PARI PUBLIC AFFAIRS RESEARCH INSTITUTE

LRC LEGAL RESOURCES CENTRE

LAND GOVERNANCE

What are the challenges of incorporating the diverse land rights of the majority of South Africans into the existing formal land registration system?

POLICY BRIEF 1/3

NOVEMBER 2024

ABOUT THIS BRIEF

This is the first of a series of three policy briefs in which we unpack the problem of registering the land rights of millions of South Africans currently not capable of being registered in the formal deeds registration system. We explain why the problem is a complex one that requires a considered response. After discussing the most important existing initiatives that are aimed at addressing the problem in the second brief, we suggest a way forward for policymakers on this issue in the third.

AUTHOR

Wilmien Wicomb, Legal Resources Centre

SUGGESTED CITATION

Wicomb, W. (2024) 'What are the challenges of incorporating the diverse land rights of the majority of South Africans into the existing formal land registration system?'. LRC/PARI Policy Brief 1/3. Johannesburg: Public Affairs Research Institute.

AVAILABLE ONLINE AT

https://pari.org.za

The majority of South Africans hold land and occupy dwellings outside the formal system of registered land rights captured in the country's deed's registry.[1] This includes the people on communal land, farm workers and dwellers, people in informal settlements and backyard shacks, inner city buildings, and RDP houses with either no title or outdated titles. These rights are often described as 'off-register' or 'informal'.

In the context of a formal system that continues to privilege common law forms of private property above all else, 'off-register' rights are necessarily insecure and vulnerable. Is it possible to simply roll out the existing formal registration system to all South Africans by issuing title deeds to all off-register rights holders?

This policy brief argues that such a simplistic approach will not only be impossible to sustain, but without an understanding of, and engagement with, what different forms of existing tenure mean, how these are defined and what the rationale is for people's need for tenure security, a reliance on simply converting rights into title deeds could render people's land rights more *in*secure. Rather, a more nuanced approached is required, building on the ways in which people are organising around tenure in the absence of the formal legal system.

1 Hornby, D., R. Kingwill, L. Royston and B. Cousins (2017) 'Tenure Practices, Concepts and Theories in South Africa', in D. Hornby, R. Kingwill, L. Royston and B. Cousins (eds) *Untitled: Securing land tenure in urban and rural South Africa.* Pietermaritzburg: University of KwaZulu-Natal Press, p7.

Background: Why the majority of South Africans have off-register land rights and therefore insecure tenure

Colonisation radically changed the land relations and institutions that had existed across Africa.[2] Property, as understood in Anglo-European property law, envisions an owner having both *access* and *control* over the property. It is the logic of private property: to have full authority to do with your land as you please, subject only to state regulation and potential other registered rights. The late great Kenyan scholar Okoth-Ogendo powerfully explained misperceptions that colonisers used to justify their mass appropriation of indigenous land in Africa. In an affidavit to the South Africa's Constitutional Court in the *Tongoane* matter, he said:[3]

> *Widespread misperceptions about the content and dynamic of indigenous social and legal systems particularly as they relate to land rights and land relations [...] include that land occupied by indigenous populations at the beginning of colonization was terra nullius [...] and was available for expropriation in terms of the law of the colonizers; that in consequence, indigenous populations had no rights constituting property in such land, this being possible only under Western property law and in terms of 'ownership' [...]. The ideology behind this reasoning is that property in land exists only if it is derived from some sovereign authority and if it vests exclusive rights of use, abuse and disposition in individuals; [...] that at family or individual level, indigenous populations had through customs and usage, not law, mere usufructuary rights in such land, such rights being held at the whim of traditional authorities; [...] that only the transformation of indigenous societies, founded on 'modern' individualised systems, would convert those usage rights into legal property rights [...]; that the proper goal of land tenure policy therefore was the transformation of community regimes into private property systems based on freehold or comparable forms of ownership.*

The imposition of colonial legal systems that understood property exclusively as private property, systematically suppressed indigenous law, institutions and value systems. This did not destroy the African tenure rights and the relations that defined these rights but rendered them invisible to the formal legal system.

In South Africa specifically, the complicated local and regional tenure regimes developed by different colonial governments at different times and in different areas of South Africa, left an even more complex legacy, with weak forms of tenure such as quitrent and Permissions to Occupy[4] – initially created specifically for black South Africans and enforced unevenly across the colonies. After the consolidation of South Africa into a union, the Natives Land Act 27 of 1913 entrenched the dispossession of black people into national law. Even so, in tiny pockets of the country, some black purchasing of land continued, often by land-buying syndicates.[5]

2 Chitonge, H. (2021) 'Land Governance in Africa: The New Policy Reform Agenda', in H. Chitonge and R. Harvey (eds) *Land Tenure Challenges in Africa: Confronting the Land Governance Deficit,* pp. 1–25. Cham: Springer, p3.

