COMMUNAL LAND RESEARCH PROJECT

RFP/JHB/2015/003

ANNEXURE 4:

PERSPECTIVES ON LAND RIGHTS AND INHERITANCE

November 2015

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1 PART A. THREE BROAD PERSPECTIVES ON STRENGTHENING LAND RIGHTS

1.1 Introduction: Three Paradigms

Institutions, professionals, officials, practitioners and academics understand, conceptualise and act on the challenges of land tenure reforms in varying ways. These perspectives are influenced by practical and strategic concerns, as well as by ideas that are framed by a particular 'world view'. Ideas about land tenure are often associated with beliefs about other objectives, e.g. how best to achieve economic progress, development and democratic governance; extension of basic socio-economic and human rights; promotion of gender equity; how best to tackle persisting poverty; how to encourage investment, etc.

These broader goals, however, sometimes override the reality that societies differ in how they think about, and organise their social units (e.g. families, clans and other socially constructed groups) and how they access and control various natural and material resources, including commodities that are acquired through the market. Hence perspectives about land tenure are also informed by norms and values that inform, and are informed by, wider societal concerns and interests. Many of these norms and values continue to derive strength from indigenous traditional values and 'customary' forms of social organisation. On the other hand, an overriding concern of governments and professionals may be to encourage market values and thus market relations between land holders, which are associated with 'individualisation' of land ownership, which is seen to be a 'western' intrusion.

The cultural attributes associated with particular beliefs and practices result in an unfortunate tendency to see land tenure in terms of a binary distinction between 'western' and 'customary' ideas about land tenure, when the reality is far more complex. Colonial governments were extremely ambivalent about introducing market-related principles in land tenure, and tended to institute measures to curb such developments, while many Africans engaged in the market with alactrity when they had the opportunity to do so. These seemingly paradoxical approaches should not cloud the fact that despite social diffusion many aspects of social organisation continue to relate to predominantly African or predomominantly western values, especially in the arena of family law.

One of the great paradoxes of the transition from apartheid to democratic state institutions has been the persistence of principles that informed past legal frameworks with regard to land tenure. Many of the ideas from the colonial and apartheid era continue to exercise a great hold over current policies, institutional frameworks and law-making. In the rural communal areas, not only have there been few concrete changes to mark the transition, but to make it worse, there is an absence of state institutions to implement and monitor land rights protections. Most of the old land-related functions were restructured, resulting in the removal of various land administration services. The unfortunate result has been a great increase in tenure insecurity, not in the sense of increasing landlessness, but in the sense that the more powerful in these communities can exercise unchecked discretion making decisions about land use (e.g. mining vs arable), revenues and alienation of land, since they are not accountable to an electorate. There is growing evidence of alienation of the commonly-held land associated with communal tenure (i.e. the 'commons'), as well as situations where the powerful elite derive revenues therefrom. The process can be described as one of creeping dispossession. Pauline Peters has documented these processes occurring across sub-Saharan Africa (Peters 2013a, 2013b). At the same time the absence of clear authority discourages more beneficial investments.

The threat to rural communal land tenure rights is sufficiently alarming to warrant serious attention to alternative approaches to securing land tenure at the present juncture, some of which are discussed below. Some of the ideas are not novel to South Africa, but resonate with new approaches being developed in other African contexts that face similar challenges. Many of the ideas are appropriate for both urban informal and rural contexts, though the detail may change.

The section reflects on ideas about land tenure in terms of three broad paradigms, which include tenacious past and present approaches. The paradigms are abstractions that group together patterns of thinking that tend to cohere around particular practices and approaches[1]. It is not possible to draw out in great detail the variations and nuances that may be associated with each, nor the overlaps between them. The idea is to show how ideas tend to stick to patterns of institutional policy and practice in ways that are not always the most rational, constructive or beneficial if considered from the angle of increasing land tenure security for the poor, though these may not necessarily be the objectives shared by policy makers.

A summary is provided first, followed by some elaboration.

a) The formal system

There is widespread belief, mainly among professionals and state officials, that all tenures should ultimately be absorbed into the formal property system as currently constituted. This approach rests on the basic idea that all unregistered rights should be registered. The formal property system, to which registration is central, comprises a legal form of property based on western law which is associated with particular ways of recognizing tenure, viz. a deeds registration system, and its linkages to the cadastre, financial system (bonds, credit, public development financing), and the spatial planning and land use management system. The powerful professions of survey and conveyancing assure its accuracy, which makes it theoretically possible to raise credit through mortgage from private banks, while planning paradigms and municipal taxation are integrally tied into cadastral information. This system is usually referred to by the term 'title' or 'titling' system.

By 'title' we mean legally recognised Title Deeds that are registered in the Deeds Registry. We include individual title, as well as sectional title and Homeowners' Associations where individual plots are owned by individuals and the common space is owned by the body corporate or Homeowners' Association. We also include Communal Property Associations or land owned by trusts, companies or other corporations, as well as land transferred in title to any other publicly recognised legal body or entity.

Title deeds, in addition to the information about current ownership, also carry information about the successors to property, which in formal property system is based on a particular reading of the family and how it is constituted, viz. the western family form. The implications

1 I wish to acknowledge the ideas of Ben Cousins in conceiving of the idea of 'paradigms' of land tenure. I have drawn heavily from two sources that have mutually influenced each other using the idea of 'paradigms'. I have, however, adapted my own analysis which may not necessarily reflect all the ideas in the original: (i) the Conclusion of a forthcoming book to be published by UKZN Press entitled 'Beyond the Edifice' edited by B. Cousins, D. Hornby, R. Kingwill & L. Roysten. The latter three authors are members of Leap, a collective of land tenure research specialists; (ii) a chapter by B. Cousins, for a forthcoming book commemorating the life and work of HWO Okoth-Ogendo, a Nigerian agrarian economist, entitled 'Beyond private ownership: alternative paradigms for rural and urban tenure reform in post-apartheid South Africa'.

for both are that rights can be tied to particular individuals and transmitted to particular individuals. Rights of inheritance are synchronised with the system of title, and in fact comprise the fuel to the engine of the land rights system as a whole, since they drive the continuation of the system over time and across generations (see section 2 on Succession and Inheritance).

The other 'face' of the formal system is the system of customary rights in 'communal areas' that are currently under legal review with strong suggestions that these rights will be subsumed by Traditional Councils to which the land is proposed to be transferred and registered as 'ownership'. Though not conventionally thought of as part of the formal system, these policies are geared to incorporating customary or 'communal' systems into the formal system, and hence we include these land rights here, whilst also discussing these rights in the other paradigms through different lenses.

We refer to this paradigm as the 'transfer' paradigm, as the feature that is common to all forms of registration (whether the title is held by an individual, multiple owners or a group) is the transfer of land from one owner to another through grant, sale, succession, inheritance, mortgage or first title. The process of transferring the land in title establishes registration and thus ownership, and implies that the boundaries of the parcel that is transferred have been precisely surveyed by qualified land surveyors, and the transfer passed by qualified legal conveyancers, both of which are generally private practitioners.

b) Recognition of existing off-register tenure rights

The approach among many practitioners who have worked on the ground with land tenure issues is to recognise and strengthen rights that already exist in various forms, regardless of their formal legal status. This approach is seen to be the most logical way to bridge the gap between registered and unregistered rights. The tests that are applied for legitimacy are not legal status *per se*, but local legitimacy and robustness as well as compliance with a range of anti-eviction legislation and protective legislation such as the Interim Protection of Informal Rights Act no 31 of 1996 (IPILRA) and the Constitution. The idea behind this approach is that upon initial recognition, legal strength should be added cumulatively through various administrative measures and instruments, as well as through strengthening IPILRA to the point where it provides permanency and stronger legal recognition.

It is not enough to simply recognise these on-the-ground tenures if they comply with these criteria. The approach requires a broader interpretation of the legitimacy of rights than seeing the Deeds registration system as representing the only legitimate standard of ownership, to which all rights should ultimately aspire. On the contrary, the approach recognises the saliency of these rights *in their own right.* The advocates of this approach argue for institutions that can recognise or record and house local land rights in a way that gives credence to the customary values that underpin them. Since these customary values reflect social relationships that are not reflected in the system of title, we categorise these tenures loosely as 'social tenures'[2]. Effective support to social tenure requires new institutions for

2 ***'Social tenure'*** used in this document, and indeed the entire report, is not at all related to the concept of *social housing* used by the Department of Human Settlements. Social housing has a very specific meaning in formal housing institutions, referring to affordable rental and cooperative forms of housing developed by social housing institutions in designated restructuring zones where higher density housing is promoted. **Social tenure** refers to tenures that are not fully recognised in law but are highly prevalent in South Africa. These tenures are quite diverse, and are not illegal as much as extra-legal simply as a result of the failure of the legislature to produce a legal paradigm that incorporates them. The term has been coined by practitioners working in the field as a category that accommodates a wide range of tenure where the social relationships that underpin these tenures provide different sets of criteria for recognition and legitimacy than any current law.

resolving disputes and special techniques for recording these rights e.g. modern digital technology. In the event of recording these rights, new forms of evidence must be accepted, requiring the development of adjudicatory principles and procedures that match the evidence. Accredited adjudicators would need to be trained in the use of the new systems, including the use of flexible 'soft systems' techniques that recognise layered customary social relationships rather than singular ownership with its reliance on mathematical accuracy and precision.

c) Radical overhaul of the entire legal and institutional framework

Many academics and practitioners believe that approaches that merely attempt to 'adjust' existing systems and platforms will not make sufficient impact at the scale required to make a significant difference to improving the tenure security of such large numbers of people whose rights currently fall outside the formal system. They point out that there could be as many as 60% of South African households whose rights are unregistered and therefore fall outside any system of legal recognition. In addition, there is some evidence to support the claim that the number is growing rather than diminishing (Cousins, 2015 forthcoming).

The argument against attempting to incorporate these rights into the formal system is that research evidence suggests this approach is unsustainable and paradoxically weakens rather than strengthens rights on account of the poor fit between social tenures and the Registration system. In other words, this approach inadvertently contributes to the 'slide into informality', rather than contributes to increased formality and security.

The view that suggests radical legal overhaul calls for full and systematic recognition to land rights that do not have the characteristics of the exclusive, Western-legal form of property, but should enjoy equal status and large-scale support. Implementing this vision would entail new laws that recognize different ways of owning land, including customary systems and family rights.

