COMMUNAL LAND RESEARCH PROJECT

RFP/JHB/2015/003

MAIN REPORT

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Abbreviations

- AA: Administrative Area
- CoGTA: Department for Cooperative Governance and Traditional Affairs, either national or provincial
- CLaRA: *Communal Land Rights Act No.11 of 2004*
- CLB: *Communal Land Bill* (still under discussion within the DRDLR and not yet available for public comment)
- CLTP: Communal Land Tenure Policy, 2013
- CPI: collective property institutions
- CPA: *Communal Property Associations created by the Communal Property Associations Act No.28 of 1996*
- DHS: Department of Human Settlements, either national or provincial
- DRDLR: national Department of Rural Development and Land Reform
- EC: Eastern Cape
- FIG: Federation of Surveyors
- FLOSSOLA: Solutions for Open Land Administration
- GLTN: Global Land Tools Network
- GPS: Global Positioning System (a satellite based global navigation system)
- GTAC: Government Technical Advisory Centre (within national Treasury)
- HDA: national Housing Development Agency
- IPILRA: Interim Protection of Informal Land Rights Act No.31 of 1996
- ITB: Ingonyama Trust Board
- ITC: University of Twente, Faculty of Geo-information Science and Earth Observation, The Netherlands
- KZN: Kwa-Zulu Natal
- LaPSIS: Land and Property Spatial Information System
- LRB: *Land Rights Bill* (of late 1990s)
- MPRA: Municipal Property Rates Act No.6 of 2004
- MPRDA: *Mineral and Petroleum Resources Development Act No.28 of 2002* MPT: Municipal Planning Tribunal
- MTSF: Medium Term Strategic Framework 2015-19
- NEMA: *National Environmental Management Act No.107 of 1998*
- OUR: Occupation and Use Rights
- PTO: Permission to Occupy
- R188: *Bantu Areas Land Regulations, Proclamation No.R.188 of 1969*
- SDF: Spatial Development Framework
- SG: Surveyor General
- SPLUMA: *Spatial Planning and Land Use Management Act No.16 of 2013*
- TAB: *Traditional Affairs Bill of 2013*
- TC: Traditional Council
- TKLB: *Traditional and Khoi-San Leadership Bill 2015*
- TLGFA: *Traditional Leadership and Governance Framework Act No.41 of 2003*
- ULTRA*: Upgrading of Land Rights Act No.112 of 1991*

1 Introductory section

The following abstract informed four regional workshops on 'Land Administration, Searching for Alternative Approaches' held in Ghana, Malawi, South-Africa and Tanzania, May 12-15, 2008, convened by the Southern African Development Community (SADC) Land Reform Support Facility. We quote it here at length since it encapsulates the growing sense of urgency and frustration with problems of rural land administration that are the legacy of the colonial period, but continue well into the democratic era:

> *While it took several centuries for Western countries to develop their current land administration systems, it took only a few decades to introduce them in Africa. However, the ability of Western forms of land administration to interpret the 'African reality' has been very limited. These systems are often associated with costly and complex procedures along with a narrow conception of land rights centered on the notion of individual land ownership. As a result, these remain inaccessible for most Africans, with an estimated 90 percent of the population without formally recognized land property rights*.
>
> *In Africa, the 'privilege' of having access to formal land rights is for the few and always the wealthiest. For the others, land rights have no legal existence, are not formally secured and, thus, remain contestable. In rural areas land rights are generally informally defined and managed under customary forms of land administration. While customary systems have for a long time been efficient in making land available to those who needed it and providing land tenure security, they have been increasingly challenged by the evolution of societies and, today, they are showing their limits. In urban areas, where the share of the population living in informal settlements keeps growing, land rights do not only lack formal recognition but they are contested in many cases.*
>
> *In this context, the need is evident for rethinking land administration systems in order to make them more accessible. However, while the limits of both the customary and statutory systems are today recognized, no evident alternative solutions have yet been found and the need for innovation is often mentioned. Fortunately, notable progress has been made over the last decades.*

1.1 Key points and underlying themes

This report summarises the substantial challenges that continue to plague efforts to reform the land administration system in the country in order to ensure that all citizens have access to legally secure land tenure rights, and suggests alternatives which we believe are both logical and feasible to implement. These proposals are based on both practical experience and theoretical insights.

In order to bring about the necessary institutional changes, however, we believe that we need at least two paradigm shifts in how officials and practitioners think about land administration in order to muster the political will to effect the changes:

- Firstly, we do not endorse the assumption that tenures should be moved into the formal system as is currently practiced in order to be recognised. This report argues for an approach that recognises the social significance of existing land rights and how these are held and transmitted, even if these rights are not yet legally recognised and registered. We categorise these existing rights (that are often written off as 'informal tenures') as 'social tenures' that exist and function on a day-to-day basis but without legal and administrative backing to make them more functional. We argue that the conventional wisdom of upgrading all land tenure to full registered title, whether this is

done incrementally on existing land or on greenfield developments, has failed to bring about effective reform for a range of reasons. We argue for an alternative institutional framework that can accommodate social tenures in their diversity and in their own right. Social tenures are defined and explained in more detail in Section 4.2 under the heading Opportunities.

- Secondly, we do not endorse the assumption that land administration is the concern of the Department of Rural Development and Land Reform (DRDLR) alone. Although 'land affairs' in the broadest sense is a national function under the jurisdiction of the DRLR, that does not mean that land *administration*, which involves multiple sectors at the local level, is solely the responsibility of DRDLR. Land and land related functions are transversal across all spheres and most functions of governance. Land use planning, land development, environmental concerns and revenue/taxation on and from land cut across several departments.

An approach which accepts and supports these 'social tenures' can be applied to both rural and urban areas. This report covers rural areas that are referred to by the general label 'communal land areas' in this document. Full legal and institutional backing for such social tenures is required and can be provided within the current legislative framework through the drafting of regulations in terms of existing Acts, accompanied by effective delegations and institutional arrangements. The report suggests that the current void in public land administration that is plaguing these areas can be addressed in the short term.

The same logic should be applied to peri-urban areas on the edges of communal land, and to urban areas, though the report does not specifically address urban concerns. Administrative recognition of so-called 'informal tenure' by means of alternative formalising mechanisms to registered title is a key to resolving the problems associated with widespread, ongoing insecurity, labels of 'illegality', informal transactions and the backlog in the issuing of registered title.

The absence of formal, public land administration in rural and former African homeland areas, called 'bantustans' by apartheid's racial architects, is indicative of a wider crisis of rural governance and perpetuates the relative incapacity of the municipal sphere of governance. We argue that the establishment of effective land administration is central to addressing these larger pressing challenges of municipal and rural governance.

The contestation presently being experienced between municipal elected governance on the one hand and traditional leadership on the other is partly a consequence of the institutional weaknesses referred to above, and these failures create the space for and perpetuate such contestation. The solution lies within the present constitutional architecture which allows for the introduction of effective public land administration which may be nationally constituted but locally administered; and for the extension of the provisions of other related legislation to the affected areas. Two good examples of such overarching legislation are the *Spatial Planning and Land Use Management Act No.16 of 2013 (SPLUMA)* and the *Municipal Property Rates Act No.6 of 2004 (MPRA)*.

The promise of democracy since 1994 includes the principle of full citizenship for all South Africans. Central to the notion of citizenship is a sense of place which is recognised and rights to which are formalised. The provision of government subsidised housing has begun to address a societal need for shelter and housing, but where housing programmes have been implemented in areas without a public land administration system in place, there is no sustainable means by which to record rights in land. It may even be unlawful for the state to continue building housing without any public land administration system in place to enable accounting for public expenditure in the short, medium and long term. It can be argued that it is both financially and ethically irresponsible for the state to continue with the subsidised

housing programme on land where there is no coherent public land administration system in place.

It is a requirement of many documents issued by state departments and many private companies (including cell phone companies and retail stores) that individuals must have a fixed place of residence.[1] Yet the failure of other state departments to provide a formal national land administration system discriminates against the residents of rural former bantustan areas as they must seek letters from headmen and chiefs to confirm their place of residence. This reinforces the rule of such unelected office bearers of the state and confirms the status of residents of these areas as subjects of these office bearers rather than as full and free citizens in a democratic state.[2]

1.2 Background and introduction to research

The Housing Development Agency (HDA) is developing a policy for a 'Coherent and Inclusive Approach to Land' as called for in Outcome 8 of the Medium Term Expenditure Framework 2014-19. This research report provides background information to help inform the development of this policy.

The purpose of study is to:

- convey basic factual information to introduce the HDA and national Department of Human Settlements (DHS) to the current situation relating to land administration in communal areas.
- provide a situational analysis to help explain the trajectory of how we got to the situation we are in regarding the present state of land administration or the general absence thereof.
- propose a suggested way forward, including clear recommendations for action.

The title of the paper has been amended by the authors from 'Rural Land and Communal Land' to 'Communal Land' since the paper specifically addresses communal land issues, and does not consider private commercial farming land or land tenure issues relating to farm dwellers.

The research methodology included:

- Documentary research on the legislative and policy framework;
- A comprehensive literature review to inform both the understanding of the problem and the conceptual development of the analysis and recommendations; and
- Oral or electronic interviews with HDA officials, state officials, NGO practitioners and advocacy institutions.

The research process involved:

- consultation with the HDA on both the preliminary draft and the revised draft reports that were submitted prior to the submission of the final report; and
- ongoing sharing, discussing and debating the contents of the report between the authors.

[1] The latest such requirement was reported on 2 November 2015: "The Department of Transport has confirmed that vehicle owners will not be able to renew their car licences or drivers' licences if they are unable to furnish proof of residence." http://www.bdlive.co.za/

[2] For an insightful discussion of the citizenship expectations of people who maintain a rural place in a former bantustan see the recent article by Leslie Bank, 2015, "City Slums, Rural Homesteads: Migrant Culture, Displaced Urbanism and the Citizenship of the Serviced House", *Journal of Southern African Studies*

The outline of the report is as follows:

- Past and present: Provides a history of land administration in communal areas as well as a summary of past and present legislation relating to communal land.
- Challenges and opportunities: Summarises the various challenges and opportunities associated with land administration and land development in communal areas.
- Options for addressing challenges: Summarises various options that have been proposed for how the challenges can be addressed.
- Recommendations: Makes recommendations as to how land administration can be reinstated in communal areas.

A separate document with a number of annexures has been prepared where much more information can be found on the following topics:

- Annexure 1: Terminology and definitions
- Annexure 2: Legacies, current legislation and policies
- Annexure 3: Issues of jurisdiction on state trust land in the Eastern Cape Province
- Annexure 4: Perspectives on land rights and inheritance
- Annexure 5: Locally administered land record system
- Annexure 6: international and local experience with land administration
- Annexure 7: Interim Procedures Governing Land Development Decisions which require the Consent of the Minister of Land Affairs as Nominal Owner of the Land, as amended
- Annexure 8: Eastern Cape Planning Commission Diagnostic Study on Land Administration (extracts)
- Annexure 9: List of interviewees
- Annexure 10: Reading list

These annexures can be found at www.thehda.gov.za/communal_land_research

1.3 Concepts

In order to understand many of the issues and recommendations outlined in this report it is important that we all have a similar understanding of what we mean by many of the terms used throughout the report.

1.3.1 Communal land versus state trust land

At the request of the HDA this report uses the term ‘communal land’ on account of the familiarity of the South African public with this label. However this term is a misnomer that glosses over the reality of diverse and mixed land tenure regimes on land which is owned by the national state as trustee. A more accurate label of the formal status of such land is ‘state trust land’, which at the same time differentiates this trusteeship from land held under private trusts.

