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# **Policy Brief on an Integrated, Inclusive Land Administration System**

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Expert Policy Brief on improvement of the land administration system in South Africa in line with the VGGT to achieve an integrated and inclusive land administration system

***The document is for discussion purposes***

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## 1 Acknowledgements

This Policy Brief was prepared on behalf of and for the National Multi-Stakeholder Platform (MSP) on Land Governance in South Africa, with the support of the Food and Agriculture Organization of the United Nations (FAO), in order to develop capacity in land governance monitoring, policy dialogues and engagement on responsible tenure governance in the context of agricultural and rural development in line with the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*.

The development of the Policy Brief was managed by the Association for Rural Advancement (AFRA) in its capacity as Co-Chair of the National MSP, and the Secretariat for the Land Network National Engagement Strategy of South Africa (known as LandNNES) and the Civil Society arm of the MSP. The National Multi-Stakeholder Platform (MSP) was established in September 2017, with the FAO playing a catalysing role. The MSP is co-chaired by the Department of Agriculture, Land Reform and Rural Development (DALRRD) and Civil Society, currently represented by the Association for Rural Advancement (AFRA).

LandNNES is a broad civil society platform bringing together over 26 civil society formations (who are members) with a common medium-to-long term vision around strengthening people-centred land governance, especially for marginalised and vulnerable groups. LandNNES is supported by the International Land Coalition (ILC) and is concerned with both the policy and implementation dimensions of land governance.

## 2 Terms of Reference

The Policy Brief will contribute to meaningful policy dialogues and engagement on responsible tenure governance in the context of agricultural and rural development in line with the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT). It provides contextual mapping, critique and analysis of the complexities around Land Administration in South Africa and propose recommendations for multi-stakeholder interlocution between Government, United Nations Agencies and Civil Society.

### Contents:

- A brief analysis of the current Land Administration situation in South Africa with special emphasis on the recognition and protection of tenure rights.
- A brief overview of the main challenges for improvement using the VGGT Technical Guidelines No. 9 and 10 on (a) creating a system to record tenure rights and first registration; and (b) 'improving ways to record tenure rights' (FAO 2017).
- Recommendations on how to improve the South African land administration system in line with the VGGT Technical Guide #10 'Improving ways to record tenure rights'. The objective is to achieve an integrated and inclusive system that will allow the recognition and protection of diverse land tenure rights and their enjoyment by rights holders.
- A set of incremental, concrete and actionable recommendations of how to get to the desired situation. These recommendations will constitute the essential inputs for discussions in the future multi-stakeholder meetings and will be the base to develop an action plan/road map on the issue.

## POLICY BRIEF ON LAND ADMINISTRATION IN SOUTH AFRICA IN LINE WITH VGGT TO ACHIEVE AN INTEGRATED AND INCLUSIVE LAND ADMINISTRATION SYSTEM

### 3 Abstract

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 the sense of a holistic, co-ordinated and integrated system, has been a highly neglected element in South Africa's land reform programme resulting in dysfunctional LA that needs to be urgently addressed to support the goals of land reform, economic development and social equity. LA is the critical implementation element of land governance, which FAO defines as all the formal and informal rules, institutions, 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 made, implemented and enforced and competing interests managed. LA is the element that actualises these land-related policies, laws, plans and programmes. Land governance and LA are characterised by fragmentation, misalignment, inconsistency and inequality in South Africa. State land administration focuses on the formal system governing the cadastral and land registry system, while land rights and uses outside of this are largely regulated by local or hybrid institutions with minimal state regulation. Conventional technical approaches to land management and regulation are inadequate to address the challenges of equitable LA. Existing LA tools cannot cope with the challenges of incorporating diverse tenure systems and unequal spatial distribution of land use that continue to reflect racialised apartheid geo-spatial boundaries and governance patterns. The Policy Brief addresses short, medium- and long-term recommendations for incremental restructuring. The long-term goal is an unified LA system that provides an integrated infrastructure for managing land rights and uses and develops 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. A twenty-year vision should be developed with short, medium and long-term goals for incremental institutional restructuring with appropriate development of law, executive capacity and budgetary commitments. An immediate priority supported by FAO is to develop capacity to record off-register rights. This must be accompanied by holistic institutional strengthening including developing adjudication and dispute resolution institutions to accompany recordal. There must be policy and budgetary commitment to inter-government and inter-sectoral task teams and a special purpose vehicle to drive policy, implementation, monitoring and evaluation. These should include civil society. We argue for commitments to test new approaches and technologies in the field using problem-solving and iterative approaches which engage and develop local institutions. We propose an *enabling* Act, the Land Administration Framework Act (LAFA) that provides for:

- an integrated land information and data system including a system for recording rights e.g. by means of a separate Land Records Act;

- new forms of rights adjudication set out in a Land Rights Adjudication Act or a sub-section of the proposed Land Records Act to provide principles for admission of new kinds of evidence for ‘informal’, customary and neo-customary systems;
- appropriate succession and inheritance law reforms;
- dispute and conflict resolution institutions to handle mediation of disputes, rights-violations and rights-determinations, instead of relying on the courts for every dispute;
- a national land Ombud to manage higher-level conflict especially between the state and citizens; corporate liability/responsibility; and state accountability for enforcement and implementation of policies and laws;
- Land valuation reforms;
- new accredited LA curricular in tertiary institutions and training of officials in new LA systems.

#### **4 Brief analysis of the current situation of Land Administration in South Africa with special emphasis on the recognition and protection of tenure rights**

##### **4.1 Setting the South African Land Administration context**

Land Administration (LA) is an element of public administration that relates to the public regulation of land, including marine, forest and mineral resources. Previously referring only to formal regulation, its use in Africa currently includes so-called ‘informal’ regulation, thus both state and non-state institutions, and a mixture of the two, also deliver land administration services. When state and non-state actors co-operate or collaborate, we refer to the LA institutions as ‘hybrid institutions’. In South Africa, private sector professionals undertake at least half of LA functions, such as surveying, conveyancing and planning. They fall under professional institutes that are regulated by statute and hence the system is state-regulated.

Land Administration is often thought of as the country’s land tenure system. We adopt a much broader interpretation of LA, defined and discussed in more detail below. The tenure system is entwined in land administration, but is only one, albeit very central, facet of land administration. Without LA the tenure system cannot be actualised and enforced. Land tenure includes the regulatory aspects of land management, such as land use planning, dispute resolution, land valuation and raising revenue. LA could be seen as a set of interconnecting mechanisms that are needed to support the property system as a whole<sup>1</sup>. The property system includes registered, recorded and off-register tenure rights. However, some actors continue to regard the ‘formal’ system of registered rights as the property system. This narrow definition goes to the very heart of the difficulties in integrating diverse rights into the property system in many post-colonial societies with pervasive legal pluralism; and, indeed undermines the state’s ability to develop an integrated land administration system that reaches beyond the ‘formal’ system as currently constituted. The problem in these contexts is that many rights are not fully recognised if they are undocumented or off-register and are not considered to be an integral part of the property system. In many post-colonial states, customary rights or neo-customary, hybrid and other related rights (that are often erroneously called ‘informal’) fall into this category. At least part of the solution is to see all legitimate rights as part of the property system and to make appropriate adjustments.

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<sup>1</sup> The South African Constitution recognises all rights that fit certain criteria, whether or not they are registered. There are a number of laws protecting categories of rights that cover all tenure terrains. Thus, property rights’ does not only include registered or recorded rights but all legally recognised rights. In this policy brief, all legally recognised or legitimate rights are thus regarded as property rights and part of the property system as a whole, in spite of the weaknesses in the management of these rights.

This policy brief is concerned with how LA can play a central role in South Africa in integrating off-register (including customary) rights into an Integrated Land Administration System that recognises, manages, administers and records all legitimate land rights. We regard LA as the means by which to provide a unifying land governance framework to manage and hold together diverse land rights and family law systems in the context of legal and social pluralism.

The South African Constitution devotes an entire section (s. 25) to property rights, and which includes the imperative to provide equitable access and tenure security for all citizens. Section 25.5 states that the state “must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis” and section 25.6 states that “[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress”. The Constitution also recognises customary law. There is a set of land tenure laws enacted in terms of the Constitution that protect off-register rights covering all land use categories in the country. These laws are detailed in section 3.4 below.

