Discussion document for LandNNES

Inclusive Land Administration
in the context of People Centred Land Governance

The document is termed a 'discussion document' to illicit comments and responses

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1 SECTION A: INTRODUCTION AND PROBLEM STATEMENT

1.1 Introduction

LandNNES identified serious weaknesses in land governance in South Africa as an obstruction to land reform, and identified Land Administration (LA) in particular as weak, fragmented and poorly conceptualised in relation to the land reform sector. LandNNES commissioned the formulation of a conceptual framework to set out a clear exposition of what we mean by Land Administration, why it matters and how it can be improved and adapted to meet the needs of all citizens, and not only the elites. The purpose of the document is to inform an advocacy strategy and appropriate policy response for strengthening Land Administration. The document also aims to start a process towards developing a common understanding of Land Administration to inform an appropriate and coherent response to the breakdown in Land Administration in South Africa.

In general, the discussion document attempts to clarify the concepts and forward processes that need to be understood and agreed on. This is important since it is likely that the ideas and recommendations will form the basis for further action in the form of policy proposals and advocacy issues around LandNNES wishes to build to inform strategies for engagement and for developing pilots to test new approaches.

The document is divided into five sections.

1. The **first section presents a problem statement of Land Administration** as a critical land reform issue in South Africa, in order to frame the motivation for LandNNES to develop a conceptually strong and compelling case for developing an advocacy strategy around the need to repurpose Land Administration. LA was not identified as a land reform issue during the Constitution-making process; instead, 'tenure reform' was thought to cover land administration. Tenure reform is one of three pillars of land reform, the other two being restitution and redistribution. The document clarifies that land tenure, though a core constituent of LA, it is not the same as LA; and the distinctiveness and importance of LA for land reform and constitutional property rights suggests strongly that LA should be reconsidered as a fourth pillar of land reform, since it is critical to the other three legs of land reform. Moreover, all three legs of land reform have suffered from severe weaknesses in LA due to the inability to build a durable LA infrastructure to record and support legally recognised rights in a sustainable and enduring way. The test of durability is whether the evidence of a right stands up to long-term administrative and judicial scrutiny.

2. The **second section defines what we mean by Land Administration**, focusing on terminology, definitions and the governance aspects of Land Administration. It includes a brief summary of the evolution of Land Administration as a concept of governance in capitalist market economies and what the evolution of this concept in a land reform context implies. In order to bridge the original and extended concept of LA, the section covers:

(a) the development of LA in the west as a distinct sphere of land governance in the context of increasingly market-driven land allocation, for which high levels of specificity are required in defining boundaries through surveyed land parcels and defining owners through contractual arrangements, culminating in registration;

(b) the adaptation of LA (or the need for adaptation) in contexts where the formal market is not the sole allocator of rights, and individual surveyed land parcels are not available or feasible, which means that the conventional framework of Land Administration has to be modified.

The significance of the two frames is that there are relentless debates about whether the latter should be adapted to meet the former or the former adapted to meet the latter. This document takes the latter approach, a conclusion that is based on empirical research and observation.

3. The **third section focuses on the particular challenges of Land Administration in South Africa** in the context of growing realisation that the registration system is not serving the needs of the majority of the population who have so-called 'off-register' or unregistered rights. The need to modify the conventional Land Administration system is becoming an urgent prerogative in South Africa (echoed in other African countries) as it is becoming clear that the conventional approach is not working, even for hybrid systems that have adapted to local markets and adopted fairly routine processes of recording transactions through local witnessing and affidavits. Customary norms and practices persist, and must to be factored in to any proposed tenure and land administration reforms. These norms resist full incorporation into the conventional LA system on account of the layered boundaries and access rights. The section looks at alternative forms of adjudication, documentation or recordal and enforcement, and includes a set of recommendations and proposals for repurposing Land Administration to overcome the weaknesses at present.

4. **The fourth section looks at the problem in the global context, since it is not peculiar to South Africa**. Calls for the need to modify LA are becoming stronger in many parts of the world, backed up by new methods and technologies for recording rights in innovative ways, using GIS. Many United Nations, World Bank and other international institutions are beginning to re-think the conventional LA approach in growing acknowledgement of its shortfalls when applied to post-colonial and post-conflict regions and countries with mixed tenure legacies and multiple legal systems. The latter refers to the simultaneous observance of indigenous or customary practices, customary law, common law, civil law, statutory law, religious law, etc. These manifest in varying combinations in different countries, and with varying degrees of recognition by the state. The section looks at the development of new tools and systems, using modern digital technology, for recording rights that do not fulfil the requirements of the cadastral system. These new approaches have influenced some of the ideas mentioned in Section 3 above, and provided added motivation for the adoption of new tools.

5. **The fifth section is a proposal for implementing a series of pilots in different contexts in South Africa** to test new processes, tools and records using alternatives to the conventional system of registration. The proposal for piloting is to acknowledge that a great number of variables are involved in creating new systems of land tenure information, and pilots are

essential to identify common standards, reduce risk and create the necessary baseline evidence for design and budgeting.

1.2 Problem statement

LandNNES has identified serious problems in Land Administration (LA) in South Africa, which require urgent intervention. It is common cause that state LA has collapsed in some sections of society in South Africa, or is too fragmented to be effective, or is simply absent.

LA is needed to provide a coordinated response to spatial planning and land use management, tenure and succession law, environmental management, taxation and revenue, etc, all of which require an integrated land information system. The importance of alignment is critical. In South Africa the functions are fairly well aligned when it comes to property that falls firmly within the cadastral system of tenure and use, but is completely out of alignment or simply non existent when it comes to properties that fall outside the formal property system which is cadastrally defined. For most South Africans, LA provides no overarching administrative support to secure tenure, since it is fragmented across different legal systems, sectors, jurisdictions and settlements.

One of the causes of fragmented systems of LA is the legacy of colonialism and conquest, where customary law was largely superseded by common law or civil law systems, and only a small relic of customary law was preserved, largely restricted to issues of governance of land and family life. This **resulted in legacies of legal pluralism**. The presence of more than one system of law is known as legal pluralism. The concept includes norms and practices that are not necessarily recognised (or fully recognised) as law. We refer to these as 'normative orders'. The way people think about, and practice land tenure is informed by sets of norms (ordered into law or unofficial law) that govern all the aspects of land tenure, such as allocation, succession and inheritance, spatial delimitation or demarcation of boundaries, how land is valued, how and where information is held (orally, in pieces of paper, in digital records and/or in deeds, etc) and also systems of authority for these functions. Authority is exercised at different levels from families through communities to the state (and off-register systems may not even involve the state).

Although the Constitution has a clear set of national values, principles and aspirations, with a set of laws that began to meet them, the **day-to-day implementation of land-related policies occurs through the mechanisms of Land Administration**. If LA is weak, implementation will fail, and it is here that disjuncture is experienced. In poorer settlements land governance is often localised at community level, often operating unofficially or extra-legally. In informal settlements governance is usually undertaken by local structures that are not endorsed by government, though may enter into negotiations or temporary partnerships with government. The absence of state LA institutions means that local institutions proliferate and become increasingly embedded in local dynamics and conflicts. Sometimes multiple institutions compete for control over functions of land governance exacerbating the potential for conflict. The proliferation of social networks and institutions adds further layers of complexity. These networks seldom disappear with formalisation.

The official South African formal system of registration comprises the registry system that is designed to provide registered rights holders with various levers to activate the maximum benefits from ownership, such as credit or bonds, returns on investment and rateability which guarantees quality service provision. These require capital, which most people with off-register rights do not have. Contra to the views of many influential policy makers, simply registering off-register rights without adapting the system of LA to the underlying norms and practices does not automatically transform them to comply with the Deeds registry system. This process of formalisation is likely to result in superficial changes that do not address the deeper symptoms of exclusion. These deep-seated problems keep the rights of the majority outside the formal property structure even if titles are issued. Research suggests that the poor tend to revert to extra-legal mechanism to manage their property. These patterns need to be better understood.

Figure 1: Distribution of off-register rights among % SA Population

Numbers and proportions of South Africans holding land or dwellings outside the formal property system in 2011

Location	Number of people	% of SA population (total of 51,8 million)
Communal areas	17 million	32,8
Farm workers and dwellers	2 million	3,9
Informal settlements	3,3 million	6,3
Backyard shacks	1,9 million	3,8
Inner city buildings	200 000	0,38
RDP houses—no titles	5 million	9,6
RDP houses—titles inaccurate/outdated	1,5 million	3,0
Total	30,72 million	59,7

Source: Donna Hornby, Rosalie Kingwill, Lauren Royston and Ben Cousins, *Untitled: Securing Land Tenure in Urban and Rural South Africa*. UKZN Press 2017

The unregistered status of these rights relegates them to the margins of the property system, and they are widely perceived to be 'informal' rights with no legal status. The rights do in fact have legal status as protected rights, but their lack of institutionalisation has meant that rights are not systematically enforced. There have been debates about how to formalise these rights, some believing they should be registered in the deeds office, and others believe they should be recorded in alternative ways. The latter proponents are largely researchers and NGOs with first-hand experience of the problems, who propose alternative systems in order to allow for the flexibility that is needed to record a wider range of relationships and variables than the registration of a title allows. The registration system provides for a one-to-one relationship between a property object and an identified owner(s) who has full powers of alienation. This is at odds with more multiplex relationships that characterise most off-register rights. In customary systems there are usually multiple and overlapping claims to land among family and community members. Some of the land units have porous boundaries which makes surveying into fixed parcels an impossibility.

As a result of this institutional disjuncture, Land Administration is not serving the land reform sector effectively. There are some pockets of excellence that serve the richer members of society, but off-register rights are not publicly regulated in a systematic sense. The rights of the estimated 60% (and it could be rising to 70%) of people whose rights fall outside the formal property system are subject to minimum levels of state regulation. The rights are subject to legal protections, but there is no systematic or overarching management or oversight. There are no state institutions to administer, mediate and adjudicate day-to-day land rights-related issues, and many conflicts that could be administratively solved end up in the courts.

The absence of overarching state land administration institutions in managing off-register rights (adjudicating, keeping records and updating them, regulating transfers, settling disputes, etc) means that there are no means by which authoritative decisions are made concerning land use and ownership. This insulates these systems of rights from many public and private services and benefits, while registered rights remain the only fully legally recognised rights that fit into spatial planning, land use management and revenue frameworks, which makes them eligible for servicing.

The unavailability of land administration institutions to regulate off-register rights results in lack of certainty and dispute; and leaves much scope for conflict with the state over the legitimation of rights. There is thus an over-reliance on the Courts to settle disputes that involve land rights, rather than administrative processes to regulate and reduce disputes and conflict. Judicial process has become a strategy of first resort rather than last resort. This problem is reduced in the system of registration, since systems of registration and recordal are precisely a way of adjudicating rights outside of the courts.

Land Administration is not a preordained system. The way that society recognises land rights and tenures will inform how the Land Administration system is structured. Land policies should ideally be guided by coherent national values, ideals, plans and goals, and Land Administration should be structured and guided by those. In South Africa the Constitution provides a powerful exhortation to follow more inclusive and equitable ideals and goals with regard to land and socio-economic rights, and some legislation was enacted to meet these. In regions of rapid change however, such as South Africa, land policy at the centre seldom holds for the country at large and you find significant disjuncture occurs across and between sections of society and the levels of governance. This happens when the racially configured institutions of the prior regime are dismantled and no clear vision is generated to replace them, leaving only the formally constructed system in place.

In summary, twenty years into democracy there are clearly articulated national aspirations and principles that inform a new dispensation of land rights, but an absence of coherent, overarching and unifying institutions of Land Administration to enforce this 'new breed' of rights. The weaknesses in Land Governance and Land Administration weighs most heavily on the poorest citizens of the country, since there are serious disparities in governance between those with formally recognised and registered assets in land, and the poor whose rights in land are unrecorded. The potential for disaffection threatens the social stability and economy of the whole country.

The document emphasises the need to consolidate a broad understanding of Land Administration in order to rebuild it in a unifying and sustainable way. In the next section we look at what we mean by Land Administration before turning to the particular challenges and potential solutions in South Africa, which is then followed by some examples of international responses to the challenges of LA in developing economies.

2 SECTION B: WHAT IS LAND ADMINISTRATION

2.1 Understanding Land Administration (LA) in the context of Land Governance and Land Tenure

It should be clear that when we speak of Land Administration we are referring to a much broader concept than land tenure and a narrower but critically important element of Land Governance.

2.1.1 Land Tenure

Land tenure, derived from the Latin *tenere* – 'to hold', is a system incorporating the way in which land is defined and held. Land tenure comprises a matrix or constellation of social and legal relationships that support and negate the holding and use of land by individuals or groups of people (Barry 1999). Land tenure is thus a sub-system of land governance, defined in terms of the various tenure forms will be legally recognised through policy, laws and regulations, and implemented and enforced by the various Land Administration measures listed below.

Although land tenure is one among many other elements of LA, it is a foundational and core value that is indicative of how the functions of Land Administration will be geared in a particular country system. It is, however, a common mistake to conflate land tenure and Land Administration, and this flawed assumption has consequences. It is one of the reasons that South Africa did not address LA in its land reform programme, and focused only on particular land tenure laws and their assignment. This has contributed to the fragmented LA system in South Africa.

