PARI PUBLIC AFFAIRS RESEARCH INSTITUTE

LRC LEGAL RESOURCES CENTRE

LAND GOVERNANCE

Proposals to Policymakers to Transform Land Administration and Secure Tenure for Unregistered Land Rights in South Africa

POLICY BRIEF 3/3

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ABOUT THIS BRIEF

In the first policy brief in this series, we outlined the problem of off-register rights in South Africa and the challenge of finding appropriate ways of bridging 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 the second policy brief, we discussed the concept of land administration and why a well-functioning and coherent land administration system is a necessary conduit for secure tenure. We also looked at the two most important international approaches to addressing the problem.

In this policy brief, we consider existing and ongoing research into the problem in South Africa that, we argue, provides the empirical data and context-specific analysis that South African policy makers need to transform land administration and tenure in South Africa.

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1. Gathering useful data to inform policy and law reform

On 2 December 2020, Cabinet approved the National Policy Development Framework.[1] The Framework, following an evaluation of government policy and lawmaking during 2017–18, indicated key problems with policymaking, including policy incoherence and a lack of policy coordination – bills crafted without first developing discussion documents (green and white papers) and policies – and limited stakeholder engagement during policymaking processes.[2]

The Framework[3] identifies 'a lack of data-driven policy decision-making and a slow transition from opinion-based policy making into evidence-based policy making' and 'a tendency to separate initial impact assessment (SEIAS)[4] from the policymaking process, meaning that there is a lack of critical due diligence in devising alternative policy options during the impact assessment phase' as important causes to these problems.[5]

1 The Presidency (2020) National Policy Development Framework. Pretoria: The Presidency of the Republic of South Africa. Available at https://www.gov.za/documents/other/national-policy-development-framework-2020-02-dec-2020.

2 Ibid: 6.

3 Ibid.

4 The objectives of SEIAS, a requirement for policies and draft bills presented to Cabinet since 2015, are to: a) Ensure that departments analyse risks and costs associated with the development of policy, legislation and regulation and propose ways to mitigate them; b) Contribute to improving policies, rather than simply helping to decide whether they are worthwhile; c) Address the lack of consistent implementation of the public participatory process to date and point to ways to improve the effectiveness and efficiency of implementation; and to, d) Take into consideration how government actions impact on and relate to transformation, environment and inclusive growth of the economy (p5–6).

5 N1: 5.

The Department of Planning, Monitoring and Evaluation (DPME) understands evidence-based policymaking (EBPM) as being 'about making decisions based on knowing with an estimated degree of certainty what works, at achieving which outcomes, for which groups of people, under what conditions, over what time span, and at what cost?'.[6] In this way,

> *EBPM differs from policy-making based solely on what people believe to be the best way to achieve better outcomes, and from decision-making based on ideology and political conviction alone [...] For policy-making and implementation purpose it is as important to establish that an intervention does not work, as it is to know that it does work. Hence we need information and data that can confirm, or reject, our assumptions about a policy's anticipated effectiveness and how it is best achieved.*

The DPME distinguishes between statistical evidence based on sampling and comparative analysis of policy options, and quantitative evidence that seeks to 'understand *why*, *how*, and *under what conditions* a policy intervention will be effective'.[7]

Of course, EBPM is, in fact, a constitutional obligation. S195(1)(e) requires from public administration that 'people's needs must be responded to, and the public must be encouraged to participate in policy-making'.[8] Thus, in terms of the Framework, 'consultation with stakeholders should commence as early as possible prior to a decision taken on policy direction, including when identifying and conceptualizing a policy issue'.

Crucial quantitative evidence as to how people are understanding, regulating and protecting their off-register tenure rights in urban and rural contexts exist and continue to be produced. What makes this research so valuable from a policy-development perspective, is that it demonstrates how people navigate the complexity of social forms of tenure in ways that work for them. As such, it provides valuable clues to answering the key questions identified by the DPME, namely why, how and under what conditions a policy intervention will be *effective*.

In what follows, we point to some of the important research work already done and currently undertaken that should inform the policy development of the transformation of tenure and land administration in South Africa. We end by briefly discussing the policy lessons that different analysts have drawn from this research.

6 DPME (2014) 'What is Evidence-Based Policy-Making and Implementation?'. Department of Planning, Monitoring and Evaluation. Available at https://www.dpme.gov.za/keyfocusareas/evaluationsSite/Evaluations/What%20is%20EBPM%2014%2010%2013_mp.pdf.

