locally administered land record system to sit alongside and complement the existing land registration system (that involves the Survey General's office and the Deeds Registration system).

Land administration is a cross cutting issue involving land tenure, land transfer and succession, land custodianship, land adjudication, spatial planning, land use management, land taxation and fees, and land enforcement; and as such finding a way forward for land administration in communal areas cannot be left to one department.

The Departments of Rural Development and Land Reform, Human Settlement, Cooperative Governance and Traditional Affairs, Environment, and Treasury amongst others all need to come together and present their respective perspectives and suggestions for how they could contribute to addressing the land administration challenges found in communal areas. A jointly agreed on way forward needs to emerge from this collaborative engagement, including commitment from all parties involved to work together to establish and incrementally role out a locally administered land record system.

The chaotic and unregulated land administration system in communal areas cannot be allowed to continue. The introduction of a nationally constituted and locally administered land-record system (preferably administered at the magisterial district level) will go a long way to satisfying governments constitutional mandate to secure the tenure rights of those living in communal areas. Residents of communal areas will be finally able to call themselves full and free citizens of South Africa.

Annex 2. Extract from Report for AFRA on Land Administration by R. Kingwill, 2015

Excerpt from 'Options for developmental Land Administration Systems in the context of Communal Tenure situations; & implications for Service Delivery'. Unpublished Report prepared for the Association for Rural Advancement (AFRA), 2005 by Rosalie Kingwill.

Conclusions

Land tenure and its administration must be viewed with reference to the overall social, economic and political milieu of society. Addressing tenure reform without reference to the "whole" perpetuates dualism. Borrowing options from other countries is limited as any option must mesh or interconnect with the broader country system. South Africa has a more developed cadastral system than other countries in Africa and hence no African model is transportable in its entirety. There are, however, notable examples of innovation in Africa, where a great deal of energy has been invested in decreasing the state centralism and legal pluralism and conferring more power over property at the local and household level. These innovations all involve the recognition of customary law with regard to property.

In South Africa customary systems were overhauled by colonial authorities with the result that authority systems and allocation procedures in most communal areas have been subject to substantial state intervention either directly or through "tribal authority" intermediaries. However, research has revealed that in South Africa, as in the rest of Africa, certain customary principles of land access and authority have remained resilient to external and internal pressures over the past century. These principles tend to persist, even in urban contexts. In an environment characterised by extreme levels of poverty, land access according to customary-like principles has provided a key livelihood resource. Programmes aimed at privatising this resource has not led to a reduction in poverty.

The report has attempted to address some of the components that should be included in any overall assessment of land tenure options. In particular, the report draws attention to a particularly neglected field of land reform, viz., cadastral reform. The report has attempted to show the central binding element of the cadastre in the South African land management framework. The cadastre is the glue between the centralised spatial and registry system and the decentralised land use management system. Land tenure reform has attempted to move "informal" and off-register rights into this system. This requires extending the cadastre into "informal" settlements. So far the results have not been promising.

The suggestion is that the entire legal and policy environment governing rights needs critical review. As long as "exclusive ownership" is conflated with "tenure security" this property form is likely to remain at the top of the legal hierarchy. It means that tenures other than "exclusive ownership" are unlikely to receive equal legal treatment on a par with this form of property. Evidence suggests that 'informal' rights that have been "moved" into the ownership paradigm have performed badly – there is an increase in tenure insecurity and uncertainty due to the additional rights and authority overlays that are created. Informal transfers continue to be conducted extra-legally which partially negates the entire exercise. Access rights of family members, a feature of customary tenures, are extinguished in the eyes of the law. In practice customary access continues to operate alongside the legal system. Updating of registers is consequently ignored, and legal tenure has to be constantly updated by the state at huge expense. Over time, the formal procedures simply lapse. Research on informal land transfers suggests that the formal system of transferring title is inaccessible and legal conveyancing incomprehensible to many users. (Rutsch 2004)

A related problem is that in rural areas the system requires a highly accurate cadastral infrastructure and boundary delineation which is at odds with most customary systems which are characterised by overlapping and co-existing rights across a range of land uses.

