

# Country Assessment: Towards a National Engagement Strategy (NES) for South Africa

April 2018

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## ACKNOWLEDGEMENTS

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## CONTEXT AND AIM

This Country Assessment aims to summarise the current state of the realisation of people centred land governance in South Africa, and has used the 10 people centred land governance commitments for action of the International Land Coalition (ILC) as a framework to conduct this assessment against. The 10 Commitments are as follows:

1. Secure tenure rights
2. Strong small-scale farming systems
3. Diverse tenure systems
4. Equal land rights for women
5. Secure territorial rights for indigenous peoples
6. Locally managed ecosystems
7. Inclusive decision-making
8. Transparent and accountable information
9. Effective actions against land grabbing
10. Protected land rights defenders

The purpose of the Country Assessment is to inform the development of a multi-year Country Strategy for South Africa, and contributing to the national baseline measuring trends, and combines both quantitative and qualitative information.

## 0. SUMMARY AND GENERAL CONTEXT

### 0.1 Summary

South Africa's Constitution strongly commits national institutions to the aims of the International Land Coalition (ILC) Commitments 1, the first part of 2, 4 and 10, viz. respect, protect and strengthen the land rights of women and men; gender equity; equitable access to and distribution of land; and the rights of human rights defenders. Section 25 of the Constitution known as the 'Property Clause' extends and protects land and property rights, and allows for expropriation of land. Sections 25(5), (6), (7) and (9) guarantee (a) equitable access to land through redistribution; and (b) restitution to those whose rights were historically dispossessed as a result of racial discrimination.

Implementation has not been equal to intention. There is widespread dissatisfaction that these rights are not being adequately promoted, enforced and protected, and land redistribution has not been effectively implemented. Section 25 requires the balancing of one right against another, and requires protection of existing property rights, which can result in ambiguity, as some rights are stronger in law than others since the legal system reflects a hierarchy of rights inherited from the previous order. This ambiguity can be politically exploited to either block land redistribution or to advance ideas in favour of radical seizures, neither of which advances equity or justice. There is clear evidence that the existing tools available for land reform have not been used to maximum efficiency or effectiveness, with the result that the land reform programme has been highly flawed, slow and ineffectual.

A particular defect has been poor restructuring and support of rural land distribution to smallholder land uses, thus weak application of Commitment 2, support for small holders. White-owned land (which is the only realistic category of land available for redistribution) has been geared towards concentration of ownership and large-scale, highly capitalised agriculture and agri-processing and these land complexes are still in place, thus weak application of Commitment 3, recognition of diverse production systems. Urban land allocation has been poor and not met the rising rate of urbanisation.

Commitments 6, 7 and 8, dealing with participatory, inclusive, transparent and accountable systems for decision making and local resource management are strong on paper, in law and policies, but extremely weak in implementation and enforcement. The Constitution (s.33) guarantees administrative justice, which has been particularly poorly addressed in practice.

Commitment 5 imparts a special meaning to 'indigenous peoples' associated with 'inherent rights', but in South Africa the meaning of 'indigenous' is not associated with officially defined ethnic categories or minorities. The concept of indigenous is sometimes used to justify rights under customary law, which is not restricted to particular ethnic groups. The existing constitutional commitment to redistribution and redress applies to all people who suffered past discrimination, who in South Africa are black, but with variable ethnic identities and historical claims.

Protection of rights against land grabbing (Commitment 9) is under examination in South Africa, particularly in the context of mineral and resource-rich parts of the former African reserves, where for example, corporate interests collude with traditional authority interests in mining deals, and effectively deprive rights holders of their share of the benefits; if not by outright land displacement, but through lack of adequate state and corporate accountability.

Some redistributive challenges are:

- Disaggregating and redistributing large commercial land complexes, formerly under white ownership, to smallholders;
- Under-capitalised claimants or beneficiaries of redistributed or restituted land are expected to farm commercially and productively without capital and support;
- The skewed socio-spatial structure on commercial farmland — which is still mainly owned by whites – with large numbers of vulnerable black farm workers and their families;
- Under-capitalised, densely populated black reserves (formerly doubling as labour reserves) with communal tenure which is poorly conceptualised in law. They comprise unsurveyed land with residential rights, limited arable rights and access to common property resources. Although referred to as ‘communal tenure’, there is no collective production beyond the family complex
- Most occupiers on commercial farmland and communal land do not have certification, although they do have protected legal rights against arbitrary eviction, and on communal land, against arbitrary dispossession. There is a growing call for a ‘land records system’ to register off-register rights held by the majority of the population. Redistribution and restitution must take into account the rights of existing occupiers and rights holders, thus rights and claims must be balanced.

The defects in the implementation of land reform have resulted in high degrees of social dissatisfaction and political disaffection, with increasingly radical calls for ‘expropriation without compensation’. Critics point out that existing instruments could be used more effectively and rigorously to achieve more radical redistribution, e.g. section 25 of the Constitution contains highly transformational provisions, which have not been tested to their limits. Redistribution is a complex process, since existing occupational rights of farm dwellers on commercial or communal land are also legally protected and need to be extended. Critics propose more public investment in small-scale and diverse production systems and land uses; more commitment to strengthening tenure rights of farm workers; more commitment to gender equity and guarding against rent-seeking on redistributed land, which usually favours men with access to power. Alternatives should be found to male dominated authority structures that persist in families, neighbourhoods, wards and administrative regions, which gain control of ownership and/or access and use of communal land as well as redistributed land. Traditional authorities contradict the notion of elected leadership and democratic institutions.

## **0.2 General Context**

### **Political:**

The transition to democracy in 1994 gave rise to a republican constitutional-democratic political structure with a unitary state wherein governance is divided between three tiers of government — national, provincial and municipal. Each has constitutionally designated powers and responsibilities defined in relation to each other. The Constitution is the supreme law of the land. All laws and their execution must be consistent with the Constitution, accountability to which is ensured through appeal to the Constitutional Court. The Constitution has a Bill of Rights that guarantees fundamental rights and freedoms. Government is divided into a legislature (Parliament), executive (Cabinet) and judiciary (the Courts, with the Constitutional Court at the pinnacle). Parliament is bicameral, made up of the National Assembly and the National Council of Provinces (NCOP). The National Assembly is made up of Members of Parliament (MP's) who are elected in general elections, and oversee the Cabinet, i.e. the executive. The Judiciary is independent, comprising the court system made up of different levels of courts. Cases can be appealed upwards, and the Constitutional Court is the highest court. The judiciary has achieved widespread acclaim for its independence in the face of increasing erosion of political accountability. There has been widespread corruption by state officials, including the former President, working in collusion with corporate interests, known as ‘state capture’. Focus on

self-enrichment has resulted in evasion of constitutional duties to reform society towards social and economic equality.

### **Political stability and democracy**

A relatively peaceful transition to majority rule was achieved in 1994 with the ruling party, the African National Congress (ANC) retaining its majority over successive elections, albeit with ever-decreasing margins. The Constitution has proved to be the fulcrum around which political stability and aspirations to a more egalitarian society hinge. The political system of democracy enjoys strong support, with the judiciary playing a critical role in holding the legislature and executive to account. Political and social rights and freedoms are largely aspired to, if not fully adhered to. The biggest threats to political stability are failure to redistribute land and strengthen tenure (rural and urban) and deepening poverty. These have been ameliorated by improved access to basic services, treatment for HIV/AIDS, and social security transfers in the form of pensions, disability grants and child support grants.

Continuities with the past continue to impede social transformation. There is a relatively large proportion of whites compared to other African countries, who continue to control many of the country's economic resources. White minority rule only ended in 1994. For nearly half a century prior to 1994 the apartheid system aimed at complete segregation of races, with Africans forced into small 'reserve' areas or 'bantustans' and serving the primary economy as wage labourers. This has been a difficult legacy to overcome, with dense populations still living in these reserves. Deepening this problem is that 'tribal' or 'traditional authorities', which were constructed by colonial rulers to facilitate indirect rule, have been retained and refashioned by the post-apartheid state as 'Traditional Councils', prompting much contestation. They are established not through election but hereditary succession to title and exist only in the former reserves or 'bantustans'. They are also associated with the traditional courts system. Gender activists and democrats oppose the systems of traditional courts and traditional authorities, particularly their powers over land access and allocation and local justice.

**Social:** Poverty and socio-economic inequality have deepened during the past twenty years, and land distribution remains skewed in favour of whites. Unemployment is a social scourge, estimated currently at 27.7 % for the third quarter of 2017 (Statistics South Africa). Among the ruling party's achievements have been the abolition of the death sentence, legalisation of same-sex marriages and freedom of movement, gathering, speech and the press, though the latter comes under strain at times. Evidence of social strain can be seen in sporadic outbursts of xenophobic violence against non-South African Africans and protests against poor implementation of improved infrastructure and services in the poverty-stricken black townships; as well as ongoing protests in tertiary institutions against high fees and lack of transformation of curricular as well as racial profile of University staff, with the main focus being on the limited access to higher education by the majority on account of ongoing poverty.

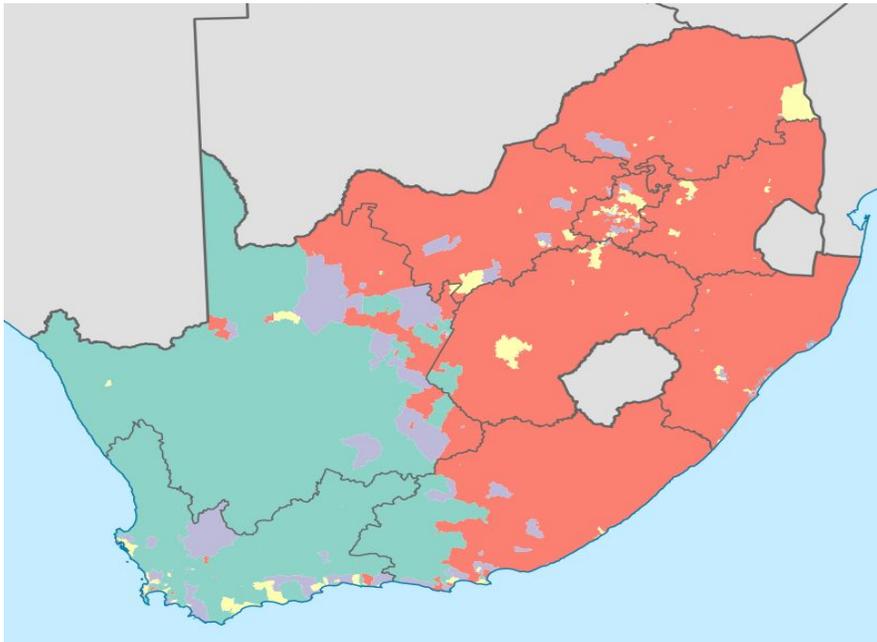
### **Population, ethnic and class make-up**

South Africans are a multi-ethnic population reflected in multiple linguistic categories. There are eleven official languages: English, Afrikaans, Ndebele, Northern Sotho, Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa and Zulu. According to Statistics South Africa, 2011 Census:

- 80.2% of the population is made up of the majority black Africans. They speak 9 Bantu languages (as above) categorised into two language groups, Nguni and Sotho. Prior to colonisation they were mainly pastoralists, also producing and trading in metals and other goods.

- 8.8% of the population is made up of people of mixed descent make up. They were categorised by the apartheid government as 'coloured' (a term still used colloquially). In reality they comprise a wide variety of ethnic backgrounds including Black, White, Khoisan<sup>1</sup>, Griqua, Chinese and Malay.
- 8.4% of the population (down from 22% in 1911) are white people of European descent, who speak mainly English and Afrikaans.
- 2.5% of the population are of Indian/Asian descent making up.

**Figure 1: Map showing the dominant population groups in South Africa at electoral ward level**



- Black African
- Coloured
- Indian or Asian
- White
- No group dominant

A population group is considered dominant if it makes up more than 50% of the population in a ward, or if it makes up more than 33% and no other group makes up more than 25%.

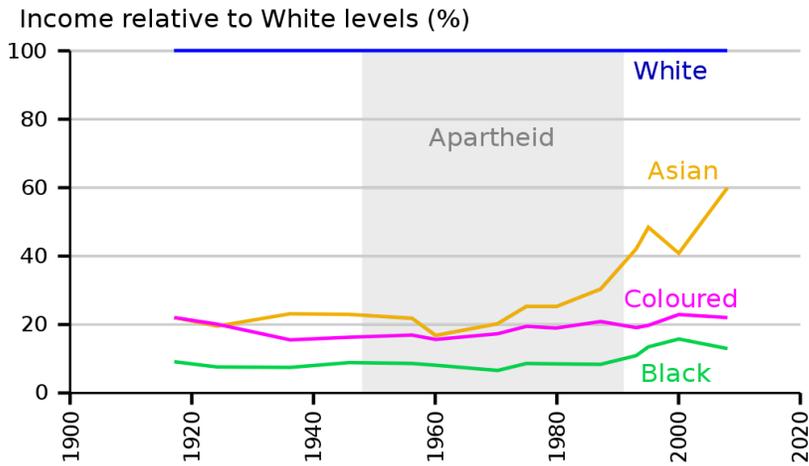
**Source:** Census 2011 [https://en.wikipedia.org/wiki/Demographics\\_of\\_South\\_Africa#Ethnic\\_groups](https://en.wikipedia.org/wiki/Demographics_of_South_Africa#Ethnic_groups)

Poverty %

<sup>1</sup> A unifying name for two broad groups of people who belong to a common ethno-linguistic category that is distinct from the Bantu-speaking Africans. They lived all around southern Africa. The San were hunter-gatherers and the KhoiKhoi were pastoralists. Some claim 'indigenous' or 'first nation' status. They are categorised as 'coloured' and mostly speak Afrikaans.

More than half of the total population is living in poverty, according to data from Statistics South Africa. The Poverty Trends Report 2006-2015 indicates 30.4 million people (55.5% of the population) is living in poverty. This is up from the 53.2% or 27.3 million people reported in 2011.

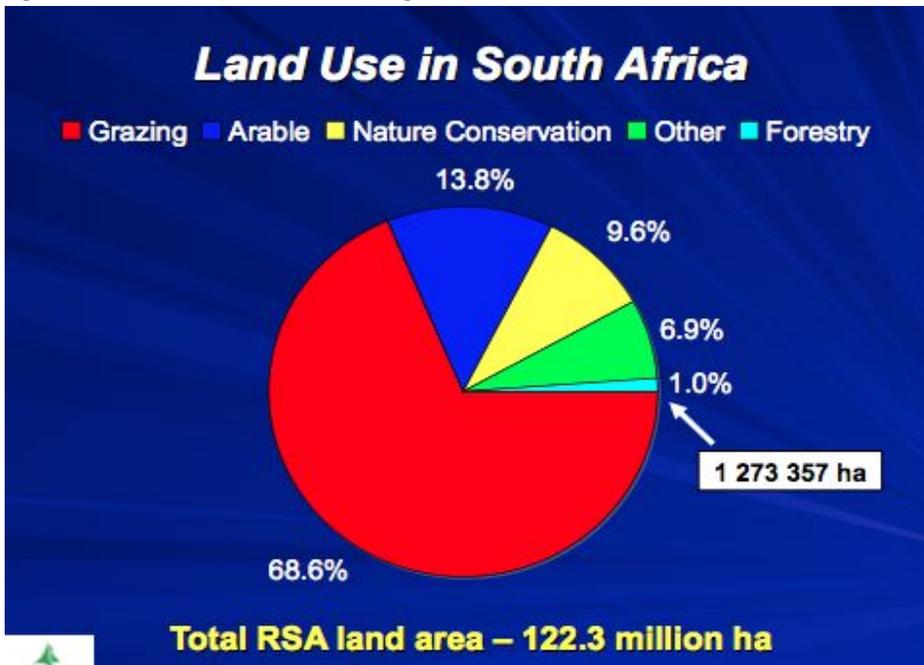
**Figure 2: Income in relation to white income levels**



Source: [https://en.wikipedia.org/wiki/Demographics\\_of\\_South\\_Africa#/media/File:Annual\\_per\\_capita\\_personal\\_income\\_by\\_race\\_group\\_in\\_South\\_Africa\\_relative\\_to\\_white\\_levels.svg](https://en.wikipedia.org/wiki/Demographics_of_South_Africa#/media/File:Annual_per_capita_personal_income_by_race_group_in_South_Africa_relative_to_white_levels.svg)

**Environment: types of land and current use**

**Figure 3 Land Use % per categories in South Africa**



Source. Robert Godsmark. 2017. South African Forestry and Forest Products Industry, Forestry SA. [https://www.forestry.co.za/uploads/File/industry\\_info/statistical\\_data/new%20layout/South%20African%20Forestry%20&%20Forest%20Products%20Industry%20-%202015%20\(R\).pdf](https://www.forestry.co.za/uploads/File/industry_info/statistical_data/new%20layout/South%20African%20Forestry%20&%20Forest%20Products%20Industry%20-%202015%20(R).pdf)

### **Urban distribution and demographics**

Currently approximately two thirds of the total population reside in urban areas (World Bank, <https://data.worldbank.org/indicator/SP.URB.TOTL.IN.ZS?locations=ZA>) while most of the white population (over 95%) is urbanised. 37% of the total population lives in the eight primary metropolitan areas. Between 1995 and 2008, the population of the former homelands grew by only 9%, while the metros expanded by nearly 40%, and the secondary cities expanded by 24%, reflecting outward migration as a result of limited economic and social development in rural areas (Ivan Turok. 2012. 'Urbanisation and Development in South Africa: Economic Imperatives, Spatial Distortions and Strategic Responses'. International Institute for Environment and Development (IIED): [http://www.delog.org/cms/upload/pdf-africa/Urbanisation\\_and\\_Development](http://www.delog.org/cms/upload/pdf-africa/Urbanisation_and_Development)).