To do so would entail creating new institutions, e.g. a Land Rights Ombudsman to resolve disputes in a way that is respectful of the layered and nested rights that characterise customary systems, and which are best resolved by negotiation rather than fixing boundaries. Some proponents of radical overhaul favour the addition of institutions for recording land rights and a new adjudication system that develops new forms of socially derived evidence to determine land rights, while others warn against attempts to pin down rights spatially and textually, arguing that recording rights increases the possibility for conflict rather than increasing certainty over land rights.

Proponents of radical overhaul of the legal system argue that customary rights and systems should not be treated as 'shadow' systems, but should be given the full force of law, and of constitutional approbation to enforce compliance with the Constitution, democratic governance and gender equity.

1.2 The Three Paradigms in detail

1.2.1 Paradigm One: the 'transfer' paradigm associated with the formal system

As mentioned above, the 'transfer paradigm' describes the processes involved in registering ownership of the land through Deeds registration. We call it a paradigm because there are proponents of this approach that believe that the ultimate destination of all forms of land

tenure should be the Deeds office, meaning that ownership is recognised by way of a title deed which carries a great deal of information about the status of the owner. The following forms of title are included under the heading of 'title', since all these forms of title require transfer into the hands of specified owners by means of compulsory legal conveyancing and transfer in the Deeds Office. In all cases the land owned must be surveyed into a registered parcel or set of parcels, the diagrams of which are registered and held by the Surveyor General.

- Individual freehold (which can be more than one person and may include a company)
- Private trusts and companies may also own land in title.
- Sectional Title where individuals own surveyed parcels (usually in a block of apartments) while the Body Corporate (who can delegate trustees) manages the common property, such as parking areas, walls, roofs, shared gardens etc.
- Communal Property Associations, a corporate form of ownership designed for land reform beneficiaries, very similar to sectional title except that the land is most often rural land, and parcels do not need to be surveyed, thus the group owns the land by means of undivided ownership rights. The management is placed in the hands of trustees who must follow a registered constitution.
- Homeowners' Associations may also own land in a similar manner as for Sectional title and CPAs, where the HA owns and manages the common property.
- The state also owns parcels of land for state domestic facilities (e.g. state governance institutions) or for public purposes (e.g. schools, clinics, reserves).

When we refer to the 'transfer paradigm' we thus mean the preference for a system of titling land that involves, in this case, the transfer of land out of public or common holding into private hands through registration of both the parcel and the title; and crucially, also implies that the title holders must transfer the land every time ownership changes thereafter.

South Africa was once renowned as having one of the most rigorous systems of registration in the world, and to some extent this reputation still holds true in spite of instances of abuse and corruption having allegedly crept in. The system allows for corporate, multiple and individual ownership. There is a marked tendency towards individualisation of ownership in the sense that regardless of whether there are multiple owners, individual shares will usually be quantified proportionately (i.e. mathematically). If two owners wish to demarcate spatially bounded portions of the property, the property must be sub-divided by survey and split into separate ownership. In other words, our property system does not allow for co-incidental rights.

The Deeds Registry system is synchronised with a range of other supporting legal frameworks so that all the component parts interlock with each other, which is why we refer to titling as a 'system'. The system is made up of the following characteristics:

- survey and registration of the boundaries of the parcel through the Surveyor General;
- adjudication and registration of title conducted by the Deeds Registry;
- compliance with spatial planning and land use management processes and procedures undertaken by planning professionals and institutions of the state responsible for planning and land use management functions;
- synchronisation of property ownership and property boundary description with the municipal database for the delivery of municipal or other services and the billing thereof;
- synchronisation of property transfers with fiscal processes that raise revenue, or monitor payment of revenue, through links between the property owner and the municipal database in order to establish clearance with the national revenue services (SARS), municipal accounts, etc.

- establishing the credit-worthiness of property for raising bonds through mortgages where the property is held security to the lender and the lender becomes effectively a co-owner with powers of foreclosure.

The system involves the payment of high fees to the various service providers to effect transfer. It works well for the middle classes and for corporate and business interests. Proponents of the system, however, tend to believe that the approach is suitable for all forms of property holding, and should be extended to all tenure situations. This position stems from the belief that tenure follows an inevitably evolutionary route in the direction of individual title as tenure moves towards increasing formalisation. They believe that the result should always be precise identification of owners as well as the parcels of land to which the title deed refers.

The main rationale for the transfer model in general is that under conditions of a capitalist political economy, rights holders, and banking or other credit institutions and investors are more likely to invest in privately owned property, which, according to the theory, will develop into a fungible asset and 'grow' in value. There is an assumption by many that if the system is extended to the poor, they will make use of property ownership in the same way as middle class and wealthy people are able to use their property ownership as an asset and for raising credit.

A key rationale for extending the approach to the poor presupposes that the poor will make use of property ownership in the same way as middle class and wealthy people in using property as an asset that grows in value through market exchanges. Title is associated with the 'free market' principles of our economy, in which property markets are seen to be an anchor.

A second, related, rationale advocated by some proponents of the 'free market' principles is that titling is 'pro-poor' and pro-equity, since black people were assigned 'second class rights' under the colonial and apartheid regimes of the past, and clearly they should now qualify for, and be allocated the 'first class' rights that white people traditionally had. They argue that titling allows the poor to be brought into the market paradigm. They argue that following the transition to democratic governance it is no longer justifiable to maintain these distinctions, and clearly black people should now qualify for the same 'ownership' rights previously associated with the ruling classes.

A third, related, rationale is that 'individual' private ownership should be encouraged, since 'individuals' are more likely to invest in their property than large numbers of rights holders who have a stake in the property. In some cases the 'individual' owner may be an entity, such as a corporation, co-operative or trust. Collective ownership is theoretically possible in urban contexts, though it is more often associated with rural tenure. The approach has thus seldom been employed for tenure reforms for the poor in urban contexts, where the preferred policy has been to transfer ownership to individuals. It is possible to establish housing co-operatives where the land can be transferred to the entire group of housing beneficiaries in a complex and where the Housing Association thus holds the land as a group, but this approach has not been widely applied, and where it has, problems have arisen.

In rural areas, however, there is some support for using the transfer model to transfer land to large entities, including in recent policy pronouncements, to Traditional Councils. The precedent to this approach can be found the Communal Property Associations (CPA) Act, No 28 of 1996. CPAs are legal entities representing groups of specifically formerly-disadvantaged (black) people that can own land that is transferred formally and registered in the Deeds Office. The rationale behind this legislation can be found in the need in the early

years of reform to create vehicles for the transfer of land returned to restitution claimants (also suitable for land redistribution beneficiaries). Since the claimants are identified and quantified, it stood to reason that the land they received should be clearly spatially demarcated and not simply returned to the 'communal pool'. Proponents of this form of tenure recognise that the land cannot be subdivided into small fractions for the number of beneficiaries, and therefore the holding mechanism would need to be a legal entity of some sort. The holding mechanism for this land was designed to be an association of all property holding members, called a CPA. The Act does not detail how individual rights are held, transmitted or transferred. An alternative that was used in many farmworker redistribution projects was to form the land holders into a private Trust for owning the land, similarly transferrable. In both cases the nature of the individual rights is left up to the respective constitutions and founding documents of the legal entity.

The CPA Act was specifically designed to set out democratic and transparent procedures for managing the internal land rights of the members, as well as the interface between the CPA and outside agencies. Given the cadastral coverage of land, restituted land or redistributed land is almost invariably taken from former white-owned land, and therefore in most cases the farm or farms in question are already surveyed. Hence group title seemed to be the most rational answer to the question of tenure.

The proponents of this form of CPA tenure are generally motivated by a strong desire to redistribute and restore land to the formerly dispossessed and to do so in a way that transfers rights to the recognised claimants, and protects the land they receive from larger competing groups/authority structures and from the state. The model was therefore designed with these specific circumstances in mind. Most unfortunately, the transfer model is now being mooted for *all* communal land in terms of the new Communal Land Tenure Policy of 2014. According to this policy, the proposed land-owning entity will be the Traditional Councils, which will thus become landowning entities. The individual members will thus not be regarded as owners. The draft Communal Tenure Policy of 2014, as in the struck-down Communal Land Rights Act of 2004, envisages the transfer of surveyed parcels of land in the former bantustans to the centralised authority of traditional councils with families being accorded 'statutory use rights' to their residential plots and arable fields. The common lands and their resources (mostly grazing, woodlands, water and so on, but also minerals) will be owned by the council, which will then be able to enter into investment deals with companies for its 'development'.

The proponents of this approach are mainly the traditional leader lobby, supported by the Department of Land Reform and Rural Development. Traditional leaders maintain that land allocation has historically been their function (an assumption that is not supported by historical evidence), and that Traditional Councils are the most accessible and familiar source of authority regarding land in the rural areas. This lobby is generally against having CPAs existing within these TC areas.

The most likely proponents of the free-market and 'first class' rights views are economists and land professionals who have been trained in western economic and institutional discourses that foreground the progressive role of individualism and private ownership as a motor for 'development' and 'progress'. Economists understand 'property' as synonymous with 'assets' that grow in value, while land professionals such as land conveyancers and land surveyors are trained to delineate individual 'parcels' of land and convey these into the hands of individual owners.

Politicians tend to support all the arguments that favour the transfer model, but particularly the second, in the current context where the government needs to demonstrate that land ownership is being de-racialised. Politicians wish to show that the state is providing 'first

class' land rights, which, in the absence of demonstrably viable alternatives, are associated with individual 'ownership' following the Deeds Registry model, at least in urban contexts.

Since most formal property institutions are geared towards titled land, it follows that the academic and training curricula, bureaucratic procedures and office systems and procedures of professionals, such as planners and conveyancers, and of bureaucrats and officials will follow the lines of the dominant system, and it is extremely difficult to change course. The record systems and databases of all three spheres of government, national, provincial and municipal, have been set up in way that links individuals to immovable property, and individual property units to servicing, billing and other services. It is therefore difficult for anyone who operates within the institutional parameters of the official property system to do things differently, even by those who may question some of the assumptions.

1.2.2 Paradigm Two: winning greater recognition for off-register rights, sometimes called 'incremental tenure'

An alternative paradigm has arisen as a result of the failures of the formal system to appropriately address the tenure needs of the rural and urban poor. The idea behind this approach is to adapt the formal system so that the land and dwelling rights of the poor can be at least partially recognized, thus conveying a degree of tenure security, sufficient to enable some basic developmental processes to be initiated. The general idea is to allow for adaptive modifications of the official system, allowing incremental improvements in tenure security at the local level through administrative and legal recognition (Urban LandMark 2013, Royston 2014, Development Works and SERI 2015)

This approach offers more effective protection of social tenure rights through greater legal recognition and support. It does not seek to directly challenge the hegemony of the dominant approach in the first instance, but attempts to bring about major adjustments to the official system by building institutional support for social tenures, and thus creating the potential for legal recognition of a greater variation of tenures.