This means that the cadastre cannot play one of its principle roles, namely, provide evidence of ownership. This is serious if considered against the costs of establishment. This does not mean that it does not have administrative value. Its usefulness needs to be investigated with the view to supporting existing practices rather than counter to them. The state "compromise" of registered group properties (e.g. Communal Property Associations) has so far failed to overcome these problems (LEAP, 2003). The role of the cadastre in creating evidence for land titling, however, needs a thorough re-think. A broader approach to an appropriate South African LIM is needed, and an LIM that is not entirely subject to a cadastral layer should be established, as well as a GDI to link different types of information.

5.2 Options

The entire legal framework for land tenure needs to be reviewed. A system that legalises a range of land use rights rather than recognises exclusive private property as the only form of "ownership" would seem to be unavoidable. Van Der Walt suggests a system of 'use rights' outside of a "hierarchy of rights". (van der Walt 1999). In this way it may be possible to incrementally bind two fundamentally different approaches to property drawing from English (Wallace 2004) and African approaches rather than from Roman-Dutch jurisprudence.

An 'intermediate' land administration system catering to diverse tenure situations would need to find alternative ways of recognising evidence to the deeds and cadastral system without ditching the central registry and cadastre. It should not rely on the cadastre as the central or only element or 'glue' between the various land management components, nor provide first evidence of ownership in certain tenure configurations. The cadastre should be a subset rather than the dominant element in a developmental land administration system.

However, the usefulness of a cadastral infrastructure as a basis to extend other infrastructures and services should not be sacrificed. Expansion of an administrative rather than property-based cadastral system should be investigated – viz. based on administrative rather than property boundaries in particular situations, for example, the former homelands.

Visualisation and mapping as a means of recognising property rights within communal situations needs to be given much more attention – research pilots, such as Ekuthuleni, need to inform the understanding of technical experts and professionals. It should be possible to base a land administration system on soft boundaries, rules, predictable procedures and adjudication, rather than the cadastre on its own. However, experience in West Africa using "rural land plan" methods has shown how difficult this approach is, as the exercise contrasts with customary practice of permanent negotiation over time. Land rights holders may have to make certain choices – sacrifice certain intrinsic customary practices by opting for some form of codification or cadastre which will inevitably transform customary practices and solidify or "freeze" them; or stick with customary land management which implies that rights cannot be recorded – only rules and procedures can.

The following options are raised for discussion, all of them based on an approach that minimises the *central* role of the cadastre as a point of departure, but which can accommodate cadastral change. In other words, a system where the present cadastre accommodates off-cadastre land rights and conversely a system of land rights that accommodates the present cadastral infrastructure. With the exception of the "landhold title" concept borrowed from Namibia (see below) all these options recognise customary or neo-customary rights as possessing value in their own right, and hence confer "powers" on the rights holders. I.e. the rights do not require registration in the central registry to achieve legal

recognition. These rights could be recognised as "use rights" with equal value in the eyes of the law as current "freehold" rights.

It should be possible, using an incremental framework to accommodate essentially THREE forms of tenure outside the central registry (existing side by side with the Deeds Registry):

Customary land management – based on predictable *procedures* and a system of *adjudication* to min-imise opportunistic and undemocratic authority systems. The focus will be on rights and authority sys-tems that respect rights, but wherein the *rights themselves cannot be recorded*. Norms to clarify rights can be externalised in a written constitution. Transactions that involve mortgage would not be possi-ble, since no parcels are identified. Individual sales or rental of certain *recognised rights* would be pos-sible subject to the constitution. This option does not involve central registration, not even of the outer boundary. However, the option of registering the larger parcel as a "state registered title" wherein the state merely holds the land but without transaction rights should be possible. The Mozambique exam-ple (see below) most closely fits this option, but the lessons of downward raiding should be taken heed of there.