Those who migrate from the rural areas maintain strong connections with their rural homes, and foster social networks between rural and urban areas (Neves, David and du Toit, Andries. 2013. Rural Livelihoods in South Africa: Complexity, Vulnerability and Differentiation. *Journal of Agrarian Change*, 13: 93–115. doi:10.1111/joac.12009).

# 1. COMMITMENT ONE

*Respect, protect and strengthen the land rights of women and men living in poverty, ensuring that no one is deprived of the use and control of the land on which their well-being and human dignity depend, including through eviction, expulsion or exclusion, and with compulsory changes to tenure undertaken only in line with international law and standards on human rights.*

## 1.1 LEGAL FRAMEWORK

### 1.1.1 Who can own land

The meaning of 'ownership' is problematic since the common law defines ownership as land under title, registered in the national Deeds Registry. Land owned directly by the state, and land held in trust by the state for black communities is also mostly registered in the Deeds Registry as 'state owned' There is, however, much land held under various forms of customary and informal tenure which need to be recognised as positive rights in accordance with Section 25 of the Constitution. To avoid confusion, a distinction is made here between 'private ownership' (by individuals, companies, trusts and Communal Property Associations), state ownership/trusteeship and effective but unregistered ownership that is not called 'ownership' in law. See Table 1 below for the breakdown.

**Private Ownership:** According to the 2017 government land audit, 82% of the total land registered in the Deeds Office (114 223 273 ha) is owned by private landowners, 95% of which is owned by individuals, companies and trusts (see 1.2.1 below: '% and/or # of people who own land')

Entry to private ownership is in principle determined by the market, and is not impeded by any legal prohibitions. There are two exceptions to direct acquisition through the market: (a) successful claimants of land restitution (discussed further below) get free transfer of restored land in ownership, in practice usually in group ownership; and (b) beneficiaries of land redistribution, where the price of land purchase is included in the land reform subsidy. There are no laws barring individuals owning land by means of registered freehold title on the grounds of race, identity, citizenship or status, but in reality the poor are largely excluded for the following reasons:

1. Prior to the transition to democracy in 1994, blacks were barred from private ownership of land. Since the passage of the Constitution and new laws, ownership is open to all, but land must be purchased at market value. The poor are dependent on land reform subsidies but land redistribution and restitution have been slow and inefficiently implemented.
2. Rights in the black occupied communal areas, which cover roughly 13% of the land surface area, as well as in urban informal settlements, are not geared for private ownership by individuals. Community and individual rights are layered and overlapping, and access to common property is determined by community protocols. There are thus socio-cultural conceptions of land tenure that do not fit comfortably with the legal framework for registering land parcels in the names of individuals, since rights are held primarily by the family. Access to family land involves kinship networks that stretch beyond those physically resident, to include the 'dead, the living and the unborn'. These layered relationships do not translate into neat parcels of land under identified individual owners. In theory, communal land can be surveyed in large blocks and transferred to group ownership, e.g. to a new category of collective ownership in the form of communal property institutions (CPIs) or traditional institutions, the latter being highly contentious. In South Africa CPIs are legislated as Communal Property Associations (CPAs), where group title is registered in the Deeds Office. CPA are entities that were specifically created as a vehicle for blacks to acquire land through land reform or restitution. Most restituted land has been transferred to CPAs. There

are 1484 registered CPAs but most are not faring well (<https://pmg.org.za/committee-meeting/23228/>).

3. Historical appropriation and acquisition of vast tracts of black-occupied land by colonial settlers resulted in big expanses of white-owned commercial farms on which millions of farm dwellers reside, many of whom trace their roots to this land. Their rights are protected by the Extension of Security of Land Rights Act 62 of 1997 (ESTA) but strengthening their long-term tenure is far from resolved (<https://theconversation.com/how-farm-dwellers-in-south-africa-think-about-home-land-and-belonging-86939>). Estimates of their numbers vary from 2 million or 4% of the population to 3 million or 6% of the population (Malcolm Langford, Ben Cousins, Jackie Dugard & Tshepo Madlingozi. 2013. *Socio-Economic Rights in South Africa Symbols or Substance?*: 170. Cambridge: Cambridge University Press). See Table 1 below based on the 2011 census.

### 1.1.2 If citizens and other individuals or communities cannot own land, can they get user rights?

All vulnerable rights that are not categorised as ‘ownership’ are protected by the Constitution and various laws, listed in section 1.1.3 below. These rights are generally off-register, and cover tenure and use rights in ‘communal areas’ and tenure rights on farms and in urban areas, so that all rights are legally protected. There are growing calls for a system of ‘land records’ to record and certify these rights in rural and urban areas to make them more visible, justiciable and secure against elite capture and dispossession. The process of record-capturing would involve adaptations to the existing common law methods of recognising rights, i.e. the development of legal principles to guide what legal evidence would be accepted as proof and strength of a right, systems of adjudication, local digitised databases to hold the evidence of rights, methods of updating the records and issuing of paper records and resolving disputes. These

**Table 1: Land holding outside the formal property system, 2011 (total population: 51,8 m)**

on	er of people	ulation
unal areas	ion	
workers and dwellers	on	
al settlements	lion	
ard shacks	lion	
city buildings	00	
ouses no titles	on	
ouses titles inaccurate/outdated	lion	
	<b>million</b>	

Source: Donna Hornby, Rosalie Kingwill, Lauren Royston & Ben Cousins (eds). 2017. *Untitled: Securing Land Tenure in Urban and Rural South Africa*. University of KwaZulu-Natal Press, Durban

### 1.1.3 Laws currently governing land tenure

#### The Constitution (Act 108 of 1996)

The overriding law of the country is the Constitution. Section 25 in the Bill of Rights, the 'Property Clause', sets out the state's obligations for land reform, and extension and protection of tenure rights. <https://www.gov.za/documents/constitution-republic-south-africa-1996>

#### The formal legal framework

The formal legal framework of 'ownership involves rigorous laws of survey and registration of land parcels in the name of identified individuals or entities. All surveyed parcels are held in the state office of the Surveyor General, while all title deeds and accompanying documentation are held in a national state repository or Deeds Registry. 79% of the land is privately owned ([https://www.agrisa.co.za/wp-content/uploads/2017/11/AgriSA\\_Land-Audit\\_November-2017.pdf](https://www.agrisa.co.za/wp-content/uploads/2017/11/AgriSA_Land-Audit_November-2017.pdf)) but by a minority of people.

If one includes surveyed state land, roughly 87% of the land falls under the formal cadastral system. The remainder is unsurveyed 'communal land' in the former black reserves estimated at 13%.

All surveyed parcels of land are registered in ownership to private persons (including corporate bodies such as companies and trusts) or various state entities or state departments. As shown in Table 1 above, there are a range of other rights that are off-register, held by an estimated 60% of the population — mainly black and poor. These unregistered occupational rights are protected by a suite of laws that cover the country 'back-to-back'. The laws were passed during the 1990s (see list below and a). They are categorised according to the circumstances of occupation on commercial farmland and in the former homelands and urban areas.

These rights have not been integrated into the formal land administration framework, and must therefore be defended on a case-by-case basis when under threat. In the past they were mainly administratively driven and enforced, but the post-apartheid state abolished the old administrative regime and has not created a new land administration system. Though protected, they therefore exist outside of an appropriate and official land administration system for the purposes of legal recognition, administrative support and dispute resolution. The imperative is therefore to build a new land administration system to include these rights.

#### List of laws that impact on vulnerable tenure categories

##### Acquisition of land

- Provision of Land and Assistance Act 126 of 1993<sup>2</sup>

##### Redistribution and restitution:

- Restitution of Land Rights Act 22 of 1994
- Provision of Land and Assistance Act 126 of 1993, the operating law for redistribution
- Communal Property Associations (CPA) Act 28 of 1996
- Expropriation Act 63 of 1975 (with amendments)

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<sup>2</sup> Previously 'Provision of Certain Land for Settlement Act 126 of 1993', substituted by s. 10 of Provision of Certain Land for Settlement Amendment Act 26 of 1998

- Expropriation Bill 2015

**Base-line protection against eviction or arbitrary dispossession applicable to particular categories of people:**

- Farm workers, farm dwellers and labour tenants on privately owned land
- Residents in coloured rural areas, mostly former mission stations
- People living under customary tenures ('communal tenure'), former reserves or 'Bantustans'
- Occupants of (rapidly expanding) informal settlements in urban areas

**The relevant tenure laws are:**

- Land Reform (Labour Tenants) Act (LTA) 3 of 1996
- Interim Protection of Informal Land Rights Act (IPILRA) 31 of 1996
- Extension of Security of Tenure Act (ESTA) 62 of 1997
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) 19 of 1998

**Older laws passed toward the end of apartheid to allow for upgrading to title, maintenance of existing titles:**

- Upgrading of Land Rights Act 112 of 1991 (ULTRA)
- Land Titles Adjustment Act 111 of 1993 (LTAA)

**1.1.4 Signatory of specific international treaties / conventions related to land**

The **Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGTs)** are the first comprehensive, global instrument on tenure and its administration to be developed by governments through negotiations conducted in the UN system, including the South African Government, and endorsed by the Committee of Food Security on its 38<sup>th</sup> extraordinary session, on the 11 May 2012, in Rome. They are the first international 'soft law' instrument that focuses on economic, social and cultural rights and how they can be applied to the governance of land, fisheries and forests. The Food and Agricultural Organization of the UN (FAO), in collaboration with the Government of South Africa mainly through the DRDLR and DAFF, and with financial support from The Department for International Development (DFID), have been supporting a series of national engagements with various relevant state and non-state actors towards implementation of the VGGTs in South Africa since 2014, culminating with a national workshop in September 2017 to establish a national Multi-Stakeholder Platform for the implementation of the VGGTs.

South Africa signed the **Convention on the Elimination of All forms of Discrimination against Women (CEDAW)** of 18 December 1979, on 29 January 1993, which was ratified on the 15 December 1995.

The **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)** was adopted by the General Assembly on Thursday, 13 September 2007. South Africa was among the 144 states that voted in favour of the Declaration.

**1.1.5 Public institutions that govern land**

There are robust institutions for governance of land falling within the cadastre with registered rights of 'ownership'. Most of the back-up functions for governance are undertaken by the private profession:

**Land Surveying:** The state Surveyor General's Office (SGO) holds and safeguards the diagrams of all surveyed land parcels. Land parcels must be surveyed by professional land surveyors in order to be legally recognised and transferred in ownership. Land surveyors are mostly private but some work for the state. They are regulated by the state, through the Land Survey Act 8 of 1997, and are internally governed by the South African Geomatics Institute (SAGI).

**Registration:** The national Deeds Registry, comprising regional branches, is the repository of all registered titles (real rights) and registered leaseholds and servitudes. All land transfers must be conveyed by private land conveyancers. The profession is regulated by the state. The Deeds Registries Act 47 of 1937 regulates all matter concerning land title registration.

**Planning:** State planning functions fall mainly under the Municipalities, who have their own planners, but most planning is undertaken by private professionals, all of whom fall under the South African Planning Institute (SAPI). A new national planning law, the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA), now overrides a myriad old provincial and regional laws. It regulates all aspects related to formal planning and embraces modern planning principles.

Unregistered rights are generally officially unsurveyed and unplanned, and thus not covered by these laws. The lack of land administration for unregistered rights remains one of the central burning questions regarding land governance. As mentioned above, off-register rights, which are held by the majority, have no system to recognise, record, maintain and defend them systematically, though they are protected against arbitrary deprivation and in practice locally secure. They were previously administered by various racially segregated proclamations, systems and structures. These have been dismantled, but not replaced by a new national legal-administrative system.

## 1.2 ASSESSMENT OF EXISTING RIGHTS

### 1.2.1 % and/or # of people who own land in the country according to government registration/database/cadastre

**Table 2. Land Parcels and ownership registered in the Deeds office (Total extent: 21 924 881 ha)**

parcel type	Number of parcels	Number of plots	Number of owners
[plots]	985	760	845
Agricultural holdings*	5	243	2
	<b>243</b>	<b>13 276</b>	<b>890</b>

\*Subdivisions of old agricultural estates being converted to non-agricultural commercial, residential and industrial land uses. Source: South African government, Department of Rural Development and Land Reform, **Source:** Land Audit, 2017 <http://www.ruraldevelopment.gov.za/publications/land-audit-report/file/6126>.

93% of the land (114 223 276 ha) is registered in the Deeds Office, including land registered under state ownership or trusteeship; and individuals, companies, and trusts own 90% of the registered land (89 523 044 ha of the 114 223 276 ha).

- Individuals own 39% (37 800 986 ha) of this total land;
- trusts own 31% ( 29 291 857 ha);
- companies own 25% (23 199 904 ha);
- CBOs own 4% (3 549 489 ha); and
- 1% is under co-ownership (883 589 ha).

Farms and agricultural holdings are owned by 7% (588 045) of total landowners.

94% of total land parcels are urban land plots (6 839 985), but which amount to only 3% of the total land (3 197 760 ha). 93% of the total owners of land own these urban plots (8 469 845). 65% or 56 million of the total population are found in these small urban land parcels.

Roughly 40% of the population, or 22.6 million, own land. Statistics South Africa estimates the current population to be 56.5 million. (<http://ewn.co.za/2017/07/31/sa-population-rises-to-56-5-million-stats-sa>)

It is difficult to assess the racial makeup of registered ownership, as the Deeds Office previously did not provide for racial categorisation. However, the Land Audit maintains that of the total 37 031 283 ha of farms and agricultural holdings, ownership is as follows:

		res
		144 ha
eds		383 ha
s		790 ha
is		873 ha
nership		7 ha

It is extremely difficult to aggregate and disaggregate accurate racially defined statistics on ownership of land in South Africa and the land audit is not regarded as a definitive or accurate source. According to experts at the Institute of Poverty, Land and Agrarian Studies (PLAAS) at the University of the Western Cape there is contradictory evidence on how much land has been transferred through land reform. The Department claimed that land restitution has transferred 3.4-million hectares to claimants to date, and land redistribution has transferred 4.7-million hectares. That yields a total of 8.1-million hectares. But an alternative audit by the agricultural industry through its body, Agri-SA, reports a total of only 6.5-million hectares of agricultural land acquired through both government and private acquisitions. PLAAS maintains that there is an absence of reliable data, which means that government policy does not rely on rigorous evidence and informed debate on how to improve delivery.

### 1.2.2 People who have government recognized tenures

See Tables 1, 2 and 3. A rough estimate of 40% of the country own 79% of the land in title. Roughly 60% have protected rights, but which fall outside of the formal property system. The protected rights are defined in terms of occupational status, rather than a form of tenure, as many of the old tenure categories from apartheid days are no longer officially recognised. Older rights such as quitrent and permission to occupy (PTO) rights are no longer officially administered, though they still exist.