In this report we use the term ‘communal land’ to refer to land that is owned by the state and held in trust for the residents on that land, many of whom have been settled on that land for many generations. Communal land is not communal in the sense that the land is owned or occupied in common. Households living on this land have, through their customary land tenure practices, strong rights to occupy and use much of this land on an individual family basis. These rights are tantamount to individual rights.

Land use rights to residential and arable land parcels are held by the family under the management of representatives of the family (thought of as ‘custodians’ and often referred to as ‘keepers’ on behalf of the household or extended family. Grazing lands may be

accessed in common but such access is usually determined by local conventions, established over years if not generations. Similarly, the rights to harvest and utilise common resources for building, fuel, medicinal, spiritual and other purposes are usually subject to local conventions.

Access to land and rights to the utilisation of land and its products is a result, firstly, of membership of a community, secondly, as a member of a family or extended family (household), and, thirdly, based on one's position within that household and contribution to the well-being of that family.

There is thus some community oversight of land access and control of the land which differentiates the rights we describe from individual title that is recognised in the Deeds Registry. In the latter, rights holders have mathematically calculated subtractable shares to property, whereas in communal settings, some elements of the rights are flexible and overlapping and cannot be calculated on a one-to-one basis between the land and the holder as with individual title.

However some of the collective controls and sanctions over land use may be more appropriately compared with conventional land use controls such as zoning and land use schemes. They can also be compared to some extent to collective control over rights to land within townhouse and sectional title arrangements.

The blanket misnomer 'communal land' also tends to gloss over and equate all land holding in former rural bantustan areas as operating under one uniform land tenure and land administration regime. While the social attitudes and practices with regard to land have much in common across South Africa – and indeed Southern Africa – the exact local histories vary according to some key historical determinants such as when the land was first reserved for black occupation; whether it was mission land or crown land; whether acquired by conquest or some other manner; whether initially acquired in full registered ownership, or held under quitrent title, or held in trust by a mission or government official, or recognised by means of individual certificates of occupation (PTOs), etc. The trajectory of ownership and occupation patterns were also fundamentally affected by the varied prevalence and relative rights of tenants or 'squatters' on African-owned land or on commonages, and by the varied processes of transmitting land inter-generationally. These differentials indicate the complexity of settlement and tenure patterns across the country.

1.3.2 Tiers of governance structures

Communal areas invariably bear some relationship to traditional governance, though these relationships vary in form and strength according to the historical trajectories outlined above. In some cases traditional authority boundaries clash with other administrative boundaries.

The following table (table 1) summarises the various scales or tiers and organisational structures of both traditional and administrative authorities. It is important to stress that not all people who live in these areas identify or affiliate with the traditional structures, other than as administrative bodies. Many rural people reject the notion that they should automatically fall under these territorialised jurisdictions which are legacies of apartheid planning, and which fixes people administratively to ethnically-defined boundaries and structures. There is therefore a widespread call for an 'opt-in', rather than compulsory, system of traditional governance.

Table 1: Tiers of governance structures

Scale	Structure	Comments
Province, *iphondo* – isiXhosa, *isifundazwe* – isiZulu	House of traditional leaders	
Kingdom, *isizwe* – isiXhosa & isiZulu but contentious because it also translates as "nation"	King, *ikumkani* – isiXhosa, *isilo* – isiZulu, assisted by councillors, *amaphakathi* – isiXhosa	3 kingdoms in EC, all in the Transkei, 1 in KZN, none in Limpopo
Regional Authority/Council, combined a number of Tribal Authorities / Territorial Councils of the same tribe, coincided with magisterial districts in KZN	Regional Authority/Council	8 in EC, all in Transkei, 23 in KZN, 12 in former Lebowa, 6 in former Gazankulu, and 5 in former Venda.
Traditional Authority/Council – generally, always Territorial Council – Venda	Chief, *inkosi* – isiXhosa and isiZulu, *magoshi* – siPedi, *tihosi* – Xitsonga, *mahosi* – Tshivenda, and traditional council, *inqila* – isiXhosa, *isigungu* – isiZulu	286 in EC, 281 in KZN, 140 in former Lebowa, 39 in former Gazankulu, and 28 in former Venda. About 4 or 5 traditional council areas per local municipality in KZN. The boundaries of these areas were surveyed for CLaRA if not before, creating or reviving many boundary disputes
Administrative Area. This level only exits in the Eastern Cape (EC)	Headman, historically and generally known as *isibonda*, now *inkosana.*	These areas were surveyed in the EC for CLaRA. Administrative Areas are about the size of a few municipal wards but boundaries do not coincide
Traditional ward, village, *ilali* – isiXhosa, *igodi* – isiZulu	Sub headman, *ibhodi* / *unozithetyana* in EC, headman, *induna,* now *inkosana,* assisted by *ibandla* in KZN, *mantona, borakgoro* - siPedi, *tindhuna, xamuganga* - Xitsonga, *vhamusanda* – Tshivenda	There are a number of homesteads, as many as 100 or more, in a village or traditional ward.
Homestead, *umzi* - isiXhosa, *umuzi* – isiZulu	Family guardian	

After the reintegration of the bantustans into a united SA in 1994 there were a total of 387 magisterial districts across the country. Table 2 compares magisterial districts and municipalities for three provinces. These magisterial districts were the administrative units for most but not all state functions and departments.[3] In the period 1999-2000 the Municipal Demarcation Board rationalised the number of local municipalities down to 234.

Table 2: Magisterial districts compared to municipalities

Province	Magisterial districts	Total no. of municipalities
EC	78	39
KZN	52	51
Limpopo	34	25

[3] For example the Deeds Registries work according to older "Registration Divisions" which probably originally corresponded to earlier magisterial boundaries.

Land administration under the Permission to Occupy (PTO) system in the bantustans was centred on the administrative centres, the magistracies, in other words at a lower level than the current local municipalities. The fact that there are more magisterial districts than municipalities is despite the stated intention of the Minister of Justice and Constitutional Development to rationalise the magisterial districts to correspond with local municipal boundaries.[4] The local institutions, offices and staff, for any future land administration systems should preferably be located in these same centres for ease of accessibility by the users of the system.

1.3.3 The concept of land administration

Land administration covers a range of cross-cutting issues. Decisions in one area of land administration usually affect the others areas, which is why it is important to design a coherent system.

- Land tenure: How is it held and with what rights? Who can be on the land and on what terms?
- Land tenure and transmission: How are land rights transferred? How does land devolve from one generation to the next, and/or how is land transferred from one land occupation and use rights holder to another?
- Land tenure and custodianship: Which state/ civil institutions are the custodians of land records and registers, and how do they define the rights they safeguard?
- Land tenure and adjudication: How are existing claims to land rights verified and checked? Who decides which rights to accept? Adjudication in this context refers to the processes by which *existing* rights to a particular parcel/piece of land are authoritatively ascertained, i.e. it does not mean creating new rights. In a conventional cadastral system, it refers to the painstaking checks performed by registered land surveyors and legal conveyancers to ascertain the precise spatial and textual characteristics of ownership to prevent overlaying boundaries and overlapping rights. A new set of adjudication principles are required for social tenures in communal land areas where rights may overlap and boundaries may be fluid.
- Land planning: What activities are envisaged to take place on the land in future? Who decides?
- Land use management: How is land use changed from one use to another? What activities can be undertaken on the land? Who decides?
- Land taxes and fees: How are land taxes and fees determined and collected in relation to land and services from occupants and users? What are land taxes and fees used for?
- Enforcement: How are above functions enforced and by whom?

1.3.4 Registered and recorded land rights

With specific reference to the function of state custodianship mentioned above, this report identifies two broad systems by which documented land rights can be recognised and protected in the context of South Africa's institutional and legal framework. A distinction is made between 'registered' and 'recorded' rights, and the distinction is crucial for the purposes of the institutional reforms that are recommended:

[4] Minister to Chairperson of the Board of Sheriffs of South Africa, 2014/01/14

- 'registered' land rights refer to the rights to land that are recorded and registered in the Deeds Registries and offices of the Surveyor Generals according to the national cadastre and the existing national property legislation.

- 'recorded' land rights refer to rights that are proposed in this report must be recorded in a locally administered land administration system, as yet not encapsulated in national legislation. We refer to the systematic recording of these rights as a 'land-records system' to distinguish them from the land registration system. However there is a history of such locally recorded and administered rights, the most pervasive example of which are Permission To Occupy (PTO) certificates.

In this report we strongly advocate that the latter 'recorded' land rights approach becomes recognised in national law, and that the two systems as proposed are synchronised so that they articulate and become part of a single broader but flexible land administration system.

The report advocates against the wholesale systematic 'upgrading' of land tenure rights to registered rights. The emphasis on 'wholesale systematic' is important, since it does not suggest that voluntary sporadic upgrading on demand by individuals or institutions, especially public institutions, should be outlawed. The report rather highlights social tenures that do not fit in with the paradigm of individual registered rights, such as freehold, and for which freehold tenure is regarded as inappropriate for a number of related reasons. This approach represents a paradigm shift that allows for the *recognition* of local and socially accepted understandings of land and land tenure, and creates a single cohesive and inclusive public platform for the administration of these rights. Table 3 compares the existing land registration system against the proposed land record system.

Table 3: Comparison of land registration and land record- system

Aspect	Land registration system	Land record system
Enabling legislation	*Land Survey Act No.8 of 1997* *Deeds Registries Act No.47 of 1937*	Modification of and regulations to the *Interim Protection of Informal Land Rights Act (IPILRA) No.31 of 1996*
Responsibility for enabling legislation	DRDLR	DRDLR
Responsibility for administering the system	National DRDLR through the national Deeds Registry and Survey General systems with offices in provinces	Short term: DRDLR / CoGTA Long term: municipalities
Spatial location and/or boundaries	Surveyed erven, detailing boundaries	Some geo-spatial referencing such as a point or points, areas, outlines, natural boundaries
Responsibility for establishment and maintaining spatial location and/or boundaries	Registered land surveyors using technologically advanced measuring tools for centimetre accuracy. Town and regional planners. Engineers. Other specialists may be called upon for specific boundary problems.	Local officials using digital geospatial public tools such as GPS and Google Earth
Social units of people	Individuals, nuclear families,	Extended families,

Aspect	Land registration system	Land record system
around which the system is based	corporate bodies	individuals, organised or identifiable groups of individuals
Adjudication of rights to authorise ownership and transfers	Registered land surveyors and conveyancers	Local land record officers according. This requires new guidelines, preferably legislation, for adjudication of social tenures
Custodianship of spatial records	Erven kept by provincial Surveyor General's office	Plots, points, areas kept at local municipal level
Custodianship of the identities of land rights holders	List of names recorded in Deeds Registry kept at the deeds office, as part of a national data base	List of names recorded in land record system kept at the level of the local municipality, as part of a national data base
Evidence of registration or record	Title deeds stored in the deeds office, copies to owners	Occupation and Use Rights (OUR) certificate stored in local system, copies to rights holders
Procedures for dealing with disputes over social and spatial boundaries and associated rights	Professional conveyancers, courts	Local structures as appropriate, then escalate to CoGTA/ DRDLR. Investigate establishing an office of a land Ombudsman. Approach courts as last resort

1.4 The context

Up to 17 million South Africans (see table 4), about a third of the total population of 50.7 million people, regard home as a place in a rural part of a former bantustan area (see map 1) where the public administration of land tenure rights has been allowed to collapse since 1994. The poorest district municipalities in South Africa are those that include communal areas. The 10% of local municipalities with the highest levels of poverty are all situated in the Eastern Cape, Kwa-Zulu Natal or Limpopo Provinces and all are in former bantustan areas. In the Eastern Cape they are all situated in the former Transkei bantustan.