The land tenure laws protecting off-register rights make it clear that the rights should be interpreted as property rights. Many people in the private sector and government may not refer to them as such, but we in LandNNEs advocate that the ‘property system’ should include all legitimate rights; and that those that are not registered or recorded should be documented or recorded in an appropriate manner to make it possible to administer them in a way that advances tenure security. While in some countries off-register rights are recorded systematically along with registered rights, in South Africa there is no system to record rights that are unregistrable in terms of the Deeds Registry but could be recorded via alternative means. Seen in this light, the Policy Brief regards LA as including the governance of both registered and unregistered rights, and there is increasing emphasis on both sporadic and systematic recordal of off-register rights. Moreover, LA is taken to be broader than just registration or recording of rights, though these are key elements of LA.

Alternative systems to record off-register rights have to be very carefully thought about, designed, applied and integrated as there are a number of challenges and pitfalls in recording rights that are/were formerly unrecorded. In the past, there was a limited system of records in the former ‘homeland’ areas during the pre-democratic period called ‘permission to occupy’ (PTO). In the post-apartheid era these rights were regarded as inferior and conferring second class rights. They were formally withdrawn in post-apartheid tenure institutions, if not entirely eliminated from the legal system in some former homelands. Nevertheless, people continue to use them and create them even without a legal framework to administer them. This is in the absence of other alternatives. The perception that records or titles that are not registered in the Deeds Registry (as currently configured) are inferior has contributed to ambivalence in making policy commitments to developing alternative systems or using them. Some may interpret such systems as racially discriminatory. They would need to be robust, secure, affordable, accessible, administerable and workable for the state and rights holders to accept them. Alternative systems, however, may be better able to adapt to, or absorb, customary, neo-customary or ‘informal’ systems.

There is a large government archive as well as ‘grey’ and academic literature recording the history of the diverse and racially discriminatory land tenure systems in South Africa. More recently there has been a growing body of grey literature as well as debates and contested ideas about solutions to the

challenges and problems of land tenure and land administration reform in South Africa. The solutions are not easy, given the fraught history related to the dispossession of black land rights under segregation and apartheid. These sources are far too numerous or detailed to reference here, and they go back in time to the era of forced removals in the 1980s. Some studies relating to land administration are referenced in footnote 4, but this is far from exhaustive.

A weakness in drawing from the literature for the purposes of land administration reform is that research and policy tended to focus on land tenure in isolation of land administration as a whole. This is partly attributable to land tenure providing obvious handholds, for example, identifying and applying a particular 'form' of tenure. Land administration, on the other hand, is wide in scope and crosses numerous sectors and disciplines. In reality tenure security results from all these elements working in tandem. Holding a tenure right in terms of a particular form is not in itself a reliable indicator of tenure security and conversely it is possible to have security without an up-to-date Deed in the registry. In reality a Deed in the registry could even contribute to vulnerability to alienation through foreclosure, or transfer that are not endorsed by family members by the person who is registered. 'Land grabs' do not result only from external threats but also internal threats by elites within families and communities.

The law protecting land rights in South Africa is wide in scope. Many people who had been involved in the anti-apartheid campaigns were active in constitution- and law-making with regard to land tenure reforms. New protective land tenure laws were formulated from 1994 to 1999 in conformance with the new Constitution. Other key foci in law reforms that have a big impact on land administration and tenure were new local governance institutions resulting in new structures of local government, and land use management and spatial planning resulting in a single law consolidating myriad older laws that differed regionally, provincially and territorially. These are, however, poorly co-ordinated with different boundaries and jurisdictions which create contested and clashing systems of authority. There was very little focus on Land Administration as a discipline in its own right as a cross-disciplinary domain of governance. Thus, tenure, planning, spatial boundaries, local governance, valuation, etc were all separately legislated with poor inter-governmental institutions to co-ordinate them.

To correct this imbalance, LandNNES supported the preparation of a Discussion Document on Land Administration for South African policy engagement for the National Multi-Stakeholder Platform to put Land Administration front and centre of land governance. The document includes discussion on the complexity and problem areas of land administration in South Africa<sup>2</sup>. Another report on LA was prepared for the Open Society Foundation (OSF) setting out the status quo, problems and proposals related to LA reform<sup>3</sup>. Numerous evaluations and reports relating to LA were undertaken over the course of the past twenty years,<sup>4</sup> but unfortunately these made little impact on the way land

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<sup>2</sup> <https://landnnes554026872.files.wordpress.com/2019/01/la-conceptual-framework-for-landnnes-jan-2019-final.pdf>

<sup>3</sup> <https://trello.com/c/MZhsloqe>

<sup>4</sup> To name but a few: MXA (1998) 'Land Administration in the ex-homelands: Past, Recent and Current Situation'. For Department of Land Affairs; MXA 4-person team including Rosalie Kingwill (2001-03) 'Evaluation of Land Administration Systems in the Eastern Cape for Public Service Commission' including 'Status Quo Report'; Urban LandMark (2011) Land Governance Assessment Framework (LGAF) Commissioned by World Bank; Mike Kenyon, Rosalie Kingwill & Mike Coleman (2013) 'Diagnostic Study on Land Administration in the Eastern Cape Province' for Eastern Cape Planning Commission; R. Eglin, M. Kenyon, R. Kingwill & S. Manona (2015) 'Report on Communal Land Administration for the Housing Development Agency, South Africa, Oct 2015; R. Kingwill on behalf of AFRA for International Land Coalition (2018) 'Country Assessment:

administration has been structured in the three tiers of government. In reality, it is fragmented across a range of sectors, ministries, departments and spheres of governance.

Other land administration-related discussion documents were also prepared on behalf of LandNNEs for the Multi-Stakeholder Platform,<sup>5</sup> addressing, respectively, land data management and information systems and monitoring and evaluation systems. These are all critical elements of land administration. In the formal institutions of government, the system of data and land information is referred to as the National Spatial Data Infrastructure (NSDI). The South African [NSDI](#) is a component of land governance under the wing of the Department of Agriculture, Rural Development and Land Reform's directorate National Geo-Spatial Information ([NGI](#)) and deals solely with formal geo-spatial data, accurately measured boundaries and geodetic surveying.

This Policy Brief is not confined to the state system but addresses issues and problems that have arisen outside of state governance as a result of the fragmented data and information management in South Africa, which the NGI system in its current format is unable to capture. In most communities there is a mixture of state, semi-state and non-state organisations or institutions that undertake land administration functions, and when there is a combination of these we refer to them as 'hybrid institutions'.

## **4.2 What is Land Administration?**

Land Administration (LA) has become a recognised concept in land governance. In this Policy Brief we endorse the definition adopted by FAO in 2014 that defines land governance 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".<sup>6</sup> In other words it is the management framework for governing land related issues. It includes policies and laws in the legislative sphere which are in turn linked to executive authority and recourse to adjudication and dispute resolution by both the judiciary and other local or juridical institutions. In countries with extensive poverty and legal and institutional pluralism, governance is also in the hands of non-state or hybrid institutions, that is NGOs, community-based organisations and private sector bodies that sometimes combine with state agents in what is known as 'hybrid governance'. In short, land governance refers to the institutions, including policies, laws and organisations that govern land-related concerns and interests. These operate at national and sub-national levels and involve applicable (and sometimes diverse) norms and standards that are not always aligned. In Africa they are often not aligned. This gives rise to problems with the coherence and efficiency of the governance framework.

The conceptual shift towards the concept of 'land governance' in recent years allows for reconceptualising land administration within the context of broader land management, rather than

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Towards a National Engagement Strategy (NES) for South Africa', April 2018; R. Kingwill & S. Manona (2019) 'Report on Land Tenure and Land Administration in South Africa' on behalf of Phuhlisani for the Open Society Foundation (OSF), April 2019.

<sup>5</sup> <https://landnnes.org/discussions-documents/>

<sup>6</sup> FAO (2014) Ministerial meeting on governance and international commodity markets. 6 October 2014. Concept Note <http://www.fao.org/3/a-ml297e.pdf>



focusing on land tenure in isolation. This approach helps to identify key areas of institutional misalignment. Land governance is critical to socio-economic development and all of the functions that affect or are affected by secure property rights. In the ideal, LA could be conceptualised as a co-ordinated set (or 'system') of component parts or sub-systems that need to be synchronised to ensure that the tenure and rights-related elements of LA are aligned with the regulatory, planning, fiscal and enforcement aspects of LA. Land data systems management is critical to all of them. These components are norm-driven, informed by social, political and economic values and goals. Together these institutions constitute the governance of land.