An intermediate customary system which attempts to codify rules and rights and register these locally – using experience from the PFR methods in West Africa. (see below). However, in opting for this approach, communities must accept that rights get "frozen" and bracketed off at a certain point in time. It will decrease the ongoing negotiability of rights, but an *adjudication system* will be necessary. Mapping as a method of local registration would be the main technical tool. Internal cadastral bound-aries would not be a legal requirement as overlapping rights would remain the norm. These will be recorded as part of a "predictable set of procedures". Since this system is not cadastral-based, individ-uals wishing to mortgage property would not benefit, and alternative credit systems would need to be accessed. The outside boundary of the area would be registered in the name of either a community legal entity similar to a CPA, or as "state registered title" as above. Inside rights could have legal recog-nition in the form of recorded "starter titles" registered in a local register parallel to the central registry – these rights will not be spatially specific other than identification in the larger block.

An intermediate cadastral-based system drawing from the proposed Namibian urban land tenure sys-tem. This option moves closest to the cadastre and would be most suitable in urban areas or very dense rural settlements which are peri-urban in nature. This approach borrows from the Namibian "two-option" approach of a starter title and a landhold title (see below). The former is not spatially identified, but the latter is. Both titles are recorded in a registry that is *parallel* to the main registry. Both are capable of moving along the cadastre and into the central registry. Both are capable of trans-acting – the starter title limited to sales, inheritance and donation (but not mortgage), and the landhold title capable of most but not all land transactions common to "freehold" title.

All of these models suggest the need for:

(a) An expanded *Land Information System* that includes non-cadastre land should be a major focus of land reform. The development of a Geo-spatial Data Infrastructure to link different types of land data-bases would be a priority.

(b) A land *adjudication system* that can support the customary and informal systems. Customary sys-tems in particular are noted for flexibility and negotiability. (Cousins, 2002). Adjudication is currently seen in terms of adjudicating for the purpose of registration, not adjudication to support the existing social tenure systems. Urgent redress in this respect is required, including the development of a legal framework, predictable procedures and accreditation of adjudicators.

5.3 Four international examples: Namibia (urban); West Africa; Mozambique; Mexico

"[A] real shift in the balance of interests and powers in property matters – from centre to periphery, and from state to people – is under way [in Africa], albeit a shift which is hesitant, uneven and still incomplete. Moreover, a number of opposing forces threaten to concentrate certain key powers at the centre." (Wily 2000)

5.2.1 Namibia

Namibia opted for a parallel interchangeable property registration system for urban areas, wherein the initial secure right is simple and affordable but may be upgraded according to what the residents and government need and can afford at any given time. The new legal framework is called the Flexible Land Tenure System and the new law the Flexible Urban Land Tenure Bill of 2004 [now the Flexible Land Tenure Act, 2012, it thus took a decade to come into being]. The system is expected to operate *parallel* to the existing registration system. *Starter title* and *landhold title* are two new basic forms of tenure.

Starter title is an inexpensive and simple form of land registration which provides a degree of security of tenure to existing urban dwellers in the context of an upgrading project or to new occupants of a "green fields" development. It is also intended as a tool for land management at the local government level. It is a recordal system which will supply a record of families and individuals occupying land in a defined area and will underpin a system of "fair taxation". It is also to establish a rational basis for planning the layout of the area, installing engineering services and further upgrading of tenure over time. Starter title is an *individual* type of tenure in that one person, as a custodian for a family or a household, is allocated a right to an *unspecified site*. It is, however, *group based* in that each household within a 'blockerf' must abide by the rules of a community association. The blockerf may be held in ownership by a local, central or regional government body, or a private sector developer or a community organisation. Registration provides the right to occupy in perpetuity a site within the boundary of the blockerf (or another) – it does not specify a delineated parcel, but could do so with further upgrading. It is capable of being sold, donated and inherited, subject to restrictions that may be imposed by a constitution drawn up by the group or other rights recognised by the group. It would however, be impossible to be encumbered by mortgage, lease, or servitudes since the site has not yet been defined.

Landhold title is a statutory form of tenure without the full range of transactions associated with freehold ownership. Landhold title, like starter title, would be registered in a computer-based registry, which would exist *parallel* to the central deeds registry. The underlying parcel of land would remain registered in the Deeds registry, but endorsed to the effect that it is subject to the registration of landhold title recorded in the landhold title register. Transactions would be processed by the land registration officer or a conveyancer in accordance with standardised computer-based forms. Landhold title should be capable of being sold, donated and inherited; and mortgaged. By limiting the range of transactions, the land registration officer can be trained to recognise and record transactions without extensive legal training. The cadastral map, which is an integrated part of the cadastral information system showing landhold title sites, should be capable of amendment for subdivisions and consolidations. The land measurer would be legally permitted to undertake the adjudication, land survey and mapping of the plots.