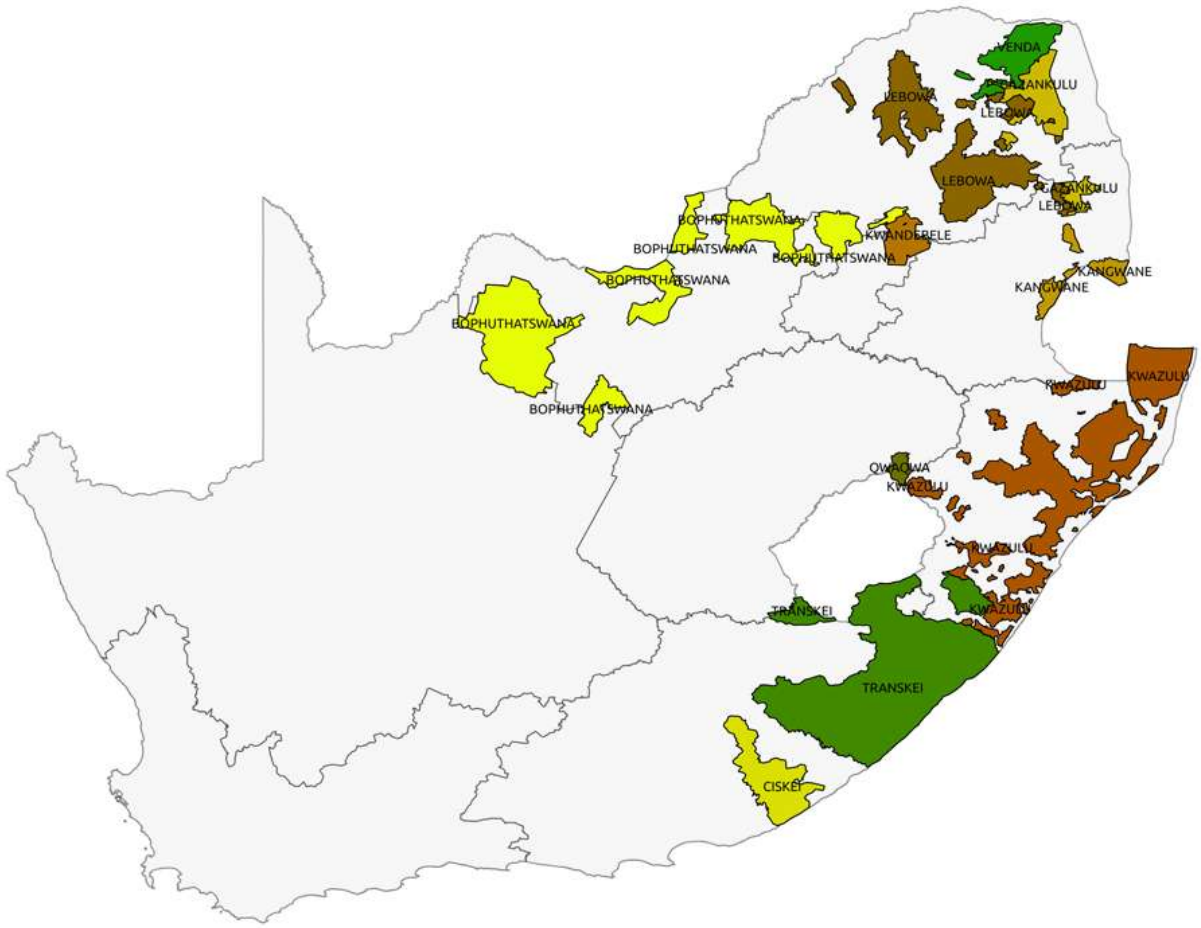
Table 4: South Africans occupying land outside formal property system

South Africans occupying land or dwellings outside formal property system in 2011

Location	Number of people	% of SA population
Communal areas	17 million	32.8%
Farm workers & dwellers	2 million	3.9%
Informal settlements	3.3 million	6.3%
Backyard shacks	1.9 million	3.8%
Inner city buildings	200, 000	0.38%
RDP houses – no titles	5 million	9.6%
RDP houses – titles inaccurate/outdated	1.5 million	3.0%
Total	30.72 million	59.7%

(Source: Prof. Ben Cousins, presentation to REDI workshop on spatial inequality, UCT, 2015/08/18)

Map 1: Areas referred to as bantustans prior to 1994



(Source: www.customcontested.co.za)

2 The past, present and future

2.1 The past: previous policy and legislation

The following summary provides a highly truncated view of the historical development of communal land administration in South Africa. The main legislation that dealt with land administration in communal areas prior to 1994 was the Bantu Areas Land Regulations, Proclamation No.R.188 of 1969 (R188) that, amongst other things, provided for the administration of Permission to Occupy (PTO) certificates.

> *'Although a variety of homeland legislation guided the Permission to Occupy (or PTO) system, all of these systems had common features being variants of Proclamation R188 legislation. These systems of land administration were generally founded on the notion of land being held in trust for black people, the Trustee initially being the State President and later the homeland governments themselves.*[5]

One of the many legacies of colonialism, segregation and apartheid are the stark patterns of inequality which have not been broken during the twenty year period under a democratic constitution. These legacies link directly back to core processes and institutions of the past such as the reserved areas under colonialism which became 'the Bantustans' under apartheid.

While it is too simplistic to chart a simple and linear trajectory from the wars of dispossession to the elaboration of bantustan rule, it is clear that very similar processes and systems emerged across the bantustans with regard to land administration and rural settlement. In law this was embodied in Proclamation R188 of 1969, which confirmed earlier practices that emerged in the wake of colonial rule. The general framework established an administrative basis for weaker land rights for rural, black South Africans in the bantustans. The enabling legislation for this proclamation has been repealed. Proclamation R188 thus cannot be amended nor should it. The language and idiom of this proclamation arise from a highly racialised and oppressive state apparatus which has no place in a democratic institutional culture. Yet its removal has created a large legal gap that needs to be filled by legislation suitable to democratic principles in land tenure and land administration, which will meet the real needs of the long term inhabitants of the rural areas in the former bantustans.

The older laws that preceded proclamation R188, and upon which it was built, carried administrative norms and rights which had evolved over more than a century, and many of the associated practices have become deeply ingrained in conferring a modicum of legitimacy in the absence of more elaborate – or new – law. Where the formal, public administration of the land tenure and rights system has completely broken down – which is an unfortunate reality in most former bantustans – many rural people still hark back to the some of the practices of old that got enshrined in Proclamation R188. Many of these practices have been the basis of local decision-making and processes for up to one hundred years, and these took place at very localised spatial levels. For example, in the former Ciskei and Transkei the local systems developed alongside the development of Administrative Areas (AA) which were sub-units of the magisterial districts. Local decision-

[5] A McIntosh, D Atkinson, R Kingwill of McIntosh Xaba & Associates and Jan Barnard, *Land Administration in the Ex-Homelands: Past, Recent and Current Situation*, DLA Project Reference: 98/RSA/TRCG/007, page 7/114 of digital version in MSWord

making involving magistrates/native commissioners, headmen and other officials of the Native Affairs Department, took root at this level as a viable form of localised administration in relation to land administration and rural governance in general.

2.2 The present: existing policy and legislation

The following section highlights the relevant policies and legislation that need to be taken into account when reforms of communal land administration are considered.

2.2.1 The constitution

The Constitution states:

- section 25(6): *a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*
- section 25(9): *Parliament must enact the legislation referred to in subsection (6*).

2.2.2 The Medium Term Strategic Framework (MTSF) 2014 - 2019

Outcome 7 of the Medium Term Strategic Framework (MTSF 2014 – 2019), dealing with comprehensive rural development and land reform, identifies the following action:

- *(f)ast track the development of tenure security policies and legislation in communal areas to address tenure insecurity.*

2.2.3 Interim Protection of Informal Land Rights Act (IPILRA) No.31 of 1996

As the title suggests, IPILRA was intended to be interim legislation until such time as comprehensive land tenure legislation was enacted and implemented. As such it is an Act which has to be extended annually by proclamation.

The Act continues to provide legal protection for a variety of users and occupants on state trust land (i.e. in the 'communal areas'), which fall mainly within the former bantustan areas.

IPILRA provides protection to people who use, occupy or access land in terms of

- Customary laws and practices
- Beneficial occupation, or
- Land vested in the South African Development Trust, or so called self-governing Bantustan government, or any other kind of trust established by statute.

The Act defines beneficial occupation as:

> *the occupation of land by a person, as if he or she is the owner, without force, openly and without the permission of the registered owner*

and an informal right as:

> *the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office.*

The effect of the Act is that it grants the holders of these rights very strong legal protection in theory (but not always observed). The rights accord in some respects with real rights in that they can only be expunged by formal processes of expropriation. Section 2 (1) states:

(s)ubject to ... the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.

2.2.4 Spatial Planning and Land Use Management Act No.16 of 2013 (SPLUMA)

The SPLUMA is new framework legislation governing spatial planning (which is mainly associated with the development of Spatial Development Frameworks (SDF's), land use schemes and land use management. The objects of this Act are to "(a) provide for a uniform, effective and comprehensive system of spatial planning and land use management for the Republic; (b) ensure that the system of spatial planning and land use management promotes social and economic inclusion; (f) redress the imbalances of the past and to ensure that there is equity in the application of spatial development planning and land use management systems."

Directly in opposition to the objects of the Act "land" is defined as "any erf, agricultural holding or farm portion, and includes any improvements or building on the land and any real right in land." This definition may exclude all communal land.

SPLUMA is wide-ranging legislation defining the scope of the country's planning system, at the same time addressing normative direction, planning instruments, planning processes, institutional arrangements as well as supportive actions in the realm of intergovernmental relations. The aim is to address fragmented, unsustainable spatial development patterns, create a single, integrated legal system dealing with planning and specify the role of each sphere of government in planning.

Before SPLUMA most municipal planning decisions were taken in terms of provincial planning law but SPLUMA has changed the emphasis and now most municipal planning will take place in terms of municipal by-laws. National and provincial government must assist municipalities to develop their by-laws (e.g. through model laws). Each province may pass provincial planning law further regulating municipal planning in that province as well as provincial planning.

Most of the detail of municipal planning, however, will be regulated in municipal by-laws. Municipal planning tribunals and appeals structures are to be established by municipalities to determine, and decide on, land development applications. A single and inclusive land use scheme for each entire municipality is to be developed. All three spheres of government must prepare Spatial Development Frameworks based on norms and standards guided by development principles. These must be synchronised, since no sphere of government may trump a with regard to municipal planning, including forward planning such as SDFs. Each has its own autonomous powers.

Since 1 July 2015 SPLUMA is now applicable in communal areas, but the regulations and the mechanism for using SPLUMA in communal areas still needs to be developed. If a land use change triggers the need for a land use approval, one needs to apply, via the municipality, to the Municipal Planning Tribunal (MPT) or a designated officer, for a land use change approval. SPLUMA makes it possible to incrementally introduce land use schemes into these areas, and also to make use of alternative approved procedures for dealing with land use change in communal areas. At the moment there are no clear land use categories or purposes for communal areas. SPLUMA says that traditional leaders have to be involved in land use decisions, but is very clear that the municipality – through the MPT – makes the final decision. Exactly how traditional leaders are to be involved in land use decisions is left to other legislation and provinces and municipalities to determine.

SPLUMA, the regulations as well as the bylaws are likely to go through a number of iterations before these are is fine-tuned to fit the communal tenure context. This is likely to take years. Not only does the Act face challenge of being inappropriate to the communal contexts, it still will require a lot of adjustment for it to be aligned with environmental, mining, forestry and other relevant legislation.