3 Okoth-Ogendo, H.W.O. Affidavit presented to the Constitutional Court in the matter of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC) ; 2010 (8) BCLR 741 (CC) (11 May 2010), para 8.

4 Hornby, D., R. Kingwill, L. Royston and B. Cousins (2017) 'The Policy Context: Land tenure laws and policies in post-apartheid South Africa, in D. Hornby, R. Kingwill, L. Royston and B. Cousins (eds) *Untitled: Securing land tenure in urban and rural South Africa.* Pietermaritzburg: University of KwaZulu-Natal Press, p45.

5 Feinberg, H.M. (2009) 'Black South African Initiatives and the Land, 1913-1948'. *Journal for Contemporary History* 34(2): 39–61.

In urban areas, policies were designed to limit access for black South Africans and any residential rights tended to be weak and temporary.[6] The apartheid government added a further layer, giving wide-ranging powers, including control over the allocation of land, to traditional leaders compliant with the aggressive betterment policies of the government.[7] In the second half of the twentieth century, mass forced removals further impacted millions of black South Africans.[8]

The legacy of imposing an exclusive private property regime, thereby rendering indigenous forms of tenure invisible, continues to contribute to the high levels of poverty on the continent, and in South Africa, to the extraordinary levels of inequality that persist. In addition, the scramble for Africa's natural resources that intensified over the last decades have exponentially increased the pressure on these unregistered rights.

Earliest attempts to formalise tenure

After the World Bank's 1975 'Land Reform Policy Paper',[9] the Bank started to drive reform of national land policies in Africa that focussed on formalisation through titling. However, by the 1990s, even the World Bank accepted that simply imposing titles on land tenure systems that did not subscribe to the tenants underlying private property systems, could not work. Their focus then shifted to formalising existing rights, such as customary tenure rights, by recognising such rights through existing local institutions.[10] While their approach had shifted, then, it still did not appreciate that property in the African context does not in reality follow the logic of private property, that relies on a 'supreme authority' – in this case traditional leaders – conferring access and control upon an exclusive 'owner'.

Since the early 2000s, this World Bank approach was further informed by the ideas of Hernando De Soto, who argued that if rights are documented, they become assets that can be turned into capital, that in turn can create additional value by, for example, being used as collateral. He advocated for local agreements and rules to be standardised to create a single, integrated regulatory framework.[11]

While both the World Bank and De Soto presented their approach as a mere 'adjustment' of existing local legal frameworks, no doubt aware of the failure of titling efforts of the previous century, the policies they promoted arguably still 'boil[ed] down to converting informal property into private property through systematic titling'.[12] As Cousins et al. (2006: 6) argued:

> *Most critics agree that titling probably is useful to elite and middle-income groups who can afford financial leverage, risk and real estate markets. For the poor, whose concerns are more about day-to-day survival, direct access to livelihood and keeping costs down, de Soto's prescriptions, far from being empowering, may provoke their further descent into poverty.*

6 Hornby, D., R. Kingwill, L. Royston and B. Cousins (2017) 'The Policy Context: Land tenure laws and policies in post-apartheid South Africa, in D. Hornby, R. Kingwill, L. Royston and B. Cousins (eds) Untitled: Securing land tenure in urban and rural South Africa. Pietermaritzburg: University of KwaZulu-Natal Press, p46.

7 Ibid.

8 N6 above (Hornby et al., 2017: 47).

9 Deininger, K. and H. Binswanger (1999) 'The Evolution of the World Bank's Land Policy: Principles, Experiences and Future Challenges'. *The World Bank Research Observer* 14(2): 247–276.

10 Chitonge, H. (2021) 'Land Governance in Africa: The New Policy Reform Agenda', in H. Chitonge and R. Harvey (eds) *Land Tenure Challenges in Africa: Confronting the Land Governance Deficit,* pp. 1–25. Cham: Springer, p6.

11 Cousins,B., R. Kingwill, T. Cousins, D. Hornby, L. Royston and W. Smit (2006) *Mysteries and Myths: De Soto, Property and Poverty in South Africa.* International Institute for Environment and Development, p5.

