

# **The role of land tenure and governance in reproducing and transforming spatial inequality**

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Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa

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FINAL

July 2017

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Acknowledgements	
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Section 2	Rosalie Kingwill
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Section 4	Lauren Royston and Rosalie Kingwill
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The final paper is a much condensed version of the first draft submitted to the HLP

## Introduction

### *The High Level Panel Initiative*

The High Level Panel is an initiative of the Speakers' Forum of Parliament aimed at taking stock of the impact of legislation insofar as it advances or impedes progress in addressing the triple challenges of poverty, unemployment and inequality. The mandate of the panel is to investigate the impact of legislation in respect of:

- the triple challenges of poverty, unemployment and inequality;
- the creation and equitable distribution of wealth;
- land reform, restitution, redistribution and security of tenure;
- nation building and social cohesion.

The panel aims to assess the possible unintended consequences, gaps and unanticipated problems in post-apartheid legislation, as well as how effectively laws have been implemented. The panel will propose appropriate remedial measures to Parliament including the amendment, or repeal of existing legislation or additional legislation where necessary.

### *Assessing the contribution of land tenure and governance in reproducing or transforming spatial inequality*

This review critically examines the evolution of laws, policies and practices across colonial, apartheid and contemporary eras to identify the associated processes and patterns of uneven development and their contribution to the structural poverty and systemic inequality and the ways in which these are manifested in space and place. The primary focus is on the effectiveness of policies and laws shaping land tenure and governance in the democratic era and the extent to which they have been able to engage with these spatially differentiated legacies in order to promote spatial justice.

The review explores the potential of policy and law to contribute to spatial justice and makes recommendations for legislative, tenure and land governance review.

The review locates structural poverty and systemic social inequality within the legacies of the profoundly uneven spatial development<sup>1</sup> at the heart of South African rural and urban geographies. As will be examined in some depth below the spatial dimensions of poverty and inequality raise deeply political questions which ask who has access to which resources and how land, mineral and natural resource access is mediated and controlled. The workings of tenure and land governance systems and the ways in which they recognise, protect and confer rights provide important insights into the underlying political economy shaping rural and urban land allocations and access to mineral and other natural resources.

### *The structure of the review*

The review is structured as follows:

- Section 1 provides an overview which identifies and delineates the diverse historical and social forces which have shaped the construction of contemporary spatial inequalities.

- Section 2 reviews the evolution of land tenure and governance systems in the former reserves and bantustans.
- Section 3 explores tenure and governance linked to continuing patterns of spatial inequality in urban South Africa
- Section 4 critically assesses measures put in place to secure access and rights in land through titling and other approaches to the formalization of land governance systems in South Africa.
- Section 5 sums up the key issues emerging from the review to identify possible recommendations for policy and legislative reform.
- An annexure provides international perspectives on tenure reform, development and planning approaches to address spatial inequality.

## **1. The historical roots of contemporary spatial inequalities**

The current inequitable distribution of land and sharply skewed access to resources in South Africa has deep roots in the country's history, dating back to early colonial settlement since Jan Van Riebeeck arrived in 1652, evolving through successive waves of colonial settlement, the minerals revolution in the late 19<sup>th</sup> century, segregation following the Union of South Africa in 1910, and the National Party's system of apartheid after 1948.

In this section, we briefly discuss the military, political, legislative, and economic factors that shaped the distribution of land that emerged prior to 1994 and the broad challenges that have arisen since the democratic transition which have constrained the effectiveness of measure intended to rectify and reverse spatial inequality.

Two major themes emerge – particularly as a result of apartheid – the profound differentials between the former homelands and the rest of the country, and profound differentials within the urban areas.<sup>2</sup>

### *19th century wars of conquest and dispossession*

As a number of historians have observed, the antecedents of today's observed spatial inequality date back beyond segregation and apartheid, to the very colonisation of South Africa, beginning in 1652 with the arrival of white settlers.<sup>3</sup>

The dispossession of the colonial era, was, as Davenport and Hunt noted, not just a single historical moment, but (as Hall paraphrases) "rather the outcome of multiple complex processes in a long historical trajectory of dispossession, the methods of which included outright coercive force, treaties, cattle theft, forced sales and taxation".<sup>4</sup>

Prior to the European's arrival on South Africa's shores, land tenure systems amongst indigenous societies 'accorded to all members of the community rights of access to a reasonable share of the land, and to those natural resources available to and claimed by that community'.<sup>56</sup>

However, in South Africa as in many other colonies, colonial governments had a distorted perception of customary tenure systems and their application. They perceived African communities to be tribal entities, failing to recognize the heterogeneity of such communities.<sup>7</sup> As Cousins has noted, land rights in communal tenure were 'socially embedded' and inclusive where individuals and families hold relative rights to the same portions of residential and agricultural land.<sup>8</sup>

The imposition of Roman-Dutch property law failed to recognise these historical rights. For example the Volksraad Resolution of 1853 excluded non-whites from 'any right to possess immovable property in freehold' (in the Transvaal).

As Europeans moved inland from the Cape, their incursions on the lands held by indigenous societies saw them displace, hunt and kill or assimilate the Khoikhoi and the San inhabitants. Their expansion northward brought them into conflict with the Xhosa. Nine frontier wars were fought between 1779 and 1894 in which the Xhosa lost much of their territory which was then incorporated into the Cape Colony.

*“The conflict between Europeans and indigenous southern Africans at the Fish River in 1780 signalled the beginning of massive dislocations of indigenous agricultural peoples and appropriation of their land”.<sup>9</sup>*

In 1846-7 a Natives Commission was established which, in Natal, delimited wholly African areas.<sup>10</sup> Colonial administrations controlled allocation of land within the reserves, sometimes indirectly through tribal authorities, at other times directly, through government officers. However despite these interventions indigenous land tenure systems persisted in most reserves. However, the establishment of ‘reserved’ land set a precedent which was to be followed in the years that ensued.

The discovery of diamonds in 1867 and gold in 1884 created a need for labour which provided the impetus for more concerted efforts to manage the African population, and constrain their access to land. These measures took different forms in the various provinces, reflecting competing labour needs of the local economy and the disposition of a colony’s rulers.

As Davenport and Saunders state, by the close of the 19<sup>th</sup> century, the frontier wars were over and nearly all the land that was to pass into white hands had done so; but problems that were to arise from the transfer were only just beginning.’<sup>11</sup>

#### *20th century rationalisation of dispossession and segregation*

The colonisation of South Africa by European settlers up to and including the 19<sup>th</sup> century was progressively disadvantaged African communities and restricted their access to land, but it was in the laws of the early 20<sup>th</sup> century that African alienation from land was legally enshrined, country-wide.

Following the gold and diamond rushes of the late nineteenth century, there emerged legislation allocating or permitting the acquisition of land along race lines. Although the country was not yet under a union, the Glen Grey Act of 1894 was a significant piece of legislation: Cecil John Rhodes (then prime minister of the Cape Colony) saw it as ‘a native bill for Africa’. Rhodes wanted to draw out labour for mines that he owned near to the small district north of Queenstown (Glen Grey) and stated that some ‘gentle stimulus’ was needed for natives to ‘come forth and find out the dignity of labour’. The Act introduced rules defining tenure rights in land (converted to perpetual quitrent); limited the size of holdings (individual tenure on 4 morgen plots); specified succession and introduced taxation (in the form of a labour tax on non-title holders to prevent squatting), while limiting the franchise.

Rhodes’ speech to the Cape parliament emphasised the segregationist function of the reserves:

*My idea is that the natives should be kept in these native reserves and not be mixed with the white men at all. Are you going to sanction the idea, with all the difficulties of the poor whites before us, that these people should be mixed up with white men, and white children grow up in the middle of native locations? <sup>12</sup>*

Glen Grey was “designed to set a pattern of land-holding throughout the Cape African reserves”.<sup>13</sup> As Hall notes, the Act marked “a key moment in the disenfranchising of Africans and restricting civil and land rights”.<sup>14</sup>

The next major legislative milestone in the alienation of Africans’ land rights was the passage of the Natives Land Act (No. 27 of 1913). The Act defined the territorial segregation of the country,

prohibiting Africans from acquiring land outside certain scheduled areas (and prohibiting whites from buying lands in the scheduled zones). The act identified the scheduled areas (equalling about 10 million morgen - roughly 21 million acres, or approximately 7 per cent of the land) and it established a Natives Land Commission to recommend additional land to be set aside for the exclusive use of Africans.<sup>15</sup>

The Act also intervened in the relationships of African farmers who lived outside the reserves. Such farm workers had, hitherto, paid rent in three forms – either as cash tenants (referred to as ‘squatters’ by the early 20<sup>th</sup> century); as sharecroppers (who paid a share of what they produced); or as labour tenants (giving typically 60/90 days per year of labour to the landowner). The Land Act sought to reshape these relationships in the interests of white farmers.

The impact of the Natives Land Act needs to be understood in its historical context rather than being conceptualised as an isolated instrument of dispossession. Beinart and Delius stress that land dispossession had already taken place as a result of the colonial wars of the 1800s and contend that the impact of the 1913 Land Act may have been exaggerated in contemporary discourse<sup>16</sup>. Feinburg argues that the Act did not stop blacks from buying land (and that black South Africans owned more land by 1936 than they did in 1913, since thousands of Africans took advantage of an exception clause and purchased more than 3000 farms and lots between 1913 and 1936), observing that the Act had not imposed full rural segregation by 1936.<sup>17</sup>

Nevertheless, there can be no doubt that the Act had a profound impact. As Plaatjie wrote in 1916, following the act “the South African Native found himself, not actually a slave, but a pariah in the land of his birth”.<sup>18</sup> As Bundy states, it “codified and ratified various discriminatory practices established in the colonies and Boer Republics; and in doing so, it welded racial discrimination into the social order of the new Union of South Africa”.<sup>19</sup> The significance for land holding and tenure was enduring: the Act sought to arrest black land ownership by preventing further land purchases in ‘white areas’, while it was all but impossible for Africans to buy land in the reserves due to overcrowding and the strength of support for communal tenure in the traditional system. “These influences together caused the abandonment of individual tenure, as the Government sought to retribalise African life in the rural areas from the 1920s”.<sup>20</sup> Black land ownership was limited to scattered holdings, particularly in white areas, which were labelled after 1950 as ‘black spots’ and scheduled for forced removal from the 1960s onwards.

Hall (2014) identifies four legacies of the act, namely:

- a material legacy of rural poverty and inequality;
- a displaced legacy of urban poverty and inequality;
- social and spiritual legacy of division, alienation and invisibility;
- a political and legal legacy of dualistic governance.<sup>21</sup>

Similarly, Kate Philip, articulates that the Act “linked the politics and economics of land and labour – spatial and economic development – in ways that have shaped South African society and its economy in profound ways ever since”.<sup>22</sup> Whether it represents a significant departure or a continuation of previous policy, it is clear that the 1913 Land Act laid foundations upon which future land allocation

and segregation was to be built, contributing significantly to the architecture of contemporary spatial inequality in South Africa.

The Natives Trust and Land Act (No.18 of 1936) (later the Development Land and Trust Act) established the South African Native Trust (SANT, later the SADT), together with a fund to acquire and develop land for the Trust within the native areas or released areas. The Act allocated 13.6 per cent of the country to the reserves. However it has been argued that this target was never achieved and that much of the additional land acquired was of poor quality and already overcrowded and exhausted.<sup>23</sup>

The Act made unlawful African labour tenancy in white rural areas. Thus, outside the scheduled areas, Africans were largely unable to acquire land. The implementation of this law, together with the 1927 Native Administration Act (No. 38 of 1927) gave the executive power to remove blacks on land in declared white areas and relocate them to the reserves. This accelerated the limitation of African land ownership and overcrowding and environmental degradation. This trend has persisted through the apartheid era and beyond.<sup>24</sup>

Conditions in the 'reserves' or Bantustans/homelands as they were to become, declined further during the apartheid era. A raft of legislation buttressed the creation of Bantustans. The Bantu Authorities Act (No. 68 of 1951) established ten 'homelands', or 'Bantustans' for different black African ethnic groups while the Promotion of Black Self-Government Act (No. 46 of 1959) gave the Bantustans some devolved administrative powers and funds to encourage industrial decentralisation. Further legislation was passed in 1967 to encourage industrial development in the Bantustans (with the intention of reducing rural-urban migration) while pass laws were tightened to prevent unwanted migration. The Bantu Homelands Citizenship Act (No. 26 of 1970) restricted black South Africans to citizenship of the homelands, making them 'foreigners' in the rest of South Africa.<sup>25</sup>

The government held most of land in the homelands' territories in trust, with tribal chiefs allocating plots to residents.<sup>26</sup> In the early 1990s, it was stated that only one per cent of homeland residents had freehold access to land. Furthermore, the land in the homelands – already over stretched and underinvested – was subject to immense pressure. From an agricultural perspective, while South Africa's white farmers were supported through a range of subsidies and incentives, homeland agriculturalists suffered from lack of access to credit, low income levels, insufficient water resources, and inadequate transportation systems.<sup>27</sup> Thus poverty was compounded.

Outside the homelands some 2.57 m ha of land which had originally been allocated to the Reserves, was administered by the SADT. The Black Areas Land Regulations (Regulation R188 of 1969) defined two types of tenure that could apply in these areas: quitrent and permission to occupy (PTO). Although both types "carried a permanent right to occupy land... numerous restrictions applied so that all rights of ownership under common law were not present".<sup>28</sup> Administrative consent was required for many types of transaction, and the title could be cancelled if the holder failed to comply with restrictions or pay charges set out in the regulations.

As noted above, so called "black spots" existed where black South Africans resided in declared white areas.



Thus, by the time of the democratic transition, the South African homelands were critically over populated and under resourced. The population of the Bantustans increased from 3 million in 1946 to 11 million in 1980. Turok paints a sober picture of the homelands:

*'In most of these areas there were few economic assets, poor natural resources, scarred ecosystems, incapable state institutions, deficient infrastructure and services, a weak skills base and few competitive enterprises. Soil erosion was serious in many areas because of over-grazing, and there was little practical support for small-holder farmers'.<sup>29</sup>*

Turok notes that the Bantustan economies "were only about 20 per cent as productive per person as the economies of the main cities, so poverty was widespread. And yet, this is where the majority of black South Africans (52.7 per cent of the population lived) lived with densities up to 329 persons per km<sup>2</sup> (compared to 17 per km<sup>2</sup> in white South Africa).

Unravelling the effects of the chronic deprivation would be a difficult and protracted task for the new government – the burden of the Bantustan policy and the accompanying spatial inequality would endure for generations.

Urban areas were also subject to a web of restrictive measures limiting spatial freedom of black urban dwellers. The paradox behind urban strategies that persisted through the era of segregation and apartheid was that industry depended upon black urban labour, but, wanting to control the black majority, and reserve jobs and land, government sought to prevent the settlement of Africans in towns.

The Native (Black) Urban Areas Act (No. 21 of 1923) reflected the recommendations of the Stallard Commission in 1922 which had stated that the native should only enter white areas to administer to the needs of white man.<sup>30</sup> The act required and empowered local authorities to set aside land for 'locations'; to keep separate 'Native Reserves Accounts' (into which revenue from fines, fees, rents, and beer sales would be paid); to apply influx control and remove surplus Africans from urban areas. The Act's initial implementation was patchy, but it was significant, as Maylam states, representing the first major intervention by the central state to shape the process of African urbanisation. The Act was subsequently amended a number of times, and "grew into one of the most complex pieces of control legislation ever devised anywhere".<sup>31</sup> Further removals took place under the guise of anti-slum measures such as the Slums Act (No. 53 of 1934) but, while white families who were relocated were compensated or provided with new accommodation, black people often faced financial ruin as a result of being removed.<sup>32</sup>

The Native Laws Amendment Act (No. 46 of 1937) prevented Africans from acquiring land in urban areas and the Native (Urban Areas) Consolidation Act (No. 25 of 1945) outlined four different categories of urban residents and the tenure rights to which they were entitled, linking their right in the city to their employment.

Following WWII and the election of the NP government, the influx control system<sup>33</sup> became increasingly sophisticated. The Native Laws Amendment Act (No. 54 of 1952) "limited Africans with a right to live permanently in the urban areas to those who were born there, those who had lived there continuously for fifteen years, and those who had worked continuously for the same employer for ten

years".<sup>34</sup> Wives and dependent children with Section 10 rights were also entitled to reside in the urban areas. The *dompas* became a crucial instrument of government control: a black person had to have permission to be resident in an urban area, which was tied to their employment therein.

Within towns, the principles laid down in the Native (Urban Areas) Act (No. 21 of 1923) were put into practice. The Group Areas Act (No. 41 of 1950) (subsequently amended several times) made compulsory what the 1923 act had recommended. The Act divided urban areas into racially segregated zones. As Mabin (1991) notes, the Act marked the first time that general segregation was extended to the Coloured population. It undermined municipal autonomy; laid the basis for long-range, wide-scale land allocation planning; opened the way to greatly expanded (though of course strictly segregated) public housing provision especially for the poorer sections of the urban population; provided for retroactive segregation; and massively interfered with concepts of property rights.<sup>35</sup>

Under the auspices of the Group Areas Act, more than 860,000 people were forced to move to distant, segregated, townships. Such forced removals had numerous effects on both people and urban spaces: they robbed people of their property or tenancy (compensation for land and housing was hopelessly inadequate, and alternative sites allocated to blacks have not appreciated in value at anything like the same rate as the original holdings); they destroyed urban economic niches; they increased the costs to those removed by placing them far from town and they disrupted established community sectors.<sup>36</sup>

The apartheid state central government initiated land use planning for African residential development. It identified tracts of land, and funded the development. By the late 1970s, the state had erected schools, administration blocks, clinics, beer halls and built about half a million houses for urban Africans in white South Africa and constructed 160 748 units in Bantustan urban areas. However from this point public investment in housing in segregated townships in white areas was cut back.<sup>37</sup>

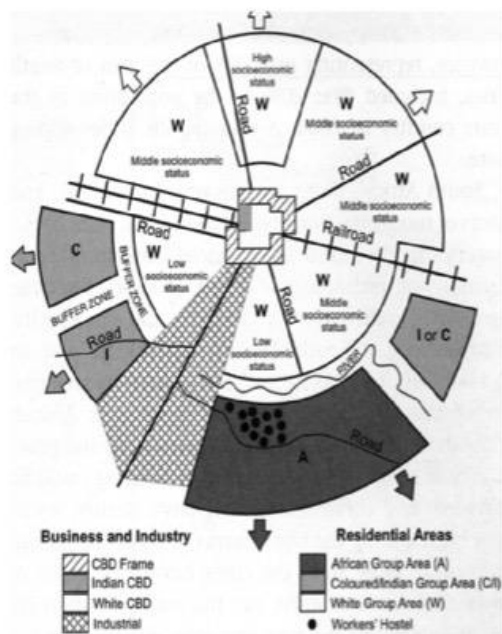
Philip presents the following framework of conditions under which townships could be developed according to the dictates of the apartheid government – as can be seen the terms were geared towards keeping black people separate from whites, far away, buffered, in housing that was only available on a rental basis.<sup>38</sup>

- The site should be an adequate distance from the white town.
- It should adjoin an existing African township so as to decrease the number of areas for Africans.
- It should be separated from the white area by a buffer where industries exist or are being planned.
- It should have land to expand away from white areas.
- It should be within easy distance of the town or city for transport purposes, by rail rather than road.
- It should have one road that connects it to the town, preferably running through the industrial area.
- It should be surrounded by open buffer areas.
- It should be a considerable distance from main and national roads.
- Housing should be built and allocated in areas for different ethnic groupings.
- Although the standards and design of housing for Africans varied considerably before 1947, the central

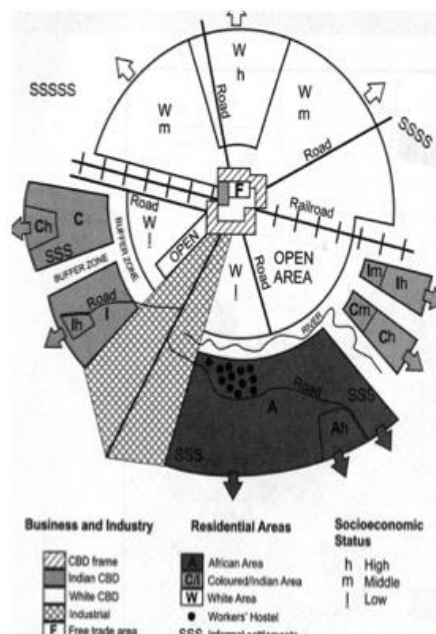
government thereafter specified the minimum standards for African and “Coloured”<sup>3</sup> housing. The four-room, 40.4-square-meter “51/6” prototype<sup>4</sup> was the most typical house built under this requirement.

- A mix of formal housing, site and service schemes, and hostels should be provided.
- Housing should be provided on a rental basis.

The above measures (and others) resulted in cities structured along the lines of the diagram on the left below (although in reality by the late apartheid period the cities were increasingly stratified within each social category while informal settlements started to spring up on the urban peripheries, as depicted on the right).



Model apartheid city, showing residential/industrial/CBD areas (adapted from Davis, (1981))



The late apartheid city (adapted from Simon, (1989)).

Source: Roy Cole and Harm De Blij. *Survey of Sub-Saharan Africa: A Regional Geography*. New York: Oxford Press 2007. Cited in *Urban models of apartheid cities in South Africa*, <http://people.uwec.edu/ivogeler/Travel/Southern%20Africa/apartheid-models.htm>

Overall, across the country during the heyday of apartheid (1960-1980) some 3.5 million people were removed from rural and urban areas.<sup>39</sup> By this point apartheid spatial geographies and associated racial inequalities had been deeply inscribed within the rural and urban social fabric. The imprint of successive measure to impose state controls restricting where people lived and worked would cast a long shadow over attempts by a democratic South African state to reorder urban and rural space and create a more equitable society.

### Key Features of Contemporary Spatial Inequality

As indicated above South Africa's historical development led to profound spatial inequality, both between the urban areas and the rural areas (especially the homelands), and within the sprawling

urban areas themselves. It has been a complex challenge for the post-apartheid regime to grapple with. Since the democratic transition, spatial inequality has persisted, as will be analysed in subsequent sections.