2.2.5 National Environmental Management Act (NEMA) No.107 of 1998

NEMA's objective is to provide for co–operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith.

If a project is of such a scale and type that it triggers a need for environmental authorisations, then one must get approval from the Department of Environmental Affairs for the development. It does not matter where such projects are located.

2.2.6 Traditional Leadership and Governance Framework Act (TLGFA) No.41 of 2003

Section 211 of chapter 12 of the Constitution provides explicitly for the recognition of traditional leadership and also recognises that, as with all branches of the law, customary law must be subject to repeal and amendment. Section 212, the only other section in this, the shortest chapter in the Constitution, states that national legislation may provide for the role of traditional leaders at local levels and the elaboration of customary law and institutions.

The TLGFA in effect recreates the Tribal Authorities of the apartheid era as Traditional Councils, with the added requirement that at least 30% of the members of any traditional council must be women. It is argued that provisions of the Act which enable administrative actions by traditional leaders may be contrary to the provisions of the Constitution which provide for only three spheres of government – national, provincial; and municipal.

The TLGFA recognises headmen and headwomen as traditional leaders. Previously they were regarded as paid or unpaid servants of the state. However this Act may be repealed by the *Traditional and Khoi-San Leadership Bill* – see below.

2.3 The future: draft policy and legislation

2.3.1 Draft Communal Land Tenure Policy

A *Land Rights Bill* (LRB) was developed in the late 1990's but this was never enacted as there was a change of ministry and new policy. Part of the justification for dropping the Bill was that it would have been too expensive to implement. The *Communal Land Rights Act (CLaRA) No.11 of 2004* was enacted but was subsequently struck down by a judgement of the Constitutional Court in 2010. Although it was struck down on procedural grounds, the case came about as a result of serious contestation by various lobby groups over of the principles contained in the Act, including the transfer of registered ownership of communal land to traditional councils, the new name for the tribal authorities created during the bantustan era.

The draft Communal Land Tenure Policy (CLTP) of 2013, also popularly known as the 'Wagon Wheel', is the latest official attempt to address the gap in policy in communal areas. It also seeks to transfer the land within the 'outer boundaries' of 'tribal' land in the former bantustans to traditional councils. DRDLR is in the process of drafting a new *Communal Land Bill* (CLB) which is not yet in the public domain.

There is a strong groundswell of opposition among some sectors of civil society that are vociferous in their condemnation of this policy and anticipated bill on the grounds that people will be compelled to derive their rights to land from authorities that are fixed to the old bantustan boundaries, and thus compels people to be subjects of territorialised, re-tribalised boundaries which constrains their rights of citizenship of the country.

It is very likely that this new legislation will be challenged all the way up to the Constitutional Court and that another ten years may pass without any effective new national land tenure legislation. This will result in an ever-increasing administrative and governance vacuum. Any such challenge is likely to be based at least in part on the argument that the *CLB* elevates the institution and structures of traditional councils to a fourth sphere of government, contrary to the Constitution which provides for only three spheres of government. This was one of the substantive arguments raised against CLaRA.

2.3.2 Draft Traditional Affairs Bill (TAB)[6] and Traditional and Khoi-San Leadership Bill

The draft *Traditional Affairs Bill* (TAB) was published in a Government Gazette notice by the Minister of Co-operative Governance and Traditional Affairs on 20 September 2013. It has been replaced by the almost identical *Traditional and Khoi-San Leadership Bill* (TKLB) which was recently (23 October 2015) introduced to the parliamentary standing committee as a Section 76 Bill. The TKLB is criticised for providing powers and autonomy to traditional leaders that are far greater than they ever had under the *Traditional Leadership and Governance Framework Act of 2003*. Section 24 of the Bill provides for traditional leaders to enter into partnerships and agreements with various state and non-state institutions without the requirement for consultation with land rights holders or communities, which is likely to be out of line with IPILRA.

The national Department of Co-operative Governance and Traditional Affairs (CoGTA) has made changes to the 2013 TAB. In August 2015 Cabinet decided to introduce the revised bill in Parliament towards the end of 2015. The bill is now called the *Traditional and Khoi-San Leadership Bill.*

Although there are already laws on traditional leadership in South Africa, CoGTA has said that this new law is needed for two main reasons:

- to put the various traditional leadership laws that currently exist into a single law, while at the same time solving problems that exist in the current laws, and
- to provide recognition to Khoi-San communities, leaders and councils – since this recognition has been absent until now.

2.3.3 Draft Traditional Courts Bill (TCB) [7]

[6] Centre for Legal Studies, Rural Women's Action Research Programme, *Notes on the 2013 Draft Traditional Affairs Bill*, Feb 2015.
[7] http://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/

The stated aim of the TCB was to advance South Africans' access to justice by recognising the traditional justice system in a way that upholds the values in customary law and the Constitution. It was developed to replace Sections 12 and 20 of the *Black Administration Act No.38 of 1927*, segregation-era provisions that empowered chiefs and headmen to determine civil disputes and try certain offences in traditional courts.

When the TCB was first introduced in Parliament in 2008 it met with much opposition which continued after its reintroduction in late 2011. The legislation was criticised for giving traditional leaders too much power, as it allows a chief to punish someone in a number of ways including with compulsory or forced labour.[8] There was also no accountability or oversight body to review court decisions and community members could not opt out of the jurisdiction of a traditional court. The Bill was withdrawn in 2014 but is likely to be reintroduced in 2015 according to the Minister of Justice.[9]

2.3.4 Opposition to these three bills

There has been ongoing mobilisation against the TAB and TCB and the linkages between these two and the anticipated CLB. The TKLB has also already attracted significant opposition. Together these are seen as attempts to shore up undemocratic and archaic forms of governance which have very uneven levels of legitimacy across SA. Whether one agrees with this analysis or not, the attempt by the ruling party to enact such legislation introduces a huge amount of instability and thus unpredictability with regard to governance in rural, former bantustan areas. The outcome of the legislative process and possible legal challenges to such legislation if enacted cannot be anticipated. However such uncertainty may be counterbalanced by administrative steps including the development of a land administration framework that is more 'neutral' and removed from the heart of these contests yet which satisfies the demands of the existing social tenures.

3 Challenges and opportunities

3.1 Challenges

The process of establishing administrative stability to the current 'quicksand' of land administration in the communal areas is bound to be faced with significant challenges. However we do not believe that these are insurmountable. These challenges may be grouped as follows:

- administrative challenges
- conceptual challenges
- locational challenges

Various recommendations on how to deal with each of these challenges are outlined in section 5 of this report.

3.1.1 Administrative challenges

1. Cross-cutting land mandates

[8] https://www.enca.com/south-africa/traditional-courts-bill-kicked-out-parliament

[9] http://www.bdlive.co.za/national/law/2015/03/24/masutha-to-return-traditional-courts-bill-to-parliament

Land is a transversal issue across all spheres and many functional areas of governance. It impacts directly on the delivery of human settlements, and on municipal government. There are many different departments within government that deal with land in one way or another (users of land administration system), including for example:

- Department of Rural Development and Land Reform
- Department of Agriculture, Forestry and Fisheries
- Department of Human Settlements
- Department of Environmental Affairs
- Department of Cooperative Government and Traditional Affairs
- Department of Public Administration
- Department of Mineral Resources
- Department of Water Affairs
- National Treasury

There is often lack of clarity as to which department is responsible for which aspect/s of land. For example land use management is an exclusive municipal competency, whereas land reform is an exclusive national function. Agriculture, forestry, environmental and forestry legislation are often not seen a land use management legislation, whereas in essence they are.

Land administration, as we have defined it, includes land tenure (which includes adjudication, transfer and succession issues), spatial planning, land use management, land taxation, and enforcement. Each of these functions of land administration is managed by different role-players, and in communal areas these functions are not well coordinated if at all.

2. Administrative void and dearth of required skills

There is no single government department that is taking leadership in respect of fixing land administration in communal areas. There is no legislation that regulates how to keep records of who is on the land and what they can do on this land. Historically magistrates offices used to be responsible for issuing and administering Permission to Occupy (PTO) Certificates, assisted by officials mainly of the various Departments of Agriculture and also in some other departments. However, since 1996, all these officials have been withdrawn from these functions in the absence of the assignments and delegations of the PTO legislation to the appropriate departments and officials. There were also high expectations that new-era rights would obviate the need for administering PTOs and thus the loss of institutional capacity was accompanied by ideological contestation around the appropriateness of PTO rights. The result of the legal vacuum, however, was that these departments stopped issuing PTOs at different points of time in different places, leading to an administrative void with which municipalities and local communities have had to grapple. Many of the steps taken to fill this void are unlawful, such as municipalities issuing what are called PTOs.

Staff within government who have performed these functions in the past have been scattered and absorbed into various departments or have retired. There has thus been significant ‘institutional loss of memory’ and capacity. The loss of experienced public servants who may have passed on their expertise to a new generation of land administrators has already been one of the considerable costs to the project of re-establishing rural land administration capacity, but not one that should impede the possibility of starting afresh and training a new generation of local land officers who may be free of the baggage of some of the past arrangements, some of which still stir up older resentments about ‘inferior’ rights.

As should be clear from the above review of legislation, the government justifies these legal gaps on the ground that the DRDLR is in the process of developing new communal land tenure legislation to address this. But the delays in successfully introducing new legislation due to ongoing contestation raises serious doubts whether this legislative route will provide respite from the malaise in land administration in the near future. It is certain that the prospective *Communal Land Bill* will be challenged if it is enacted, leading to a further delay of five to ten years and a corresponding deepening administrative void.

3. Traditional versus democratic boundary overlaps

The boundaries for local traditional communities and the boundaries for local municipalities and wards do not align in the Eastern Cape, though this appears to be less of a problem in KZN and Limpopo. These administrative-spatial disconnections add to the ability of each of these sectors to mobilise independently around administrative issues, and increases the possibility for contestation. For example, local leadership, whether civic or traditional, in some areas have to work with more than one ward councillor and ward councillors have to work with a number of local/traditional leadership structures. Two people from the same local/traditional community, depending on where they live in that community, may have to work with different ward councillors if the ward boundary splits the long-established area. This often creates confusion and tensions.

4. Boundary disputes within/between communities

Boundary overlaps also occurs at the household, village and community scale, where there is sometimes contestation over the boundaries between households, villages and communities. This contestation can be over boundaries that are recorded in oral history or on maps and plans.

There are different paradigms at work here. The mindset of the *Land Survey Act* and the Deeds Registry system are of mutually exclusive and non-overlapping land rights. On the other hand in customary practice and perception, land rights are as likely to be overlapping depending on a range of social and environmental factors. The techniques of land surveyors cannot resolve such issues. The likelihood of ongoing conflict in some areas (but by no means all) where boundaries are contested should be accepted as an inherent feature of the order, since the nature of customary rights militates against being fixed within definite boundaries. For this reason it is proposed to strengthen conflict-resolving institutions, e.g. in the form of a national office of a land ombudsman.

5. Governance tensions

In some, or more appropriately many, communal land areas there are tensions between traditional leadership structures and municipal structures. Some traditional leaders feel that they do not have to be subjugated to the municipality when making certain land administration-related decisions in their communities. In other instances councillors do not engage with traditional leaders or vice versa. It must be noted however that there are also some places where the traditional leaders and the municipal councillors work very well together.

The tensions between municipalities and traditional leadership structures often play themselves out within communities, with communities having to make choices about which structures will represent their needs.