Local land rights offices ("property shops") would house the registers, staffed with a land rights registrar linked to a land registration officer and land measurers (para-professionals). The latter would work with professionals such as planners and engineers in upgrading projects and link the project to the city-wide land management system (Christensen 2004).

5.2.2 West Africa – the "rural land plan tool" or *Plan Foncier Rural* (PFR).

PFR methods have been conducted in Côte d'Ivoire (1990), Guinea and Benin (1993-1994), and Burkina Faso (1999). In PFRs the accent is on *rights* and *procedures* - topographical mapping is used to identify rights which are then transcribed and registered by the PFR. Registration is regarded as preliminary registration of rights and land assets, which do not include automatic legal ratification of the rights registered. The specificity of the PFR tool lies in the fact that it is intended to capture and "externalise" the *procedures* used to ratify such rights. This means that once these rights have been recorded and registered, the PFR aims to replace local procedures for endorsing them with another, legal procedure. The main aim is to contribute to securing customary land rights, thereby helping to manage and reduce conflict over land tenure and promote rural development. At the very least, this would entail: 1)identifying all locally recognised rights, using surveys with local people to investigate their respective claims to land; 2) topographic mapping to demarcate the plots thus identified (which areas might be used for particular purposes, such as grazing lands for herds); 3) recording by an official agency; 4) putting in place local structures (village land commissions) responsible for keeping documentation on land tenure and ensuring that it is put into practice. PFRs were launched as pilot projects, but the fact that they have been implemented indifferent institutional contexts "has led them to evolve in unexpected ways". Implementation has varied from country to country, not only in how it is expected to contribute to the legal ratification of customary rights, but also in how it has been implemented and the range of objectives being sought. (Chauveau 2002)

Evaluation of PFRs suggests that the method has been valuable in some respects, but has severe limitations in others. However, this "evolutionary" nature of the PFR method is not regarded as negative, as the process has reportedly been useful in showing what it *can* achieve as what it *cannot*. It has produced valuable qualitative information on customary tenure. However, it should be seen as only ONE of a number of *tools* in clarifying land rights. Initially it was thought that PFR could in itself constitute a coherent procedure, which could be put forward as an alternative both to the centralised model of securing land rights through top-down legislation. PFRs provide insight into the complexity of attempts to "pin down" customary rights at one point in time when in reality they are subject to permanent negotiation over time relying on "a balance of power", i.e. customary practice is by nature "procedural". PFRs on the other hand attempt to "externalise" the rules and hence codify them – thereby confronting the essence of customary practices. This contradiction is not easily resolved. There is an acknowledgement, however, that the process of defining and recording rights partially transforms them – and a weakness (or inescapable reality?) of PFRs has been their inability to be 'neutral' tool in this process.

The major achievements of PFR are conceptual and technical. Conceptually, because the point of departure is "starting from existing and locally acknowledged rights" (Lavigne Delville 2004) which contrasts with legal approaches that only rights recorded in titles are regarded as "real rights". Secondly, the principle of recording rights is based on local *identification of rights and not plots and their outlines*. Hence PFRs can accommodate overlapping rights to the same land. Technically, PFRs have shown it is possible to use topographical mapping to record locations and surface areas on a large scale at reasonable costs. This was by no means certain when the pilot projects started, when the principle of exhaustive land mapping on a regional or national scale was inconceivable with the techniques usually used (cadastral surveys and centralised registration). (Chauveau 2002).