7 N6: 2.

8 N1: 19.

2. Urban tenure security in South Africa

A substantial body of evidence exists about how off-register rights operate in urban areas of South Africa.[9] In 2021, SERI and the Nelson Mandela Foundation published a report[10] on urban tenure security, summarising key findings drawn from the various research initiatives. They found, among other things, that:

- In the absence of formal land administration process, locally managed systems that regulate access to, holding and trading land exist, but are not officially recognised. 'The procedures for land access were well known, the local land managers or authorities were relatively accessible, the evidence was affordable, people were aware of dispute resolution mechanisms and the arrangements were participative and allowed for ordinary members of the community to act as witnesses.'[11]

- While these forms of urban tenure remain unrecognised (legally and administratively), they are coherent forms of social tenure organised through local oversight, social recognition, process and flexibility.

- The identified local tenure arrangements and land-use management include how people protect their own housing rights; how they organise access to services in the absence of state provision; and how they regulate their settlements to minimise the vulnerability of their unrecognised rights.

SERI concludes that 'an alternative approach is required which begins by recognising the local norms and regulations which already exist in informal settlements and the human agency that developed them'.[12] One of the options for recognising off-register tenures that they propose is to develop local land records as a means to recognise tenure and improve its security. Research has indicated that in informal settlements and occupied inner city buildings, lists of occupiers usually exist to record who has the right, among the inhabitants, to be there. These lists are usually managed by local institutions such as building committees or informal settlement structures. 'When these registers are used to identify PIE rights holders in the course of housing rights litigation or when municipalities co-produce them with local organisations, the lists become more secure land records, providing occupiers with proof of residence that they can use to defend their claims should they be threatened.' While these measures provide a good starting point, the potential for political and local elites to capture and manipulate these processes, particularly once they provide a gateway to secure and recognised tenure, should not be underestimated.

This is why a fundamental transformation of the land administration system in South Africa is required in addition to finding ways of recording rights, as was argued in Policy Brief 2. The administration of these rights, once recorded, should be part of a coherent and comprehensive land administration system in South Africa.

9 Such research emanates from initiatives such as Urban LandMark, the Tenure Security Facility Southern Africa, the LEAP collective, SERI, LandNNESS and the research commissioned by the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change.

10 NMF and SERI (2021) 'Urban Tenure Security: A Proposed Approach to Urban Land Tenure Reform'. Nelson Mandela Foundation and Socio-Economic Rights Institute of South Africa. Available at https://www.nelsonmandela.org/uploads/files/NMF-Urban-Tenure-Security-050721.pdf.

11 N10: 5.

12 N10: 6.

3. The Family House

Bolt and Masha (2019) have researched disputes surrounding family houses and urban inheritance in South Africa since 2016 drawing on extensive ethnographic fieldwork. They describe the family house, in particular as it exists in metropolitan areas in South Africa, as an amalgamation of customary norms and the history of apartheid law that prohibited black people from owning urban property, instead providing residential permits listing family members as occupants. 'However, whatever its provenance, the family house is widely insisted upon as a matter of obligatory urban custom, not just habitual cultural usage.'[13] Based on their research into how people who are members of family homes understand the concept, Bolt and Masha define it as 'a social form of property which, after the death of an elder, instead of following testate or intestate succession law and registration of title, continues a more collective family relationship to the property. There is also a strong sense of allowing a sibling or relative unable to acquire their own home to be afforded dignity by taking on the deceased's property'.[14]

From the late 1970s onwards, the then government took steps to convert the permits for township houses into long-term leases and eventually ownership. In the 1990s, the transfer of houses into ownership was ramped up significantly. Thus emerged the problem of individual family members successfully claiming ownership of these houses and even in cases where the family nominated a 'custodian' or where the administration allowed for families to nominate custodians per written agreement, these arrangements were unenforceable as soon as an individual was registered as the owner of the house.

In recent years, disputes over family houses have increasingly reached the High Court, particularly in Gauteng.[15] These disputes overwhelmingly arise when the person, whose name appears on the title deed, sells or otherwise transfers the property to the surprise of other family members who considered the 'owner' as the custodian and the family entitled to joint decision making over the property. These matters are typically dealt with in terms of the specific legislation in terms of which the property was upgraded to ownership. The court would cancel the transfer and, where an inquiry into the rightful owners was required at the time of transfer, order that such an inquiry be done. Where inquiries were done, some courts allow for the outcome to be challenged, while in a third category of cases, the deed is cancelled and transfer instead of intestate succession is ordered. None of these remedies address the real issue, namely that the family house does not recognise a single owner.