The 'recognition' approach applies to the diverse practices, concepts and instruments that have been developed in an attempt to give a wide range of locally variable social and off-register tenures the legitimacy of official recognition. In South Africa this perspective has mainly been tried out in urban housing programmes and informal settlement upgrading, but there is a wide international lobby in Africa that advocates these approaches for rural areas, e.g. UN Habitat and the Global Land Tool Network that is linked to it. The approach is increasingly being used in small-town urban-edge contexts that abut and extend into rural communal land.

Proponents of this paradigm are mainly seeking to find intermediate solutions between the so-called formal and informal sectors. The approach involves adaptation of both the formal and informal systems to find pragmatic solutions by incrementally securing tenure through what some proponents call 'administrative recognition' (Development Works and SERI 2015). This is a strategy that grew out of an earlier approach developed by the Urban Land Markets Programme, and since incorporated into the National Upgrading Support Programme capacity development modules to help bridge the current gaps in policies and laws for securing tenure for the urbanised and semi-urbanised poor.

The approach follows two, sometimes competing, trajectories: (i) legitimation of existing rights that do not necessarily proceed to full titling; and (ii) recognition of existing rights as a step towards title, thus see title as the end goal and the intermediary forms are not seen as

the destination. In both cases the proponents see the possibility of rights that can be 'added to' over time, which is why the paradigm is often seen as synonymous with 'incremental tenure'.

Advocates of the second approach— that see title as the ultimate objective —such as Urban LandMark, regard such innovations as consistent with current government policy to 'upgrade' informal settlements. It thus connects to the 'ultimate delivery of individual ownership', but 'provides for increasing levels of security during the period before this goal is achieved' (Urban LandMark 2011: 61). Urban LandMark also encourages small-scale (or 'backyard') rental as a housing option, including the introduction of a small-scale rental incentive subsidy scheme to promote this approach (ibid: 92). ULM argues that this approach encourages municipalities to support the densities by beginning to invest in infrastructure and facilities, which in turn leads to more formal processes of lay-out planning. These processes in turn encourage other agencies to use housing micro-finance to support the building of backyard rental units, which would eventually require the revision of the minimum standards for building regulations.

There is, however, an alternative approach to incremental tenure, which has arisen because of the failures of titling. Advocates of this approach argue that 'ownership' through registered title should not represent the only desirable destination for tenure reform.

Royston (2015) developed an approach for informal settlement upgrading that is summarised here. She conceptualises the following steps that are not necessarily stand-alone options, and nor do they necessarily proceed in any particular sequence:

(i) administrative recognition;
(ii) legal recognition;
(iii) developmental regulation;
(iv) township establishment.

Administrative recognition promotes local record books based on local community members' practices, which requires an understanding of how transactions take place and disputes settled. In other words, establishing a basis for local agreements that are built on existing, socially legitimate practices. The approach results in each household in the settlement receiving a document acknowledging that they occupy a dwelling, and local government can issue them with an occupation permit.

Legal recognition legitimises occupation and means there is a commitment to allowing people to remain in the settlement and not be relocated. Central to this idea is that municipalities can provide blanket legal protection of the settlement by rezoning the area, or using a Town Planning Scheme. This enables land use planning and regulation, integration into municipal administrative systems and infrastructure provision. It immediately increases tenure security because it brings the settlement into a regulatory framework where land use and tenure can be effectively managed, and places the settlement on the path towards township establishment.

Developmental regulation involves the regulation and improvement, e.g. through layout plans, systems for land use management and building controls, providing services, introducing land administration systems that ensure that residents have identifiable addresses, and dispute resolution processes. These processes could theoretically result in township development, i.e. opening a township register to enable title deeds registration in individual ownership, but the steps should not depend on this assumption.

The concept of a 'continuum' is closely associated with this paradigm. The continuum depicts a spectrum of tenures that can be recognised in their own right, in contrast to the assumption

that all tenures that are not moving towards registered ownership as deficient or 'informal'. The continuum unsettles the mindset that the only legitimate form of tenure is individual title. The continuum concept builds on a range of tenure rights that can be regarded as legitimate, though some require greater institutional support. In its earlier form the continuum tended to represent tenure as an arrow moving in the direction of increasing formalisation and individualisation through titling. As mentioned, some adherents of 'incremental tenure' option see title as the end goal, and here the continuum is depicted as a progressive, 'evolutionary' advance towards title. More recent adaptations use the idea of movement "from less to more official recognition", which can be either administrative or legal recognition. There are many different depictions of the continuum. The continuum is an attempt to show that there is a more complex reality that the simple depiction of two extremes: the "formal" system of registered deeds on the one hand, and the variety of "informal" systems of customary and communal administration on the other. The idea is to show the whole range of tenures and not in any particular order. (cf Barry for UN-Habitat 2015; Royston & du Plessis 2014).

Practitioners who advocate for the legalisation of existing tenure rights draw on a range of existing legislation, from protective tenure, to anti-eviction measures and planning and land use management. Increasingly the concept of 'administrative justice' is also being applied, which means that administrative law is also important. On the tenure front, the advocates of this approach argue that to be effective and to harness sufficient political traction, the main protective law, the Interim Protection of Informal Land Rights Act, No 31 of 1996 (IPILRA) needs to be strengthened, expanded and made permanent (CLS 2015, Manona, 2015) in order to render these enforceable.

The use of local-level planning instruments goes hand-in-hand with this model, and strongly advocates the refinement of the Spatial Planning and Land Use Management Act no 16 of 2013 (SPLUMA) for rural communal and urban informal settlement contexts. Already the potential exists for relaxing zoning regulation to allow for special use zones, with low-impact mixed uses for residential development which allows for settlement-wide recognition. The use of zoning to advance tenure security is being used in various urban contexts, notably in the City of Johannesburg and contemplated in Cape Town.

The Promotion of Administrative Justice Act No 3, 2000, is increasingly seen to be another important fall-back measure to support the application of fair administrative measures to enforce various principles in the Constitution. Concerns such as gender equity and democratisation of land right administration are additional concerns that advocates of the 'recognition' paradigm believe should be built into local rule-making processes in order to ensure internal compliance with constitutional principles.

The proponents of this approach argue that most South Africans hold land or dwellings in terms of what they call 'social tenures' and that these rights should not be seen and treated as 'second class rights', though there are serious legal lacunae associated with them. The fact that these tenures do not fit into the legal definition of 'real rights' should not mean that these rights should be written off as devoid of substantial rights that are equivalent to ownership. These tenures should be understood in their own right, and the reasons for the disjuncture with formal law should be better understood. Various innovative legal approaches are being developed to promote their legal recognition in terms of a different paradigm. They argue that the current system of real rights should not be the only rights that are equated with 'ownership'.

The other argument in support of the development of new approaches to recognising off-register' rights is that when these rights are forced into the current registration framework, they may paradoxically lose some of their strength because their normative base differs from the normative basis of the registration system. These rights derive their strength from local

legitimacy and therefore may become less secure when pulled into a centralised framework that follows different lines of legitimation. An example is that the local system recognises that all family members have access rights to the property irrespective of registration, and no person has the right of alienation or transfer of the rights, whereas the centralised Deeds Registry insists on recognising particular registered individuals (usually one, but it can be two spouses or other identified people) as having rights of both ownership and transfer. Once the rights are registered, the category of kin with access rights lose their legal protections that are locally supported. Advocates of this paradigm therefore argue it is necessary to design a system based on the normative values that people follow and understand, but to make them subject to Constitutional values as well (to prevent gender discrimination, for example).

Advocates of this paradigm argue that in spite of the absence of legal recognition, off-register tenure is dynamic, and responsive to a variety of land uses and livelihoods, urban-rural spatial connections, social relations and norms and values.

1.2.3 Paradigm Three: the radical legal overhaul of the property and tenure system to fully recognise customary tenure (or 'social tenure')

Paradigm three arises from similar concerns that inform the recognition of social tenure paradigm. Advocates of this approach observe that there are no legal means of appropriately recognising these rights in a way that secures them in law, since they do not, and cannot, meet the stringent requirements of the cadastre. The advocates of more radical overhaul argue that social tenures involve layered and nested property relationships which cannot be captured in the current cadastre, since it is designed to support one-to-one property relationships, both the 'human-land' and 'human-human' relationships.

Advocates of this paradigm argue that one of the reasons for the persistence of social tenures is that rights are not confined to particular individuals owning particular parcels, but overlay various social and spatial units that are locally understood and administered. They maintain that the dominant view, endorsed by the state, fails to acknowledge, and thus downplays, the enduring social features and functions of social tenures. Social tenures confer *de facto* rights and are widely observed by their members – despite the contestations that occur, as they do in any tenure regime. These positive features tend not to be well understood and in some cases the mechanisms are regarded as inferior. These disparaging views of social tenures can be seen in the reform rhetoric that argues for 'replacement' rather than acceptance of local norms of tenure. Attempts to replace these local normatively-driven tenures with state-approved structures have had generally poor results, not only in South Africa, but across sub-Saharan Africa and a range of other former colonial regions in the world.

Off-register social tenure systems may differ from locale to locale or region to region with regard to patterns of land use, livelihoods and local institutional forms. The cultural values and norms that drive them result in different manifestations of social relationships. In some cases the tenures are more robust than others, depending on historical contexts and state interventions. The significant variations between and within these tenures, even at local level, suggests that it is not wise to prescribe centralised and standardized solutions to all their problems (see Cousins 2011).

In spite of the variation, proponents of this paradigm believe that the underlying principles of social tenures share much in common. They argue that the problems that people face in attempts to secure their rights to land and dwellings are similar. A critical aspect of this

perspective is that in spite of the sometimes extremely localised manifestation of these tenure rights, the relationships do constitute 'property relationships' which would become more visible if the rights were legally recognised.

Some of the common characteristics that cut across social tenures are that (i) land rights derive from accepted membership of a group; (ii) processes of claiming and recognising rights and resolving disputes take place primarily at the local level (i.e. in families, neighbourhoods and wards) rather than at the centralized offices of the chieftaincy or traditional council; and (iii) social *and* physical boundaries tend to be flexible and overlapping at layered or nested levels of social and political organization (Cousins 2008). The characteristics are summarised by Cousins (2015) as follows:

- In many rural contexts where 'living' customary law plays a role, as well as some informal settlement contexts, there is local oversight of processes of claiming, recognising and transferring rights, as well as of processes of dispute resolution. This oversight takes place through institutional structures regarded as responsible for managing or administering land rights and associated duties.