5.2.3 Mozambique

Mozambique has followed the route of recognising customary tenure without codification. Land-use rights can be acquired through customary occupation, "good faith" occupation (unquestioned use of an area for ten years or more), or a formal request to the State for *new rights* to be allocated. Existing rights acquired through the customary channel are fully recognized by the new law and enjoy its full

protection, *without the need to formally identify them or register them. The right involved in each of these three cases is the same* (having paper documentation for a right acquired through a request to the State does not outweigh a right acquired through customary occupation, even if in the latter case there is no documentation available). Proof of customary occupation can be verbal testimony or other forms of evidence of long-term occupation agreed to by the parties concerned. A new legal and juridical entity - the "local community" - was created by the Land Law as a customary landholding and land management unit within which customary land law is applied without need for registration by State cadastral services. The validity of customary land management practices and laws is recognized within "local communities", provided that these do not contradict basic Constitutional principles (important in the case of safeguarding the rights of women, for example). Through the concept of "local community" it is possible to avoid the need to classify and codify the many different types of customary land law and practices, and leave it up to each community to manage its affairs in line with its own norms and practices.

In recognition of the validity and relevance of customary land management institutions and their great (and low-cost) usefulness to the State, local communities are given a strong role in the management of land and other resources, including being consulted and participating in the allocation of land to new investors from outside the community. (The basic approach was to promote an integrated development strategy bringing local communities and private investors together). The concept of co-titling was introduced into the Land Law as an economical and quick way of registering the community's lands, i.e. registration of land that belongs to the community, and not to individuals within that community. It confirms the existing rights of the community to their lands with the same degree of security as a land title has for a private concession. A community land certificate is the outcome of the registration process, and has the same legal value for confirming land rights as a land title. The identification of local community lands is supposed to be based on rural household *strategies*, not on current plot cultivation which is regarded as too "static".

Problems have emerged with this approach. There has reportedly been a "conservative backlash" – poor institutional capacity has allowed renewed exploitation of the resources of customary land by elites who view smallholders as simply subsistence farmers. It would seem that considerable state institutional capacity is needed to follow the Mozambique example, and there are arguments that it allows for state centralisation. (Tanner, C. 2002)

5.2.4 Mexico

According to Barnes (2005) the experience of Mexico "provides a window into other Latin American countries as the post-revolution agrarian reforms in Mexico were used as a "template" in a number of other countries in the region". The case of Mexico is interesting from a South African point of view in that after Spanish colonial and immediate post-colonial (1820-1910) attempts to transform indigenous communal land into private estates for the elite, tenure shifted back to communal tenure after the revolution of 1910-1920; though since 1992 there has been renewed focus on the private market as part of a "modernisation drive". Barnes provides statistics showing that over half of the land in this large country[9] is held under communal tenure (105 million hectares). There are two types of communal tenure: *ejido* and "*bienes communales*" (BCs). *Ejidos* are social properties that in territorial terms coincide with the "haciendas" of the earlier regimes, while BCs have more indigenous characteristics. The Mexican case is also interesting because of the emergence of an active informal land market prior to the1992neoliberal reforms, since communal land holders (*ejidatarios*) were not legally permitted to sell land on the open market before that. Also, rental markets have been intimately associated with "de facto *ejidal* tenure" (ibid). Barnes quotes research that estimates as much as 50% of good agricultural land in *ejidos* was being worked under some form of rental arrangement by the early 1990s.

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[9] Mexico is about 1/5th the size of the entire US.

In sum, during the colonial period and first century of independence (1820-1910), community land was systematically lost to private estates. The national policies of nineteenth century were aimed at promoting private property. During the post-revolution era of the twentieth century there was a reversion to communal tenure as haciendas were expropriated for land reform, especially in 1940s. In 1992 there was a swing back to legalising land sales. A change to Article 27 of the 1992 constitution and the 1992 Agrarian Law (*Ley Agraria*) removed many of the restrictions that characterized *ejidal* tenure. Currently *ejidos* can legally move into a private property regime (*dominio pleno*) provided two thirds of the *ejidatarios* vote in favour of the conversion. It also allows for *ejidos* to enter into joint ventures with outsiders; individual agricultural and residential lots can be sold to other members; and leasing is allowed to outsiders. The 1992 reforms shifted the focus from land redistribution to land "regularisation". In 1993 a nationwide titling program, PROCEDE,[10] was launched to register *ejidos* (which are now regarded as legal entities) and to issue certificates of *ejidal* rights to individual *ejidatarios.* By 2000, more than 3 m. households had been issued with certificates.