Land administration is more specific. It refers to the actualisation of the framework in every-day life. It is mainly the 'doing' part. State land administration is entirely dependent on a good legal-institutional framework for land governance as it involves *applying the law*. Land administration activities in South Africa are not confined to state agencies. They are increasingly undertaken by community-based or hybrid (state plus non-state) institutions as a result of weak state penetration and capacity in formerly colonised countries with high levels of inequality and legal pluralism. They are also undertaken by state-sanctioned traditional authorities. In some cases, communities deliberately wrestle control from state or traditional authorities as a result of competing power struggles and structures at local level. These local communities tend to harness customary, neo-customary and emerging hybrid norms in governance frameworks.

The discipline of land administration has evolved since the development of nation states where fiscal land administration was needed to raise funds for state revenue. The rise of land markets and commoditisation of land in the west was a further catalyst that necessitated highly quantifiable and accurate measures of boundaries, ownership and land values linked to state revenue generation. These increasingly complex components of land management require co-ordination and regulation, particularly as planning and environmental issues impact on land management. The state cannot leave the markets as the sole regulatory mechanism as the state needs to care for all citizens including the vulnerable and marginalised. The interconnecting mechanisms for these land-related matters form the core idea behind land administration.

LA could be seen as the administrative infrastructure of land governance, which supports tenure, dispute resolution, spatial planning and land use management, revenue collection, enforcement, and information systems. These components should cohere and articulate ('talk the same language') if LA is to be effective. Integrated Land information Management Systems (LIMS) (both digital and hardcopy) should hold all the parts together. There has been increasing acknowledgement of institutional misalignment in many countries' land governance frameworks, particularly those with plural systems of land governance and tenure.

The land administration systems that have emerged in the west work well for market-driven private property systems. The formal land administration system in South Africa drew its inspiration and rationale from this paradigm. It is geared to formal land management through the land registry, a system that evolved from the cadastre that mapped and surveyed areas of economic interest. In this brief we adopt the following definition of the land registry and cadastre:

*“Land registry: the land registry is the institution or office responsible for land registration. [...]”*. (In the Multilingual Thesaurus on land tenure published by FAO in 2003).

*“Cadastre: [...] A cadastre is normally a parcel based and up-to-date land information system containing a record of interest in land (i.e. rights, restrictions and responsibilities). It usually includes a geometric description of land parcels linked to other records describing the nature of the interests, and ownership or control of those interests, and often the value of the parcel and its improvements. [...]”* (In the Multilingual Thesaurus on land tenure published by FAO in 2003).

This system has not been equipped to handle the complexities and challenges of South Africa’s socio-spatial geography that still reflects the legacies of apartheid racial segregation. Most black settlements fell outside the land registry historically. They were mostly not surveyed into parcels according to the rules governing the formal cadastral system. These former patterns of spatial inequality are still imprinted in the spatial geography of rural and urban areas. The current system favours registration through formalisation into the existing legal-administrative framework. Customary systems are, however, not easily absorbed into the registration system as, in their current state, they are not unregistrable. Conversely, the registry is in turn not equipped to absorb systems of customary, neo-customary and urban informal land rights which are managed by local and customary systems of authority according to local or customary norms. Customary systems and informal settlements therefore still remain largely outside the cadastral and deeds registration systems. These land rights cover diverse terrains and contexts but tend to be inappropriately lumped together and dubbed ‘informal’ tenure in South Africa. There are substantial challenges to integrating land administration systems in contexts of legal pluralism, leading to many policy commentators to argue that titling should be viewed with great circumspection. For example, even where the cadastral system has been applied in urban settlements in the form of township planning and plot surveys for state-subsidised housing, the registry is struggling with the registration of thousands of these newly registered houses where problems have arisen as a result of data mismatches between the register of recorded owners and actual occupiers (Ray Mahlaka 2018, ‘Title Deed backlog still plagues SA’, Moneyweb & The Citizen 22 May 2018). Many of these problems relate to normative di

This Policy Brief argues that there is misalignment between the national registry and cadastral system on the one hand, and customary and hybrid systems of land rights. The latter are not registrable unless they conform to conditions of registrability. To render them registrable through survey and registration will transform them substantially. That process will generate resistance by those who will lose, e.g. many family members who currently have access through kinship, and it will also be resisted by local (community-level) authorities such as traditional authorities who seek to control allocation and distribution of rights. Recording rights will face similar challenges. It is important to understand the socio-legal contexts of these rights when embarking on restructuring the country’s land administration system and the way land tenure rights are recognised, held and recorded.

Customary, neo-customary and new hybrid institutions do not fully align with the conditions of registrability in the national Deeds Registry, though some elements can be registered. The latter does not address the issues holistically. Their allocatory systems are generally interwoven with, and connected to, community and family systems of rights holding which are difficult to reflect in the Deeds Registry system. This system requires the registration of a single owner, or a set of named owners, and a defined set of named heirs who have powers of alienation which clashes with

customary access rights. They also tend to be less connected to formal land markets than registered freehold property rights. This is an important point of disjuncture since the formal market is integral to the rationale of titling. On the other hand, 'informal' land markets have developed rapidly in urban areas.

In South Africa there is good alignment of the formal systems but extreme misalignment between the formal system and the various off-register systems. An example of good alignment is the inter-operation of the Surveyor General's Office (SGO) property diagrams (boundaries) and the system of title deeds registered in the Deeds Office. In this example, the spatial and textual ownership details are in harmony, and it is possible to track applicable land use rights according to the municipal zoning systems. Though the zoning of land use rights is regulated separately, the use restrictions are in general harmony with the Deeds system. This situation, however, only applies to property that falls within the cadastre, while off-register and customary rights are outside it. This is the central challenge.

A strong and integrated LA system keeps track of all the steps in any land development and should ensure that all legally recognised rights are protected, and that there is transparency. There is a danger that when land developments apply to land with customary or other legally recognised off-register rights the system is not aligned to enforce the requirement that land developers follow due process with regard to rights holders' interests. Approval of the proposed land use changes often override their rights to administrative fairness. There are many examples of this in South Africa, particularly the mining areas. The implications for rights, spatial planning, land use, environmental impact and land valuation should apply equitably to all land holding systems. These processes can easily become mired in administrative injustice, bureaucratic red tape, corruption and ineptitude if land tenure and information systems are fragmented and opaque and the LA processes not aligned. In contexts where land rights are not serviced by a coherent state LA system, such as in communal and informal settlements, they become vulnerable to the interests of more powerful players who are supported by the LA system.

In short, a coherent LA system must be aligned to service diverse land rights holding systems through an integrated land information and data management system and cross-cutting systems of recording and adjudicating rights, resolving disputes, planning, managing land use and collecting revenue. An LA system that does not serve all rights holders is dysfunctional, even if there are pockets of excellence. That is the diagnosis for South Africa.

#### **4.3 The importance of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)**

In the past decade there has been a significant focus on land tenure security and land administration by international rights-based organisations, the most specific and influential of which has been the VGGT. The VGGT programme provides countries with a framework for best practices in tenure-related policies, laws, regulations, strategies and practices. The VGGT are the result of an international participatory and consultative three-year long process and endorsed by the UN Committee on World Food Security in 2012. LandNNES considers the principles and protocols informing the VGGT to be highly relevant to the context of tenure insecurity and misalignment in governance institutions in South Africa. As a member of the FAO, the South African government is encouraged to use the VGGT

as a support to guide land tenure and land administration reforms as proposed in many recent policy engagements and recommendations (see section 4 below). The VGGT resonate strongly with the struggles in South Africa to develop durable and sustainable land tenure reform laws and LA institutions. The principles converge with many of the ideas that have come out of decades of rural and more recently, urban struggles for tenure security.

The South African government is urged to consider the approach used in the VGGT such as defined in VGGT para 7.1, 17.2 and 9.4 among many others. The emphasis on the recordal of off-register rights, an issue that is becoming more and more urgent in situations such as in South Africa where we estimate over half the population has off-register rights.<sup>7</sup> These sections encourage states to provide systems to record rights, including off-register and customary rights. See Box 1 below that sets out these sections in full.

**Box 1 VGGT 17.1 and 17.2; 9.4**

17.1 States should provide systems (such as registration, cadastre and licensing systems) to record individual and collective tenure rights in order to improve security of tenure rights, including those held by the State and public sector, private sector, and indigenous peoples and other communities with customary tenure systems; and for the functioning of local societies and of markets. Such systems should record, maintain and publicize tenure rights and duties, including who holds those rights and duties, and the parcels or holdings of land, fisheries or forests to which the rights and duties relate.