To some extent, it was expected that the removal of apartheid restrictions, the settlement pattern between rural and urban spheres would normalise:

*With the termination of apartheid controls, people would migrate to the cities, and 'artificially created' settlements would wither away (UF, 1990: Tomlinson, 1990; Roux, 1991). The characteristic apartheid spatial disjunctures between population and economic activity at a national and regional scale would disappear as people moved closer to work, 'normalising' the settlement pattern.<sup>40</sup>*

This did not initially happen to the extent that might have been expected. While the cities and centres of growth did exert economic pull on people, significant numbers of rural people continued to remain in, or move to, places with weak or declining economic bases. Those who had secured some sort of a base through a mix of livelihood strategies in one place were less likely to move, depending for survival on a mix of pensions and social grants, combined with local survivalist sources of income and irregular remittances from migration by members of the household. As Todes stated, “the complex and messy legacy of apartheid settlement patterns is likely to remain for some time, and cannot simply be wished away”.<sup>41</sup>

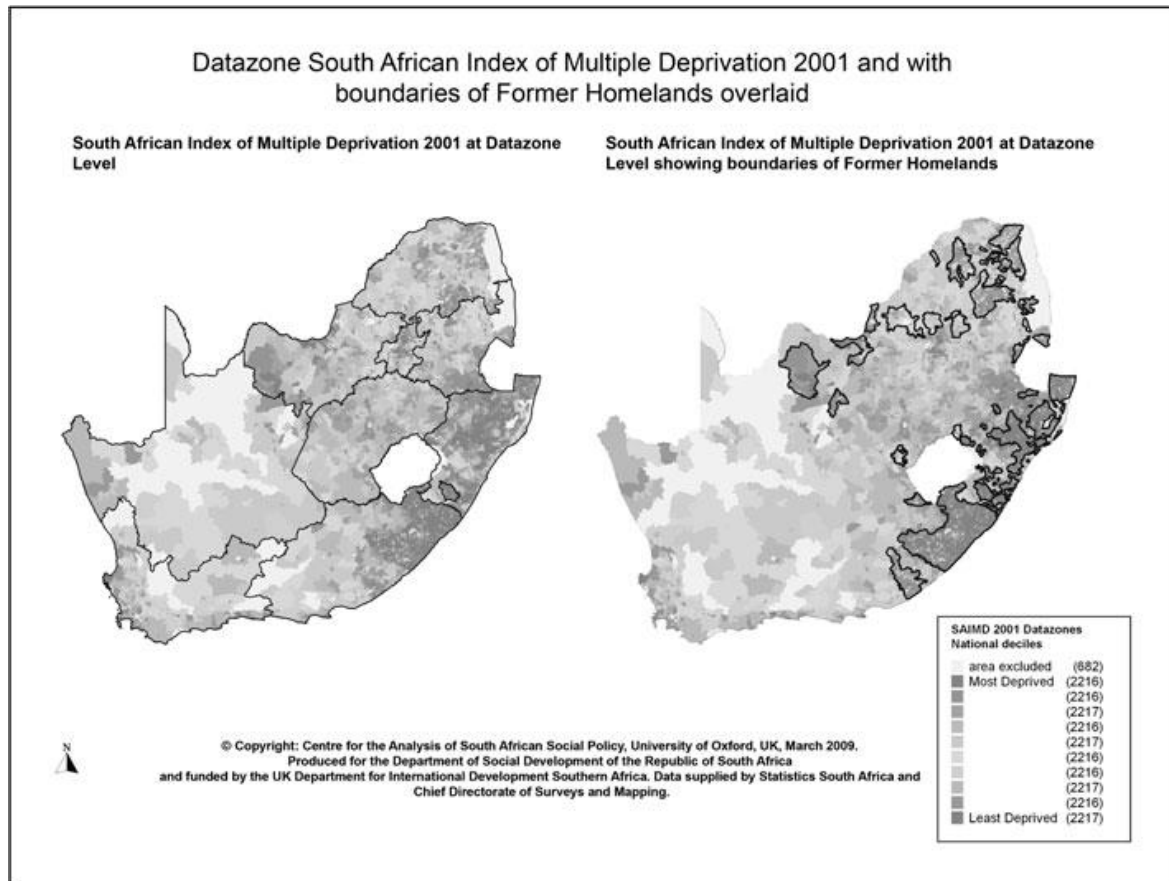
Until 2008, evidence suggested that migration patterns established under apartheid had persisted. In 2009 the HSRC identified the economic downturn as a key driver likely to accelerate in-migration to secondary cities and metro peri-urban zones, while in 2013 the CSIR highlighted how “the population estimated to be living within or within a 20km distance from city regions, cities and towns in South Africa continued to increase steadily from 82% in 1996 to 83% in 2001 and to 86% in 2011”.<sup>42</sup>

Complex and spatially heterogeneous rural urban linkages have developed over time. These were shaped by the migrant labour system and have adapted to social and economic continuities and discontinuities in the post-apartheid era. Rural households under apartheid relied heavily on transfers from other family members (‘remittances’), and while these have diminished post-apartheid, they still make a significant contribution (alongside social grants) in supporting members of the family who continue to reside in rural areas.

At the same time in the South African context, land in rural areas still continues to represent a “sense of security, identity and history and a preferred place for retirement”.<sup>43</sup> It seems therefore that South Africa’s population dynamic is changing, but has not changed as rapidly as might have been predicted. There are a number of consequences of this. One that is immediately apparent is the persistence of poverty in the homelands areas, but another would appear to be increasing social and economic differentiation within these areas.

Some studies<sup>44</sup> have shown improvements in conditions in the former bantustans since the collapse of apartheid. However, a sophisticated analysis by Noble and Wright shows that poverty in the former homelands has endured. Drawing on data extracted from the Census in 2001 and the 2007 Community Survey the researchers conducted a spatial analysis based on indices of multiple deprivation in South Africa. Using a model, based on datazones (small statistical units) and examining 13 variables of

deprivation which included *inter alia*, income, employment, education, living conditions and health, they graphically demonstrated how the legacy of apartheid had persisted. Levels of deprivation were compared between former homeland areas as a whole, the rest of South Africa and a case-study township, as well as between each former homeland.



**Table 2** SAIMD 2001 deprivation rates by domain by former homeland and for ‘the rest of South Africa’

Region	% Income deprivation	% Employment deprivation	% Education deprivation	% Living environment deprivation
Former Bophuthatswana	85.4	55.8	41.6	82.7
Former Ciskei	89.8	69.2	38.5	77.7
Former Gazankulu	91.0	63.4	50.3	89.5
Former KaNgwane	91.2	56.8	50.2	87.6
Former KwaNdebele	88.6	56.2	45.4	84.8
Former KwaZulu	92.0	66.6	47.2	87.2
Former Lebowa	92.6	63.4	45.6	92.9
Former Qwa Qwa	91.5	64.4	40.3	84.0
Former Transkei	96.1	71.5	56.9	97.0
Former Venda	90.7	60.3	44.6	93.7
Rest of South Africa	64.3	37.3	30.2	50.0

Noble and Wright's results are telling: the legacy of the creation of the reserves and their consolidation into Bantustans has persisted largely unchecked into the present day.<sup>45</sup>

In commercial farming areas, where labour tenants, farm workers and farm dwellers have lived on white farms (many of them for generations) the sector has been shedding labour since the 1970's. There has also been widespread loss of rights since apartheid ended. A combination of factors in the agricultural sector including mechanisation, pressures of deregulation, the casualisation and externalisation of farm labour, evictions and displacement in response to legislation attempting to secure tenure rights (The Land Reform Labour Tenants Act (No. 3 of 1996) and The Extension of Security of Tenure Act, (No. 62 of 1997)) have been factors in the reduction of numbers employed on farms.<sup>46</sup> A survey of farm evictions found that nearly 2 million black people moved off farms from 1994 to 2003: of these it was estimated that 940 000 were forcibly evicted.<sup>47</sup>

Land reform and rural development programmes have not provided alternative livelihoods for farm workers who have been displaced – delivery rates have been modest and fallen well below projected targets.<sup>4849</sup> Many former farm dwellers with neither tenure security nor access to land have relocated to informal settlements on the edge of small rural towns.

Thus there has not been a major eradication of poverty or inequality in the rural sphere. As Hall states:

*“Far from unravelling this history of dispossession, the land reform process has merely dabbled at its edges while the inequalities it set in place have in some ways been further aggravated since 1994”.*<sup>50</sup>

One of the other notable legacies of apartheid, however, is its impact on the structure of metropolitan centres and cities in the country. Here, the legacy of apartheid is enduring and “formidable...a fractured urban form with unequal access to jobs, amenities and public services”.<sup>51</sup>

The apartheid regime literally set the set racial segregation in concrete which has been difficult to undo subsequent to apartheid's demise. “South African cities have remained profoundly divided, segregated and unequal despite sixteen years of concerted government efforts to extend development opportunities to the urban poor”.<sup>52</sup> The durability of the built form, the interests vested in maintaining the status quo, the enduring economic inequalities amongst the population, and insufficient upward mobility are all implicated in persistent spatial inequality in cities.

There have been numerous attempts to address spatial inequality in national policy discourse. The Reconstruction and Development Programme (1994) spoke of the spatial reconstruction of urban landscapes, and the 1995 Urban Development Strategy noted the goals of urban transformation:

*The spatial integration of our settlements... will enhance economic efficiency, facilitate the provision of affordable services, reduce the costs households incur through commuting, and enable social development. Spatial integration is also central to nation building, to addressing the locational disadvantages which apartheid imposed on the black population, and to building an integrated society and nation (RSA, 1998: 24).*<sup>53</sup>

In 2004, the Department of Human Settlement's new housing policy, Breaking New Ground, proposed “utilizing housing as an instrument for the development of sustainable settlements, in support of

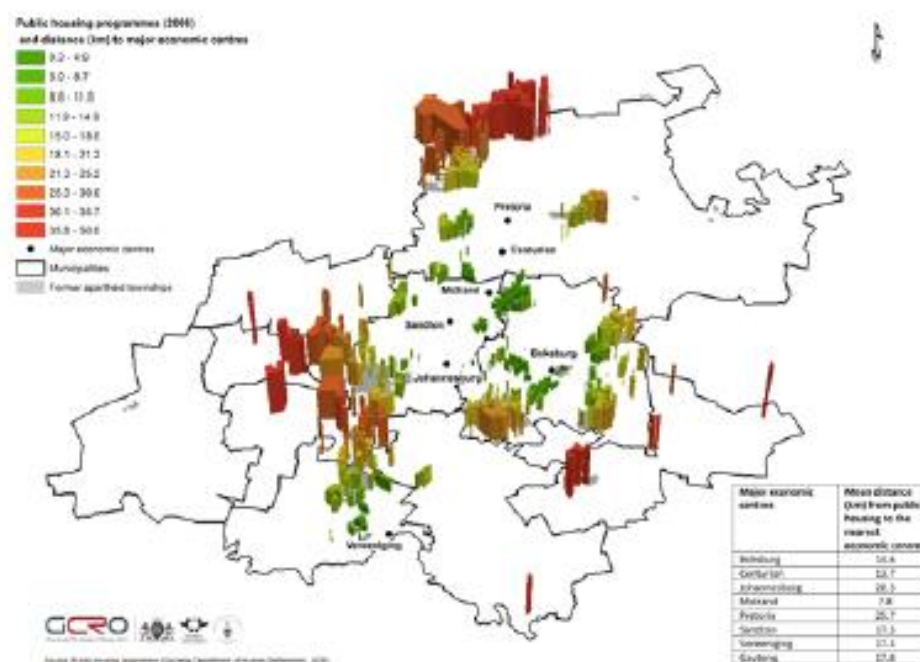
spatial restructuring”.<sup>54</sup> More recently, there has been increased recognition by government of the need to address the inefficient and exclusionary urban form inherited from apartheid. The National Development Plan (2012) made a strong case for spatial transformation in the cities and stimulated further work on the Integrated Urban Development Framework to address *inter alia* “fragmented residential settlement patterns, underdeveloped business areas in townships and long travel times between home and work”.<sup>55</sup><sup>56</sup> In addition, City Support Programmes, led by Treasury, have included a component to encourage municipalities to devote more attention to stimulating growth and promoting spatial transformation. Recently, policy commitments have been made to more broadly advancing “spatial justice”. As is discussed further below the concept of spatial justice is lead development principle in the Spatial Planning and Land Use Management Act (SPLUMA) (No. 16 of 2013).

In spite of these good central government intentions, there has been a replication of apartheid urban spatial distribution and a persistence of urban divides since 1994. In the early years post-apartheid, the public housing programme became the *de facto* urban development strategy.<sup>57</sup> Between 1994-2014 the government reportedly built some 2.68m houses, and aided 12.5m people to obtain a better form of accommodation than under apartheid.<sup>58</sup> However, the programme has not addressed the underlying spatial inequality inherited from the apartheid urban model. Pillay, Tomlinson, and du Toit (2006) characterise this as a “notorious example of a numerical goal over-riding the need to build sustainable settlements”.<sup>59</sup>

The diagram below which depicts housing delivery in Gauteng indicates how new houses built under public housing schemes are often located on the periphery, far from the economic opportunities and often without adequate transport infrastructure. <sup>60</sup> This pattern is similar in other provinces.

FIGURE 7

#### Proximity of RDP housing to major economic centres



Source: Gauteng Department of Human Settlements (July 2008 Housing Programmes)

Source: Kate Philip, Mbofholowo Tsedu and Meshack Zwane, *'The impacts of social AND economic inequality on economic development in South Africa'*, (UNDP, 2014),

[http://www.za.undp.org/content/dam/south\\_africa/docs/Reports/UNDP%20Inequality%20South%20Africa.pdf](http://www.za.undp.org/content/dam/south_africa/docs/Reports/UNDP%20Inequality%20South%20Africa.pdf)

The location of public housing developments since 1994 replicates the spatial injustices of apartheid and cements disadvantage for poor households who can only access housing on the periphery. Distance from economic opportunities constrains individuals from finding work due to the time and expense spent travelling. Where people do have jobs the daily commute presents significant time and cost constraints, raising stress, wasting hours and eroding the purchasing power of wages through high transport costs.

This replication of the apartheid land distribution is due to many factors, including:

- The strength of private property rights enshrined in the constitution, such that existing land owners can object if their rights are likely to be infringed by a new development (therefore municipalities are more likely to use greenfield sites for new houses, rather than densifying existing areas).
- Land appreciation has made the most suitably located land seem unaffordable compared to more peripheral areas.
- A raft of provincial planning legislation has not been overturned, and so planning applications are open to legal challenge (which can favour those who can afford consultants, planners and lawyers).
- There is a lack of municipal capacity to strategize more broadly around spatial transformation, and confused lines of accountability have depleted the political will to address spatial transformation.
- Transport policies have not fulfilled potential to promote integration.
- Municipal financial constraints see the municipalities dependent on rate payers in middle class areas.

The 'white spaces' demarcated by long histories of social engineering have opened up only to those who can afford to pay. These enclaves have become increasingly exclusive and securitised, policed by private security firms. A proliferation of 'gated communities', eco-estates and townhouse developments has been "followed by rapid development of nodal patterns of commercial and retail investment. Commercial retail and 'closed commercial centres' have spread out following the spatial patterns of gated communities. This has reinforced race-class segregation and strengthened rich- poor polarisation. These developments, gated communities, "closed neighbourhood and eco-estates not only represent a new way of privatising public space but also taking over and privatising public administration and delivery of services".<sup>61</sup>

It remains to be seen whether the latest policy iterations by national government represent a genuine step forward in confronting spatial inequality issues, that may be implemented on a municipal level, or are just "more and more policies and programmes [that] are allowed to proliferate creating confusion, inaction and "more-of-the-same" with some tinkering on the edges"<sup>62</sup>. Unless they represent a new departure that represents a significant break with the past, South Africa will remain as Pieterse says, "trapped in a paradox: the more it pursues redistributive social policies that reduces material poverty, the more it worsens spatial inequalities, which in turn reinforces economic and cultural marginalisation".<sup>63</sup>



## **2. Overview of Land Tenure and Governance in the former Bantustans**

### *Reforming the legacies of spatial differentiation*

Section 1 reviewed the historical basis of the highly differentiated patterns of settlement and their spatial and racial overlays. This section looks at some of the implications of the distinctive systems of tenure and governance that went hand-in-hand with these distinctions, and which in many respects reinforced them. The post-apartheid regime has had to grapple with how to reshape these institutional legacies to bring about more equitable access to, and control over land in the face of entrenched property rights that for the most part reflect continued spatial marginalisation of the poor.

The task is mired in complexity, and, as the past twenty years of reform measures testify, the consequences of decades, if not centuries of social engineering are not easily undone. New sets of interests and power have been imprinted on older property relations and these are not readily sacrificed in the interests of social justice and equity.

The policy directions of the post-apartheid government can be divided into two distinct phases:

The first phase of reform, until roughly 2000, placed the emphasis on establishing a clearly defined platform of 'rights' for various categories of land holding of the formerly disenfranchised. The new legal architecture was designed to apply back-to-back across all spatial-tenurial categories:

- rural commercial farmland, with its various categories of workers, occupiers and labour tenants;
- former homelands/Bantustans under communal systems;
- the various urban settlements, formal and informal.

This approach did not involve dismantling the existing cadastral system, but instead challenged the exclusivity of rights associated with existing land parcels with entrenched property rights, mostly in the hands of whites, established through the Deeds system comprising cadastral boundaries and parcels. The rights-based approach to reform replaced the notion of exclusive rights with the 'bundle of rights' approach that recognised the possibility of coincidental rights to the same parcel of land. This direction in property law challenged the notion of singular dominium that had been adopted by South African courts since the early twentieth century<sup>64</sup>.

While most obviously challenging power relations on commercial farms and in cities, there were also implications for communal tenure systems in the former Bantustans. Here the approach in proposed legal reform of communal tenure (as set out in the Land Rights Bill) was to challenge the entrenched power of apartheid-endorsed chiefly governance of tenure rights with the reconstruction of rights from the bottom up. This would have involved recognition of customary rights interpreted in terms of living norms and practices (i.e. 'living law'), which could accommodate the nested systems and flexible boundaries that characterise customary tenure systems<sup>65</sup>, and allow for negotiation and dispute resolution of overlapping or contested rights. The policy allowed for choice of governance structure based on local preferences, and shied away from any attempt to recreate the former system of traditional authorities in so far as they were mandatory wall-to-wall statutory structures contained within the former boundaries of Bantustans. In short, while there was still to be a separate system of

governance of customary tenure, the necessary close association with politically appointed traditional authorities in land allocation was to be considerably loosened.

The second phase, from 2000 to the present, while not abrogating the rights legislation that had been passed during the first phase, looked for more singular approaches to reform that has resulted in a return to an accentuated dualistic divide in property law between the commercial farmland and urban areas on the one hand, and the former homeland/Bantustan areas on the other.

Private ownership in different forms remains the dominant tenure form in the urban areas and former white commercial areas. With regard to land reform the state now retains ownership of land acquired through the proactive land acquisition programme and leases it to redistribution beneficiaries.

In the case of communal areas land allocation and common property management are to remain firmly under the control of traditional authorities. There is no room in this scenario for choice of governance structure to manage land allocations and their administration, resulting in the concretisation of former apartheid spatial-tenorial boundaries and controls. In the former Bantustans the inherited spatial boundaries defining distinctive traditional authority governance structures are to be retained. The aim is to entrench mandatory statutorily defined traditional governance systems, retaining for the most part the structures that were set up by the colonial and apartheid regimes that coincide neatly with the former apartheid boundaries that remain defined by racial and spatial criteria. In terms of this approach, there will be room, ostensibly, for defining individual use rights, called 'institutional use rights' in policy proposals<sup>66</sup>. In the case of KwaZulu-Natal, where all the land is vested in the Ingonyama Trust Board ITB, there have been contentious proposals for converting individual rights into leases. Boundary demarcations and subdivision are to make use of the existing land surveying system that is designed for demarcating parcels of land, rather than layered systems of rights that currently characterise the exercise of rights in these areas.

It is argued that African land tenure during the twentieth century in South Africa can be boiled down to the subjection of African law to rule by administration, proclamation and codified customary law. The ultimate statement of the colonial state's view of land rights, according to Chanock, was a total rejection of rights existing beyond administration.<sup>67</sup>

The separation and insulation of customary law was designed to prevent the recognition of African property rights in the interests of underpinning a political economy designed to foster white capital formation. By the same token, these tendencies strangled the robust development of customary law in keeping with constitutional values and democratic norms.

Even though the Native Administration Act itself has been finally repealed (it had to be repealed in stages), there should be scope for review of those aspects that continue to influence the shape of current laws and policies. This can be seen in two key respects.

The first is the continued application of differentiated rules of property rights that apply only within the enclosed tribal boundaries of the past, and do not allow for the healthy development of a discourse of universal property rights that are protected by the Constitution, and acknowledged in property law. This interpretation should not suggest that the tenures that emerged from the complex history of past struggles are irredeemable. Many examples of adaptive and innovative customary

tenure practices have emerged on the ground, and provide the most obvious pointers for a transformed structure of property law in South Africa.

The second is that the broadly generalisable models of governance that emerged over the course of the twentieth century are still being actively fostered in the present. We have argued that there was considerable local variation in response to complex conditions on the ground. The late colonial government, the apartheid state and now the post-apartheid state have all attempted to disguise this regional variability by imposing a monolithic top-down one-size-fits-all framework of governance based on a common denominator of tribalism and traditionalism. A century of concerted attempts at uniformity have not dampened the evidence of variability in governance and tenure forms across the South African landscape, nor the social shifts towards modernist interpretations of African law and custom. These approaches that attempt to straight-jacket African tenure and governance by criteria of spatial isolationism and rules and structures imposed from above could fruitfully give way to more flexible approaches which are more closely rooted in the realities of socio-spatial relations on the ground.

Any serious attempt to tackle the socio-spatial, economic and political asymmetries in South Africa must examine the way in which the Native Administration Act created, invented and maintained an edifice of customary law that contributed to the highly differential systems of governance of the Bantustans. The maintenance of the traditional system of governance, with its direct links to the Native Administration Act contributes to the maintenance of a dualistic system of property law and the suppression of robust development of modern versions of customary law in line with the Constitution.

### *The Evolution of Trusteeship*

One of the difficult questions that continues to challenge the contours of land governance policies is the nature of the balance that should be struck between a custodial role for government to protect rights that continue to be vulnerable (which includes the former Bantustans), and the encouragement of self-determination by rights holders over their property.

There are in fact several distinct patterns in the historic development of trusteeship. The key distinctions that emerged were between local land holding trusts (which some call tribal trusts, or tribal title trusts)<sup>68</sup> and state trusteeship. The latter emerged in Union political discourses as a means by which to provide a broad governance framework for land reserved for Africans short of ownership, and which eventually provided a means of transferring ownership to the state, ostensibly to hold in trust for the beneficiaries.

Over the course of the twentieth century, the protectionist ideas that partially informed the rationale of state trusteeship changed direction. The emphasis on the state's custodial duties became secondary to the state's governance function in regulating political and spatial segregation. It is difficult to untangle the state's desirable role in protecting vulnerable rights and the potentially negative consequences in reinforcing spatial inequality and limiting self-determination of property rights.