- Processes by which people constitute their social and political relations and identities at the same time inform the dynamics of recognition (*which people* hold rights and duties in relation to land and dwellings) and how the *institutional arrangements* are structured. These processes may be firmed up through elections or by reference to practices that derive from notions of 'customary law'. Another way of conceptualising these relational characteristics is that land tenure is 'socially and politically embedded'.

- Claims are often made and rewarded on the basis of 'need' (usually channelled through family, clan and community social networks) as opposed to the ability to pay a market price. A number of studies are, however, showing an increase in market activity but markets are constrained and prices remain relatively low for the most part.

- These regimes are generally less oriented to strict and well-defined rules than to socially and politically defined processes, i.e. they are more 'processual' than rule-oriented, but there are patterns and clear channels of action and legitimation, hence it cannot be said that the processes are 'open-ended'. (Peters 1997)

- The processes and systems are characterised by flexibility how people access locally legitimate rights (i.e. both the social and spatial aspects), which is not the same as 'open-access'. The inherent flexibility contributes to the inability of social tenures to fit into the cadastral system comprising mathematically surveyed parcels of land linked to registered title Deeds with individually identified owners. As already mentioned, the layered and nested property relationships militate against one-to-one property relationships that characterise the cadastral system (Cousins 2008, Kingwill 2013).

It is incorrect to conflate social tenures with 'informality' since there can be high degrees of formality associated with some of customary tenures; just as levels of informality may invade the so-called 'formal system'. The continuum therefore has limitations when it comes to social tenures, since there are so many dimensions that make up a tenure configuration, including notions of social relationships, access rights, governance controls, space, succession, use, value, etc which cannot be plotted along a line.

Proponents of this paradigm believe that the differences and mismatches between the formal cadastral system and social tenure systems is so great that what is needed is a fundamental shift towards providing full and systematic recognition of, and large-scale support for, land

rights that do not have the characteristics of the exclusive, Western-legal form of property, but enjoy equal status and support. The model requires acknowledgement of the fundamental robustness of social tenures, which should be recognised in their own right.

There are two trajectories associated with this paradigm:

i. statutory recognition *not based on written records*, but rather recognition of flexibility of customary (elastic) spatial boundaries and overlapping rights;
ii. statutory recognition *with written records* based on an alternative, newly designed and legally recognised record-keeping database (a land-records system) that has equivalent value to the Deeds Registry, and is able to articulate with it.

Trajectory one: no records

The first argument involves winning legal recognition of social tenure rights in their own right, with no attempt to provide an integrated institutional framework. This approach aims to recognise difference and provide full legal recognition for customary rights. Support should take the form of institutions that assist with negotiation, mediation and arbitration.

The idea would be to extend the concept of statutory or 'protected rights' that would have the status of property rights, in that the law would protect their holders from deprivation without their consent, i.e. alienation can only occur via a legal process of expropriation that compensates the former owners. Statutory rights would provide blanket statutory rights and protection. Households occupying and using land in communal areas would not have to first resolve, in each and every case, disputes over land ownership before their rights are recognised. Rights holders would be the key decision makers on matters related to that land, rather than traditional leaders or institutions, or government.

The Minister of Land Affairs would continue to be the nominal owner of the land, but with delimited powers. These protected rights would vest in the individuals who use, occupy or have access to land, but these rights would be subject to those shared with other members. This would require the definition of the boundaries of the group, but these boundaries would not have to coincide with a demarcated land parcels recognisable in the cadastre.

One particular model proposed to support governance of this approach is a system of Land Rights Officers based at Local Municipality level accountable to Land Rights Boards at District Municipality level to provide the institutional back-up for resolving disputes about overlapping rights, boundaries, and the delineation of disputed rights and play a 'watchdog' role in relation to internal processes of alienation of land, deprivation of rights and the awarding of adequate compensation. A national Land Ombudsman would provide the national oversight to a system of dispute-resolution (Cousins 2014).

Cousins summarised the proposed system as follows: Individual rights would be recognised as "a statutory right that is legally secure yet also qualified by the rights of others within a range of nested social units, from the family to user groups to villages and other larger 'communities' with shared rights to a range of common property resources. Women's rights would need to be explicitly recognised at all levels". (Cousins, forthcoming)

Trajectory Two: written records ("Local Land Records")

The second line of thought about radical reform holds that it is possible to create spatial and textual records by capturing existing rights using flexible social mapping mechanisms by combining oral and locally held records with modern digital technology. We call these written records 'Local Land Records' or a land-records system to distinguish between these forms of

records and those in the Deeds Registry, which we refer to as 'registry records' or 'registers' to indicate that these latter records are registered in the Deeds office; or in the case of the land parcels, registered in the offices of the Surveyor General. The model of 'Local Land Records' can recognise a range of relative rights within households. There is a degree of 'spatial fixing and record creation' without resorting to the individual owner-parcel relationship. It is this matter of record-making that is subject to contestation within this paradigm. The proponents of the first trajectory, described above, believe that it is neither possible nor desirable to capture social and spatial records, since these will 'fix' an approach that is inherently flexible and negotiable.

Alternative record systems that do not aim at full title are practical approaches to securing tenure while at the same time challenging the principles of the existing formal system.

A key example of a context where a rights recording system would be appropriate are records that are developed in the process of upgrading informal settlements in both urban and rural contexts. The approach can also be extended to situations where residential settlements mushroom on the edges of small rural towns but where the land is 'communal land'. Another example is when rural villagers request that their rights be converted into recorded rights, or where former recorded rights are updated to the new system of records.

The approach has the advantage that local government bodies may begin to supply infrastructure and services in the absence of registered titles. Advocates of alternative record systems believe that this approach could result in winning legal recognition of a modified version of social tenure rights provided the system is designed around locally accepted norms and practices that can pass constitutional muster.

The second approach sees the necessity of setting up local land record systems or databases that can be maintained by digital servers at a larger scale, e.g. District Municipality or provincial levels.

Since the model is record-based, a system of 'adjudication' would be necessary. A new system of adjudication is needed in order to define what socially accepted evidence can be used to determine and legitimate local rights. The new system would include a set of legally recognised adjudicatory principles and procedures, as well as legally recognised adjudicators who are empowered to weigh up new forms of evidence that differ from the evidence that is needed to determine the legitimacy of registered title or 'real rights'. The new set of legal guidelines would establish what evidence is eligible, and in what order of preference, a concept that may be referred to as developing a 'library of evidence' or a 'hierarchy of evidence', and should be sufficiently flexible to accommodate varying contexts. (Kingwill 2004. See also Annexure 6 on International and national experiences on ideas about recording land rights.

1.3 Assumptions

The reason we use paradigms to portray the mind-sets that tend to adhere to certain tenure approaches is in order to make visible the assumptions that frequently lie behind particular approaches.

The first paradigm depicts the characteristics of the dominant and currently entrenched legal system of property rights. The overarching insight offered by the second and third paradigms is that there is a fundamental disjuncture between the dominant system of registered private property rights and the local realities of off-register, 'social tenure' arrangements. The disjuncture contributes substantially to the lack of legal recognition of a range of de facto

social tenure arrangements conventionally and misleadingly characterised as either 'informal' or 'communal' or both.

As already implied above, the paradigms are not necessarily mutually exclusive, and there may be strategic or practical reasons to work within more than one at the same time. It is thus quite possible for one person or institution to straddle various paradigms for pragmatic or strategic reasons. It is possible to pursue some of these options simultaneously, rather than choose between them. Incremental tenure and other adaptations of conventional approaches are perhaps the easiest to advocate for, but even these are still not widely accepted by local government bodies. More experimentation and piloting on the ground would no doubt provide many useful lessons. Since it is unlikely that 'incremental tenure' will proceed seamlessly to full individual titling, this approach can be combined with continued advocacy for legal recognition of social tenure rights and the means to provide them with effective support, i.e. the 'intermediate' option. It is critically important that both practitioners and scholars continue to engage in research in order to document the realities of land and dwelling rights of people who fall outside of the formal system and to show the linkages with local institutional arrangements and informal markets.

One of the problems raised by the advocates of the second and third paradigm is that the formal system is made of tightly interlocking parts, and is thus particularly difficult to penetrate. Nevertheless, they argue that progress with recognition of social tenures in particular applied cases or pilots can make an impact on the formal system and how it is viewed. Indeed one of the justifications made by the advocates of the 'intermediate' paradigm, is that by 'chipping away' at the formal system it is possible to change it (Cousins et al forthcoming). One paradigm or model may thus transform the circumstances of another, causing new sets of challenges or opportunities to arise. The entire architecture might thus shift as changes begin to happen, which is why the paradigms should not be seen as 'closed systems'.

The paradigms should thus be seen as an abstraction from reality in order to make sense of, and make visible, the underlying assumptions behind the various approaches. Assumptions cluster around a range of concerns, beliefs and convictions, for example:

- Beliefs that certain forms of land tenure are more conducive to progressive goals such as economic development, asset formation, long-term secure tenure, gender equality, etc.
- Beliefs around what the most sustainable interventions are, some believing that there must be radical replacement of tenure with new forms of tenure such as individual title, or transfer to Traditional Councils
- Belief among practitioners that the best approach is not to attempt to replace tenure with radically new forms, but rather adapt existing practices that are known and familiar.
- Acceptance of bureaucratic and administrative processes currently in operation but inherited from the past, which continue to dominate the way that officials think about and apply tenure rules, leading to resistance to new and untested approaches.
- Ideas about where the functions associated with land tenure, land allocation and land administration are best located in terms of spheres of government (national, provincial, municipal or below, e.g. Traditional Councils).
- Concerns about socio-economic rights: the Constitution refers to rights to land, housing and services. It is estimated that close on 60% of the population still do not have legally recognised tenure rights.
- Concerns about how best to secure individual or household rights to cut down on elite capture of communal land, particularly with regard to natural and mineral resources

where failure to legally secure rights leads to opportunities for the powerful to appropriate rents and resources on the land, and sometimes the land itself.

1.4 Critique of paradigms

1.4.1 Critique of the Transfer Paradigm

As summarised above, the transfer paradigm, which rests on a highly prevalent view to solving tenure reform among the mainstream land professionals, is seen to lie in 'transferring' land out of the public register into the hands of specific individuals or entities. This approach is conventionally justified on the basis of an argument that transferring land corrects the inequitable distribution of land 'ownership' inherited from the past and encourages asset formation.