17.2 States should provide recording systems appropriate for their particular circumstances, including the available human and financial resources. Socio-culturally appropriate ways of recording rights of indigenous peoples and other communities with customary tenure systems should be developed and used. In order to enhance transparency and compatibility with other sources of information for spatial planning and other purposes, each State should strive to develop an integrated framework that includes existing recording systems and other spatial information systems. In each jurisdiction, records of tenure rights of the State and public sector, private sector, and indigenous peoples and other communities with customary tenure systems should be kept within the integrated recording system. Whenever it is not possible to record tenure rights of indigenous peoples and other communities with customary tenure systems, or occupations in informal settlements, particular care should be taken to prevent the registration of competing rights in those areas.

9.4 States should provide appropriate recognition and protection of the legitimate tenure rights of indigenous peoples and other communities with customary tenure systems, consistent with existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. Such recognition should take into account the land, fisheries and forests that are used exclusively by a community and those that are shared, and respect the general principles of responsible governance. Information on any such recognition should be publicized in an accessible location, in an appropriate form which is understandable and in applicable languages.

Source: FAO, VGGT: 15, 19.

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<sup>7</sup> Donna Hornby, Lauren Royston, Rosalie Kingwill & Ben Cousins (2017) Introduction: Tenure Practices, Concepts and Theories in South Africa in Donna Hornby, Rosalie Kingwill, Lauren Royston & Ben Cousins, *Untitled: Securing Land Tenure in Urban and Rural South Africa*, Pietermaritzburg, UKZN Press: 8.

#### 4.4 Why is land administration an important land reform issue in South Africa?

State land administration in South Africa is highly fragmented and, in some contexts, non-existent. The main, but not only, area in which LA is malfunctioning relates the land reform sector. The latter is characterised by contexts where people have unregistered (or off-register) rights that are not publicly regulated in a systematic sense and/or where people have newly registered rights where the registration process is not maintained thereafter or it does not capture the actual situation on the ground.

In summary, there is institutional dichotomy between: On the one hand, the management and regulation of formally registered rights, which are closely regulated by formalised policies, laws and institutional arrangements, and are readily judicable and enforceable through all tiers of government and the private sector; and on the other hand, unregistered and unrecorded rights that are recognised by the Constitution and rights laws, but are unregulated and managed mainly at the local (community) level or controlled by highly contested or disjointed local systems of authority or by ambiguous institutional arrangements, with little recourse to state institutions for conflict resolution and adjudication, and which renders land rights at the individual family level vulnerable and invisible to the law and property institutions.

This dualistic and inequitable institutional framework fragments land governance and land management and heightens the vulnerability of land rights that are subject to third party interventions such as mining licences or land development, or compromises rights in contexts that require servicing or upgrading especially in urban areas. This exacerbates an already existing institutional silo culture of land administration, particularly data systems that are disconnected and duplicated, impairing administrative and cost effectiveness.

As conceptualised above, LA works well for small pockets of elites in South Africa. It works largely as intended for the so-called 'formal system' which is code for the regulated system of deeds and surveyed property. Off-register rights slip almost entirely outside of this net and are generally regulated at highly localised levels by community-based organisations in various formats, sometimes in hybrid arrangements with local levels of official governance structures, mostly traditional authorities and municipalities, but also provincial and central state institutions.<sup>8</sup>

When land developments involve an interface between the formal land use management system and off-register rights that are often locally managed, the rights of developers or mining corporations usually prevail at the expense of the latter. In cases of local or familial disputes, the power of elites, usually men, tend to prevail over the rights of other family members. In city planning systems, the rights of developers and formal rights holders tend to prevail over informal settlement dwellers. Even where rights of formerly untitled rights holders are registered as title, individuals (usually men) often

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<sup>8</sup> Donna Hornby, Lauren Royston, Rosalie Kingwill & Ben Cousins (2017) Introduction: Tenure Practices, Concepts and Theories in South Africa in Donna Hornby, Rosalie Kingwill, Lauren Royston & Ben Cousins, *Untitled: Securing Land Tenure in Urban and Rural South Africa*, Pietermaritzburg, UKZN Press; Michael Barry (2020) Hybrid Land Tenure Administration in Dunoon, South Africa *Land Use Policy* 90 2020 available online at: <https://doi.org/10.1016/j.landusepol.2019.104301>; Michael Barry & Rosalie Kingwill (2020) Hybrid Governance, Organisational Culture and Community Record Systems in Monwabisi Park Informal Settlement (forthcoming in *Land*)

dispose of the property at the expense of other family members, and often do not register the transfers.<sup>9</sup> In short, the coverage of LA is inequitable.

Clearly, the system is fragmented and inequitable. It has been estimated that 60% of the population has off-register rights which are not adequately administered.<sup>10</sup> A system that does not serve 60% of the population is seriously compromised. The formal system is often portrayed as evidence of a well-functioning country system. Consequently, other systems such as customary, hybrid or formalising systems of rights and land use management are expected to conform to those standards. There are, however, structural constraints to the success of this formula, which paradoxically reproduces inequity and dysfunctionality. There is a moral, economic and Constitutional duty to address diverse tenure norms that govern tenure, and to address the structural weaknesses in the present system. The inability of LA to serve all South Africans equitably means that it is in breach of the Bill of Rights of the South African Constitution s.25 (property) and s.33 (administrative justice). The situation in South Africa goes against some key international protocols which, as mentioned above, as a member of the United Nations it has endorsed. It flies in the face of many sections of the VGGT, discussed in more detail below, as well as elements of the Sustainable Development Goals, specifically Indicator 1.4.2 of Goal 1, to 'End Poverty', which measures the proportion of documented land rights in a jurisdiction.

Property rights, including legitimate rights that are not recorded, or recorded rights that are not registered, are a central element of LA. While this implicates land tenure reform, land tenure is only one element of LA. Property rights are only as strong and secure as the underlying LA system that underpins them. How land rights are defined, allocated, divided, recorded, transferred, and how they succeed inter-generationally over time, must fit in with the country's broad tenure system. As the preface of the VGGT set out:

How people, communities and others gain access to land, fisheries and forests is defined and regulated by societies through systems of tenure. These tenure systems determine who can use which resources, for how long, and under what conditions. The systems may be based on written policies and laws, as well as on unwritten customs and practices. (VGGT p. iv)

The system as a whole should take into account socio-spatial, land use planning, geographical, environmental, physical infrastructure and fiscal considerations. The impact of the climate change and emergencies are now an added key consideration. All these elements should ideally follow a coherent and consistent set of goals and values, supported by administrative and data management systems

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<sup>9</sup> There is an extensive literature (media coverage, 'grey literature' and academic literature) on these and related topics, too large for citation in this brief. Some indicative references, in addition to footnote 3, are: Fiona Anciano & Laurence Piper (2018) *Democracy Disconnected: Participation and Governance in a City in the South*. Routledge <https://www.routledge.com/Democracy-Disconnected-Participation-and-Governance-in-a-City-of-the-South/Anciano-Piper/p/book/9781138541054>; <https://doi.org/10.4324/9781138541061>; Hornby et al 2017 op cit.; Rosalie Kingwill (2017) *Square Pegs in Round Holes* in Hornby et al, op cit.; Open Society Foundation (2017) *In Good Company? Conversations around Transparency and Accountability in South Africa's Extractive Sector*; Llewellyn Leonard (2019) 'How South Africa's rural communities are getting a raw deal from mining', *The Conversation* 14 July 2019 <https://theconversation.com/how-south-africas-rural-communities-are-getting-a-raw-deal-from-mining-118464>

<sup>10</sup> Hornby et al (2017) op cit.

that are interconnected and compatible. Land data systems should be inter-operable to connect these elements and provide transparent information for all users: the state, private sector land professions and, of course, serve the public.

For these reasons, LandNNES has campaigned for Land Administration to be added as a fourth pillar of Land Reform (the other three being restitution, redistribution and tenure reform). This recommendation was included in the report of the Presidential Advisory Panel on Land Reform that was presented in June 2019. The PAP report is discussed in section 4.2 below.