There are many reasons for this misconception, perhaps mostly because LA and land tenure are so fundamentally linked to the entire property system. Also, the history of land rights dispossession led to a disproportionate corrective focus on 'rights' in post-apartheid SA. Thus 'rights' became the definitive concept for defining, restoring, reforming, amending laws and making laws relating to tenure. There was little conceptualisation of what kind of infrastructure might be required to manage and enforce these rights, which is a necessity given the legacy of legal pluralism in this country.

2.1.2 Land Governance

Land Administration (LA) is also a critical aspect of *land governance*.

"Governance is the exercise of political, economic and administrative authority in the management of a country's affairs at all levels." (Palmer et al 2009). ***Land governance*** refers to the policies, rules, processes and structures (i.e. the institutions) through which decisions are made about access to land and its use, the manner in which decisions are implemented and enforced, the way that competing interests in land are managed, and the way by natural resources are managed. Sound land governance requires a legal regulatory framework and operational processes to implement policies consistently within a jurisdiction or country, in sustainable ways. Land Governance could thus be seen as the overarching process of decision-making around land resources, including responsibility for the implementation of the decisions. From an institutional perspective it includes the formulation of land policy, including land rights, the preparation of land development and land use plans, and the sub-systems for the land administration of a variety of land related programmes. (Enemark, Bell, Lemmen McLaren 2014; Kingwill 2004)

Land governance encompasses statutory, customary and other non-state institutions as well as a range of state structures, including various ministries, provincial departments, municipalities, courts as well as private sector professional institutions such as planning, surveying, conveyancing and valuation. It also includes informal land transaction agencies, developers and community or traditional bodies. It covers the legal and policy framework for land, as well as formal and traditional practices governing land transactions, inheritance and dispute resolution. In short, it includes all relevant institutions from the state, civil society and private sector.

Land governance is fundamentally about power and the political economy of land. Who benefits from the current legal, institutional and policy framework for land? How does this framework interact with non-state, informal and traditional authorities systems? What are the incentive structures for, and what are the constraints on, the diverse land stakeholders? Who has what influence on the way that decisions about land use are made? Who benefits and how? How are the decisions enforced? What recourse exists for managing grievances? (Palmer at al 2009).

The institutions that manage land-related functions in modern democracies are arranged, as for any other governance function, in terms of the separation of powers between the legislature, executive and judiciary. Most LA functions are in the executive, but the political and judicial fields inform them. The structure is:

- Policies and laws set at national parliamentary level
- Implementation of these at the executive level, also involving the private sector and civil society, and is where most Land Administration functions are situated.
- Resolution of civil disputes as well as holding the state to account at the judicial level, also involving new commissions like Public Protectors.

Figure 2: Governance levels of land-related functions

| Land Related Functions | **Policies and Laws**
Constitution; legislature |
	Management (Land Administration) Executive; private; corporate; communities; NGOs
	Settling disputes Judiciary; courts, jurisprudence; Public Protector

2.1.3   Land Administration

Land Administration is the management function that executes government policies and laws, or follows through the legislative decisions. Land Administration comprises the functions that actualise the policies, laws, plans and programmes of the land management system, and could thus be seen as the binding strategy and implementation system.

From the perspective of land rights, Land Administration comprises all the mechanisms that 'actualise' land rights and land use in a way that balances individual and broader societal interests. It must (or should) respond to court judgements that result from judicial adjudication of civil disputes or transgressions by the state. LA comprises the management and execution elements of land governance, providing the glue between the political and judicial spheres to make sure these policies and laws 'stick', and are carried out in line with spirit and letter of the law. However, it would be a mistake to view this as a technical matter blindly carrying out government policy. Land Administration is principally about managing land as a resource, and is structured according to the way a country makes decisions about who can do what where on the land.

Land Administration must adapt to social change. Land-related relationships, and the governance thereof, change and evolve in response to social, political, technological and environmental challenges. Those who are at the coal face of Land Administration are well placed to influence policies and laws, and should do so. LA is an iterative engagement between civil society and the state, and continuously loops back to the political level.

The legislative, executive and judicial spheres collectively circumscribe the processes, institutions and regulation of land-related matters, which is the state's contribution to land governance. None of these spheres of government can meaningfully exist without the other, which is why Land Administration is crucially dependent on inter-governmental co-operation. The latter can only be achieved when the roles of land related institutions are clearly conceptualised and spelt out in policies, laws, regulations, processes, procedures and programmes. Any fuzziness, inequity or poor alignment in one of the fields will upset the entire equilibrium of Land Administration.

Figure 3: Conventional Land Administration Structure and Functions
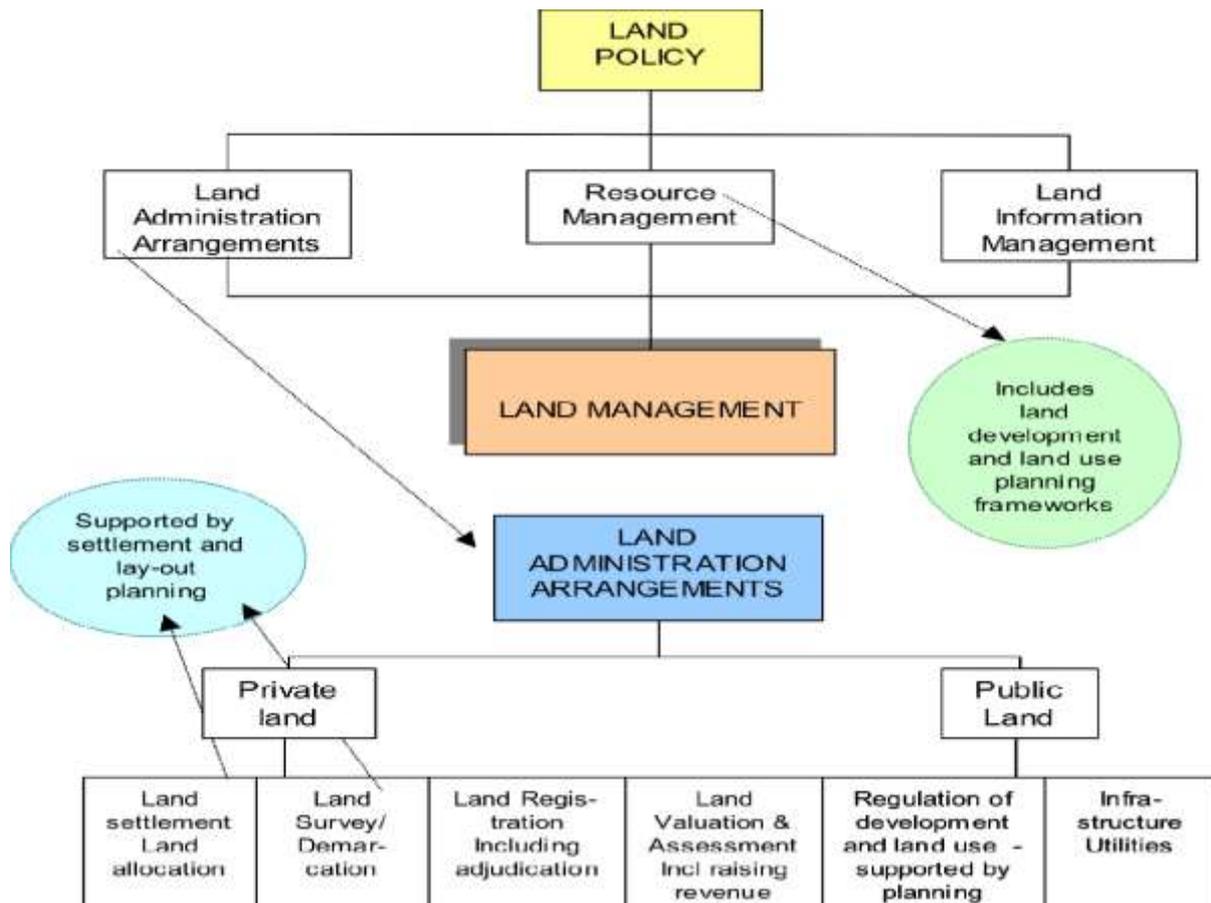
Source: R. Kingwill (2004).

Setting up a land administration system involves an overarching policy with supporting legislation and institutions. Professionals, scientists and officials with different backgrounds and disciplines need to co-operate its ongoing development. It cannot be reduced to a mere set of technical applications that can be undertaken separately from the broader institution of Land Governance. LA is inherently an aspect of land governance and power relations. In fact, LA concerns institutions because technical application requires decisions which are made and informed by individuals working in or managing those Land Governance institutions, who are interpreting and applying laws and regulations. It is much more complex to get the non-technical institutional issues right than the technical issues.

Land Administration (LA) emerged as a distinct component of national governance in modern statecraft when new land governance responses were needed to manage the dramatic changes to the way land was owned, used, valued and transacted, accompanied by the changing role of government itself. The changes resulted in increasingly complex interactions between humankind and land, reflected in new ways of managing land, particularly as market forces took over the role of allocating land in market economies. In contexts (such as South Africa) where you have mixed market and customary land allocation, the complexity multiplies.

Land Administration comprises a number of operational systems, such as the land registration system, the cadastral surveying and mapping system, land valuation and taxation, building regulation administration, sub-division application and development administration, and land related conflict management administration. These involve administering tenure arrangements, demarcating spatial units, resolving conflicts concerning the ownership and use of the land, regulating the development and use of the land, gathering revenue from the land (e.g. through taxation, leasing, sale, etc.), valuing land and the enforcement mechanisms for these. Increasingly, these activities are supported by formal planning processes. (Barry 1999, Kingwill 2004)

Land administration systems thus provide a country with an infrastructure for implementing land policies and land management strategies in support of sustainable development. Such land administration systems need a spatial framework to operate. This framework may be very sophisticated and included as a basic layer of interactive land information systems, or it may be just an satellite/orthophoto imagery showing the way land is divided into plots for specific use and possession (Enemark, Bell, Lemmen, McLaren (2014).

2.2   Understanding the elements that make up a Land Administration system

Any definition of LA should be flexible enough to absorb and adapt to different contexts and changing conditions given the context of land governance is constantly evolving. Changes produce or result from different policies, structures and institutions. Broadly speaking, Land Administration should be conceived as a system of interacting, intersecting and moveable parts that coordinate with each other, and are capable of supporting a range of tenures.

The main elements or functions of LA may be categorised as:

- Juridical
- Regulatory
- Fiscal
- Enforcement

Figure 4: Land Governance Structure Showing LA Functions
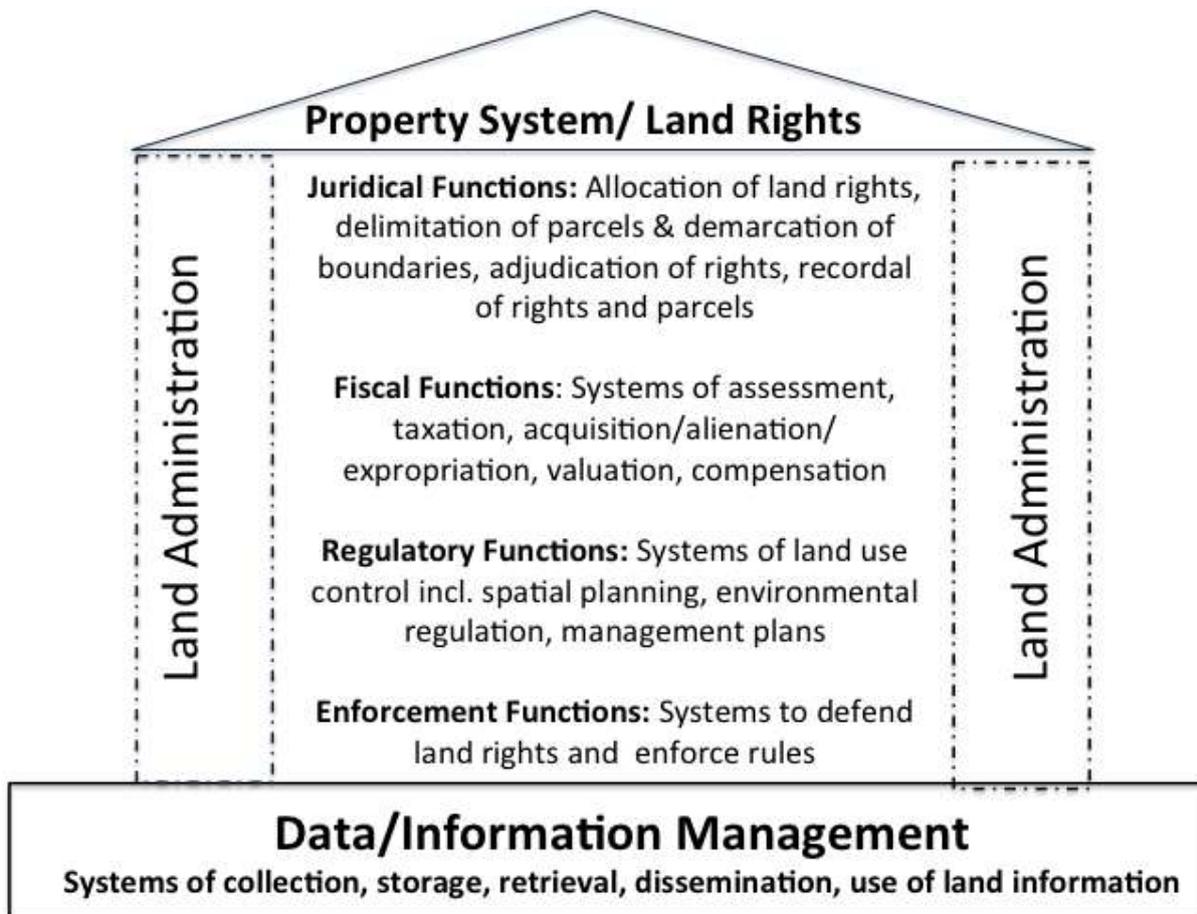
Figure 4 describes these functions and how they might be analysed :