While this cleavage is a manifestation of lack of a cooperative governance framework to bring these parties to work together, there is a political aspect that cannot be avoided. There are complex issues of legitimacy which impact on the traditional leadership institution

in general. In the midst of all the power dynamics, the institution of traditional leadership is facing intractable questions of legitimacy.[10] Legitimacy has a number of faces to it. One of the faces of the legitimacy question relates to traditional leaders' genealogies. Since this is not an elective system, but one which revolves around automatic succession, these issues often stir up difficult dynamics about democratic governance versus traditional succession. The second face of the legitimacy challenge relates to how the individual traditional leaders conduct themselves in the eyes of their constituencies. The third and more complex face of the legitimacy conundrum is in relation to 'tribes' having been moved and interspersed spatially, as a result of wars, disasters and natural population movements, which often resulted in lack of congruence between the traditional leader, spatial jurisdiction and tribal affiliation. Unfortunately the current policy proposal of government on this issue evades the legitimacy question by providing no choice to rural communities. While traditional leadership have their legitimacy battles, elected councillors face different questions of legitimacy, which relate to their lack of proximity to communities.

3.1.2 Conceptual challenges

6. Second class title

There are some who see individual title deeds as the ultimate form of tenure and 'permit' based tenure systems associated with communal land as a second class form of tenure. They argue, for example, that without individual title deeds, as part of the formal deeds registry system, people will not be able to access bonded loans through banks and as a result will not be able to use their landed assets to lift themselves out of poverty.

We argue, along with a large literature on this subject, that this is a myth:

- Title in and by itself does not get anyone credit. People must have a regular form of income in order to obtain and sustain credit. Moreover banks are generally loathe to lend capital in areas where they are unlikely to be able to, or even want to, reclaim their loans through foreclosure of the land.
- A huge body of scholarship based on empirical research indicates that title in itself does not have any noticeable effect on intensity of land use, small-holder agricultural productivity; and nor does it appear to be a determinant of selling and buying land which happens regardless of title.

Given the majority of the populations' experience of arbitrary historical administrative action in relation to land rights, there is very often a popular demand for title or "*itayitile*". But when this demand is unpacked it is usually a demand for some public record or acknowledgment of a land right and not a demand for registered title itself. When confronted with the transaction costs of registered title, municipal rates etc., people generally shy away from registered title if they have the choice.

7. The definition of rights in the family linked to issues of succession and inheritance

Communal tenure arrangements do not fit neatly into the western concept of land tenure where rights of ownership are defined in terms of a specific owner and a specifically defined portion of land (called a land parcel), and where the owner has the rights of alienation or testation. The one-to-one property relationship of western-style ownership thus has repercussions for the heritability of rights. Heirs can be named in wills, or, in the case of intestate succession, particular heirs are identified in succession law.

[10] http://www.dispatchlive.co.za/opinion/proposed-communal-land-policy-could-replay-1913/Daily Dispatch, 08 July 2015, Opinion article by S. Manona

In communal areas the social unit that holds the rights to the land is not always a neatly bounded group of people and the land is also not always a neatly bounded parcel of land that can be mathematically and accurately defined through survey. If owners cannot be identified precisely as discussed above, it stands to reason that specific heirs cannot be identified. Family ownership generally implies that particular categories of kin have rights of access without having to name people individually. Rights are usually conceived over successive time and generations and are seen to apply the dead, the living and the yet-to-be-born.

These contrasting notions of ownership and rights thus also result in contrasting notions of inheritance. The way rights combine with issues of heritability is an added reason why registration of owners in the deeds registry is inappropriate in its current form, since many people do not like to register a particular individual who may then use these powers to sell the property, or leave it to someone in a will. For this reason, registration tends to be avoided and the deeds office registers lose their currency very rapidly, a phenomenon that has dogged the administration of freehold (and quitrent) titles ever since they were first issued to Africans in the nineteenth century.

When laws of succession are mooted for reform in order to counteract discrimination against women's rights of inheritance, it is important also to consider the very different context in which people consider the succession of property, which is that there are strong imperatives to hold the property in the family group, rather than allowing any single person to inherit, whether male or female. The alternative practice that is already widespread is of recognising particular individuals as 'custodians' or 'family representatives' (often called 'keepers' in the vernacular) to protect family property.

The land-record system we propose therefore needs to be devised in ways that that create the link between the way rights are defined and how these rights devolve over time and across generations. The system should recognise:

- family property
- the rights of access by recognised family members, male and female, over time and across generations
- the principle of custodianship rather than rights that allow for alienation.

This approach implies some kind of accepted definition of who the 'recognised family members' are and how the agreed definition is decided.

8. Differing contexts

Communal areas are not all the same. In some areas there are well respected traditional leaders while in other areas the traditional leaders do not have the full support of the community. In other areas there may not even be traditional leaders.

A one size fits all solution does not work in contexts where local dynamics are very different from location to location. Any land administration system will need to take these differing contexts into account.

9. Differing solutions

Many people have different perspectives on what the best solution is for addressing land administration in communal areas, ranging from those that want to transfer all land to either democratic land holding entities or to traditional leadership structures, through to those that want to privatise all communal land and those that want to introduce systems of public

recording that maintain the social characteristics of tenure, but introduce increased definition and powers of the rights holders. These differing perspectives on how land tenure and land administration should happen in communal areas leads to conflicts over what legislative and administrative interventions should be implemented.

The lack of progress as a country to seriously address the protection of the land rights of people living in communal areas in the new democratic South Africa can be traced back to this challenge of differing solutions. These tensions often play themselves out in fierce court battles, where for example the CLaRA was contested in courts by many who claimed that CLaRA provided too much power to traditional leadership structures. Although CLaRA was struck down on procedural grounds, much of the substantive arguments around the powers of traditional leaders were not addressed.

3.1.3 Location specific challenges

10. Expansion of settlements into communal areas

There are many communal areas, especially on the edge of urban centres, for example, where there is a great demand for new land for residential purposes. In the absence of clear land administration procedures dealing with tenure security and land use management, this rapid urbanisation creates tensions in these areas between competing role-players over who is responsible for controlling such development and contestation over who owns the land in question.

11. Approvals for larger scale development projects

There are no clear procedures for developers who want to implement larger scale development projects (like, for example, agricultural irrigation projects, development of schools and clinics, new shopping centres, new hotels and backpacker establishments) to obtain formal tenure security to the land nor to obtain the necessary land use approvals. There are a set of formal 'procedures' associated with IPILRA that set out clearly what processes should be followed to facilitate development applications, but unfortunately these procedures, which were never formalised into legal regulations and only have the status of departmental instructions, have fallen into disuse.[11]

12. Benefits from mining

The lack of clear definition of land rights leads to sharp and growing tensions within communities as to who should benefit from the income from mining within communal areas. This ranges from small mining operations such as sand mining for construction, borrow pits, right through to large scale and commercial mining operations. Tensions around this issue have arisen in North West, KZN and the Eastern Cape Provinces.

13. Rural housing subsidies

The 'rural housing on communal land' subsidy was introduced to avoid the need for registration of title when issuing subsidies. However the policy has veered to the extreme where there is no administrative or spatial referencing of the allocated subsidy. The approach advocated here of introducing local land administration by public institutions will formally and officially connect a subsidy, a house, a family and a geographic reference in a

[11] *Interim Procedures Governing Land Development Decisions which require the Consent of the Minister of Land Affairs as Nominal Owner of the Land*, as amended

public record. Precise implications will need to be determined. For example, consideration will need to be given to the implications of whose name will be recorded on the national housing subsidy data base when housing subsidies are allocated to 'families' as opposed to married or co-habiting individuals.

14. Leases on land falling under the administration of the Ingonyama Trust Board

The Ingonyama Trust Board (ITB) has stated that it is issuing or at least intends to issue residential leases to households living on land under its jurisdiction. The ITB argues that this provides households and lease holders with more secure tenure. However it can be argued that leasehold tenure is a weaker form of tenure for households living in these areas as compared to the tenure rights they already have and which are protected by IPILRA. Furthermore such leases are contrary to the provision at section 25(6) of the Constitution which requires enhanced tenure security.

In practice the ITB seems to have issued leases for business purposes rather than residential sites except where banks have wanted evidence of land tenure for the purposes of granting personal loans. However as with the issue of mineral leases, questions arise as to who benefits from such rental income.

15. Land claims in communal areas

Unresolved land restitution claims in and around rapidly urbanising bantustan towns like Mthatha in the Eastern Cape further complicate the already murky and fluid situation with regard to jurisdiction over land areas and the contestation over land itself. It would seem that where land claims are made (or even rumoured to have been made) there arises a conflation between the claim and actual authority over claimed land - that is that claimed land is often assumed by claimants to be *de facto* "their land".

This unstable situation is compounded by the reality that most, if not all, Local Municipalities where such complex dynamics around land (and municipal commonage, specifically) play themselves out lack robust and proficient political and administrative capacity to manage such challenges. Thus, in effect, many of these instances lead to a paralysis on the part of Local Municipalities with regard to taking charge over or managing land that is registered as theirs.[12]

16. Private value capture

If communal land is privatised those that obtain private registration and title deeds are able to sell and dispose of this land and benefit from the full property value increase. There is no clear policy or entrenched mechanisms in place to retain land value increases for the original land owners, which arise from the conversion of previously communal land to private land and the associated rezoning. This is critical in a number of situations where there is significant development potential such as where there are mineral rights and commercial possibilities including tourist development.

One way of averting this is to lease the land in question with clear benefit flows including rental income back to the underlying land rights holders as envisaged by the *Interim*

[12] These insights are derived from a report on a workshop in early February 2015 of concerned specialist working in the Eastern Cape Province on the issue of land administration and funded indirectly by GTAC of the National Treasury, with recommendations specific to the Eastern Cape. It was prepared in response to a request for a document to brief a national Minister and contains material prepared by a number of participants.

Procedures Governing Land Development Decisions (referred to in footnote 11). There are precedents for this both in contemporary South Africa and in the developed world where there have been successful first nation land claims to prime real estate.

Furthermore some existing legislation still contains what appear to be unused or underused provisions to enable municipalities to claim up to 50% of the increase in land value on transfer due to changes in land use zoning. The Cape Provincial *Ordinance No.33 of 1934* still applies in the proclaimed urban areas of the Transkei. Sections 35*ter* and 50 provide for some limitation of value capture due to changes in zoning. Section 35*ter* of Ordinance 33/1934 is incorporated into the revised and updated *Land Use Planning Ordinance No.15 of 1985* which applied in the Cape Province but not the then "independent" Ciskei and Transkei. However it is not clear if these sections have ever been applied and if not, why not.

17. Quitrent

In most districts of the former Ciskei and nine districts of the former Transkei, a form of title known as quitrent title was introduced in the nineteenth century. As with PTOs, quitrent applied to both residential and arable allotments, with the exception that quitrent land is surveyed and registered in the deeds registry system. These were individual titles with more restrictive conditions than freehold, for which the state had dominion over the land. Quitrent titles have always existed alongside the 'lesser' rights of the natural increase of family members who could not succeed to the original family plots, as well as large numbers of informal occupiers who were called 'squatters'. Many of the families in the latter categories were in some cases subsequently issued with PTO rights. Many of these PTOs were issued over earlier quitrent land rights. There have also been cases of bitter contestations in some areas over the common property.

Quitrent was upgraded to freehold in terms of the *Upgrading of Land Rights Act (ULTRA), No.112 of 1991*.[13] In addition to the overlapping of land rights and the contestations arising from this aspect, there are the ongoing problems of the records in the Deeds Registries not reflecting current owners and occupiers but usually ancestral owners. This is partly due to the lack of a cheap and accessible procedure to update titles. A further challenge with quitrent titles is clarity on procedures for subdivision and registration of servitudes.