#### **4.5 The components and functions of Land Administration**

The components of LA are generally categorised in terms of four categories of functions: juridical, fiscal, regulatory and enforcement.<sup>11</sup>

In LandNNES we currently break down these categories as follows:

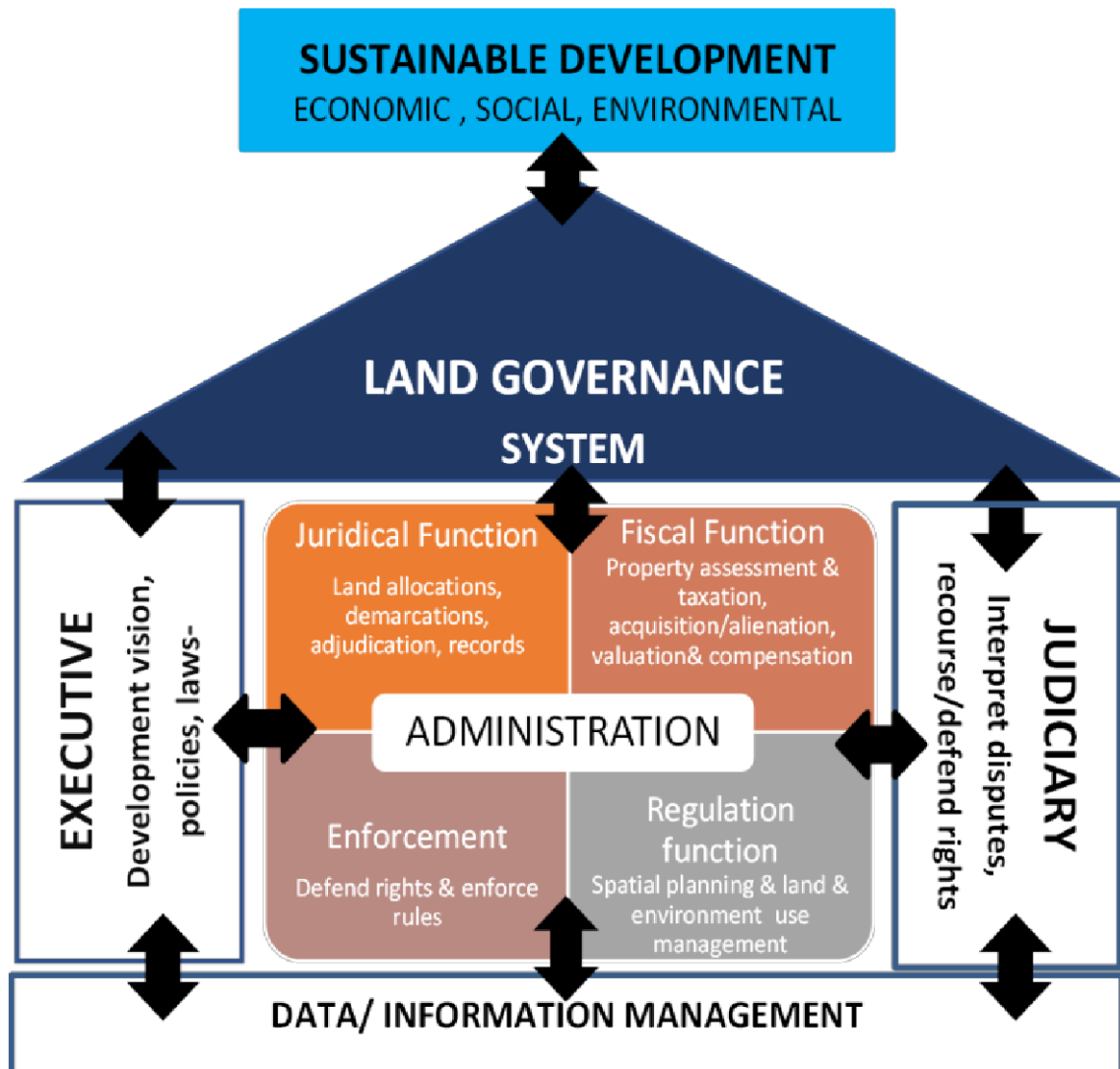
- Regulation of tenure and use rights (juridical functions): rights allocation, adjudication, recordal, registration, transfers, inheritance; and boundary delineation
- Regulation: Spatial planning, land use & environmental management, national planning
- Revenue (taxes, rates, fees, expropriation, valuation)
- Enforcement of all land related policies and laws
- Data governance, land Information system, data storage, access to information, monitoring and evaluation.

***Figure 1: A graphic representation of the elements of Land Governance and Land Administration***

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<sup>11</sup> Dale, Peter F & McLaughlin, John (1999) *Land Administration*, New York: Oxford University Press: 10; MXA (2003) 'An Evaluation of Land Administration in the Eastern Cape, Status Quo Report, Public Service Commission, Republic of South Africa; references in footnote 3 above.





Source: COGTA presentation to meeting to discuss curricular development on Land Administration at the University of Cape Town, held at AFRA, Pietermaritzburg, 9 November 2019.<sup>12</sup>

As shown in Figure 1, Information and data management systems are the foundation of LA. In the past, information-storing and sharing was seen as internal to the workings of LA, but more latterly the advocacy for ‘open data government’ (ODG) is reframing data management processes as a public service and stressing public accessibility. This includes the recording of rights that are currently not systematically recorded, as mentioned above.

In addition, the multi-dimensionality of LA requires land information to be visible to all its components, which ideally requires aligning different sectoral data systems through a single, compatible and inter-operable data portal. This approach is being advocated in many post-colonial contexts where legal pluralism has resulted in particularly complex or ‘wicked’ land governance

<sup>12</sup> The general formulation of these categories LA has been developed over time and evolved from other examples in MXA (2002-3) op cit.; Rosalie Kingwill (2004) ‘Square Pegs in Round Holes’ presentation at the LEAP-KZN Planning Commission symposium; Rosalie Kingwill (2019) ‘Land Administration at the Crossroads’, presentation at the Presidential Advisory Panel on Land Reform Roundtable obo of LandNNEs, 12 February 2019



challenges. The idea of single data portals, called ‘land observatories’, has been applied in many countries in Africa, and through LandNNES (discussed in two LandNNES policy documents)<sup>13</sup> is on the South African policy-making agenda. A critical element to a functioning LA is a monitoring and evaluation system, also addressed in a LandNNES discussion document<sup>14</sup>. The proposal is for the monitoring system to be institutionalised as currently the Monitoring department do not have a continuous monitoring programme for land.

The ‘land tenure’ components are conceptualised as the ‘juridical’ aspect, meaning the functions associated with law in relation to land rights management. This term refers to the administration of justice and the execution of the law, not to be confused with *judicial* functions. In the past land rights were managed by judicial officers and magistrates, but over time this function evolved into management and administration by the executive branch of government. A public administration system for managing rights at scale unburdens the courts from adjudicating rights, transactions, disputes, succession, etc., in the context of land markets and registration systems. A system should be in place to first try to resolve disputes by bringing the disputing parties together at the lowest administrative level and only in the case of no agreement or consensus should the case be referred to court. In other words, courts should adjudicate cases judicially when they cannot be resolved by administrative action unless there is a question of interpretation of law. The large number of cases referred to the South African courts, including the Constitutional Court involve interpretations of law, constitutionality and the need to set clear precedent is an indicator of the inadequacy of dispute resolution institutions on the one hand, but on the other, it is also an indication that there are still a number of legal and institutional ambiguities associated with South Africa’s land tenure and property system. People with vulnerable rights have no other resort than the courts to resolve disputes and conflicts involving civil law and interpretations of property law and succession. These could, however, be handled at scale by the executive if an appropriate LA system were to be developed.

#### **4.6 Current legal framework for land tenure outside the formal property system**

South Africa has an extensive legislative framework of tenure reform laws. An interrelated set of land rights laws were passed in the 1990s in terms of the Constitution, that apply to distinct categories of vulnerable rights:

- Land Reform (Labour Tenants) Act (LTA) 3 of 1996;
- Communal Property Associations Act 28 of 1996 (CPA Act);
- 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.

Pre-1994 reforms include:

- The Land Titles Adjustment Act 111 of 1993 (LTAA)

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<sup>13</sup> See the LandNNES discussion document and proposals: <https://landnnes554026872.files.wordpress.com/2019/01/sas-national-data-ecosystem-for-landnnes-final-edit-ver1.2-1.pdf> and [https://landnnes554026872.files.wordpress.com/2019/11/land\\_observatory\\_concept\\_note\\_final\\_2019.pdf](https://landnnes554026872.files.wordpress.com/2019/11/land_observatory_concept_note_final_2019.pdf)

<sup>14</sup> The need to set up an effective monitoring and evaluation systems have been raised in numerous fora and by several research and academic institutions over the past twenty years, the sources too many to cite here. Ruth Hall at the Institute for Land, Poverty and Agrarian Reform at PLAAS has been a particular advocate for improved M&E. See the LandNNES discussion document here: <https://landnnes554026872.files.wordpress.com/2019/01/developing-a-people-centred-land-governance-monitoring-system-for-south-africa-landnnes-jan-2019.pdf>.