12 Ibid: 6.

South African Government initiatives to provide tenure secure for all

An initial spate of policies and legislation in the late 1980s and 1990s attempted to make some inroads into the legacy of weak and insecure property rights for black South Africans. After 1994, the new government did create statutory land rights or protections for groups of particularly insecure people and a limited mechanism for upgrading to title as set out in this table:

1.	**Farm workers/dwellers**	Extension of Security of Tenure Act 62 of 1997 ('EStA')	Statutory rights
2.	**Labour tenants**	Land Reform: Labour Tenants Act 3 of 1996 ('LTA')	Statutory rights
3.	**Former mission stations/'coloured' rural areas**	Transformation of Certain Rural Areas Act 94 of 1999 ('TRANCRAA')	Mechanism for communal registration
4.	**Customary land rights holders in the former Bantustans**	Interim Protection of Informal Land Rights Act 31 of 1996 ('IPILRA')	Statutory rights confirming customary rights
5.	**Beneficial occupiers of state land**	Interim Protection of Informal Land Rights Act 31 of 1996	Statutory rights
6.	**Descendants of black land-buyers**	The Land Title Adjustment Act 111 of 1993 ('LTAA')	Mechanism for communal registration
7.	**Occupants with insecure tenure in urban areas**	Housing Act 107 of 1997	Mechanism for registration
8.	**Certain leaseholds, quitrent and deeds of grant**	Upgrading of Land Tenure Rights Act 112 of 1991 ('ULTRA')	Mechanism for registration

Legislation aimed at creating mechanisms to simply usher unregistered rights into the deeds registry, such as ULTRA, have had limited success. There remains only one way of registering property rights in South Africa and that is through the deeds registries system which 'has evolved over centuries largely to match land and inheritance practices of western and settler societies'.[13] As a result, only real rights such as ownership, notarial leases, mortgage bonds and servitudes are currently capable of registration, and then only over surveyed parcels. This system fulfils the vital function of publication, in other words, of ensuring that anyone is capable of determining through a search of the registry, who the owner of a piece of land is and who may have other registered rights over the property. In this way, publicity is one of the key reasons why private property is so secure.

The registry system is fundamentally based on an understanding of property as a relationship between a surveyed parcel of land as the property and a person as the holder of real rights over it. Invisible to this system are the relations from which African tenure rights emanate, which, in terms of the Western common law would be regarded as personal rights, which, like a contractual right, applies between specific persons only, and is thus not capable of being registered.

The statutory protections have, for different reasons, not provided the needed protections for the tenure of most of the people it aimed to serve. These statutory rights are not capable of being recorded in the registry, because they fall outside the common law framework, and because the legislation largely aimed at protecting these rightsholders from arbitrary deprivation or eviction without providing positive content to the rights. It is thus not possible to register the rights of a farmworker on the title deed of a private landowner, for example, or of households with customary land rights on communal land. As a result, the content of these rights has been slowly and systematically unpacked through the courts, but those gains are often slow to be rolled out beyond the jurisprudence.

13 Kingwill, R. (2018) 'Title deeds for all: It isn't that simple'. *Politicsweb*. 26 October 2018. https://www.politicsweb.co.za/opinion/title-deeds-for-all-it-isnt-that-simple.

Consequences of the current land registry for those who are not accommodated

The real-world impact of the inability of the existing registry to accommodate the myriad of existing land rights in South Africa is significant. Some examples include:

The customary rules of rural homesteads were taken to urban areas and evolved into what is known as 'family houses' that 'belong collectively to multi-generational lineages'.[14] The function of the family house is to provide a place of refuge where a family member can return to in times of need. When some of these houses were granted title in upgrading initiatives, that title was placed in the name of a single person, which eradicated the shared rights of the rest of the family entirely. Family members are increasingly approaching the courts, usually when they realise to their shock that the family member in whose name the house was registered intends to sell it – and has the legal authority to do so as the registered owner. Our law does not have a mechanism to recognise family houses and shared rights to them at present.

Research in informal settlements that had been upgraded and title deeds awarded to homeowners have indicated that the 'formal' system of registration soon broke down, with people reverting to informal transfers as the formal process was too expensive. It also had the effect of making many residents' tenure less rather than more secure, because of the disregard for how tenure exists within social relations that prioritise the safety of a home for family and kin above the economic value of the house.[15]

The registering of so-called 'communally' owned land, such as land recovered through restitution, into the name of a single entity, like a Communal Property Association or a Trust, to hold ownership on behalf of the members of the community, has proved to provide little to no security for the tenure of the members individually,[16] which arguably lies at the heart of the 'failure' of these communal property institutions.

Some off-register rights holders have their right not to be removed without due process protected in statute law, like farm dwellers who are protected by ESTA, labour tenants who can rely on the Land Reform: Labour Tenants Act and customary rights holders and beneficial occupiers who have protective rights in terms of IPILRA. However, these protections are difficult to enforce, with any threat to these rights having to be prosecuted in the courts which is prohibitively expensive for most people.

Research in informal settlements that had been upgraded and title deeds awarded to homeowners have indicated that the 'formal' system of registration soon broke down, with people reverting to informal transfers as the formal process was too expensive.