18. Coastal and Protected areas

The interface between coastal and environmental regulation is brought to the fore by High Court Dwesa Cwebe Case (Malibongwe David Gongqoshe and other vs. The Minister of Agriculture Forestry and Fisheries). At the heart of this court case is the conflict between customary rights to marine resources and the conservationist approach imposed through a Marine Protected area. What this case brings up is that, customary rights cannot be ignored in the scheme of land use and environmental management. While the case may be limited to customary rights of access to marine living resources, the judgement is likely to have far wider implications for other resources such as forestry and sand.

Coastal and riverine forests which are prevalent in some of the coastal communal areas are disappearing at an alarming rate despite levels of statutory protection. Forests are typically cleared for slash and burn agriculture and firewood, cleared for roadways and resources such as bark is harvested at unsustainable rates. Indigenous forests and

[13] ULTRA upgraded quitrent as defined in R188 and therefore did not apply in the Transkei where quitrent was established under much earlier legislation which still applies, at least in theory if not in practice.

plantations are governed in terms of the *National Forestry Act No.84 of 1998* without parallel provincial legislation, the *National Environmental Management Act No.107 1998 (NEMA)*, and more recently they are also subject SPLUMA.

Despite forestry being a concurrent competency between national and provincial government there is only national legislation. Many of these forest areas on communal land are being plundered due to lack of state capacity to enforce the multiple pieces of legislation. This raises complexities in how a balance should be struck in respect of the notion of recognition of customary rights *vis-a-vis* the maize of conservation legislation. The lack of a balance between these legislative thrusts is resulting in many of the laws being unimplemented.

Sand mining in the coastal areas is also subject of intense difficulty of finding a balance between customary rights and the prevailing overarching legislation. Sand mining is equally subject to three themes of mineral regulation, environmental regulation, and land use planning regulation and no one theme takes precedence over another[14]. There are three authorities in the national sphere that claim to regulate sand mining from an environmental perspective: the Department of Mineral Resources, the Department of Environmental Affairs, and the Department of Water Affairs (DWA). These authorities use the *Mineral and Petroleum Resources Development Act No.28 of 2002*, the NEMA and the *National Water Ac No.36 of 1998t,* respectively, to regulate sand mining. There is also a fourth authority, sitting in the provincial sphere of government, and that is the provincial department responsible for environmental affairs in each province, of which there are nine[15].

It is a pipedream to think that the various responsible departments are all going to monitor, control and enforce the range of other legislation on a wall-to-wall basis

19. State land lease and disposal policy

The state, in its trusteeship role over communal land, has fiduciary responsibilities in respect of the communal land while confusion over the powers the state wields becomes glaring in relation to decisions pertaining to leasing and disposal of communal land.

The national policy document entitled "*State Land Lease and Disposal Policy*" explicitly states that it is applicable to all immovable assets for which the Department has legal title. DRDLR officials tend to erroneously include communal land in this broad category of land which is "owned by the state". Of particular importance is that communal land is a particular form of state land, in that it is nominally held by the state or in a custodianship, trusteeship capacity.

The policy seeks to reverse the legacy of the *1913 Natives Land Act*, by addressing issues relating to "historical exclusion, equitable access to land, and participation in the optimal utilization of land; as well as to address challenges relating to access to food at both household and national level to bring about household food security and national food self-sufficiency." Communal land does not fall into this category of land available for use to achieve this objective.

[14] Green S. C. (2012) *The Regulation of Sand Mining in South Africa; A thesis submitted to the University of Cape Town in fulfilment of the requirements for the degree of MPhil*, Faculty of Law, UCT.
[15] Op Cit

In cases where state land (this excludes communal land) is to be transacted or disposed of, in favor of an entity which could include a company, person, beneficiary, CPA, or sphere of government such as a municipality, the general 'rule of thumb' is that a Section 28(1)1 certificate should be issued in line with Schedule 6 of the Constitution. The competent authority to sign the Section 28(1) certificate is the Director General of the DRDLR. The Section 28(1) certificate serves as a due diligence formality to confirm that the land is vested in that particular sphere of government, and that the Registrar endorses that parcel to that effect.

For the certificate to be issued there should be sufficient motivation with all checks and balances to the relevant section of national DRDLR to issue the certificate. It is only on the basis of the certificate that the SG can affect the endorsement of title, after which the property can be 'transacted'. The circular cited below clarifies the matter, by drawing a distinction between other categories of state land as I have done and land that is held in Trust for tribes or other identifiable communities or persons. "When dealing with such land the relevant Minister acts in the capacity as trustee and therefore no item 28 (1) certificate should be called for." For all the reason outlined above, this policy is neither designed for the purposes of regulating leases and disposal on communal land.

20. Foreign and elite communal land grab

In some African countries foreign companies and elites are buying up land in communal areas. The correct procedures are not always followed in the land transfer process. Local community residents find themselves evicted from land they have been using for years and their ancestral lands. The land is then often used for the production of export crops that does not adequately benefit the local population and country. There are indications that this could become an issue in South Africa if the state does not find ways to deal with the issue.[16]

3.2 Opportunities

The following section identifies opportunities that can be built on to help address the challenges identified in the previous section.

1. Seizing the crisis as an opportunity

The challenges above, which are exacerbated by the crises and void in land administration for communal areas, have led to attempts by most local role-players to find solutions to address this crisis. Almost no-one wants the present administrative void to continue. There is a window of opportunity for government and others to do something to address this crisis.

2. Introduction of SPLUMA

The implementation of the SPLUMA, with its wall-to-wall requirement for SDF's and land use schemes across all municipalities, has opened up the potential to explore new ways of addressing land use management in communal and other areas. It will be possible and pragmatic to re-establish land administration functions at the same time as land use management functions are extended into these areas.

[16] See for example http://www.stopafricalandgrab.com/ and http://www.plaas.org.za/sites/default/files/publications-pdf/IntroChapLandRush.pdf for examples of the African land grab debate

3. Living customary law

The use of the concept of 'living customary law' that is being used by the courts, provides a unique opportunity to build a land administration system that is embed within and builds on existing practice or custom which includes social tenure, while at the same time allowing for, as an example, adaptation to such law to the principle of equality in the Constitution.

> *What needs to be emphasised is that, because of the dynamic nature of society, official customary law as it exists in the textbooks and in the Act[17] is generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognises and acknowledges the changes which continually take place …*
>
> *The official rules of customary law are sometimes contrasted with what is referred to as 'living customary law', which is an acknowledgement of rules that are adapted to fit in with changed circumstances.[18]*

4. Growing recognition of the core problem

There is an increasing sense of urgency amongst a range of role-players to address the land administration void in communal areas, since this problem is seen to be at the heart of stalled development in the former bantustan regions.

While land tenure reform and land administration is the responsibility of the national Minister for the Department of Rural Development and Land Reform (DRDLR), the functions of land administration and land tenure reform are transversal issues across and underlying a number of functions of all three spheres of governance.

The ineffectiveness of rural land administration is widely seen to have had extremely negative effects on attempts to develop viable rural settlements in the former bantustan rural areas. Many of the day-to-day activities of local government (managing land use, building control, rates and services collection, etc.) are based on an assumption of effective local land administration.

In the longer term, local government must expand its revenue base and an obvious source of revenue is rural land which was once administered under R188 and its variants. Just as SPLUMA applies across the board to all areas, including those previously excluded from land use schemes and land use zoning, it is only a matter of time before the *Municipal Property Rates Act No.6 of 2004* will similarly be extended to all areas. There have been exemptions to the applicability of this Act but these are unlikely to be sustained in the long run. Already CoGTA in KZN is urging local municipalities to levy municipal rates on all business sites and also on residential sites with improvements valued at over R500 000.

5. Growing global interest in land-record systems and improved technology

In more recent times there has been a renewal of the call to register informal land rights as formal titles by international economists who have influence with western governments, as well as by institutions such as the World Bank. [19] This would entail converting all land in communal areas to private ownership through the introduction of a land registration system

[17] 1927 *Native Administration Act*
[18] *Bhe & others*, Case CCT 49/03, paragraphs 86, 87
[19] Hernando de Soto, the Peruvian economist, published *The Mystery of Capital (2000)*, a landmark study into the relationship between property rights and poverty

with registered erven and title deeds. Where these programmes were tried in South America, however, they have been shown to have been largely ineffective in promoting 'asset formation'. Research in Africa conducted for the World Bank showed conclusively that productive use of the land is not linked to title. There is thus a growing recognition that alternative tenure approaches, based on more localised land-record systems, are more appropriate.

The World Bank has since been cooperating on solutions to this global issue of land administration in 'rural' and other off-register areas and the 'fit-for-purpose approach' to land administration has emerged as a game changer. It entails some of the following key elements:

- Flexibility in spatial data approaches.
- Inclusivity in terms of coverage of various tenures
- Participatory to ensure community support.
- Affordability for the government.
- Reliability in the sense providing authoritative information.
- Attainability of the system within a set time frame.
- Upgradeability regarding improvement over time.[20]

International support for alternative land administration systems is growing exponentially, since the problems outlined in this report are replicated in various ways in most regions of the world that were once colonised. In Africa, another key role player in developing new Land Administration systems based on the recognition of social tenure is UN-Habitat which has devised a set of pragmatic interventions.

The UN-Food and Agriculture Organisation (FAO) has also developed the "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests" (VGGTs). These guides recommend that states should ensure that publicly held rights are recorded together with tenure rights of indigenous peoples and the rights of the private sector in a single or at least linked land record system. The Voluntary Guidelines commit state to the following principles, to:

- RECOGNIZE AND RESPECT all legitimate tenure rights and the people who hold them
- SAFEGUARD legitimate tenure rights against threats.
- PROMOTE AND FACILITATE the enjoyment of legitimate tenure rights.
- PROVIDE access to justice when tenure rights are infringed upon
- PREVENT tenure disputes, violent conflicts and opportunities for corruption[21]

The Guidelines go beyond the states, to non-state actors (including business enterprises) committing them to a responsibility to respect human rights and legitimate tenure rights.

Technology is providing opportunities for the establishment of simple and affordable record open source land management systems such as, amongst others:

- Social Tenure Domain Model from a multi party initiative involving UN-Habitat the World Bank, the Global Land Tools Network (GLTN), the Federation of Surveyors (FIG), and the University of Twente, Faculty of Geo-information Science and Earth Observation, The Netherlands (ITC).
- Talking Titler from the University of Calgary

[20] GLTN and others: available at http://metaspatial.net/downloads/Standard-Open-Source-Software-for-the-Social-Tenure-Domain-Model-Tool_paper.pdf accessed 3 November 2015

[21] UN FAO (2012) Voluntary Guidelines on the Governance of Tenure Food and Agriculture Organisation of the United Nations, Rome.

- LaPSIS – Land and Property Spatial Information System from the Housing Development Agency
- FLOSSOLA (Solutions for Open Land Administration) supported by the United Nations Food and Agricultural Organisation
- Google Earth

6. Increasing understanding of how to intervene in a complex environment

There is growing understanding internationally on how to deal with development in complex environments.[22] Rather than trying to pre-plan for every eventuality, a broad framework can be developed within which people are able to try out local solutions, drawing on but not blindly replicating best practice from elsewhere. By adopting such an iterative approach of intervention and learning from experience, one is able to find ones way to interventions that are more likely to lead to better outcomes.

4 Options for addressing challenges

Before an attempt is made to make recommendations for how to deal with the challenges and build on the opportunities listed above, this section summarises, in broad terms, what options have been considered. These options have been broken up into the following categories:

- transfer communal land to one of the following:
  - traditional councils
  - collective property institutions
  - individuals
- build on existing tenure related practices found in communal areas
- do nothing

4.1 Transfer

One of the options that frequently arises among reformers is to 'transfer' the land on a wholesale systematic basis from state trusteeship to another landholding or owning entity in registered title. Several models of transfer have arisen, and some have been tried, others only mooted. For example, the current government policies favour transfer to traditional council structures, while transfer to other legal lend holding entities such as Communal Property Associations is an option. A second model, which was mainly created for land returned under the land restitution programme, is collective title in the form of collective property institutions (CPIs) for which South Africa created a law, the *Communal Property Associations Act No.28 of 1996*. A third, already discussed, is transfer to individuals in title.