Critics, however, point out that it is necessary to problematise the concept of 'transfer', since research in both South Africa and other African contexts has revealed that transferring land does not miraculously transform the properties of ownership into a more viable land tenure model, and that what appears at first sight to be a rational solution is in fact part of what created the problem in the first place. We therefore go to some lengths to explain the various components of ownership under the transfer model, since the problems can only be understood in relation to the system of land management as a whole.

Transferring land to individuals in a land reform context in rural areas has not been applied very much, so the critique of the individual title model is mainly drawn from lessons in urban areas where the policy is widely applied. There are two main critiques of the transfer-to-individual model.

Firstly, in urban contexts, the transfer of *land* has become intermeshed with high-priority *housing* needs in the context of the massive growth of urban informal settlements. Housing policies have been closely aligned with the transfer model, though in theory offering other options for social housing and upgrading of informal settlements. Since new housing can only be provided on a limited qualifying 'list' basis, the consequences are that land tenure security lags behind, and only those who are allocated houses simultaneously attain tenure security, while all the rest remain outside.

In other words the conflation of housing with land tenure reform has simultaneously limited the number of beneficiaries to secure tenure, given the limits to provision of housing. The alternative model of upgrading informal settlements (the Upgrading of Informal Settlements Programme, UISP) using other forms of tenure has been barely developed, let alone applied in spite of much lip service given to the idea policy documents and political speeches.

Secondly, the track record of titling of state-subsidised housing projects has been manifestly poor. A large percentages of RDP houses have not been issued with titles due to numerous cross-cutting problems of identification of beneficiaries whose statuses often change rapidly, as well as the capacity of the deeds office to absorb such a huge number of new registrations that are often complicated by difficulties of identification.

Evidence also shows very poor performance with regard to the management of transmission of land that has been transferred in title. It was noted early on that new owners tend to evade registration of transfers on sale and succession, with large numbers of houses changing hands rapidly by 'informal' means despite the moratorium on , for a stipulated period of time. It is now widely acknowledged that there has been widespread use of 'informal markets' rather than the Deeds office to record transfers (Howard Rutsch Consortium 2004, Kingwill

2011, Barry 2016). As fast as titles are issued, they seem to lose their currency. In most cases, officials have to devise means by which to 'normalise' the fast growing 'informality' and misapplication of the documents and registry records, where names on titles do not match the occupiers/owners of the units. Research has revealed that far from being a new phenomenon, the use of other forms of evidence by local owners, instead of deeds registry records, has a long history on titled land in South Africa. In spite of all this evidence, the state steadfastly persists in applying the model with the justification that the 'abnormalities' are merely a minority of cases, caused by 'lack of education' or finance or laziness, when in actual fact research results show the causes to be much more deep rooted (Kingwill 2011, 2013, 2014).

Another major critique of the 'transfer' model is the Deeds Registry system of title deeds, which is highly sophisticated and regulated form of titling, is conflated with 'first class' rights. The reverse argument, that other forms of ownership that are not based on western models may deliver more secure, locally viable forms of tenure are seldom considered given the intense focus on the 'quality' of the object delivered rather than the quality of the practice that ensues. If the outcome does not match the theory then it is questionable whether the object has merit on the grounds of quality.

The performance of group title using the Communal Property Associations Act, has similarly been undermined by a range of problems, many of them associated with the problems with the transfer model as a whole, e.g. the requirement to register changes when identities of owners change through sales, death, births etc. Many other problems of accountability have resulted from lack of support from the state.

The idea of transferring land to Traditional Councils is highly contentious and is heavily criticised by various sectors of society who view the approach as tantamount to 'dispossessing' black rural people of their land rights all over again. The approach leads to a number of contradictions and tensions between municipalities, who are constitutionally mandated to perform range of planning and land use management functions and traditional councils who are claiming these roles.

The dominance of the transfer model, which is only attainable for the few, with its strict adherence to black-letter law to which in reality few beneficiaries adhere, has created a seemingly impenetrable barrier to bringing about the more fundamental shifts in thinking towards a better match between practice and law. Indeed the model has created a 'mindset' that is uncritically supportive of the system and not open to persuasion that other methods are likely to be more fruitful. Indeed, a land tenure research network known as Leap has coined the term 'edifice' to describe the insurmountable obstacles that the system creates in blocking the development of more viable and familiar forms of tenure. The system that is seen to be the 'cure' to land tenure inequality is seen by its critics as the actual cause of the disease. 'Ownership' and 'real rights' as conferred by South African property law always trump off-register social tenures, which means that the latter are systemically discriminated against, compromising the security of tenure of their members.

In spite of the numerous problems that have arisen with titling programmes and projects, there has been reluctance to re-evaluate the appropriateness of the system as a whole for the low-income market, since this would involve reviewing the assumptions that inform the approach as a whole. In general the approach is to attempt to 'fix' the titles that have lost their currency despite evidence that the problem is widespread and ongoing. The critics view the problem to be systemic and therefore 'unfixable' by conventional means.

Another line of critique questions the causal link between titling and credit. There is now an abundance of research and evidence that rebuts the idea that titling is the necessary

condition to facilitate credit among the poor. That it does so for the middle classes is a result of the assets they already have, most notably steady incomes. According to Cousins, studies have found that in South Africa even entrepreneurs with title deeds in townships are reluctant to put their houses at risk in order to access a business loan (FinMark 2004). As Rust notes: 'Given the volatility of South Africa's economy and the erratic nature of the businesses [of low income earners), perhaps they are right to be risk-averse and protect their home at all costs' (Rust, 2004). This strongly echoes findings from elsewhere in the world (Haldar and Stiglitz 2013, Sjaastad and Cousins 2009).

Cousins (forthcoming) has singled out some of the main problems with the titling model:

Individual titling works for people who are socially mobile, meaning people with steady incomes or with some capital who are able to pay the costs involved. One may add that it works if the owners wish to individualise the title holders in preference to holding land for the larger family group.

Evidence, however, suggests that even where the end goal of titling is being pursued through the incremental tenure approach, it fails to reach its own targets. There are official statistics showing that there is a large backlog in titles actually being issued. Furthermore, there is now much evidence to show that there is a thriving off-register market for purchase and rental of RDP dwellings, even in situations where the beneficiaries were expected to refrain from transactions for a certain period of time. The results of research generally suggest the realities of low cost property do mot match the requirements of the state registration system. We foresee that this situation is likely to persist for a long time to come.

The assumed benefits of titling are appear to be highly contingent on a range of variables and only a small minority fits most of the criteria for success. Large numbers of people do not fit these criteria, and for these people social tenures already offer some degree of tenure security, and could provide more substantive property rights if they were officially recognized and supported.

As discussed above, the model for communal tenure currently favoured by draft Communal Tenure Policy of 2014 envisages transferring surveyed parcels of land to the highly centralised authority of Traditional Councils. Under this model, traditional councils under a chief become the owner of the land parcel and thus hold 'real rights'. The rights of ordinary people are relegated to a secondary and subordinate status of 'use rights' and hence rights holders *lose* their currently strong rights to individual and shared common resources. The so-called formalisation, as with individual title, therefore has the effect of diminishing *de facto* rights rather than adding more security. Families will only be accorded 'statutory use rights' to their residential plots and arable fields, with common lands and natural resources owned and controlled by the council. The council would thus be empowered to enter into investment deals with companies for its 'development'.

Various studies have shown how chiefs and traditional councils in the platinum belt and elsewhere are already applying this model with government support, despite question marks about its legality (Mnwana and Capps, 2015). The idea that traditional leaders had these powers historically is not proven by research and is at odds with the modern Constitution.

Critics of the transfer model as currently proposed by government policy point out that the policy does not involve recognition of the distinctive character of these forms of land rights and do not secure them in law. According to Cousins the policy gives:

> *traditional leaders much stronger powers over land and resources than they ever enjoyed in pre-colonial societies, or even under apartheid, and involve a gross*

distortion of a key underlying principle of governance in the pre-colonial era, inkosi yinkosi ngabantu*, or 'a chief is a chief by the people'. They do not provide for the downward accountability of institutions to rights holders. Policies that privilege an unelected elite at the expense of ordinary citizens do not represent a viable solution to the problems caused by the severe disjunction between the [dominant system] and social tenures. They are already generating anger and resentment, and this can only grow with time.*

1.4.2 Critique of the 'recognition' model

The second paradigm which advocates the recognition of existing tenure rights sidesteps the ambitious goal of reforming property law in its fundamentals, focusing instead on developing pragmatic solutions within dominant frameworks, and taking different forms in rural and urban areas.

One of the critiques of this approach is that despite the eminently pragmatic and problem-solving nature of these proposals, there is no evidence that any level of government (national, provincial, local) has accepted them as yet. Various case studies on alternative registration practices documented in the forthcoming Leap book bring out the challenges and limitations of this approach, which is why the authors of these studies question the end goal of full title. The cases nevertheless demonstrate that municipalities in particular have not so far managed to adapt their mainstream information systems to fully accommodate the alternative forms of recording rights (Cousins forthcoming).

Various practitioners, e.g. Lauren Royston, are applying this paradigm to break the policy logjam with regard to situations where small rural towns are expanding onto surrounding communal land as urban growth occurs, or where new townships are emerging on communal land. In these situations, people need plots on which to erect dwellings on a more individualistic level than is the case in rural villages. The current framework only provides planning procedures for 'township development' (e.g. using legislation like Less Formal Township Establishment Act (LFTEA)) but this leads to high levels of conflict with the communal rights holders on whose land the townships arise. In these situations innovative approaches are apposite, since local customary systems have partially or wholly broken down, and official processes of formalisation through township development get mired in local contestation and market transactions that are not backed by legal contracts.

The innovative attempt in Sterkspruit in the Eastern Cape is described by Manona in this study (in Annexure) to manage these processes through establishing a local land office that oversees transactions, enables the witnessing of agreements and validates documents that assert rights of occupation. This example is the first major attempt to introduce the second paradigm in a rural context.

The problem with these innovative attempts, justified as they are by the realities of the cases, is that without institutional support the systems tend not to endure over time, but break down rapidly with informal sales and inheritance, where the new owners are not recorded. The system is as yet highly fragile and rights remain vulnerable to capture by the powerful. These innovative administrative interventions do potentially undermine the rigidity of the formal system, but without institutional support, these efforts are unlikely to find lasting and sustainable solutions. Hence there is a need to strengthen these efforts with legal and institutional reforms as mentioned repeatedly in the study as a whole.

