

**ABSTRACTS for the Land Governance and Agrarian
Transformation Policy Roundtable**

March 20 – March 21

Birchwood Hotel, Johannesburg

A systematic approach to equitable access to rural land in South Africa

Presenter: Dr Farai Mtero

Senior researcher at the Institute of Poverty, Land and Agrarian Studies (PLAAS)

South Africa's land reform is embedded in the constitution. In relation to the land redistribution component of land reform, section 25 (5) of the Constitution clearly provides for the right to equitable access to land. However, much of the public debate has revolved around the failure of the market-based approach to land reform. Discussions often highlight the limitations of the 'willing buyer willing seller' approach as a mechanism for land acquisition and the need to expropriate land without compensation in order to accelerate the pace of land redistribution. However, the 'willing buyer, willing seller' approach is largely a policy choice and not a constitutional requirement. Furthermore, the existing constitutional provisions on expropriation have not been fully utilised as an instrument for land acquisition. Nevertheless, the 18th Constitutional Amendment Bill presents an opportunity to make explicit the state's existing expropriation powers and this could give a new impetus to land reform in South Africa. The High Level Panel (HLP) on the Assessment of Key Legislation and Acceleration of Fundamental Change (2017) and the Presidential Advisory Panel (PAP) on Land Reform and Agriculture (2019) have identified the absence of appropriate laws to give effect to the right to equitable access to land in South Africa. For instance, key questions in relation to who should benefit from South Africa's land reform, how beneficiaries should be prioritised and targeted, how land should be identified and allocated remain unresolved. In the process, land reform policy has shifted markedly in terms of the profile of beneficiaries. The means-test initially adopted to ensure a pro-poor focus in the early years of land reform was abandoned and, as a result, well-off individuals have become predominant as beneficiaries. In addition to these policy shifts, research reveals a rise in elite capture in land reform. A key recommendation echoed in both the HLP (2017) and PAP (2019) is the need for an overarching national land reform law which provides the overall framework and outlines a key set of principles on broadening access to land on an equitable basis. The HLP process produced an illustrative National Land Reform Framework Bill that represents a key reference to possible legislative interventions to operationalise equitable access to land in South Africa.

Equally significant is the Draft National Policy on Beneficiary Selection and Land Allocation released for public comment on the 03 of January 2020. This policy brief maps out the key set of challenges, opportunities and possible policy interventions in relation to equitable access to land in South Africa.

Urban Land Tenure Reform and Equitable Access to Land

Presenters: Lauren Royston and Maanda Makwabela

Researchers at Socio-Economic Rights Institute (SERI), a member of LandNNES

Our presentation is based on two papers commissioned by the Nelson Mandela Foundation which focus on urban land tenure reform and equitable access to urban land. We will present key principles to frame the debate and set the parameters for the proposals including: constitutional alignment; protection against arbitrary eviction; recognition of off-register tenures; the non-material meaning and value of land; proactive and responsive approaches to land reform; the role of state land in land reform; managing the urban land market; ensuring a multiple land use focus; disaggregating “the poor” and targeting appropriately. Our papers review existing measures for land reform and, together with the principles, these inform our proposals. We make four proposals for urban tenure reform: realise the rights of access to adequate housing and secure tenure; make better use of existing instruments; recognise off-register tenures; and reform land administration. Regarding equitable access to land we argue for the idea of a Framework Act, contained in both the High Level Panel and Presidential Advisory Panel reports. In order to operationalise the approach we propose a process for fine-tuning urban equitable access principles, the main legislative measure (the Framework Act) and the policy measures (the various programmes we reviewed). Institutional location is one of the most significant constraints to an urban land redistribution agenda and we propose an Office of Equitable Access in the Presidency. Finally, we propose that a series of test cases should be identified for both urban land redistribution and tenure reform.