Figure 5: Land Administration Categories and Functions

*Juridical/ administrative/ technical	● *Allocation of rights to land* (e.g. sovereign grants, sales, donations, inheritances, prescription, expropriation, reversion, servitudes, leases, mortgages (registered) and off-register allocations by various local or community authorities) ● *Delimitation of the parcel* (e.g., definition of the parcel, demarcation of boundaries on the ground, delimitation of the parcel on a plan)	● **Land tenure rights**: How is land held and with what rights? Who can be on the land and on what terms? ● **Land Tenure and documentation**: what form of record or process of registration is appropriate to produce evidence of a tenure right? ● **Land tenure and transmission**: How are land rights transferred? How does land devolve from one generation to the next, and/or how is land transferred from one land occupation and use rights-holder to another? ● **Land tenure and custodianship**: Which state/civil institutions are the

	● *Adjudication* (e.g., resolving doubt and dispute regarding rights and boundaries) ● *Registration* (e.g., official recording of information of rights and parcels)	custodians of land records and registers, and how do they define the rights they safeguard? ● **Land tenure and adjudication** (validation of particular rights): How are extant (existing) claims to land rights verified and checked? Who decides which rights to accept? **
Regulatory	● *Land use controls* (e.g., zoning, environmental regulations, etc. that restrict rights)	● **Land planning**: What activities are envisaged to take place on the land in future? Who decides on these activities? ● **Land use management**: How is land use changed? What activities can be undertaken on the land? Who decides this?
Fiscal	● *Property assessment* (e.g., valuation of the parcel land and improvements) ● *Property taxation* (e.g., computation and collection of taxes) ● *Compensation* (e.g. when land is expropriated by the state)	● **Land taxes and fees**: How are land taxes and fees determined and collected in relation to land and services from occupants and users? What are land taxes and fees used for?
Information management	● *Land information systems* e.g., collection, storage, retrieval, dissemination and use of land information	●
Enforcement	● *Enforcement mechanisms* e.g., defence of person's rights against invaders, enforcement of land use controls	● **Enforcement**: How are above functions enforced and by whom?

*Juridical means 'law-related'. The word 'juridical' is derived from the Latin *ius*, meaning 'pertaining to the law', or the 'administration of law' or 'to say the law'. It is sometimes used to refer to rights of citizenship. It is not the same as 'laws', as in legislation. It also does not mean court-related processes, judges or jurisprudence. The latter are 'judicial' functions. Judicial functions, including Judges and judgments, are derived from the Latin word *judex* meaning 'judge'. Laws or legislation are derived from *lex.* These distinctions result from the gradual separation over the course of time (since Roman law) of registration systems from the immediate jurisdiction of the courts. In fact one of the original purposes of land registries is to take the burden off the courts for functions such as adjudicating and settling rights and disputes, and enforcing rights. The courts thus become a mechanism of last resort, not first resort in determining rights.

** Rights Adjudication or Validation in this context refers to the processes by which existing rights to a particular parcel/piece of land are authoritatively determined, i.e., it does not mean creating new rights. In a conventional cadastral system, it refers to the painstaking checks performed by registered land surveyors and legal conveyancers to determine the precise spatial and textual characteristics of ownership to prevent overlaying boundaries and rights. A new set of rights validation (adjudication) principles are required for social tenures in communal land areas where rights may overlap and boundaries may be fluid, and for informal settlements in urban areas.

Land Administration as an infrastructure

Instead of a physical infrastructure, think of an administrative infrastructure that supports all land-related functions and you get the general idea of LA as a kind of scaffolding or network that supports the functions of land governance.

The following excerpt on the need for a national LA infrastructure illustrates the range of governance and management issues that a good LA system potentially addresses in promoting a nation's general economic health. The following excerpt helps to clarify the approach to LA as an infrastructure:

> The administration of land is an essential component of any nation's administrative portfolios. Here, land administration is defined as the management of land tenure, land valuation, land-use, and land development (Enemark et al., 2005). A land administration infrastructure is defined as the policy instruments, legal frameworks, institutional design, and technical tools that underpin the delivery of these four functions. The four broad functions are increasingly relevant to a nation's ability to organize itself. In the contemporary context, land administration will be relevant to the management of the macro-economy, levying of taxes, the provision of services and building of new infrastructure, and the protection of the environment and allocation of water rights. Without a national land administration infrastructure a nation will struggle to be governed holistically. Contemporary land administration literature supports this view (Dale and McLaughlin, 1999; UN-FIG, 1999). Source: Rohan, Bennetta, Abbas Rajabifard, Ian Williamson, Jude Wallace, 'On the need for national land administration infrastructures', Land Use Policy, 29, 2012, 208-219

The LA infrastructure should be able, like the road network, to cross boundaries and geographical areas, straddle jurisdictions and take various legal forms. The actual processes and procedures that regulate use and access, such as the surveying, planning, legal form and taxation are regulated by the relevant authorities, and the infrastructure is there to administer the rights. Apart from the services and security that a national infrastructure provides to citizens, an LA infrastructure creates economies of scale, since there is one networked infrastructure to serve millions of people, instead of multiple systems that only support a percentage of users, and are more difficult to regulate. Taking into account distributional issues, an LA infrastructure could potentially support affirmative programmes to address unequal access, and thus be a force for social and spatial equality.

Promoting a national infrastructure should not be confused with centralisation. These are jurisdictional issues that can be juggled in the interest of democratic governance. The issue

of centralised vs decentralised systems is a different issue, since national systems can be centralised, decentralised or deconcentrated.

2.3 Land Information Systems (LIS) as the foundational element of LA

Land Information is the very core of Land Administration. The foundation of all Land Administration functions is its data management system, or what was previously known as the Land Information System (LIS), and a key subset of any country's LIS is its Land Tenure Information System (LTIS).

Figure 6: Land Information as basis for improved Land Policy, Administration, Management and Use
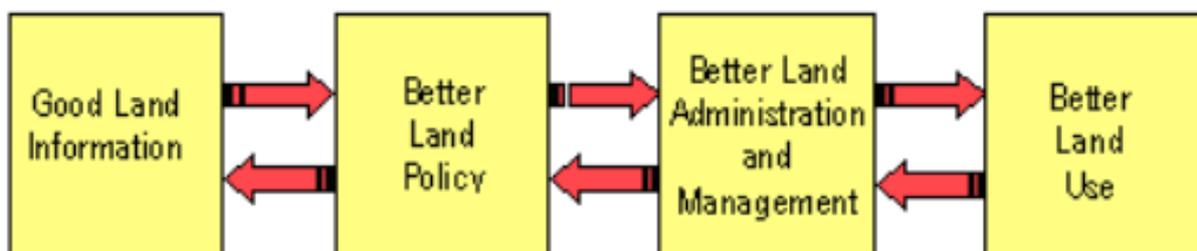
Source: FIG Publication No 21 The Bathurst Declaration for Sustainable Development

In the distant past, land information was restricted to singular purposes, mainly a government concern for taxation purposes. These developed from records of *persons* to records that linked owners or tenants to surveyed parcels. The system of records of surveyed parcels was essentially a fiscal tool i.e. for collecting revenue.

2.3.1 Land Registration

The concept of land registration —where information about ownership is held in official land registries— only developed in Europe after feudalism when the industrial revolution gave rise to land markets and later the emergence of commoditised immovable property.

Registries provide a process for linking owners/tenants and land parcels. This information can be verified by using administrative and bureaucratic processes and procedures of adjudication that no longer need to rely on judicial officers and institutions to confirm ownership. This development allowed the bureaucratic state to scale up adjudication and registration of land ownership outside of the judicial system and to record ownership systematically, at scale, through administrative action.

The idea of registration is rooted in the need for public witnessing. The legal expression of registration in our common law is 'giving notice to the world of rights in things' (*traditio coram judice rei sitae*). This means simply that when property is transferred, notice must be given to the public in the presence of a designated authority. This is what helps to 'transfer' immovable property since it cannot be delivered like a physical object and hence the need for the public to witness the transaction. With the increase in land markets it was in the

interests of the newly developing nation states to facilitate and regulate these processes. (Kingwill 2014).

Conventional land registries have become automated in land tenure information systems (LTIS). This automation relies on records of spatial units and land rights holders/owners in a standardised format that converts the records into abstracted and generalisable data format. The benefit of automation is that it reduces human error and makes it easier to detect and trace errors when they do occur. However automated systems based on abstract principles have not proved to be sustainable in many contexts in developing countries on account of the multiple social relations and network involved in property relations, i.e. they are not one-to-one relationships such as a registry relies on. There is increasing acknowledgement of the need to capture oral tradition and oral history evidence in local land rights records, and, moreover, to do this using technology (Barry, 2009).

2.3.2   The evolution of the 'cadastre' as the basis on a land information system

The main basis of a conventional land information management system, (of which the system of records are the core) in western societies is known as 'cadastre'. A cadastre describes the way in which land interests are defined by a social unit (person/ people) in relation to a spatial unit (defined land area). In developed economies, the cadastre is the basic reference point of land information and Land Administration. In developing economies with challenges of legal pluralism, the cadastre is also one of the central stumbling blocks to creating a unified Land Administration system, since the cadastre is conventionally associated with surveyed land parcels, which are not the basic unit of land tenure in customary and 'communal' systems of tenure.

In conventional cadastres the spatial unit is surveyed within precise measurement standards into what is known as a 'parcel', and the social unit is defined by the precise identity of a 'legal person' (individual(s), corporate, state entity, etc). The relationship between the two is defined in terms of ownership, leasehold, rental, etc. [1]

According to Williamson and Ting (2001), until the mid-1980s most conceptual understanding of Land Administration focused on individual cadastral and land registration activities. There is still a tendency in South Africa to remain fixated on that definition. Since then, the role of cadastral systems and land information has shifted to a broader understanding of Land Administration. There is still a focus on cadastral systems, often related to surveying and mapping and land registration, but over time the role of Land Administration has broadened to include land use planning, and has become more geared to land markets, for which valuation systems became more market-oriented. At the same

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[1] The Bogor and Bathurst Declarations are still a key reference point for LA in the west, and are also a yardstick of the ongoing changes in thinking about Land Administration and the changing role of the cadastre. The Bogor Declaration resulted from an Inter-Regional Meeting of Experts on Cadastre held in Bogor, Indonesia in 1996, responding new global challenges to redefine the cadastre, but this was followed by a broader agenda in a follow up workshop organised by FIG Commission 7, in collaboration with the United Nations, held in Bathurst, Australia in 1999. That meeting resulted in the more durable Bathurst Declaration which was composed in the United Nations – International Federation of Surveyors Workshop on Land Tenure and Cadastral Infrastructures for Sustainable Development. (see Annex 2 for executive summary and recommendations). The workshop addressed the range of pressing issues including social and environmental challenges affecting land administration, including the escalation of poverty and slums, insecure tenure, and unequal access to property rights and the need to recognise diverse tenures.

time there has been a growing recognition of the need for land administration systems to address sustainable development priorities.

The following developments and pressures contributed to the evolution of conventional cadastres from single to multi-purpose cadastres, and the latter now embrace digital systems, with increasing possibilities to use open source GIS for developing geo-referenced records for unsurveyed land, and open data systems of information.