The registration process is based on mapping the outside boundaries of *ejidos* and identifying rights holders. Once an *ejido* map has been drawn up with its boundaries, individual plots and land use areas are identified. This map must be ratified by the Assembly (the ultimate authority of *ejidos*/BCs) where final decisions concerning land rights and land use are taken. A quorum of two-thirds is required for the first assembly and 50% plus one for the next. If the *ejido* map and the list of "agrarian subjects" with rights are approved, the documents are presented for formal registration in the National Agrarian Registry (RAN). If any subjects disagree, they are informed of the four formal mechanisms available to solve conflicts: the Assembly, which is internal and direct, and external mechanisms, which are conciliation, arbitration and agrarian tribunals. (Appendini, 2001). Individual *ejidos* or BCs can create their own internal rules with respect to land and resource rights which are generally formalised in "*reglamento interno*" once these have been ratified by the Assembly. These rules must conform to the rules laid down in the Agrarian Law. (Barnes, 2005).

The significance for South Africa is that firstly, there are similarities between *ejido* registration and the Communal Land Rights Act. Secondly, there is evidence of a robust informal land market (especially in areas with creeping urbanisation) *which by-passes the formal legal and registration processes for transfers* even though these are now legally available. Thirdly, "[d]espite the predictions of those who follow the evolutionary theory of land rights, which posits that as pressure on the land increases it will be increasingly be converted from communal into individual private property, we believe that the number of formal communal properties is increasing throughout Latin America, [partly due to the increased efforts to formally title communal land] (Barnes, 2005). In other words, in spite of the post-1992 liberalisation era, which allows for individualisation and privatisation of tenure, communal tenure continues to flourish, as do informal or off-register land transactions. As such Mexico provides an important precedent to keep track of, particularly whether the liberal reforms "will shift things towards private individual tenure or consolidate existing communal arrangements" (Barnes, 2005).

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Annex 3: Extracts from Report for Eastern Cape Planning Commission on Land Administration, 2013, by M. Kenyon, R. Kingwill & M. Coleman

Excerpt from 'Diagnostic Study on Land Administration in the Eastern Cape'. Unpublished report for the Eastern Cape Planning Commission by Mike Kenyon, Rosalie Kingwill and Mike Coleman, 2013.

Executive summary

Land administration is a wide and essential aspect of public administration. It ranges from the determination and control of various land uses, to the establishment of settlements, the management and recording of rights to land across a spectrum of tenures, and the transfers of such rights.

At the most formalised level, land administration embraces the technical surveying of land, the approval of such surveys by the Surveyor-General (SG), together comprising the core of the cadastral system, and the registration of Deeds of Transfer involving such surveyed land with the Registrar of Deeds. This system functions effectively but does not include a range of land rights and tenure forms.

No less important, but less technically rigorous, is the demarcation of land parcels and recording of rights to land for a large proportion of the of citizens who reside in the rural areas of the bantustans and who make up the largest sector of the Eastern Cape population. This parallel system of land rights derives directly from the violent and catastrophic process of colonial conquest and administration from the nineteenth century. These rights include forms of tenure, especially the rights to the use of identified parcels of land for residential and arable purposes, known as quitrent and Permission to Occupy (PTO). These "rights" also include informal or unofficial rights such as customary or traditional tenure and outright illegal allocations of land by local headman, civic officials etc.

In the past the system of quitrent and PTOs captured most of the "other tenures" which were not recorded on the cadastral or Deeds Registry systems. This system at least provided some evidence of land rights and some security of tenure. Since 1994 these tenures have been discarded on political grounds but have not been substituted by replacement tenure and administration. In effect this aspect of land administration has been allowed to collapse by the commission and omission of the national state.

This neglect and the collapse of rural land administration in the bantustan areas impacts directly on the security of tenure and on the livelihoods of over *half a million rural households* in the Province.

Such neglect and collapse despite the Constitutional imperative of providing secure tenure would not be tolerated with regard to the cadastral system and Deeds Registries.

These records are the only official records of a large proportion of existing tenure rights. The state may be in dereliction of duty if it fails to take steps to preserve them. These records of existing rights must be the starting point of any land tenure reform legislation and programme as required by the Constitution.