The argument here is that the structure of property law would have to change substantially to elevate customary rights to *property rights* through statutory recognition. Until the balance of forces in property law can be recalibrated to accommodate rights that are currently off the national Deeds register there will be continued need for the state to play a strengthened custodial role over vulnerable rights. We argue that recognition of property through titling will not provide the answer, and that customary rights must be recognised in their own right. Titling does not alone address (a) the asymmetries of power in land transactions; (b) the dispossessory effects of the market; and (c) customary kinship or familial norms of access that continue to influence how land is held and passed on in practice. There is an abundance of evidence to show that creating title deeds in these situations does not solve the property divides in our society, but actually exacerbates them, counterintuitive as this assertion may appear at first glance.

For these reasons, other solutions must be found. An acceptable legislative framework for statutory recognition of rural communal land rights has eluded the legal and policy framework of the ANC government, and rights continue to be vulnerable. Under these circumstances, state trusteeship in possibly new guises continues to have an important function for the foreseeable future. The present legal ambivalences need to be ironed out, and the custodial functions strengthened.

### *The Meaning and Implications of State Trusteeship*

Defining state trusteeship in legal terms, and elaborating its continued role in a constitutional democracy, has proved elusive on account of the entangled colonial legal and political processes that gave birth to it. The difficulties of defining customary rights by means of statute in the present context, where land administration has devolved on reconstituted tribal authorities with limited accountability, means that the concept of customary rights has assumed many of the negative characteristics of early colonial interpretations of African land relations. It is argued that the concept nevertheless has saliency in respect of the need for the state to assume fiduciary responsibilities to protect African land rights from the very structures of traditional and elite power that it has helped to create in the first place.

As Capps points out, the British "brought with them a distinctive conception of indigenous tenure that ... tended to conflate political authority with land ownership and control by viewing the chief as the 'traditional custodian' or 'trustee' of his tribe's corporate property".<sup>69</sup> Capps coined the term 'tribal trusteeship' to capture the essence of the concept which he claims was pioneered and advocated by Shepstone, which he distinguishes from 'state trusteeship'. "The net effect was to produce an entirely novel and administratively defined form of African private group ownership in the Transvaal, which may be termed the tribal-title-trust regime".<sup>70</sup>

In South Africa the state has been the trustee over African-held land for the most part of the twentieth century. Through all its regime changes to the present, however, the state has been loath to honour the custodial responsibilities that go hand-in-hand with the concept of a trust.<sup>71</sup> Bennett and Powell, argue that the courts have interpreted administrative law in relation to its fiduciary responsibilities extremely narrowly to exonerate the state from the latter.<sup>72</sup>

In the case of formally constituted trusts, the trustee assumes a fiduciary duty to manage the asset in the exclusive interests of the 'trust beneficiaries', and that this fiduciary relationship is normally regulated by private property law. In the South African case, "it seems to have been assumed that [a legally] enforceable trust relationship could not exist ... because controlling statutes gave the state extensive powers with no explicit duty to account to the beneficiaries".<sup>73</sup> As Capps also points out, the state was thus immune from an *actionable* fiduciary duty, which deprived African 'beneficiaries' of legal protection against the negligent or corrupt administration of trust land.<sup>74</sup>

Puzzlingly, the South African Constitution does not impose fiduciary duties on the state. Elsewhere the United States and Canada have developed a bold set of principles to protect the beneficiaries of state land trusts<sup>75</sup>. These examples suggest that state bodies administering land under trusts in South Africa should be held legally accountable for their actions, and furthermore, that *private law* should be used for remedies in situations of dispute or ambiguity. In spite of the strong case for state custodianship, the authors argue that the courts in South Africa have shown an unwillingness to circumscribe the state's powers to act in the public interest. They argue that the basic principle that vulnerable groups should be entitled to legal protection should override legalistic arguments.<sup>76</sup>

In addition to concerns about the predatory tendencies of powerful elite interests within communal areas and of external agents such as private investors, customary rights are subject to an additional layer of vulnerability in the form of the market. Clearly a developed form of state trusteeship could be seen to be an important intermediary between land holders and the market in the context of vulnerable rights and customary norms.

In the present context, the suggestion that the state's custodial duties should be strengthened is an acknowledgement of the continued vulnerability of indigenous rights. The post-apartheid state has failed to elevate customary rights by statute. Customary rights remain subordinate to formal property law definitions of ownership in spite of strong legal protection, e.g. in the form of the Interim Protection of Informal Land Rights Act (No. 31 of 1996). The need for continued state oversight is thus an indication of the failure to transform the structure of property law in post-apartheid South Africa. It remains heavily skewed in the interests of private capital and state assets. As mentioned, titling does little to correct this imbalance, and in some respects may even deepen it.

A critical weakness in land tenure reforms relate to the vagueness of individual family entitlements to land rights where customary norms apply. Proposed legislation in terms of the Communal Land Tenure Policy (CLTP) does little to allay the reality that even where individual 'institutional use rights' are suggested, these cannot be fully realised as long as they are subject to the overriding 'ownership' of traditional councils to which it is proposed that the land will be transferred. The poor track record of state trusteeship in South Africa indicates that when state or quasi-state entities take ownership of the land to which it has trusteeship and custodial responsibilities, it has largely failed to honour the latter, and in general has tended to abuse them. There is thus no reason to believe that traditional councils will fare any better, and some disturbing case histories prove their tendency to support elite interests, as well as their own, in appropriating the social and economic assets of customary property.

#### *Tribal Trusteeship and Tribal Governance Institutions*

Over time, the state's erstwhile custodial duties as trustee gave way to the more powerful interests of tribal governance during the apartheid period. The accountability of tribal institutions is politically circumscribed, and their reproduction is firmly predicated on heritable notions of succession to positions of authority. These norms cannot be easily reconciled with the accountability of officials in the employ of public governance, but even the latter resist the notion of public accountability over communal lands.<sup>77</sup>

The new trajectory of accumulation in communal areas is most evident in areas where investment in mining has led to various corporate notions of tribal property on mineral-rich tribal land, particularly the platinum belt. Capps captures the new arrangements as 'tribal landed property'.<sup>78</sup> He argues that strengthening of chiefly control over communal land enhanced the capacity of customary authorities to extract revenues from investors seeking access to this land for the purposes of production, in the process commoditising communal land, providing a pathway to new forms of rentier accumulation for landed chieftaincies which he refers to as the emergence of a class of 'rentier chieftaincy'.

Capps maintains that the assumption that land could only be collectively owned and managed by Africans on a tribal basis was for a long time enforced merely by *ad hoc* administrative practice rather than legislative enactment, but which after a series of court cases in the first two decades of the twentieth century that "cumulatively defined the tribe as a '*universitas personarum*' - a corporate entity with the capacity to acquire property rights, enter contracts and incur obligations through the office of its chief".<sup>79</sup>

Capps argues that in reality, "'customary' decision-making ... was mediated, diffused and, to some extent, counterbalanced through the multi-layered institutions that were the warp and weft of the living tribal polity" which contrasted sharply with the formulation of "the autocratic corporatism of the *universitas* formulation".<sup>80</sup> Strengthening chiefly control over tribal land opened new avenues of chiefly appropriation that threatened to undermine its political legitimacy, calling forth further interventions in the 1920s to separate the property and incomes of the chief from those of the tribal authority.

#### *The imposition of a model of Tribal land holding linked to tribal governance*

Formerly decentralised practices of land allocation, which required a degree of consultation, became centralised in the tribal authorities and chiefs. These shifts were authorised by uniform national proclamations regulating land tenure, Proclamation R118 of 1969 and Proclamation R293 of 1962 for rural and urban townships respectively. R118 was a restatement of earlier forms of tenure, notably quitrent and Permission to Occupy, but their administration was considerably tightened up under tribal authorities. The tribal authorities under chiefs were given powers over land allocation unheard of in the past, let alone under pre-colonial regimes where land abundance required no such controls. Powers over land were concretised by virtue of the powers tribal authorities had over people's mobility, since they were given responsibility for the approval of passes. The Chiefs' increasing powers over land were increasingly dependent on their loyalty to the state rather than arising out of a responsive relationship to their subjects.<sup>81</sup>

#### *Traditional Governance Institutions in the present*

The development of formal segregation and apartheid resulted in the steady erosion of the independent powers over property as uniform tribal structures were established in blanket fashion over people living in the scheduled and released areas that eventually became the Bantustans. Under present ANC rule, these pockets of land have been subjected to the mandatory wall-to-wall tribal governance structures imposed by the Traditional Leadership and Governance Framework Act ("TLGFA"), 41 of 2003.

The controversial Traditional Leadership and Governance Framework Act (TLGFA) inflamed tensions by stipulating that officially recognised Traditional Councils would become the mandatory land administration committees overseeing all land within its boundaries. In cases where property values are enhanced by mining, the tensions have in some cases lurched into crises of considerable magnitude. In some cases the imposed leadership has attempted to corporatise the property holding entity and appropriate the income which it generates.

The various forms of title that do not fit the notional mould of traditional communalism linked to tribal authority have continued to raise burning issues in recent times to the seemingly intractable problem of what forms of governance and property rights are most suited in contexts of group ownership where customary norms and values continue to have traction. The late colonial, apartheid and now post-apartheid states have all shared a policy tendency towards extending control over African-held land by monolithic state-created traditional authorities (now officially known as "traditional councils" established in terms of the TLGFA, proposed to be replaced by the Traditional and Khoisan Leadership Bill (TLKB)). This control is envisaged to supersede both the variability of historic and current forms of tenure, including legal entities that draw on notions of trusteeship or group ownership, and any notion of independent property rights by the members of group owning entities.

### *Conclusion*

It is argued that despite the significant positive shifts made in the legal architecture of property rights, the governance frameworks of the colonial and apartheid periods have not only failed to transform the land relations between the Bantustans and other zones of space in South Africa, but have rather succeeded in entrenching unequal relations of power and property rights within these areas. The extension and elaboration of the powers over land by traditional governance institutions to the point of transfer of ownership has in some respects amplified the negative tendencies associated with the evolution of the notion of trusteeship so as to enable the actual appropriation of people's rights.

In Section 4 we argue that the paradigm of 'formalisation' of rights has misleadingly led in the direction of entrenching the binary distinction in property law between the system of title as formally regulated by the Deeds Registries Act of 1947, to which all individual rights are being channelled, and a subordinate system of customary rights that are subject to the governance institutions of unelected traditional authorities. We argue that some necessary adaptations to both the structure of property law, and the administrative infrastructure regulating land, including the cadastral system, must be made to provide the necessary legal and administrative framework for the realisation of property rights.

### 3. Tenure and governance systems linked to continuing patterns of spatial inequality in urban South Africa

Tenure security and urban access have been historically linked in South Africa: limitations on urban tenure rights were established as early as 1910, through to urban segregation and apartheid influx controls, forced removals to bantustans and the construction of Group Areas townships. Territorial segregation has always been a feature of urban South Africa.<sup>82</sup>

Until 1978, black South Africans had temporary occupation rights through section 6, 7 and 8 permits. Despite considerable restrictions, the urban black population continued to grow and informal settlements with it since the 1960s, so that by the 1970s, informal settlements were a significant feature of the urban landscape, in Bantustans and in so-called white South Africa. Informality accelerated, despite influx control and when population control gave way to a policy of “orderly urbanisation” in the mid-eighties – amid a widening political outcry and urban civic resistance – registrable, 99-year leasehold rights became legally possible with the passage of the Black Communities Development Act (No. 4 of 1984) as amended. Freehold was also made possible by the same Act. A site and services approach followed shortly thereafter, influenced by the Urban Foundation private sector think tank, with tenure being delivered through individual, registered title. About 110 000 serviced sites were delivered nationally in the late-apartheid years.

The policy of orderly urbanisation was also significant in this period because it signalled recognition by the apartheid-state of the irrevocable break down of influx control. The proposed site and service scheme was aligned with international trends at the time which saw the abandonment of public housing programmes and the harnessing of the informal housing sector for private sector delivery.<sup>83</sup>

Widespread civic resistance to the site and service approach, combined with an escalation in political violence in hostels, gave impetus to the establishment of a national housing forum which duly negotiated the first post-apartheid housing policy, promulgated as the Housing White Paper in 1994 and given legal expression in the Housing Act of 1997.

By 1994 the key urban tenure challenges were:

- the legacy of exclusion of the majority of South Africans from property ownership until a very recent past;
- protections against evictions given the legacy of forced removals and apartheid spatial planning;
- insecure tenure in urban informal settlements;
- urban tenure reform in former homeland towns;
- the drive to privatise township rental stock;
- informal tenure in backyard shacks.

#### *The evolution of housing policy*

Shisaka (2011) offers the following time line of policy development.

<b>1992 - 1994: Policy formulation</b>
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*This period commences with the National Housing Forum and ends with the launch of the National Subsidy Programme in 1994. The key focus of this period is the development of South Africa's housing policy.*

**1995 - 2001 : Private sector developer driven delivery**

*This period commences with the implementation of the National Subsidy Programme in 1995 and ends with the termination of the use of conveyancers to pay out subsidies. The period is characterised by the delivery of subsidised housing through private sector developers who identified land and structured and implemented projects drawing down the subsidy through a process managed by conveyancers. Initially developers identified the beneficiaries themselves, towards the end of the period beneficiaries were allocated to the project from a waiting list managed by Provinces and/or Municipalities.*

**2001- 2004: Public sector driven delivery**

*This period commences with the termination of the use of conveyancers to pay out subsidies and ends with the publishing of the Comprehensive Plan (Breaking New Ground). The period is characterised by the delivery of subsidised housing through Provinces and Municipalities who structured projects and appointed private sector developers and contractors to implement them. Increasingly, small scale builders were appointed to implement projects.*

**2004-2009: Delivering human settlements**

*This period commences with the publishing of the Comprehensive Plan (BNG) and ends with the adoption of the Revised Housing Code. This period is characterised by a focus on sustainable human settlements. This came to be interpreted as the implementation of "mega-projects" of which subsidy housing was one component. The issue of the need to upgrade informal settlements was identified during this period.*

**2010+: Informal Settlement Upgrading**

*This period commences with the adoption of the Revised Housing Code. Government policy begins to focus on upgrading of informal settlements as the key mechanism to address the housing backlog.*

Currently a Human Settlements White Paper is under development. It will repeal the Housing White Paper and the Housing Act and it will result in the promulgation of a new human settlements law.

*The rise of informality*

Urban informality is a fluid concept that takes shape in particular regional locations. The conventional discourse surrounding informality often involves notions of a 'culture of poverty' and marginalisation. One finds, however, that informality situates itself in the broader politics of state power, economic dependency and populist mobilisations.<sup>84</sup>

Urban informality has its roots with the emergence of the 'informal sector' which resulted from the movement of labour to the cities in the mid-twentieth century. Since then, two schools of thought have emerged in urban theory debates surrounding informality. One sees informality as the realm of

the marginalised within society as a “temporary manifestation of underdevelopment characterised by survival activities of the urban poor”.<sup>85</sup> The other views informality as closely tied to the formal sector and a permanent and essential part of the modern economy.

Informal settlements, one manifestation of informality, have been a part of the urban landscape for many decades. Largely seen as an organic part of a city’s growth, in that informal residential areas expanded as cities did, uneven development (such as in cases of war or mass displacement) has led to informal development overtaking formal development to the extent that today, the majority of sub-Saharan Africa’s urban residents live in informal settlements.<sup>86</sup>

In the urban residential<sup>87</sup> context in South Africa, informal land markets have been extensively researched and a body of knowledge developed around local norms and standards governing land management. “Informal” tenure is an important component of this field of enquiry. However, the local arrangements that govern land access, holding and transfer are seldom truly informal, in the sense that they are often organised around locally determined “rules of the game”.<sup>88</sup> Neither is the state completely absent.<sup>89</sup> Security in these situations can be fairly widespread, depending on how locally legitimate the arrangements are. These are best described as “off-register” or “social” tenures, rather than as informal tenure.<sup>90</sup>

Protests relating to housing and service delivery and court cases dealing with evictions have highlighted the fact that, while policy plans may have been drafted to provide tenure security and improve the living conditions of informal settlement residents, the unwillingness of local authorities to implement these policies has meant slow progress.

#### *Spatial Inequality, housing rights and evictions law*

The Constitutional Court has issued a series of land mark judgments concerning housing rights, the Grootboom case in 2001 being one of the earliest and best known. Strauss and Liebenberg argue however, that “an emphasis on spatial justice remains elusive in the jurisprudence and academic literature on section 26”<sup>91</sup> even although “spatial inequality, which stems from deep historical and social exclusion from formal access to land and housing, continues to hold profound implications for South Africa’s urban poor”.<sup>92</sup>

They analyse the housing rights and evictions case law to evaluate the extent to which it contributes to undoing patterns of spatial inequality. Using the idea that justice has “consequential geography” they argue that “current legislative and jurisprudential frameworks fail to adequately address issues of spatial justice”.<sup>93</sup> Their conclusion is that planning legislation, policy and practice and the jurisprudence of the courts need to integrate both the social and spatial dimensions of housing as a human right. Their conclusion points in the direction of SPLUMA, and the principle of spatial justice it enacts.

#### *Spatial inequality and the growing idea of “spatial justice”*

Recently, policy commitments have been made to more broadly advancing “spatial justice”. For example, spatial justice is the first development principle in the Spatial Planning and Land Use Management Act of 2013 (SPLUMA):

- (i) *past spatial and other development imbalances must be redressed through improved access to and use of land;*
- (ii) *spatial development frameworks and policies at all spheres of government must address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation;*
- (iii) *spatial planning mechanisms, including land use schemes, must incorporate provisions that enable redress in access to land by disadvantaged communities and persons;*
- (iv) *land use management systems of must include all areas of a municipality and specifically include provisions that are flexible and appropriate for the management of disadvantaged areas, informal settlements and former homeland areas;*
- (v) *land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas;*
- (vi) *a Municipal Planning Tribunal considering an application before it, may not be impeded or restricted in the exercise of its discretion solely on the ground that the value of the land or property is affected by the outcome of the application.*

This principle creates a legal obligation that future spatial planning, land development and land use management must accord with the principle.

The South African National Development Plan (NDP) lists spatial justice as one of its overarching principles for spatial development. In the NDP, spatial justice is explained as meaning that:

*The historic policy of confining particular groups to limited space, as in ghettoisation and segregation, and the unfair allocation of public resources between areas, must be reversed to ensure that the needs of the poor are addressed first rather than last.<sup>94</sup>*

The concept of spatial justice has the potential to be politically powerful in South Africa, where both a justiciable state obligation and activist commitment to the concept may be used to transform Apartheid-era spatial forms. However practical definitions of the concept remain elusive, which simultaneously renders the state unaccountable to this principle and hinders attempts to use the concept to concretely set policy agendas. The predominant academic understanding of the term is that commitments to spatial justice should be about addressing links between spatial circumstances and unjust social phenomena, and vice versa.<sup>95</sup> The definition favoured by the South African government seems to be more historically-oriented, and about “righting the wrongs of the past”. Spatial mismatch is one potentially useful dimension of “spatial inequality”. The spatial mismatch hypothesis predicts that unemployment rates will be higher for people living in areas which do not have appropriate jobs in close proximity, because this lack of proximity will make it harder for people to achieve employment.

### **The persistent “apartheid city”<sup>96</sup>**

As indicated in the introductory section it is widely acknowledged that spatial inequality is a persistent apartheid legacy and South Africa’s contemporary cities are still frequently called “apartheid cities”.<sup>97</sup> Although the apartheid urban planning system began to crumble in the late 1980s with urbanisation and economic pressures and resistance, its legacy is still evident today. South Africa’s urban areas, after 22 years of democracy, are still characterised by spatial inequality: jobs and economic activity are generally concentrated around “urban cores”, a disproportionately white elite residing in well-located city cores, with proximity to economic activity and social amenities and a disproportionate

black South African population living on the urban peripheries in dense and poorly serviced settlements, far from economic opportunities.<sup>98</sup>

Persistent spatial inequality is identified in government policy documents as well. For example, Breaking New Ground (BNG) in 2004 recognised that “the inequalities and inefficiencies of the apartheid space economy [have] lingered on” and that “the existing spatial fabric has shown little change”.<sup>99</sup>

The legacy of the apartheid city has proven to be difficult to reverse, despite priority commitments in government policy in the housing and planning sectors. A number of factors have contributed to the persistence of urban spatial inequality<sup>100</sup> including its direct, physical legacy which is difficult to undo; private property protections in South Africa’s Constitution<sup>101</sup>; a strong private development sector which has led development and organised powerfully in its interests<sup>102</sup>; and, perhaps surprisingly, post-apartheid housing policy itself.<sup>103</sup>

Pieterse<sup>104</sup> and Todes<sup>105</sup> argue that private sector developers prefer to construct housing and commercial developments in already-established zones of economic and social activity, thus leaving poorer areas undeveloped and entrenching existing spatial divides. Turok<sup>106</sup> makes the case that developers successfully resist municipal efforts to direct private investment into poorer areas.

Many writers have argued that post-apartheid housing policy, focused on individually titled housing, has entrenched, rather than disrupted, spatial inequality by prioritising delivery at scale in inevitably peripheral locations. The construction and delivery of freehold housing is cheaper and easier to do at scale on peripheral green-field sites than it is in already built-up areas.<sup>107</sup>

### **Housing, jobs and “spatial mismatch”**

There is little evidence to suggest that state-subsidised housing, as some kind of asset for the poor, has any systematic ability to facilitate poverty exit<sup>108</sup>. Recent research undertaken by the Socio-Economic Rights Institute (SERI) on the spatial mismatch hypothesis argues that “the asset-based potential of ownership housing to reduce poverty is over-emphasised in current human settlements policy” and that “(m)ore impact would be achieved were the programme to provide opportunities for poor people to live close to jobs”.<sup>109</sup>

This research explores a poverty trap which is intricately linked to city structure and South Africa’s dysfunctional labour market: Living in a badly-located area makes it more difficult to find a job but well-located areas are unaffordable for the poor. This is a quintessential poverty trap, which would require targeted and strategic state intervention to address. One such prospect, the national housing programme, has failed to adequately respond. Although it has delivered a significant number of subsidies since 1994, the location of these properties has not contributed to undoing the apartheid legacy of spatial inequality. Were it to do so, a compromise might need to be made between the asset creation purpose and better located non-ownership subsidy projects, a balance addressed in the concluding sections of this report.

In South Africa, jobs and economic activity are generally concentrated around “urban cores”, with the wealthy (and disproportionately white) urban population living relatively close to these cores, while poorer (overwhelmingly black) South Africans remain on city peripheries, far from economic

opportunities.<sup>110</sup> This means that in South Africa, where jobs are concentrated around the urban core, the spatial mismatch question becomes whether people who live on city peripheries face higher unemployment because of their location.

### *Concluding comments*

In summary, this review of the urban tenure context contains implications for:

- The human settlements white paper process currently underway
- The legal framework governing urban tenure security
- The UISP
- SPLUMA

The human settlement white paper should revisit the asset creation logic that underpins the policy currently in order to achieve a better balance between potentially competing policy objectives regarding housing rights, asset creation and an emphasis on location. If it is to contribute meaningfully to spatial equality then more emphasis should be given to:

- well-located public rental housing in inner cities and former white suburbs;
- in situ, informal settlement upgrading;
- intensive development in well-located RDP (IRDP) projects in preference to mega projects in generally peripheral locations;

The implications of this review for the legal framework are to consider increasing the legal and administrative recognition afforded to urban occupation rights beyond PIE. Land administration would be a significant area of policy development in this respect.