- Rapid urbanisation and servicing needs
- Widening economic inequity and an increase in poverty and food shortages
- Land markets, commoditisation of land
- Changes in land values and valuation criteria
- Land distribution and land reform
- Environmental degradation
- Increased Infrastructure development
- The need to adapt traditional geo-referencing methods to new technologies
- The changing role of government in society
- The economic and social challenges associated with increasing globalisation

Figure 7: Evolution of the Cadastre in the West
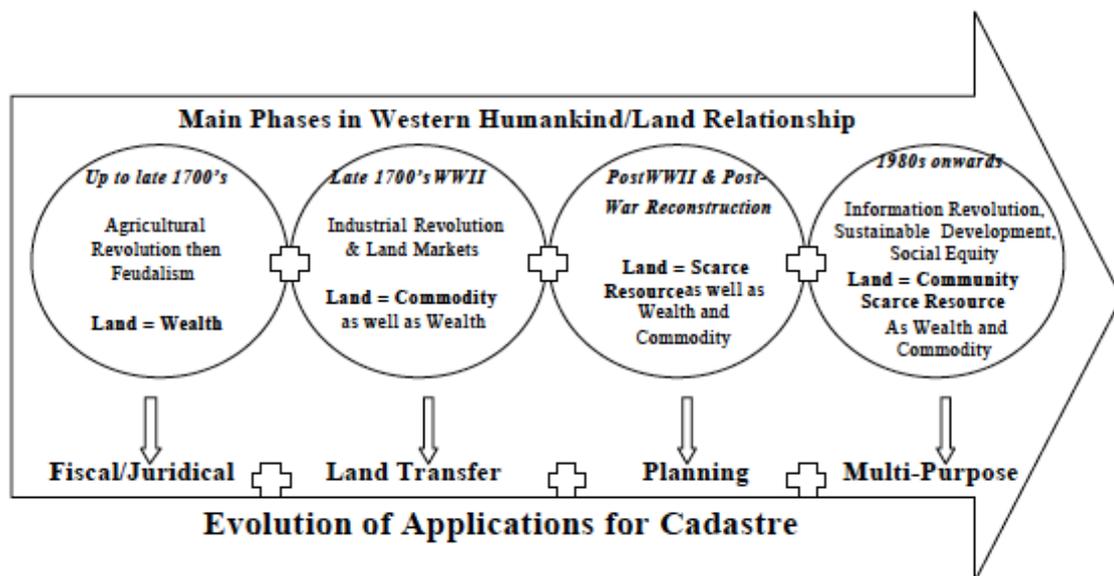
Source: L Ting L & I Williamson, 2001

The past two decades have seen further rapid developments towards new GIS technologies that can record fixed spots and points and use aerial photogrammy and drones, digital systems, open source software, blockchain, etc. At the same time renewed attempts are being made globally and in South Africa to advocate for redress of tenure insecurity that is also related to poverty. New technologies are being explored to record rights that involve more complex social relationships rather than captured in land parcels.

In summary, land information systems have changed over time from:

- simple cadastres that documented landowners for the purposes of taxation and surveillance;
- to land registers that linked owners to parcels;
- to parcel-based cadastres;
- to cadastres that support commodification and market-based transfers;
- to cadastres that require planning and land use management to regulate human densification, environmental degradation and rising land values;
- to multi-purpose cadastres where land information serves multiple purposes including environment and city planning and servicing issues and to promote sustainable development, and thus requiring integrated land information systems that cross-cut natural resources, planning, land use, land value and land titles;
- to the rapid transformation towards digitised GIS-based Land Information Systems that both store and disseminate information systems;
- to the current trend towards distributed decentralised databases and open data government.

All these changes require more systematic, inter-related and co-ordinated land information management systems that can cope with multiple purposes.

> The availability of reliable information about land and its resources emerged as a vital issue in managing these challenges. If relevant and good decisions are to be made by public authorities, private resource users or community bodies, they must be based on sound information about the land and environment in order to contribute to sustainable development. This in turn requires the articulation of principles for the development and operation of land information and cadastral systems, as well as land registration systems, which give effect to the principle of sustainable development. (Australian Intergovernmental Committee 2014)

Over time national concerns that traditionally centred on country cadastral information have also become the concern of international human and environmental rights organisations. The narrow focus on cadastre has been increasingly subsumed by global concerns about sustainable development, including security of tenure and environmental protection for vulnerable people and habitats as we saw amongst the community of geomatics professionals in their drafting of the Bathurst Declaration in 1999. These international platforms have given rise to a range of new international goals and standards such as the Sustainable Development Goal (SDGs), the FAOs Voluntary Guidelines on Responsible Governance of Tenure (VGGTs).

These global concerns raise, or should raise, penetrating questions about how to develop appropriate cadastres that do not prejudice indigenous or customary systems of managing land, and which do not lock out the poor. Global organisations concerned with land administration have became more vocal about recognising customary rights and land access by the poor that are not recorded in conventional registries. There is more and more evidence that shows that attempts to convert them have not been successful.

2.4 Land Administration and Sustainable Development

As discussed above, much of the pressure to develop the cadastre is to meet mounting social and environmental concerns, expressed in terms of 'sustainable development', which in UN interpretations includes social equity. According to Ian Williamson, former chair of various FIG and World Bank Commissions on the cadastre, land management and GIS infrastructures: "[c]urrent land administration systems are the product of 19th century economic and land market paradigms and have failed to properly support sustainable development." [2] He goes on to suggest that there is wide acceptance that urgent reform is needed, though the way forward was not at all clear. (Williamson n.d.). This still seems to be the case.

What do we mean by 'sustainable'? A good way of presenting sustainable development is from the Brundtland Report (1987):

'… development that meets the needs of the present without compromising the ability of future generations to meet their own needs''

The Report goes on to argue:
> Development involves a progressive transformation of economy and society. A development path that is sustainable in a physical sense could theoretically be pursued even in a rigid social and political setting. But physical sustainability cannot be secured unless development policies pay attention to such considerations as changes in access to resources and in the distribution of costs and benefits. Even the narrow notion of physical sustainability implies a concern for social equity between generations, a concern that must logically be extended to equity within each generation. (Brundtland Report Ch 2)

This statement stresses that sustainability is not possible without addressing social equity, though of course it was aimed at the implications of the global economy and environment.

A key challenge in addressing social equity is, as mentioned, the disconnect between parcel based and socially based land information, tenure and managements systems. The rapid development of GIS is making a huge impact on how information is being understood, organised, stored and used. These developments mean there is growing potential for geo-referencing that is not only parcel based. However, this shift is not easy. Firstly, it requires new variables in adjudicating and maintaining land information. Secondly, there is resistance to innovation from some formal property interests, since this possibility has the potential to transform the conventional cadastre and threaten their class interests.

Non-parcel based recording of human-land relationships could help to make land administration more inclusive of poor people or people who follow customary practices and

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[2] He was chairperson of FIG Commission 7 (Cadastre and Land Management) 1994–98 and Director United Nations Liaison for the FIG from 1998–2002. He was a member of the Executive and Chair, Working Group 3 (Cadastre), UN sponsored Permanent Committee on GIS Infrastructures for Asia and the Pacific (2001–2009).

off-register rights. However, it is far from simple to adapt cadastres to non-parcel surveys. Cadastres have until now been fundamentally tied to some form of parcel-based survey to manage the pressure of numbers on land. Non-parcel based approaches would require radical innovation, but some single-point geo-referencing tools are already breaking into this space.

All these considerations and challenges have made LA a human rights issue. Numerous international resolutions, protocols, guidelines and development goals have proliferated in the past two decades, to which more and more national governments are signatory. These foreground human rights, among others, and the concerns are becoming political concerns for national governments. National and international NGOs have campaigned in favour of pro-poor land management and tenure policies over the past decades.

2.5 Conclusion

From a universal perspective, all property rights in land involve a social unit, and spatial unit and some mediating authority that refers to societal rules and processes to determine the relationship between the two. The way these are configured vary widely depending on historical, political, ecological and cultural contexts.

Can law and technology bridge these differing human-land relationships? There have been a wide range of national and international responses to the increasing gaps in land rights between rich and poor, exacerbated by divergences between different kinds of land rights. From a technical point of view, these discrepancies are mainly reflected in cadastral versus social (off-cadastre) ways of recognising land rights, and thus reforming the way in which rights can be mapped even without full conventional cadastral coverage.

It is, however, important to understand from political, ethnographic and sociological perspectives that these discrepancies are not the mere reflection of institutional gaps or errors, but have arisen in countries that were formerly colonised by western powers and severe power differentials emerged between coloniser and subjugated. The former developed mirror images of their own imperial property systems in implanted settler societies. These property systems were superimposed on customary systems. In some cases or countries, colonial governments experiments with 'assimilation' but most colonial governments adopted a binary institutional structure between civil or common-law systems and customary systems. Freehold (commonly understood as ownership and in many cases private property) is nevertheless a malleable concept and is able to be grafted onto customary norms.

Post-colonial governments have struggled to integrate these legacy systems, and to re-align these systems in the interests of equity. In some countries customary law is recognised. However, these efforts have come up against an edifice that has been difficult to traverse (Hornby, Kingwill, Royston and Cousins 2017). Aligning and integrating property systems are not a mere technical or institutional problem that can be solved by simply adopting single-purpose laws that redefine rights, without redefining the entire spectrum of land administration institutions. Property relations are dynamic and they intertwine. Everyday

life is made of numerous elements that affect property. Contracts that involve transaction agreements, employment, private subscriptions, familial transfers, as well as criminal offences, follow national law and apply equally to all citizens. Customary law, however, is confined to a narrower set of concerns, e.g. land and familial social relations; land, forest and marine resources; customary marriage and customary succession and inheritance. These intertwine with civil life governed by common law or statutes based on common law. Transactions over time develop into hybridised systems and understandings that are not easily untangled. These hybrid systems are difficult to capture in single purpose tenure laws alone. It is impossible to separate land tenure relations and customary law from the socio-economic settings in which every day life transactions take place.

The point of raising these arguments is to show that tenure cannot be resolved by a simple binary between customary law and common law, but should be conceived as a unified whole that is able to recognise diverse cultural norms and practices providing they conform with the Constitution and principles of sustainability.

The rights associated with most market driven land tenure systems, regardless of their precise configuration, are:
- Use rights –the rights of a holder to utilise the land in various defined and undefined ways.
- Transfer rights — the rights of a holder to transfer their rights to someone else by means of sale, mortgage, leasing, renting or bequeath.
- Exclusion rights — the rights of a holder to exclude others from claiming use access or transfer rights.
- Enforcement rights — legal, institutional and administrative provisions which guarantee rights (Feder and Feeny, 1991).

These can be configured in different ways to meet the requirements of secure tenure and property rights. The Global Land Tool Network refers to tenure variability as a 'continuum of land rights'.

> No single form of tenure can meet the different needs of all social groups. However, a range of land tenure options enables both women and men from all social groups to meet their changing needs over time. Legal recognition for different forms of tenure can also strengthen the development of dynamic land markets in highly populated areas. (GLTN n.d.)

The concept of the continuum incorporates tenure rights that are documented as well as undocumented, formal as well as informal rights and works for individuals as well as groups, including pastoralists and residents of slums and other settlements, which may be legal or not legal. (GLTN)

3 SECTION C: LAND ADMINISTRATION CHALLENGES IN SOUTH AFRICA

3.1 Why should we be concerned about Land Administration in SA?

The main purpose of this discussion document is to provide a grounded argument as to why Land Governance in general, and Land Administration in particular, should be front and centre of the land reform programme in South Africa, and to identify some critical gaps and disconnections in the South African Land Administration system that have paralysed the ability of the state and society to fully recognise the rights of all those citizens that are unrecorded and off-register. The argument rests on the assumption that land governance and land administration have been highly fragmented and uneven in South Africa, with pockets of excellence which largely serve the formal property system, i.e. those whose rights are derived from the system of registration.

Poor land governance affects all aspects of land reform, and we have witnessed a decline in effectiveness of land reform over the years. One of the contributory factors has been an absence of an overarching conceptualisation of land reform and along with that, an absence of an overarching governance framework with mechanisms of land administration to execute a clear vision. Instead, both the framework and building blocks of land reform (including land tenure which is the main concern in this document) have been fragmented in both vision and execution.

In the early days of Constitution writing, the assumption was that issuing new tenure laws would be enough to change the balance of power regarding property ownership, with the judiciary (particularly the Constitutional Court) in attendance to defend the laws. Unfortunately, there have been various leadership shifts, and policy directions have become increasingly diffuse, with a highly ambiguous legal environment.

The judiciary has been overburdened with defending the Constitution, but we lack the institutions to implement the judgements systematically. The developing jurisprudence has led to a process of principled amendment and adjustment, which are important, but the legislature and executive continue to sidestep the broader institutional implications of the problem. All policy formulation involves consciously mediating and choosing between competing norms and interests, but the basis must be an understanding of what these are and how they may favour particular beneficiaries and authorities. There is, however, little identification or acknowledgement of what these competing interests represent and what the implications of various policy choices would be.

An outcome of the poor execution of land reform and the ambiguous legal and policy environment has been the polarisation of society around land matters, leading to some citizenry taking governance and action into their own hands. To build a sustainable, democratic and efficient governance framework that will serve the next generation, we need to focus discussion and thinking on the quality of the detail that goes into rebuilding the governance framework. The detail is to be found in the various elements that make up land administration; the bricks and mortar that constitute the building.

3.2 Historical Context and current challenges

The post-apartheid state undoubtedly inherited a complex set of land tenure systems. It began by focusing on the vulnerability and insecurity of the rights of black South Africans. This led to Constitutional recognition of the need to convert rights that were insecure as a result of racial discrimination into secure rights through a process of redress. A series of rights-based laws were passed according to five categories of land rights holders to provide base-line protection against eviction or arbitrary dispossession, and a form of legal recognition to redress discriminatory land tenure legacies[3].

The laws are separately applicable to particular categories of people and/or land jurisdictions that translate into: labour tenants; farmdwellers and farm workers; people in the former homelands; occupiers in urban areas; and residents of coloured rural areas (mostly former mission stations). In 1996 the Communal Property Associations Act provided for collective registered property. The reform of communal tenure was contemplated in the Land Rights Bill, which was later scuppered in favour of the Communal Land Rights Act (CLARA), which has since been declared unconstitutional, but a similar version is due to be resubmitted as the Communal Land Tenure Bill (CLTB).