14 Bolt. M. (2023) 'The family home in South African townships is contested – why occupation, inheritance and history are clashing with laws'. *The Conversation*. 26 September 2023. https://theconversation.com/the-family-home-in-south-african-townships-is-contested-why-occupation-inheritance-and-history-are-clashing-with-laws-213100.

15 Cousins, B., T. Cousins, D. Hornby, R. Kingwill, L. Royston and W. Smit (2005) 'Will formalising property rights reduce poverty in South Africa's 'second economy'? Questioning the mythologies of Hernando de Soto'. PLAAS Policy Brief No 18, October 2005. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. https://www.researchgate.net/publication/237787711_Will_Formalizing_Property_Rights_Reduce_Poverty_in_South_Africa%27s_Second_Economy_Questioning_the_Mythologies_of_Hernando_de_Soto

16 Cousins, T. and D. Hornby (2017) 'Leaping the Fissures: Bridging the Gap between Paper and Real Practice in Setting up Common Property Institutions in Land Reform in South Africa', in D. Hornby, R. Kingwill, L. Royston and B. Cousins (eds) *Untitled: Securing land tenure in urban and rural South Africa,* pp. 353–55. Pietermaritzburg: University of KwaZulu-Natal Press.

With no way of registering the nature and contents of the customary land rights of households living under traditional leaders, they are largely not recognised as the 'affected rightsholders' for the purposes of IPILRA. Rather, their rights disappear behind the veil of 'the community' with the traditional authority treated as the presumed representative, owner and land allocation authority. Despite repeated statements from the courts that the rightsholders themselves have the right to consent to any deprivation of those rights, in practice traditional authorities continue to act as the assumed rightsholder on behalf of the community.

The litigation brought by CASAC against the Ingonyama Trust Board ('ITB')[17] and others in 2018 also emanated from the fact that the customary rights of the people living on Ingonyama Trust land were ignored, even despite the statutory protection provided by IPILRA. As a result, the ITB attempted to 'convert' these land rights into leases. This was declared unconstitutional by the KZN High Court.

Conclusion

Many still argue that the solution lies in bringing off-register rights, including those rooted in African tenure, into the private property regime. Even within this group, however, most dismiss the possibility of simply upgrading indigenous and statutory forms of tenure, including family holdings, to individual ownership. The attempts in South Africa to do so, through legislation such as the Upgrading of Land Tenure Act and the Conversion of Certain Rights into Leasehold or Ownership Act[18], have created more problems than solutions.

The existing situation of the majority of South Africans falling outside the formal registration system is clearly untenable. In terms of s25(6) of the Constitution, 'a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. There is thus a constitutional imperative for policy makers to address this problem.

In April 2024, parliament passed the Deeds Registries Amendment Bill of 2022, which is currently awaiting the President's signature. The Bill will empower the registrar, for the first time, to record 'land tenure rights lawfully issued by Government or any other competent authority', paving the way for the recordal of new forms of tenure in the registry – even though the wording of the Act still fundamentally relies on the tenure being awarded by a 'supreme authority'. This presents a crucial opportunity to ensure the appropriate recordal of rights previously no capable of registration. As much was recognised by the Portfolio Committee on Agriculture, Land Reform and Rural Development, who passed the Bill with the caveat that the registration of land tenure rights will not come into effect until legislation exists that facilitates the recordal of such rights.[19]

In the next policy brief, we consider different approaches to this problem, in South Africa and abroad, to tackle this issue and assess what these mean for the recordal of off-register rights in South Africa.

17 *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others* (12745/2018P) [2021] ZAKZPHC 42; 2021 (8) BCLR 866 (KZP); [2021] 3 All SA 437 (KZP); 2022 (1) SA 251 (KZP) (11 June 2021).

18 81 of 1988.

19 The committee report notes: *During the deliberations, the Committee noted that the Bill introduces, amongst other issues, the recordal of land tenure rights lawfully issued by the Government or any other competent authority. Such records will be kept at the Deeds Registry to ensure tenure certainty. Given that there is no legislation to facilitate recordal of land tenure rights, Clauses 3(a), 6(b), 12(d), 12(g), and 13 will remain in abeyance until a comprehensive communal land tenure legislation is passed. The clauses referred to will come into operation on a date to be determined by the President by proclamation in the Gazette. The Committee urged the Minister to speed up development of the Communal Land Tenure Bill or any other legislation that will provide for mechanisms to facilitate recordal of land tenure rights.* ATC231206: Report of the Portfolio Committee on Agriculture, Land Reform and Rural Development on the Deeds Registries Amendment Bill [B28 – 2022], dated 5 December 2023, available at https://pmg.org.za/tabled-committee-report/5627/.