1.4.3 Critique of the 'radical overhaul' model

The main critique of the approach that seeks a fundamental change in the legal structure is that one of the trajectories of this paradigm seeks to legalise a system of customary rights in a way that is so markedly different from the current property system that it will reproduce and reinforce the binary between the so-called western system and customary systems, and thus entrench the bifurcation of the legal system rather than contribute to its integration.

Although many of these systems confer a great deal of day-to-day, *de facto* local recognition, and thus, an element of tenure security, even proponents of the 'radical' solution warn that while there is significant capacity for self-organisation in relation to land rights management amongst poor South Africans, one should beware of idealizing these local 'social tenure' regimes (Cousins forthcoming). They experience many problems, including gender discrimination and abuse by local power holders such as chiefs, traditional councils and shacklords, some holding sway within local institutional arrangements, as well as within or across families or clans and small, closely-knit communities. The absence of locally legitimate channels of mediation and adjudication of claims makes the inevitable conflicts around property extremely contested, e.g. claims related to different branches in a lineage especially where children have been born out of marriage and have the "wrong" surname; claims by affinal family against patrilineal norms of control; contests as a result of pressure having been put on an "owner" to allow someone in need to have an allocation; or where someone's fields have crept over another family's boundaries. There are always claims waiting to erupt beneath the visible settlement pattern, and there are many different triggers for eruptions, which include abuse of power by local or familial elites (Cousins *et al*, forthcoming).

Advocates of the approach that seeks to legalise customary systems defend some of the problems on the grounds that social tenures receive little external support and almost no oversight of their local arrangements and there is thus no external recourse, which creates opportunities for abuse by the powerful. It is thus lack of oversight and support that leads to the problems of 'capture' by local committees and traditional councils, and turn a blind eye to discrimination against women. There are few available avenues for recourse other than the courts, which are expensive, slow and thus in practice often inaccessible, and even where they do reach the courts, the rights are not treated on a par with registered rights. While some landmark cases have constrained large-scale evictions, the systemic impact of these cases continues to be hampered by the lack of sustained legal and institutional reforms.

Critics of the paradigm also maintain that the levels of inequality and social differentiation in customary systems are growing rapidly, pointing out that you do not need a western-style property system to promote the concentration of wealth. There is growing evidence that there is much more social and class division within customary systems than is visible, and that the customary 'processual' aspects 'mask' the levels of concentration of wealth, relying on the ideas about 'inclusivity' and 'need' to point to the redistributional aspects of customary systems (Peters 2013 a, 2013b). Commentators and researchers are beginning to document the growing commercialisation within customary systems, leading to the potential for dispossession, both from within and as a result of investments from the outside (Peters 2013a, 2013 b). Some critics thus propose that the time has come to implement a system of adjudication and record-keeping pointing out that customary rights without a system of procedures is unlikely to eliminate these problems, even with state oversight and support.

1.5 References part A: Three broad perspectives on strengthening land rights

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2 PART B. SUCCESSION AND INHERITANCE: IMPORTANCE FOR LAND ADMINISTRATION SYSTEMS

2.1 Introduction

A highly neglected aspect of land administration is the question of devolution of land. Once land is held by recognised owners/holders, there must be a socially legitimate form of passing the land on to the next generation. The passage of land is what we refer to as 'devolution', which is from the word 'devolves' which means 'descends'. In law, these matters are referred to as 'succession' and 'inheritance'. Succession means the process by which people are identified as the legitimate successors to property or office. Inheritance means the actual receipt of property by the recognised and identified successor/s.

How people transmit land from one generation to the next is highly culturally sensitive. During the early twentieth century in South Africa, when official customary law was being constructed in the shadows of segregationist land laws, colonial authorities set about constructing a "customary law succession" which was partly fabricated to fit with the new ideologies of the ruling classes and with the information provided by African elders who were witnessing waning powers in the face of major changes in the political economy. The colonial officials took into account their own concerns about limiting rights of inheritance of land, because to acknowledge a holder's power to choose successors to land would be tantamount to acknowledging rights of ownership, which it was not willing to do. In most African societies prior to colonisation, land was not considered a valuable resource that required identification of heirs, but all this changed when access to land became increasingly constricted and when people became fixed to particular plots of land.

For most black South Africans with communal land rights, there was no formal inheritance of land. It became the convention to reserve plots of land held by certificates of occupation or Permission to Occupy Certificates (PTOs) for the eldest sons of the recognised holders, but this practice was conducted at the discretion of the local 'Native Commissioner' and could be withheld, since theoretically the licence was cancelled upon the death of the holder, and was reissued. Thus potential successors were judged on their behaviour and compliance, as well as the currency of their payment of local taxes before the plot was confirmed in their name. With common law inheritance, matters of personal conduct do not intrude in the same way, since successors are identified either by means of a will that identifies heirs, or by means of intestate succession law that identifies successors by calculations of their relationship to the former owner.

There were exceptions to the general pattern of Africans not formally owning land by title, especially in the Cape Province, but also in Kwazulu-Natal. In these regions a small minority of Africans held land in individual quitrent and freehold title. Systems of inheritance had to be invented to suit these particular requisites. Where land was held by groups in title, such as the former Transvaal province, these rules would not have applied because the registered owner in those circumstances was usually a grouping, such as a 'tribe' under a 'chief'.

The forms that succession and inheritance took were arguably chosen to suit (a) the colonial officials' preferences and (b) the preferences of African elders' who provided oral testimony on customary practices. The result was a peculiar mix of European and African law that has proved to be ill-matched for the realities on the ground.

It is important to understand how we have come to the position we are in today, when people have very poor alternatives from which to choose when land passes from one generation to the next. The historical evidence helps to provide pointers to what challenges face law and policy makers with regard to developing laws of succession and inheritance. The evidence that will be discussed below supports the contention that it is extremely important that laws of succession and inheritance fit with people's normative conceptions and living practices of holding land and passing land on to the next generation (i.e. 'living law' approaches). The evidence shows if laws do not have an approximate fit with people's understandings and practices, they will continue to follow their own processes outside of the law.

By way of background it is important to bear in mind that the present system of formal property ownership is entirely reliant on, and in fact a constituent part of, the overall cadastral system, and laws of succession and inheritance of land correspond with the concepts of land ownership. The key characteristics of ownership within the cadastral system (as summarised in the excerpt below) follow through into laws of succession and inheritance, and cannot be easily separated. For this reason it is important when thinking of new designs to always take into account the wider context of ownership.

The South African cadastre (like most modern cadastres) is multi-dimensional. Firstly, there is a spatial component, which is the geometric description of land parcels. Secondly, and linked directly to the spatial dimension, is the textual component. This comprises the registers recording the real rights in the land parcels—such as ownership, bonds (mortgages) and servitudes. Thirdly, spatial and textual must reflect up-to-date information. This means that every time a change occurs—such as sales transactions or inheritance, or spatial alterations such as subdivisions or servitudes—each must be duly registered.

The characteristics of this three-dimensional land information system are:

- The core unit is the land 'parcel'. This is a discrete unit that, according to statutes governing survey standards, must be surveyed within an accuracy range of centimetres.

- Registered owners have real rights with a high degree of autonomy over use and disposal of the property (though users have some legal protections).

Registered owners of real rights have fiscal obligations: property registers are linked to other registers, such as those that record personal details for purposes of income tax and servicing.

Ownership is linked to rules of inheritance and succession.

Transactions set off a domino effect, reverberating along a chain. The process is like a train moving through stations: you cannot get to the destination of ownership until there has been an exchange of information at a number of stations along the way.

The nature of the contemporary South African cadastre means that all the strands that make up the 'rope' of ownership need to be braided together and work in the same direction. This is because the structure militates against fragmenting the ownership bundle among a range of rights holders simultaneously. Thus owners hold the entire pack of cards, and can deal individual cards only in relation to the whole, aggregate bundle. The rights are not divisible, though subordinate rights may be surveyed and/or registered. The aggregate value of private property is the full hand.

Even in situations of co-ownership, the concept rests on clearly defined and quantified shares, which are subtractable from the whole, the complete pack. All co-owners are

nominated and registered and thus adhere to the 'nominated and quantified' ownership regime.

The preparation of township layouts, property surveys and conveyancing of title are undertaken by private professionals. This adds to the professionalism of the South African property system, which has among the most exacting standards in the world.

The core principle, following the liberal tradition, is the conferring of proprietary powers on the nominated owner/s whose name/s appear in the register. This represents an evolution in Western private property regimes. The older forms of conditionality that rest on family consent, obligations, and rights of access by others have been virtually obliterated by the emphasis on the powers of alienation accorded to those whose names appear on the register; or those names that appear in succession law as entitled to be registered should the owner die without a will. The owner holds the right to identify a successor in a will, deriving from the owner's powers of alienation. Thus registration in modern Western law corresponds to the development of the idea that land is a fungible asset, capable of 'growing' in value, hence exchangeable on the market. Thus, even in Western law, property concepts have evolved in an increasingly exclusionary direction. It is misleading to pin down any property system in isolation of its history, since in any social context property is a product of historiography (Peters 1998: 351–7). This implies that property law is capable of adjustment and should not be taken as a 'given'.

Excerpt from Kingwill, R. (forthcoming).

2.2 Historical conditions regarding succession and inheritance in African society

In pre-colonial times in sub-Saharan Africa land was not considered an item that needed to be retained in the family, since land was plentiful and did not have the value of an object that needed to be kept, accumulated and passed on. It was far more important to retain the labour potential of women than to retain parcels of land. There were no rules of inheritance of land as a consequence. There were however, strong systems of inheritance regarding moveable assets, particularly cattle, and related to that, there were very stringent rules and processes relating to the passage of moveable property to bring about marriage alliances. It was therefore not the concept of individual inheritance that was missing; indeed, individual inheritance was well established. Rather, it was the concept of inheritance of *land* that was absent. Land was considered to be a resource that provided the means of reproduction of the family, and therefore held families together. It did not have to be a particular, measured and identified piece of land. People were mobile during periods of migration in search of new pastures and as a result of displacement from warfare and colonisation. Land held families together, but land did not itself have to be held together or 'boundaried' as a measured parcel. One could say that 'people belonged to the land' rather than 'land belonged to people' (Peters 1998: 360).