In 2017, in the *Hlongwane*[16] matter, the court was provided evidence of a family agreement but held that it was a personal agreement between family members and therefore did not supersede

13 Bolt, M. and T. Masha (2019) 'Recognising the family house: a problem of urban custom in South Africa'. *South African Journal on Human Rights* 35(2): 147–68.

14 N13: 10.

15 See, for example, *Nzimande v Nzimande & Another* 2005 (1) SA 83; *Khuzwayo vs Estate of late Masilele* (28/10) [2010] ZASCA 167; *Nzimande and Another v Nzimande and Others* (24490/12) [2012] ZAGPJHC 223 (11 September 2012); *Moloi v Moloi and Others*, *Smith and Another v Mokgedi and Others* (20175/2010, 14628/2012) [2012] ZAGPJHC 275 (26 October 2012); *Sebatana v Mangena and Others* (08560/13) [2013] ZAGPJHC 246 (6 August 2013); *Ntshalintshali and Others v Sekano and Others* (2014/31317) [2015] ZAGPJHC 123 (12 June 2015); *Khwashaba and Another v Ratshitanga and Others* (27632/14) [2016] ZAGPJHC 70 (29 February 2016); *Maimela v Maimela and Others* (13282/16) [2017] ZAGPJHC 366 (24 August 2017); *Hlongwane and Others v Moshoaliba and Others* (A5009/2017) [2018] ZAGPJHC 114 (2 February 2018); *Ngcobo and Others v Mathonsi and Others* (685/2017) [2019] ZAKZ DHC 32 (16 May 2019); *Ketlele N.O. and Another v Ketlele and Others* (35600/19) [2022] ZAGPJHC 47 (9 February 2022); *Gauteng Provincial Government: Department of Human Settlements and Others v Pogatsi and Others* (2020/19559) [2022] ZAGPJHC 762 (7 October 2022); *Marule and Others v Marule and Others* (15082/2020) [2023] ZAGPJHC 928 (17 July 2023) and *Masilela and Another vs Masilela and Others* (70305/2018) [2024] ZAGP PHC 16 (15 January 2024).

16 *Hlongwane and Others v Moshoaliba and Others* (A5009/2017) [2018] ZAGPJHC 114 (2 February 2018).

the individual ownership registered on the title. In more recent cases, the courts have started to understand the real issue underlying these disputes but remain constrained by the common-law remedies on offer. In *Shomang*,[17] the court explicitly acknowledged that urban custom was applicable and that the family's custom in terms of their family house had to be recognised in law. Du Plessis AJ (as she then was) decried the fact that she remains constrained by the only remedy on offer, namely, to order that an endorsement be made on the title deed indicating that it is a family house. Endorsements remain a bureaucratic remedy, not a legal one and its enforceability remains to be tested.

Once more, the significance of building a strong, transformed land administration system in order to successfully recognise and record the custom of the family house and the rights arising from it, is evident. Both the initial recording of the rights and disputes arising from it should ideally be dealt with administratively, with the courts only providing a final backstop for those who can afford it.

4. Rural tenure

As a starting point, the history of rural tenure under the colonial and apartheid governments continues to have an impact on rural tenure today.[18] Since the late 1930s, the Permission to Occupy (PTO) system was the most widespread form of government regulation of African landholding in the former homelands. PTOs were considered by the government as awarding landholding of occupation but not ownership. From the 1950s onwards, the system was largely adopted by the homeland governments. While millions of PTOs were issued and often kept by magistrates, it was not nearly universal and in cases where land registers were started, these soon became out of date.

After the transition in the 1990s, issuing PTOs was largely discontinued as it was seen as an apartheid relic. However, nothing was put in its place. Today, while a few new allocations are accompanied by PTOs being issued based on local arrangements, in most instances this no longer happens.

Interestingly, when the KwaZulu-Natal High Court found, in 2021, that the Ingonyama Trust's decision to issue leases to customary land rights holders on its land was unconstitutional, it directed that 'until such a time that the Minister of Land Reform and Rural Development may implement an alternative system of recording customary and other informal rights to land of persons and communities residing on Trust-held land, the Minister is directed to ensure that the administrative capacity necessary to implement PTO regulations is reinstated forthwith'.[19] As of the end of 2024, no steps have been taken to restart the implementation of PTO regulations, a process that would require, in essence, creating a new land administration system at the provincial level.

An impressive body of research exists into the ways in which tenure is organised in rural contexts in South Africa in the former homelands. In this section, we focus on the patterns that have emerged from different research projects in different contexts.