The Constitution did not identify Land Administration as a specific subject for land reform, since Land Administration was widely conceived of as the body of land tenure or tenure-related laws and proclamations, mainly those formerly applicable in the homelands and segregated urban areas. Land Administration was indeed singled out as a tangled web of laws and authority systems inherited from the era of segregation and apartheid governance, but the immediate challenge was to reassign these laws in terms of the new provincial and later municipal jurisdictions after the disbandment of the racially and spatially based homeland and urban authorities.

The Land Administration Act 2 of 1996 had limited scope. It comprises the delegation of powers and assignment of functions regarding the administration of land-related laws (basically land tenure laws), largely to allow for the migration, modification or repeal of laws that previously applied to the former homelands and other apartheid jurisdictions, so that their administration would be taken over by the national and provincial governments. This law was an important first step, but is wholly inadequate to address the need to remould Land Administration comprehensively in the interests of providing a coherent platform to administer all diverse land rights as function of land governance. As mentioned, at that stage Land Administration tended to be conflated with land tenure legislation.

It would seem that in South Africa the concept of Land Administration was not congruent with the international trends of conceptualising Land Administration as a critical element in land governance. Land Administration was often associated with the administration of

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[3] 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
- Transformation of Certain Rural Areas Land Act (TRANCRAA) 94 of 1998

communal land and PTOs by the 'native administration' (which under apartheid was known as Bantu administration). With the passage to democratic governance, Land Administration was seen as the body of land tenure laws, proclamations and regulations rather than a distinctive, if complex aspect of land governance.

The White Paper on South African Land Policy, 1997, did identify Land Administration legacy problems, but neither analysed these holistically and purposefully, nor in terms of the need for a systematic approach to Land Administration reform. Rather, the turn to democratic and Constitutional governance in the early 1990s was seen as an opportunity to review the legal framework of tenure, rather than the entire legal framework *governing* land rights.

Each of the new land rights laws contains its own provisions for the legal and administrative processes that must be followed for the application and enforcement of the law. This approach rests on the assumption that the registration system provides the backstop for all land rights, and the new rights were to be protected within that system. Each set of laws provides a comprehensive set of procedures to ensure that rights are not violated, but these are not widely systematised or institutionalised, and thus difficult to apply across the board.

While these procedural aspects are important, they do not meet the challenge of developing a unified system of land administration that provides for the implementation and enforcement of a range of land rights as an automatic right, that is, an administrative right. Having multiple land tenure laws with their own systems and procedures reinforces, or at least mirrors, the narrow conception of Land Administration. What is needed instead is a single infrastructure that supports diverse land rights.

There are many aspects to the problems, including:

The failure to deal with legal pluralism in a coherent way, which has led to fragmented institutions and many contradictory laws and processes. There has been lack of political will to tackle the problem at the political level, as it undoubtedly airs thorny problems and also potentially exposes networks of patronage and corruption that thrive in an environment of institutional chaos or fogginess. The current system benefits elites. A clear and coherent system of LA that recognises off-register rights ought to be a redistributive mechanism, and formal property interests are likely to find this threatening and they may resist it. There will also be resistance from 'informal' and illicit property interests that use the formal system in an underhand way.

The separation of 'communal' land administration from the country's LA system has also contributed to a fragmented LA. The potential separation of traditional authorities from the country's national LA system will present challenges for developing a unified system with common sets of administrative norms and standards. This binary is precisely the paradigm that LandNNES argues should be broken down, and a repurposed, unified system of Land Administration built to serve all citizens.

A repurposed LA would require municipalities and metros to develop LA sub-systems to expand their present land-related administrative systems such as land information systems, recordal systems, land acquisition and servicing, for which they have almost no capacity at

present. They are barely able to service existing formalised settlements, let alone new ones, and their information systems operate in silos and are inaccessible to the public. These incapacities are a key stimulant for advocacy of open government data and inter-operable datasets that can easily exchange and store a range of data without being dependent on single institutions operating their own information systems, such as municipalities that are often the 'weak link in the chain'.

3.2.1 The Disjuncture : conventional cadastre and customary/local land rights management systems

Conventional LA involves processes to create land units and rights to these, and to value land and buildings according to market principles and formal standards. These land parcels are recorded in cadastres and rights to those parcels are recorded in land registers. The conventional LA system in South Africa was designed for registered rights via the Surveyor General's Office and Deeds Registry, who then issue title deeds. This design has retained its dominance, with equivalents in most post-colonial countries with legal pluralism. This design cannot by its very nature recognise, map and record off-register rights, which often predominate in African countries.

Formal LA can ensure efficient change of parcel structure, such as subdivisions, and rights, such as transfer of lease or ownership. The property valuation/taxation process assesses and records property values for land taxation, market transactions, expropriation, etc. These functions do not always fit neatly with off-register rights that are not easily parcelled, e.g. customary and informal settlements where professional surveying of parcels is not feasible. Estimates in Africa, including South Africa, vary from 60-80% of rights fall outside the cadastre and formal property system.

Parts of South Africa are covered by a conventional cadastre, which is most of the surface area but coincides with former white ownership. Other parts do not have a developed cadastral system, and land access and rights are managed by unofficial local systems or customary systems prevalent in the former homelands and rural and urban informal settlements. The existing infrastructure (a) supports only registered rights, including freehold title, servitudes, leases, etc and also Communal Property Associations that have proved inadequate (discussed below), or (b) falls back on Chiefs and Traditional Councils in the former homelands. Urban rights, though covered by protective legislation, are not recognised within the formal urban land management system. Instead, people are put on waiting lists until houses are apportioned in terms of housing policies and laws, and only a small fraction of the urban poor ever access them. In rural areas some land has been transferred to Trusts and CPAs that have also proven to be a poor vehicle for holding property rights in the land reform context.

This is the legacy of South Africa's historically racially divided landscape with differentiated land jurisdictions and tenure across different spatial-geographical areas as a result of colonialism and apartheid. While the management of tenure, cadastral and information systems that have been historically segregated, they are not easily integrated with end of apartheid. The cadastre needs to be modified and broadened to take into account rights that are not managed by a conventional cadastre.

In the past, apartheid land administration institutions administered separate rights that were not legalised through Parliament, but through proclamations that applied mostly in the former homelands and urban areas. Land tenure in the former homelands was formally administered through magistrates' offices, which coordinated the various services such as allocation, spatial delineation and taxation. Chiefs and tribal authorities fitted into the broader bureaucracy within the homeland governance structures, which included magistrates who doubled up as 'Native' Commissioners (later known as Bantu and then District Commissioners) at magisterial level, and Regional and National Authorities. There was thus a layer above TA's that connected them into the larger land governance system, even if separated into homeland systems.

The new jurisdictional framework comprising 'three spheres of government' defined both separate and co-governance functions between and across these spheres of National, provincial and local government. Land Administration was never categorised as a category in itself, but various LA functions were broken up and assigned to the various spheres.

When magisterial functions were logically absorbed into the judicial system post-Constitution, the bureaucracy was removed, and a gaping hole was left in the administration of land tenure and land records. The gap was never filled with a national bureaucracy. Traditional authorities have campaigned to become recognised in their own right as stand-alone land administration institutions, with the extreme example of the Ingonyama Trust. Off register rights in former homelands no longer "fit" into the national infrastructure as Traditional authorities appear to float free of the land governance system. This gap has contributed to obstructing the development of a unified and integrated LA.

In summary, a binary opposition of LA systems has been created by default, with no systems to administer the majority of rights that fall in between the recognised systems. In effect, LA was not redesigned to fill the needs of the post-apartheid society. The formal structures were retained for the system that is supported by the Surveyor General's Office and Deeds Registry, including planning, surveying, valuation, taxation, etc. On the other side of the equation, the Chiefs and traditional leaders are asserting powers of control over land allocation and land access in the communal areas.

By 2000 the new ministry of Land Affairs gave them the power they were seeking, and Traditional Councils are now legally recognised structures, with some LA powers accorded by the Traditional Leadership and Governance Framework Act. In reality traditional governance remains a hotly contested and uneven space, with much informalisation and localisation of land administration, which is often undertaken by community structures.

The solution to the apparent institutional binary between Traditional Councils and the formal state-supported Land Administration system is not easily resolved by simple conversion of one system to the other. A range of social and cultural issues still exist and persist in the country, such as customary systems of land tenure, marriage, inheritance and succession make a simple conversion a contested option.

The alternative structures through which collective rights are registered —where chiefs and TCs do not control rights allocation— are Communal Property Associations. The lack of mechanisms to administer individual rights within the CPAs has proved to be a major weakness, and CPAs have often degenerated into institutions that compete with TCs for authority over members. The CPA tenure system also exemplifies the gaps in LA, as, in floating free from the formal LA system, members report to and seek enforcement directly from the Department of Rural Development of Land Reform or have to rely on courts. In this, these rights are no different from other off-register rights.

The urban and peri-urban settlements were left out of tenure reforms, to be absorbed by the Deeds Registry, and the outcome of that policy has been disastrous for land rights. The Upgrading of Land Rights Act (ULTRA) promulgated before the 1994 transformation of the state is regarded as the appropriate vehicle to convert off-register and customary rights to freehold. The Act is held up as the beacon to guide the future direction of land rights, but in reality is inoperable and recently a key clause was declared unconstitutional.

None of these options has proved to be suitable or Constitutionally justifiable to secure rights for those whose rights are off-register. The differences are not simply a problem of geography and jurisdiction, but a continued reflection of differentiated socio-cultural norms and practices. The challenge is therefore much more complex than simply expanding the existing cadastral system.

Some argue that to solve the problems of disparity we need to recognise customary law as a body of law in itself, and indeed there is jurisprudence to this effect. The problem is that hybridisation and interacting domains of land administration (e.g. some civil law contracts enter into customary or 'informal' land transactions) means you cannot simply isolate domains like customary law, and indeed this would impede the aim of developing a unified LA system for the country. It is wiser to recognise diverse norms without entrenching dualism.

The reality is that both common law and customary law in South Africa have become hybridised and are not clean divides. They do nevertheless reflect diverging norms and values regarding key aspects of relationships between people in relation to land. The normative divergences are particularly manifest in kinship and property relationships. These matters have not been clearly addressed in policy, law or implementation

Much of the problem lies in competing interests, and no amount of policy or technology ever rids society of competition for resources, and hence the issue cannot escape from normative assessment and policy choices.

After three decades of weak enforcement of the new land rights in South Africa, it is becoming apparent that state institutions to 'actualise' and enforce these rights are weak or missing. The argument for repurposing LA rests on this reality, arguing that the entire institutional framework that manages land tenure and land use ought to be revisited, and land administration repurposed to examine and identify the administrative requirements for the majority of rights that are situated between them.

4 GETTING POLICY DIRECTION RIGHT

The discussion so far has provided the context and argument as to why it is an urgent necessity to reform the institutions that are responsible for Land Administration in South Africa. There are compelling reasons for South Africa to fix the ailing and ineffective LA system, and to systematically restructure it to make it more inclusive by designing a framework for an inclusive national property rights system.

As argued in the document so far, LA lacks a conceptually coherent approach to challenges and there are ambivalent and contradictory sets of land tenure laws. The argument puts the case for developing a holistic, unified, 'pro-poor land administration' system which also acknowledges customary norms and practices. Repurposing LA will entail embarking on a comprehensive journey and process of institutional redress to give effect to s25(6) of the Constitution as well as sections that concern a range of other rights as well as right to administrative justice.

The process of reform should avoid rushing to pass new laws or make ad hoc amendments to existing ones. First society should agree on an **approach**.

The main proposal for 'getting policy right' is to develop a forward-looking **Vision** for LA in South Africa.

4.1 Develop a forward-looking Vision for LA in SA

The most important starting point is to embark on a process of developing a Vision for Land Administration in South Africa looking well into the future.

It would be optimal to establish a separate institution to promote Land Administration reforms, outside of any of the present government ministries. For example, the Law Reform Commission could be reengineered into a permanent institution to clean up the labyrinth of old and new order land laws that are not aligned, and some of which are redundant, while others need to be merged or repealed. Another option could be an Interministerial Commission or a Chapter 9 institution to develop a Vision for unified LA and appropriate cadastre in South Africa. This idea draws from the model of the Interministerial Committee in Australia, which developed a Vision called "Cadastre 2034". South Africa could develop a Vision such as "Cadastre 2040".

The institution-building should go beyond law reform alone, and promote a new *approach* to property law and land administration, drawing from evidence-based research and pilots that test new approaches in the field. SA needs a forward looking vision to move LA in South Africa out of the present rut of racially, spatially and legally fragmented Land Governance and LA. These are simply unsustainable from both a political and economic perspective (not to mention institutionally irrational). The Committee or Commission should start by conducting a thorough appraisal of existing LA policies, laws and regulatory frameworks from a perspective of promoting a holistic LA system that addresses social equity, and weeds out superfluous, archaic, contradictory and un-implementable laws that are no longer constitutional or viable.

The Commission therefore needs to expose the institutional weaknesses in the existing policy and legal frameworks. The Commission must be guided by **principles**, and a coherent, integrating, purposeful thread running right through its mission in order to unify LA and integrate all relevant aspects of LA (land information or data management being central) into a future-oriented system that recognises diverse rights making good use of new technologies. The Commission needs to get to grips with the concept of Land Governance as a sphere of governance, with LA comprising the implementing institutions, and the role they must play in promoting a pro-poor and sustainable LA. in all these above goals and propose a set of reforms that incrementally rebuilds.