The SPLUMA implications are to:

- define the principle of spatial justice so that it can be more meaningful applied (and measured) in an urban context
- develop a programme of municipal support regarding SPLUMA and informal settlements in order to realise the potential of the Act

The Housing Code / UISP implications are:

- to reinforce the intention of the programme for relocation as an option of last resort, especially where informal settlements are relatively well located compared to proposed relocation sites
- to more fully explore the alternative tenure options proposed in the programme such as the commodatum (a gratuitous loan of a site for occupation regulated by common law principles) and rental arrangements (regulated by the Rental Housing Act) and a range of “promising practices” advocated for in the non-state sector using planning law and administrative recognition

Urban tenure remains largely concealed within the housing and planning sectors. It is partly as a result of this invisibility that urban tenure security is generally conflated with registered title. An urban tenure reform programme should aim to provide access to tenure security, and the benefits that are meant to derive from it. Central to this purpose should be ensuring that tenure reform increases spatial justice and spatial equity.

#### **4. Perspectives on property and attempts to secure land tenure in South Africa in urban and rural settings**

##### *Titling and spatial inequality in urban areas*

A Finmark study in 2011<sup>111</sup> investigated “the extent to which a subsidy house is a financial asset in the hands of the subsidy beneficiary. The primary focus of the study therefore was to increase understanding of the effectiveness of the national subsidy programme in providing housing assets to poor people and the impact of this on poverty and inequality in South Africa”.<sup>112</sup> The significant finding was that close to half of the subsidised properties in South Africa had not been registered, meaning that nearly 50% of housing beneficiaries did not yet have title to their subsidised properties. The study covered both RDP and DBS subsidy properties. Lack of title deed registration at this scale severely compromises the ability of the housing programme to contribute to poverty exit on its own terms, as asset ownership is a central feature of the approach.

The Finmark research, and an extension to it, undertaken by Urban LandMark in the same year,<sup>113</sup> identified lack of title deed registration as being more of a bureaucratic problem than something fundamental to the programme itself, or indeed to our ownership paradigm in South Africa. For example, lack of township proclamation and the failure of beneficiaries to collect their title deeds. As a result, the main recommendations included a title deed backlog eradication programme. Indeed, this approach has been taken up in several provinces. For example, an initiative of the Western Cape provincial government aims to rectify delays in the registration of title deeds. At the national sphere, the Estate Agents Board has taken the lead in a similar “rectification” approach. Gauteng province has a long history in transferring township rental properties and a rich experience of the local complexities.

The impact of the Finmark study finding on the asset ownership rationale of the housing programme has been under-explored but it begs a more fundamental question about whether or not South Africa’s title deed registration system can work for the majority of South Africans. Is it merely a question of a backlog to be rectified? Is the problem accurately identified as one of delay? Or, is the system itself unable to cope with the demands of registering the scale of properties required were the majority of South Africans to access the deeds registry?

Some of the problems that were encountered in the Western Cape initiative point to the more systemic constraints<sup>114</sup>. For example, efforts to rectify the backlog immediately confronted the need to identify original subsidy beneficiaries. Although original subsidy beneficiaries can be identified off the housing subsidy database, they are not necessarily the existing occupants of the subsidy property. Title deed rectification can become an expensive, time consuming, but ultimately paper based, exercise that has little to do with the reality “on-the-ground”. Title might well be registered in the name of subsidy beneficiaries but they may not be the current property holders. Identifying the existing occupants requires undertaking occupancy surveys that will themselves yield results that are time bound: snapshots of occupancy at a specific moment in time. Once the occupancy survey findings are in, then the mismatch between approved beneficiary and actual occupants needs to be resolved, potentially requiring rights enquiry and adjudication.

Rather than a once-off rectification programme, these initiatives could well become a permanent, ongoing effort to keep the deeds registry up-to-date with dynamics on the ground due to death, separation, divorce, familial conflict, circular migration and other forms of mobility resulting in

transfer, sale, donation, sharing, “looking after”, custodianship and a host of under-researched “social tenures” that do not “fit” into South Africa’s western, Roman Dutch inspired property paradigm.

A backlog in title deed registration in the context of land scale titling schemes, of which our national housing subsidy scheme is an example, is not unusual internationally<sup>115</sup> and has been ascribed to the capacity required to adjudicate, survey and register large numbers of individual title.<sup>116</sup> Further, UN Habitat sees the goal of achieving “complete title coverage” as highly unlikely: it would take centuries to achieve at the current rate (UN Habitat, 2012, p2).

### *Perspectives on property*

Some schools of thought view property as a means for accumulating wealth, and here tenure security relates to securing property for *wealth accumulation* or growing one's asset base. This is achieved when land or house sales generate a profit, enabling the seller to invest the profits in the purchase of another house, thereby moving up a “property ladder” to a bigger house in a better area.

There is little evidence to suggest that state-subsidised housing, as some kind of asset for the poor, has any systematic ability to facilitate poverty exit<sup>117</sup>. Recent research undertaken by the Socio-Economic Rights Institute (SERI) on the spatial mismatch hypothesis argues that “the asset-based potential of ownership housing to reduce poverty is over-emphasised in current human settlements policy” and that “(m)ore [poverty exit] impact would be achieved were the programme to provide opportunities for poor people to live close to jobs”.<sup>118</sup>

This notion of property mobility through titling does not reflect the realities of land relations for most South Africans, for whom tenure security is a form of *livelihood security*. Many land holders view a house or plot as a family asset which most family members strive to keep well out of the market. In urban areas, where the demand for housing far outstrips the supply, owners are often induced into selling subsidised homes for less than the value of the subsidy, as mentioned above, thus often moving *down* the property ladder, back into informality. These transactions, moreover, frequently occur through 'informal' transactions.

Formal credit generally requires legally recognisable rights, such as a long-term lease, Permission to Occupy (PTO) or a title deed. There is a risk, however, that providing tenure for these purposes can *undermine* the actual tenure security in local or customary tenure systems, which we refer to as 'social tenures' by dint of their association with socially derived norms. Market-based evictions regularly occur on titled land or in the case of leases. Where customary rights are already in existence, leases convert strong rights of customary ownership into legally weaker tenancy rights, and increase the possibility of alienation.

### *Tenure diversity and the freehold ‘fixation’*

The relationship between tenure and poverty is thus not resolved by simple recourse to titling and home ownership. A huge and growing body of empirical research all over Africa reveals that there is not a causative relationship between these two phenomena (see the final chapter in this report), showing that titling is not a 'silver bullet' out of poverty as is misleadingly caricatured by some economists and policy makers. Poverty and tenure should be analysed in their own right, as these are

separate phenomena. The coincidence of poor households without formally recognised tenure is a political issue that is a problem of property law more broadly.

Without demonstrable symbols of tenure security, people in informal and rural settlements cannot get access to basic services, small scale finance and public investment in infrastructure like water services. One of our major challenges is to make sure that tenure security is sufficient to access these benefits, as in many places municipalities are reluctant to provide services unless a township is established and title deeds issued. This is one of the key areas where more innovation is needed in South Africa.

'Freehold' tenure is defined by its association with the possession of a title deed, which in turn defines tenure as 'ownership' to which only registerable rights can aspire. To be registerable, property boundaries must be surveyed by professional, accredited land surveyors to maximum and statutorily defined standards of precision with very narrow margins of error, a system patently inappropriate in customary tenure systems, as well as social tenures that have emerged in informal settlements. The definition of ownership in terms of title excludes customary property rights from the scope of ownership. Registered titles are generally issued to legally identifiable persons or corporate entities, and thus exclude *categories* of title holders, such as communal or group land holders who access rights by way of kinship relationships rather than by identifying individuals.

It has long been debated in the context of colonial conquest and legal pluralism whether titling constitutes a superior form of tenure. There are increasingly vociferous voices arguing in support of a diversity of tenure forms that should receive statutory or other official recognition. On the other hand, many insist that registered title is the answer to both tenure security and economic development.

Due to 'fixation' with freehold by many policy makers, law makers and officialdom, formal titles have become synonymous with 'formalisation', while other well-established forms of tenure tend to be overshadowed. One of the consequences is that government does not provide the equivalent administrative infrastructure, planning and information systems support to off-register tenures as it does to the legally recognised system of deeds that are hierarchically placed at the apex of a property hierarchy. The lack of administrative and juridical support increases the levels of insecurity of off-register tenures, thus setting in motion a self-fulfilling prophecy of inadequate performance.

As detailed in the annexure to this report, a growing number of international institutions, including the World Bank, have become increasingly aware of the limitations of strategies based on formalisation of land markets. Non-governmental institutions that engage with tenure issues on the ground have long been providing empirical evidence to counter the claim that individual titling provides superior levels of security (and can show that titling can actually exacerbate insecurity); or is an appropriate expression of property rights in the context of customary or neo-customary ideas about owning and holding land.

The belief that nothing short of freehold title secures tenure focuses policy and practical attention, including budgets, on processes of systematic registration of title which (a) would take decades to achieve; (b) demands an astronomical budget; and (c) which is never a once-off item on the national budget, since the evidence points conclusively that title registration tends to 'regress', frequently within a single generation, back to known and familiar local practices, as holders do not register transfers.<sup>119</sup> The evidence that titles are not sustained by their owners through registration of transfer



(thus not fulfilling the legal requirements of title) is overwhelming, not only in South Africa, but in other African countries where titling has been pursued.<sup>120</sup>

The property system requires currency of title deeds for these to pass legal muster, and the systematic 'lapsing' of title deeds suggests strongly that the normative misfits are simply too large to ignore. These qualifications beg the question of why other forms of entitlement, which are built on local norms and practices, do not attract policy attention, legal recognition, budgets and comprehensive administrative support. The latter includes systems of spatial identification, planning, dispute resolution, adjudication, recording and inheritance and succession. These are fundamentally political questions.

#### *Arguments for a range of instruments enabling tenure security*

There is growing recognition that a range of tenure instruments can, and should be employed to secure a range of tenures. These require legal and budgetary recognition and support proportionally equivalent to the formal institutions and official accoutrements that provide legality and administrative support to the system of Deeds.

Overall it is highly misleading to conflate 'tenure' and 'title', as many do, or to use these terms interchangeably. Tenure is secured and legitimated by a range of local, legal and administrative processes, and tenure takes a variety of forms. Freehold title is only one of many forms that tenure can take. It is designed for asset formation of a certain kind, and is dependent on the market, and not suitably configured to support social tenures. These are not the organising principles that inform the tenure practices of social tenures. These are informed by norms that define access to, and control of the land, not in terms of the market, but in terms of active social relationships that link multiple family residences stretched spatially across different localities and contexts. To suggest that titling is synonymous with tenure shuts down possibilities for recognition of strong tenure rights by other means, or for incremental processes of reform.

Evidence shows that it is not the *form of tenure* in itself that brings about tenure security, whether we are speaking of registered titles, certification or unrecorded mechanisms of legitimation. Tenure is secured when rights can be realised through (a) their legitimacy in the eyes of society, and (b) access to the range of supportive legal and administrative mechanisms that allow rights to be actualised in practice. In other words, the important criterion for tenure security is the ability of rights holders to enforce a socially legitimate tenure system that is backed up by strong governance and juristic institutions.

Despite this evidence the reform trajectory of 'upgrading' rights or systems of rights into the Deeds and Registration system has continued to dominate the legal tenure reform trajectory of the post-apartheid period. However, this direction has been qualified by, a portfolio of new laws that provide protection to vulnerable rights across all the property configurations, from private to state owned land, and communal land. The new laws do not extinguish the rights of 'owners' as defined in common law, but provide for the possibility of coincidental rights to the same property.

This reflects a significant jurisprudential shift away from the acceptance of exclusive private property rights, an interpretation that was consciously chosen by the South African judiciary early in the twentieth century<sup>121</sup>.

### *Recognition of bundles of rights*

The shift can be characterised in terms of the concept of a 'bundle of rights', which accommodates the notion of shared or coincidental rights to the same property. These need not necessarily be equal in value, e.g. people may have defined rights of occupation on private or state-owned land, or protection against eviction. The 'bundle of rights' interpretation of property law represents a breakthrough in the direction of acceptance of norms previously defined as 'informal' and of no enforceable value against 'owners', towards formal recognition of enforceable 'rights'.

### *Preventing eviction*

Security against eviction has increased considerably since 1994 as a result of numerous court cases that have led to the development of a body of case law around the right to housing. The rapid development of jurisprudence regulating evictions in urban and rural contexts has helped to concretise constitutional principles and socio-economic rights and substantially slowed down the rate of forced removals and evictions.

Current residents in informal settlements, regardless of the lawfulness of their occupation and irrespective of how the settlements are assessed and categorised, possess a range of substantive and procedural protections that impose obligations on municipalities, private land owners and occupiers and rights holders.<sup>122</sup> The protections can be summarised as follows:

- procedural requirements for an eviction;
- meaningful engagement;
- rights of private property owners;
- municipal provision of alternative accommodation;
- “adequate” alternative accommodation, or expropriation of the right of residence;
- accountability of municipal office bearers to enforce court orders.

Threats to tenure security do not come from the state alone. In the agricultural and mining sectors evictions can originate from land owners, and can also arise within communities and families.

Overall notions of a bundle of rights have not gone far enough in confronting the asymmetrical relationships in South Africa's property law. While the rights-based policies and laws of the early post-apartheid period have had the effect of considerably diluting the exclusiveness of ownership inherent in past property law, they have not been able to address the general legal inferiority associated with customary and off register rights.

### *The collapse of the management of customary rights in rural areas*

It would be no overstatement to claim that the management and administration of land rights in the communal areas of the former Bantustans have 'collapsed' in the sense that there is no identifiable 'system' that draws together the various components of a viable land administration system. In section 2 we concluded that the rationale of the colonial and apartheid regimes resulted in the phenomenon where African land rights did not exist outside of, or apart from, administration. African tenure was reduced to an administrative system that incorporated all aspects of African daily lives. With the introduction of constitutionally recognised 'rights', which enjoy a life *in their own right*, there has been

a dramatic shift towards acceptance in law and practice of the existence of land tenure rights, even if these rights are over-layered by stronger rights.

There is, however, a bitter irony in that in the post-apartheid era, where rights have been defined and are protected, there is a virtual absence of state administration to provide the range of administrative supports needed to make these rights real, in the sense of meaningful and actionable rights that come to play in people's day-to-day lives, from engaging in transactions to negotiating for services. Thus, communal tenure regimes, along with other off-register tenures in commercial farming and urban areas, continue to be vulnerable to the predations of powerful interests, including traditional elites, mining houses, local authorities etc., with no obvious means by which to check abuses and corruption other than by litigation. There has thus been an unprecedented use of the courts in providing direction in cases of disputed rights (frequently involving abuse of power by traditional authorities) in what ought to be regulated by policies and administrative processes and procedures that relate to statutory law. Thus, from being overly circumscribed by administration, rights are now vulnerable as a result of the virtual absence thereof.

The scope of the Native Land Administration Act in the past, through its network of proclamations, embraced all the facets and components of land administration, including spatial planning, land use management, transmission practices and inheritance, etc, albeit in the form of highly authoritarian and centralised forms of governance. Land holders could slip under the radar of the edicts of the law, but the tentacles of Bantu Authorities reached deeply into people's daily lives.

With the dismantling of these structures and institutions, e.g. magisterial district commissioner's offices (where the commissioners doubled up as magistrates), there are no locally accessible civil institutions at community level that can mediate between local households on the one hand, and municipalities, provincial and national authorities, and investors in land developments, including the state, tourist or mining houses, on the other. The only recourse is to local traditional structures that have been re-established in terms of TLGFA.

In the absence of state administrators, there is no alternative civil law administrative framework to regulate the range of support functions to make rights fully realisable and protect them from abuse.

This requires the development of functions and processes including:

- Land use management and spatial planning regulations, which are, in theory, promoted by the Spatial Planning and Land Use Management Act (no 16 of 1913) which purports to address 'spatial justice';
- Adjudication of existing land rights, that is, authoritative recognition (oral or documented) of the legitimacy of rights at the level of family and individual, which can be agreed with reference to locally accepted normative standards by family members or household residents, neighbours, etc; or, where more systematic community-level enquiries are needed, e.g. for land developments or restitution, by a higher authority. There is a need for a consistent application of accepted principles of adjudication, not to be confused with dispute resolution or judicial processes. This is an objective process that follows agreed local norms (which may be variable) and in all cases, must be consistent with general constitutional principles. The process is

comparable to the checks performed by private property conveyancers as well as those employed in the Deeds registries.<sup>123</sup>

- A system of arbitration to resolve disputes that may originate in spatial contestation over boundaries, family conflicts over rights, or contestation over rights that may be sparked by administrative or adjudication processes. These institutions should be readily accessible to local communities.
- An office of a land ombudsman that can play a continued custodial role on account of the pervasive uncertainty and abuse of customary land rights. According to Cousins<sup>124</sup>, an independent and impartial body such as an ombudsman could be established to act in support of land rights in both urban and rural areas and in land reform contexts.

*An ombudsman would be empowered to investigate complaints and requests for assistance from land rights holders and others. This body would also facilitate solutions in situations of conflict and disagreement. It could hold powers of investigation as well as conciliation and arbitration. Its purpose would be to ensure that the state and other institutions fulfil their obligations to confer, recognise and protect land rights, and to promote agreed solutions outside of the courts. Its role would be complementary to those of government departments.*<sup>125</sup>

- The alignment of inheritance and succession law with customary norms and values, rather than being relegated to official common-law norms that many families do not identify with. There should be a thorough review of the Intestate Succession Act (no 81 of 1987) that is currently obligatory for all systems of property following the Constitutional Court judgement, *Bhe & others v Magistrate Khayelitsha & others* 2005. This is required to bring it in line, not only with constitutional principles (as interpreted by the courts) but also customary principles<sup>126</sup>.

The brief summary of functions above speaks to the failure to complete a process of review of the Native (Black) Administration Act of 1927, which has resulted in the paradoxical outcome that in dismantling former apartheid institutions and the various proclamations associated with the Act, the administrative rug has been pulled from under the feet of rights holders.

The paradoxical outcome is that where land holders previously had administration but not rights, they now have rights but not administration to fully realise their rights. This naturally bolsters the claims of traditional authorities to have their powers over land administration strengthened. In this scenario, subjects have limited recourse to due legal process outside of this spatially and racially segregated institutional framework.

This requires a comprehensive review of post-apartheid land administration with the view to replacing the various components of the discredited 'native administration' system with a modern land administration framework in line with both constitutional principles and customary norms and values.

The absence of a modern governance framework that allows for the realisation of the rights that have been elaborated in various laws could be seen to lie at the heart of the vulnerability of these newly protected rights. Thus, it is argued, the failure to replace these components after the disassembling of colonial and apartheid administrative systems has opened these rights to manipulation by the powerful, and in some situations, they have been reduced to virtual informality. There are nevertheless countless examples that provide evidence of the resilience, sustainability and even

vibrancy of customary rights, but like all rights, they need to be managed within a framework of governance that embraces broadly acceptable norms and values that line up with the Constitution.

*Current legislation relying on formalisation of various kinds*

### **Communal Property Associations (CPA) Act (no 28 of 1996)**

During the early phase of tenure reform, when 'rights' took centre stage in tenure reforms, a new property vehicle was designed for awards of land that clearly needed to be distinguished as the property of the beneficiaries of restitution or redistribution, and also to provide for democratic forms of governance thereof. Communal property institutions (CPIs) were seen as the answer. The CPA Act required no major changes to the structure of property law, and is thus an example of formalisation using the existing property system for both spatial boundary identification, and for registration of group title. The model departs from formalisation via subdivision, by providing for the recognition of group ownership under shared rules, with title registered in the name of the joint property holding entity. The boundary demarcation and title registration followed the existing formal administration of property via the Deeds Registries Act (no 47 of 1937).

Among the problems that have emerged are the lack of definition of individual customary rights at the level of the family within the ambit of the CPA ownership regime, and the problem that accumulation by some comes at the expense of the rights of others. Another political problem has emerged in that intensely competitive and conflictual relations have developed between traditional authority structures (TCs) wishing to extend their jurisdiction over privately owned CPA land. The inappropriate policy response has been to argue for transfer of ownership to TCs in the same way that rights are transferred in ownership to CPA entities, thus exacerbating the problem that CPAs were partly designed to overcome, i.e. to clearly distinguish the rights of purchasers and claimants.

The recently proposed CPA Amendment Bill (2016) has recently lurched towards a process of increased formalisation. It stipulates an obligatory General Plan, which translates into formal, surveyed subdivision, as for a township, i.e. individually defined rights and surveyed land use zones. GPs may be a positive possibility in some areas, provided the land use planning is carefully facilitated and participatory. Other proposed changes in the draft Amendment Bill aim to turn CPAs into management and not landowning entities (such as Body Corporates), but this shift is highly contentious, since it is unclear where the 'ownership' functions will rest. If ownership is intended to be transferred to individuals, the problems of titling as discussed above will inevitably emerge. If ownership is intended to be transferred to a state entity, the problems discussed under 'state trusteeship' above need to be taken into consideration.

### **The Upgrading of Land Tenure Rights Amendment Act (no 34 of 1996)**

As already mentioned, a central plank in the pre-democratic era reforms was the Upgrading of Land Tenure Rights Act (no 112 of 1991) known as ULTRA. ULTRA has since its passage become a key piece of legislation adopted by the post-apartheid government and remains part of its thinking. The 1996 amendment pays attention to important details, but with minimal changes to the original conception.<sup>127</sup> ULTRA reflects the dominant interpretation of 'formalisation' as a process of conversion of rights to freehold, critiqued in the sections above.

ULTRA has been difficult if not near impossible to apply effectively in rural areas<sup>128</sup> for several reasons that support the arguments above:

(a) The title deeds of quitrent and deeds of grant (defined as schedule 1 rights) do not reflect current ownership. The processes of adjudication to establish who the current 'owners' are is near-impossible on account of the complex dynamics of kinship claims on property over generations and within the current generation.

(b) There are usually multiple claims by family members to property, and registration in the name of one or two members of the family often leads to family disputes as to the ownership.

(c) Informal land markets lead to rapid turnover of properties that go unregistered.

(d) There are invariably overlapping rights with tenants and informal occupiers to land in the case of quitrent settlements, including highly contested rights to the common property. These problems cannot be solved by automatic conversion to freehold, which may even compound the problem. This problem has spatial relevance in that the only solution would entail redistribution of land.

The Upgrading of Land Tenure Rights Act has thus had limited effectiveness in practice<sup>129</sup>. The automatic conversion of rural quitrents has led to a purely paper exercise without solving the fundamental questions of (a) overlapping rights which only redistribution policies could ultimately help to solve and (b) the problem of lack of currency of deeds registers which can only be solved by finding closer matches between individual tenure and customary concepts of land holding and transmission.