Once land became a scarce resource following the colonial fixing of people to land and the establishment of state sovereignty over land, then residential land and gardens or fields became an increasingly fixed and measureable unit of land, while the natural resource land continued to be held in common. The land itself began to assume enormous value in the context of the restrictions placed on African access to the land, and the demarcation of reserves, later 'homelands' and 'bantustans' and also the importance of the rural home base for the migrant labour system.

The corollary of these development is that the function of 'allocating' these individual plots assumed greater importance in colonial than in pre-colonial times. Whereas formerly people located themselves in relation to networks of kin who lived in neighbourhoods, under colonial conditions people had to get permission from the colonial authority in the form of Native Affairs Department (NAD) for a plot of land. Though the magistrates/native commissioners gave final approval, the NAD delegated much of the practical work to headmen or chiefs, thus strengthening a role that was previously of lesser importance. This newly evolving approach to accessing plots of land resulted in very strong individual rights associated with the residential and arable plots, and that remains the case today. This did not mean that all Africans who held these plots of land had the freedom of testation or that families or family members had an automatic right to inherit these plots.

2.3 The evolution of formal rules of succession in customary law and the common law

Over the course of the twentieth century, two routes provided legal sanction to formal inheritance of property, including immovable property (land): the common law or customary law.

Customary law was the preferred route identified by both African male elders and the colonial authorities. Common law approaches were preferred by the emerging educated Christian elite, but even there the common law was found to be a poor fit when it came to inheritance of land. The colonial authorities observed at an early stage that Africans were very attached to their own customary systems of succession and inheritance.

The official customary law of inheritance emerged by trial and error over time, but was eventually sanctified in the Native Administration Act, No 38 of 1927. Where Africans held land in freehold title, the situation was extremely complex, given that title was derived from common law notions of property, whereas the law-makers attempted to mould aspects of customary law to the transmission of property to accede to the testimonies of various African males who objected vociferously to European notions of succession (Kingwill 2014). In the end, the routes taken were decided according to the form of marriage. Marriage by customary or civil law dictated whether inheritance would be via customary law or the common law. The version of official customary law that was legislated in the Native Administration Act was a compromise between colonial interests and those of African male elders whose pleas to extend customary succession laws to immovable property were heeded. This resulted in severe restrictions on women's rights to inherit. The blatant gender discrimination in the official customary laws of succession, which played into patriarchal norms, caused considerable reaction and resistance from women over the decades.

The official customary law relied on an official "Tables of Succession" which set out a succession route via male members of the family. If there were no sons, for example, property passed via collateral male relatives (uncles, nephews, etc). This formula was drawn from an overly rigid interpretation of customary succession rules regarding positions *of status and office* (e.g. positions of headship of families (*indlunkulu*) or higher up the hierarchy to positions of headmanship, chiefship, etc), previously irrelevant to the inheritance of land. In Xhosa society this position also corresponded with the position of heir, *indlalifa*, who was responsible for distributing property, mainly cattle. The Tables of Succession did not allow for female inheritance of land, neither sisters/daughters nor wives.

Civil marriage could earn exemption from customary law, providing people understood the complex connections between marriage law and the implications for inheritance, which most

people did not. In the case where civil law/Christian marriages allowed for the common law principles of succession to apply (instead of customary law), then it was possible to escape the customary succession principles, i.e. if one was married by civil or Christian rites.

However, there was a catch. African elders were opposed to the European concept of property held 'in community of property' (COP), meaning that property was shared by husband and wife. The choice of COP became standard in European succession law, including South Africa in terms of its intestate succession law (all versions through the twentieth into twenty-first century). In order to avoid COP, marriage partners must contract out of COP via an ante-nuptial contract stipulating the separate terms of property ownership. Without such a written and registered contract, community of property is the default position. The concept of 'community of property' between husband and wife was, however, an anathema to the African elders whose interests lay in protecting the customary family, where property was held by the family lineage (explained in more detail below). As a result, officially drawn-up customary law (as set out in the Native Administration Act of 1927) did not allow for Africans to automatically hold property in 'community of property' as the default, as applied to whites who were subject to common law of intestate succession. For Africans to hold property 'in community', they had to specifically request COP, and to do that they had to know about the alternative choices and the implications of each.

One can safely assume that most people were not aware of the all the new intricacies of succession and inheritance rules, though we do not know something about how these tensions played out in practice.

Firstly, the idea that women did not have rights to the family land was contrary to the actual practice that emerged among many African families who owned land in quitrent or freehold. Evidence from research (Kingwill 2014) reveals that customary practices with regard to the transmission of land certainly allowed for the maintenance of access rights of daughters of the family, and were thus not opposed to women's rights to land as a blanket rule. In fact, the practices that emerged protected land from inheritance by *any* single individuals, male or female. This development is not surprising considering how hard it was for Africans to access and own land, and thus the approach was based on the idea that all family members should have continued access, and that no individuals should have powers of alienation. This approach simultaneously protected the families as social units as well as the plots which were referred to as 'family property' (Kingwill 2014).

There is some evidence (which needs more detailed research) that when these new rules resulted in women being dispossessed of property, they did lead to a lot of contestation. Women did come to appreciate the negative consequences of the change in law away from COP, and in many cases they did oppose the new rules. According to research by Weinberg, women from quitrent families who lost out to older brothers objected to the rule of primogeniture that was inscribed in the new customary law of succession regarding quitrent land. In their objections they were supported by the Ciskei General Council who strongly criticised the new rules (Weinberg 2010). Quitrent cases attracted a great deal of public contestation on account of the fact that the Tables of Succession were to be applied to all quitrent land in blanket fashion, regardless of marriage contract. Freehold title holders had the escape route of Christian or civil marriage, whereas quitrenters did not.

It would seem that most people with title actually disregarded the law and simply continued to devolve land in the customary manner (as explicated below). In other words, most families followed their familiar ways regardless of what the law said and regardless of the Magistrates' rulings on the distribution of property when the deceased estates were being administered.

Where cases were contested in outright legal battles, these were more likely to be in situations where Magistrates (who were responsible for the administration of deceased estates in most cases[3]) had made formal rulings on the distribution of estates at the offices of the Magistrates. But empirical research conducted by Kingwill indicates strongly that in most cases *landed property* continued to devolve outside of the formal rules (Kingwill, 2014).

It is necessary to understand the historical context that reproduced the rationale for the official customary rules of succession that came into effect with the Native Administration Act of 1927. Africans were being increasingly subjected to oppressive segregationist laws, highly restricted land access and were in the process of becoming completely disenfranchised in the Cape where previously a limited franchise applied. Under these circumstances, African male elders did all in their power to shore up what little power they had left in their family circumstances. The elders argued that the customary systems of succession and inheritance should recognise the gender differentiation that was inherent in the older African systems by recognising the eldest adult male as the rightful successor *to property*, and therefore to land, on account of the fact that men in this position carried responsibilities and obligations for the welfare of the whole family. The term used for this position of the eldest adult male who simultaneously received and passed property in isiXhosa was *indlalifa,* as previously indicated.

When applying these concepts of inheritance *to land*, however, it is important to grasp that the application of male primogeniture to the inheritance *of land* was a novelty born out of colonial circumstances. As mentioned above, concepts of male primogeniture were of importance in determining the passage of *moveable property*, primarily cattle, but was not in the past applied to immovable property or land. Primogeniture (if not male primogeniture) in relation to landed inheritance, however, was a familiar concept in English law. The mixing up of these various stands of African and English law resulted in a concept that was not widely accepted among African families, particularly women and those younger men who would be cut out of the inheritance. The concept of 'individual inheritance of land' remains a problematic concept today. While some men who fit the legal criterion attempt to use the advantage it gives them by combining African prejudices towards women's inheritance on the one hand, and formal property law of intestate succession on the other, families as a whole tend to resist the implications of individual inheritance by men or women.

With regard to communal land, strong individual rights did not translate into rights of inheritance. Land that is not surveyed is in any case not registerable. In order to inherit land formally, it must be registered in the name of individuals according to the rules of the Deeds Registry, which only allows for surveyed parcels of land to be owned by identified individuals. These rules of ownership spill over into succession and inheritance, since it follows that if the land is not surveyed and owned by a particular individual, then neither can it be 'inherited' in a similarly individualistic way by individuals, which is the system that is expected in terms of the present common-law rules of Intestate Succession Act.

2.4 Recent changes in the laws of succession and inheritance

The official customary laws of inheritance were finally repealed after various court judgements in the post-1994 phase of constitutional democracy, the most important of which is the Bhe judgement. In terms of *Bhe*, various sections of the Native Administration Act, No 38 of 1927 were declared unconstitutional. Prior to the Constitutional Court judgement that effectively outlawed the customary law of succession, there were two interpretations of the

3 In contrast to whites whose property was administered by the Master of the Supreme Court.

customary law of succession. There was the official interpretation and the 'living law' practices.

Firstly, with regard to the official interpretation of the customary law of succession, there were two associated problems:

The first problem relates to the prohibition on succession to land that was not held in title, but held through customary access or by means of a PTO or similar certificate issued by the colonial/apartheid government. In these cases, land could not *formally* devolve through identified people from one generation to the next. As already mentioned, the colonial government was determined to limit rights of inheritance to communally-held land, because rights of ownership were curtailed. To admit to inheritance would be to admit to ownership.

The curtailment of rights of succession and inheritance meant that, in theory at least, every time a holder died, the land right (in most cases, the PTO) was cancelled and re-issued. In practice, widows and sons were given preference as successors to hold land when the male head of household died. This practice was, however, extra-legal, and there was no law compelling an official to leave the land to the son or wife. This meant also that officials could use this practice as a kind of weapon or inducement to land holders to conform to the law in general, and to local land laws in particular, with particular emphasis on the up-to-date payment of local taxes. By conforming, there was a much greater chance of the land remaining within the family, as the Magistrate would in most cases extend the right of the deceased to the next-in-line in terms of customary succession law. In practice Magistrates also allowed widows to hold what they called a 'usufructory' right to the land of her dead husband, pending the eldest male son taking over after her death. This practice cut down, but did not eliminate the eviction by sons of their mothers from their father's land.

The second problem relates to the way in which the official customary law interpreted male primogeniture in the succession rules that determined the inheritance of immovable property (i.e. where there was title quitrent or freehold).

As a result of the judgement of the Constitutional Court, the latter, specifically the law and practice of primogeniture, has been outlawed. Legally speaking the Intestate Succession Act is the only law that now applies to all South Africans, black and white. The Constitutional Court judgement urged the legislature to draft new law, which it has not. Where Intestate Succession law is inadequate, the judgement did include reference to the possibility of negotiated solutions.