Integrated Land Administration Systems for South Africa

Presenter: Dr Rosalie Kingwill

LandNNES member and independent consultant

Land Administration is an element of public administration that relates to the formal and informal public regulation of land, including marine, forest and mineral resources. It includes both state and non-state institutions as well as private sector and community organisations. Land administration as a holistic concept of managing land rights has been a highly neglected element in South Africa’s land reform programme resulting in dysfunction in land reform contexts. Land administration is the critical implementation element of land governance, which FAO defines as “all the formal and informal rules, institutions, and organisations and

processes through which public and private actors articulate their interests; frame and prioritise issues; and make, implement, monitor, and enforce decisions” relating to land and natural resources. It includes the manner in which decisions are implemented and enforced and competing interests managed. It thus comprises the functions that actualise these policies, laws, plans and programmes. Land governance and land administration in South Africa are characterised by fragmentation, inconsistency and inequality. State land administration focuses on the formal system governing the cadastral and land registry system, while the land rights and uses that are outside of this are largely regulated by local or hybrid institutions with minimal regulation. Conventional technical approaches to land management and regulation are inadequate to address the challenges. Existing land administration tools cannot cope with the challenges of diverse tenure systems and the unequal spatial distribution of land use that still reflects racialised apartheid geo-spatial boundaries and patterns. There is an urgent need to address dysfunction in land administration institutions in order to support the goals of land reform, economic development and equitable change. The Policy Brief addresses short, medium- and long-term recommendations for incremental restructuring. The long term goal is an integrated and unified LA system that provides *infrastructure* for managing land-related rights and issues, including an integrated land tenure information system and data management system capable of recording all legitimate land rights in a way that recognises and accommodates normative diversity, customary rights and a continuum of rights. An immediate priority supported by FAO is to develop capacity to record off-register rights. This process must be accompanied by holistic institutional strengthening with a major focus on developing adjudication and dispute resolution institutions to accompany recordal. There must be policy and budgetary commitment to specific and focused inter-government and inter-sectoral task teams and a special purpose vehicle to drive policy, implementation, monitoring and evaluation. These should include civil society representatives. A twenty-year vision should be developed with short, medium and long-term goals for incremental institutional restructuring, with appropriate development of the law and executive capacity along with budgetary commitments. In particular we argue for policy and budgetary commitments to test new approaches and technologies in the field using problem-solving and iterative approaches which engage and develop local institutions. In particular we propose an *enabling* Act, the Land Administration Framework Act (LAFA) that provides for (a) an integrated land information system including a land records system, e.g. by means of a separate Land Records Act (b) new forms of rights adjudication with a Land Rights Adjudication Act that provides for principles for admission of new kinds of evidence including customary and neo-customary law (c) appropriate succession law reforms (d) dispute and conflict resolution institutions (e) a national land Ombud to manage higher-level conflict especially between the state and citizens, or corporate liability/responsibility, and to manage state accountability for enforcement and implementation of policies and laws (e) accredited curricular and training of officials in new LA systems. These institutions would handle adjudication, mediation of

disputes, rights-violations and rights-determinations, instead of relying on the courts for every dispute.

Integrated Land Information and Data Management Systems for South Africa

Presenter: Siyabu Manona

Senior research at Phuhlisani

The land question in South Africa is firmly finding its way back on the policy chopping block in political and academic circles. While most of the current debates are sedimenting towards the modalities of increasing the pace and reducing the cost of land reform, very little attention is given to the basic requirements for land data/information as a centre pivot of land governance and administration. Globally there is a growing realisation and appreciation of the need to manage geodata as a resource, which is coupled with emerging methods of collection, storage and dissemination of land data. The LandNNES concept is primarily based on a detailed review of secondary literature and other documents, as well as observations and key stakeholder interviews. The concept note presents a brief assessment the state of South Africa's land data/information ecosystem, as a cross-cutting domain in land governance and administration. The outcomes of the analysis points to a land data/information ecosystems that is archaic, fragmented and incoherent. The concept not makes a case for the development of a national land observatory as part of repurposing of South Africa's land governance and administration system. The concept note builds on pre-existing ideas of a national approach, and national data infrastructures to governance and administration of land. Primarily the paper presents an argument for South Africa to move beyond Spatial Data Infrastructures (SDI), towards the constitutional imperatives of Open Government and Open Government Data. The paper begins to generate a set of ideas for some of the key principles that should underpin the repurposing South Africa's land data/information domain, and setting up of a land observatory. The concept note import the notion of 'infrastructuring' from ICT studies and the notion of a 'single source of truth', from the Fourth Industrial Revolution (industry 4.0).