ULTRA was seen at the time of its passage as the ultimate means by which tenure would move along the continuum from informal to formal status with the end result of freehold title. Policy makers regarded this approach as unquestioningly rational and correct. With the passage of time it has become abundantly evident that upgrading so-called 'lower order' rights to freehold title is not as simple as it appears. In spite of the evidence suggesting that a simple evolutionary model from 'lower order' rights to freehold is not working as expected, and that the problems are complex, the approach has had – and continues to have – remarkable tenacity among officialdom and some political and business lobbies.

#### **Land Titles Adjustment Act 111 of 1993 (as amended by the Land Affairs General Amendment Act 11 of 1995)**

This Act has remained one of the central pillars of the post-apartheid land tenure-related laws, even though it was enacted shortly prior to the democratic transition. The Act applies to land titles that have lost currency. It is a modernised version of a legal clause in Section 8 of the Native Administration Act of 1927 that allowed for similar measures.

The Act provides for administrative measures to 'update' title deeds (quitrent or freehold) whose ownership details in the Deeds Registry are not up to date. In terms of the Deeds Registries Act of 1947, 'ownership' requires that land be registered in the name of the living owner. It is a critically important requirement for the legality of ownership for registers to be in the name of the living owner.

Administrators recognised at an early stage (particularly in the Cape where a number of freehold and quitrent titles had been issued in the nineteenth century) that Africans tended to avoid registering transfers after sales or death. The above Act (and its predecessors) allow for various administrative short-cuts to convey title to its present owners without requiring the current owners to go through the expensive and time-consuming legal steps of conveyancing to achieve this. Magistrates and legal commissioners are given powers to adjudicate ownership and override conventional conveyancing.

Over the years the state has incurred massive expenses in updating titles, but in a large percentage of cases, the new 'owners' do not sustain the process of transferring titles, and they hence tend to revert rapidly to *status quo ante*, where transfers are not registered. In practice, African forms of freehold have tended to prioritise family interests over those of individuals. Contrary to western models of exclusive ownership, African freehold has tended to emphasise inclusive customary values. Empirical research reveals<sup>130</sup> that the selection of a particular named heir(s) or owner(s), as required by law, does not accord with a prevalent practice among title holders to give access rights to all members of the family related through accepted customary kinship ties (which are different from western patterns of kinship) without necessarily naming them. Selected representatives regarded as 'custodians' and not owners with rights of alienation. This is contrary to the act of registration that consciously bestows powers of alienation. These patterns are being reported in newly titled urban townships, thus multiplying the scale of the problem exponentially.

The Land Titles Adjustment Act should be reconsidered in its entirety. The Act contributes to reproducing a dysfunctional programme of reform that prioritises title as the ultimate model of land tenure reform. As the arguments above indicate, the reasoning behind promoting this model is flawed, and creates the paradoxical effect of requiring a law to fix a problem that has come about as a result of the very problem it is designed to fix, resulting in a circular, self-perpetuating process of disjuncture.

### **The Interim Protection of Informal Land Rights Act (no 31 of 1996)**

IPILRA is a short piece of legislation that provides blanket protection of informal rights defined to include the communal tenure areas, excluding tenants, labour tenants, sharecroppers or employees whose rights derive from a contractual relationship.

This legislation was intended as a temporary measure to secure the rights of people occupying land without formal documentary rights, pending the introduction of more comprehensive reform. In the absence of such legislation, the Act has been extended annually and remains in force. Informal rights to land such as rights to household plots, fields, grazing land or other shared resources (for example, forests) are protected. The Act has proved to have remarkably strong legal traction since it extends blanket protection provisions.

Section 2 contains the core of the Act, and means that a person may not be deprived of an informal right except either with the person's consent or by expropriation. The formulation is the same as that of the property clause in the Constitution. The wording implies that rights under this Act qualify as property rights that approach the category of 'real rights' in the common law. Unfortunately, this provision is not well understood by bureaucrats and developers who routinely violate communal rights for land or infrastructure developments.

IPILRA has demonstrated a great potential in strengthening rights in land through a fairly simple, statutory blanket measure, rather than individually. Although this approach needs to be bolstered considerably with increased definition of substantive rights, it has proven its worth as a starting point to incrementally securing tenure rights, and should be far more widely used than it is currently. IPILRA would indeed provide a good basis from which to generate communal land tenure reform that is sustainable. It is not known empirically the extent to which IPILRA has been used to secure rights, but it has been successfully used by a facilitator in the former Transkei to make sure that land developments do not result in arbitrary dispossession of communal land rights. In cases of developments such as expansion of small towns into communal areas, IPILRA was successfully used to negotiate with, and compensate rights holders.<sup>131</sup>

IPILRA is an excellent example of an alternative and countervailing measure to 'formalisation' by upgrading to individual title. It is recommended that IPILRA be the starting point for strengthening the property rights of communal tenure land holders. It needs revision to provide more substantive definition of rights, particularly the rights of families, but without attempting to link the rights to single bounded parcels and registered individual identities.

### **The Transformation of Certain Rural Areas Act (no 94 of 1998)**

TRANCRAA applies to 23 rural 'coloured' areas covering 18 000km<sup>2</sup> in four provinces: 12 in the Western Cape, 8 in the Northern Cape, 2 in the Free State and 1 in the Eastern Cape. These areas were previously mission stations, occupied by people of mixed Khoi, San and European descent. The land was later nationalised, regulated by Coloured Rural Areas Act of 1963 and the Rural Areas Act 9 of 1987. As a result of strong advocacy, TRANCRAA aimed to restore the land to the historical rights holders who felt aggrieved by the loss of their ancestral lands to the state, white farmers and mining companies. Since most land dispossession took place before 1913, residents cannot lodge restitution claims, and the major emphasis of land reform has thus been on redistribution, as discussed in the Diagnostic Report for the HLP compiled by PLAAS.

TRANCRAA is thus a prime example of legislation aimed at restoring rights through processes of formalisation. The law provides for 'transfer' of the land to an entity, either a municipality or a Communal Property Association; failing which another legal entity may be approved. Land in designated township areas (section 2 land) must, however, remain vested in the municipalities, and people may register private title on residential plots in townships. There has been a general preference by those with voting rights to opt for CPAs, which, however, has so far not solved a range of tenure problems that arise when the relative rights of individual, family and community rights must be balanced and applied to applicable categories of land.

The implementation of TRANCRAA has been extremely slow, tedious and at times marked by complete inactivity. The delays have resulted in a loss of momentum and community demoralisation, which, though resurrected with the establishment of a TRANCRAA Task Team, illustrates the enormity and complexity of formalisation processes, and begs the question of whether an alternative approach could have been taken.

Only one area has been 'transformed', the term used to refer to an area that has been successfully *transferred*. 'Transformation' is conflated with transfer of the land rather than with substantial strengthening of rights. The official processes of transformation are firstly, a land rights enquiry aimed



at establishing the tenure rights and governance rights of members and secondly a process of investigating land use in detail. For these purposes, TRANCRAA provides resources to record and map family and individual use rights, and to help resolve land-related conflicts. A Transformation Committee is supposed to hold meetings least once a month to provide feedback on progress<sup>132</sup>.

The emphasis in official circles in DRDLR has more recently shifted away from resolving complex internal issues of defining rights and resolving disputes, to a fast-track transfer agenda, i.e. 'transfer first, and sort out the internal rights issues later'. This approach involves resolving who should hold the outer boundary so that the land can be transferred, leaving the complex internal contestations for later.

Any formalisation process invariably throws up deep-seated conflicts within and between families regarding who got rights in the past, and who should qualify for rights in the present. The processual and painstaking model of participatory research may be contrasted with the formalisation model that attempts to apply a quick-fix 'silver bullet' solution by subdivision and titling. The customary approach of certifying only one (male) person for registration sets the scene for contestation by those in the family (and their descendants) who are unregistered. Thus, the issue of individual versus familial rights is a burning issue, and is usually fuelled by registration and titling if it is applied as the first recourse.

Additional problems have emerged where township land has been transferred to a municipality. Here rights to land have become embroiled in housing issues. There is contestation over the housing lists, since the latter is an official allocation process that follows the list consecutively. Many people contest the official approach, arguing that descendants of rights holders, especially those occupying informal housing, should have priority and that TRANCRAA claimants should have a say in the process of housing allocation.

The TRANCRAA process is an early-warning system for the problems that emerge using the models of formalisation that tend to be the standard preferred policy stance of policy and law-makers. The model starts with making rights registerable through survey and title, and then follows with intractable problems and conflicts that emerge as a result of the relative rights that are held between family members and between families and the community. The approach does not accommodate the complex internal familial affiliations that cause contestation, not unlike the intractable problems that emerge during 'rights enquiries', or that commissioners face in conducting 'titles adjustments', as discussed above.

The lack of progress contributes to a sense of insecurity that pervades situations where no authority takes overall responsibility, for which municipalities have proved incapable in spite of their powers. In other words, people have occupation of the land, and blanket approval to be there, but without individual statutory authority and without identifiable certification, which fuels internal or intra-family disputes.

The question remains whether an alternative approach would not be far preferable, given the critique of the titling model above. A process that starts with detailed land use planning, zoning and identification of rights *outside* the formal registration system, using a local records system for recording rights, is likely to be more sustainable over time. Here a strengthened version of IPILRA would provide the basic nuts and bolts of statutorily recognised rights, including individual rights. This

approach could provide the long-term foundation for conversion to individual title where situations support such transfers.

**Communal Land Rights Act (also known as CLRA) 11 of 2004 (declared unconstitutional 11 May 2010); the Communal Land Tenure Policy (CLTP) 12 December 2013; the Communal Land Tenure Bill of 2015 and the Traditional Leadership and Governance Framework Act, No 41 of 2003 (As amended by the Traditional Leadership and Governance Framework Amendment Act 23 of 2009)**

The CLRA needs to be understood in relation to the Traditional Leadership and Governance Framework Act ("TLGFA"), 41 of 2003, since the two were closely inter-related and thus discussed jointly for present purposes.

The evolution of an appropriate legal and administrative framework to define the legal parameters of communal land tenure and governance has not found resolution after twenty years of contestation. At stake is the legal definition of ownership of communal land rights, whether these should be vested in individuals, entities or traditional authorities. There are sharply divided positions that reflect substantially different approaches to formalisation of customary rights. Policy and law makers in the period from 1994 to 2000 attempted to design a legal framework in line with the White Paper on Land Reform published in 1997, which vested rights in the *members* of communities with communal (or customary) land rights, but allowed for movement towards individual rights by majority consent (a process unlikely to be triggered at scale in the short or medium term, but accommodated nonetheless). After 2000 this approach was rejected in favour of the vesting of rights in traditional councils by way of *transfer of title* into their name.

The idea of transfer of title to traditional entities represents a radical shift away from the rights-based approach that provides for the *direct* recognition of the rights of members of families, groups, clans, etc. or recognition of group rights via CPAs. The transfer of title to traditional entities is a regression to the 'indirect rule' approach that informed the colonial and apartheid policies discussed in chapter 2 above, which eventually proved to be the main pillars in the constitution of homelands, the idea of 'self-rule' and eventually Bantustans. This shift is explained by the political compromises that were made during the compilation of the Constitution, where traditional leaders were accorded disproportionate powers that, far from being slowly reined in to accord with democratic constitutionalism, have in fact been emboldened in response to their clamouring for more recognition and powers, especially over land administration and traditional courts.

During the first phase of law-making, rights were defined in terms of existing tenure relations on land held in Trust for long terms occupiers, who are regarded as the *de facto* owners of the land. As mentioned, IPILRA provides blanket protection of property rights, making it unlawful to alienate these rights without having followed formal measures of expropriation, a legal mechanism that is tantamount to acknowledging the rights as real rights. Building on this foundation, the next proposed step was the Land Rights Bill, which set out in detail the scope of the rights and the governance structures to regulate them. According to this model, members would have had the right to choose which institution should manage and administer land rights on their behalf. The proposed group systems were designed to provide 'bottom line' protections for their members, consistent with constitutional principles of democracy, equality (including gender equality) and due process. In summary, the Bill proposed to recognise customary rights in their own right, not defined in terms of

individual western title, but at the same time not smothering the possible spontaneous movement towards more individualised rights.

In contrast to this approach, the policies adopted since 2000 represent the diametrically opposing view that land should be transferred to traditional authority structures, called Traditional Councils created in terms of the TLGFA. The latter provides for explicit recognition of Traditional Councils as the land administration bodies of communal land defined in terms of communal land policies<sup>133</sup>. These define the spatial jurisdictions of Traditional Council in terms of colonial and apartheid boundaries. The Communal Land Rights Act of 2014 (void since 2010), the Communal Land Tenure Bill of 2015 and the current Communal Land Tenure Policy (CLTP) all propose the *transfer* of the land to traditional councils established by the TLGFA. The latter is proposed to be superseded by the Traditional and Khoi San Leadership Bill (TKLB) which follows similar lines to the TLGFA as far as land administration is concerned.

Thus, traditional councils will be in the powerful positions occupied by the state trusts of yesteryear discussed in chapter 2 above and the current Ingonyama Trust Board in Kwazulu-Natal, discussed briefly below. By combining governance and ownership functions in the same entity, when that same entity is designed to play a control or governance function at the very most, the dynamics of power and accumulation by those in powerful governance positions sets the rights of ordinary members at risk. These institutions are likely to run into the same temptations to centralise governance and power that state trusts have run into, with little motivation in law to provide custodial protections to the property rights of ordinary members. State trusts were shown to have overstepped their powers of ownership at the expense of their custodial duties, which the very purpose of the creation of a trust or entity is supposed to advance.

The potential abrogation of the custodial duties is not merely a potential threat in the case of Traditional Council ownership, but has already been glaringly illustrated by a number of cases where 'tribal trusteeship' models have turned into vehicles for the appropriation of people's customary rights. Several examples, especially in the mineral rich platinum belt of in the northern provinces, provide ample evidence of how supposedly civil or state entities that acquire ownership rights as well as control functions tend to appropriate power and assets, since they acquire proprietary rights that are as yet untempered by laws that directly confer the rights on the members.<sup>134</sup> Members thus have to rely on the courts, who in turn must rely on common-law remedies as well as such legislation such as the Promotion of Administrative Justice Act (no 3 of 2000) (PAJA), which, however, does not specify land rights but rights in general.

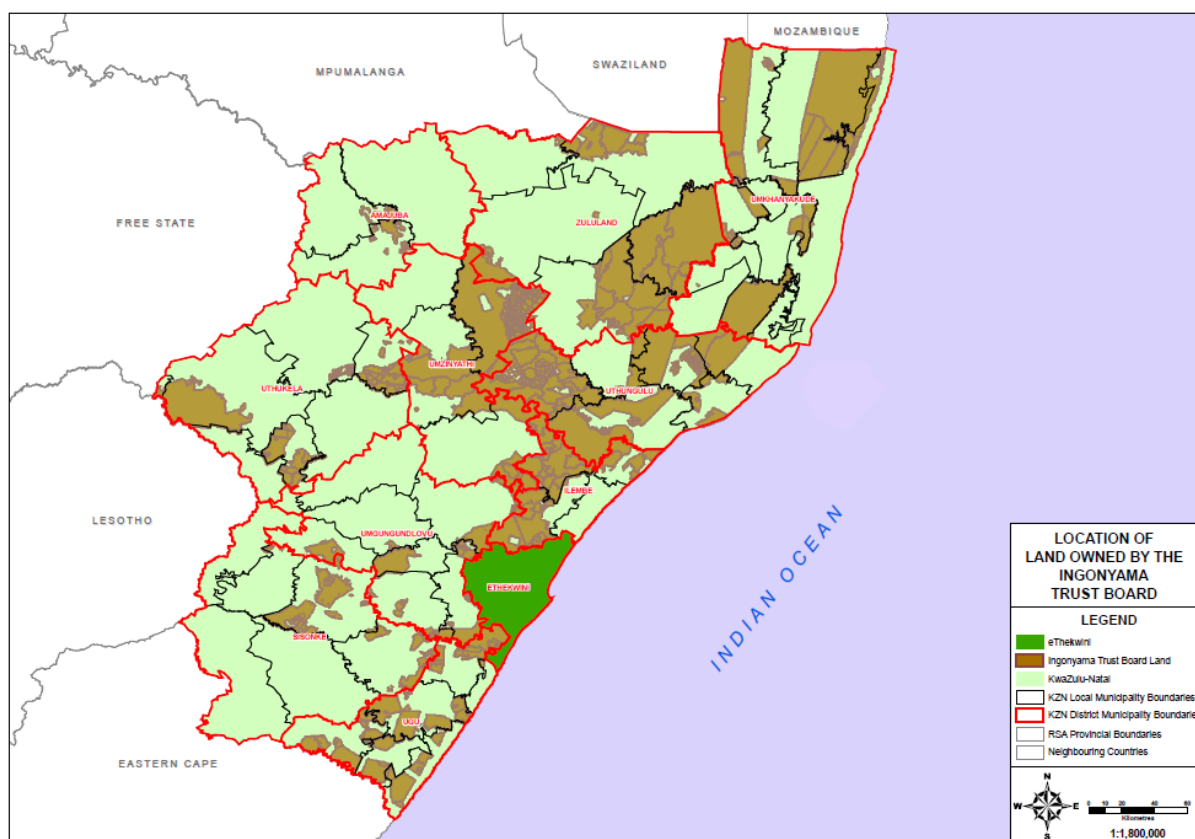
The premise of the Traditional Leadership and Governance Framework Act is that the Constitution recognises customary law and that the state must 'respect, protect and promote' the institution of traditional leadership. However, the Preamble to the Act says that the institution of traditional leadership must also be 'transformed to be in harmony with the Constitution and the Bill of Rights', so that democratic values and governance as well as gender equality may be promoted and advanced. The institution of traditional leadership must also promote the principles of co-operative governance and a fair system for the administration of justice. The problems arise because the control of land administration by Traditional Councils, so it was argued in the cases opposing the Communal Land Rights Act, will not be able to accommodate the layered nature of land rights in customary systems,

including those existing at family, clan, village and group levels. A significant flash point is the definition of 'community' used in the Act, which the Court held failed to protect the land rights of smaller or independent communities living within the boundaries of large traditional councils<sup>135</sup>.

The current approach to communal land tenure reform is thus focused on a version of formalisation, including boundary identification and potential subdivision that relies on old apartheid boundaries to define jurisdictions of traditional authorities into whose corporate title the actual land belonging to communal land rights holders is proposed to be transferred. This is an unfortunate example of the blending of formal property law concepts (such as cadastral boundaries, land transfer and Deeds registration) with reinvented 'customary norms' to solidify powers over property rights by unelected institutions. This approach seems to contain all the disadvantages of formalisation in the form of a corporate title without any of the advantages of formally recognising individual property rights of members of families, clans and other customary groupings. The proposal in the CLTP to recognise 'institutional use rights' at that level of family plots has some merit, but once subject to transfer of an overriding entity, will have limited powers of realisation.

### **The Ingonyama Trust Act (no 3 of 1994)**

The Ingonyama Trust is an entity which reports to and falls under the budget of the DRDLR. The Ingonyama Trust Board is the appointed custodian of traditional land, holding about 40% of the land of the Province. The Trust as a whole is an organ of state as defined in section 239 of the Constitution and as such is subject to legislation such as the *Public Finance Management Act No.1 of 1999*, the *Promotion of Administrative Justice Act No.3 of 2000* and other statutory and common administrative law in general. Since the passage of the *KwaZulu-Natal Ingonyama Trust Act No.3 of 1994* and subsequent amendments, all such trust land in KwaZulu-Natal falls under the control of the Ingonyama Trust Board. However, the legal status of the land and the long-term occupants of this land is essentially the same as for the state trust area across South Africa.



Source: MHP GeoSpace Durban produced for Atelier von Riesen based on data provided by Department of Rural Development and Land Affairs

The Ingonyama Trust raises all the questions discussed under trusteeship in Section 2 above, but in addition raises additional questions that arise from the unique stance of the ITB that emphasises the 'ownership' capacity of the ITB at the expense of existing rights of the communal land owners. An example is its recent stated intention to issue residential leases to households living on Ingonyama trust land. While the ITB argues that this will provide households and lease holders with more secure tenure, mirroring ideas of 'formalisation', critics point out that leasehold tenure downgrades rights holders with already strong rights as defined by IPILRA, into a weaker form of tenure. Some argue that these leases are unconstitutional in terms of section 25(6) of the constitution dealing with the property protection clause. The ITB is, however, engaging in other processes that digitally record rights on spatial information systems, the outcome of which is as yet unclear. The creation of lease rights would require cadastral surveying and subdivision of the entire area under the ITB, which seems unsustainable.

### *Review of relevant planning sector laws*

#### **The Development Facilitation Act**

The DFA along with the 1994 Housing White Paper, were significant sectoral developments from an urban tenure perspective. Post-apartheid housing policy was negotiated over several years through the National Housing Forum, a multi-stakeholder negotiating forum, in the years preceding the 1994 democratic elections. The DFA was an early outcome of consultations surrounding housing. It was repealed when the Spatial Planning and Land Use Management Act (SPLUMA) came into effect in

2015. A constitutional challenge to the DFA affirmed the municipal planning competency. The DFA contained a provision for “initial ownership” which sought to provide tenure security early in the land development process. Modelled on a flexible land tenure law in Namibia, it was never applied in the South African context. Apparent reasons include a general resistance on the part of town planning practitioners and officials to “business unusual” and the widely held belief in registered individual ownership as the “highest and best” form of tenure. Such deeply entrenched beliefs are hard to shift and are likely to impact on the potential innovations in SPLUMA.

### **The Spatial Planning and Land Use Management Act**

SPLUMA came into effect in 2015 and has a number of aims, which include:

- addressing the fragmented, unsustainable spatial patterns;
- creating a single, integrated legal framework to deal with planning and to stipulate the role of each sphere of government in planning.

This Act comprises over-arching legislation which defines the scope of South Africa’s planning system. It also addresses ‘normative direction, planning instruments, planning processes, institutional arrangements and supportive intergovernmental relations.’<sup>136</sup>

The Act provides tools in the form of spatial plans and a land use management system by which spatial and social transformation can potentially be levered. The legislation has a dual character, partly direct legislation and partly a framework. Some parts can be applied directly, while other parts require synchronicity with other legislation such as regulations, ministerial norms and standards, environmental law, land law, mineral law and so on.

Prior to this Act, most municipal planning decisions were taken in terms of provincial planning law. The Act has changed the emphasis and now most municipal planning will take place in terms of municipal by-laws. National and provincial government must assist municipalities to develop their by-laws (for example, through model laws). Each province may pass provincial planning law further regulating municipal planning in that province as well as provincial planning. Municipalities must establish municipal planning tribunals and appeals structures to determine, and decide on, land development applications. A single and inclusive land use scheme for each entire municipality is to be developed. All three spheres of government must prepare Spatial Development Frameworks (SDFs) based on norms and standards guided by development principles. These must be synchronised, since no sphere of government may trump another with regard to municipal planning, including forward planning such as SDFs. Each has its own autonomous powers. It is not yet clear how potential differences in SDFs between the three spheres will be resolved.

