

Enhancing Security of Tenure Through Land Administration

POLICY BRIEF 2/3

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ABOUT THIS BRIEF

In the first policy brief, we outlined the problem of off-register rights in South Africa and the challenge of finding appropriate ways to bridge the gap between the recordal and administration of typically common-law property rights on the one hand, and customary and other informal land rights on the other.

In this policy brief, we discuss the concept of land administration and how it relates to tenure security, arguing that a well-functioning and coherent land administration system is in fact the necessary conduit for securing tenure. Secondly, we look at the key international approaches to addressing the problem of off-register rights and consider the suitability of these approaches to the South African contexts.

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What is land administration?

If land governance refers to policy, development and land-use decisions around land resources, then land administration is the management function that executes those policies laws. 'From the perspective of land right, land administration comprises all the mechanisms that "actualise" land rights and land use in a way that balances individual and broader societal interests.'¹ Put differently, land administration can be defined as²

the management of land tenure, land valuation, land use, and land development. A land administration infrastructure is defined as the policy instruments, legal frameworks, institutional design and technical tools that underpin the delivery of these four functions.

Kingwill (2019) has developed a useful table setting out the categories of functions that form part of a land administration system, which we present with some adaptations here.

1 Kingwill, R. (2019) LandNNEs Discussion document, referenced in _____ (2021) 'Towards an Integrated Land Administration System'. A PLAAS, PARI, SALGA Diagnostic Report. Johannesburg: Institute for Poverty, Land and Agrarian Studies, Public Affairs Research Institute and South African Local Government Association. Available at <https://pari.org.za/towards-an-integrated-land-administration-system/>

2 Bennett, R., A. Rajabifard, I. Williamson and J. Wallace (2012) 'On the Need for National Land Administration Infrastructures'. Land Use Policy 29 (1): 208–19.

JURIDICAL /ADMINISTRATIVE

Allocation of rights to land, that is, the mechanism of acquiring rights to land. Examples include sale, donations, inheritances, prescription, expropriation, servitudes, leases, mortgages, customary allocations, beneficial occupation.

Defining the land parcel, by, for example, defining a surveyed parcel, demarcating boundaries on the ground or on a plan.

Adjudication and conflict resolution, that is, the administrative process by which the rights to a piece of land are determined. This includes resolving disputes or doubts about the land, such as boundary disputes, but does not refer to disputes that are adjudicated by courts.

Registration which refers to the recording of information of rights and parcels as a form of witnessing the rights.

REGULATION

Management of land use through, for example, zoning, environmental regulation and planning permissions.

FISCAL

Valuation and taxation of the property.

Compensation, for example in the case of expropriation.

INFORMATION MANAGEMENT

Storage of land information which requires collection, storage, retrieval, dissemination and ideally, publication. For example, the Deeds Registry and diagrams available from the Surveyor-General's Office.

ENFORCEMENT

The mechanisms used to enforce these functions.

Once these functions are understood, the dichotomy between registered and off-register rights in South Africa emerges very clearly, as demonstrated in the comparative table below:

Registered rights	Unregistered rights, including customary, statutory and other informal land rights
JURIDICAL /ADMINISTRATIVE	
Allocation of rights to land: based on the common law property system in South Africa, a range of clearly defined mechanisms are recognised as a lawful means of acquiring rights to land, include through sale, donation, inheritance, prescription, servitude and lease. Rights acquired through these mechanisms can be registered in the Deeds Registry.	Allocation of rights to land: rights recognised in statute, such as ESTA, the LTA and IPILRA; land rights allocated in terms of custom, local law and norms (including informal sales agreements); transmission in terms of hybrid of common law and customary law succession.
Defining the land parcel: parcels are precisely demarcated and surveyed and integrated into the cadastre system.	Defining the land parcel: boundaries determined informally by local traditional or community structures. Rarely does an individual hold a right over a single parcel, but overlapping rights are held by a family, a community or other group. Land rights and land use often fused into single concept. Parcels not able to be integrated into the cadastre system.
Adjudication: checks by land surveyors and conveyancers to precisely determine the spatial and textual elements of the right in land.	Adjudication: often determined by local traditional or community structures. Disputes sometimes adjudicated by traditional courts. Reliance sometimes placed on community witnesses.
Registration: these rights are precisely recorded in the Deeds Registry	Registration: these rights are not capable of recording in the deed's registry. Largely unrecorded.
LAND-USE REGULATION	
Spatial planning implemented by local government in terms of national legislation, the Spatial Planning and Land Use Management Act, provincial legislation and municipal by-laws through zoning, land-use management plans etc. Further regulation in terms of national and provincial statute relating to environmental protection, mining rights, heritage, building requirements, etc.	Spatial planning and further regulation very unevenly applied in settings with off-register rights. Land use largely determined by local traditional or community structures with no reference to national or provincial legislation.
FISCAL	
Valuation, taxation and compensation regulated by national legislation and implemented by national and municipal government.	Falls outside the regulated valuation, taxation and compensation system. Extra-legal and unregulated 'taxation' often enforced at a local level by traditional or community structures.
INFORMATION MANAGEMENT	
Information captured in the Deeds Registry, Surveyor-General's Office, SAHRA, PASA, DMRE, local government systems. Information thus captured and coherent, but no integrated data system exists for easy retrieval.	Hardly any information captured. Entirely outside the information system.
ENFORCEMENT	
Enforcement by government authorities responsible for taxation, land-use planning, environmental permissions, etc. in terms of legislation.	Informal and extra-legal regulation enforced by informal and extra-legal authorities or not at all.