- The Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA)

Planning law reforms culminated in a unified law out of myriad fragmented laws:

- The Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA)

Traditional Authorities and repeated attempts to introduce laws to bolster traditional courts and chiefly authority of land administration that are deeply contentious:

- The Traditional Governance and Leadership Framework Act 41 of 2003 (TGLFA)

In spite of this suite of laws, there is general acknowledgement of a failure to give legal effect to the tenure security provisions of the Constitution.

#### **4.7 Some problems with the current system**

It is common cause that land administration is excessively fragmented and disjointed. In some sectors of society, it has broken down completely, mainly in the former homelands and in urban informal settlements or semi-formal settlements. Land administration institutions continue to reflect legacies of extreme rights differentiation from the past. This results in discrimination against the majority of people in this country, mainly the poor. They have Constitutional rights that are recognised, but the land administration system as is only geared to support registered rights. These off-register Constitutional rights are not integrated into a land tenure information system, are generally unrecorded, and are often managed at localised levels under incoherent old legislation or new legislation that is not aligned with other functions of land administration. These rights are extremely vulnerable to third party interventions and are not able to benefit from the range of services that come with full recognition. There have been various attempts made by NGOs to develop local systems to record rights that provide some insight into the challenges and potential solutions. The FAO's Technical Guidelines (the practical support to the VGGT) No's 9 and 10 also provide a range of practical mechanisms to assist states in developing systems to record rights.

There is a strong call for recording these rights within an appropriate land administration system. Land administration includes the way that people hold land and manage transmission of rights and how the state and private sector agents manage and regulate land allocation, adjudication of rights, spatial planning, land use management, land valuation, revenue collection and recording and documentation of land information, including rights. These elements all need to be aligned in order for Constitutional rights to receive the full recognition and support they need in terms of legally accepted principles of a continuum of rights.

The state-regulated land management system has limited coverage over systems of rights that are off-register, such as in informal settlements and on black 'communal land'. Many of land administration services in South Africa are undertaken by private sector professionals, whose services and conduct are regulated according to legally enforceable standards, with members belonging to their respective professional institutes that are regulated by statute. In contrast, former homeland, township and informal settlements have highly inadequate regulation as the standards are seldom aligned with the concrete conditions on the ground, such as layered access rights rather than single-ownership land parcels that cannot be surveyed into 2-D parcels. In informal settlements there are no state-implemented-out plans or records. Some NGOs have tried to introduce locally managed records using GIS and GPS systems to identify rooftops, but these are not funded by the state and seldom last

beyond project-phase.<sup>15</sup> This has resulted in the management of most rural and urban black settlements by local community organisations, leaders, traditional authorities, etc according to highly localised customary or neo-customary practices.

Many of the categorical functions listed in Figure 1 are mirrored in local management, except they are not regulated or enforced by national standards. Local management has some advantages in adapting and applying well-understood local norms but can easily slide into partisan or corrupt leadership, thus avoiding accountability to local people's land rights as well as planning, land use, environmental and other societal concerns, as well as Constitutional rights and obligations. Accountability should work both ways: the local management to citizens and the citizens to local management.

The **following challenges** need to be confronted in reforming the land administration system:

The formalised state land administration institutions centering around the SGO and Deeds Registry system covers less than half of the population<sup>16</sup>. Even where the law requires LA to service the land rights of newly formalised systems, such as Communal Property Associations (CPAs), it is weak, mismatched and ineffective. There is a massive reported backlog in registration of RDP houses in urban areas, a result of discrepancies between ownership details on the records and actual occupation<sup>17</sup>. Many RDP titles are already out of date as a result of off-register sales and inheritance<sup>18</sup>. These challenges reveal capacity deficits that are unlikely to improve under current formalisation policies. However the particulars of the problem reveal that innovative approaches are needed to solve them, as conventional systems are not working. This is the key argument in this brief and it is supported by the approach taken in the VGGT.

- The SGO and Deeds Registry systems, and the whole land administration framework presented in Figure 1 above, work relatively well and in tandem for private property or state-owned entities, but the functions are poorly aligned with the *de facto* or customary arrangements governing spatial definition 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 either in competition with each other or work together as 'hybrid 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. Accountability must be embedded in all systems of authority regarding land administration, including customary and local systems.

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<sup>15</sup> Michael Barry (2020) Hybrid land administration in Dunoon op cit.; Michael Barry and Rosalie Kingwill (2020) Community Land Records in Monwabisi Park, op. cit.

<sup>16</sup> Donna Hornby, Lauren Royston, Rosalie Kingwill & Ben Cousins (2017) Introduction: Tenure Practices, Concepts and Theories in South Africa in Donna Hornby, Rosalie Kingwill, Lauren Royston & Ben Cousins, *Untitled: Securing Land Tenure in Urban and Rural South Africa*, Pietermaritzburg, UKZN Press: 8.

<sup>17</sup> Michael Barry (forthcoming) Hybrid land tenure administration in Dunoon, South Africa. *Land Use Policy*. Also stated in many official government documents.

<sup>18</sup> Ibid. See also Rosalie Kingwill (2017) 'Square Pegs in Round Holes: The Competing Faces of Land Title' in Donna Hornby, Rosalie Kingwill, Lauren Royston & Ben Cousins, *Securing Land Tenure in Urban and Rural South Africa*, 235

- 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, even for the formal system and more so for off-register systems of land rights. The full range of information regarding land rights and land use regulation affecting registered parcels of land, such as land claims, water rights, land use zoning, environmental regulations, physical hazards is not aligned with land ownership records. Even basic details of land rights holders and land uses in off-register systems is entirely absent.
- Land use regulatory systems for off-register systems of land rights are absent or highly localised according to informal or local arrangements.

Where then does this take us? How do we move forward under conditions of *de facto* and *de jure* legal pluralism? How do we align institutions that serve diverse normative and socio-economic conditions with coherent governance and management principles in a democratic state with constitutionally driven principles of equity, administrative justice and recognition of customary rights?

## **5 National and International platforms to strengthen land governance and reform LA**

### **5.1 The High Level Panel (HLP)**

The High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change chaired by former President Kgalema Motlanthe from January 2016 to November 2017. It was an initiative of the Speakers' Forum of Parliament to investigate the impact of legislation with respect to the main socio-economic challenges facing the post-apartheid state, of which land reform was a critical element comprising a quarter of the brief.<sup>19</sup> The HLP deliberated over a two-year period that allowed for some introspection and commissioned research on various strands of land reform. It gathered vast research-based resources from the research and conducted countrywide consultations. It came up with widely researched proposals and recommendations on all the facets of land reform and pushed strongly for the introduction of a Land Records Act in line with proposals from researchers. As a Parliamentary process, however, the HLP was politically constrained and its findings proved difficult to integrate inside the executive.

### **5.2 The Presidential Advisory Panel on Land Reform and Agriculture (PAP)**

The PAP was instituted during the period of mounting urgency of land reform in the making of post-Zuma societal renewal, with calls for expropriation without compensation. It sat for only seven months from September 2018 to May 2019 with limited resources. The PAP Report<sup>20</sup> was submitted to the President and the public on 11 June 2019. Located in the Presidency, it had the advantage over the HLP in facing towards both the legislature and executive, resulting in more buy-in from government departments, and appears to have secured a degree of support from inside the Department of Rural Development and Land Reform. The PAP provides a fairly coherent and coordinated response to the urgency of land reform. It was able to build on the HLP and include many of its recommendations. The PAP engaged with researchers and civil society representatives around land reform institutions, not

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<sup>19</sup> See the report here:

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

<sup>20</sup> [https://www.gov.za/sites/default/files/gcis\\_document/201907/panelreportlandreform\\_0.pdf](https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_0.pdf)

through commissioned research but in roundtable sessions, which did help to provide more nuanced understandings of underlying structural and institutional weaknesses in land administration and land reform more generally. The report has attempted to come to grips with underlying structural and institutional obstacles. In particular, the report addressed urban land reform as a priority that was previously lacking. The PAP report addressed 'land administration' as a critical land reform issue, and endorsed the idea of the adoption of a recording system and for land administration to be added as a fourth pillar of the land reform programme.<sup>21</sup> The latter was proposed by LandNNES members at a special roundtable on Land Administration and in various other PAP forums. This report has boosted the prospect of appropriate systems of recordal and valuation of these previously off-register rights in rural settlements and informal or formalising settlements.