4.2   Institutional reforms

In the current official or formal system in South Africa, decisions about land ownership are centralised, while questions about land use management are increasingly seen as provincial and local level functions with the actual execution thereof taking place at municipal level. Planning is a municipal function. The extent of local government discretion for decision-making is still being tested. Thus, in South Africa today, the question of "who decides" takes place at different levels, with greater or lesser co-ordination of these decisions across the formal and informal systems divides. In this sense, there is no overarching Land Governance and management System in South Africa today, and this is a cause for concern.

Jurisdictional, mandates and functions issues: re-examining the jurisdictional levels of Land Administration in terms of the Structures and Functions listed in the Constitution, and the roles of Department of Rural Development and Land Reform (DRDLR), Co-operative Governance and Traditional Affairs (COGTA), Department of Agriculture, Forestry and Fisheries (DAFF), Department of Human Settlements, Treasury,
LA straddles these, and but is undefined, fragmented and in some cases just missing.

4.3   Implement a range of Pilot Test cases for new Land Records systems

The first part of this process should involve a wide-scale process of enquiry and pilots in a range of tenure contexts in urban and rural South Africa. This process should gather rich, empirical information about how tenure systems actually work, and to test some of the new tools that have been developed internationally (and in South Africa) to understand, map, record and administer local land rights in a sustainable way. Sustainability is a non-negotiable, as many land records systems simply focus on the present generation, and the data loses currency almost immediately. Records must be updateable. They will be updated if (a) the right technology is used and (b) if the records are valued and seen as a legitimate expression of land rights and property relationships by the rights holders. If not, they will simply ignore them, as they currently do in several examples where rights have been registered or recorded.

This proposal entails the design, piloting and progressive roll out of a **land records system** that accommodates a range of land rights which are currently off-register. The recordal of these rights is intended to make the rights of people in informal settlements and communal areas and on farms, as well as beneficiaries of land reform 'visible' and administrable, and in so doing, convert 'negative' or passive rights into 'positive' and active rights. These aims can be achieved by developing new surveying standards combined with new mapping

technology, as well as changed criteria for adjudication and recognition of rights. The final legislative component of this proposal will entail the promulgation of a Land Records Act as mooted by the High Level Panel (HLP, 2017) and a linked Land Adjudication Act.

The pilot should be seen to be a parallel and interrelated process with the Institutional review and revisioning proposed in 4.1 and 4.2 above. They are not mutually exclusive processes, and should ideally run in tandem in a single, mutually reinforcing and incremental process to develop the supporting structures equivalent to those of registered title. These support services include spatial demarcation or surveying, conveyancing, registering rights, transferring rights, recording inheritance and so forth.

4.4   A Green Paper followed by White Paper on Land Administration

The gathering and analysing data, and storing it, should then culminate in a process of national engagement that lead to a Green Paper and White Paper on Land Administration, followed by the promulgation of a Land Administration Framework Act, foreseen as an 'enabling law'' that will provide a platform for a new land administration system and the passage of other related laws. This should not be read to entail a framework for a single tenure, but instead to develop a single land administration framework that provides mechanisms for administration records all tenure rights, and which allows different tenure systems to function. This will require the design and setting up of a system of adjudication, and legitimating rights within each tenure regime.

4.5   Law Reform

4.5.1   Enact a Land Administration Framework Act

The first proposal for a Land Administration Act will not only support land governance, but will also provide a decision making tool, which will help in planning land reform, and development and also in monitoring outcomes. The proposal for Land Records Act will advance the route towards the realisation of Constitutional obligations for secure land tenure rights of all South Africans.

4.5.2   Enact a Land Records Act

The proposed unitary system for recordal of what are now off register rights should operate alongside and articulate with the Deeds registry/Surveyor General system, even if it operates along different logics and principles. *This section is not edited yet….* This is a national competency that should preferably be initially driven by DPME and be deconcentrated to local levels. Consideration should be given to the establishment of a 'land cluster' because of the transversal nature of land. The processes of making all rights visible is therefore the first step towards developing an administrative system for all valid claims to rights that are currently 'off-register'. The proposal is contrary to the idea that the institutions are being developed in parallel in order to maintain a system of 'second class rights' that are not comparable in gravity with title deeds.

Quality spatial data is critical to the country's street address system for the purposes of managing "interaction between people, places and activities" (R. Bennett et al, p214). Various government agencies ranging from Independent Electoral Commission (IEC) to SASSA depend on valid street address information. The Constitutional Court strengthened the need for legal recognition of people-land relationships by demanding that all South Africans should have an address. A unanimous judgment In the Constitutional court written by Wallis AJ, in the matter *Xolile David Kham and Others v Electoral Commission and Others,*[4] held that the every voter must have an address for the healthy operation of our democracy at local government level. As such elections take place in wards, it is vitally important and a legal requirement for the chief electoral officer, when registering a voter on the voters' roll, to register that voter in the voting district in which they are ordinarily resident. The requirement that had not been observed by the IEC, providing all candidates with a copy of the relevant segment of the voters' roll containing the addresses of voters in the ward with their addresses ("where such addresses are available") was seen by this court as a serious breach of the IEC's statutory obligations.

4.5.3 Enact a law on Land Rights Adjudication

The term 'adjudication' tends to be associated with judges and courts, i.e. judicial processes of adjudication. The use of the term adjudication outside of its judicial connotation confuses land professionals and particularly lawyers. Indeed for most people the concept is so closely associated with the judiciary and court judgements that no other form of adjudication can be conceptualised. Adjudication, however, occurs in many forums outside of courts, e.g. in contests. By distinguishing between the concept of 'judicial' and 'juridical' it becomes possible to see the subtle difference in emphasis between these two arenas. Colloquially, the two terms are frequently used interchangeably, but they are distinctive. The distinction helps to shed light on the significance of proposing a system of adjudication that is housed outside of the judiciary and in the executive, i.e. out-of-court adjudication, or 'administrative adjudication'.

The terms for judges and judgments are derived from the Latin word *judex* while the word juridical comes from the Latin word *ius*, which means law, or more precisely, 'to say the law'. These words are thus naturally related but not the same. Interestingly, the registrar of Deeds is an office descended from that of a judge. Therefore in the past, registrars of Deeds were indeed appointments associated with the judiciary, but nowadays the post is regarded as 'semi-judicial', "because the registrar, in the exercise of his or her duties with regard to the registration of certain transactions must rely heavily on his or her opinion to quickly solving issues that could take officers of the court hours or days to tease out if they were called upon to decide these issues" (Badenhorst, Pienaar and Mostert 2006: 215-6). It is therefore not unprecedented to create institutions that are associated with judicial and juridical functions, but which reside outside the courts.

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[4] *Kham and Others v Electoral Commission and Another* (CCT64/15) [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) (30 November 2015)

With the shift towards pro-poor land management systems there is also growing recognition of the need to improve participatory adjudication approaches to accommodate social land tenures, including complex layered rights, and be able to accommodate less accurate forms of data and maps. The new system needs to be underpinned by a set of legally recognised adjudicatory principles and procedures, as well as legally recognised adjudicators who are empowered to weigh up new forms of evidence that differ from the evidence that is needed to determine the legitimacy of registered title or 'real rights'. (Kingwill 2004). The big question is what is the set of socially accepted evidence that can be used to determine and legitimate local rights? The new set of legal adjudicatory guidelines or principles would establish what evidence is eligible, and in what order of preference; a concept that may be referred to as developing a 'library of evidence' or a 'hierarchy of evidence', and should be sufficiently flexible to accommodate varying contexts.

There is increasing diversification of registration systems worldwide and in South Africa[5]. There are thus precedents for arguing that functions of registration, and by extension, recordal of rights, can be located outside the courts, situated in the executive branch of government as a function of the administration of property law. Adjudicators in the executive should be legally trained people acting as commissioners, but the determinations they make are made out of court.

The imminent question is whether the current registration system can cater effectively for the variety of needs addressed in the emerging framework of land law, by dealing with the proliferation of registration activities expediently, without sacrificing its characteristic accuracy and meticulousness[6].

In South Africa the Deeds Registry, which is renowned for its efficiency historically (bearing in mind it was mainly geared for limited 'white titles') is highly centralised. The pending digitisation of all historic records, however, means that deeds records will become

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[5] In South Africa, for example, title to mineral and petroleum resources is registered outside of the Deeds Registry. The Mining Titles Registration Act establishes the office of the Director-General who is an officer of the Department of Minerals and Energy, with duties similar to the Registrar of Deeds. The Director-General is assigned the duty of registering all rights granted in terms of the Mineral and Petroleum Resources Development Act, and "generally all documents evidencing title which by law are proper for registration in the Mineral and Petroleum Titles Registration Office" (*ibid)*. Another example is the office of the registrar in the Department of Rural Development and Land Reform created in terms of the Communal Property Associations Act, no 28 of 1996.

Anecdotally, law professionals and activists have criticised these two institutions for lack of efficient functioning. However, in terms of a 2016 amendment bill, section 2D of the proposed CPA Amendment Act, provision has been made for upgrading the status of 'registration officer' to the status of 'registrar', with the possibility of a 'deputy registrar'. These officers have powers of registration of CPAs, though not of the land parcels. As is currently the case, CPA registration officers/registrars cannot register title to land, but have powers to register the constitutions of the CPAs. The proposed registrar will have increased powers to actively assist CPAs develop capacity to govern and to comply with legal requirements. This is an example of lateral thinking, showing that there can be an overlap between the duties of the Registrar of Deeds and the duties of registrars of new forms of property. Giving CPA registrars greater powers, will, however, be of little assistance if the normative logic informing day-to-day customary tenure practices diverge substantially from the normative logic governing title deeds.

[6] An important consideration in discussing the role of the registrar of Deeds in South Africa relates to the limitations of the Deeds Registry as repositories of registerable rights only. Could the Deeds Registry overcome the legacy of highly unequal rights between whites and black historically? Based on the past twenty years' experience, there is a mountain of evidence to show that the present Deeds registration system cannot cater for the new forms of rights that have been recognised by the Constitution and in the first policy paper viz., the White Paper on South African Land Policy (1997). The diversity of tenure rights that need to be recognised can therefore not be demonstrated due to the rigorous restrictions on what immovable property is considered to be 'registerable'. In the latest edition of the eminent property law text book, *Silberberg and Schoeman's The Law of Property* (Badenhorst, Pienaar and Mostert 2006, 239), the authors raise serious doubts.

increasingly accessible and thus the question of where they are housed becomes less and less critical. Title deeds showing current information are already available electronically. The question of expanding or decentralising the functions of the Deeds Registry is a vexing and challenging question. There are examples of decentralised local deeds registries in other parts of the world, e.g. India[7]. There are also examples of attempts in South Africa (see Rubin and Royston forthcoming 2017) to develop local land records for urban townships, but these remain off-register.

The jurisdictional location of local land administration records systems in South Africa is influenced by capacity issues, and not only by legal-institutional considerations. Municipalities would be the obvious institutions to provide repositories for holding and maintaining local records, since they have the most to gain by having accurate land records. Many of these institutions have, however, struggled to deliver the services they are constitutionally empowered to do. There are anecdotal accounts that land surveyors argued in the late 1990s that the private sector could be the repositories for land rights information, and would sell it to developers to recoup costs. The case for local registration/records in South Africa has not gained much traction in South Africa, and is generally frowned upon by Deeds Registry officers and land professionals.

The system is expected to operate *parallel* to the existing registration system, establishing novel forms of title called starter title and landhold title

4.6   Piloting new data management system

A key element of such a process would entail integration setting up of a national land data infrastructure/s (land data repository) into a decentralised national land data infrastructure. This would be made up an IT system or systems that store and are used for accessing of land data. While such a system could potentially have a range of functionalities in future, it should initially serve as a national repository of all land data which has been generated through the state machinery or paid for by the state.   This will entail some level of short to medium term practical alignments and legislative reforms which include the alignment and cleansing of old order land administration statutes. This will entail reviewing, aligning and reconceptualising legal frameworks in order to build an integrated land management.

> Advances in communication technologies and data sharing cultures enables easier integration and aggregation of decentralised land administration processes and information. The focus is now on delivering national land administration infrastructures, regardless of whether centralized or decentralized organisational approaches are used. (R. Bennett et al, p209)

The envisaged restructuring process will entail a long term change management strategy based reform to the country's land data systems, systematically migrating them into a decentralised — but integrated — national system.

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[7] Acknowledgements to Lauren Royston for pointing this out

See LandNNES Discussion Document on Data Management and Open Data Government. Central to repurposing LA is changing the country's approach to, and thus policies regarding land information and how it is collected, stored and accessed.

4.7   How to make this work: some considerations for discussion?

The proposals entail a programme which could be implemented over time, in a period ranging from 10 – 20 year. The process requires political will and envisages mostly institutional realignment, with the development of robust policy, legislative reform and practical roll out.