The PTO system as inherited from the colonial and apartheid eras has a number of problems and defects that would need to be modified. Most particularly, attention would need to be paid to adjudication between family claimants, women's access and the rights of heritability. This would involve stronger rights and modifications to succession and inheritance laws that were previously denied, discriminatory or left to administrative discretion. There is evidence that despite these past weaknesses, the system can be modified into a rights regime consistent with the Constitution.

The need for an integrated system

The critical challenge in land administration is to develop an integrated system that accommodates a variety of rights to land and fosters economic development for all citizens. The processes and systems administered by the SG and Registrars of Deeds could be modified to meet this challenge.

South Africa is fortunate to have escaped the pressure from international institutions such as the World Bank in the 1960s and 1970s which insisted on land titling programmes as a precondition for financial assistance. These programmes were expensive and involved the establishment of private property relations or ownership in land in areas where such concepts had previously been unknown under traditional forms of land use and land tenure.

On the basis of empirical evidence the World Bank has since revised its approach. Extensive research in Africa revealed that land titling programmes have not had the desired effect on land use and have failed to stimulate higher productivity, investment and economic development. There is evidence that titling programmes have worsened the position of the poorer strata of these societies, many of whom have lost what land rights they previously held to land speculators and powerful interests.

In the Eastern Cape a variety of types of land tenure sometimes exist side by side in the same village and range from full ownership to quitrent and PTOs. Yet there is very little by way of land use and productivity to distinguish them, and the distinctions are not visible. There is no apparent correlation between specific forms of tenure, including ownership, and increased productivity or exchange of this land.

Administrative breakdown

Most of the discussion in this report points to institutional disconnections and incompatibilities of land administration in the former bantustans at spatial, legal, jurisdictional and administrative levels. The examples and situations outlined in Sections 3.1 and 3.2 of this report indicate that the disjuncture has reached critical proportions across the Province and especially in the Administrative Areas, also widely referred to as communal areas, which make up the rural areas of the former bantustans.

The problem and the solutions lie squarely within the domain of the various spheres and structures that make up the three spheres of governance. Most of the difficulties appear to originate within the national sphere which does not function to support local development within the Province. The effect of these problems is to frustrate rural and economic development as well as to deny constitutional rights and entitlements.

The vacuum in a statutory framework for recognising land rights in the rural areas is made worse by the fact that different areas of governance are competing for authority over land – traditional councils versus municipalities, municipalities versus province, traditional councils versus the deeds registry system, province versus national, etc.

Opportunities

But an administrative and institutional void does not mean nothing is happening – in rural, peri-urban and urban areas people have some or other tenure, formal or informal, over their land, but increasingly without legal recognition. Looking carefully at these practices points the way to new designs – there are "emerging tenures" in the rural areas, containing aspects of indigenous law as well as of subsequent systems including PTOs.

There is a growing body of expertise in South Africa in land administration and land tenure, with connections to international networks such as UN-Habitat and international NGOs. A number of innovative approaches to the development of appropriate frameworks or reforms to land tenure and administration have resulted from trials in various post-colonial contexts and countries.

In the absence of land administration by the state some traditional leaders have assumed aspects of this function and claimed land administration and even ownership of rural land in the Administrative Areas and beyond. However this is an intervention that arises from the collapse and withdrawal of the state from rural land administration rather than a reflection of traditional leaders having performed these functions.

The argument in this study is that the public administration must return to provide effective land administration. There is no reason to create a fourth or fifth sphere of government under traditional leaders which has not existed before.