4.1.1 Traditional council ownership

Transfer communal land to traditional leadership structures.

Advantages:

- The Traditional Council (TC) could maintain and administer social tenure arrangements at considerably lower cost than if the state appoints local land tenure officers and sets up infrastructure to record rights..

[22] See http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8287.pdf accessed 28 October 2015

- The TC could behave as a trustee and recognise the existing IPILRA rights that rights holders already have.
- The revenues raised from business ventures could be mobilised by the TC to develop the infrastructure and public services, such as roads, schools, clinics, internet, etc.
- The TC could provide conflict resolution services at considerably lower costs than if the state were to set up a national ombudsman or some other institution to mediate conflict.

Disadvantages:
- The state divests itself of its constitutional responsibilities over the land tenure and its responsibility to provide public services to ordinary South Africans. Local government will not be bound to provide planning services and service delivery.
- Once land is transferred to TCs, the state will have little traction to interfere in the possible governance abuses that TCs may engage in.
- People's ability to exercise their democratic rights as citizens of the whole country will be constrained, since the source of their rights will be territorially-bound potentially unaccountable structures that exist outside of the current three-tier system of governance.
- There are no guarantees that the TC will behave as a trustee and not a proprietor, given that title confers 'ownership'. Existing examples suggest that TCs do not always act in the interests of the rights holders, but instead tend to use their ownership as a vehicle for individual accumulation at the expense of ordinary rights holders.
- Once the land is in the name of the traditional council the traditional council could raise rents through leasing, tribute, etc. There are already examples where these measures have indeed occurred, such as in KZN where the ITB has issued leases to businesses on the understanding that it intends to issue residential leases to ordinary people in spite of the fact that they already have rights defined by law in terms of IPILRA.
- There are examples, such as occurs in the platinum belt, that revenues raised from extractive industries like mining accrue to the TCs instead of the members of the community with the rights. There are fears that the same pattern will follow when other forms of revenue, such as from tourism, commercial forestry etc, will similarly be channelled to the TCs instead of the rights holders.

Comment: Since IPILRA recognises existing rights that are stronger than leases, the residential leasing option is not likely to withstand constitutional muster. There will almost certainly be challenges to attempts to issue leases to rights holders, just as it can be foreseen that there will be endless rounds of litigation concerning the competition around controlling revenue sources from mining, commercial agriculture and tourism.

4.1.2 Collective Privatisation

Transfer communal land to Communal Property Institutions like Communal Property Associations (CPAs), private trusts, housing (property owning) cooperatives, etc. The CPA model has been the most used in communal areas.

Advantages
- The CPA protects the rights of the rights holders from dispossession
- The CPA behaves as trustee on behalf of the rights holders, and administers and manages the property
- CPA committee members are accessible to the ordinary members since they are rights holders themselves
- The CPA undertakes land administration which then lowers the costs of land administration for the state

- The CPA mobilises revenues in the interest of rural development (as above for TCs). Since the CPA is on the spot, it has a good idea of the best opportunities for development
- The CPA acts as an intermediary between the state and the CPA members

Disadvantages:

- Almost all CPAs have run into difficulties of various kinds.
- The state divests itself of responsibility for service delivery, maintaining that these properties are 'private property' - this problem has arisen in numerous examples
- The constitutions of CPAs are often written in legalese and are incomprehensible to most of the ordinary members
- CPA committees act in an unaccountable manner towards the rights holders
- CPA procedures for democratic governance (elections, transparency, gender equity etc) are often not observed
- CPA committees behave as above described for TCs and use the property for private accumulation, and do not re-invest revenues from business ventures back into the development of the property
- The CPA Act does not set out the scope and nature of the individual rights of families or individuals within the CPA, and thus CPA members make very unequal demands on the property

Some of these models have been tried to a limited extent in urban contexts with limited success so far. For example, experience with housing cooperatives in the Amalinda suburb of East London shows that households do not fully understand the complex legal relationships established in housing (property) owning cooperatives.[23] Housing (development) cooperatives may have more promise in that households come together to arrange for building of houses, where the houses are then owned individually

4.1.3 Individual privatisation

Sub-divide the communal land into erven and transfer erven to individuals or companies etc.

Advantages

- Some individual rights holders feel that individual tenure in title will be secure from potential and actual abuses by either TCs or CPAs; and that it will help to escape the current indecision that plagues land administration if they take control themselves.
- Some individual rights holders want title in order to use their properties to raise credit.

Disadvantages

- Titling programmes, as already mentioned (see section 3.1.2), have been found to be ineffective in promoting more security and productive use (and in fact can promote more insecurity)
- Titling gives proprietary powers to individuals which flies in the face of people's practices in securing land as a social security measure and holding it in the family
- Titling promotes family feuds and conflict since those members who are registered on the title deeds sometimes try to use title as a means of selling the property without the approval of the majority of members

[23] see http://www.afesis.org.za/images/lessons_learned.pdf accessed 31 October 2015

- Titling divests the state of its responsibilities for the welfare of the poorer and indigent members of the society, particularly delivery of subsidised services

4.2 Build on existing practice

This approach proposes official and legal recognition of social or 'off-register' tenures. Social tenure is an umbrella term encapsulating tenures in both communal land areas and various urban contexts which, though they are off-register rights, they are recognised and protected in law by IPILRA.[24] These rights tend to be categorised as 'informal rights', but the concept of 'social tenures' has replaced this term on account of a number of positive and unique features that have been identified by practitioners who have worked on the ground for decades. A body of practitioners and researchers[25] have begun to record the range of practices and concepts associated with social tenures, as well as to start to develop instruments to secure the legitimacy such systems.[26]

The rationale for this option is that, instead of seeing communal land rights as interim rights waiting to be incorporated into the title registration system, it makes more sense to *recognise* the existing rights in their own right and mainstream emerging practice. Strictly speaking, existing 'informal' rights are already recognised as forms of property rights by IPILRA. Section 2 (1) of the Act states that rights can only be removed by means of 'expropriation' which implies that these rights are already strong rights, close to real rights:

> *Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.*

The problem is there is no administrative back-up to uphold these rights, which means that while they are protected, there is no state capacity to enforce them, except on a piecemeal and reactive basis. The idea is therefore to start a process of 'mainstreaming' these processes that are already underway.

Recognizing social tenures rather than only title deeds involves a broader understanding of rights and how they might be administered, recorded and registered than is allowed by the current system of deeds registration. Some of the practices and instruments that have emerged include legislating protective anti-eviction legislation, democratizing local land administration, promoting gender equity in the allocation of land rights, promulgating special land use zones, recognizing occupation rights settlement-wide, and using forms of locally accepted evidence to record rights. The next step would be to implement broader institutional interventions to allow for official recognition at a more systematic level to ensure that these rights can be effectively enforced. Without further institutional development, these protected rights remain extremely vulnerable in spite of legal protection.

In order to make these rights enforceable, systems of adjudication and conflict resolution will need to be put in place, as well as a legislative framework that provides a system for recording the rights, and storing/safeguarding the records as well as training a new brand of accredited land officers trained at accredited educational institutions. These provisions,

[24] given the centrality of the concept of social tenure to the argument and recommendations in this report, this section is slightly longer than the previous section on 'transfer'.
[25] For example the land tenure research network known as Leap http://www.lrc.org.za/focus-areas/applied-research
[26] See for example http://www.lrc.org.za/focus-areas/applied-research accessed 4 November 2015

viz, (1) conflict-resolution, (2) adjudication, (3) recording, (4) storing and (5) education/training are integral elements of the Deeds Registry system and the idea is to mirror these in an equivalent, though different, set of institutional arrangements.

The guidelines for developing these five components should ideally be developed over time by means of several pilot projects in order to test the principles that should be incorporated in the proposed institutional framework. For example:

- what evidence is locally accepted for recognising rights and how can these forms of evidence be built into an adjudication system?
- What are the main categories of conflict, and how can institutions be set up to deal with these conflicts?
- How can this evidence be recorded, given the more flexible spatial and social boundaries of communal tenure?
- How can these records be stored and safeguarded by the state so that they can be drawn on for a variety of purposes by all the users of a land administration, for example, local municipalities?
- How can we design curricula for land officers to implement locally deduced evidence?

Advantages

- Social tenures are familiar to people living in communal areas, and build on local living customary law. Social tenure is embedded in peoples lived experiences.
- IPILRA provides a starting point around which to build a land administration system for social tenure
- The establishment and operation of a land-record system to record social tenure rights is much cheaper than attempting to record these rights in the existing Survey General and Deeds Registration systems
- A land-records system is more sustainable than the deeds registry system which has been shown to unravel fast when applied to social tenures which do not fit the legal requirements
- Social tenures can be implemented without having to resort to written evidence drawing on peoples' local knowledge as to who has what rights to which portions of land.
- The administration of social tenures can be incrementally introduced into communities over time as the pressure for establishing and maintaining a land occupation and use records system intensifies in these areas
- By pursuing such social forms of tenure, this does not close off opportunities in future for specific communities to follow one of the transfer options, like, for example, transferring land ownership to individuals or small businesses.

Disadvantages

- The concept of social tenures is not well understood within large segments of the state apparatus, and with professionals dealing with land related matters including many town planners, conveyancers and land surveyors .
- Social tenures require a particular understanding by officials and local land officers of how they operate in a day-to-day fashion, and would require a re-training exercise.
- The inherent flexibility of social tenures means they cannot be implemented in an overly technocratic fashion, and would require a mindshift in current bureaucratic thinking
- The personnel within government with the skills and memory for how PTO and similar systems operated in the past have retired or been moved to new positions and it will take time to build the capacity once again.

- The land-records system would need budget allocations to staff and implement. However, given that there is no officially recognised land administration system in communal areas at the moment, the resourcing of such a system is needed anyway.
- Gender discrimination, or the abuse of power by chiefs, traditional councils, and community leaders can be a problem if not specifically addressed.
- In the absence of legitimate channels of mediation and adjudication of land claims, this can make the resolution of conflicts over who has the right to allocate plots, who within family lineages has the right to claim rights to land or housing, etc. very difficult

A record of a social form of tenure that could be considered and constructed is one that closely resembles the PTO (certificate) system of the past, where for example, Occupation and Use Right (OUR)[27] certificates are issued to families and not individuals for a portion of land as defined around a geo-referenced point with boundaries determined by local living customary law. Rights to this homestead land parcel come with associated rights to make use of the common and communal lands of the 'village' for grazing, collecting wood, etc. as determined by local custom, as well as possibly rights to a corresponding allotment parcel of land for agricultural purposes.

The process through which the certificates could be issued would depend on local circumstances, involving a role for traditional leadership structures, where these legitimately exist, to confirm who has the right to this geo-referenced point and its associated boundaries. These certificates, ideally in the long term, should be administered at local offices linked to the local municipal office. The records would form part of a nationally coordinated land-record system.

Local leadership structures could also play a role in approving, or 'permitting' any land use change applications (e.g. converting land from grazing to residential homestead), where it is understood that such 'permitting' is just one of numerous approvals that would need to be obtained for the land use change to take effect. Such local approvals should follow broadly similar but locally unique procedures involving the collection of community and neighbourhood consent. Other approvals that may be needed are from the Department of Agriculture for converting agricultural land to residential, the Department of Environment for environmental authorisation, and the local municipality, through the procedures outlined in SPLUMA legislation for land use approval. Failure to secure any one of these approvals would prevent the land use change proceeding. Appropriate disputes resolutions mechanism would need to be followed to find agreement on a way forward. This should actually be a procedure which could include community consent, consent by the neighbours, authorisation by relevant government departments, endorsement by local leadership structures – right through to the municipality.