Small Scale Farmers

Presenter: Dr Donna Hornby

LandNNES Facilitator and agrarian researcher

It is often claimed that smallholders produce most of the world's food and are thus key to global food security. In South Africa, however, because of our history, small plot holders (in their differentiated nature) use significantly less than 13% of the land, while approximately 5% of commercial farmers produce most of the country's food. Nevertheless, small scale

farmers provide employment opportunities (in the form of part- or full-time wage employment, self-employment and household labour) that exceed work opportunities provided by the commercial farming sector and make a significant contribution to household food security and are the main suppliers of under-recognised local or informal markets. It is thus an under-valued sector of the agricultural economy. Furthermore, despite being the lowest contributors to carbon emissions, smallholder farmers, and the poor across rural and urban landscapes are the hardest hit by climate change induced flash floods, fires and prolonged droughts.

The paper analyses the situation of smallholder farmers in South Africa and identifies the challenges they face, including tenure, social dynamics of labour and differentiation, markets and technical and financial support. The brief takes as a point of departure the United Nations Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT). Within this context, the paper highlights the poor implementation of land reform resulting in job losses, a significant reduction in agricultural production due to lack of understanding and support for subsistence and smallholder farmers, insecure access to and control over productive resources, including climate change adaptation, and government's failure to effectively transform the dominant corporate structure of South Africa's food system.

The author argues that smallholders are a highly differentiated group of farmers and their diversity is the result of dynamic social and economic processes that play out at the household level, which require targeted and flexible policy and programmatic interventions at national and local government levels to support their farming activities and to help them build resilience to climate change. Emphasis is placed on the potential of agro-ecological and adaptive farming systems for improving smallholder resilience to climate change, making a contribution to household food security, and developing more viable and sustainable livelihoods. To conclude, recommendations addressing climate change strategies for different categories of farmers are discussed alongside a set of proposed policy and legislative amendments.

The South African Small-Scale Fisheries Policy (SSFP)

Presenter: Aphiwe Moshani

UCT Researcher and Founder of Black Womxn and Research

Coastal communities in South Africa continue to face marginalization from decisions regarding their livelihoods at the hands of poorly managed state institutions such as policies and laws. Communities along the South African Coastline, which stretches to about 2. 798 km, have made use of marine resources for livelihood purposed for thousands of years' pre-

colonial rule. In fact, over 30 000 thousand households relied on fisheries specifically (Sowman, 2006). However, colonial and apartheid institutional arrangements prohibited black fishers from accessing marine resources making it difficult and dangerous for rural communities on the coast to sustain this traditional livelihood.

The anticipated transformation of the post-1994 government aimed at redressing these inequalities in marine sector and thus introduced transformative institutional mechanisms such as the Marine Living Resources Act (MLRA) 1998. However, local small-scale fishers were not provided for by this or any legal framework at the time thus, these fishers and communities remained criminalized.

After many small-scale fishing communities demanded legal recognition according to their human rights, an Equality court order ruled in favour of all these communities by ordering the amendment of the MLRA and the promulgation of the National Small-Scale Fishers Policy (SSFP) in 2007. Almost 13 years after this court order and thus far, the success of the SSFP in achieving its objectives of improving access to fisheries resources and therefore sustain fisher livelihoods has proven underwhelming to coastal communities, more so in rural communities on the country's East coast (KwaZulu Natal and Eastern Cape). Therefore, the apparent disconnect of the policy's aim and implementation processes has left communities uncertain and with no access to a traditional livelihood.

This is particularly concerning as the voices of fishing communities have been central to the development of the SSFP principles and objectives. Therefore, the policy is still highly relevant, however, conditions in the sector have indeed changed since the Equality court judgement in 2007. This suggests that the policy cannot be forced into an existing set of circumstances. At this stage, decision-making processes have had poor representation of fishing communities. The following policy brief includes recommendations that emphasize mechanisms for inclusive, people-centred and human rights-based policy implementation post-policy development.

