

Tenure Reform: Land administration

A review of the findings of the High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change – December 2017

Land administration comprises the sub-systems that **actualise** strategies to implement land policy and other policies within the land management system. Land administration is the binding implementation system. It comprises a number of operational systems, such as the land registration system, the cadastral surveying and mapping system, land valuation and taxation, building regulation administration, sub-division application and development administration, and land related conflict management administration (Barry 1999).

Land tenure, derived from the Latin *tenere* (to hold) is a system incorporating the way in which land is defined and held. Land tenure comprises a matrix or constellation of social and legal relationships that support and negate the holding and use of land by individuals or groups of people (Barry 1999).

Key issues at a glance

Core problems	Principal HLP recommendations
<ul style="list-style-type: none"> ● A total systems collapse of land administration in communal areas. ● An absence of land administration institutions to record, update and manage and adjudicate off-register rights. ● The land administration failure is transversal, affecting the Departments of Rural Development and Land Reform, Human Settlements and Co-operative Governance and Traditional Affairs. ● The current system supports a deeply entrenched hierarchy of rights that favours a particular mode of registration that is highly exclusionary. ● Around 60% of the population who hold land in customary and informal tenure are either excluded from the national register by definition or, alternatively, lose access after registration has been affected. 	<ul style="list-style-type: none"> ● The enactment of a Land Records Act. ● The Law Reform Commission or an inter-ministerial Commission should drive the process of developing the Land Records Act. ● The state needs to build executive capacity to develop a robust and inclusionary land rights administration infrastructure. ● Land rights should be disassociated from traditional authorities.

Problem statement

The total systems collapse in land administration was a common theme in various submissions to the HLP, which has acknowledged that the breakdown in land administration is as a key driver of tenure insecurity.

“Legislative and policy frameworks have so far been ineffective at reflecting and recording the nature of the customary and de facto land rights that exist in practice for most South Africans. There has been a failure to fulfil the promise in Section 25(6) of the Constitution that people whose tenure is legally insecure as a result of past discrimination obtain secure rights to the land which they hold on the basis of customary law and socially legitimate everyday practices.” (p. 226); and “... despite the constitutional requirements of Section 25(6), implementation of tenure reform laws has been weak and ineffective.” (p 471).

Submissions to the HLP argued that in spite of comprehensive protective land rights legislation, the state lacks the capacity to convert protected rights into positive rights. The state has not developed land administration institutions to support, enforce, adjudicate, resolve disputes, record, update and sustain off-register rights of individuals at family/household level, which means that protected rights are not fully legally recognised.

Submissions argued that the current system supports a deeply entrenched hierarchy of rights that favours a particular mode of registration that is highly exclusionary. At the top of the hierarchy is land registration, constrained by the legal parameters of the Deeds Registry and Surveyor General's Office. Evidence shows that conversion to title deeds results in a range of problems due to the disjuncture between common law and customary law (and various hybrids), and title deed records are not kept up to date.

Government proposals/responses

There is no current legislation for addressing land administration failure. The issue is transversal, affecting several jurisdictions including the Departments of Rural Development and Land Reform, Human Settlements and Co-operative Governance and Traditional Affairs, none of which have any grasp of the gravity of the issue. New legislation either ignores or exacerbates the disjuncture between customary and common law system e.g. the Planning and Land Use Management Act (SPLUMA) and proposed amendments to the CPA Act.

HLP Recommendations

The HLP Report recommends the enactment of a Land Records Act in numerous sections dealing with: tenure insecurity, urban and rural spatial inequality, land administration, urban development, continuum of rights, customary and living law rights, family rights, women’s rights, CPAs, land information, geospatial technologies, and others.

“We recommend that a Land Records Act be developed and piloted to formally record and define property rights that are currently off-register, largely because of past racial discrimination, but also because the Deed Registry system is not geared to reflect family-

based systems of layered customary rights. This Act would provide for a continuum of rights and encompass the land rights of those in shack settlements around the cities, those on 'communal' land within the former homelands, families and individuals within Trusts and Communal Property Associations, and people living on farm land".

"The Act will be pivotal in putting in place a robust and integrated land information and administration system for the country which will enumerate, adjudicate and record the rights of some of the poorest families across rural and urban settings and provide a mechanism for advancing our obligations in terms of Section 25(6) of the Constitution."

The HLP recommends that the state needs to build executive capacity to develop a robust and inclusionary land rights administration infrastructure to address the gap in the current state apparatus to recognise and administer land tenure rights that are insecure and contentious. The enactment of new *enabling legislation* was proposed to rebuild land administration institutions, with application to all off-register rights in communal areas, urban informal settlements, CPI's and farms.