Recommendations

In the **short term** it is recommended that to halt the collapse of rural land administration in the Administrative Areas in all affected provinces:

PTO Proclamations to be administered until replaced. Either: Existing Proclamations for the effective administration of the PTO system in the AAs in the must be properly delegated by the national Minister to a combination of officials located within the Provinces in national and provincial departments. However elements of these Proclamations may be contrary to provisions of the Constitution. However there are a range of difficulties, legal and practical, against this option, including the repeal of the enabling legislation for R188/1969

Or [preferred option]: The existing Proclamations that remain are annulled and the essential elements of these Proclamations are formulated as Regulations in terms of the *Interim Protection of Informal Land Rights Act (IPILRA) No.31 of 1996* and properly delegated by the national Minister to a combination of officials located within the Provinces in national and provincial departments. This will allow for the contents of the proclamations to be brought in line with the provisions of the Constitution, for example by eliminating gender and other discrimination in the original proclamations.
A Land Administration Unit must be established, preferably within the Provincial Department responsible for the sphere of Local Government, to administer the delegations to Province. This unit must seek to capture serving public servants from departments within the provinces who historically performed and are familiar with land administration function in the AAs, and locate them at magisterial district level (where some of them may still remain) with appropriate delegations and instructions. These officials at magisterial district level must work closely with traditional leaders, ward councillors and officials charged with various planning and land management functions including the PTO legislation until repealed and replaced. Review and consolidate all existing assignments and delegations on land tenure, planning and land administration from DRDLR to provinces. Pilot innovation with regard to the recording and documenting of existing land rights on the ground in selected districts. UN-Habitat and associated networks are engaged in ongoing and related work. Open-source software is available for this purpose.

In the medium term:
- In the context of SPLUMA, formulate and/or align Provincial Land Administration Policies which integrate and supplement national policies.
- As required to implement such policies, formulate, consolidate, enact, amend and align as required Provincial planning legislation which includes a rural land use planning framework that is compat-

ible with and supplements SPLUMA, which repeals former provincial ordinances and other provincial legislation, and fills any rural planning void such as that which still exists in the Transkei despite the promulgation of SPLUMA.

- Locate Land Administration functions at Local Municipality level (records, transfers, land-use), initially performed by the provincial department responsible for local government, increasingly transferred to Local Municipalities supported by provincial department responsible for local government, and within national framework legislation.
- Ensure that local systems are not incompatible with the formal system (SG, Deeds, District and Local Municipality spatial and land use plans, etc) with local land records, including local public access. Note that this is very different from proposing that all systems must ultimately lead to full survey and registered title.
- National rural land tenure reform act (Constitutional requirement) which provides incremental tenure security and a variety of tenure options in urban, peri-urban and informal settlements as well as on trust land and which protects the land rights of holders, especially of vulnerable land rights holders and communities, and of rights to high potential land in particular. Avoid blanket land titling programmes in favour of an incremental approach and a range of secure land tenure options.
- Spatial planning and land use management at national level to be moved to the Department of Co-operative Governance and Traditional Affairs
- Re-demarcation of local municipal boundaries and wards to align with AA boundaries to the maximum extent possible, and also to follow magisterial district boundaries to the extent practical, in order to give effect to various legislation including section 5(1) of the Traditional Leadership and Governance Framework Act (TLGFA) to encourage cooperation at local village and AA levels between municipal, traditional and civic structures.

All suggested reforms should follow an overall trajectory that leads towards the following *goals*, i.e. in the longer term:
- Providing security of tenure for all citizens as per the imperative in the Constitution and to uphold the values of the Constitution.
- Building an efficient and equitable local land administration system to record land rights, facilitate transfers and manage land-use, which builds on existing and recent practices or emerging tenures where these meet the requirements of the Constitution.
- Building a unitary system of land tenure rights and land administration that provides a continuum of rights and practices.
- Protecting the land rights of holders, especially of vulnerable land rights holders and communities, and of rights to high potential land in particular.
- Establishing a system of secure tenure in AAs that facilitates the inflow of private capital investment with clear and demonstrable benefits to local land rights holders. This could include the long-existing form of registered leasehold.
- Developing appropriate public institutions at local municipality level for land administration (or even at lower levels such as at town or magisterial district level where local municipalities include more than one town or the seats of more than one magistracy and where local citizens are accustomed to finding these services).
- The establishment or harmonising of existing mechanisms for resolving land disputes locally (and therefore cheaply) in the first instance.
- Avoiding the pitfalls of systematic and across-the-board titling programmes which have not produced increased productivity where they have been applied elsewhere in the developing world including in sub-Saharan Africa.
- Incremental tenure security and a variety of tenure options in urban, peri-urban and informal settlements as well as on trust land.

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