SPLUMA contains the following provisions regarding informal settlements:

- Legal definition: “**incremental upgrading of informal areas**” means the progressive introduction of administration, management, engineering services and land tenure rights to an area that is established outside existing planning legislation and may include any settlement or area under traditional tenure.

- Principles: Provincial laws must include provisions that will promote incremental upgrading and tenure “... development procedures must include provisions that accommodate **access to secure tenure and the incremental upgrading of informal areas**”
- Municipal spatial plans: “Include previously disadvantaged areas..... **informal settlements, slums**...and address their **inclusion and integration** into the spatial, economic, social and environmental objectives of the relevant sphere”
- Land use management schemes: must “include provisions that permit the **incremental introduction of land use management and regulation** in areas under traditional leadership, rural areas, **informal settlements, slums** and areas not previously subject to a land use scheme”
- Land use management schemes: must include “**appropriate categories of land use zoning and regulation** for the entire municipal area including areas not previously subject to a land use scheme”; may include provisions for “specific requirements regarding any **special zones** identified to address the development priorities of the municipality”

The Act, its regulations and municipal by-laws can potentially accommodate the introduction of special zones for informal settlements. Extending land use regulation over an informal settlement is a way to legalise the land use ‘informal settlement’. While legal declaration is not township establishment (land development), it allows for public investment in services and potential improvements in tenure security.

However, the Act criminalises informal land use in the meantime and makes it possible to criminally prosecute informal settlement residents. For the progressive potential to be realised it is imperative that guidelines be developed and advocated for. Further concerns with the Act pertain to the role of traditional authorities in the land use management realm. Specifically, there are concerns that the Act permits traditional authorities to usurp the land use management function of democratically elected municipalities, calling into question the constitutionality of this provision.

## 5. Conclusion

The post-apartheid reform measures since 2000 have tended to reinforce the pre-1994 law reform measures that do not eradicate the problems of the past. Instead, they added further complications by pegging the bar for tenure security to a standard of registered title with limited understanding of the social conditions of tenure that generate resistance to individual title in its present form. The assumptions underlying the reforms have tended to persist in the present, and continue to dominate the thinking of officialdom.

During the early period of democratic transition, from 1994 to 2000, the newly formed ANC government did attempt to focus on reforming the over-arching legal framework by beginning to restructure the extremely hierarchical structure of land rights into a more equitable distribution of rights, rather than to focus solely on converting tenure rights to freehold. While these laws still hold, this approach has been overshadowed by policies that seek uniformity rather than to grapple with the complexity of the legacies of the past. This has meant something of a return to a dualistic paradigm of titling in urban and peri-urban contexts, and reversion to traditional leadership controls in rural communal contexts<sup>137</sup>.

Overall this review has detailed the historical processes which have led to the persistence of stark economic, social and institutional inequalities which continue to isolate former homeland areas from the rest of the country. These inequalities have coalesced within the spatial zones which are the outgrowth of former reserves and homelands and have yet to be meaningfully addressed. Likewise, within the urban areas the spatial and social architectures of the apartheid city have proved stubbornly inert to contemporary urban planning and development measures which have sought to fashion a more equitable and integrated cities. Indeed, it has been argued that post-apartheid housing policy and delivery have served to deepen spatial divides so that “South African cities remain beacons of racialised inequality”.<sup>138</sup>

The key question is whether land tenure and governance systems have contributed to the emergence and entrenchment of these spatial inequalities and if so in what ways? The review has examined the fundamental differences in underlying tenure, property rights and land governance systems which shape the content of land rights in different settings.

The elaborate deeds, survey and cadastral system which provide the institutional architecture for the registration and transfer of private property rights is rooted in Roman Dutch law which from the outset failed to recognise the historical rights of indigenous South Africans. *De facto* this system works best at securing the private property rights of the wealthy and the relatively well to do. Evidence presented in the review indicates that this system has proved to be inadequate and inappropriate in extending security of tenure for the majority of South African citizens.

The review has distanced itself from narrowly conceptualised hierarchies of rights which place freehold ownership at the apex and which overtly or tacitly characterises other rights as ‘second class’. It has presented evidence setting out the arguments for a more a flexible and adaptive tenure security continuum which offers a range of effectively supported options to record, secure, transact and transfer rights in land across a range of different settings. This approach is based on a comprehensive review of international experiences which makes it clear that a wide range of organisations including the World Bank have come to recognise that the pre-eminence accorded to titling as a vehicle for securing tenure has proved to be an expensive mistake. The review highlights that contrary to expectations there is little evidence to suggest that titling has delivered benefits to the poor. To the contrary it has been shown that this trajectory has unpicked many of the safety nets woven into consensual and socially embedded systems of communal tenure which have rendered the rural poor vulnerable to loss of land, livelihood and social security.

The review has shown that to date the South African state has been unable to balance the maintenance and operation of the existing deeds, survey and cadastral system with its obligations to secure tenure or provide comparable redress for whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices as provided for in section 25 (6) of the Constitution. Likewise, the constitutional imperative to enact legislation as required by Section 25(9) has largely remained unfulfilled.

The review has argued that many; if not the majority of South African citizens, continue to lack legally secure rights in land. In rural areas land and traditional governance systems are frequently infused with distorted colonial codifications of customary law. Indeed, the land rights of the majority of South Africans are either obtained informally, or through poorly supported and increasingly dysfunctional



rights holding systems which are remnants from the colonial and apartheid period and which remain out of step with living customary law.

The high transaction costs associated with the transfer and updating of title have put the deeds system out of reach of the majority of households who qualify for a housing subsidy. This means that there is a high incidence of informal sales and off grid transfers of subsidy houses and serviced sites. This means that ownership and occupancy on the ground often bear little resemblance to what is recorded in the deeds system. Likewise, the Upgrading of Informal Settlements Programme is seldom applied as the policy intends. For example, although relocation is framed as an option of last resort in practice in situ upgrading seldom occurs. Furthermore, despite the provision of a wide range of tenure options in the programme, the default to individual ownership still occurs. Overall the potential for incremental tenure security as envisaged by the programme has not been widely explored.

#### *Assessing the contribution of tenure to persistent spatial inequalities*

The review has strongly argued that the relationship between tenure and poverty is thus not resolved by simple recourse to titling, home and land ownership. A huge and growing body of empirical research all over Africa reveals that there is not a causative relationship between these two phenomena. This conclusively shows that titling cannot be presented as a 'silver bullet' which will lift people out of poverty as has been misleadingly argued by some economists and policy makers. Poverty and tenure remain separate phenomena. The ways in which poor households often intersect with those who lack formally recognised tenure is a political issue that is a problem of property law more broadly.

The international review in Annexure 1 shows that serious questions have been raised about the efficacy of land registration and titling programmes from the outset.<sup>139</sup> This has been on the basis of growing empirical evidence from various parts of the world indicating that customary systems of tenure are not inherently inefficient.<sup>140141142</sup> Importantly, there has also been mixed evidence on the question of whether land titling and registration programmes actually enhance security of tenure and yield such benefits as increased investments in land and high agricultural productivity.<sup>143</sup>

A recent systematic review analysed both quantitative and qualitative studies to ascertain the impact of land property rights interventions on investment and agricultural productivity in developing countries.<sup>144</sup> The systematic review concluded that there was no strong, direct causal link between tenure rights recognition and productivity as well as income gains.

Various studies in sub-Saharan Africa seem to confirm the failure of land titling and registration and the formalisation of land rights in general to bring about agricultural development.<sup>145146147148</sup> Evaluation of titling programmes has revealed that these initiatives are not a universal panacea to agricultural development problems.<sup>149150</sup> Sociological and anthropological studies have revealed that customary practices are resilient and exist alongside the newly created formal land administration processes<sup>151152153</sup>.

In many instances, land markets have *not* developed as a result of land titling and registration.<sup>154</sup> As a result, the World Bank and other advocates of land privatisation have had to review their approach to land titling and acknowledge the continued importance of customary systems of land ownership especially in developing countries.

The international experience indicates clearly how titling programmes have been known to extinguish pre-existing customary rights to land. The multiple and overlapping nature of customary rights to a parcel of land are affected when that parcel of land is subject to exclusive ownership through formalisation processes.<sup>155</sup> In addition to producing winners and losers through excision of overlapping claims to land<sup>156</sup>, land titling may encourage land grabbing by the elite and other well-resourced members of the community who are more familiar with the processes of land registration, have more information and resources to comply with the processes of formalisation of land rights. Instead of enhancing security of tenure and yielding such advantages as increased investment in land, higher levels of productivity, increased access to credit as land can be used as collateral security; there have been increased instances of land-related conflicts.

Instead there is growing recognition that a range of tenure instruments can, and should be employed to secure a range of tenures, and that these should receive legal and budgetary recognition and support proportionally equivalent to the formal institutions and official accoutrements that provide legality and administrative support to the system of Deeds.

In summary, the review argues that it is not the *form of tenure* in itself that brings about tenure security, whether we are speaking of registered titles, certification or unrecorded mechanisms of legitimation. Tenure is secured when rights can be realised through (a) their legitimacy in the eyes of society, and (b) access to the range of supportive legal and administrative mechanisms that allow rights to be actualised in practice. In other words, the important criterion for tenure security is the ability of rights holders to enforce a socially legitimate tenure system that is backed up by strong governance and juristic institutions.

The concept of spatial justice is a useful concept to help transform Apartheid-era spatial forms. However, the intersection between spatial justice and forms of tenure remains complex and challenging to neatly delineate. What seems clear is that spatial justice can be served in part by finding viable alternatives which counter the current tendency in state policy and practice to default to the ownership and titling paradigm which reinforces and deepens spatial inequalities through a crude menu of 'options'. De facto these promote ownership for the wealthy, informality for the urban poor, precarity for farm dwellers and labour tenants and crude renderings of customary law for those who live in former homeland areas in ways which valorise colonial codification and reinforce spatial boundaries established through the 1951 Bantu Authorities Act.

In the rural setting Okoth-Ogendo has argued that indigenous living customary law which recognises a web of reciprocal rights and obligations can afford individuals and communities real and substantive rights over land. Currently it is only the Interim Protection of Informal Land Rights Act (No. 31 of 1996) which facilitates some legal recognition of these rights in that it casts members of any relevant group, community or tribe as "co-owners" of the land who are required to take a majority decision to dispose of any of their rights. This Act needs to be reviewed and strengthened to further protect the rights of rural citizens in former homeland areas and to actively draw in aspects of living customary law which increasingly recognise the rights of women.

In the urban setting, an inclusive regeneration agenda needs to be developed in which private sector (re)development occurs hand-in-hand with formal opportunities for poor households whom the market does not reach. One example would be the development of more private and public rental accommodation in both inner cities areas and centrally located former white suburbs that is affordable

for poor and working-class people. No formal rental options exist in either the social or private rental sector that accommodate the majority of poorer urban households' needs for rental accommodation. Public rental housing should bridge the gap between the demand for and supply of affordable rental accommodation in South Africa's higher density urban centres, areas where the prospects for spatial equality are much greater.

## References

- ActionAid, (2008). ActionAid, 2008. Precious Metal: The Impact of Anglo Platinum on Poor Communities in Limpopo, South Africa. London: ActionAid.
- Akram-Lodhi, H. A. (2007). Land, Markets and Neoliberal Enclosure: An Agrarian Political Economy Perspective. *Third World Quarterly*, 1437-1456.
- Alexkor Ltd & another v Richtersveld Community & others 2003 (12) BCLR 1301 (CC)
- Anseeuw, W. (2013). The Rush for Land in Africa: Resource Grabbing or Green Revolution? *South African Journal of International Affairs*, Vol. 20, Issue 1, 159-177.
- Atuahene, B. (2004). Legal Title to Land As An Intervention Against Poverty in Developing Nations. *The George Washington International Review*, 1109-1180.
- Bank, W. (1975). Land Reform Sector Policy. Washington DC.: World Bank.
- Barnes, G. and Child, B. (2012). Searching for a New Land Rights Paradigm by Focusing on Community-Based Natural Resource Governance. *Proceedings of Annual World Bank Conference on Land and Poverty*. Washington D C: World Bank.
- Bennett, T.W. & C.H. Powell. "The State as Trustee of the Land". *South African Journal of Human Rights*, 16, 2000.
- Bhe & others v Magistrate Khayelitsha & others 2005 (1) SA 580 (CC), 2005 (1) BCLR 1
- Bledsoe, D. (2006). Can Land Titling and Registration Reduce Poverty. In R. G. John W. Bruce, *Land Law Reform: Achieving Development Policy Objectives*. Washington D C: World Bank.
- Boamah, F. (2014). How and why chiefs formalise land use in recent times: the politics of land dispossession in through biofuels investments in Ghana. *Review of African Political Economy*, Vol. 41, Issue 141., pp. 406-423.
- Boone, C. (2007). Property and Constitutional Order: Land Tenure Reform and the Future of the African State. *African Affairs*, Vol. 106, No. 425, 557-586.
- Boone, C. (2015). Boone, Land Tenure Regimes and State Structure in Rural Africa: Implications for Forms of Resistance to Large-scale Land Acquisitions by Outsiders. *Journal of Contemporary African Studies*, Vol. 33, Issue 2, 171-190.
- Borras, S. M., Fig, D and Suarez, S. M. (2011). The politics of agrofuels and mega-land and water deals: insights from Mozambique. *Review of African Political Economy*, Vol. 38, No. 128, 215-234.
- Bromley, D. (2008). Formalising property relations in the developing world: The wrong prescription for the wrong malady. *Land Use Policy* 26, 20-27.
- Bromley, W. D and Cernea, M. M. (1989). *The Management of Common Property Natural resources: Some Conceptual and Operational Fallacies*. World Bank Discussion Papers No. 57. Washington DC: World Bank.

Bruce, J. W. (2006). Reform of Land Law in the Context of World Bank Lending. In R. G. John W. Bruce, & R. G. John W. Bruce (Ed.), *Land Law Reform: Achieving Development Policy Objectives*. Washington DC: World Bank.

Budlender, Debbie, Sibongile Mgweba, Ketleetso Motsepe, and Lelanie Williams. "Women, Land and Customary Law." Community Agency for Social Enquiry. Last modified 2011. Accessed 18 October, 2016. [http://www.cls.uct.ac.za/usr/lrg/downloads/Women\\_and\\_Land.pdf](http://www.cls.uct.ac.za/usr/lrg/downloads/Women_and_Land.pdf).

Bundy, C. Introduction: Umhlaba 1913 - 2013: Images from the Exhibition Commemorating the Centenary of the Natives Land Act of 1913. Cape Town: PLAAS, University of the Western Cape, 2015.

Byamugisha, F. K. (2013). *Securing Africa's Land for Shared Prosperity: A Program to Scale up Reforms and Investment*. . Wahington D C: World Bank.

Campanale, M. (2013). Private Investment in Agriculture. In M. K. Tony Allan, & M. K. Tony Allan (Ed.), *Handbook of Land and Water Grabs in Africa: Foreign Direct Investment and Food and Water Security*. New York.: Routledge.

Cape of Good Hope. Report and Proceedings: With Appendices of the Government Commission on Native Laws and Customs. Cape of Good Hope Blue Book: 1883 Nr. G. 4

Capps, G and Mnwana, S. (2015). Claims from Below: Platinum and the Politics of Land in the Bakgatla-ba-Kgafela Traditional Authority Area. *Review of African Political Economy*, Vol.42, No. 146, 606-624.

Capps, Gavin. "Phd Thesis: Tribal-Landed Property : The Political Economy of the Bafokeng Chieftancy, South Africa, 1837-1994 " Unversity of London, 2010.

Capps, Gavin. "Tribal-Landed Property: The Value of the Chieftaincy in Contemporary Africa." *Journal of Agrarian Change* 16, no. 3 (2016): 452-77. <http://dx.doi.org/10.1111/joac.12179>.

Chagache, C. S. (1999). Land Issues and Tanzania's Political Economy. In P. G. Maghimbi (Ed.), *Agrarian Economy, State and Society in Contemporary Tanzania*. New York: Ashgate, USA. .

Chalin, V., Golaz, V and Medard, C. (2015). Land Titling in Uganda Crowds out Local Farmers. *Journal of East African Studies*, Vol. 9, No. 4, , pp. 559-573.

Chanock, Martin. "The South African Native Administration Act of 1927: Reflections on a Pathological case of Legal Pluralism". In Mendelsohn, O. & Baxi, U. (eds), *The Rights of Subordinated Peoples*. 295-323. Delhi: Oxford University Press, 1994.

Chanock, Martin. 'Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure'. In Mann, K., & Roberts, R. (eds), *Law in Colonial Africa*. (Portsmouth & London: Heinemann & James Currey, 1991).

Chanock, Martin. *The Making of South African Legal Culture 1902-1936*. Cambridge: Cambridge University Press, 2001.

Charlton, Sarah and Caroline Kihato. "Reaching the Poor? An Analysis of the Influences on the Evolution of South Africa's Housing Programme." In *Democracy and Delivery in South Africa*, edited by U Pillay, R Tomlinson, and J du Toit. Pretoria: HSRC Press, 2006.

Chauveau, J and Colin J. . ( 2007). Changes in Land Transfer Mechanisms: Evidence from West Africa . In L. Cotula, Changes in "Customary" Land Tenure Systems in Africa. UK and Rome: IIED/FAO.

Claassens, Aninka. (2014). Denying ownership and equal citizenship: continuities in the state's use of law and custom, 1913-2013. *J. South. Afr. Stud.* Vol. 40, No.4, 761–779.

Claassens, A. Matlala, B. (2014). Platinum, poverty and princes in post-apartheid South Africa: New Laws, Old Repertoires. In G. N. Khadiagala, *New South African Review*, vol. 4. . Wits University Press.

Claassens, Aninka and Durkje Gilfillan. "The Kalkfontein land purchases: eighty years on and still struggling for ownership". In A. Claassens, & B. Cousins (eds), *Land, Power and Custom. Controversies Generated by South Africa's Communal Land Rights Act.* pp. 295-314. Cape Town: University of Cape Town Press, 2008.

Claassens, Aninka and Moray Hathorn. "Stealing restitution and selling land allocations: Dixie, Mayaeyane and Makuleke. In A. Claassens, & B. Cousins (eds), *Land, Power and Custom. Controversies Generated by South Africa's Communal Land Rights Act.* pp. 315-352. Cape Town: University of Cape Town Press, 2008.

Claassens, Aninka. "Customary Law and Zones of Chiefly Authority: The impact of government policy on whose voices prevail in the making and changing of customary law". In A. Claassens, & B. Cousins (eds), *Land, Power and Custom. Controversies Generated by South Africa's Communal Land Rights Act.* 353-382. Cape Town: University of Cape Town Press, 2008.

Coldham, S. (1978). The Effect of Registration of Title upon Customary Land Rights in Kenya. *Journal of African Law*, Vol. 22, No. 2, 91-111.

Coldham, S. (1995). Land Tenure Reform in Tanzania: Legal Problems and Perspectives. . *The Journal of Modern African Studies*, Vol. 33, No. 2, 227-242. .

Coles, Catherine M. "Land Reform in Post Apartheid South Africa." *Boston College Environmental Affairs Law Review* 20, no. 4 (1993): 699 - 759.

Cotula, L. (2007). Introduction. In L. C. (ed.), *Changes in "Customary" Land Tenure Systems in Africa.* UK and Rome : IIED/FAO.

Cotula, L. a. (2009). Deal or No Deal: The Outlook for Agricultural Land Investment in Africa. *International Affairs*, Vol. 85, No. 6, 1233-1247.

Cousins, Ben "A proposal for a land rights ombudsman in South Africa." University of the Western Cape, unpublished paper 2014.

Cousins, Ben. "Characterising 'communal' tenure: nested systems and flexible boundaries Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa". In *Land, Power and Custom. Controversies Generated by South Africa's Communal Land Rights Act.* pp. 109-137. Cape Town: University of Cape Town Press, 2008.

Cousins, Ben. "Contextualising the controversies: Dilemmas of communal tenure reform in post-apartheid South Africa". In *Land, Power and Custom. Controversies Generated by South Africa's Communal Land Rights Act*. pp. 3-32. Cape Town: University of Cape Town Press, 2008.

Cross, Catherine. "Informal Tenure in South Africa: Systems of Transfer and Succession". Durban: University of Natal, unpublished, n.d.

Davenport, T. R. H. "Can Sacred Cows Be Culled? A Historical Review of Land Policy in South Africa, with Some Questions About the Future." *Development Southern Africa* 4, no. 3 (1987/08/01 1987): 388-400. <http://dx.doi.org/10.1080/03768358708439331>.

Davies, Robert. *The Struggle for South Africa. A Reference Guide to Movements, Organizations and Institutions. Volume 1* London Zed Books, 1984.

De Soto, H. (1989 ). *The Other Path: The Invisible Revolution in the Third World*. New York : Harper & Row Publishers.

De Soto, H. (2000). *The Challenge of Connecting Formal and Informal Property Systems: Some Reflections Based on the Case of Tanzania*.

De Soto, H. (2000). *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. UK: Black Swan.

Deininger, K and Feder, G. (2009). *Land Registration, Governance and Development: Evidence and Implications for Policy*. *The World Bank Research Observer*, Vol. 24, No. 2, 233-266.

Deininger, K. (2003 ). *Land Policies for Growth and Poverty Reduction*. Washington DC : World Bank and Oxford University Press. .

Deininger, K., Byerlee, D., Lindsay, J., Norton, A., Selod, H and Stickler, M. . (2011). *Rising Global Interest in Global Farmland: Can it yield sustainable and equitable benefits?* T. Washington DC: World Bank.

Delius, Peter. "Contested Terrain: Land Rights and Chiefly Power in Historical Perspective". In *Land, Power and Custom. Controversies Generated by South Africa's Communal Land Rights Act*. pp. 3-32. Cape Town: University of Cape Town Press, 2008.

Delville, L. P. ( 2002). *When Farmers Use 'Pieces of Paper' to Record their Land Transactions in Francophone Rural Africa: Insights Into the Dynamics of Institutional Innovation*. *The European Journal of Development Research*, Vol. 14, Issue 2, 89-108.

Delville, L. P. (2007). *Changes in "Customary" Land Tenure Systems in Africa*. In L. Cotula, *Changes in "Customary" Land Tenure Systems in Africa*. UK and Rome: IIED/FAO.

DRDLR. *Draft Proposal: Strengthening the Relative Rights of People Working the Land - Policy Proposals*. Pretoria: Department of Rural Development and Land Reform, 2013.