### 1.2.3 Government systems showing land ownership or tenancy

The Deeds Registry is a repository for all title deeds, while survey diagrams and layout plans are held in the Surveyor General's Office. Tenancy is mostly a private contract, and short-term rentals are not registered, nor the records kept in a database. Under the official leasehold system, the contracts are registered but this is still fairly new.

In some informal settlements, NGOs are assisting the communities to develop records systems, but these are not officially recognised. Land rights advocates are pushing for a national system of land records for off-register rights in order to develop a national digitised database of all rights, but collected, stored and maintained at local level. This must go hand in hand with other land administration measures, such as new modes of collecting and validating rights, by accepting new forms of evidence, a process known as rights adjudication or rights enquiries, and specialised land dispute institutions.

### 1.2.4 Unique rights to land recognized for specific groups

A legacy of the colonial and apartheid period are the African 'homelands' or 'Bantustans' which were designed as reserves for African occupation where whites were forbidden to own land, covering roughly 13% of the land (see Tables 1 & 3). These reserves are no longer recognised as territorial or geographic entities, but their *de facto* status as 'communal areas' under traditional authorities is preserved through the registration of the land in the name of the state in trust for the communities. The rights are protected by national legislation, the Interim Protection of Land Rights Act (IPILRA), and some pockets are registered as Communal Property Associations. There are other forms of tenure on this land which are hangovers from colonial-apartheid times that are not recognised anymore, but which continue to operate *de facto*, such as PTOs and quitrent tenure.

Some former 'coloured reserves' in the south west of the country are recognised for particular historic occupants in terms of the Transformation of Certain Rural Areas Act 94 of 1998 (TRANCRAA). These areas are being re-planned and disposed to their occupiers.

**Table 3: Corresponding Land Use and Ownership Categories**

Use/ownership category	Area (ha)	Substrate break down	Area (ha)
Commercial farmland	37	white-owned farms in early 1990s = 70% total area ----- mainly white owned farming units in 2013	7
Communal areas, most state owned	5	'homelands' excluding other than in KwaZulu-Natal ----- KwaZulu-Natal Trust, former KwaZulu 'homeland' ----- customary lands held in trust by state ----- 'coloured' reserves	0
State land	0	provincial, incl schools, hospitals, agricultural ----- national, incl Home Affairs, Justice, Agriculture	6

		police, prisons	4
		vation Areas	
der, including urban areas	8		
		cluding non-metro urban areas	
	00		0

Source: Compiled for Land Portal (<https://landportal.org/voc/regions/south-africa>) from figures in Cheryl Walker with Alex Dubb. Fact Check No 1. 'The Distribution of Land in South Africa', Institute for Poverty, Land and Agrarian Studies (PLAAS), 2013. Available at <http://www.plaas.org.za/plaas-publication/FC01>

Thirdly, a landmark restitution judgement transferred an area known as the Richtersveld in the west of the country to Khoisan claimants (Alexkor Ltd and Another v Richtersveld Community and Others (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).

### 1.2.5 Categories of persons disallowed from owning land

There are no categories of persons who are legally forbidden to own land. There are bureaucratic conditions of transfer set out in the Deeds Registry Act, 47 of 1937, e.g. transfers cannot pass if municipal bills have not been paid. Registered ownership is, however, constrained because only surveyed land parcels can be registered with title in the Deeds Office, as discussed above. There have been ongoing debates about curbing foreign ownership. or restricting foreigners' rights to long-term leaseholds rather than ownership. Foreign ownership in South Africa is, however, statistically minimal.

### 1.2 6 Protections against eviction, expulsion or exclusion

The country has a set of strong baseline legislation to prevent eviction of people whose rights are protected 'back-to-back' in rural and urban areas, including farms, informal settlements and communal areas. See 1.1.3 above for the list of laws that constitute baseline protection against eviction or arbitrary dispossession applicable to particular categories of people. The enforcement mechanisms, however, are not systematically available, since the land administration infrastructure is inadequate or entirely missing, hence many cases go to court on a case-by-case basis.

### 1.2.7 Dispute resolution mechanisms on land

The judicial system is the mechanism used in South Africa. There are no other state institutions specifically designed to solve land rights conflicts. There are local traditional courts to which many people in communal areas submit conflicts.

Owners with title deeds have recourse to lawyers and the courts for dispute resolution. This provides an adequate framework for those with money to pay for legal services. However, there is a category of title held by Africans that are subject to family disputes, which are not easily resolved through the usual legal mechanisms. These titles are not up to date in the Deeds Registry since the families who own the land regard this as 'family property'. The Land Titles Adjustment Act 111 of 1993 is intended to bring ownership in line with deeds records, but in practice is an unwieldy and ineffective system.

In the communal areas, disputes are generally settled at family and neighbourhood level, sometimes involving trusted traditional leaders in informal traditional courts and sometimes in the formally constituted traditional courts. Traditional courts were previously set up in terms of colonial law, but will forthwith be subject to new legislation, the latest being the Traditional Courts Bill of 2017. This Bill is highly contested, with activists insisting that it should be optional and not obligatory. The terms of traditional courts are contested; particularly around their legacy of discriminating against women, e.g. the way women are represented; and also on account of the automatic application of the system on all members. The Constitution allows for these courts only on condition that they are fully compatible with constitutional principles, and hence have had to undergo much revision.

Traditional courts are not 'courts' in the western sense in that they are generally flexible and the idea is to not resolve a dispute through adjudication but to facilitate a settlement that is acceptable to all parties. Legal representation is prohibited. The idea is to restore equilibrium of the community and not to have a winner/loser binary typical of the western legal system. Some argue that traditional courts resemble 'alternative dispute resolution' (ADR) mechanisms.

The new Bill has addressed gender disparities and included a major concession that people may opt out. Traditional courts only have jurisdiction when customary law is involved, which is not always easy to establish. This condition would potentially be a constraining factor for resolving land rights disputes if rights become statutorily regulated in future. The use of these courts for land rights dispute resolution is therefore somewhat contingent. It should be a firm goal of legal reform to establish specialised land rights dispute resolution institutions across the board, in all areas of the country so that people may opt out of the traditional courts system.

The lack of dispute resolution institutions is part of the general weaknesses in land administration. Cases involving dispute around land rights could be pre-empted or resolved by specialised land rights administration institutions but these are absent. There is thus over-reliance on the judiciary to settle disputes. A land administration law/system/framework is needed to set out clear processes and procedures for establishing, maintaining and transmitting land rights, with specialised dispute resolution institutions to settle disputes, guided also by the principles and procedures that are established for validating rights in a future land records system.

### **1.2.10 Large-scale land acquisitions**

There have not been large-scale acquisitions of African-held land in South Africa, but rather the threat against land rights comes from indirect access via the traditional authorities for purposes of resource extraction e.g. of minerals. This is a form of land appropriation without land dispossession, and is regarded as a very big threat to land rights in mineral-rich areas that are black-held, particularly in the north west of the country.

### **1.2.11 Land Expropriation**

Expropriation has been used in South Africa, before and since the transition to democracy. There was a law of expropriation with compensation in place during apartheid rule, which was used to acquire white-owned land to add to the black reserves as well as the more usual purposes of acquiring land for public services. The Act is still in place, and the 1996 Constitution preserved the legal obligation to pay compensation. Critics of the implementation of land reform maintain that expropriation has not been sufficiently used by the state to acquire land for land reform. The new Expropriation Bill (passed by Parliament in 2016, but not yet signed into law) makes it easier for the state to acquire land for land

reform in that it allows for compulsory expropriation ‘in the public interest’ and with ‘just and equitable’ compensation, as provided for in Section 25 (3) of the Constitution. Hence it continues to provide for compensation, but this can be set at any figure considered just and equitable, and not necessarily market value. The new Bill addresses criticisms of the ‘willing buyer, willing seller’ approach to land acquisition for land reform purposes as it allows the state to expropriate by paying an amount determined by the Valuer-General, even without the owner consenting to the amount offered or the expropriation itself (<https://mg.co.za/article/2016-05-26-parliament-approves-land-expropriati...>).

There are growing calls for the Constitution to be amended to allow for expropriation without compensation, and this has become a burning issue. A motion was tabled in Parliament on 27<sup>th</sup> February 2018 calling for the expropriation of land without compensation and the consequent amendment of Section 25 of the Constitution. This has provoked a flurry of debate, applause and criticism. The motion established an ad hoc Constitutional Review Committee, comprising different political parties, to “review and amend section 25 of the Constitution to make it possible for the state to expropriate land in the public interest without compensation”. Critics point out that the existing laws have not been used effectively, even with budgets, and point out that with “just and equitable” compensation, it is possible to set compensation at zero, which would be allowed under the Constitutional ‘property clause’. Each case would thus be evaluated according to what is just and equitable in each case, and in theory can be set at zero.

<https://www.news24.com/Columnists/GuestColumn/land-expropriation-without-compensation-what-does-it-mean-20180304-5>

### **1.2.11 The accordance of national laws with international law governing rights to land and other human rights**

Land reform laws are supposed to be written in line with the Constitution, and the Constitution adheres to international law.

## **1.3 LAND REFORM MEASURES TO INCREASE TENURE SECURITY**

### **1.3.1 Current land reform / redistribution programmes**

See section 1.1.3 above. The Constitution committed the government to major land reforms, and various programmes have been launched. The Constitution formalised a new institutional framework after the first democratic elections in 1994, and embraces democratic principles aimed at restorative justice to transform the socio-spatial and political legacies of three centuries of white minority rule. Land reform is thus built into the Constitution and is part and parcel of the policy and legal framework.

The land reform programme adopted after 1994 contains three separate but complementary components:

- Land restitution designed to restore both urban and rural land to individuals and communities dispossessed of their land through racially discriminatory practices after 1913.
- Land redistribution aimed at creating a generally more racially equitable distribution of land.
- Tenure reform aimed at providing land tenure security to those deprived of it as a result of racially discriminatory laws. Comparable redress is required where tenure cannot be secured. The new government identified tenure insecurity as a significant

At the time of the democratic transition, the ratio of white to black land ownership was said to be 87:13<sup>3</sup> white-to-black ownership. As a result of this skewed ownership, the ANC government committed itself to transfer of the productive land to blacks by 2014 as part of its policy response to the Constitutional obligations for redistribution. This target was set in the Land Redistribution for Agricultural Development (LRAD) programme launched in 2000/2001.

(<http://www.nda.agric.za/docs/Policy/redistribution.htm>; Peter Jacobs, Edward Lahiff & Ruth Hall. 2003. 'Evaluating Land and Agrarian Reform in South Africa'. PLAAS Occasional Paper <http://www.plaas.org.za/sites/default/files/publications-pdf/ELARSA%2001.pdf> )

This goal has not materialised, and inequities in historic settlement patterns remain deeply entrenched. Experts estimate about 8 million hectares of farmland have been transferred to black owners since the end of apartheid, amounting to 8 to 10% of the land formerly in white hands in 1994, though precise information is unavailable. This amounts to only 5.46% of commercial agricultural land. This weak statistic is only a third of the ANC's 30% target (Walker and Dubb, 2013). Commercial agricultural sector sources maintain that twice as much land has been transferred through commercial transactions from black to white. 67% of agricultural land is still considered 'white' in spite of a slowly changing racial ownership profile. Millions of blacks inhabit densely settled former homelands and coloured reserves, and other state and trust lands, estimated at 15% of the country's land surface, 84% of which is considered agricultural (Walker and Dubb, 2013).

Many white landowners have switched from agriculture to game farming and tourism, partly to escape land tenure and labour laws. This has created some skilled jobs for a small number of black workers, but has not had a positive impact on land reform.

State land outside the communal areas acquired by the state from white commercial farmers before 1994 is heavily occupied already, and not available for redistribution. Some state land is necessary for public purposes and the common good: around 7% of the land is 'protected' (Walker and Dubb, 2013).

Land redistribution has been notoriously ineffective, even with the allowance of expropriation (with compensation), which, as critics point out, has been little used. The greatest indictment has been aimed at the poor angling of land reform support in favour of black smallholder agriculture.

Land rights advocates maintain that a key constraint to effective land reform is the absence of a framework law on land reform to guide redistribution policies and priorities, and to address gaps by creating: guiding principles; definitions of key terms such as 'equitable access'; clear institutional arrangements (particularly at district level); requirements for transparency, reporting and accountability; and other measures that promote good governance of the land reform process as a whole, as well as land redistribution in particular, and to bring all the existing anchor laws into line with the framework law, thus ensuring overall consistency and coherence within the land reform programme (Ben Cousins 2017 op cit)

### **1.3.2 Formal commitments expressed by the government for increasing tenure security**

As shown above, there is an extensive legal framework to protect rights across all land sectors, but efforts to legally strengthen and institutionalise these rights have come up against a number of constraints. There is widespread agreement that tenure reform has been woefully inadequate. The legal

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<sup>3</sup>This figure is somewhat symbolic but misleading, as it does not represent reality. It was one of the blueprints of the former apartheid regime, which was never successfully implemented. Millions of blacks and most coloureds continued to live in the 'white core' area, including commercial farmland and urban areas as described above (Walker and Dubb, 2013).

framework has remained steeply hierarchical, with registered rights at the top, below which are a range of off-register rights. These vary according to particular contexts and histories and cannot be treated as a single category, though they share common characteristics. In Table 1 we estimate 60% of the population has tenure that falls outside of the formal cadastral system.

Since 2000 the policy environment has been heavily contested, with a new emphasis in official policy on chiefly governance and empowering apartheid-era traditional authorities (renamed Traditional Councils) as the owning structures. Instead of recording the rights of individual land holding families, the policy encourages the land to be surveyed and registered in the names of the statutory traditional councils. This approach is strongly resisted by many civil society organisations. The most extreme version of this has been the establishment of the iNgonyama Trust in KwaZulu-Natal (a political compromise to appease traditional leaders at the time of transition in 1994), which has recently gone on to dispossessing people of their rights in terms of IPILRA by stating intention to convert them into leasehold, which makes them tenants instead of owners. This has provoked an outcry which is ongoing.

There have been fluctuating and ineffectual policies to strengthen rights of farm dwellers, including a policy to share ownership between the formal owner and the farmworkers (called the 50-50 policy) but it is flawed in concept and unlikely to be implemented. Ideas about off-farm settlements have never been tried. Farm dwellers' rights remain weak and policy for farm dwellers appears to have no connection to redistribution.

In urban areas an extensive state-subsidised housing programme for the poor has been coupled with full registered title, but the majority of poor rights holders live in informal settlements where rights are protected but not recognised as property rights. There is no land administration system to record the rights of those in informal settlements, though their rights are protected against arbitrary evictions. Informal settlements are growing rapidly in the major metropolitan cities as a result of both external and internal migration. The latter include people who sell their state-subsidised house on the informal market. This is not only against the conditions of title but indicates some dysfunctionality in the system of title for this segment of the market, many of whom disregard the formal legalities of title and buy and sell off-register. Since informal settlements are not officially recognised in terms of tenure, survey or planning laws, formal land use planning and tenure frameworks are not well suited to solving their 'informal' status, though attempts are made through innovative planning. Services are thus extremely difficult to establish, though electrification, basic water and sanitation are in some cases provided.

There are large numbers of farm dwellers on commercial farms and state owned land acquired from white owners during apartheid to expand the black reserves. Farm dwellers rights co-exist with the rights of lessees and the state, and the situation is administratively chaotic with a break down of any form of overriding authority or control.

Thus the only two officially recognised tenures are registered title deeds (and associated capacity to rent), in some cases group title (CPAs) and 'communal' tenure under traditional authorities. The *de facto* reality is that there is a range of off-register rights that are mostly regulated by means of local practices at the level of families and neighbourhoods. Traditional authorities, where these exist, play a more ceremonial role in land allocation, though they are attempting to seek stronger powers over land access and control. In many rural settlements and in urban informal settlements there are growing calls for tenure recognition through some form of title or legal record.