As this table illustrates, finding a way to incorporate the formal and informal systems requires innovative thinking to ensure that the land administration infrastructure is in place so that, even if off-register rights make their way into the register, those rights are made real. Internationally, this divide between parcel-based and socially based land information, tenure and management has come to the fore as part of the conversation on sustainability and environmental concerns. We now turn to the two standout approaches internationally to attempt to bridge the gap between registered and unregistered tenure and land administration.

Alternative approaches to land administration

a. The Fit-for-Purpose Land Administration Approach

The fit-for-purpose land administration approach is promoted by the World Bank and UN-Habitat as a solution to the estimated 75 per cent of the world population without access to formal systems of registration and securing land rights. The elements of the fit-for-purpose approach are that it should be:³

- Flexible in the spatial data capture approaches to provide for varying use and occupation;
- Inclusive in scope to cover all tenure and all land;
- Participatory in approach to data capture and use, to ensure community support;
- Affordable for the government to establish and operate and for society to use;
- Reliable in terms of information that is authoritative and up-to-date;
- Attainable in relation to establishing the system within a short timeframe and within available resources;
- Upgradeable with regard to incremental upgrading and improvement over time in response to social and legal needs and emerging economic opportunities.

In addition, the approach requires that 'a country's legal and institutional framework must be revised to apply the elements of the fit-for-purpose approach. This means that the approach must be enshrined in law, it must be implemented within a robust land governance framework and the information must be made accessible to all users'.⁴

The four key principles of the approach are:⁵

- General rather than fixed boundaries;
- Aerial imageries rather than field surveys;
- Accuracy related to the purpose rather than technical standards;
- Opportunities for updating, upgrading and improvement.

Critics point out that the approach, with its focus on quick solutions, does not afford time for community engagement, enumeration and adjudication based on local rules, norms and protocols and therefore glosses over the realities of power relations that are entrenched in local governance structures. As Kingwill (2019), following Barry et al. (2013), argues with reference to the South African context:

³ Enemark, S., K.C. Bell, C. Lemmen and R. McLaren (2014) 'Fit-For-Purpose Land Administration'. A Joint FIG/ World Bank Publication. International Federation of Surveyors No. 60 (2): 6. Available at <https://www.fig.net/resources/publications/figpub/pub60/figpub60.asp>

⁴ Ibid.

⁵ N3: 7.

In many communities in South Africa where state-regulated land administration has been absent for so long, [...] interventions like records, firstly, do not capture the existing power relations and local mechanisms people have used to defend their interests, and secondly, the records potentially change the power dynamics and there are no means to monitoring an maintaining the new relationships that are not necessarily captured in the records.

There are, however, examples where this approach has been successfully implemented. In 2009, Rwanda implemented the Land Tenure Regularisation programme to provide legally valid land documents to all rightful landholders.⁶ During the course of five years, 10.4 million parcels of land were registered and 8.8 million printed land-lease certificates were issued.⁷ A general boundaries approach was used and the collection of data was highly participatory, with locally recruited and specially trained ‘para-surveyors’ outlining the parcel boundaries.⁸ Information on the owner’s rights and particulars were captured in claim registers by legally constituted adjudication committees.⁹ The reduction in land conflicts and improved security of tenure has increased investment and productivity.¹⁰

b. Talking Titler Network

From fieldwork in the 1990s in South Africa – that included informal settlement upgrades and restitution communities, customary tenure regimes in Ghana and post-conflict land administration in Somaliland – a group of researchers spearheaded by Mike Barry developed what they call the Talking Titler evolutionary design approach.¹¹

Barry et al. (2013) are critical of the fit-for-purpose and related Social Tenure Domain Model (STDM)¹² developed by the World Bank and others to deal with complex tenure systems. These models, they argue, still apply a standardised solution to problem contexts. The more appropriate approach, they suggest, is to allow a particular design for different contexts to emerge after empirical testing over a long period.

The model is based on four primary classes, namely media, person, land object and reference.

Media refers to any item that serve as evidence, whether a photograph, handwritten notes or a will.

Person includes anyone (i.e. individual, legal person, social group) who might hold an interest in land and/or be involved in administering the land (i.e. land surveyor, system operator).

Reference refers to some sort of document or identifier of the land object, such as a title, a reference number, a permission to occupy or an informal house number.

The **land** object and the person in question may be related to other land object and other persons, reflecting nested rights and relations based on social networks and social hierarchies.

6 N3: 27.

7 Ibid.

8 Ibid.

9 Ibid.

10 Ibid.

11 Barry, M., R. Molero and A. Muhsen (2013) ‘Talking Titler: Evolutionary and Self-Adaptive Land Tenure Information System Development’. South African Journal of Geomatics 2(1): 1–12.

12 The STDM is a relational database, using open source GIS software that can support a range of tenure. It was designed to provide a standard for representing people-land relationships regardless of their levels of formality or legality. See <https://stdm.gltm.net/>

Based on the capturing of data into this basic model which remains flexible, the designers see a more complex land administration process suitable for the specific land administration situation emerging from it.

Barry et al. (2013) do point out that the trade off for having a flexible system that can adapt to and accommodate complex situations, is that the system is not as simple to use as a standard, inflexible model, and therefore uptake from the community will be harder to achieve. It is a challenge that requires significant further thought.

South Africa's land-rights system is complex and context specific. An approach that can accommodate and adapt to these complexities may be suitable in responding to South Africa's land administration situation.

Conclusion

In this policy brief, we demonstrated why tenure security depends on a coherent and accessible land administration system including the wide array of functions that fall under this umbrella. We demonstrated how these functions exist in relation to registered rights, but not for unregistered rights. This deepens the challenge of bridging the gap between registered and off-register rights. Fortunately, there are existing attempts internationally to address this problem, although the unique South African situation arguably requires a uniquely South Africa response. In the third policy brief, we discuss the work being done by practitioners within the South African context towards feasible proposals for securing tenure within a coherent land administration system.