Dubow, Saul. "Holding 'a just balance between white and black': The Native Affairs Department in South Africa c.1920-33". *Journal of Southern African Studies*, 12 (2) 217-239.

Durand-Lasserve, Alain. "Market-Driven Evictions and Displacements: Implications for the Perpetuation of Informal Settlements in Developing Cities " In *Informal Settlements: A Perpetual Challenge*, edited by Marie Huchzermeyer and Aly Karam. Cape Town: UCT Press, 2006.

Duval, S. M. (2012). Land and Water Grabbing in an East African Coastal Wetland: The Case of the Tana Delta . *Water Alternatives*, Vol. 5, Issue 2, pp. 322-343. .

Duval, S., Medard, C., Hamerlynck, O and Nyingi, W. D. (2012). Land and Water Grabbing in an East African Coastal Wetland: The Case of the Tana Delta. *Water Alternatives*, Vol. 5, No. 2, 322-343.

Eglin, Ronald, Mike Kenyon, Rosalie Kingwill and Siyabulela Manona, "Rethinking communal land administration: Unlocking human settlement development in communal land areas". Housing Development Agency (HDA) RFP/JHB/2015/003, 2015.

Fairbairn, M. (2013 ). Indirect Dispossession: Domestic Power Imbalances and Foreign Access to Land in Mozambique. *Development and Change*, Vol. 44, No. 2 , 335-356.

FAO. (2012). Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. Rome : FAO . 2012. Voluntary Guidelines on the Responsible GoFood and Agriculture Organisation of the United Nations.

FAO. (2013). Land Titling in Peru: What Future for Women's Tenure Security? . Rome : FAO Gender and Land Rights Database and Land Portal. .

Feder, G. and Nishio, A. (1999). The Benefits of Land Registration and Titling: Economic and Social Perspectives. *Land Use Policy*, 25-43.

Ferguson, James. *The Anti-Politics Machine: "Development" and Bureaucratic Power in Lesotho*. Minneapolis: University of Minneapolis Press, 1994.

FIAN. (2010). Land Grabbing in Kenya and Mozambique: A Report on two Research Missions – and a Human Rights Analysis of Land Grabbing. German Netherlands: FIAN International.

Fitzpatrick, D. (2005). 'Best Practice' Options for Legal Recognition of Customary Tenure. *Development and Change*, Vol. 36, No. 3, 449-475.

Fort, R. 2. (2008). Assessing the Impact of Rural Land Titling in Peru: The Case of the PETT program. Paper presented at the World Bank Conference on New Challenges for Land Policy and Administration. World Bank Conference on New Challenges for Land Policy and Administration, 14-15 February, 2008 Washington D.C. Washington DC: World Bank.

Giovarelli, R and Hanstad, T. (1999). Land Ownership . In R. P. (eds.), *Legal Impediments to Effective Rural Land Relations in Eastern Europe and Central Asia*. World Bank Technical Paper No. 436. . Washington DC : World Bank.

Greenspan, E. (2014). Greenspan, E. 2014. Free, Prior and Informed Consent in Africa: An Emerging Standard for Extractive Industry Projects. [http://www.oxfamamerica.org/publications/fpic-in-africa.:](http://www.oxfamamerica.org/publications/fpic-in-africa.) Oxfam Backgrounder Series.



Hall, R. (2011 ). Land Grabbing in Southern African Africa: The Many Faces of Investor . Review of African Political Economy, Vol. 38, No. 128, 193-214. .

Hanlon, J. (2004). Renewed Land Debate and the 'Cargo Cult' in Mozambique. Journal of Southern African Studies, Vol. 30, No. 3, 603-625.

Haugerud, A. (1989). Land Tenure and Agrarian Change in Kenya . Journal of the African International Institute, Vol. 69, No. 1, 61-90.

Hay, Michelle. The Roots of Dispossession Input into a five day course on the political economy of land, mining and rural governance. Unpublished: Phuhlisani, 2016.

Hornby, Donna. "Becoming visible on the grid: attempts to secure tenure at Ekuthuleni in Untitled: Securing Land Tenure in Urban and Rural South Africa, edited by Ben Cousins, Donna Hornby, Rosalie Kingwill and Lauren Royston. Durban: University of KwaZulu-Natal Press, forthcoming.

Huchzermeyer, Marie and Aly Karam, eds. Informal Settlements: A Perpetual Challenge? Cape Town: UCT Press, 2006.

Huchzermeyer, Marie. "A Legacy of Control? The Capital Subsidy for Housing, and Informal Settlement Intervention in South Africa." International Journal of Urban and Regional Research 27, no. 3 (2003): 591-612. <http://dx.doi.org/10.1111/1468-2427.00468>.

Isandla Institute. Setting the Stage: Current Housing Policy Debate in South Africa. Cape Town: Isandla Institute, 2001.

Kerekes, C. B and Williamson, C. R. (2010 ). Propertyless in Peru Even With a Government Title. American Journal of Economics and Sociology, Vol. 69, No. 3, 1011-1034. .

King, D and Veit, P. (n.d.). Overlapping Land and Natural Resource Rights Creates Conflict in Africa. Washington DC: World Resources Institute. <http://www.wri.org/blog/2013/12/overlapping-land-and-natural-resource-rights-creates-conflict-africa>.

Kingwill, Rosalie. "The Map is Not the Territory. Law and Custom in 'African Freehold': A South African case study". PhD thesis, University of the Western Cape, 2014.

Kingwill, Rosalie. "Papering over the Cracks: An Ethnography of Land Title in the Eastern Cape" in Dhupelia-Mesthrie, Uma (guest editor). Kronos: a Journal of Southern Africa. Vol 40 November 2014.

Kingwill, R., Cousins, B., Cousins, T., Hornby, D., Royston, L and Smit, W. (2007). Mysteries and Myths: De Soto, Property and Poverty in South Africa . Are De Soto's Views Appropriate to South Africa Graduate School of Public (p. ). Parktown. School of Public and Development Management.

Kingwill, Rosalie, "Square Pegs in Round Holes: the competing faces of land title" in Untitled: Securing Land Tenure in Urban and Rural South Africa, edited by Ben Cousins, Donna Hornby, Rosalie Kingwill and Lauren Royston. Durban: University of KwaZulu-Natal Press, forthcoming.

Kingwill, Rosalie, Donna Hornby, Lauren Royston and Ben Cousins. "Conclusion: Beyond the 'edifice'" in Untitled: Securing Land Tenure in Urban and Rural South Africa, edited by Ben Cousins, Donna Hornby, Rosalie Kingwill and Lauren Royston. Durban: University of KwaZulu-Natal Press, forthcoming.

Kingwill, Rosalie, Lauren Royston, Ben Cousins and Donna Hornby. "The policy context: land tenure laws and policies in post-apartheid South Africa" in *Untitled: Securing Land Tenure in Urban and Rural South Africa*, edited by Ben Cousins, Donna Hornby, Rosalie Kingwill and Lauren Royston. Durban: University of KwaZulu-Natal Press, forthcoming.

Klopp, J. (2000). Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya . *Africa Today*, Vol. 47, No. 1 , 7-26. .

Lawry, S., Samii, C., Hall, R., Leopold, A., Hornby, D and Mtero, F. (2016). The impact of land property rights interventions on investment and agricultural productivity in developing countries: A systematic review. *Journal of Development Effectiveness*, 1-21.

Legal Resources Centre, "Submission of the Wonderkop Land Claim Committee in respect of the farm Wonderkop" submitted to the Commission of Enquiry into the Tragic Incident in Marikana, Centurion, 30 July 2014.

Manson, A and Mbenga, B. . (2003). The Richest Tribe in Africa: Platinum Mining and the BaFokeng in South Africa's North West Province, 1965-1999. *Journal of Southern African Studies*, Vol. 29, No. 1., pp. 25-47. .

Manson, A. (2013). Mining and 'Traditional Communities' in South Africa's 'Platinum Belt': Contestations over Land, Leadership and Assets in North-West Province c. 1996-2012. . *Journal of Southern African Studies*, Vol. 39, No. 2, pp. 409-423. .

McKechnie, L. (1999 ). Property Rights Reform in Peru: Why Titling Does not Increase Access to Micro-Credit . *Journal of Development and Social Transformation*. .

McMichael, P. (2012). The land grab and Corporate Food Regime Restructuring. . *Journal of Peasant Studies*, Vol. 39, Issue 3-4, 681-701.

Migot-Adholla, S., Hazell, P.B., Blarel, B., Place, F. (1991). Indigenous land rights systems in sub-Saharan Africa: a constraint on productivity? *The World Bank Economic Review* Vol. 5, No. 1, 155–175.

Mnwana, S. (2015 ). Mining and 'Community' Struggles on the Platinum Belt: A Case of Sefikile Village in North West Province, South Africa . *The Extractive Industries and Society* 2, 500-508. .

Mnwana, S. and Capps, G. (2015). No Chief Ever Bought a Piece of Land: Struggles Over Property, Community and Mining in the Bakgatla-ba-Kgafela Traditional Authority Area, North West Province. University of Witwatersrand: Society, Work and Development Institute, Working Paper 3.

Mnwana, S. Mtero, F and Hay, M. (2016). Dispossessioning the Dispossessed? Mining and Rural Struggles in Mokopane, Limpopo. Braamfontein, South Africa.: Society, Work and Development Institute (SWOP), Working Paper 7, University of Witwatersrand.

Moore, Sally Falk. *Social Facts and Fabrications. "Customary" law on Kilimanjaro, 1880-1980*. Cambridge: Cambridge University Press, 1986.

Musembi, C. N. (2007). De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights . *Third World Quarterly*, Vol. 28, No. 8., pp. 1457-1478.

Myers, J.C. *Indirect Rule in South Africa: Tradition, Modernity and the Costuming of Political Power*. Rochester: University of Rochester Press.

Nunow, A. A. (2015). Land Deals in the Tana Delta, Kenya in Ruth Hall, Ian Scoones and Dzodzi Tsikata (eds.) *Africa's Land Rush: Rural Livelihoods and Agrarian Change*. James Currey, New York (pp. 99-113).

Odgaard, R. (2002 ). Scrambling for Land in Tanzania: Process of Formalisation and Legitimisation of Land Rights. *The European Journal of Development Research*, Vol. 14, Issue 2, 71-88. .

Palmer, R. H. (1997). *Contested Lands in Southern and Eastern Africa: A Literature Survey*. Oxfam UK: Oxfam Working Paper.

Paradza, G. and Sulle, E. (2015). Agrarian Struggles in Mozambique: Insights from Sugarcane Plantations. in Ruth Hall, Ian Scoones and Dzodzi Tsikata, *Africa's Land Rush: Rural Livelihoods and Agrarian Change* (150-161). New York.: James Currey.

Peters, P. E. (2009). Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions. *World Development*, Vol. 37, No. 8, 1317-1325.

Peters, P. E. (2013). Conflicts Over Land and Threats to Customary Tenure in Africa. *African Affairs*, 1-20.

Pieterse, Edgar. "Building with Ruins and Dreams: Some Thoughts on Realising Integrated Urban Development in South Africa through Crisis." *Urban Studies* 43, no. 2 (February 1, 2006 2006): 285-304.

Place, F and Migot-Adholla, S. E. (1998). The Economic Effects of Land Registration on Smallholder Farms in Kenya: Evidence from Nyeri and Kakamega Districts . *Land Economics*, Vol 74, No. 3 , 360-373. .

Platteau, J. (1996). The Evolutionary Theory of Land rights as Applied to Sub-Saharan Africa: A Critical Assessment. *Development and Change*, Vol. 27, 29-86.

Platzky, Laurine & Cherryl Walker. *The Surplus People. Forced Removals in South Africa*. Johannesburg: Ravan Press, 1985.

Roy Prosterman and Tim Hanstard (eds.) . (1999). *Legal Impediments to effective Rural Land Relations in Eastern Europe and Central Asia: A comparative Perspective*. Washington DC: World Bank Technical Paper No. 436. .

Sansom, B. "Traditional Economic Systems". In Hammond-Tooke, W. (ed), *The Bantu-speaking Peoples of Southern Africa*. pp. 135-176. London, Boston & Henley: Routledge and Kegan Paul 1937, 2nd ed 1974.

Sjaastad, E and Cousins, B. (2009). Formalisation of Land Rights in the South: An Overview. *Land use policy*, Vol. 26, No. 1, pp.1-9.

Southall, R. (2005). The Ndungu Report: Land and Graft in Kenya. *Review of African Political Economy*, Vol. 32, No. 103, 142-151.

Stein T Holden, Heijiro Otsuka and Klaus Deininger. (2013). Land Tenure Reform in Asia and Africa Assessing Impacts on Poverty and Natural Resource Management. UK: Stein T Holden, Heijiro Otsuka and Klaus Deininger. 2013. Land Tenure Reform in Asia and Africa. The Palgrave MacMillan. .

Sulle, E and Nelson, F. (2013). Biofuels Investment and Community Land Tenure in Tanzania: The Case of Bioshabe, Kilwa District. Future Agricultures.

Union of South Africa. 1922. 'Report on Native Location Surveys.' UG 42–22. Cape Town: Cape Times.

Van der Walt, A.J. and Duard Kleyn, "Duplex Dominium: the History and Significance of the concept of Divided Ownership". In Daniel Visser (ed.), Essays in the History of Law. Cape Town: Juta, 1989.

Van der Walt, A.J. Van der Walt, Andre J. 1999. "Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa." *Koers* 64 (2 & 3): 259-295.

Verma, R. 2014. Land Grabs, Power and Gender in East and Southern Africa: So, What's New? *Feminist Economics*, Vol. 20, Issue 1, 52-75.

Vermeulen, S and Cotula, C. (2010). Over the Heads of Local People: Consultation, Consent, and Recompense in Large-scale Land Deals for Biofuels Projects in Africa . *Journal of Peasant Studies*, Vol. 37, No. 4, 899-916.

White, B., Borrás Jr. S. M., Hall, R., Scoones, I and Wolford, W. (2012). The New Enclosures: Critical Perspectives on Corporate Land Deals. *Journal of Peasant Studies*, Vol. 39, Vol. 3-4, 619-647. .

Wily, E. L. (2013). Enclosure Revisited: Putting the Global Land Rush in a Historical Perspective . In M. K. Tony Allan, *Handbook of Land and Water Grabs in Africa: Foreign Direct Investment and Food and Water Security* (pp. 11-23). New York : Routledge.

Wily, L. A. (2011). Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa. New York: Rights and Resources, customary tenure in the Modern World .

Woertz, E. 2. (2013). The Global Food Crisis and the Gulf's Quest for Africa's Agricultural Potential in Tony Allan, Martin Keulertz, Suvi Sojamo and Jereon Warner (eds.) *Handbook of Land and Water Grabs in Africa: Foreign Direct Investment and Food and Water*. In M. K. Tony Allan, *Handbook of Land and Water Grabs in Africa: Foreign Direct Investment and Food and Water* (pp. 104-119). New York: Routledge.

Wolpe, Harold. "Capitalism and Cheap labour-power in South Africa: From Segregation to Apartheid. *Economy and Society*, 1972. pp 425-456.

World Investment Report. (2007). Transnational Corporations, Extractive Industries and Development . New York: United Nations.

Endnotes

- Capps, Gavin. "Phd Thesis: Tribal-Landed Property : The Political Economy of the Bafokeng Chieftancy, South Africa, 1837-1994 " Unversity of London, 2010.
- Capps, Gavin. "Tribal-Landed Property: The Value of the Chieftancy in Contemporary Africa." *Journal of Agrarian Change* 16, no. 3 (2016): 452-77. <http://dx.doi.org/10.1111/joac.12179>.
- Coles, Catherine M. "Land Reform in Post Apartheid South Africa." *Boston College Environmental Affairs Law Review* 20, no. 4 (1993): 699 - 759.
- Davenport, T. R. H. "Can Sacred Cows Be Culled? A Historical Review of Land Policy in South Africa, with Some Questions About the Future." *Development Southern Africa* 4, no. 3 (1987/08/01 1987): 388-400. <http://dx.doi.org/10.1080/03768358708439331>.
- Lobao, Linda, M, Gregory Hooks, and Ann Tickamyer, R, eds. *The Sociology of Spatial Inequality*. Albany: State University of New York Press, 2007.
- Noble, Michael, Helen Barnes, Gemma Wright, and Benjamin Roberts. "Small Area Indices of Multiple Deprivation in South Africa." *Social Indicators Research* 95, no. 2 (2010): 281-97. <http://dx.doi.org/10.1007/s11205-009-9460-7>.
- Pieterse, Edgar. "Building with Ruins and Dreams: Some Thoughts on Realising Integrated Urban Development in South Africa through Crisis." *Urban Studies* 43, no. 2 (February 1, 2006 2006): 285-304. <http://dx.doi.org/10.1080/00420980500404020>.
- Pieterse, Edgar. *Post-Apartheid Geographies in South Africa: Why Are Urban Divides So Persistent?* : Leuven University, 2009.
- Pieterse, Edgar. *Spatial Transformation in South African Cities: Gtac Public Economic Winter School* Cape Town: African Centre for Cities, 2016.
- Posel, Dorrit. "Have Migration Patterns in Post-Apartheid South Africa Changed?" *Journal of Interdisciplinary Economics* 15, no. 3/4 (2004): 277-92.
- van Huyssteen, E, G Mans, M Ngidi, J. Maritz, and C Green. "Urban and Settlement Growth in South Africa: 1996 - 2011." Council for Scientific and Industrial Research. Last modified 2013. Accessed 14 October, 2016. <https://goo.gl/FZH24p>.

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<sup>1</sup> Linda Lobao, M, Gregory Hooks, and Ann Tickamyer, R, eds., *The Sociology of Spatial Inequality* (Albany: State University of New York Press, 2007).

<sup>2</sup> <<http://www.tips.org.za/projects/past-projects/inequality-and-economic-inclusion>>

- 
- <sup>3</sup> Kristin Hendrad, The internally displaced in South Africa, *Jura Falconis*, jg 32, 4 (1995-1996), p. 491-522.
- <sup>4</sup> Ruth Hall, 'The Politics of Land Reform in Post-Apartheid South Africa, 1990 to 2004: A Shifting Terrain of Power, Actors and Discourses' (PhD Thesis, University of Oxford, 2010), p.75.
- <sup>5</sup> Catherine M. Coles, 'Land Reform from Post-Apartheid South Africa' *Boston College Environmental Affairs Law Review*, 20, 4, (1993).
- <sup>6</sup> Cousins (2008) describes land rights in communal tenure as 'socially embedded' and inclusive, meaning that individuals and families hold relative rights to the same residential and agricultural land. These individuals and families also negotiate access, relative to other individuals and families, to 'common property resources such as grazing, forests and water' (Cousins 2008: 129). ...practice administration of communal land is 'nested' or 'layered' in nature (Cousins 2008: 125). This means that people and groups who are consulted in decisions about land include individuals, families or households, kinship networks and wider communities.
- <sup>77</sup> UNECA, *Land Tenure and Land reform: management of land and natural resources in Africa*, <<http://www1.uneca.org/Portals/sdra/sdra1/chap4.pdf>>
- <sup>8</sup> Tara Weinburg, *The Contested Status of Communal Land Tenure in South Africa*, (Cape Town, 2015). <http://www.plaas.org.za/sites/default/files/publications-pdf/PLAAS%20Rural%20Report%20Book%203%20-%20Tara%20-%20Web.pdf>
- <sup>9</sup> Catherine M Coles, "Land Reform in Post Apartheid South Africa," *Boston College Environmental Affairs Law Review* 20, no. 4 (1993).
- <sup>10</sup> Colin Bundy, *The Rise and Fall of the South African Peasantry*, (Berkley and Los Angeles, 1979).
- <sup>11</sup> Rodney Davenport and Christopher Saunders, *South Africa: A Modern History*, (New York, 2000) p.190.
- <sup>12</sup> Cecil John Rhodes' Speech on the Second Rereading of the Glen Grey Act to the Cape House Parliament on July 30 1894, <[http://www.sahistory.org.za/sites/default/files/glen\\_grey\\_speech.pdf](http://www.sahistory.org.za/sites/default/files/glen_grey_speech.pdf)> (accessed 6 September 2016).
- <sup>13</sup> Davenport and Saunders, *South Africa*, p.190.
- <sup>14</sup> Ruth Hall, 'The Politics of Land Reform in Post-Apartheid South Africa, 1990 to 2004: A Shifting Terrain of Power, Actors and Discourses' (PhD Thesis, University of Oxford, 2010), p.75.
- <sup>15</sup> H. M. Feinburg, *The Failure of Rural Segregation (Land Policies) in South Africa*, undated, <<https://www.files.ethz.ch/isn/47022/AS01.pdf>> (accessed 6 September 2016).
- <sup>16</sup> William Beinart and Peter Delius, 'The 1913 Land Act: A longer history of dispossession', *Mail and Guardian Online*, (14 Jun 2013), <<http://mg.co.za/article/2013-06-14-00-1913-land-act-a-longer-history-of-dispossession>> (accessed 10 September 2016) Rick De Satge, 'Land divided: Land and South African society in 2013, in comparative perspective', (Cape Town, 2013), <http://www.landdivided2013.org.za/sites/default/files/Synthesis%20Report%20-%20Land%20Divided.pdf> (accessed 6 September 2016).
- <sup>17</sup> Harvey M Feinberg, 'The Natives Land Act, 1913', *The Global Herald Online*, (published online 19 June 2013), <http://theglobalherald.com/the-natives-land-act-1913-professor-harvey-m-feinberg/29524/> (accessed 6 September 2016).
- <sup>18</sup> Sol Plaatje, *Native Life in South Africa*, Chapter 1, (1916), <http://www.thuto.org/ubh/etext/nlisa/nl01.htm> (accessed 6 September 2016).
- <sup>19</sup> C. Bundy, *Castling a long shadow: The Natives Land Act of 1913 and its legacy*, Plaas, (Cape Town, 2013), <[http://www.plaas.org.za/sites/default/files/publications-pdf/umhlaba\\_file3.pdf](http://www.plaas.org.za/sites/default/files/publications-pdf/umhlaba_file3.pdf)> (accessed 6 September 2016).
- <sup>20</sup> Davenport and Saunders, *South Africa*, p.598.
- <sup>21</sup> Ruth Hall, 'The Legacies Of The Natives Land Act Of 1913', *Scriptura 113*, 1 (2014), pp. 1-13. <[http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/1590/hall\\_land\\_act\\_scriptura\\_2014.pdf?sequence=3](http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/1590/hall_land_act_scriptura_2014.pdf?sequence=3)> (accessed 14 September 2016).
- <sup>22</sup> K. Phillips, 'Inequality and economic marginalisation: How the structure of the economy impacts on opportunities on the margins', *Law, Democracy & Development*, 14 (2010), p.110.
- <sup>23</sup> Hall, 'The Politics of Land Reform 2010', p.80.
- <sup>24</sup> 1936 Act also established the 'six native rule', which again distorted indigenous tenure systems in favour of an autocratic model that was easier for the state to control (Claassens 2008). According to the rule, any group of more than six black people who had cooperated to buy land had to constitute themselves as a tribe under a chief or they would lose their land. This was to pre-empt land-buying syndicates from constituting themselves democratically. The 'six native rule' was rooted in the prevailing colonial assumption that all blacks were tribal subjects as opposed to active citizens, able to create their own identities and choose the legal arrangements that suited them.
- <sup>25</sup> Kate Philip 'A History of Townships in South Africa' in

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Sandeep Mahajan, Ed., *Economics of South African Townships* (2014), [http://www.za.undp.org/content/dam/south\\_africa/docs/Reports/UNDP%20Inequality%20South%20Africa.pdf](http://www.za.undp.org/content/dam/south_africa/docs/Reports/UNDP%20Inequality%20South%20Africa.pdf) (accessed 6 September 2016).