### **1.3.3 Dedicated Government budget for land reform**

There has been a dedicated budget for land reform since 1994, divided between agricultural support, redistribution, restitution and tenure reform. Critics complain that the percentage of overall national budget woefully inadequate and, moreover, has been in “precipitous” decline in spite of the urgent political calls for radical land redistribution policies. The latest budget allocation to the Department of Rural Development and Land reform was 0.1% of the total national budget, and only 0.4% for land redistribution specifically (<https://www.dailymaverick.co.za/article/2018-02-26-op-ed-budget-2018-shows-misguided-land-reform/#.WpwV15Nubkl>)

[https://www.businesslive.co.za/bd/opinion/2018-02-20-this-is-what-the-budget-would-look-like-if-it-took-people-seriously/?utm\\_content=bufferbe6e9&utm\\_medium=social&utm\\_source=facebook.com&utm\\_campaign=buffer](https://www.businesslive.co.za/bd/opinion/2018-02-20-this-is-what-the-budget-would-look-like-if-it-took-people-seriously/?utm_content=bufferbe6e9&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer))

### 1.3.4 Civil society organizations engagement

There is vigorous civil society engagement around land rights in South Africa, and for the most part NGO activists are free to organise, engage in advocacy and with the media, criticise, and support judicial action. However, some grass-roots activists who live in rural settlements are extremely vulnerable to local retribution from local power holders if they oppose land developments such as private contracts to mine on their land without their consent; and there have been assassinations. In urban areas, activists also become embroiled in local-level power struggles that have at times resulted in violence and deaths. Elected Parliamentary, Provincial and Municipal representatives are often impervious to the critiques by civil society, which leads to extreme frustration.

## 2. COMMITMENT TWO

**Concerns land and resource distribution:** *Ensure equitable land distribution and public investment that supports small-scale farming systems, including through redistributive agrarian reforms that counter excessive land concentration, provide for secure and equitable use and control of land, and allocate appropriate land to landless rural producers and urban residents, whilst supporting smallholders as investors and producers.*

### 2.1 ASSESSMENT OF EXISTING RIGHTS

#### 2.1.1 % of population holding % of land resources; % of population controlling % of land

See Table 1, 2 and 3 above under Commitment One for some percentages of land access and use. On rural land, ownership and use patterns are still highly skewed towards white ownership and control of most of the agricultural land. Statistics vary but the following would capture the extent of the dualism:

The agricultural sector is dualistic. It consists of a well-integrated, highly capitalized commercial sector with approximately 35 000 white farmers, producing around 95% of agricultural output. In contrast, the smallholder sector consists of around 4 million black farmers farming in the former homeland areas on 13% of agricultural land of South Africa. (Louw Pienaar and Lulama N. Traub, 2015. ‘Understanding the smallholder farmer in South Africa: Towards a sustainable livelihoods classification’, International Conference of Agricultural Economists. Available at: <https://ageconsearch.umn.edu/bitstream/212633/2/Pienaar-Understanding%20the%20smallholder%20farmer%20in%20South%20Africa-1233.pdf>)

These figures must be seen in relation to the population as a whole. Approximately two thirds of the total population reside in urban areas, while most of the white population (over 95%) is urbanised. 37% of the total population lives in the eight primary metropolitan areas. Between 1995 and 2008, the population of the former homelands grew by only 9%, while the metros expanded by nearly 40%, and the secondary cities expanded by 24%, reflecting outward migration as a result of limited economic and social development in rural areas. Informal settlements in urban areas grew by roughly 800% since 1994. (World Bank: [https://data.worldbank.org/indicator/SP.URB.TOTL.IN.ZS?locations=ZA\(link is external\)](https://data.worldbank.org/indicator/SP.URB.TOTL.IN.ZS?locations=ZA(link%20is%20external))); Ivan Turok. 2012. 'Urbanisation and Development in South Africa: Economic Imperatives, Spatial Distortions and Strategic Responses'. International Institute for Environment and Development (IIED): [http://www.delog.org/cms/upload/pdf-africa/Urbanisation\\_and\\_Development](http://www.delog.org/cms/upload/pdf-africa/Urbanisation_and_Development); Mary Tomlinson. 2015/6. 'South Africa's Housing Conundrum'. Institute of Race Relations @Liberty No 4, 2015/6 October 2015/Issue 20. <http://irr.org.za/reports-and-publications/atLiberty/files/liberty-2013-...>)

### **2.1.2. Average number of land holdings (% private versus public holdings)**

See Map 1 and Table 2 and section 1.2.1 above for breakdown of ownership. As stated, about 82% of the country is held in private ownership, according to the recent land audit. In 2013 there were roughly 40,000 mainly white owned farming units covering about 67% of the land surface area, held in private ownership. About 15% of the country is occupied by black and coloured rights holders in the former African reserve areas (homelands/Bantustans) and coloured reserves held in various forms of 'communal tenure.' People living in the homeland reserves are part of social networks that extend to towns and cities, and hence precise demographics are not possible (Walker and Dubb, Fact Check No 1, 'The Distribution of Land in South Africa', Institute for Poverty, Land and Agrarian Studies (PLAAS), 2013. Available at <http://www.plaas.org.za/plaas-publication/FC01>).

### **2.1.3 Average size of agricultural / rural land holding**

Average size holdings mean very little in South Africa, considering (a) enormous agro-ecological diversity with great variability in the sizes of agricultural holdings and (b) a very concentrated agricultural production structure, with a small core responsible for a large share of commercial production.

The extent of the country is 1.22 million km<sup>2</sup>, and nearly 80% of total land use is agricultural, but of varying qualities (<https://data.worldbank.org/indicator/AG.LND.AGRI.ZS?locations=ZA>). South Africa is a largely dry country with poor arable potential, estimated at around between 10-13%. There are significant ecological variations ranging from dry conditions (desert and semi-desert) in the west, to bands of higher rainfall regions in the east, with only 28% of the land surface receiving 600mm or more of rain per annum. 83% of the land is suitable only for extensive livestock production and 17% cultivated for cash crops, with 1.3 million hectares irrigated (<http://www.nda.agric.za/docs/StratPlan07/07sectoral.pdf>)

An older estimate indicates that in 2007 there were 237 commercial farm units accounting for 33% of total agricultural income, while in 2005 there were 2330 farm units accounting for 53% of gross agricultural income, with increasing concentration since then. Productive land sizes vary by agro-ecological context. There are high-value fruit and wine farm units in the Western Cape that occupy relatively little land, whereas large sheep and cattle farms in the Karoo and Northern Cape occupy vast tracts and may struggle to break even. Statistics from 2007 show average land sizes by province vary from 427 hectares in Gauteng to 5 799 hectares in the Northern Cape (Stephen Greenberg, 'Why Size Matters for Farmers', Mail and Guardian, 13 March 2015).

The main challenge is how to break down concentration of production in combination with unjustifiably large farm sizes in order to increase accessibility by smallholders but without threatening the food security for non-producers who live in urban areas.

The ANC-led government committed itself to expand the number of smallholder producers selling their produce from 200 000 to 250 000 by 2014, and to 500 000 smallholders towards 2020 (Aliber, M. & Hall, R., 2012. 'Support for smallholder farmers in South Africa: Challenges of scale and strategy'. *Development Southern Africa*, 29(4), pp.548-62.). These attitudes towards supporting smallholders are clearly illustrated by the increased budgetary allocation by the Department of Agriculture, Forestry and Fisheries in recent years, with R2.38 billion being allocated to smallholder support programs in 2014 (Aliber & Hall, 2012; DAFF, 2014). (Louw Pienaar and Lulama N. Traub, 2015. 'Understanding the smallholder farmer in South Africa: Towards a sustainable livelihoods classification', International Conference of Agricultural Economists: <https://ageconsearch.umn.edu/bitstream/212633/2/Pienaar-Understanding%20the%20smallholder%20farmer%20in%20South%20Africa-1233.pdf>

#### 2.1.4 Smallholder farming

A rough estimate indicates there are about 4 million smallholders, the majority of whom are located in the former homeland areas as it was demarcated according to the 1913 and 1936 Native Land Acts, and production is mostly aimed at securing food to the household. Only a very small number of these farmers, approximately 160 000, farm to market their produce. The majority of rural farming households consist of women, children and elderly people. These rural households develop different livelihood strategies said to be conducive to the given opportunities and constraints in their specific environment, most of which relate to agriculture whether through wage employment or direct subsistence (Louw Pienaar and Lulama N. Traub, 2015).

These are estimates, as there is lack of reliable data on small scale farming in South Africa (Ben Cousins, 2010, 'What is a 'smallholder'? Class-analytic perspectives on small-scale farming and agrarian reform in South Africa', PLAAS Working Paper 16). What is known, however, is that there is great diversity among smallholder farmers and existing definitions of smallholder farming tend to obscure important differences between and even within households engaged in agriculture (ibid). In view of evidence of great concentration of agricultural production in a small number of units and unjustifiably large tracts of land owned by single owners or enterprises, the general consensus among land reform advocates is that there should be a concerted focus on redistribution to, and agricultural support for, smallholders; but these policies should differentiate between the different classes of smallholders who need different scales and kinds of support (Cousins, B., 2013. Smallholder irrigation schemes, agrarian reform and 'accumulation from above and from below' in South Africa. *Journal of Agrarian Change*, 13(1), pp.116-39). Research reveals that many poor people want relatively small parcels of land, with others wanting to engage in marketable production and wanting more<sup>4</sup>.

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<sup>4</sup> For more information see: Aliber, M. & Hall, R., 2012. 'Support for smallholder farmers in South Africa: Challenges of scale and strategy'. *Development Southern Africa*, 29(4), pp.548-62; Hall, Ruth, 2009a. 'Land reform for what? Land use, production and livelihoods', in: Ruth Hall (ed.), *Another Countryside. Policy Options for Land and Agrarian Reform in South Africa*. Cape Town: Institute for Poverty, Land and Agrarian Studies, School of Government, University of the Western Cape (pp 23-61). Hall, Ruth, 2009b. 'Land reform how and for whom? Land demand, targeting and acquisition', in: Ruth Hall (ed.), *Another Countryside. Policy Options for Land and Agrarian Reform in South Africa*. Cape Town: Institute for Poverty, Land and Agrarian Studies, School of Government, University of the Western Cape (pp. 63 -91) Hall, Ruth, 2009c. 'A fresh start for rural development and agrarian reform?'. Policy Brief 29. Cape Town: Institute for Poverty, Land and Agrarian Studies, School of Government, University of the Western Cape. Hall, Ruth and Lionel Cliffe, 2009. "Introduction", in: Ruth Hall (ed.), *Another Countryside. Policy Options for Land and Agrarian Reform in South Africa*. Cape Town: Institute for Poverty, Land and Agrarian Studies, School of Government, University of the Western Cape (pp 1-19). Hebinck, Paul and Wim van

### 2.1.5 Land ceilings for agricultural lands

In 2015 the government announced plans to impose a land ceiling of 12,000 hectares on agricultural land, but national uniform land ceilings across the country do not make sense in view of the fact that productive land sizes vary by agro-ecological context. 12,000 ha means very different things in these different contexts. Hence experts suggest that it would be necessary to set land ceilings at a district level in consultation with stakeholders, which could address the issue of flexibility for different agro-ecological contexts. However present policies are also aimed at globally competitive farming, which requires increasing concentration, and hence the suggestion of land ceilings is part of a highly ambiguous policy environment. Some experts suggest that the aim should be to break down the economic concentration of ownership of assets and engage many more people to produce on smaller scales for more localised markets, an approach that could include ceilings as one among other variables. In South Africa it is important to maintain a core of large-scale producers who are able to meet the food needs of those not engaged in food production, especially in the urban areas. However, this approach should go hand-in-hand with a different structure of agro-food production that would require more a democratically controlled, large-scale core with more diversity in the production structure, including diversity of scale. (Stephen Greenberg, 'Why Size Matters for Farmers', Mail and Guardian, 13 March 2015; see also: <http://www.plaas.org.za/blog/nonsensical-ceilings-%E2%80%98viable%E2%80%99-farm-sizes-are-announced-budget-speech-minister-rural-development>)

### 2.1.6 Landless population

In South Africa, due to the rights-based protective legislation and the existence of the former 'homeland' areas, there is no category of fully landless people. There are people with more or less secure tenure and there are people on rural communal land who only have residential land rights and do not have access to arable land. The latter are sometimes referred to as 'landless', though this must be qualified as people who generally have access to the commonage for grazing. Given the great variability of conditions across the country, there is no up to date statistic on how many people in the communal areas do not have access to arable land but in many communities it could rise to half.

### 2.1.9. Class and land distribution

As discussed above, estimates are that around 40% of the middle class owns 79% of the land. Around 60% of poor or poorer people have various social/customary forms of tenure.

According to a recent land audit by organised agriculture, however, if you include market transactions, black people own more than half of all agricultural land in two of South Africa's most fertile provinces, the Eastern Cape and KwaZulu-Natal, and landowners who are not white own 26.7% of agricultural ground and control more than 46% of South Africa's agricultural potential. This audit estimates that twice as much land has been transferred to black entrepreneurs and farmers through ordinary commercial purchases than the state has managed to buy for black owners as part of its land redistribution programme. These statistics have been contested by PLAAS as exaggerations, but do indicate the prevalence of market transactions.

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Averbeke, 2007. 'Livelihoods and Landscapes: People, Resources and Land Use, in Hebinck, Paul and Wim van Averbeke, 2007. *Livelihoods and Landscapes: the people of Guquka and Koloni and their resources*. Leiden: Brill.

## Redistribution of agricultural land (see also 1.3.1 above)

There have been major swings in ANC policy. Initially, influenced by the World Bank, policy favoured state-assisted land purchase and transfer of title to beneficiaries. This took the form of small grants to poor households to buy modest areas of land for settlement and small-scale farming. From 2000 the policy shifted towards promoting black capitalist farmers, and providing larger land purchase subsidies to those with their own means to engage in commercial production. From 2011 the state has adopted the willing buyer, willing seller approach. Now the state has itself become the purchaser of land, acquiring land for redistribution to beneficiaries without transfer of title, thus moving away from the original private ownership model to state leasehold, with very little substantive adherence to the original goals of land reform (Ruth Hall & Thembela Kepe. 2017. 'Elite capture and state neglect: new evidence on South Africa's land reform.' Review of African Political Economy <http://dx.doi.org/10.1080/03056244.2017.1288615>; Ruth Hall. 2017. 'Land redistribution: some national statistics and case studies in the Eastern Cape'. Presentation to the Colloquium 'Land Ownership, Governance and Sustainability', University of Fort Hare, Hogsback Hunterstoun Centre, 25-27 October; Peter Jacobs, Edward Lahiff & Ruth Hall. 2003. 'Evaluating Land and Agrarian Reform in South Africa'. PLAAS Occasional Paper <http://www.plaas.org.za/sites/default/files/publications-pdf/ELARSA%2001...>)

The policy is guided by a Proactive Land Acquisition Strategy (PLAS), which empowers state officials to buy farms on the open market and allocate them to selected beneficiaries. In 2013 the emphasis shifted to 30-year leases renewable for a further 20 years before the state will consider transferring ownership to them under the State Land Lease and Disposal Policy (SLLDP). To qualify for on-farm infrastructure and production support, under a Recapitalisation and Development Programme (RECAP), 'beneficiaries' are required to enter into a partnership with a 'strategic partner' – i.e., a farming or agribusiness company – in a mentorship or joint venture arrangement. RECAP (2009/2010) replaced all previous land reform funding programmes. Funding is for a maximum of five years and beneficiaries must have business partners, who assist with 'business plans', recruited from the private sector, as mentors, or within share-equity schemes, or through contract farming. RECAP has been criticised by on many grounds, even by the government's Department of Planning, Monitoring and Evaluation (DPME) who suggest it be scrapped Available at: <http://evaluations.dpme.gov.za/evaluations/407>; <http://evaluations.dpme.gov.za/evaluations/407/documents/5bc0b2e1-dff5-4...>

Critics at PLAAS maintain that RECAP is an attempt at 'commercialisation' of land reform projects, where large sums are spent on relatively few beneficiaries, few jobs have been created, and access to markets remains limited (Ben Cousins. 2017. 'Land reform in South Africa is sinking. Can it be saved? Nelson Mandela Foundation: [https://www.nelsonmandela.org/uploads/files/Land\\_law\\_and\\_leadership\\_...\(link is external\)](https://www.nelsonmandela.org/uploads/files/Land_law_and_leadership_...(link_is_external)) 7; <https://theconversation.com/why-south-africa-needs-fresh-ideas-to-make-l...>)

The programme was transferred from the Department of Rural Development and Land Reform to the Department of Agriculture, Forestry and Fisheries who maintain it is an 'unfunded mandate' without funds (<https://pmg.org.za/committee-meeting/19977/>). Another programme, the Comprehensive Agricultural Support Programme (CASP), which applies only the communal areas, has been running since 2004, providing grants to applicants, so far having allocated R750 million to the programme.

