Policy Brief on an Integrated, Inclusive Land Administration System

1 INTRODUCTION

Land Administration (LA) is an element of public administration concerning the formal and informal public regulation of land, including marine, forest and mineral resources. In our definition, it is a holistic concept that includes and co-ordinates rights regulation and boundary demarcation, information and data systems, spatial planning, land use and environmental management, land valuation, dispute resolution and enforcement; and includes both state and non-state institutions as well as private sector and community organisations.

LA in this sense has been a fragmented and highly-neglected element in South Africa's land reform programme. It needs to become an integrated, publicly accessible land information 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.

This is the first step toward a twenty-year vision with short, medium and long-term goals for incremental institutional restructuring

2 PROBLEMS WITH THE CURRENT STATE OF LAND ADMINISTRATION

The SGO and Deeds Registry systems and the whole land administration framework work relatively well and in tandem for private property or state-owned entities, but significant problems are apparent when the scope of reference is widened:

➢ The current LA functions are poorly aligned with the de facto or customary arrangements governing spatial defintion or institutional boundaries, land rights access, succession and inheritance and land use of off-register, customary or communal systems of land rights.

➢ The administration of off-register rights is no longer undertaken by legally-recognised state institutions and is largely undertaken by localised state and non-state institutions that are not regulated by law, but by ad hoc arrangements sometimes referred to as 'adhocracy'.

➢ Chiefly governance has become increasingly unaccountable with respect to protecting local land rights, and more geared towards rent-seeking by elites.

➢ Boundaries of governance institutions and local authority systems applicable in various black rural and informal or formalising urban settlements are seldom aligned, thus spatial definition of land is often disjointed or overlapping.

➢ Land information and data management is fragmented, especially for off-register systems of land rights. Details of land claims, water rights, land use zoning, environmental regulations, physical hazards are not aligned with land ownership records and even basic details of land rights holders and land uses in off-register systems are entirely absent.

➢ Land use regulatory systems for off-register systems of land rights are absent or highly localised according to informal or local arrangements.

- We have strong tenure laws, but we do not have LA institutions to apply and enforce the principles contained in the laws, and this constantly undermines the capacity to deliver tenure security.
- The absence of an integrated land administration infrastructure to support all tenure regimes has undermined the effectiveness of the undoubtedly progressive elements of the rights-based laws.

3 DESIRED CHANGES AND ENVISAGED GOALS

First steps:

- A land administration system that includes all recognised and locally legitimate property rights, both registered and unregistered;
- A recordal system to bring off-register rights on-record through an alternative system to title deeds (but articulates with it); and
- A single land data portal that is able to tap into all land related sources of information through inter-operable data bases that are transparent and accessible.

Additional goals include:

- Acknowledge land administration a distinct and critical area for both land reform and coherent land governance;
- Alignment with VGGT guidelines from the UN's Food and Agriculture Organisation. (Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security)
- Integrate the insitutionally side-lined informal land administration systems with state-regulated formal systems;
- Deliver administrative and regulatory equity and land tenure security;
- Preserve diverse norms and customary practices, provided the latter are in line with Constitutional principles and the VGGT;
- Boost the security of currently vulnerable rights and build a sustainable land use management framework for the country as a whole;
- Factor in socio-economic realities and environmental (climate) concerns;
- Embed accountability in all systems of authority, including customary and local systems; and
- Develop a strong and holistic LA infrastructure.

These ideals do not mean 'one size fits all' or that we should aim for unitary and centralised models and systems. It means finding the unifying and common elements among the LA components so that they can be better aligned.

4 RECOMMENDATIONS ON IMPLEMENTING THE CHANGES

Our recommendations can be viewed in three stages: short-, medium- and long-term.

4.1 SHORT-TERM: IMMEDIATE PRIORITIES

4.1.1 Set up a vehicle to drive change
Appoint a special-purpose vehicle to drive a general process of land administration restructuring that is aimed at policies, laws and institutional arrangements. Its goals include:

➢ The development of a twenty-year "Vision for LA"
➢ Include a chapter on land administration for the proposed Green and White Paper on land reform.
➢ Commission a study that identifies specific sites of institutional disjuncture across the country in historical context, including misaligned planning frameworks, laws and land use management processes and fragmented land information and data management systems.

4.1.2 Institute pilot studies
We propose a series of pilots to test alternative methods and approaches in a range of sites (urban and rural) on the ground using new tools to measure and record existing rights. The methodologies for these applied studies include working with existing local institutions and understanding local practices to record rights.

The proposal specifics:

➢ start locally,
➢ build sustainable local systems using GIS and GPS,
➢ develop hybrid LA institutions to govern them, and
➢ over time bring about their progressive integration into municipal, city, provincial and national recordal systems.

The pilot studies should aim to understand:

➢ Urban land records systems
➢ Mining rights on communal land
➢ Tenure and use rights in CPAs
➢ Customary / neo-customary rights adjudication
➢ Small businesses and early childhood development (ECD) facilities in townships and informal settlements
➢ Township establishment processes in former homeland/peri-urban/urban

This information can then be used as feedback into the longer-term "Vision for LA".

4.1.3   Change the current teaching curriculum

We suggest substantial emphasis on curricular changes in tertiary institutions to teach and apply new concepts and tools related to land administration to (further) develop capacities.

4.1.4   Change legal definitions

There should also be evolutionary changes in property law and family law and the development of institutions such as the Surveyor General's Office and the Deeds registry, all of which need to change their interpretations of 'property', 'family' and 'ownership'.

4.2   MEDIUM TERM: LEGISLATION AND NEW INSTITUTIONS

- ➢ Create a second special-purpose vehicle to evaluate the evidence from pilot studies.
- ➢ Set up a commission to drive legislative changes, specifically:
  - o a proposed enabling Act,
  - o the Land Administration Framework Act (LAFA),
  - o a Land Records Act, and
  - o a Land Rights Adjudication Act.
- ➢ In the process, the Land Titles Adjustment Act 111 of 1993 (LTAA) and the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA) (listed in the legal framework above) should be substantially amended and merged, as much of their content will be superseded by the Land Records Act.
- ➢ LAFA is envisaged as enabling law that will allow for
  - o (a) recordal
  - o (b) new forms of adjudication
  - o (c) appropriate succession law
  - o (d) dispute / conflict resolution
  - o (e) an ombud
- ➢ Institutionalise conflict and dispute resolution mechanisms — create institutions for mediation of disputes, handling of rights-violations and rights-determinations, instead of relying on the courts for every dispute.
- ➢ Develop principles for admission of new kinds of evidence based on findings in pilots, including customary and living law norms; and systems and procedures, and accredited training of officials to adjudicate rights for recordal and statutory recognition (to be included in the proposed Land Administration Framework Act)
- ➢ Develop a monitoring system for the implementation of Land Reform and Land Administration reform policy provisions.
- ➢ Appoint a national land ombud for managing 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

4.3   LONG TERM: AN INTEGRATED AND UNIFIED LA SYSTEM

This system provides an infrastructure for all land-related management and rights, 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 and a continuum of rights.