Gender and Land Reform

Presenter: Makhosi Mveli

Independent land and gender researcher

South Africa is at the height of an economic crisis with high levels of unemployment, persistent poverty and inequality. The agricultural sector has the potential to contribute significantly to the country's economy, if innovative opportunities are explored. One of the key issues in expanding the agricultural sector's potential is making land that is available more productive and by providing access to land to more people who currently do not yet have access. Evidence from different developing countries, shows that women contribute significantly to the agricultural sector, yet the majority of them do not have same access and

control over land and other resources. The South African government has passed good and progressive policies starting with a very progressive constitution, to several other pieces of legislation along with it, in an attempt to address inequitable land ownership in the country. Using the FAO Legal Assessment Tool for gender-equitable legal frameworks to analyse the legal instruments governing land in South Africa, at a glance one assumes that gender equality in land distribution and ownership has been achieved. However, when analysing each of the pieces of legislation governing land, significant gaps have been identified. There are even more gaps when it comes to implementation of policy since there are no specific indicators and resources allocated to advancing gender equality in land distribution and therefore no tools to monitor progress.

Furthermore, while the constitution recognises customary law, variations in the implementation of customary law, with some elements which tend to discriminate against women, further confounds the issue of gender equality in land ownership. Different policy proposals for securing tenure in communal areas which are governed by customary law have tended to move towards securing tenure through titling, which some have challenged. The brief does not advocate for titling, as a means to address the gender gap in ownership and control of land, however it advocates for recognition of informal rights under customary law. The general observation is that policy is not conceived equally from a racial and a gendered perspective and as a result has failed to transform systems and institutions that render women inferior. A set of recommendations including aligning all policy to the constitution and developing guidelines, processes and procedures for implementation and transforming discriminatory institutions are proposed.

Learning from a District Approach to Settling Land Rights on Farms

Presenter: Siya Sithole

AFRA, Land Rights Programme Coordinator

Millions of South Africans remain marginal participants in the country's economy and continue to be largely invisible in government's planning instruments despite positive advances by the state such as the abolishment of labour tenancy, the enacting of labour legislation and the promulgation of land rights laws seeking to protect vulnerable people living on commercial farms in South Africa. At the recent State of the National Address, President Ramaphosa declared that Districts will be the main locality to drive development and transformation mandates. This paper considers what AFRA, a land rights NGO in the Umgungundlovu District, has learnt about operationalising a District approach to realising farm dwellers land rights. It thus services as a case study for learning about district approaches to development and service delivery.

Recent court decisions in favour of labour tenants and occupiers on farms have fostered opportunities for different interest holders and role-players to work in a collaborative way to

ensure the processing of land claims in a way that ensures provision of basic services and establishment of sustainable settlements on and off farms. The diverse nature of farm dwellers necessitates that a variety of options are considered to inform different packages for settlement that can be offered to different beneficiaries. One of the court orders referred to above appointed a Special Master of Labour Tenants to mitigate the two-decade long challenges in the implementation of the Labour Tenants Act. Pronouncements from the Office of the Special Master (OSM) suggest alignment with government's recent commitment to a district level approach to service delivery.

The presentation will unpack AFRA's district-led proposals which promote ground-based development processes that are driven by:

- Alternative Dispute Resolution (ADR) mechanisms that ensure speedy and mutually beneficial solutions to land rights disputes – contrary to the often-chosen litigation which is adversarial in nature and inevitably empties the pockets of all the parties to the dispute over a protracted period of time.
- Adaptive local planning processes that seek to address the tenure needs and service delivery rights and interests of farm dwellers. Local mechanisms such as these make it possible for farm dwellers to explore different settlement options in terms of rights and geography, and address the institutional arrangements necessary to make them real choices for people who live on farms. This includes providing options that accommodate better housing and services along with better opportunities for decent work and independent livelihoods, without compromising the tenure rights that labour tenants and farm occupiers have.