Many evaluations of state programmes, including one published by Presidency, conclude that despite CASP and RECAP, there has been a lack of transformation in the commercial agricultural sector, and "a large number of land reform beneficiaries have not been able to use the land productively, partly due to inadequate infrastructure, inputs and technical support after finalising settlements" (Twenty Year Review 1994-2004, Rural Transformation Background Paper, Commissioned by the Presidency: <http://www.dpme.gov.za/publications/20%20Years%20Review/20%20Year%20Revi...>). Prof Ben Cousins of PLAAS at the University of the Western Cape is among those who strongly advocate a shift away from support for large-scale commercial farming to smallholders. According to Cousins, 'mentors' were 'milking' the projects (Ben Cousins. 2017. 'Diagnosing South Africa's Land and Agrarian Reform'. Presentation to the Colloquium 'Land Ownership, Governance and Sustainability', University of Fort Hare, Hogsback Hunterstoun Centre, 25-27 October).

## **The legal framework and equal ownership of land**

Section 25, sub-sections 5, 6 and 7 of the Constitution:

- 5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

## **Conflict and displacement**

There were massive programmes of forced removals under apartheid that led to large scale displacements, in response to which the government enacted the Land Restitution Act of 1994. However, thousands of restitution claims have not been settled, and many settled restitution claims have not been fully implemented. The great majority of 69,000 urban restitution claims have been settled through cash compensation. In addition, over 130,000 new claims have been submitted in terms of an amendment to the Restitution Act passed in 2014 (Ben Cousins. 2016. 'Why South Africa needs fresh ideas to make land reform a reality':

<https://theconversation.com/why-south-africa-needs-fresh-ideas-to-make-l...> ;  
<http://www.customcontested.co.za/laws-and-policies/restitution-land-righ...>)

The Constitutional Court in June 2016, however, found the amendment Act to be invalid and ruled that old claims must be processed first. The court interdicted the Land Claims Commission from considering, processing and settling new claims for 24 months, pending Parliament's re-enactment of the amendment act or finalisation of those claims filed by 31 December 1998, whichever occurred first (<https://www.groundup.org.za/article/parliament-must-pass-new-land-claims...>).

Current conflicts are mainly related to poor service protests in townships; while in rural communal areas mainly related to opposition to mining deals.

## **2.2 CURRENT STATE OF PUBLIC INVESTMENT IN SMALL-SCALE FARMING**

### **2.2.1 Government support schemes/microcredit available for small farms**

Support for the land reform programme, particularly for small-scale farmers, has been widely criticised particularly on the ground of the ineffectiveness of financial support to small farmers, and how to provide effective post-settlement support.

Research suggests the need to also invest in the non-farm sector. Livelihoods-related research has revealed that improved access to basic services (water, electricity and sanitation) in poor areas has had a significant impact on quality of life, while the greatest impact on poverty so far has been the introduction of social grants, of which over 16 million South Africans are recipients. Other protection services such as provision of food, increasing subsistence production and strategies to moderate food prices have also reportedly made a significant impact (David Neves, 2017, 'Reconsidering rural development: Using livelihood analysis to examine rural development in the former homelands of South Africa. PLAAS Research Report 54: [http://www.plaas.org.za/sites/default/files/publications-pdf/PLAAS\\_Polic...](http://www.plaas.org.za/sites/default/files/publications-pdf/PLAAS_Polic...))

### **2.2.2 Land use legislations and plans made at national and/or sub-national levels**

There is National Spatial Development Plan that states that rural areas are important; and each province must prepare a Spatial Development Framework and municipalities must prepare SDI's with local consultation. The Spatial Planning and Land Use Management Act (SPLUMA) 16 of 2013 is an exhaustive framework to guide land use planning. The Act provides for development principles, norms and standards and for sustainable and efficient use of land. It also provides for cooperative government and intergovernmental relations amongst the national, provincial and local spheres of government. A problem with SPLUMA is it does not accommodate regulation of land tenure and use in areas that do not fall under the cadastre, i.e. the communal areas. In other words, it is strongly linked to surveyed land parcels. A highly complicating factor is legal pluralism and dual jurisdictions that result from traditional governance in communal areas, which means that spatial planning is often opportunistic and insufficiently regulated.

All investment must comply with land use plans and land use planning legislation.

### **2.2.4 Safeguards or environmental impact assessment laws that protect the rights of small farmers before investments are made**

South Africa has a rigorous legal framework for regulating land developments, and all land developments must go through Environmental Impact Assessments (EIAs) in terms of the National Environmental Management Act, (No 107 of 1998) (NEMA) which includes an overarching framework policy developed through a comprehensive participatory process known as the Consultative National Environmental Policy Process (CONNEPP). The framing principles define the nature of sustainable development and introduces sustainable development as the accepted approach to resource management. EIAs are regulated by the Environmental Impact Assessment Regulations of 2014. EIAs do not necessarily result in protection of the rights of small farmers, as EIAs balance various factors.

Most of the land in the former homelands or black reserves, which comprise about 12-13% of the country's surface area, is formally registered in state ownership in trust for the customary rights holders. The Trust was originally set up in terms of the Native Trust and Land Act 18 of 1936, which established the South African Native (later Development) Trust (SADT). The law was repealed by the Abolition of Racially Based Land Measures Act 108 of 1991 but the land remains in state ownership. These areas are still characterised by poverty (70% considered 'poor'), joblessness, weak institutions and gross inequality, though research indicates some upsurge in economic activity in the small towns.

Direct appropriation by private investors in communal areas is not possible, given that formal ownership is in the name of the state. There are nevertheless disturbing patterns of indirect appropriation by mining companies in the mineral-rich communal areas where land administration institutions are extremely weak. Traditional authority structures provide a vehicle for private mining corporations to strike deals that do not benefit the rights holders, whilst creating wealth for corporatised structures directly connected with the chiefly networks.<sup>5</sup>

There has been increasing resistance from local communities to this form of land rights dispossession, resulting in several court cases. In some communities there has been violence and even assassinations (<http://www.ee.co.za/article/murder-south-africa-wild-coast-escalates-con...>)

The government drew up a controversial Mining Charter that was more concerned about changing the racial structure of the ownership of the mines (which are still largely white-owned) through mandatory shareholding by blacks, rather than upholding the rights of community landholders to share in the benefits (<https://www.dailymaverick.co.za/article/2017-06-16-zwanes-radical-mining...>; <http://www.customcontested.co.za/next-mining-charter-will-revolutionary-...>). The new Presidency has committed itself to redrafting it on more favourable terms for investors, but it is not yet known if rural communities' rights will be sufficiently addressed in the review.

In some cases, restitution settlements on communal land have resulted in eco-tourism/game lodge enterprises, whereby the successful restitution claimants become the owners of the land, but agree to remain off the land in return for shareholding in the businesses. These projects are, however, haunted by contestations between traditional authority and community structures over control of the land and income, as well as the power dynamics between owners and entrepreneurs (Conrad Steenkamp & Jana Uhr. 2000. 'The Makuleke Land Claim: Power Relations And Community-Based Natural Resource Management' Evaluating Eden Series Discussion Paper No.18. London: IIED. Available at: <http://www.conservation-development.net/Projekte/Nachhaltigkeit/CD1/Sued...>)

### 3. COMMITMENT THREE

**Concerns Tenure diversity:** *Recognize and protect the diverse tenure and production systems upon which people's livelihoods depend, including the communal and customary tenure systems of smallholders, indigenous peoples, pastoralists, fisher folks, and holders of overlapping, shifting and periodic rights to land and other natural resources, even when these are not recognized by law, and whilst also acknowledging that the well-being of resource-users may be affected by changes beyond the boundaries of the land to which they have tenure rights.*

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<sup>5</sup> For more information, see: *In Good Company? Conversations around transparency and accountability in South Africa's extractive sector.* 2017. 2 ed. Open Society Foundation for South Africa: <http://www.customcontested.co.za/bapo-ba-mogale-money-looted>; Joanna Pickering & Thabiso Nyapisi. 2017. 'A community left in the dark: the case of Mapela - Struggles for transparency and accountability in South Africa's Platinum Belt' in *In Good Company? Conversations around transparency and accountability in South Africa's extractive sector.* 2 ed. Open Society Foundation for South Africa; Gavin Capps. 2016. Tribal-Landed Property: The Value of the Chieftaincy in Contemporary Africa. *Journal of Agrarian Change*, 16(3), 452-477. Gavin Capps, Dunbar Moodie and R. Bush (eds). 2015. *Review of African Political Economy* Special Issue: *White gold: new class and community struggles on the South African platinum belt*, 42:146; see SWOP working papers on [https://www.swop.org.za/working-papers\(link is external\)](https://www.swop.org.za/working-papers(link%20is%20external)), including Gavin Capps and S. Malindi. 2017. *Dealing with the Tribe: The Politics of the Bapo/Lonmin Royalty-to-Equity Conversion.* Working Paper: 8. Johannesburg: Society, Work and Development Institute (SWOP), University of the Witwatersrand; S. Mswana, F. Mtero and M. May. 2016. *Dispossessing the dispossessed? Mining and rural struggles in Mokopane, Limpopo.* Working Paper: 7. Johannesburg: Society, Work and Development Institute, University of the Witwatersrand.

### 3.1 How land is classified in South Africa

Rights are classified according to a hierarchy with rights of ownership at the top.

- Ownership (freehold title) (registered)
- Leasehold (not widespread, registered)
- African Quitrent (supposed to have been upgraded but not in reality) (registered)
- Labour Tenants (not registered)
- State land held in trust for occupiers on the former reserves, some with former Permission to Occupy (PTO) rights with no official records or registers and no longer officially valid but continuing to be issued in many regions
- Protected rights on farms by farm dwellers and informal settlements (no official registers/ records)

The following specific tenure forms are legal:

- *Freehold*: Rigorously regulated ownership by juristic entities that may be individuals, corporations or trusts in rural or urban areas, allowing for rental.
- *State leasehold*: Previously 99-year state leasehold for urban blacks, currently an option put forward by the state as an alternative to freehold, e.g. for emerging farmers and land reform beneficiaries. The State Land Lease & Disposal Policy of 2013 mandates a 30-year lease on state-owned land, renewable for a further 20 years.
- *Leasehold title*: Little used but growing in popularity in middle class property developments, and proposed as a possible way of curtailing foreign ownership. It involves a notarial deed against the title of ownership by the lessor (the person letting the property) in favour of the lessee (the person to whom the property is let). The lessee gains rights over the property for a certain amount of time without that person becoming the owner, but can exchange the right for compensation at market value.
- *Sectional Title*: Mainly urban apartment blocks or housing estates for middle class owners. Surveyed individual units under full ownership, with common property and corporate management. Regulated by the Sectional Titles Act 95 of 1986.
- *Communal Property Associations*: Designed specifically for group ownership by black land reform beneficiaries, regulated by the CPA Act (Trusts are sometimes preferred).
- *Quitrent title*: a historic form of title phased out for conversion to freehold for whites a long time ago, and recently, but ineffectively, for blacks (mainly in the Eastern Cape) in terms of the Upgrading of Land Tenure Rights Act (ULTRA).
- *Protected off-register rights* exist on all of these categories of land, often overlapping.

#### 3.1.1 Extent of formalization of rights

The only rights that are formalised are Title Deeds registered in the Deeds Registry, covering approximately 40% of the population, and leasehold and state leasehold that are not as yet widely used. State land is also surveyed in land parcels and registered in the Deeds Registry as ownership. Private lease agreements between an owner (lessee) and lessor are not registered unless they are long term. A rough estimate is that 60% of the population has off-register rights with no official records system. In some urban informal settlement, NGOs have assisted communities to set up records systems but they are not integrated into the country's land administration system.

#### 3.1.2 Decentralization of land services

The Deeds Registry and Surveyor General's offices are centralised, but have branches in all the major centres. The formal land administration system is serviced by private professionals (surveyors, planners and conveyancers) who are accessible around the country; however, they must be contracted and paid. Furthermore, land use planning is a municipal function.

Unregistered rights are generally unsurveyed and unplanned and lack systematic land administration services. This is a burning gap in land governance in South Africa. Off-register rights, which are held by the majority of South Africans, have no coherent land administration system to recognise, record, maintain and defend them systematically, though they are protected against arbitrary deprivation and are in practice locally secure. These rights were previously administered in terms of a range of racially segregated proclamations, systems and structures, with regional variations. These have been dismantled, but not replaced by a national legal-administrative system.

### **3.1.3 Can both men and women be land certificate holders?**

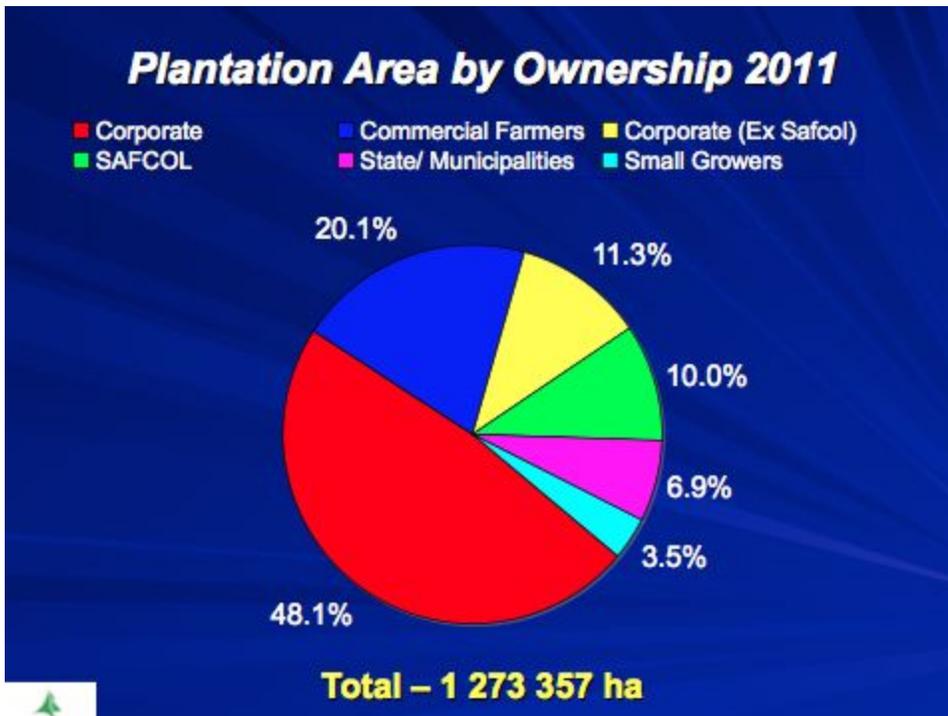
In the past, the Permission to Occupy (PTO) rights were in the name of men but PTOs are no longer officially recognised. Increasingly, single women are acquiring customary rights akin to PTOs, but these are not recorded in writing. In some rural and urban communities, NGOs are assisting communities to develop records systems, with strong emphasis on gender parity. Most informal record systems register men and women. Examples of these are farm dweller records developed by AFRA, and a community records system (CR) developed by Violence Prevention for Urban Upgrading (VPUU) in Monwabisi Park informal settlement, Cape Town.

### **3.1.4 Who can own what types of land**

*Private land* in rural and urban areas are heritable or accessible to purchasers by way of the market.

*Public land*: is state owned registered to various departments and utilities, and is differentiated into land for public purposes and land for state domestic purposes. 7% of the land is owned by the state (national, provincial and municipal governments) as protected land in the form of public parks, conservation areas and nature reserves open to the public but subject to fees and regulations.

*Forest land*: South Africa has extensive and valuable forest resources. They are valued for their biological diversity, for medicinal and local uses, and for their aesthetic and spiritual values. Commercial forest plantations were in the past wholly state owned, but after 1996 the state redefined its role in the forest sector, including the state's withdrawal from commercial forestry operations and the transfer of this function to the private sector through privatisation and public-private ventures.



*Communal land:* is generally accessible to family members, kin, and people considered 'members' of a particular community. It is allocated according to local norms and practices and in theory cannot be purchased on the market. Allocation is accompanied by payment of a consideration to the local authority in the community.

### 3.1.5 Types of tenancy arrangements for different kinds of land

Tenancy in South Africa is a private contractual matter. It is widespread on both registered and unregistered land. Tenants' rights are not registered (only long-term leases must be registered).