A dedicated body, probably an similar to the Law Reform Commission or an interministerial commission as suggested above, could be assigned this task, supported by a national Steering Committee involving specialists and key departments reflecting the transversal nature of LA, including the Presidency National Planning Commission, Department of Rural Development and Land Reform (DRDLR), Stats SA, Department of Agriculture Forestry and Fisheries (DAFF), Department of Human Settlements (DHS), Department of Water And Sanitation (DWS), Department of Environmental Affairs (DEA) and South African Local Government Association (SALGA) together with their provincial counterparts. The national body would require interim legislation to ensure allocation of budgets.

Wide ranging legislative reforms will be necessary to regulate how data is collected, stored, maintained and shared. Part of these reforms will entail modernisation of archiving systems. An integral part of the legal reform measures would be around setting national standards for data capturing and storage.

The proposals for institutional reforms in land administration should aim at reducing the outcome of a bloated bureaucracy that is simply added on to the existing bureaucratic set up with an unsustainable budgetary requirements. Rather, the proposals aim at realignment and reassignment of functions, as well as assigning some of the functions to existing staff and retraining them as far as possible.

To roll out the envisaged system will require capacity building and wide-scale retraining of officials, and also educating and training a new cadre of officials to enable the development of a layer of new officialdom and land professions over time. Universities need to be resourced to draw lessons for curricular changes and respond to the lessons learnt from the proposed piloting process mentioned above.

Both the proposed Land Records Act as well as the proposed national land data infrastructure require further research as well as incremental piloting. Given the country's fiscal constraints in the short to medium term, there is an opportunity for the state to partner with private sector players, universities, NGOs and international agencies with respect to funding, design and piloting of such a systems. It is advisable to form partnerships with international bodies that have walked the path, e.g. UN Habitat and its partner, the Global Land Tool Network (GLTN), the International Federation of Land Surveyors (FIG), and many other related institutions.

The initiation of the proposals should critically involve a wall-to-wall study to provide a comprehensive picture of existing land data land systems and their content as well as to assess their strengths and weaknesses, compatibility or interoperability; and ultimately to determine the feasibility of a national system. The study would need to include a thorough review of the legal environment and to assess legal impediments and enablers.

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5   ANNEXURES

5.1   ILC statement regarding reclassification of key land SDG indicators from Tier II to Tier III

The following was issued by the ILC Secretariat Tuesday, November 28, 2017

Now that land rights have a secure place in the 2030 Agenda and are recognised as a critical element in transforming our world, it's time to celebrate but also think of what's next.

Our fight up until now has been concentrating on getting land rights indicators in place to ensure that 'what gets measured, gets done' - and it continues. At the same time, a win for land indicators could mean a real shift in how relevant land rights are for sustainable development as a whole.

ILC members have been at the frontline to keep land rights high on the 2030 Agenda ever since discussions on the global goals began in early 2015. Years of advocacy have finally paid off this November when the Inter-Agency Expert Group on SDGs Indicators (IAEG-SDG) reclassified the remaining two land rights indicators, 1.4.2 and 5.a.2, moving them from Tier III to Tier II.

This reclassification was achieved thanks to the massive effort of international organisations leading the development of the indicators methodology, the so-called custodian agencies (World Bank, UN Habitat, FAO and UN Women), as well as many ILC members and partners engaged in the process to develop, pilot and advocate for the three land rights indicators and their reclassification to Tier II.

Here are the THREE land rights indicators for SDG 1 and 5 that are now 'Tier II'

1.4.2 Proportion of total adult population with secure tenure rights to land, with legally recognized documentation and who perceive their rights to land as secure, by sex and by type of tenure.

5.a.1 (a) Proportion of total agricultural population with ownership or secure rights over agricultural land, by sex; and (b) share of women among owners or rights-bearers of agricultural land, by type of tenure.

5.a.2 Proportion of countries where the legal framework (including customary law) guarantees women's equal rights to land ownership and/or control.

One year ago, all three land rights indicators were classified as Tier III. This meant that there was no agreed methodology and National Statistical Offices were not in a position to collect data on them. The risk was that indicators in Tier III would disappear from the 2030 Agenda entirely, and all of the efforts of ILC members and partners to stress the importance of measuring improvements in land rights as part of the sustainable development agenda would be in vain. **What does this mean concretely?**

Tier II however means that those indicators now have internationally agreed, tested and ready to implement methodologies[1] and all National Statistical Offices know how to collect the data for these indicators. For indicator 1.4.2 and 5.a.1 this means gathering data

via household surveys and collection of admin data, while for indicator 5.a.2 it implies a legal analysis for each country.

What does this mean for the land community and what's next?

Above and beyond this being a major victory for the land community, this could be the start of a profound change in land rights being recognised as being at the core of sustainable development.

According to Dr. Peter Messerli, co-chair to lead the group of scientific experts tasked with drafting the upcoming UN Global Sustainable Development Report, "the transformative potential of the land related indicators is that we can talk about land not as a threatening subject – but as having the potential to alleviate poverty and achieve sustainable development."

Now that the land indicators have moved to Tier II, everyone is focusing on monitoring, who is responsible for it, how can it be done, and who will gather the data, among other practical questions.

Coordinated actions of donors, custodian agencies and civil society organisations at country level to engage with and support NSOs will be key to encourage the gathering of data and the use of these indicators. We will need to remain vigilant and use advocacy spaces at national and global levels to ensure that indicators will:

1.   Continue to focus on various form of tenure and not only on ownership;

2.   Produce sex-disaggregated data (e.g. through randomized households surveys);

3.   [Ensure] data is gathered for all parts of the indicator - for instance both perception and administrative data for indicator 1.4.2.

While these are fundamental for us to move forward, the broader potential of these indicators is to break free from the idea that land rights is an agricultural issue only and open up a conversation on the role of land rights in sustainable development in all its dimensions: social, economic and environmental.

"The real win of these indicators is that they are an inspiration for us to link land to other development issues, including gender equality, reducing poverty and hunger, economic growth and protecting our environment", Messerli adds.

Both in practical and conceptual terms, this is a critical milestone. All of us in the land community have a role to play to ensure that there is follow-through and these indicators are able to make a real difference in people's lives.

The ILC secretariat is ready to support our members and work with other key partners at the global and national level to make sure this happens.

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[1] https://unstats.un.org/sdgs/files/meetings/iaeg-sdgs-meeting-06/Tier%20r...

5.2   UN - FIG Bathurst Declaration on Land Administration for Sustainable Development

EXECUTIVE SUMMARY

Almost all societies are currently undergoing rapid change brought about by a diverse range of factors that include growing population pressures on the land, especially in urban areas. The world's population has already reached six billion people. The poor are becoming increasingly concentrated in slums and squatter settlements in our ever-expanding cities.

The gender inequities in access to economic and social opportunities are becoming more evident. Within 30 years, two-thirds of the world's population will live in cities. Fresh water availability is now approaching crisis point. At present consumption levels, two-thirds of the world's population will live in water-stressed conditions by the year 2025. The challenge is not only to meet world population needs for food, shelter and quality of life, but also to ensure that future generations can also have their needs met.

Insecure property rights inhibit use and investment in rural and urban land. They hinder good governance and the emergence of engaged civil society. Uncoordinated development, poor planning and management of land and its use, and the increasing vulnerability of populations to disaster and environmental degradation all compound the difficulties of meeting this challenge. Without effective access to property, economies are unable to progress and the goal of sustainable development cannot be realised.

However, the world is changing. Growing awareness of the issues, better understanding of the consequences of actions, and greater capacity to secure and use relevant information are helping to bring about the necessary changes. These issues are forcing the re-engineering of land administration systems to ensure that they support sustainable development and efficient land markets. Land administration frameworks will be forced to respond rapidly to these unprecedented changes.

The joint United Nations and International Federation of Surveyors Bathurst Workshop on Land Tenure and Cadastral Infrastructures for Sustainable Development has responded to this challenge. Land administration institutions and infrastructures will have to evolve and adapt their often inadequate and narrow focus to meet a wide range of new needs and technology, and a continually changing institutional environment. They also need to adapt continually to complex emerging humankind-land relationships at the same time as changing relationships between people and governments. These conditions should lead to improved systems of governance.

The Bathurst Workshop examined the major issues relevant to strengthening land policies, institutions and infrastructures and, in particular identified the following:

- future humankind/land relationships;
- the role of land in sustainable development;
- food, water and land policies;
- land tenure and land administration systems;
- how land markets, land registration, spatial planning and valuation interact; and
- re-engineering land administration systems.

For each of these key areas, the Workshop reviewed the existing situation within the rapidly changing land administration environment. It investigated and provided recommendations as to how land tenures, land administration institutions and infrastructures and cadastral systems should evolve to enable the challenges of change in the 21st century to be met.

The Bathurst Declaration on Land Administration for Sustainable Development calls for a commitment to provide effective legal security of tenure and access to property for all men and women, including indigenous peoples and those living in poverty or other disadvantaged groups. It identifies the need for the promotion of institutional reforms to facilitate sustainable development and for investing in the necessary land administration infrastructure. This gives people full and equal access to land-related economic opportunities.

Most significantly, the Declaration justifies and calls for a commitment on the part of the international community and governments to halve the number of people around the world who do not have effective access to secure property rights in land by the Year 2010.

To realise this commitment, the Workshop proposes a set of recommendations. The policy and institutional reform recommendations ensure that there is a balanced and integrated approach to addressing all tenure relationships in both urban and rural society. Full and active participation by local communities in formulating and implementing the reforms is recommended. The need to develop land administration infrastructures that effectively address the constantly evolving requirements of the community is critical. Finally, information technology is seen as playing an increasingly important role in developing the necessary infrastructure and in providing effective citizen access to it.
Sustainable development is not attainable without sound land administration.

RECOMMENDATIONS

Given that more than half the people in most developing countries currently do not have access to secure property rights in land and given the concerns about the sustainability of development around the globe and the growing urban crisis, the Bathurst Workshop recommends a global commitment to:

1. Providing effective legal security of tenure and access to property for all men and women, including indigenous peoples, those living in poverty and other disadvantaged groups;
2. Promoting the land administration reforms essential for sustainable development and facilitating full and equal access for men and women to land-related economic opportunities, such as credit and natural resources;
3. Investing in the necessary land administration infrastructure and in the dissemination of land information required to achieve these reforms;
4. Halving the number of people around the world who do not have effective access to secure property rights in land by the Year 2010.

The Workshop in confirming the Bogor Declaration, extending the professional debate on desirable land administration and recognising that the community of nations have committed themselves to the various United Nations Global Plans of Action arising out of

the UN Summits over the last decade, recommends the following:

5. Encourage nations, international organisations, NGOs, policy makers, administrators and other interested parties to adopt and promote the Bathurst Declaration in support of sustainable development.

6. Encourage all those involved in land administration to recognise the relationships and inter-dependence between different aspects of land and property. In particular there is need for functional cooperation and coordination between surveying and mapping, the cadastre, valuation, physical planning, land reform, land consolidation and land registration institutions.

7. Encourage the flow of information relating to land and property between different government agencies and between these agencies and the public. Whilst access to data, its collection, custody and updating should be facilitated at a local level, the overall land information infrastructure should be recognised as belonging to a national uniform service to promote sharing within and between nations.

8. Improve security of tenure, access to land and to land administration systems through policy, institutional reforms and appropriate tools with special attention paid to gender, indigenous populations, the poor and other disadvantaged groups. In many nations, this will entail particular efforts in areas under customary or informal tenure and in urban areas where population growth is fast and deficiencies are most prevalent.

9. Recognise that good land administration can be achieved incrementally using relatively simple, inexpensive, user-driven systems that deliver what is most needed for sustainable development.

10. Recognise that the unacceptable rise in the incidents of violent dispute over property rights can be reduced through good land tenure institutions that are founded on quality land information data. Good land information underpins good governance. Where conflict arises, there must be inexpensive land dispute resolution mechanisms in place that are readily accessible to all parties concerned.

11. Encourage national and local government bodies to document and manage their own land and property assets.

12. Recognise that land markets operate within a range of land tenures of which freehold is but one. It is important to facilitate the efficient operation of land markets through appropriate regulatory frameworks that address environmental and social concerns.

13. In order to increase knowledge of the global situation of land administration and land tenure, the United Nations undertake a study of global land administration issues such as the range of tenure issues, gender, urban agglomeration, land disputes, problems and indicators with a view to producing a global atlas and related documentation. Much of the needed data are already available in different UN databases.

14. Recognising the difficulties in interpretation of the many land administration related terms, develop a readily accessible thesaurus, translated into appropriate languages, to facilitate a better understanding of the terminology used. Further, on the basis of selected criteria, use this to prepare examples of best practice in the field of land administration. This can be done using work already completed by FIG and FAO.

15. In view of the crucial importance of human resources in the management of land, ensure that there is sustained education and training in land administration. In particular, international agencies should seek to develop multi-disciplinary, multinational training courses in land administration and make these available at the local level through the use of

modern information technology.

16. International and national agencies, NGOs and other interested parties to arrange workshops and conduct studies with regard to such matters as the quality of access to land and information, gender issues, customary law and indigenous rights, land tenure systems, interaction between land and water rights, maritime cadastres, and the management of land administration systems.

17. In order to coordinate foreign assistance, countries seeking help should play a more active role in the coordination of aid and prepare a country profile analysis, describing the status of land administration and the need for improvements. Based on this the countries should then prepare a master plan to which all land administration, initiatives and projects should adhere.