17 *Shomang v Motsose N.O. and Others* (6990/2022) [2022] ZAGP PHC 441; 2022 (5) SA 602 (GP) (24 May 2022).

18 Beinart, W., P. Delius M. Hay (2017) *Rights to Land: A guide to tenure upgrading and restitution in South Africa.* Johannesburg: Jacana Media.

19 *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).

4.1 The strongest customary rights are at the household level

In the absence of a PTO or alternative administration and recordal systems and coupled with the rise in political power of traditional authorities, land allocation has, at least from the point of view of the government, become a function of traditional councils. The notion of chiefly custodianship of land is conflated with chiefly control or even chiefly ownership of the land. However, both historical and present-day inquiries into customary law in different contexts, indicate that this is inconsistent with customary law.

As Beinart, Delius and Hay[20] write:

> *There is abundant evidence that in customary tenure systems, rights to land are strongest at the level of the homestead or family, with some sources suggesting that household rights to land are akin to ownership. Once land had been allocated, it belonged to the family who occupied it, and could be inherited. In other words, rights to land come from membership of a family; they were not granted by a feudal landlord-chief.*

The notion of communal tenure that denies the strong rights of household and individuals was rather a colonial notion that justified the mass appropriation of land.[21] The starting point for the recognition and recordal of customary land rights, is that those rights are held at the household level.

4.2 Land administration is decentralised

At the same time, the local land administration of these rights are often decentralised with neighbours, local traditional leaders (headmen) and committees playing the most important part in validating requests for land and resolving disputes.[22] Only when disputes cannot be resolved at this level will the matter be escalated to the chief or traditional council. This has significant policy implications, particularly as the proposals for communal tenure regulation emanating from government have persistently focused on centralising land administration at the highest level of authority recognised, namely the traditional council.

4.3 The amalgamation of customary and common law norms

While the Constitutional Court has determined that customary law should be understood in its own context and not with reference to the common law, it has also become clear that in some instances, customary and common-law norms and rules have become intertwined leading to new forms of hybrid tenure. Kingwill's research into land tenure among African families who acquired freehold title in the nineteenth century, is that the customary concept of the land as family property was not extinguished by the awarding of freehold title (similar to how the family house evolved in the urban context).

20 N17: 15-16.

21 N17: 15-18.

22 See, for example, Cousins, B. (2017) 'The 'Living Customary Law of Land in Msinga, Kwazulu-Natal' in D. Hornby, R. Kingwill, L. Royston and B. Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa,* pp.132–65. Piertermaritzburg: University of KwaZulu-Natal Press.

The land is viewed as family property held by unilineal descent groups symbolised by the family name. This conception diverges considerably from the formal, legal notion of land title as embodied in common law, and from rules of inheritance in official customary law.[23]

4.4 Other rural contexts

Less data exists about how tenure is recognised and administrated in other rural contexts, such as where Communal Property Associations and Community Trusts own the land, where people hold out-of-date quitrent, or the descendants of land buyers hold out of date title deeds, and among groups of labour tenants. At the beginning of 2023, a group of researchers and practitioners[24] identified case studies across the country that represent these different contexts and are studying how tenure is recognised and understood in each case with the aim of feeding this data into the policy discussions about tenure.

5. Conclusion: What does the empirical evidence mean for policy proposals?

The government's Framework for the Development of Policy will require a multi-staged approach to developing policy proposals for the very complex problem of off-register rights in South Africa. While much empirical data exists, debates are to be had about what that means for policy proposals.

Can the Deeds Registry system, that has a proven track record of registering (common law) rights be expanded to include all the different forms of tenure we have discussed, and would that require converting such tenure to title? Is it possible and desirable to record off-register rights without converting them to title, in a parallel system to the Deeds Registry, regulated by a Land Records Act, allowing for movement between the two systems?

Either way, it seems imperative that a land administration system, including a system that allows for the administrative adjudication of contested rights, must be in place for any of these options to have any hope of success. And that would require significant investment from the state, only underlining the importance of these policy decisions to be made in a responsive and participatory manner.

23 Kingwill, R. (2014) 'Papering Over the Cracks. An Ethnography of Land Title in the Eastern Cape'. Kronos 40(1): 241–68.

24 The group includes the Land and Accountability Research Centre (LARC), the Legal Resources Centre (LRC), Phuhlisani, the Alliance for Rural Democracy (ARD), Nkuzi Development Trust, the Association for Rural Advancement (AFRA) and the Land Access Movement of South Africa (LAMOSA).