*Rent paying tenants:* Rent paying tenancies are generally secured through lease agreements between lessors and lessees for the payment of rent. There are laws regulating these relationships in the formal property system. The Roman Dutch law protects tenants rights strongly, captured by the legal principle '*huur gaat voort koop*' (lease trumps a later sale), which ensures that any contract with a tenant, whose lease has not yet expired must be honoured if and when the property is sold. This applies whether or not there is a bond on the home and whether or not the purchaser knew of the lease when he signed the deed of sale. Even if a lease is signed after the conclusion of the sale, this, in most lawyers' opinions, still has to be honoured.

*Tenants of African owned land:* In some regions of the country, Africans had titles of various kinds in what subsequently became African reserve areas. They tended to absorb large numbers of tenants over time, particularly considering the forced removals in South Africa. In these areas, conflicts between the original owners and the tenants have become pronounced since the end of apartheid, when people desire to secure their own rights more formally. These situations remain for the most part unresolved, and are often referred to as 'overlapping rights'.

*Labour Tenants:* In some region Africans secured parts of white-owned farms, in some cases having been the original occupiers, by providing specified period of labour to the owner. Labour tenants have rights that are covered by the Land Reform (Labour Tenants) Act 3 of 1996, which provides for labour tenants to attain ownership of the small portion of land that they live on. A labour tenant is defined as a person who works on a farm in exchange for the right to live on that farm without compensation, and work a portion of that farm for themselves. A land claim made by a Labour Tenant can be passed down to their children and grandchildren.

However, the responsible department in government, the Department of Rural Development and Land Reform (DRDLR), has failed to implement the Land Reform (Labour Tenants) Act. This led the Association for Rural Advancement (AFRA), and NGO in the KwaZulu-Natal, a region where labour tenancy has persisted to petition the Land Claims Court (represented by the public interest law organisation, the Legal Resource Centre, to having a Special Master appointed to ensure the DRDLR fully implement the law. This was granted in a court judgement in 2016, but implementation has still not occurred, and the matter is currently on appeal.

<https://afra.co.za/labour-tenants/>

<https://www.farmersweekly.co.za/bottomline/understanding-labour-tenants-act-purpose/>

*Backyard shack dwellers in urban areas:* In most urban areas, informal, semi-formal and in some cases formal, there are large numbers of unregulated backyard shack dwellers, so-called because of their self-made shelters.

*State leasehold:* Previously 99-year state leasehold for urban blacks, currently an option put forward by the state as an alternative to freehold, e.g. for emerging farmers and land reform beneficiaries. The State Land Lease & Disposal Policy of 2013 mandates a 30-year lease on state-owned land, renewable for a further 20 years.

### **3.1.6 Communal tenure systems**

The customary systems of 'communal tenure' in the African homelands or reserves called Bantustans by the apartheid regime, which cover roughly 14% of the country, comprise individually held residential and arable land with common grazing and natural resources accessible to all who are considered 'members' of that community. These areas fall under traditional authorities, now called Traditional Councils, or a few Communal Property Associations (CPAs) and are locally managed. There are no specific laws applicable to the land tenure or the common property since the scrapping of apartheid laws. The commons are generally regulated and managed according to locally agreed norms sometimes referred to as 'living law' or 'living customary law'. The government has on two occasions attempted to introduce legislation to regulate the tenure of communally held land, but the process has been marked by controversy and remains unresolved.

Communal tenure reform has thus been deeply contentious and prolonged. The Communal Land Rights Act 11 of 2004 (CLRA) was declared unconstitutional. Opponents of the law considered this judgement a victory, since it the law was seen as a re-enactment of apartheid systems of tribal authority rule over restricted areas of the country. They argued that the CLRA gave Traditional Councils (known as 'tribal authorities' under apartheid) wide-ranging powers, including control over the occupation, use and administration of communal land. The law was not, however, struck down on substantial grounds, but rather because the Court found that the correct procedures for its enactment had not been followed.

After several renewed attempts, a new Communal Land Tenure Bill was released in 2017 for comment. It proposes a hybrid form of registered communal titling for communities that acquire a juristic personality, and who may then be issued with a 'Deed of Communal Land'. Individual breakaway titling is legally possible but practically unfeasible. The Bill proposes a plethora of new management structures. Although the Bill theoretically allows for some choice in governance structures, reality dictates that it will empower existing traditional authorities, for the following reasons:

- The Bill fits into a broader and systematic framework of traditional governance in the form of the Traditional Leadership Governance Framework Act of 41 of 2003 as amended in 2009 (TLGFA) and the Traditional Courts Bill of 2017 (TCB).
- The Bill recognises traditional authorities (renamed Traditional Councils (TCs) in terms of the TLGFA). Democratically-minded citizens regard TCs as apartheid-created political structures that have been given broad-ranging powers over people living in the former homelands, including land administration functions, without sufficient means to opt out of the system.
- The Bill potentially endows Traditional Councils with powers of collective ownership over land at the expense of the rights of individual family units.

Critics are concerned that Bill will result in concretising apartheid boundaries and structures that were based on territorial and ethnic geo-spatial entities, with highly unequal spatial and political power. The Bill potentially plays into identity politics and gives people insufficient means to opt out of the imposed system. Critics point out that, taken together, the three pieces of legislation do not provide sufficient means to hold traditional structures to account or counterbalance their power over local governance and justice by providing recourse to other state institutions nor ensure adherence to constitutional principles. [http://www.larc.uct.ac.za/submissions\(link is external\)](http://www.larc.uct.ac.za/submissions(link%20is%20external)).

<http://www.customcontested.co.za/laws-and-policies/>

<http://www.customcontested.co.za/laws-and-policies/how-the-laws-link/>.

Land reform and land administration advocates are in the process of devising an alternative approach to customary tenure reforms to ensure that the customary rights of individual households and families are recognised, rather than the land being registered in ownership under traditional authorities.

### **3.1.7 Formal recognition to customary rights of indigenous peoples' lands, pastoralists, fisher folk and other holders of overlapping, shifting and periodic rights to land**

The homeland reserve areas are owned by the state in trust for communities. Although colloquially the areas are referred to as 'communal areas', this is not a legal category. Increasingly 'customary' right or 'indigenous' rights (sometimes used interchangeably) are being tested in various court cases in order to establish rights on these grounds.

The Constitutional Court delivered a landmark judgement validating customary law in 2011. It is known as the 'Richtersveld' judgement (*Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003). The Richtersveld community brought a claim for the restoration of its ancestral land in terms of the Restitution of Land Rights Act. The claimants asserted that it used the land according to its indigenous customs. The appellant was the mining corporation Alexkor, which had an interest in the diamondiferous parts of the Richtersveld area. Both the Supreme Court of Appeal (SCA) and the Constitutional Court upheld the community's claim, on the basis of which the land was returned to the community (<https://mg.co.za/article/2007-10-09-tears-of-joy-as-richtersveld-land-claim-is-settled>).

One of the most important outcomes of the case was the Constitutional Court's assessment of the status of customary law: In paragraph 51:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights. .... It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. ... In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.  
<http://www.saflii.org/za/cases/ZACC/2003/18.html>

The other unfolding and precedent-setting cases regarding the status of customary law as the basis of a defence of rights, in this case marine resources, which involve defence of customary rights on the east coast (known as the 'Wild Coast') on the shores of one of South Africa's major African reserves, known as the Transkei. Arrested local fishermen who are members of land holders who successfully claimed a large reserve adjacent to their occupied land were acquitted on the grounds that their fishing rights derive from custom (*Gongqose and Others v S; Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others (CA&R26/13) [2016] ZAECMHC 1; [2016] 2 All SA 130 (ECM); 2016 (1) SACR 556 (ECM) (18 February 2016)*). This is an important precedent for the development of the legal principles that determine customary rights to communal resources, and thus part of an ongoing struggle for recognition of living customary law.

### **3.1.8 Number of people with formal recognition of customary land rights**

There is no statute that formally recognises customary rights; and no database, registration system or records system to record information on customary land rights. Customary rights are, however, protected in law. The Interim Protection of Informal Land Rights Act (IPILRA) protects and extends rights held on communal lands, and these rights are relatively secure. The exception is in KwaZulu-Natal where the iNgonyama Trust is attempting to convert them into leasehold; and situations where mining, tourism and other third party rights are negotiated via traditional authorities. IPILRA rights are not covered by official regulations and there is no land administration system to enforce them, hence conflict cases tend to go to Court on a case-by-case basis. The iNgonyama Trust is violating IPILRA by attempting to convert them into leasehold.

Customary law is officially recognised in section 211 of the Constitution and through legal judgements and precedent. The most important legal precedent is the Richtersveld judgement described above in section 3.1.7. In terms of the Constitution and legal precedent, customary law is meant to have legal parity with the common law. Rights to marine resources are increasingly coming under the umbrella of customary rights, as argued by the defence in the Gongqose case discussed in 3.1.7 above

Attempts to legally formalise customary land rights have so far failed. Legal formalisation of customary land rights is still a contested, unfinished process. Communities may claim for restitution of ancestral land through restitution if the claim conforms to the conditions of the Restitution of Land Rights Act. The

outcomes of successful claims, however, result in the registration of the land through Communal Property Associations or as individual freehold rights.

There is much debate about the future trajectory of formalisation of 'informal' and customary rights, which are not homogenous but share common characteristics, and there is a push for a land administration system of land records. For more detailed discussion, see "Donna Hornby, Rosalie Kingwill, Lauren Royston & Ben Cousins, 2017, *Untitled: Securing Land Tenure in Rural and Urban South Africa*, Pietermaritzburg: UKZN Press.

#### **Amount of land held publicly**

Roughly 10% of the land is public land excluding urban areas (see Table 2 above). Public land is clearly identified and differentiated. It is managed by various state institutions. For example, the South African National Parks (Sanparks) manages nature and conservation reserves, and various other state departments, state utilities and municipalities own and manage public roads, railways and airways, land on which infrastructure is built, such as pylons and communications towers, water and sewage works, and hospitals, schools, libraries, etc. Where private land is required for public purposes, e.g. roads, pipelines or cables, the relevant land must be surveyed, acquired (expropriated if necessary) and the owner compensated. The land must be registered as a servitude in favour of the state.

## **4. COMMITMENT FOUR**

**Concerns equal land rights for women:** *Ensure gender justice in relation to land, taking all necessary measures to pursue both de jure and de facto equality, enhancing the ability of women to defend their land rights and take equal part in decision-making, and ensuring that control over land and the benefits that are derived thereof are equal between women and men, including the right to inherit and bequeath tenure rights.*

### **4.1 Policy and Legal framework**

The achievement of equality and non-sexism are two of the key founding values of the Constitution. Section 9 of the Constitution gives effect to these values by creating the right to equality before the law and equal protection and benefit of the law. In 1996 the Commission on Gender Equality Act 39 was passed to constitute the Commission on Gender Equality which is one of several "chapter 9" institutions in South Africa. In late 2013, the Women Empowerment and Gender Equality Bill (the Bill) was introduced and passed in Parliament, but has not been signed into law. Despite the strong legal framework, the struggle for gender equality remains one of South Africa's big challenges.

### **4.2 Women's rights to land under law**

Under common law there is no discrimination of ownership of land on the grounds of gender. However, there are number of social and economic constraints, as privately held land must be purchased at market prices, or acquired through land reform or housing programmes. In terms of 'living' customary law, the norms are evolving in favour of women's rights, but these are not formalized in law. In practice discrimination against women under customary law continues to be a problem.

Policy objectives and strong social advocacy for gender equity are putting pressure on the state for law reform in relation to land tenure. The dilemma for policy lies in the tension between modern constitutional values of gender equity, on the one hand, and gendered norms that structure the family group. In the contemporary politics of gender, gendered social relations must be balanced against the objective of promoting gender equality in property-holding. Feminist scholarship indicates that rights within families

are structured differentially according to gendered criteria, and these have the great potential to spread inequality between men and women (Razavi, S. (2003) 'Introduction: Agrarian Change, Gender and Land Rights'. *Journal of Agrarian Change*, 3 (1), 2-32; Whitehead, A., & Tsikata, D. (2003) 'Policy Discourses on Women's Land Rights in Sub-Saharan Africa: the Implications for the Re-turn to the Customary'. *Journal of Agrarian Change*, 3 (1)).

There remains a patriarchal legacy in familial and community social relations, but the concept of 'patriarchy' glosses over more nuanced social relationships that derive from matrilineal or patrilineal descent systems that are common in Africa. Advocacy in favour of gender equity faces the challenge of balancing different versions of kinship relations (Rosalie Kingwill. 2014. *The Map is not the Territory: Law and Custom in 'African Freehold', A South African Case study*, PhD thesis, UWC).

#### **4.3 Percentage of land under women's ownership**

Statistics of registered title are meaningless as indicators for ownership in South Africa. Most owners of land by registered title are white, and these are evenly spread between male and female, but not indicative of the demographics as a whole. The Deeds Registry has not classified registered ownership by race,<sup>6</sup> so ownership by title cannot be racially disaggregated. Anecdotal evidence indicates low ownership by black women (Rosalie Kingwill. 2011. *Report on the Deeds Registration for the Land Governance Assessment Framework*, World Bank).

#### **4.4 Avenues for women to access, claim, or otherwise acquire land**

There are two sets of avenues that must be distinguished. The first is access via customary norms to communal lands. The second is official access via land claims or applications for land with subsidies. With regard to the former, women are beginning to apply for land in their own right. There are clear indications that living customary law is changing to accommodate single women in control of their own plots, though the general norm continues to allocate land to men. With regard to the latter, there is no formal discrimination in official processes and procedures, since all laws and regulations are guided by gender equity according to the Constitution, and women are involved in lodging claims, defending claims and being represented in new ownership structures.

The difficulty comes in more generally on account of the enmeshment of gendered principles in kinship relationships and descent systems. These are not necessarily discriminatory, and in some contexts may even be protective. However, colonial regulations, which became common practice, along with other social factors have combined to encourage patriarchal controls. Families, clans, neighbourhoods, traditional wards and traditional councils all favour succession to office by men, though not exclusively. Men also conflated their succession to office with heritability of land. Women must navigate a difficult path through customary succession norms that are fundamentally linked to access to, and control over land and resources. Research indicates that women are increasingly finding avenues for asserting their rights to land in their own right; and challenging male authority over land. Since 1994 the trend for single women applying for land or succeeding to land in communal areas has increasingly become a customary norm (see Ben Cousins, 2017, in Hornby, Kingwill, Royston & Cousins op cit; Claassens, Aninka. 2013. "Recent Changes in Women's Land Rights and Contested Customary Law in South Africa." *Journal of Agrarian Change* 13 (1): 71-92. Claassens, Aninka, and Sindiso Mnisi. 2009. "Rural Women Redefining Land Rights in the Context of Living Customary Law." *South African Journal of Human Rights* 25: 491-516).

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<sup>6</sup> It may become compulsory to declare racial categories in future so that ownership can be monitored by race.

Certification of land is not an official system in South Africa, but in informal records systems both men and women can be, and are, certificate holders.

#### **4.1.4 Women's rights to land within marriage and in inheritance**

In South Africa the implications of marriage and inheritance for property rights are complicated by legal pluralism in land law, family law and succession law. Gender relationships cut across all of these. There is hence no uniform system but a number of intersections and hybridised arrangements on the ground. Kinship and descent systems continue to influence how property rights are held and transmitted. Gendered relationships are inextricably entwined with property relations, which are reflected most explicitly in the way property is passed on between generations, i.e. who in the family are regarded as rightful successors or heirs to the property.

Women who choose to marry according to civil law can follow the common law rules of succession which entitle direct inheritance by a spouse and children of any gender. The details differ according to whether she marries in community of property or by means of a prenuptial contract, and whether there is a will. However, for many black women the matter is not so clear-cut. Many marry according to customary law where succession and inheritance are different from common law. Conversely, many women who marry by civil law are influenced by customary norms of succession. The landmark *Bhe* Judgement ruled that the common law must apply, pending the development an acceptable customary law of succession that does not discriminate against women or other members of the family. The Intestate Succession Law 81 of 1987 is therefore applicable to all South Africans. This has proved to be controversial, since in reality people continue to follow customary norms of succession; and the *Bhe* judgement is not systematically enforced (Kingwill, 2014; Himonga, C. 2005. 'The Advancement of Women's Rights in the First decaded of democracy in South Africa: the Reform of the Customary Law of Marriage and Succession'. *Acta Juridica*, 2005, 82-107; Mbatha, L. (2002) 'Reforming the Customary Law of Succession'. *South African Journal on Human Rights*, 2002, 259-286.