The reality, however, is that, while male primogeniture in relation to inheritance of land does not reflect people's actual practices on the ground, the Intestate Succession Act does not either reflect the norms that drive the succession to land. Both are at odds with the concepts that inform 'family property'. The over-arching norm is that no individuals have proprietary rights, i.e. rights of disposal, including testation. Instead, the land is owned by the family as a whole, and access rights are assured to all members of the family (more accurately, lineage) who are related by agnatic descent to the original title holder. Thus daughters (or sisters depending on the vantage point) also qualify for rights (see below for more detail). For this reason there are ongoing tensions between law and practice which the Bhe judgement has not resolved.

The result of the Bhe judgement is that there is no longer any form of recognised customary law of succession. The judgement recommended that the customary law of succession should be 'developed' by the legislature, but the legislature has failed to develop customary law in this regard. The result is that all South Africans are subject to the Intestate Succession Act, no 81 of 1987, as recommended as an interim measure by the Bhe judgement. This law

dictates the common law principles of succession, and is based on highly westernised interpretation of the family form. While this has been welcomed by some middle class and some urbanised women, there are nevertheless severe problems with using the Intestate Succession Act with regard to inheritance of land specifically, though less pressing for moveable property. This conclusion has been found for both rural and urban contexts.

2.5 The customary practices of succession and inheritance of land

The idea of land being spatially specific, and the changing concepts of 'belonging' (from people belonging to land, to land belonging to people) can be traced through evidence about how people who had title (thus fixity in law). We see the emergence of a concept of 'family property', where the family as a whole became associated with the land, rather than particular individuals who could name their successors.

The application of laws of inheritance to land is therefore highly problematic, even today, on account of the fact that in most cases, ownership of family property is seen to vest in the family as a whole, rather than in individuals. Indeed, there are strong social sanctions against individuals who attempt to take over the family property at the expense of the body of eligible members (Kingwill 2014). This makes it hard to design appropriate laws of inheritance, given that European inheritance concepts link identified individuals, who can be named in advance, with identified parcels of land.

In research sites where Africans held land in title, it was found that land devolves as a whole to the family as a whole, which means that individuals do not have to be named and identified. Your kinship status gives you access. What this means for the purposes of identification is that your status within the family grouping determines your rights. You do not have to be named since all people belong to a *category* of kin determined by descent by way of kinship. Along the eastern seaboard the descent pattern is determined by way of a system of patriliny, while in other parts of Africa (though in the minority) the system is one of matriliny. In either case people trace their familial relationships through one gender. Patriliny indicates that people trace their relationships to the family through the male line or patrilineage. This pattern is different from most European families, who trace their descent through both the father and the mother (bilaterally). In the European version, the most important property-holding entity relates in some way to the conjugal couple. In African families, it is not the conjugal unit that determines who the property owning unit is, but those who are related by agnatic descent and thus are accepted members of the patrilineage. These unilinear families are conceptualised in terms of the past, present and future, since ancestors continue to play a role in how people trace their identities, and the rights of unborn children are also assured. (Kingwill 2014)

Land is managed by a nominated family representative, known by terms such as *umgcini ekhaya* ('one who looks after' from the verb 'to look after') or 'responsible person', and one of the criteria for this appointment is that people must be trustworthy and look after both the family and the property. Trustworthiness (*thembekileyo*) is an earned reputation and is not inscribed by way of birth status, which indicates a shift from traditional patterns of succession and inheritance according to status, such as eldest male. Hence the characteristics of responsibility can be ascribed or earned. Most importantly, custodians do not have rights to alienate the land. These concepts of management, rather than ownership by individuals are are fundamentally different from the system of one-to-one transmission of the western variety. (Kingwill 2014)

These concepts that make up the idea of family property have evolved over time, and are still evolving or adapting, but it is not a simple linear movement in one direction. Martin Chanock summarised the interaction of new and old ideas about property:

> *Ideas about appropriate behaviour regarding the transactional order between kin concerning 'old' property (food and cattle) extended into the dealings between strangers about 'new' property (acquired with money through the market), whilst the ideas and practices of the market economy had a significant effect on the way 'old' property was dealt with among kin (*M. Chanock, 1991: 88).

it is important to get the linkages between tenure and succession law right, meaning that the law should resonate sufficiently with local norms to give it some traction and to provide protection for family property and family members. Abuses of power occur between family members as well as between members of communities, and it is therefore important to address the current vacuum in law. The linkages between forms of ownership and forms of succession and inheritance require very careful design to take into account existing social realities.

2.6 Important Policy considerations

As emphasised in the summary above, the design of systems of succession and inheritance should attempt to match the patterns of behaviour that people relate to, but at the same time introduce measures that comply with constitutional injunctions that promote security and equity. There are complex patterns of rights that combine strong individual rights held by families or households, usually to arable and/or residential plots that coincide with some aspects of wider social control, particularly when the common lands are subject to community or family oversight. These patterns of layered rights, even within systems of individual title, throw up difficult challenges for succession law.

When designing record systems for people's land rights within a new records system of land administration as recommended in the main report, it is important to simultaneously consider corresponding systems of succession and inheritance. Bringing succession law into land tenure reforms greatly strengthens people's security of tenure, as well as their *sense* of ownership and control, and helps to guard against abuses by powerful members of the community or family.

There are several elements to consider regarding the question of succession and inheritance, some of which have been discussed above:

- Why should we see succession law and inheritance as an integral aspect of land administration?
- What is the link between succession law and practice and land tenure law and practice?
- Why does appropriate succession law strengthen land rights?

We need new legal paradigms that are more compatible with African concepts of property rights. These concepts involve how rights are distributed between individuals who belong to a property holding social unit, and how these rights are passed on inter-generationally. If new laws do not adequately take into account the nature and strength of extant and emerging social relationships, the attempts to impose major changes to property through titling schemes are likely to fail. Important elements of the law may be evaded and superseded by living 'customary' practices regardless of legal status.

It is important to understand why the existing system of property rights and intestate succession law are (1) linked and (2) incompatible with African law. The reason for the latter is answered in large measure by the constraints of the overall cadastral system, as summarised in the text box in the introduction, since the entire formal property system is tied into the cadastre.

The conclusion from research findings, which are not very extensive and arise from somewhat varied contexts and research methodologies, is that freehold title in South Africa is not aligned with the realities of African ideas about land ownership. The paradigm of land tenure reform that expects African systems to simply 'catch up' or be forced into the freehold/registration mould fails to comprehend the fundamental mismatch between the two sets of ideas. Crucially important is the further lack of alignment of family and succession law with the local transmission practices.

Scholarship on African communal and common property systems (Cousins 2008a, 2008b), reveal that relationships to land involve multiplex social relationships channelled along social networks, starting from familial relationships and spreading outwards. These social networks define rights of access to and control of land, and have important implications for rights of succession and inheritance. Familial rights to property, including transmission of property, are not organised according to the western approach of 'one-to-one relationships' between an identified owner and land as a property object or 'thing'. Rights of access within the family are generally based on categories of qualifying family members who are not nominated and quantified (Kingwill 2014; Berry 1989: 42). Western paper systems, such as South African property law, are not able to accurately reflect multiplex relationships (Kingwill 2014; Okoth-Ogendo 1989) and for this reason the property system must be modified to be able to reflect the realities of the majority of South Africans whose rights otherwise remain unrecognised.

The result of this tension is that there are competing sets of norms and values, but these are seldom made visible in the public discourse. The interpretation of the Constitutional Court in the *Bhe* judgement side-stepped some of the issues concerning customary succession by implying that these are outdated and no longer widely adhered to. This argument requires serious revisiting as research reveals that the reality is somewhat more complex, and tensions between the formal laws and practices on the ground continue. While it is true that officially constructed versions of customary succession were deeply offending to women's rights of access and inheritance, the answer does not lie in ignoring the norms that people do commonly adhere to, and which do not necessarily involve outright female dispossession of rights. These norms can be built on, rather than rejected and replaced.

The big question remains the problem with hierarchical structure of ownership in its current form, with its related links to marriage, succession, taxation and planning systems. The whole structure should be reviewed against mounting evidence that it is simply not sustainable to restrict the notion of land ownership – and by implication, therefore, also of succession and inheritance law – to registerable property as defined in the Deeds Registries Act. The property system should be designed to accommodate African approaches, not by way of separating the law into two realms, a customary and common-law realm, but by attempting to design systems with internal variation that articulate with each other. With modern digital technology, this is far from an impossible ideal.

An immediate benefit of recognising existing practices, and designing an institutional framework to accommodate them, is that current African practices can be pulled from the crevices and shadows of law into visibility, and made less vulnerable to unscrupulous practices by powerful elites and by attempts by some men to cling to outdated patriarchal constructions of power.

The crucial evidence of the competing ideas about ownership and inheritance is that even where titling has been adopted, titles are being adapted in ways that contradict the Western legal construction of title. This means that titles fast lose their currency and recognition by the deeds registry, which then also affects the legality of property transactions, including transmission to family members. From the earliest experience of land titling, the authorities have grappled with widespread evasion of registration rules and procedures (Kingwill 2014). Instead of acknowledging that there is a fundamental mismatch, the law was simply tweaked to allow for administrative interventions, called 'titles adjustment'. The Land Titles Adjustment Act (No 111 of 1993) is the successor to previous regulation of titles in the Native Administration Act of 1927, now repealed. Both past and present legislation allow for the appointment of legal commissioners to 'update' titles that are not in the name of the current rightful owners. These hopeless exercises of updating titles continue to take place in the face of insurmountable evidence that titles will not stay current in the generations to come, even after the adjustments. Commissioners continue to be appointed sporadically across the country[4] in spite of the evidence that the problem is caused by a legal mismatch that cannot be overcome by mere 'updating' titles. The result is that the expenses shouldered by the state do not result in lasting durable changes. With each generation the situation reverts back to status quo ante.

The approach to policy should therefore not be to continually paper over the cracks, but to understand the root causes of the mismatches between law and practice, and to recognise that one of the key ways in which to address the ongoing problems with titles falling out of currency is to match land tenure legislation with appropriate succession and inheritance legislation. The latter should not be split off into a separable realm of 'family law' but should be brought into the centre-stage of land tenure reforms.

2.7 References part B: Succession and inheritance for land administration systems

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4 The legal fees are regarded as too low to induce lawyers with experience and heavy workloads to undertake the painstaking and frustrating work involved. This view has been expressed in many evaluations and discussions over time.

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