### **5.3 The VGGT as a framework of land governance**

The VGGT<sup>22</sup> provide a comprehensive, global recognized instrument on tenure and its administration developed by governments through negotiations conducted in the UN system, including the South African Government, and endorsed by the Committee on World Food Security in May 2012. They are the first international 'soft law' instrument that focuses on the governance of tenure of land, fisheries and forests. By 'soft law' we mean they are not formally enforceable international black-letter law, but the protocols and guidelines are based on principles that could inform national and international law.

The Food and Agricultural Organization of the UN (FAO) supported a process of national engagements in South Africa aiming at the implementation of the VGGT since 2014, culminating in the constitution of a National Multi-Stakeholder Platform for the implementation of the VGGT in the land reform process.

The Governance of Tenure technical guides are part of FAO's initiative to help develop capacities to improve tenure governance and thereby assist countries in applying the Voluntary Guidelines. They are prepared by technical specialists and can be used by a range of actors to translate principles of the Guidelines into practical mechanisms, processes and actions and give examples of good practice – what has worked, where, why and how. They provide useful tools for activities such as the design of policy and reform processes, for the design of investment projects and for guiding interventions (FAO 2017).

The Technical Guidelines are of particular relevance to this brief, specifically Technical Guidelines 9<sup>23</sup> on recording first registration of land rights and Technical Guidelines 10<sup>24</sup> on practical application thereof. TG 3 on Free Prior Informed Consent, TG8 on governing the commons and TG 11 on valuation are also extremely relevant to the South African contexts. All three of those issues have manifested in disputes, litigation and even violence in a number of communities where land interests clash, and partisan principles are applied.

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<sup>21</sup> Presentation by Rosalie Kingwill and Siyabu Manona to the special PAP roundtable on Land Administration and to the final colloquium, February 2019.

<sup>22</sup> <http://www.fao.org/3/i2801e/i2801e.pdf>

<sup>23</sup> <http://www.fao.org/3/i7559en/i7559en.pdf>

<sup>24</sup> <http://www.fao.org/3/i7568EN/i7568en.pdf>

Technical guide 9 is about extending the recording or registration of tenure rights to people who currently are not served by systems to record their rights. It provides practical advice on ways to introduce a new system to record tenure rights and for the recording of rights for the first time by the state, a process that is sometimes called first registration.

Technical guide 10 is about making the recording or registration of tenure rights more relevant to people who hold those tenure rights, and particularly to people who are currently poorly served by systems to record or register tenure rights. It provides practical advice on ways to improve the recording of tenure rights, including by addressing barriers that prevent people from using recording systems.

The VGGT and Technical Guidelines seen as a whole, as well as individually, could be of great assistance as a set of principles and guidelines to help the South African Government develop an integrated and equitable Land Administration System in South Africa.

## **6 A brief overview of the desired changes and envisaged goals**

The huge policy challenge of land administration in South Africa is how to integrate so-called informal and localised land administration systems that have minimal state support with state-regulated formal systems in such a way as to bring administrative and regulatory equity and land tenure security; and how to do so without jettisoning diverse norms and customary practices provided the latter are in line with, or being aligned to, Constitutional principles and internationally recognised principles in the VGGT. The aim would be to boost the security of currently vulnerable rights *and* build a sustainable land use management framework for the country as a whole, and in such a way as to take into account socio-economic realities and environmental concerns in the light of the climate crisis. The ideal of good land governance requires that all components of LA — as outlined above and in Figure 1 — should cohere with each other.

In view of the diagnosis above, land administration in itself needs to be included as a land reform issue. The first goal is for land administration to be acknowledged as a distinct and critical area for both land reform and coherent land governance. Recording land rights is just one element of a land administration system. We endorse the call to record all legitimate off-register tenure rights and the transactions associated with those rights thereafter, as contained in the HLP, PAP and FAO policy documents. However, for this to be effective, there needs to be a focus beyond tenure laws towards developing a strong and holistic LA infrastructure. 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. As mentioned earlier, LA includes information systems, adjudication and dispute resolution, spatial planning, land use management, land valuation etc. Land administration as a whole was neglected in the early phases of tenure reform. When new tenure laws were promulgated to extend tenure security to particular categories of rights, the rest of the infrastructure remained fragmented as a result of (a) the legacies of the prior colonial and apartheid period (b) the continued relevance and salience of legal pluralism. The absence of an integrated land administration infrastructure to support all tenure regimes and has undermined the effectiveness of

the undoubtedly progressive elements of the rights-based laws as it has hampered the capacity to apply a sustained management system to support the new tenure and property regime.

Reforming land administration is a wide-ranging, complex and contested space, which creates a challenge for policy, and for policy adjustments. On the one hand there is an urgent need to address dysfunction in land administration institutions in order to support the goals of land reform, tenure security, administrative justice and economic development following a rights-based approach in line with the VGGT. On the other hand, the range of problems is immense, their ramifications complex, solutions are hard to find, and perspectives and proposed solutions are contested. It is futile to escape the complexity. By confronting them and deconstructing the various elements it is possible to generate new policies that will generate change. This task requires changes to the policy and legal frameworks, but also the organisational framework of which LA is a part. This is addressed in VGGT chapter 5.

While it is not possible to prescribe a simple set of solutions on the basis of general principles, we are clear on what the first steps towards change should be. It is possible to design some implementable practical steps because the goals are clear: an equitable and integrated land administration system where all citizens have equal access to quality land administration services, and where land administration serves the broad developmental goals of society in the context of social inequalities and the climate crisis.

Hence, we argue for 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. FAO's technical Guidelines 9 and 10 provide a range of proposals for this, and LandNNES has also supported the development of an integrated open data governance regime. This aspect is addressed more fully in Siyabulela Manona's policy brief for the MSP on 'Integrated Land Information and Data Management Systems for South Africa', which addresses land data/information as central to, and indeed a pivot of land governance and administration. He argues that globally there is growing realisation and appreciation of the need to manage geodata as a resource, coupled with emerging methods of collection, storage and dissemination of land data.

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. This fits with the conceptualisation of LA as an infrastructure that supports all land tenures and uses, and meets a range of social equity, environmental, Constitutional economic standards. Among these are both national and international norms and standards. The problem with a country's stated aspirations and commitments to international indicators is that the conditions on the ground are usually very different from the human and environmental rights espoused in them. The VGGT provide very good guidance in this regard.

In this policy brief we contend that developing a unifying land governance framework and land administration infrastructure can provide both tenure security for all recognised and legitimate tenure rights and good land management to advance human rights, economic development and

environmental goals. To achieve this, the current LA system must be repurposed in a way that is context-sensitive and appropriate for the purposes identified in country policy-making processes and the VGGT. To achieve this, we need to render the fragmented information and adjudication systems into a language that is translatable across all systems of land rights. This is not a theoretical exercise but a process that should and can be embedded in practical exercises. 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 is to 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.

## **7 Recommendations on how to improve the South African land administration System in line with the VGGT guidelines**

### **7.1 Introduction**

The following is a set of incremental, concrete and actionable recommendations of how to get to the desired situation. The recommendations provide the essential inputs for discussions in the future multi-stakeholder meetings and the basis of an action plan/road map on the issue.

We believe that the first steps we take will lead to cumulative change that grows exponentially, where each change will generate greater capacity and opportunities for further changes.

We identified what the first steps should be in proposals to the PAP, and the PAP report endorsed all or most of those that have arisen during a range of meetings, engagements and during the course of various other forums bringing together civil society organisations and state and/or private sector representatives. Some of these proposals or ideas are also contained in various other reports as mentioned in the brief, most particularly the HLP report. The envisaged changes do not require the development of a whole new bureaucracy, but will require changes in policy and institutions, with reorganisation and reconstruction of:

- policy and budgetary commitment to specific and focused inter-government and inter-sectoral task teams which include civil society representatives;
- short, medium and long-term institutional adjustments (as listed below) with appropriate development of the law and executive capacity along with budgetary commitments;
- 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 before legislating major changes in national government;
- substantial emphasis on curricular changes in tertiary institutions to teach and apply new concepts and tools related to land administration to (further) develop capacities; and
- 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'.