In short, the issue of the inter-linkage between marriage and succession law in South Africa is in urgent need of consultative reform to bring practice in line with law and the Constitution, rather than trying to impose a legal framework that many people simply side-step.

#### **4.1.5 Women's empowerment and decision-making rights/role within the household**

A major study in 2011 by Community Agency for Social Enquiry (CASE) focused on changing household gender relationships in three communal study sites in different provinces: Keiskammahoek, Msinga and Ramatlabana. The findings are complex but show that living customary law is dynamic and adapting to shifts in power and property relations in the family. Women are becoming increasing assertive in challenging discrimination and gaining decision-making powers. Debbie Budlender, Sibongile Mgweba, Kettleetso Motsepe, Leilanie Williams. 2011. 'Women, Land and Customary Law', Cape Town: CASE. [http://www.cls.uct.ac.za/usr/lrg/downloads/Women\\_and\\_Land.pdf](http://www.cls.uct.ac.za/usr/lrg/downloads/Women_and_Land.pdf)

#### **4.1.6 Women as decision-makers in land policy and practice**

Women occupy high-ranking posts in the government, including Ministerial level, but at lower levels of policy-making their representation is low. Women play a significant role in land advocacy institutions. Women are grossly under-represented on Traditional Councils, which one reason among others that these are being contested.

#### 4.1.7 Marital regimes governing property ownership

There are two statutory systems governing marriage: the Civil law, Recognition of Customary Marriages Act 120 of 1998, while the Muslim Marriages Bill is a first attempt to legalise Muslim marriage. In civil law, there are two main marital property regimes, namely:

1. The marriage in community of property and of profit and loss
2. The marriage out of community of property, where two options exist, namely:
  - out of community of property with the application of the accrual system and,
  - out of community of property without the application of the accrual system.

In South Africa the automatic matrimonial property regime is the marriage in community of property and of profit and loss, unless such is excluded by means of a prenuptial contract.

Consent by polygamous wives in polygamous marriages to new unions by their spouse is now a legal requisite.

## 5. COMMITMENT FIVE

**Concerns rights for Indigenous Peoples:** *Respect and protect the inherent land and territorial rights of indigenous peoples, as set out in ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples, including by recognizing that respect for indigenous knowledge and cultures contributes to sustainable and equitable development and proper management of the environment.*

### General comment

This is not a useful category in South Africa due to the ambiguity of the concept of 'indigenous'. There is good reason to avoid divisive legal ethnic categories that may play into identity politics due to the multi-ethnic makeup of the population. There is a strong pushback by many land advocates against the government's proposed Traditional and Khoisan Leadership Bill (TKLB) to replace the Traditional Leadership and Governance Framework Act 41 of 2003, both of which define authority in terms of old apartheid ethnic boundaries by connecting communal land with traditional authorities and courts and superimposes apartheid tribal identities on those living in the former homeland areas.

### 5.1 Ethnic groups and land distribution

There are no officially recognised 'ethnic groups' in South Africa or officially recognised 'indigenous people' defined by ethnicity and minority status. The Khoisan people (see footnote n1 above) do make claims to 'first nation' status and are sometimes referred to as 'indigenous', but this is descriptive, not a legal category. Unofficially, the homeland 'reserve' areas are dominated by particular cultural groups, but are not officially categorised by ethnicity or indigeneity.

### 5.2 Recognition of inherent land and territorial rights of indigenous peoples

The concept of 'inherent' or 'territorial' rights is problematic in South Africa due to historically successive and overlapping claims to land. People's rights are in reality influenced by ethnic identity and ethnic markers in the former reserves or homelands. Groups of people may win awards of land through restitution on the basis of being a 'community with shared rules', in some cases with proven links to ancestral rights, which usually rely on acceptance of customary norms. Legal arguments in court

cases are increasingly relying on the idea of indigenous rights or 'underlying customary rights' to confirm customary law, but this is a generalised argument and not specific to ethnicity.

### 5.3 Laws governing environments of indigenous peoples e.g. forests

Restitution claimants or rights claimants with group identities do defend their rights or claims on the basis of customary law and an implied indigeneity and this is increasingly infusing case law, e.g. *Richtersveld* as discussed above, and by successful restitution claimants on the east coast of the former Transkei, known as Dwesa-Cwebe, who in a fresh case are defending their rights to coastal marine resources on the basis of customary living law (see Gongqose case mentioned above). The Constitutional Court has made it clear that customary law must be treated as equal to the common law (see *Richtersveld* and *Bhe* judgements discussed above). There is a tension between 'living' customary law principles and statutory law and common law. The official national frameworks governing natural resource use draw from the latter, and do not recognise customary law norms. Harmonising customary law, indigenous rights and the common law is far from resolved or settled. There are likely to many more legal cases that will have to adjudicate these tensions and establish new normative frameworks through legal precedent.

## 6. COMMITMENT SIX

**Concerns local management of ecosystems, environmental impact, and sustainability:** *Enable the role of local land users in territorial and ecosystem management, recognizing that sustainable development and the stewardship of ecosystems are best achieved through participatory decision-making and management at the territorial-level, empowering local land users and their communities with the authority, means and incentives to carry out this responsibility.*

### 6.1 Laws or policies regarding sustainable land use or management

The Spatial Planning and Land Use Management Act (SPLUMA) of 2013 consolidated all previous national and provincial laws and creates a framework for municipal control of land use planning. Along with Environment Impact Assessment legislation and legislation regulating marine and mineral resources, a comprehensive set of land use policies and laws exists to control land use planning and the regulation of resources. The Marine and Living Resources Act 18 of 1998 (MLRA) establishes measures 'for the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources and the orderly access to exploitation, utilisation and protection of certain marine living resources; and for these purposes to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa'. The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) which concerns 'provision for equitable access to and sustainable development of the nation's mineral and petroleum resources' are examples of national statutes. The National Water Act 36 of 1998 provides for the progressive establishment of Catchment Management Agencies (CMAs) in 19 water management areas (WMA) throughout South Africa. 'CMAs will take over responsibility for managing water resources at catchment management level. They are required to do so in cooperation with local stakeholders and as such to consult and seek co-operation and agreement on water-related matters from the various stakeholders and interested persons. CMAs will manage water resources and coordinate functions of other water management institutions within WMA's'.

<http://www.dwa.gov.za/IO/Docs/CMA/CMA%20GB%20Training%20Manuals/gbtrainingmanualchapter3.pdf>

The statutory framework is comprehensive. However, as discussed, official laws and regulations continue to be at odds with customary law in many circumstances where land and natural resources fall within the ambit of customary lands or use. There is hence ongoing development of case law to establish the right of people to the use of land, mineral, forest and marine resources on the basis of 'custom'. See <http://www.customcontested.co.za/> and case material, e.g. Richtersveld judgement, Bhe judgement and Gongqose case, among others.

## **6.2 Deliberate actions by the national or subnational government to protect and involve individuals and communities in protecting the environments and land that they use**

In theory, South African land use frameworks advocate for involvement by local stakeholders, but in practice these processes have proved to be very contentious, each case with its own history of struggle. There are major imbalances in power between different segments of society, particularly those with formal property rights versus those without.

## **6.3 Large-scale participatory land use and mapping exercises**

There is a long history of NGOs making use of participatory methodologies for land use and mapping. There are mixed results for the extent to which these exercises influence state policy but they remain fairly localised unless the projects become part of national-wide advocacy around particular issues. State departments are not generally equipped to carry out participatory planning and NGOs still tend to be the watchdogs of state planning exercises to ensure genuine participation.

## **6.4 Laws or policies guiding large scale land use that protect the environment**

See also 2.2.4 above. All municipalities and provinces must have spatial development frameworks and Integrated Development Plans (IDPs) in terms of various laws. There is enforced legislation on environmental impact assessments (EIAs) that are obligatory for all land developments.

The laws are used but sometimes the municipal planning exercises are somewhat cursory and do not genuinely involve all stakeholders, particularly those whose rights are unregistered as in communal areas, or vulnerable as in informal settlements. State planning and EIAs are often not inclusive and landowners are over-represented.

## **6.5 Academic research, land tenure assessments, reports**

South Africa has a massive archive of academic and applied research and assessments on land issues. For a comprehensive recent assessment of land law and policy see:

[https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/HLP\\_Report/HLP\\_report.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf)

See also

<https://afra.co.za/>

<http://www.plaas.org.za/>

<http://www.larc.uct.ac.za/>

<http://lrc.org.za/lrcarchive/>

<http://www.customcontested.co.za/>

## **7. COMMITMENT SEVEN**

**Concerns Inclusive decision-making:** *Ensure that processes of decision-making over land are inclusive, so that policies, laws, procedures and decisions concerning land adequately reflect the rights, needs and aspirations of individuals and communities who will be affected by them.*

### **7.1 How inclusive and participatory are decision-making processes regarding land?**

It is not possible to generalise given the diversified and extensive range of sectors and communities involved in land issues. In general people with weak rights are the least able to influence policy and decision-making. The Department of Rural Development and Land Reform (DRDLR) is frequently criticised for not adequately consulting and allowing for inclusive and participatory processes. All Bills before Parliament are subject to public response processes. The general feeling among NGOs is that ordinary people are largely excluded in national, provincial and local decision-making processes.

NGOs are vigilant in monitoring consultation processes. In one case, the Constitutional Court declared a law invalid on the grounds of inadequate consultation and made the state pay. In 2015 the Land Access Movement of South Africa (LAMOSA), Nkuzi Development Association (Nkuzi), AFRA and three Communal Property Associations brought a direct challenge to the Constitutional Court regarding the Amendment Act to the Restitution of Land Rights Act, 22 of 1994 which was, signed into law 30 June 2014. The judgement maintained that Parliament and the Provincial Legislatures failed to comply with their constitutional obligation to facilitate public involvement before passing the Amendment Act. (Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others (CCT40/15) [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (28 July 2016))

A major sector of concern regards mining rights on communal land, where the rights holders are not consulted about contracts entered into between mining houses and traditional leaderships structures. This leads to dispossession of land rights and accrual of benefits to traditional authority institutions and companies that are established to handle the finances. See sections 8 & 9 below for more detail.

### **7.2 Do policies, laws and procedures concerning land reflect the rights, needs and aspirations of communities who will be affected by them?**

Land issues in South Africa are spread between a great number of institutions, and it is not possible to generalise. Some legal frameworks do reflect rights, needs and aspirations of vulnerable people, e.g. the Constitution, protective land rights legislation and local government planning regulations, but the actual implementation has been weak and ineffectual. Ordinary people have little say and are mostly excluded in decision-making, including mining deals. Implementation usually favours those with stronger property rights, capital and ability to use law to protect their interests. Advocacy groups and organisations thus often step in to help vulnerable communities contest abuse of their rights in the courts. The Constitutional Court has proved to be the most effective protector of vulnerable rights, but their judgements in favour of rights holders are often not implemented.

### **7.3 Is civil society organized and able to influence policy formulation and implementation?**

South Africa has a large network of civil society organisations. They play an active role in engaging with government and assisting poor communities in court cases. They do sometimes manage to influence policy and implementation, and sometimes not. Their advocacy has in some cases blocked legislation.

The weak and ineffective implementation of progressive land rights policies and laws has led to a great deal of litigation, often lodged by NGOs on behalf of communities. The judiciary has become a mainstay for protecting constitutional rights, rather than the legislature and executive.

#### **7.4 Civil society collaboration with the government and other stakeholders**

In general, civil society institutions collaborate with the government if genuine gains can be made for the communities they represent. The change of presidency may lead to escalation of cooperation, and less fear of compromise. The Land Access Movement of South Africa (LAMOSA) make co-operation one of their missions, and, in addition to civil society groups, co-operates with the Department of Rural Development and Land Reform (DRDLR), the Department of Agriculture, Forestry and Fisheries (DAFF), National African Farmers Union (NAFU), and the Congress of Traditional Leaders of South Africa (CONTRALESAs).

There are many examples of co-operative arrangements even though these are difficult to sustain, e.g. the local chapter of the South African National Civic Organisation (SANCO) in Monwabisi Park informal settlement in Cape Town has a co-operative arrangement with the City of Cape Town with regard to the enforcement of local management rules around land use and tenure.

There have been many calls from civil society for more inclusive platforms for input and engagement around land policy; however, the relationship between the DRDLR and civil society has been marred by suspicion and mistrust on both sides. The fall of the National Land Committee (which was a network of land organisations in South Africa, spread across all provinces) a decade ago has left a long-standing gap in a coherent non-governmental voice and ways of engaging around legislative and policy developments and advocacy. A vast range of litigation relating to land governance has resulted from the efforts of different organisations, producing some powerful jurisprudence upholding the land rights of marginalised groups. This has, however, also further impacted on the poor relationship between Government and civil society.

A series of national workshops around the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGTs), begun in 2014, saw a consistent call from civil society for a national multi-stakeholder platform (MSP) for engagement around land governance, which led to a national workshop in 2017 to establish the MSP, which it is hoped will be taken forward constructively during 2018. South Africa has, in addition, seen the recent election of a new President on the 15 February 2018, who has called for increased collaboration with civil society, and promised a renewed commitment to land reform.

#### **7.6 Societies and advocacy movements on land in the country**

There are large numbers of land advocacy organisations and movements in South Africa. Some of these include:

*Rural alliances, social movements and NGOs:* the Alliance for Rural Democracy (ARD), the Association for Rural Advancement (AFRA), the Border Rural Committee (BRC); the Land Access Movement of South Africa (LAMOSA), the Landless People's Movement (LPM), Lawyers for Human Rights (LHR); the Legal Resources Centre (LRC), the Nkuzi Development Association (Nkuzi), The Socio-Economic Rights Institute of South Africa (SERI), the Support Centre for Land Change (SCLC), Transkei Land Service Organisation (TRALSO); Tshintsha Amakhaya (TA), the Trust for Community Outreach and Education (TCOE), and Women on Farms Project.

*Urban:* Shack Dwellers International (SDI); Ndifuna Ukwazi, Violence Prevention for Urban Upgrading (VPUU); Development Actin Group (DAG); Abahlali baseMjondolo

*State institutions and Land Administration:* The Land Governance Transformation Network (LGTN); Public Affairs Research Institute (PARI)

*Research and advocacy:* The Land and Accountability Research, University of Cape Town (LARC)

*Legal organisations:* The Legal Resources Centre (LRC); Lawyers for Human Rights; Section 27

*Constitutional Rights:* Council for the Advancement of the South African Constitution (CASAC)

Land-focused CBOs and NGOs are largely at loggerheads with government over a variety of different issues and cases. The work focuses on the rights of the poor and those whose rights are insecure.

- Farm dwellers, including labour tenants
- Communal land rights
- Natural resource rights
- Land Administration reforms

In 2017 the Speakers' Forum, Parliament appointed the High Level Panel on the Assessment of Key Legislation (HLP) for responses to existing laws and policy. The High Level Panel (HLP) aimed to review legislation with a bearing on transformational goals of the post-apartheid state, and to assess implementation, identify gaps and impediments and propose action steps including strengthening, reviewing and/or amending identified laws by Parliament. One of the four committees was 'Land reform, restitution, redistribution and security of tenure' which generated a large body of material. See: <https://pmg.org.za/call-for-comment/441/>

Land advocates developed an informal network known as 'Collaboration on Alternatives for Land Policy and Law' to make submissions to the HLP. The collaboration involved a series of workshops and the production of a mass of reports and policy response that were submitted to the HLP on all aspects of land right and tenure with the view to framing alternative legal frameworks for all segments of society with weak land rights. Some members of the group also participated in round table discussions with the HLP members, and a post-HLP process by the Collaboration met in early 2018 to take the recommendations further. The submissions were organised around the following themes:

- Traditional leadership governance: Traditional and Khoisan Leadership Bill (TKLB)
- Redistribution
- Restitution (including CPAs and CPA Amendment Bill)
- Spatial inequality (urban land reform)
- Communal tenure (land records, Interim Protection of Informal Land Rights Act, (IPILRA), Communal Land Tenure Bill (CLTB), iNgonyama Trust)
- Farm dwellers & labour tenants
- Mineral rights (MPRDA)

A summarised version of the reports was published in a general HLP report in November 2017. <https://www.parliament.gov.za/high-level-panel>

## **7.6 Are land related policy formulation and review open for public hearings? Are public hearings open for all civil society? Have inputs from civil society led to some pro-poor land laws, policies and clauses?**

Policies in the form of Green and White papers and Bills before Parliament are generally made available for public comment. Inputs and advocacy have helped to strengthen the pro-poor and pro-rights orientation of legislation, policies and causes, but this is a highly uneven process that cannot be generalised. In many cases the interventions have simply helped to postpone the passage of legislation, e.g. the Traditional Courts Bill, the Amendment to the Restitution Act, the Communal Land Rights Bill, where a previous version was declared unconstitutional due to the advocacy and support from civil society organisations. There is a vigorous process of civil society engagement with land policy and law in South Africa, but much of the chorus of criticism has been ignored by the state, particularly the Department of Rural Development and Land Reform, and hence many conflict cases go to court and to the Constitutional Court. The new Presidency has ushered in hope for greater scope for consultation and influence, and already there has been some consultation with PLAAS.