The report acknowledges and agrees with complex arguments and analyses in various submissions proposing the development of a land recordal system.

- The report agrees with arguments that land rights should be disassociated from traditional authorities.
- It acknowledges that the formal system is not able to cater for family-based property institutions that protect members' rights of use and access against alienation, or for shared, layered land use access rights that recognise rights to common property resources. Families often hold and succeed to property rights as a whole, and not as individuals.
- The formal registration system only accommodates registration of specified individuals [and by implication, corporations, trusts and CPIs], and registered property must be formally surveyed into discrete parcels.
- These requirements exclude customary use rights held by family members.
- Living customary norms require some flexibility in social and spatial boundaries, which new technologies are increasingly able to map. It is also very expensive to transfer rights when land is transacted, and the value of formal transfers is not appreciated.

The report particularly strongly endorses the development of a recordal system in urban contexts where spatial inequality and non-existent land administration and recordal systems have a particularly pernicious effect on urban land development.

The report recommends that either the Law Reform Commission or an inter-ministerial Commission should drive the process of developing the Land Records Act.

Recommendation 5.1 (p 455)

People need strong and enforceable recorded rights to the land they occupy and use in order to ensure that their land rights are protected. Government needs to invest in an affordable land recordal system that can be rolled out at scale, together with strong land administration and enforcement institutions that are accessible to all, in both urban and rural areas. Upgrading informal rights to freehold title is not always the best option, as global experience has shown. What is needed is a robust recordal system that

can interface with the deeds register. Without such a system, it is inevitable that powerful elites will exploit the vulnerable. The poor will remain invisible to the formal economy and excluded from it. This is a crucial but complex intervention. The Panel recommends that further work to concretise a land recordal law must be taken forward and tested through the rollout of pilot projects. By its nature such work can only be driven by a permanent institution, or structure with an adequate life span. The Panel recommends that the task be delegated to the Law Reform Commission, or to the proposed Commission/Council should that recommendation be accepted.

Recommendation 5.3 (p. 462)

(g) To resolve the problem occurring in many townships of the poor correspondence that exists between the layout and extent of each property in the official register (the cadastre) and the reality on the ground, where many structures, boundaries and access routes have emerged over time that bear little or no relationship to the official plans; this prevents the granting of title deeds when properties are bought and sold. The Land Records Act that is proposed below would address this problem.

(h) Develop and pilot the proposed Land Records Act to provide people living in informal settlements, backyard accommodation and inner-city buildings with greater security and enable them to gradually regularise their status, invest in upgrading the property, and start a formal enterprise.

Recommendation 5.5 (p 481)

The Panel motivates for the enactment of a Land Records Act to enable compliance with Sections 25 (6) and (9) of the Constitution, which should also be read with Section 25 (1) and (2) which guarantee the right to property, and Section 33 which guarantees equitable and accountable administration. The motivation is for national legislation and executive capacity to develop a robust, inclusionary land rights administration system to address the gap in the current state apparatus to recognise and administer land tenure rights that are insecure. As a whole, this approach rests on the proposition that a key driver of tenure insecurity is the breakdown in land administration. There are two key sides to this proposed law: firstly, the idea of having different categories of rights being made 'visible' and, secondly, the elevation of such rights to constitute property.

Recommendation 4.29 (p 565)

The Constitutional Court has found that customary law provides for ownership of land. People in rural areas are entitled to the same rights as all South Africans, including the recognition of their customary ownership of land. Parliament must ensure that no laws or policies abrogate these rights and a law is introduced to secure customary land rights as required by Section 25(6) and (9) of the Constitution

Conclusion

HLP report highlights the importance of **dismantling the hierarchy of rights** as can be seen in its verbatim extract as follows:

Current legislation and systems of land administration are built upon a rigid hierarchy of rights that privilege rights registered in the Deeds Registry. Official policy discourse assumes that the answer is to move all rights into this system — an argument that appears to offer both historical redress and increased tenure security. Currently, in

South Africa, criteria for registerability require, at minimum, a one-to-one relationship between a parcel of land surveyed to within centimeter precision, and an identifiable 'owner', whether singular or joint. Rights in land that do not meet these requirements may not be registered. Owners, moreover, have rights of alienation, which threaten familial claims. These criteria mean that roughly 60% of the population who hold land in customary and informal tenure are either excluded from the national register by definition or, alternatively, lose access after registration has been affected.

The HLP report has interwoven the proposal for a Land Records System with all sections on land issues, particularly tenure reform, customary rights, family rights, CPA rights and women's rights, and given the Land Records Act concept great prominence to urban tenure under Spatial inequality. The report has taken large pieces verbatim from both the submission on Spatial Inequality and the Memorandum proposing a Land Records Act.