### **7.2 Short, medium and long-term recommendations**



### **In the short term: Set up a vehicle to drive change and institute pilot studies**

1. Appoint a *special purpose vehicle* or commission to drive a general process of land administration restructuring that is aimed at policies, laws and institutional arrangements to begin a process of change towards inclusive land administration.
2. The special purpose vehicle to drive the development of a twenty year “Vision for LA”
3. Include a chapter on land administration for the proposed Green and White Paper on land reform.
4. 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.
5. Set up institutional arrangements for testing new approaches to, and tools for, land administration in a series of identified pilot sites, including management, monitoring and evaluation systems such as informal settlements, farms and former homelands; and cross-cutting sites such as small businesses and early childhood educational centres in townships and informal settlements that struggle to meet the standards of the ‘formal’ LA system as a result of inappropriate LA requirements, e.g. where land use and building regulations are needed for registration or subsidisation purposes, but which are impossible to apply. Suggested Pilot sites or Learning laboratories for testing new LA tools and methods, including GIS, with feedback to institutional drivers, policy and legislation, e.g.
  - 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
  - Integrated Land Information system (national linked to Local Government information systems)

### **In the medium to long term: Legislation and new institutions**

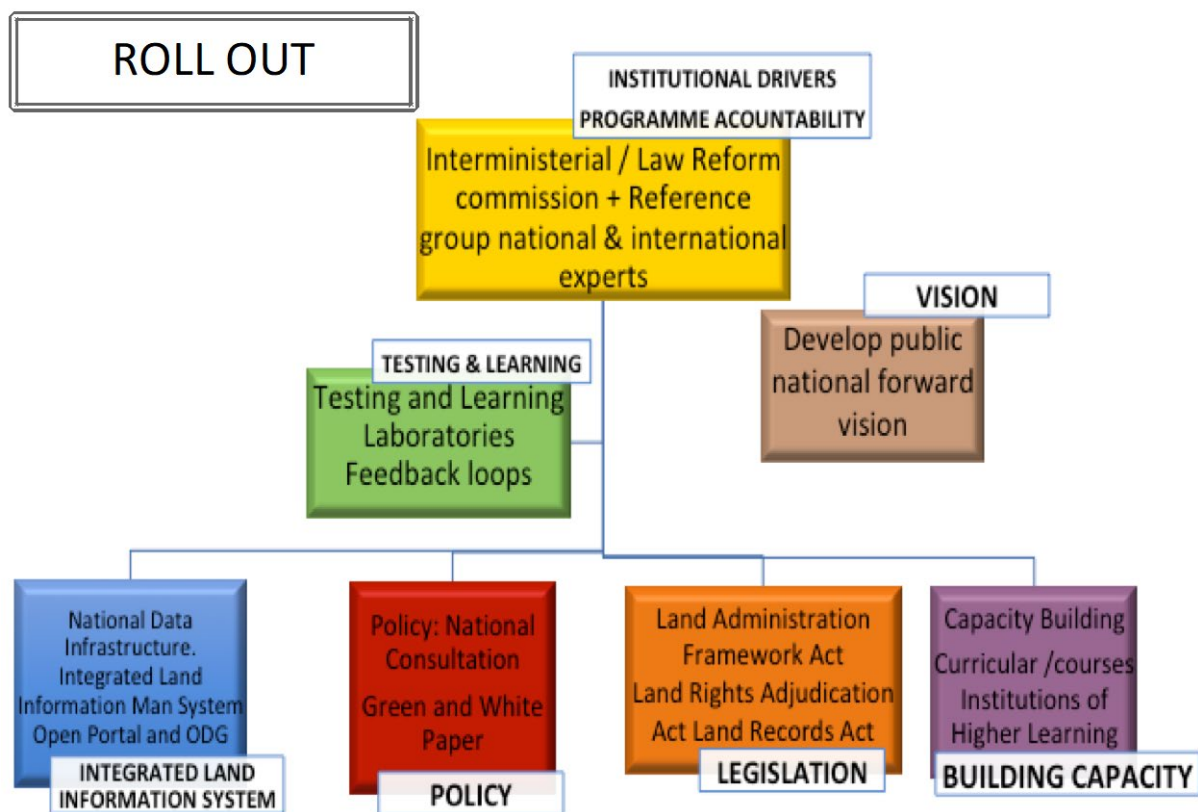
1. Special purpose vehicle to evaluate the evidence from pilots and commissioned studies.
2. Set up a commission to drive legislative changes, e.g. a proposed *enabling* Act, the Land Administration Framework Act (LAFA), a Land Records Act and a Land Rights Adjudication Act. In the process, the Land 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 (a) recordal (b) new forms of adjudication (c) appropriate succession law (d) dispute / conflict resolution (e) an ombud
3. 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.
4. 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)
5. Develop a monitoring system for the implementation of Land Reform and Land Administration reform policy provisions.

6. Appoint a national land ombudsman 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

**In the long term:** an integrated and unified LA system that 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.

### 7.3 Roll out

The following slide was presented to the PAP roundtable in February 2019 as a *guide* to actionable processes.



## 8 Appendix: Excerpt from the Report of the Presidential Advisory Panel on Land Reform and Agriculture: 90-91

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

### 3. LAND ADMINISTRATION: RECORDED, REGISTERED AND SECURE LAND RIGHTS FOR ALL

The panel has found that the state land administration system is excessively fragmented and disjointed, and in some contexts broken down completely. Land Administration has thus surfaced as a distinct and critical area for both land reform and coherent land governance. Land administration is particularly malfunctioning where people have unregistered (what we call ‘off-register’) rights that are not publicly regulated in a systematic sense. This applies both to long-term pre-existing land rights – such as in the communal areas and informal settlements – but also to land reform contexts where newly allocated rights are not effectively registered or administered.

A key high-level problem is the institutional dichotomy between: (1) the management and regulation of formally registered rights, which are closely regulated by formalised policies, laws and institutional arrangements, and are readily judiciable and enforceable through all tiers of government and the private sector; and (2) unregistered and unrecorded rights that are recognised by the Constitution and land rights laws, but are unregulated and managed mainly at the local (community) level or controlled by highly contested or disjointed local systems of authority or by ambiguous institutional arrangements, with little recourse to state institutions for conflict resolution and adjudication. This renders land rights at the individual family level vulnerable and invisible to the law and property institutions.

This dualistic and inequitable institutional framework fragments land governance and land management and heightens the vulnerability of land rights that are subject to third party interventions such as mining licenses or land development, or compromises rights in contexts that require servicing or upgrading especially in urban areas. This exacerbates an already existing institutional silo culture of land administration, particularly data systems that are disconnected and duplicated, impairing administrative and cost effectiveness.

In the short term, over the coming 1-2 years, we recommend that the State must take certain defined steps to drive change and institute pilot studies through:

(a) Appoint a **Reference Group or Technical Working Group on Land Administration** to drive a general process of land administration restructuring that is aimed at policies, laws and institutional arrangements to begin a process of change towards inclusive land administration. This will include state officials from the Surveyor General Chief Deeds Registrar, e-Cadastre, and others. Collaboration with civil society will be critical for planning and rollout.

(b) Include a **chapter on land administration** in the forthcoming process towards a new Green Paper and a White Paper on South African Land Policy.

(c) Conduct a study to **identify specific sites for priority intervention**, where land administration interventions are urgently needed, including where there are misaligned planning frameworks, laws and land use management processes and fragmented land information and data management systems.

(d) Set up **an integrated land information system** ('Land Repository' or 'Land Observatory') supported by a national data infrastructure to enable compatibility and consolidation of all land-related data, including land rights records.

(e) Set up **institutional arrangements to test new approaches** to, and tools for, land administration in these selected pilots. Examples of priority testing sites are: informal settlements, farms and former homelands, as well as thematic areas such as small businesses and early childhood educational centres in townships and informal settlements that suffer from various land administration constraints.

(f) Set up **institutional arrangements to monitor and evaluate** the results of these piloting interventions.

In the medium and long term, over the coming 2-5 years, we recommend new legislation and new institutions:

(a) The Technical Working Group will **evaluate the evidence from pilots** and commissioned studies.

(b) It will develop a **twenty-year vision for Land Administration**.

(c) It will drive enabling legislation which we recommend should be called the **Land Administration Framework Act** which allows for (a) a system of land recordal or a separate Land Records Act; (b) new system of adjudicating rights that allows for customary and other generally accepted local norms possibly in the form of a separate regulatory law on Land Rights Adjudication; (c) conflict and dispute resolution regulations; (d) regulations for a national Land Rights Protector.

(d) Institutionalise **conflict and dispute resolution mechanisms** at local level.

(e) Establish a national **Land Rights Protector** 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.

The intended outcome of these initiatives is a revitalised, integrated and unified Land Administration system that provides a legal and institutional infrastructure for all land-related management and rights. It includes 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.