18. In order to ensure sustainable development of territorial oceans claimed under UNCLOS, the United Nations emphasise the need for claimant countries to develop their capability to support effective marine resource administration through the national spatial data infrastructure.

19. Undertake analyses and develop performance indicators that can monitor the effectiveness of land administration and land tenure systems in relation to sustainable development and poverty alleviation.

20. That the Workshop and FIG strongly support the "Global Campaign for Secure Tenure" undertaken within the implementation of the Habitat Agenda, presently launched by the UNCHS (Habitat), and commits to promoting activities in terms

5.3   Global responses to Tenure Insecurity

There have been a wide range of international responses to the increasing gaps in land rights between rich and poor, exacerbated by the hierarchical legal arrangements that place more value on registered rights. The discrepancies are mainly reflected in cadastral systems that are unable to meet the needs of social governance of tenure.

Looking back over the past twenty years since an international workshop held in Bathurst Australia which culminated in the Bathurst Declaration of 1999 (see 2.4 above and 6.2 below) presents a depressing picture from the point of view of the lack of progress in many countries in addressing the concerns of people without legal tenure rights, and in South Africa this concern is evident in the growing number with off-register rights, the lack of a sustainable way to recognise customary right in rural areas, the collapse of LA in the former homelands, the rise of informal settlements and the absence of land administration to regulate land acquisition and rights in these settlements. The urgent need to address the 60% of the population with off-register rights (discussed below) has failed to unseat the conventional cadastre with its market-based land allocation from the centre of Land Administration management. South Africa has been slow in showing an interest in international examples of innovation and attempts to expanding the concept of the national cadastre to include a broader vision, but there have been some significant case-based innovations by NGOs.

The need for reformulation of concepts of tenure and tools to administer tenure in

developing countries have become recognised as an urgent global priority, resulting in the proliferation of new GIS-based systems for recording rights, and also new concepts and criteria for measuring tenure. The World Bank, UN-Habitat and its closely associated Global Land Tool Network, in collaboration with the International Federation of Land Surveyors (FIG) have been hard at work in generating alternative systems of administration and recognition of the continuum of land rights.

A number of new tools have been designed in recent years to provide alternative land recordal, land information systems and land administration models. The following is a very brief summary of some of these developments, which does not provide detailed insights into the background and mechanics of each development, but merely serves as indicative of the new international directions in LA that amplify the reforms being proposed for South African Land Administration.

5.3.1 The Continuum of Land Rights

The concept of the 'continuum of land rights' that is strongly advocated by UN-Habitat and Global Land Tool Network (GLTN) has helped to break down the conventional association of a legal rights as restricted to real rights or rights derived from real rights. The idea of a 'continuum' recognises that a continuum of tenure exists in terms of social tenure relationships, such as occupancy, usufruct, informal rights, customary rights, indigenous right and nomadic rights. The continuum does not only exist along a linear plane since it should take into account the interface between the spatial unit, social unit, authority system, information system, etc. FIG has expanded the idea of 'continuum' to 'Continuum of Continuums' to recognise that the continuum is not simply a linear plane, but has many continuum dimensions.

Parties holding the rights may be social units such as family, clan/tribe, community, village, or a farmers´ cooperative, rather than the conventional 'legal person' or single owner. The spatial unit may vary according to where the rights and social relationships apply, e.g. a point cadastre rather than a parcel boundary, or it could be text based or photo based. Similarly, one may talk about a 'continuum of data acquisition methods or technologies' that will include what could be called 'continuum of accuracy'. Another dimension could be a continuum of land recording and credit accessibility, ranging from informal land offices in an informal settlement to a governmental land registry"
https://www.fig.net/resources/publications/figpub/pub60/Figpub60.pdf

5.3.2 Sustainable Development Goals (SDGs)

Aspirational goals have become an important global advocacy tool to enjoin national governments to commit a framework of human, economic and environmental rights, and appropriate systems of governance. Millennium Development Goals (MDGs) were replaced by the Sustainable Development Goals (SDGs) that list a universal set of 17 goals and 169 targets that UN member states are committed to use to frame their agenda and policies over the next 15 years (2016-2030). The goals are action oriented, global in nature and universally applicable. Targets are defined as aspirational global targets, with each government setting its own national targets guided by the global level of ambition, but

taking into account national circumstances. The goals and targets integrate economic, social and environmental aspects and recognise their interlinkages in achieving sustainable development in all its dimensions.

The SDGs represent a rallying point for NGOs to hold governments to account and are seen a key driver for countries throughout the world – and especially developing countries – to develop adequate and accountable land policies and regulatory frameworks for meeting the goals.

The SDGs raise the requisite for effective monitoring and assessment of progress in achieving the SDGs. These depend on reliable and robust data for devising appropriate policies and interventions for the achievement of the SDGs and for holding governments and the international community accountable. Such a monitoring framework is crucial for encouraging progress and enabling achievements at national, regional and global level. The need to monitor and evaluate adds to the motivation for what some LA reformers call a 'data revolution' for sustainable development to empower people with information on the progress towards meeting the SDG targets.

5.3.3   Voluntary Guidelines

The "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests" (VGGTs) developed by the UN-Food and Agriculture Organization (FAO) have been influential in drawing global attention to inequalities in land tenure and access to resources. Signatory states commit their governments to apply the guidelines in their respective countries, and help civil society to hold their governments to account.

The Voluntary Guidelines commit states to apply the following principles:
- recognize and respect all legitimate tenure rights and the people who hold them.
- safeguard legitimate tenure rights against threats.
- promote and facilitate the enjoyment of legitimate tenure rights.
- provide access to justice when tenure rights are infringed upon.
- prevent tenure disputes, violent conflicts and opportunities for corruption.

(UN-FAO,2012)

5.3.4   Fit-for-Purpose Land Administration

Most reformers in the LA sector realise that most of the land-related SDGs 'will not be achieved with conventional land governance. The Fit-for-Purpose Land Administration approach is generally regarded as an innovative and pragmatic solution to land administration in the context of the problems described in this document.

Enemark and McLaren summarise the approach as follows:

> The solution is focused on developing countries, where current land administration solutions are not delivering, with often up to 90 per cent of the land and population in developing countries left outside the prevailing formal version. The approach is directly aligned with country specific needs, affordable, flexible to accommodate

different types of land tenure, and also upgradable when economic opportunities or social requirements arise. It is highly participatory, can be implemented quickly and aimed at providing security of tenure for all. Most importantly, the FFP approach can start very quickly using a low risk entry point that requires minimal preparatory work. It can be applied to all traditions of land tenure across the globe. To significantly accelerate the process of recording land rights, the FFP Land Administration approach advocates the use of a range of scales of imagery as the spatial framework, wherever feasible, on which to identify and record visible tenure boundaries. This fast, affordable and highly participatory approach is appropriate for the majority of land rights boundaries. Using imagery also allows the spatial framework to be used by many other land administration and management activities and generate wider benefits. Security of tenure does not in itself require precise surveys. The most important aspect of security of tenure for the majority of unregistered land parcels is identification of the land object and its relation to neighbouring objects, in relation to the connected legal or social right. The absolute precision of the survey is less important, except perhaps in high value land and properties, and nonvisible or contested boundaries when higher precision, but more costly conventional ground survey methods and monumentation, may be necessary. Rather than mandating a single surveying specification for capturing land rights across an entire country, the FFP approach supports flexibility in adopting a variety of techniques to capture the land rights depending on local circumstances, a flexibility that will ensure lower costs and higher speeds in the capture of land rights. However, this does require that those designing the FFP projects are familiar with and able to select the most suitable options from the myriad of emerging technologies and solutions that show significant promise in accelerating the process even more.

The following principles are recognised:
The basic components of the fit-for-purpose concept are threefold:
● Using affordable modern technologies for building a spatial framework, e.g. orthophotos, showing the way land is occupied and used. The scale and accuracy of the mapping may vary according to building density, topography and other requirements.
● Based on the spatial framework, using a participatory approach to identifying and recording the various legal and social tenure rights associated with occupancy and use of the land.
● Adopting a legal framework that accommodates the flexibility necessary for implementing a fit-for-purpose approach. This framework may be established up front or it may be developed incrementally.

These components translate into:
● General boundaries rather than fixed boundaries. Using general boundaries to delineate land areas will be sufficient for most land administration purposes especially in rural and semi-urban areas. In the present context, the term "general boundary" means one whose position has not been precisely determined, although usually, the delineation will relate to physical features in the field.

- Aerial imageries rather than field surveys. The use of high resolution satellite/ aerial imagery is sufficient for most land administration purposes. This approach is three to five times cheaper than field surveys.
- Accuracy relates to the purpose rather than technical standards. Accuracy of the land information should be understood as a relative issue related to the use of this information.
- Opportunities for updating, upgrading and improvement. Building the spatial framework should be seen in a perspective of opportunities for on-going updating, sporadic upgrading, and incremental improvement whenever relevant or necessary for fulfilling land policy aims and objectives. Ensuring advocacy for change and providing support to change man

https://www.fig.net/resources/publications/figpub/pub60/Figpub60.pdf

The Fit-for-Purpose Land Administration approach does have its critics among the Geomatics professionals. Prof Mike Barry queries the implication that you can side-step or leapfrog over time-consuming community engagement, enumeration and adjudication based on local norms and protocols, and argues that a pre-designed solution will not be able to meet the complexities of localised power relations and governance He maintains, based on experience gained in field research, that FFP approaches are

> … likely to work under a narrow set of conditions. In general, they might work in stable rural communities where people have been resident in the area for a number of generations. In situations where boundaries are contested and it is not clear who holds the power to manage interests in particular pieces of land, interventions based on strategies that have not been properly researched and evaluated might be ignored by the people who are supposed to benefit from them or, worse still, they may create conflicts where none existed previously and disrupt local politics. (M. Barry 2018: 1-2).

One of his main concerns, which is valid in many communities in South Africa where state-regulated land administration has been absent for so long, is that interventions like records, firstly, do not capture the existing power relations and local mechanisms people have used to defend their interests, and secondly, the records potentially change the power dynamics and there are no means to monitoring and maintaining the new relationships that are not necessarily captured in the records.

5.3.5   New tools for LA

5.3.5.1   Social Tenure Domain Model

GLTN along with its partners, UN-Habitat, the World Bank and the International Federation of Surveyors (FIG) developed the Social Tenure Domain Model (STDM) in recognition of the gap in the conventional land administration systems that cannot accommodate customary and 'informal' tenure. STDM it is a relational database, using open source GIS software STDM that can support a range of tenures. It can respond more complex social relationships and can be customised to fit different county or community contexts. The developers see it as responding to "the need for complementary approaches in land administration". The

STDM concept was designed to bridge the gap between the conventional and customary or informal systems by providing a standard for representing 'people – land' relationships regardless of their current levels of formality or legality. It is a kind of prototype information management system. The tool is said to be a response to the need for efficient land rights' recordation tools by using Information and Communications Technology (ICT) that has become a necessity and increasingly available in recent times.

STDM was designed to meet GLTN core values such as pro-poor, equity, affordability, good governance, subsidiarity, gender sensitiveness, systematic large scale approach and sustainability. UN-Habitat/GLTN together with its implementing partners support the continuous development of the information tool in a variety of application areas ranging from informal settlement upgrading to natural resource management.

5.3.5.2   Talking Titler Network

The Talking Titler Network (TTN) is a land tenure information software system designed to capture structured and unstructured data and represent tenure relationships that may be too complex for a relational database to handle. The TTN is designed to suit complex tenure situation.

The designer, Mike Barry, came up with this model in consideration of the observation that a relational model such as the Social Tenure Domain Model (STDM) "may be ill-suited to the complexity inherent in some conflict and post-conflict situations, where numerous many-to-many relationships may be represented in unstructured and conflicting data. It is also poor problem solving and strategy formulation practice to constrain a solution by adopting a particular database model or a universal standard upfront without first examining the different LTIS alternatives that may best fit a problem situation"

Talking Titler allows a great deal of flexibility in the way data relates to people, land and evidentiary media (titles, deeds, survey plans, descriptive documents, audio records of oral testimonies, videos, photographs, valuation records, etc.) can be stored and related. The system also supports the use of a mix of paper-based and digital documents. Flexibility in the database design allows for bottom up, top down and open-ended evolutionary system design. The latter is critical when developing systems for uncertain situations.
https://www.ucalgary.ca/mikebarry/TalkingTitler#whatis

1.1.1.1   UN FAO SOLA

The SOLA software design is based on the Land Administration Domain Model (LADM) that is also the foundation of the development of the STDM. It is driven mainly to address affordability, adaptability and accessibility at the most local level possible, and which could support the Voluntary Guidelines for the Responsible Governance of Tenure.

SOLA software supports both formal and informal recording of tenure rights. It has a scalable architecture from several thousand parcels/certificates to several hundred thousand – including a digital archive and business rules to validate and maintain the integrity of the Land Administration Domain Model database. Open Tenure provides communities with a low cost, low-tech option to map and record tenure interests. Open

Tenure is implemented on commonly available Android mobile devices with the field data being consolidated on a cloud-based server – or wirelessly to a low cost, low power "stick PC". Open Tenure is also being used in formal land administration for both data capture (with data transferred to SOLA Registry) and first-time land certification (with field data transferred to SOLA Systematic for public display and certificate production)." (Kadaster 2018)