<sup>26</sup> The apartheid government entrenched the link between communal land tenure and notions of tribal identity. The apartheid government tried to shut down the wide variety of land tenure practices in the areas designated as Bantustans. <http://www.plaas.org.za/sites/default/files/publications-pdf/PLAAS%20Rural%20Report%20Book%203%20-%20Tara%20-%20Web.pdf>

<sup>27</sup> Coles, 'Land Reform from Post-Apartheid South Africa', p.719.

<sup>28</sup> Coles, 'Land Reform from Post-Apartheid South Africa', p.720.

<sup>29</sup> Ivan Turok, 'South Africa's Tortured Urbanisation and the Complications of Reconstruction', (Cape Town, 2014).

<sup>30</sup> TRH Davenport, 'The triumph of Colonel Stallard: the transformation of the Natives (Urban Areas) Act between 1923 and 1937' *South African Historical Journal*, (1970).

<sup>31</sup> Davenport and Saunders, *South Africa*, p.598.

<sup>32</sup> Susan Parnell and Tim Mosdell, *Recognising, explaining and measuring chronic urban poverty in South Africa*, (Institute for Development Policy and Management, University of Manchester, 2003), <<https://www.gov.uk/dfid-research-outputs/recognising-explaining-and-measuring-chronic-urban-poverty-in-south-africa>> (accessed 6 September 2016).

<sup>33</sup> Defined by Walker as the 'web of laws and regulations developed to limit the movement to and residence within urban areas of people classified as African' Cheryl Walker, *Landmarked: Land Claims and Land Restitution in South Africa*, (Ohio, 2008), p.246.

<sup>34</sup> T. R. H. Davenport, "Can Sacred Cows Be Culled? A Historical Review of Land Policy in South Africa, with Some Questions About the Future," *Development Southern Africa* 4, no. 3 (1987/08/01 1987), <http://dx.doi.org/10.1080/03768358708439331>.

<sup>35</sup> Alan Mabin, *Structure and Experience in the Making of Apartheid* (Johannesburg, 1990), <http://wiredspace.wits.ac.za/jspui/bitstream/10539/7899/1/HWS-253.pdf> (accessed 6 September 2016).

<sup>36</sup> Paul Hendler, *Rethinking Spatial Planning and Land Use in South Africa – A Historical Analysis*, (Cape Town, 2015), <http://www.plaas.org.za/plaas-publication/seminar-urbanland-hendler> (accessed 6 September 2016).

<sup>37</sup> Paul Hendler, *Rethinking Spatial Planning and Land Use in South Africa – A Historical Analysis*, (Cape Town, 2015), <http://www.plaas.org.za/plaas-publication/seminar-urbanland-hendler> (accessed 6 September 2016).

<sup>38</sup> For more information on rental basis in townships see Hendler, 'Rethinking Spatial planning', 2015.

<sup>39</sup> Department of Land Affairs, 'White paper on South African Land Policy' (Pretoria, 1997), <http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf> (accessed 16 September 2016).

<sup>40</sup> Alison Todes, 'South African Urbanisation Dynamics And The Normalisation Thesis', *Urban Forum*, p.1.

<sup>41</sup> Todes, 'South african urbanization dynamics', p.19.

<sup>42</sup> E van Huyssteen et al., "Urban and Settlement Growth in South Africa: 1996 - 2011," Council for Scientific and Industrial Research, accessed 14 October, 2016. <https://goo.gl/FZH24p>.

<sup>43</sup> Dorrit Posel, "Have Migration Patterns in Post-Apartheid South Africa Changed?," *Journal of Interdisciplinary Economics* 15, no. 3/4 (2004).

<sup>44</sup> A 2013 report by Dieter von Fintel, Louw Pienaar showed that 'hunger levels' in the former homelands have caught up with the rest of South Africa: that food security in the former homelands has improved since 2002 (and have done so faster than elsewhere). The report uses data from the General Household Survey to draw this conclusion, positing as an explanation the large reliance on social grants in those areas, but that communal gardens and access to market may have also played a role. Louw Pienaar and Dieter Von Fintel, 'Hunger in the former apartheid homelands: Determinants of converging food security 100 years after the 1913 Land Act', Working paper for the Department of Economics and the Bureau for Economic Research at the University of Stellenbosch, (Stellenbosch, 2013) and 'How did hunger levels in the former homelands catch up with the rest of South Africa? A hundred years after the Land Act of 1913', *Econ3x3*, (2014), (<http://www.econ3x3.org/article/how-did-hunger-levels-former-homelands-catch-rest-south-africa-hundred-years-after-land-act>).

<sup>45</sup> Wright and Noble, 'Using Indicators of Multiple Deprivation to Demonstrate the Spatial Legacy of Apartheid in South Africa', *Social Indicators Research*, 112, 1 (June 2013) pp. 187-201.

<sup>46</sup> Alison Todes, *Contemporary South African Urbanisation Dynamics*, (Cape Town, 2008).

<sup>47</sup> Ruth Hall, 'The Legacies Of The Natives Land Act Of 1913', *Scriptura* 113.

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- <sup>48</sup> Alison Todes, *Contemporary South African Urbanisation Dynamics*, (Cape Town, 2008).
- <sup>49</sup> Ben Cousin notes, 'In 1994 the initial target was to redistribute thirty percent of agricultural land, or 24.5 million hectares, by 1999, later adjusted to 2014. By 2012 around 7.5 percent (or 7.95 million hectares) had been transferred through a combination of redistribution and restitution' in 'Land Redistribution, Populism and Elite Capture: New Land Reform Policy Proposals under the Microscope' *The Journal of the Helen Suzman Foundation* | Issue 70 | (October 2013).
- <sup>50</sup> Ruth Hall, 'The Legacies Of The Natives Land Act Of 1913', *Scriptura* 113, 1 (2014).
- <sup>51</sup> Turok, Ivan, *South Africa's Tortured Urbanisation and the Complications of Reconstruction*, (Cape Town, 2014).
- <sup>52</sup> Edgar Pieterse, *Post-Apartheid Geographies in South Africa: Why Are Urban Divides So Persistent?* (Leuven University, 2009).
- <sup>53</sup> Daniel P. O'Donoghue, *Urban Transformations: Centres, Peripheries and Systems*, (Canterbury, 2016), p.162.
- <sup>54</sup> Kate Philip, Mbofholowo Tsedu and Meshack Zwane, 'The impacts of social AND economic inequality on economic development in South Africa', (Pretoria, 2014), [http://www.za.undp.org/content/dam/south\\_africa/docs/Reports/UNDP%20Inequality%20South%20Africa.pdf](http://www.za.undp.org/content/dam/south_africa/docs/Reports/UNDP%20Inequality%20South%20Africa.pdf) (accessed 6 September 2016).
- <sup>55</sup> CoGTA, *The Integrated Development Framework* (Pretoria, Undated), <http://www.cogta.gov.za/?programmes=the-integrated-urban-development-framework-iudf>
- <sup>56</sup> Ivan Turok, South Africa's New Urban Agenda: Transformation or Compensation? (HSRC, Cape Town, 2015) <<http://www.erln.co.za/images/jevents/5624bfa28bcf33.24776321.pdf>> (accessed 6 September 2016).
- <sup>57</sup> Sandeep Mahajan, Ed., Economics of South African Townships Special Focus On Diepsloot, <http://documents.worldbank.org/curated/en/217211468302413395/pdf/899170PUB0978100Box385216B00PUBLIC0.pdf> (accessed 6 September 2016).
- <sup>58</sup> SA Government News Agency, Housing delivery in SA: How have we fared?, 11 March 2013, <http://www.sanews.gov.za/south-africa/housing-delivery-sa-how-have-we-fared> (accessed 6 September 2016)
- <sup>59</sup> Edgar Pieterse, Spatial transformation in SAn cities, GTAC Public Economic Winter School 2016 | Edgar Pieterse – 11 July 2016, <[https://www.gtac.gov.za/Event\\_Documents/Day%201%20-%20Spatial%20Transformation%20in%20SA%20Challenges%20Edgar%20Pieterse's.pdf](https://www.gtac.gov.za/Event_Documents/Day%201%20-%20Spatial%20Transformation%20in%20SA%20Challenges%20Edgar%20Pieterse's.pdf)>
- <sup>60</sup> Around the Cape metropole, a similar diagram shows state investment far removed from the centres of private investment (see Pieterse, <[http://www.africancentreforcities.net/wp-content/uploads/2013/10/post-apartheid\\_geographies\\_pieterse\\_15dec09.pdf](http://www.africancentreforcities.net/wp-content/uploads/2013/10/post-apartheid_geographies_pieterse_15dec09.pdf)>
- <sup>61</sup> Daniel P. O'Donoghue, *Urban Transformation in Peripheries: Transformation of South African Cities for Sustainability and Social Justice* (undated), <http://www.unil.ch/files/live//sites/igu-urban/files/shared/Simphiwe.pdf>
- <sup>62</sup> Edgar Pieterse, *Spatial Transformation in South African Cities: Gtac Public Economic Winter School* (Cape Town: African Centre for Cities, 2016).
- <sup>63</sup> Kate Philip, Mbofholowo Tsedu and Meshack Zwane, 'The impacts of social AND economic inequality on economic development in South Africa', (UNDP, 2014), [http://www.za.undp.org/content/dam/south\\_africa/docs/Reports/UNDP%20Inequality%20South%20Africa.pdf](http://www.za.undp.org/content/dam/south_africa/docs/Reports/UNDP%20Inequality%20South%20Africa.pdf) (accessed 6 September 2016).
- <sup>64</sup> Martin Chanock. *The Making of South African Legal Culture 1902-1936* (Cambridge: Cambridge University Press, 2001) pp. 276-7; Johan van der Walt and D. Kleyn, "Duplex Dominium: the History and Significance of the concept of Divided Ownership". In Visser, D. (Ed.), *Essays in the History of Law* (Cape Town: Juta, 1989), pp. 248-9. A ground breaking case set the precedent for the adoption of more absolutist interpretations of ownership, where rights are concentrated in one owner (single or corporate), and which cannot be divided. The judgement rejected the idea of ownership divisible into "bare ownership and beneficial ownership" as the judge could "not see how, consistently with the principles of our law, we can support such a contention, because it appears to me that it is one of the essential differences between the English law regarding ownership of immovable property and our law" (quoted in Rosalie Kingwill, "The Map is not the Territory. Law and Custom in 'African Freehold': A South African Case Study. Phd Thesis, University of the Western Cape, 2014, pp. 324.



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- <sup>65</sup> See Ben Cousins, "Characterising 'communal' tenure: nested systems and flexible boundaries". In A. Claassens, & B. Cousins (eds), *Land, Power and Custom. Controversies Generated by South Africa's Communal Land Rights Act*. 109-137 (Cape Town: University of Cape Town Press, 2008).
- <sup>66</sup> Department of Rural Development and Land Reform. Communal Land Tenure Policy, 2016.
- <sup>67</sup> Martin Chanock, "Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure". In Mann, K., & Roberts, R. (eds), *Law in Colonial Africa*. (Portsmouth & London: Heinemann & James Currey, 1991). pp. 68
- <sup>68</sup> Gavin Capps, "Tribal-landed property: the political economy of the Bafokeng chieftaincy, 1837-1994", PhD thesis: London School of Economics and Political Science, 2010. pp. 4
- <sup>69</sup> Gavin Capps, "Phd Thesis: Tribal-Landed Property : The Political Economy of the Bafokeng Chieftaincy, South Africa, 1837-1994 " (University of London, 2010).pp. 4.
- <sup>70</sup> Ibid. pp. 2.
- <sup>71</sup> Tom Bennett and Catherine Powell, "The State as Trustee of the Land". *South African Journal of Human Rights*, 16, 2000. pp. 601, 615-617.
- <sup>72</sup> Ibid. pp. 601, 607.
- <sup>73</sup> Ibid. pp. 619.
- <sup>74</sup> Capps 2010. pp. 4.
- <sup>75</sup> In the latter, the custodial duties of state trusteeship have been moulded around a concept of 'aboriginal title', which constellates land rights under an umbrella title. South Africa has not adopted the concept of aboriginal title with respect to African-held land, nor is it suggested it should, since it would feed into the segregated reserve concept that exacerbates the subordination of customary rights to the common law and property law; and which have resulted in contentious traditional governance institutions that have served to reinforce apartheid boundaries. The Richtersveld judgement (Alexkor Ltd & another v Richtersveld Community & others 2003 (12) BCLR 1301 (CC) established the case for indigenous title for the dispossessed Khoisan, who are, however, a minority group which is more comparable with the USA and Canada examples. There is thus an important distinction between the trajectory of the South African rights-based approach to tenure and that of the USA and Canada. Bennett and Powell's arguments show that the state's fiduciary responsibilities, however, need not rest on the concept of aboriginal title.
- <sup>76</sup> Bennett and Powell 2000. pp. 615-619.
- <sup>77</sup> Bennett and Powell, 2000.
- <sup>78</sup> Gavin Capps, "Tribal-Landed Property: The Value of the Chieftaincy in Contemporary Africa". *Journal of Agrarian Change*, forthcoming 3, 16 2016. *Draft copy*. 18-19
- <sup>79</sup> Ibid
- <sup>80</sup> Ibid
- <sup>81</sup> Delius 2008. pp. 229-233.
- <sup>82</sup> This section relies on Royston, 2002.
- <sup>83</sup> (Kingwill et al, forthcoming).
- <sup>84</sup> AlSayyad, N. and Roy, A., *Urban Informality* (Oxford, 2003) 1
- <sup>85</sup> Ibid 11
- <sup>86</sup> Hurchzemeyer, M. and Karam, A. (2006) *Informal Settlements: A perpetual challenge* 1
- <sup>87</sup> There is an extensive literature on informal economic activity.
- <sup>88</sup> Lauren Royston 2013
- <sup>89</sup> Marx 2007
- <sup>90</sup> Cousins et al forthcoming
- <sup>91</sup> Strauss and Liebenberg 2014: 428
- <sup>92</sup> Ibid: 429
- <sup>93</sup> Ibid: 445
- <sup>94</sup> National Planning Commission, 2012:277
- <sup>95</sup> (Marcuse 2009; Soja, 2009)
- <sup>96</sup> This section relies heavily on a research report by the Socio Economic Rights Institute, in which one of the authors was involved (Budlender and Royston, 2016)
- <sup>97</sup> (Pieterse, 2009).
- <sup>98</sup> (Pieterse, 2009; Turok, 2012 in Budlender and Royston, 2016)
- <sup>99</sup> (National Department of Housing, 2004:11)
- <sup>100</sup> (summarised in Budlender and Royston, 2016)
- <sup>101</sup> (Cousins et al 2005 and Tissington 2011)
- <sup>102</sup> (Pieterse, 2009; Todes, 2012)

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<sup>103</sup> (Pieterse, 2009; Tissington, 2011; SACN, 2011; Turok, 2012)

<sup>104</sup> (2009)

<sup>105</sup> (2012)

<sup>106</sup> (2012)

<sup>107</sup> (Budlender and Royston, 2016)

<sup>108</sup> See literature review in SERI's recent research report on spatial mismatch (Budlender and Royston, 2016), and in more detail the background research report (Budlender, 2016).

<sup>109</sup> (Budlender and Royston, 2016).

<sup>110</sup> (Pieterse, 2009; Turok, 2012)

<sup>111</sup> (Shisaka, 2011)

<sup>112</sup> (Shisaka, 2011, p8)

<sup>113</sup> (Gordon et al, 2011)

<sup>114</sup> Royston and Kingwill participated in the reference group.

<sup>115</sup> (Durand-Lasserve and Royston, 2002)

<sup>116</sup> (Rakodi and Leduka, n.d., p 40)

<sup>117</sup> See literature review in SERI's recent research report on spatial mismatch (Budlender and Royston, 2016), and in more detail the background research report (Budlender, 2016).

<sup>118</sup> (Budlender and Royston, 2016)

<sup>119</sup> Kingwill 2014a.

<sup>120</sup> The evidence is discussed in Kingwill 2014a.

<sup>121</sup> Chanock 2001. pp. 276-7; van der Walt and Kleyn 1989. pp. 248-9. See n. 81 above.

<sup>122</sup> (SERI, 2016)

<sup>123</sup> Ronald Eglin, Mike Kenyon, Rosalie Kingwill and Siyabulela Manona, "Rethinking communal land administration: Unlocking human settlement development in communal land areas". Housing Development Agency (HDA) RFP/JHB/2015/003, 2015.

<sup>124</sup> Ben Cousins, "A proposal for a land rights ombudsman in South Africa." University of the Western Cape, unpublished paper 2014.

<sup>125</sup> Kingwill, Hornby, Royston and Cousins, "Conclusion", forthcoming.

<sup>126</sup> See detailed analysis in Kingwill 2014a. pp. 279-287. *Bhe & others v Magistrate Khayelitsha & others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1

<sup>127</sup> ULTRA provides for the "conversion of land tenure rights" mentioned in Schedule 1 and Schedule 2 of the Act. In terms of ULTRA, the rights mentioned in the schedules (so-called 'old order' land tenure right) became subject to 'upgrading' to ownership as defined by the Deeds Registries Act, Act No 47 of 1937. A distinction was made between surveyed erven and unsurveyed rights. The rights listed in Schedule 1 are distinguished on the grounds that the land is already cadastrally surveyed and therefore registerable. Examples are quitrent, urban 'deeds of grant' and various leaseholds. Such rights can be automatically converted to freehold. The rights listed in Schedule 2 are essentially unsurveyed 'allocated' rights, such as Certificates of Occupation (Permission to Occupy) that could be upgraded only upon survey, therefore not immediately registerable. It was foreseen that rights holders might request greater levels of formalisation, or in the case of 'tribal' areas, the majority of rights holders might decide by agreement to opt for individual tenure, in which case surveys could in theory commence. The Act also provided for the naming of particular townships to be formalised. These rights were described and regulated in the now mostly repealed proclamations issued between 1962 and 1988. Proclamation R 293 of 1962 - Regulations for the Administration and Control of Townships in Black Areas, 1962; and rural rights in terms of Proclamation R 188 of 1969 - Black Areas Land Regulations, 1969 No. R188 of 1969 (mostly rural land); rights of leasehold as defined in section 1 (1) of the Black Communities Development Act, 1984 (Act No. 4 of 1984); any right of leasehold within the meaning of the Conversion of Certain Rights to Leasehold Act, 1988 (Act No. 81 of 1988); Deed of grant rights or rights of leasehold as defined in regulation 1 (1) of the Regulations concerning Land Tenure in Towns, 1988 (Proclamation No. R.29 of 1988); Deed of grant rights or rights of leasehold within the meaning of the Regulations for the Disposal of Trust Land in Towns, 1988 (Government Notice No. R.402 of 1988).]

<sup>128</sup> Urban township upgrading in the former Bantustans struck similar problems, though more surmountable. Re-planning also involves conformance with a range of town planning requirements, including zoning and public space (e.g. street measurements) and building regulations. The replanning and preparation of General Plans (i.e. subdivision to create erven with registered title) could take up to ten years to complete. Similar challenges confronted conversion to leasehold in terms of the Black Communities Development Act, 1984 (Act No. 4 of 1984) during the eighties. However those properties were easier to convert using ULTRA because they already complied with the Deeds Registries Act in terms of surveys.

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<sup>129</sup> ULTRA was comprehensively evaluated using a series of case studies in several provinces in 2009 and contextualised within a literature review. Umhlaba Rural Services for the Department of Land Affairs, "Situational Analysis Of The Upgrading Of Land Tenure Rights Act (Ultra)". Volume 1: Narrative Report including Literature Review; Volume 2: Provincial data; Volume 3: illustrative maps. 12 February 2009.

<sup>130</sup> *ibid.*

<sup>131</sup> Eglin, Kenyon, Kingwill & Manona, 2015. See Sterkspruit case study in annexure by Manona.

<sup>132</sup> Department of Rural Development and Land Reform, undated memo.

<sup>133</sup> A community is recognised as a 'traditional community' if it observes a system of customary law and this system includes traditional leadership. Section 3(2) says that once recognised, a 'traditional community' must establish a traditional council of at most 30 members, of which at least one third must be women. A minimum of 40 per cent of members must be elected for a term of five years. The senior traditional leader selects the remaining 60 per cent of members 'in terms of that community's customs'.

<sup>134</sup> Bapo ba Mogale case Bofokeng community (see chapter 2 above)

<sup>135</sup> Cousins 2008; Claassens 2008; Rosalie Kingwill, Lauren Royston, Ben Cousins and Donna Hornby. "The policy context: land tenure laws and policies in post-apartheid South Africa" in *Untitled: Securing Land Tenure in Urban and Rural South Africa*, edited by Ben Cousins, Donna Hornby, Rosalie Kingwill and Lauren Royston. Durban: University of KwaZulu-Natal Press, forthcoming.

<sup>136</sup> Chapter 2 [change to 3?]

<sup>137</sup> Kingwill, Royston, Cousins and Hornby. "The policy context", forthcoming

<sup>138</sup> Edgar Pieterse, "Building with Ruins and Dreams: Some Thoughts on Realising Integrated Urban Development in South Africa through Crisis," *Urban Studies* 43, no. 2 (February 1, 2006 2006), <http://dx.doi.org/10.1080/00420980500404020>.

<sup>139</sup> Coldham, 1995

<sup>140</sup> Bromley and Carnea, 1989

<sup>141</sup> Bromley, 2008

<sup>142</sup> Delville, 2002

<sup>143</sup> (Lawry et al, 2016)

<sup>144</sup> (Lawry et al, 2016)

<sup>145</sup> Feder and Nishio, 1999

<sup>146</sup> Musembi, 2007

<sup>147</sup> Fort, 2008

<sup>148</sup> Platteau, 1996

<sup>149</sup> Mighot-Adholla et al, 1991

<sup>150</sup> Lawry et al, 2016

<sup>151</sup> Maganga, 2002

<sup>152</sup> Musembi, 2007

<sup>153</sup> Chauveau and Colin, 2007

<sup>154</sup> (Bledsoe, 2006)

<sup>155</sup> (Coldham, 1978 & 1995)

<sup>156</sup> (Boone, 2015)