The High Level Panel (HLP) report strongly criticised the government's poor implementation of land reform. As mentioned above, Parliament established the HLP in 2016 to investigate the impact of legislation in respect of (a) the triple challenges of poverty, unemployment and inequality; (b) the creation of, and equitable distribution of wealth; (c) land reform, restitution, redistribution and security of tenure; (d) nation building and social cohesion. The HLP involved a review of legislation, assessment of implementation, identification of gaps and proposals for action with regard to existing legislation that enables the transformational goals of the developmental state, as well as laws that impede this goal. The HLP criticises the state for:

... no policy direction, no political leadership, almost no budgetary allocation, massive mismanagement, institutional incapacity, and corruption. It puts out several very powerful arguments of what should be done. One of the most powerful suggestions is that there should be a new piece of legislation stating what is justice and what is equity across all categories: redistribution, restitution, tenure reform. We need to see whether the new dispensation under the new president is willing to take up this suggestion. (Marelise van der Merwe, 'The Interview: PLAAS's Professor Ruth Hall on land, and what you should – and shouldn't – worry about', Daily Maverick 29 March 2018).

## **8. COMMITMENT EIGHT**

**Concerns transparent and accessible information:** *Ensure transparency and accountability, through unhindered and timely public access to all information that may contribute to informed public debate and decision-making on land issues at all stages, and through decentralization to the lowest effective level, to facilitate participation, accountability and the identification of locally appropriate solutions.*

### **8.1 Is land governance data transparent and accountable?**

Data on registered property parcels and ownership held in the Surveyor General's Office and Deeds Registry is largely transparent and accountable. There was some erosion of integrity between 2011 and 2014.

The public has access to this information. However, information and data relating to off-register rights is not available, as the data is not recorded. In addition:

- Housing waiting lists in urban areas are notoriously difficult to monitor and there have been cases of abuse, corruption and lack of accountability.
- Information regarding Traditional Councils is not accessible or accountable, except perhaps at localised levels in oral representations and local traditional courts. Court documents are available to researchers.
- Information regarding mining deals on communal land is not transparent or accountable to the land rights holders.
- Restitution and redistribution case material is available to researchers, but not easily accessible.

Parliament has Portfolio Committees that are supposed to report on progress on all major policy and implementation developments, which provide good information on the progress of implementation. Members of Parliament are, in theory, able to be held to account to answer questions regarding any matters of governance, but this has not been rigorously used for land governance.

The Parliamentary Monitoring Group (PMG) is an information service established in 1995 as a partnership between Black Sash, Human Rights Committee and Idasa with the aim of providing a type of Hansard for the proceedings of the more than fifty South African Parliamentary Committees for these three advocacy organisations.

## **8.2 Availability of laws and/or information about laws to the public**

There is more access to information in South Africa than most African countries. The Promotion of Access to Information Act 2 of 2000 (PAIA) obliges the state to make unclassified information available to the public. However, the quality of general statistical information on land tenure, governance, redistribution and restitution is vague, contradictory and unreliable. It is difficult to draw conclusive statistics from the information, which impinges on policy formulation. See Ben Cousins, 9 March 2018. 'South Africa's land debate is clouded by misrepresentation and lack of data' (<https://theconversation.com/south-africas-land-debate-is-clouded-by-misrepresentation-and-lack-of-data-93078>)

## **8.3 Census and government or government-recognized surveys**

The national census takes place in theory every 5 years (the last was in 2011) and the date is readily available on the Stats SA website. <http://www.statssa.gov.za/>. The census collects valuable information at individual level on all aspects of society including land, but not at the level of household rights in the case of off-register rights holders. Land Administration advocates are advocating for land related material to be added to the national census to be an important source of information for a potential land records system for off-register rights.

## **8.4 The general perception on the level of corruption amongst different authorities and users on land issues**

Corruption in South Africa has penetrated through all layers of society and during the presidency of Jacob Zuma became enmeshed in governance. However, the perception of the Land Registry is that is mostly free of corruption. However, in 2011 several high-ranking officials were suspended for corruption and in 2014 the e-cadastre project had to be suspended due to charges of corruption. The Land Bank was at one stage associated with charges of corruption among high-ranking officials.

In housing and informal settlements projects there are public perceptions of corruption aimed at local government institutions and their contractors with regard to beneficiary lists and access rights.

With regard to land reform, some major and minor cases of corruption have been uncovered, but it is not regarded as out of control. Research by some LGTN researchers is being proposed to evaluate the levels of corruption in the institutions that are responsible for land information systems and deeds registration.

Unaccountable deals and structures have resulted in mining deals where traditional authorities act like unofficial agents to the mining corporations and sign contracts with them, thus disregarding the IPILRA rights of the land holders is regarded as a form of corruption.

### **8.5 Access to information laws and the accessibility of land data**

The Promotion of Access to Information Act 2 of 2000 ((PAIA) gives effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights. The Act is generally regarded as effective.

### **8.6 The translation of laws into local languages**

South Africa has nine official languages and laws are translated into these languages.

### **8.7 Periodic land related law and policy reviews and discussions at national and sub-national levels**

A good example of a major law review is the HLP report released in 2017. See also section 7.6 above.

In 2017 the Speakers' Forum, Parliament appointed the High Level Panel on the Assessment of Key Legislation (HLP) for responses to existing laws and policy. The High Level Panel (HLP) aimed to review legislation with a bearing on transformational goals of the post-apartheid state, and to assess implementation, identify gaps and impediments and propose action steps including strengthening, reviewing and/or amending identified laws by Parliament. One of the four committees was 'Land reform, restitution, redistribution and security of tenure' which generated a large body of material. [https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/HLP\\_Report/HLP\\_report.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf)

Policies are generally made public and Bills are available for public comment. There are thus quite robust public engagements around policy, but these are not considered sufficient or satisfactory. See section 7 above.

### **8.8 Can the media and civil society organizations freely report/disseminate on local land issues?**

Yes, at a regional and national levels. At local levels there have been cases of intimidation, violence and even assassinations. Localised struggles invoke sensitivities that revolve around local allegiances and community power struggles that often involve ethnic or local 'identity' issues. One such case was the assassination of a grassroots leader of the Amadiba Crisis Committee in Xolobeni, Transkei.

### **8.9 Participation of communities in commune/local level meetings with local authorities to address and solve land related issues**

Sometimes nominal consultations are held, but often with elites and not ordinary people. Local level consultation is not considered efficient or effective.

## 8.10 The decentralization of land administration

This is a crucial issue. Land Administration is completely fragmented in post-apartheid South Africa, with virtually no state system to regulate off-register rights. The formal system is centralised in the Deeds Registry and Surveyor General Office, which do have provincial offices.

The Land Governance Transformation Network (LGTN) has recently been formed by land advocates to advocate for land administration reconstruction, for a decentralised land administration system and local land records system for off-register rights. See also explanations of land administration breakdown under Commitment One above. The details can be found in the HLP report. [https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/HLP\\_Report/HLP\\_report.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf)

## 9. COMMITMENT NINE

**Concerns effective actions against land grabbing:** *Ensure transparency and accountability, through unhindered and timely public access to all information that may contribute to informed public debate and decision-making on land issues at all stages, and through decentralization to the lowest effective level, to facilitate participation, accountability and the identification of locally appropriate solutions.*

### 9.1 Are investments made with free, prior and informed consent of existing landowners/ users?

Investments in mining on land held by customary rights holders is a burning issue, and subject of much controversy currently<sup>7</sup>. The affected groupings of rights holders comprise a large number of people of all age categories who are mobilised and relatively organized. They articulate the issues surrounding mining, but the abuses of their rights are not being systematically addressed.

The HLP reported that the Department of Mineral Resources (DMR) advises mining houses to contract with traditional leaders rather than the people whose land rights are at stake. In an attempt to put the DMR's interpretation of the powers of traditional leaders beyond legal doubt and legal challenge the Traditional and Khoi-San Leadership Bill of 2015 (TKLB) provides for the repeal of the TLGFA and explicitly gives traditional leaders the power to enter into agreements with third parties about communal land (clause 24). The Bill provides for no consultation whatsoever with affected rights

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<sup>7</sup> Open Society Foundation for South Africa. 2017. *In Good Company? 2nd Edition: Conversations around transparency and accountability in South Africa's extractive sector*. Open Society Foundation. Available at: <http://www.customcontested.co.za/bapo-ba-mogale-money-looted>; Pickering, J. & Nyapisi, T. 'A community left in the dark: the case of Mapela - Struggles for transparency and accountability in South Africa's Platinum Belt' in *In Good Company? 2nd Edition: Conversations around transparency and accountability in South Africa's extractive sector*; Capps, Gavin. 2016. *Tribal-Landed Property: The Value of the Chieftaincy in Contemporary Africa*. *Journal of Agrarian Change*, 16(3), 452-477. Capps, Gavin, Dunbar Moodie and R. Bush (eds). *Review of African Political Economy Special Issue: White gold: new class and community struggles on the South African platinum belt*, 42:146; see SWOP working papers on <https://www.swop.org.za/working-papers>, including Capps, Gavin., and Malindi, S. 2017. *Dealing with the Tribe: The Politics of the Bapo/Lonmin Royalty-to-Equity Conversion*. Working Paper: 8. Johannesburg: Society, Work and Development Institute (SWOP), University of the Witwatersrand; Mnwana, S., Mtero, F. and May, H. (2016) *Dispossessing the dispossessed? Mining and rural struggles in Mokopane, Limpopo*. Working Paper: 7. Johannesburg: Society, Work and Development Institute, University of the Witwatersrand

holders, and is unlikely to pass constitutional muster.

## **9.2 Are contracts transparent?**

No, contracts are entered into between mining corporations and traditional leaders, causing major contestation and protests. Rights holders are neither consulted nor apprised of the details of the contracts. This means that rights holders are being dispossessed of their rights. Hundreds of millions of rands paid over to traditional councils by mining houses have not been accounted for (HLP report).

## **9.3 Impact forecasts/environmental impact assessments prior to investment**

EIAs are compulsory but EIAs are, by law, commissioned and paid for by the investors themselves, and hence not considered impartial. There are major health impacts of mining on local communities that are not being adequately controlled.

## **9.4 Compensation and land restitution offered in cases where there are impacts on human rights**

In law and theory compensation and land restitution should be offered, but in practice, people with off-register rights often suffer loss of land rights without any compensation.

The Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) is explicit regarding the protection of rights and the payment of compensation for deprivation. However, while IPILRA recognises and seeks to secure the undocumented rights of people who own or use land, it has been almost universally ignored by mining companies and the Department of Mineral Resources in the negotiation of mining rights on communal land.

The HLP pointed out that revenue or compensation from mining should be paid to land rights holders with IPILRA rights, and not to the state as the 'registered owner'. For example, where a mining company uses land in terms of a mining right granted in terms of the MPRDA, it is obliged to pay compensation to the owner. Such compensation should be paid to the people who are deprived of the use of the land, namely the holders of informal rights to the land, and not to the state (the registered owner).

There is overwhelming evidence that mining has led to land dispossession and loss of livelihoods, while there are no real benefits for mine-hosting communities. The HLP recommended an amendment in relation to compensation for loss of land and livelihoods, for the transparent sharing of benefits accruing from mining, and for explicit compliance with IPILRA before the granting of a mining-related right. The HLP revealed that the Department of Mineral Resources (DMR) advises mining companies to transact directly with traditional leaders even where they have no legal authority to do so, and have not complied with the financial oversight and composition requirements set out in law.

## **9.5 Formal vs informal markets**

The formal market operates fully with regard to surveyed and registered private property. However, there is a thriving informal land market in off-register rights. There is an informal land market that operates according to local norms and principles, including local witnessing, often using adapted affidavits (Barry & Kingwill, Report on Monwabisi Park Land Records to VPUU, March 2017, Rutsch Howard Consortium. 2004. Extra-Legal Land Markets in Kwazulu-Natal. Durban: KwaZulu-Natal Provincial Planning and Development Commission).

## **9.6 Investments in land resources**

The main investments are in mining. Example of contracts with traditional leadership structures are: Lonmin and the Bapo ba Mogale traditional authority in North West, Anglo American Platinum and Kgosi David Langa in Mapela, Limpopo, and Pallinghurst and Kgosi Nyalala Pilane of the Bakgatla ba Kgafela traditional council in North West. Another example is that of Mineral Commodities Limited (MRC) and the Xolobeni community in the Eastern Cape (HLP report).

The HLP recommended that the Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002 should be amended to ensure that revenues from mining-related activities as well as opportunities generated by such mining activity are shared in an equitable and transparent manner among people whose land rights are directly affected. The recommended amendments are:

- To include clear and binding financial and administrative protocols for entities that purport to represent community interests and companies that do business with them, including accountability mechanisms that align with customary law principles of transparency and accountability.
- To provide for a Charter to protect and promote customary and artisanal small-scale miners, and set a framework for the participation of communities in the sustainable and equitable exploitation of the resources of their communal land.
- To expressly provide for the suspension or cancellation of mining rights where a company has significantly failed to meet its Social and Labour Plan and B-BBEE commitments. This power has never been used, so must be made explicit to put the matter beyond doubt. This involves Section 47 — Minister's Power to Suspend or Cancel Rights, Permits or Permissions.
- To establish a mechanism to independently investigate and advise on community grievances in an efficient, democratic and transparent fashion.

### **9.7 Centralized investment State agency**

State agricultural marketing agencies were dismantled at the end of the apartheid era. There are a number of private sector institutions, such as the Chamber of Mines and Agri-South Africa that provide advice to investors.

## **10. COMMITMENT TEN**

**Concerns the protection of land rights defenders:** *Respect and protect the civil and political rights of human rights defenders working on land issues, combat the stigmatization and criminalisation of peaceful protest and land rights activism, and end impunity for human rights violations, including harassment, threats, violence and political imprisonment.*

### **10.1 Harassment, threats, violence and political imprisonment of land defenders**

In general, land rights defenders are free from harassment, threats, violence and political imprisonment, but there are parts of the country where local human rights defenders have been threatened and even assassinated, particularly in hotspots around traditional authority controls in KwaZulu-Natal and the platinum belt in the north western provinces.

## **10.2 Cases of land rights defenders killings or violence reported or recorded by civil society and watch groups**

There have been cases reported at localised levels where power struggles are embedded in local allegiances of control of resource networks. At regional and national levels, land rights defenders' lives are generally not threatened. As discussed above, there have been cases of assassinations in communities where there is competition over political control over resource, notably in KwaZulu-Natal and the northern parts of the country with mining interests. There was a highly publicised assassination of a local anti-mining activist, head of the Amadiba Crisis Committee in the former Transkei, around the Xolobeni mining deal.

## **10.4 Independent national human rights institutions that monitors land rights issues and abuses at national and sub-national levels**

In addition to several organisations listed in 7.5 above, there are state institutions that are in theory independent. Section 9 of the Constitution established a group of organisations to guard democracy, known as the 'Section 9 Institutions'. The institutions are:

- the Public Protector
- the South African Human Rights Commission (SAHRC)
- the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission)
- the Commission for Gender Equality (CGE)
- the Auditor-General
- the Independent Electoral Commission (IEC)
- an Independent Authority to Regulate Broadcasting.
- the Independent Communications Authority of South Africa (Icasa)

Their independence has been compromised at times, particularly during the corrupt former Presidency of the country, who appointed partisan leadership in some of these institutions. There is pushback from society and new political leadership under a new President. The highly acclaimed former Public Protector, whose office provided rigorous research into accountability failures, was replaced by a compliant Public Protector when her term of office expired.