In order to help further explain the concept of social tenure we quote extensively from the forthcoming book on the problems with land tenure reform in South Africa, edited by Ben Cousins, Donna Hornby, Rosalie Kingwill & Lauren Roysten, which describes the key characteristics of this form of tenure:

> *Tenure systems derived from 'customary' norms and values are prime examples of social tenures, and are not restricted to rural areas but also found in urban areas, including informal settlements. Common features across the country are that land*

[27] OUR terminology is new terminology proposed in this report. Consideration was given to referring to PTO certificates but it was felt that the term PTO comes with its own historical baggage and that it is better to use new terminology.

rights are derived from accepted membership of a socially defined grouping (or 'community') that moderates the way in which rights are claimed and recognized and disputes are resolved. These processes take place primarily at the local level (i.e. in families, neighbourhoods and wards) rather than in centralized arenas of decision-making such as the offices of a city government, the chieftaincy or a traditional council. In rural areas the social and physical boundaries of tenure systems are often highly flexible to accommodate the overlapping or 'layered' levels of social and political organization […] *The local details of these arrangements vary considerably across the country* […]

Some of the organizing principles that define this broad category of social tenure are as follows:

There is strong local oversight of processes of claiming, recognizing and transferring rights, and of dispute resolution. *Oversight takes place through localized structures of authority regarded as responsible for managing or administering land rights and associated duties. These structures of authority are often a mix of customary, neo-customary and colonial/apartheid-era institutions, combined with features derived from recent constitutional and statutory reforms.*

There is local, socially legitimate recognition of which people hold rights and duties in relation to land and dwellings; how the institutional arrangements are structured (e.g. through elections or other means of legitimation, including by reference to notions of 'customary law'); and how rights are accessed and disposed. Land rights and duties and the processes through which they are defined are thus embedded in social and political relationships rather than occurring through simply naming people or deciding on numbers, as occurs in official bureaucratic systems. […]

Processes are as or more important than rules, *and rooted in ongoing engagements between actors rather than in strict and well-defined rules and procedures, as long-noted for systems of customary law* […] *It is a mistake to think of such processes as disorganised and chaotic, notions that often accompany the descriptor "informal". On the contrary, in both rural and urban off-register contexts these tenure processes are often organized with reference to norms that can be clearly described. Nevertheless, their internal flexibility and capacity for accommodation of diverse social features are distinctive.*

Social tenures involve flexible approaches to social and spatial recognition*, i.e. in relation to which people are seen as legitimate rights holders and how the relevant unit of land or dwelling is defined. As many scholars have pointed out* […] *flexibility should not be confused with the absence of underlying principles. There are consistently applied norms that appear as clearly discernible regulatory patterns, and flexibility is not equivalent to 'open access', where power determines benefits. The inherent flexibility of social tenures is a key reason why they cannot be captured in a conventional cadastre comprising registered title deeds and mathematically defined surveys. Layered and nested property relationships militate against the one-to-one property relationships that characterise the cadastral system, both with respect to 'human-land' and 'human-human' relationships.*

4.3 Do nothing

In the 'do-nothing' option no guidance is provided on how land administration issues can be addressed in communal areas. Rather the present confusion and potential chaos continues. For many, stable rural areas where there is not urgent for major externally-driven development, this may not be totally negative.

However if the existing situation is allowed to continue as it is with no guidance on how to deal with land administration in communal areas then powerful local role-players, including for example, traditional leadership structures, opportunistic local land entrepreneurs etc will fill in the administrative void.

5 Recommendations

5.1 Broad recommendation

The starting point to dealing with land administration in communal areas is to understand the nature of existing social tenure arrangements which we term 'social tenures'. The task is to strengthen these social tenures, or 'off-register rights', and bring them into a coherent institutional and administrative framework. This requires the establishment of a locally administered land record system to complement the land registration system that exists and create legal parity with registered rights.

This approach leaves options open into the future as to how particular communities would like to deal with tenure in their localities over time. In certain instances some communities and households are more likely to gravitate towards more individual tenure arrangements whereas in other contexts locally specific social forms of tenure will continue to predominate.

The administrative act of providing a public record and acknowledgement of rural land tenure rights will provide security of tenure for the needs of most people and households. It will facilitate the emergence of rental markets of land rights and respective land parcels, for arable and residential land in particular. It will facilitate the extension of both land use planning as required by SPLUMA and the collection of local rates and service charges as per the *Municipal Property Rates Act No.6 of 2006*. Finally the provision of security of tenure will promote a sense of equality and full citizenship for all rural residents. Practically it will also give them a geo-spatial reference or in common language, an address, with which to negotiate many administrative requirements including obtaining birth certificates and driving licences.

5.2 Recommended intervention per challenge

For each of the challenges highlighted in section 3.1 corresponding recommendations are made (see table 5) for how to address each challenge.

Table 5: recommendations per challenge

Challenge	Recommended intervention	Timeframes
Administrative		
1. There is confusion as to who is responsible for land administration when land and land related issues are transversal across all spheres and many functional areas	HDA and/or DHS to initiate the establishment of a technical committee with relevant national departments to begin a process of streamlining the institutional and legislative environment and the range of procedures relating to land and land development. This collaborative effort must include directly interested national departments including Treasury, CoGTA and DRDLR as to institutionalise these collaborative arrangements	Starting in the short term and ongoing. 12 months for detailed proposals including

Challenge	Recommended intervention	Timeframes
	within the present Constitutional architecture. These arrangements also need to be aligned with those of other spheres and departments such as environment, water, forestry, agriculture, minerals, etc.	assignments and delegations of legislative authority
2. There is no effective national legislation underpinning land tenure for communal areas.	DRDLR/CoGTA to introduce a nationally constituted but locally administered land administration system. This must be based on a clear programme over the short, medium and long term plan to revitalise land administration in communal areas. The plan should start with a programme to save and record existing and valid PTO records, while a new land record system is piloted and rolled out. This will require amendments to IPILRA and/or the provision of regulations that outline the procedures for a locally administered land record system for communal areas (and other areas like informal settlements). This system must be coordinated and not incompatible with the national land registration system (the Surveyor General offices and the Deeds Registries) and with municipal SDF process and land use schemes. Land administration including records of land rights should remain a national competency as per current Constitutional architecture	Within 12 months 6 months for any draft amendment Bill, 6 months for publication of draft regulations
3. There is a shortage of and inappropriate allocation of staff and resources for land administration.	A new land administration system will need to be designed and staffed under the leadership of the DRDLR and CoGTA. Where possible staff with a historical understanding of previous PTO systems should be retained. National programme for training and capacity building of staff would need to be put in place. The DRDLR, in collaboration with CoGTA and DHS and other government departments needs to initiate discussions with academic institutions to explore how, as a country, we can develop the human capacities to implement the locally administered land-records system.	Within 12 months put in place a human resource development plan
4. There are no institutional systems in place to administer communal land as previous administration systems have been	Between DRDLR and CoGTA, establish provincial land administration support offices to establish and support local land administration offices at local municipal level including magisterial district level (where similar functions were previously performed) and oversee and manage the locally administered land record system. This will include the following:	Within short to medium term. Start with 'pilot' projects including where there is public investment such as in housing projects

Challenge	Recommended intervention	Timeframes
dismantled or allowed to collapse	• Day-to-day administration– capture of records, recording of transfers of land rights, recording new land rights – on a national data system. • This requires staffing by delegated officials of the national or provincial sphere. Staff and functions with appropriate delegations could be transferred to municipalities later. • Provincial land support offices to assist local land offices to deal with challenging cases and disputes. • National land monitoring and evaluation function to reflect on, draw lessons and share experiences to improve the locally administered land record system. • National land administration and record support office to ensure that the local land record offices operate within the national framework and in line with policy and legislation. • National and provincial capacity building programmes to systematically build capacity of provincial and local offices and municipalities to manage the locally administered land record system.	and grow the programme over time.
5. There is uncertainty as to how to deal with land use management and spatial planning in communal areas. SPLUMA does not go into detail on this matter and leaves it up to provinces and municipalities to deal with.	The fact that SPLUMA provides framework legislation and does not go into detail relating to land use management in communal areas presents an opportunity to align the land tenure administration and the land use planning and management systems. Develop specific national, provincial and local laws to fill gaps in SPLUMA and related regulations and by-laws to deal with land use management within communal areas. This should include appropriate land use or purpose categories for communal areas with more flexible rules governing what type of activities and improvements can be undertaken. These purpose categories should be kept broad, and could include examples such as the: • Rural settlement zone (for villages with definable settlement edges) within which one can allow the full range of uses they currently contain as primary rights, or get agreement from residents/leadership on what uses they feel they want to have to consent to before it is permitted. • Agricultural settlement zone (for low density, small-holder agricultural settlement such as	The Green Paper process on Spatial Planning and Land Use Management underway in Eastern Cape in 2015 and the recommendations from this report need to be incorporated into this and other provincial planning and land use management legislative processes

Challenge	Recommended intervention	Timeframes
	Mbizana coastal areas in the Eastern Cape that were never affected by betterment). • Agricultural zone (for arable and grazing areas) • Conservation zone (for sensate river/ wetland/ forest or coastal areas recognised and agreed to as such by community members and structures). Resource harvesting can by all means be permitted, but that is where rules are needed as to what is appropriate. • Cultural / Sacred/ Heritage/Resort etc. zones For many communal areas get agreement for and apply a set of rules/ principles that can be applied on an activity-to-activity basis in pre-determined zones so as to achieve sustainable development / resource use practices. Link with and utilise the SDF planning process to identify special areas where more flexible approaches to land use management can be accommodated and to identify conservation, agricultural and other areas that can help inform decision makers when making land use change decisions.	
6. Most municipalities do not have the capacity to implement SPLUMA on a wall-to-wall basis, including communal areas.	The various government departments including DRDLR, COGTA, DHS and others need to collaborate in order to develop and implement a programme to build capacity of municipalities to implement SPLUMA and the proposed local land-records system	Immediately and on going
7. Given that there is no to very weak legislation governing land administration within communal areas, there are no clear procedures for enforcing compliance to this legislation	Include procedures and penalties for phased enforcement of the laws and regulations developed for the spatial planning, land use management and land tenure administration in new legislation and regulations developed through IPILRA and SPLUMA	These should be introduced simultaneously with land use management and land administration, area by area
8. Land taxation for local revenue has broken down in communal areas	Link the locally administered land record system to the municipal rates and services system. Historically land transaction fees for issuing and transfer of PTOs accrued to local revenue accounts	Simultaneous with extension of *Municipal Property Rates Act*
9. Due to the lack of land tenure and	Align the land tenure and land use administration system with environmental	Ongoing

Challenge	Recommended intervention	Timeframes
land use administration in communal areas, environmental and resource management legislation (e.g. conversion of good agricultural land to settlement) has not been coordinated within a broader land administration system	legislation, spatial, planning and land use management. This is in effect how it used to work in the past, with the departments of agriculture advising on which land was suitable for residential and arable purposes	
10. Boundaries of local Administrative Areas do not align with municipal ward boundaries, at least in the Eastern Cape	The Demarcation Board must be urged to realign municipal ward boundaries with administrative area boundaries. The process will require a consultative processes because the match cannot always be full congruence	Once local land administration offices are ready to assist with the process
11. In many areas there are tension between traditional institutions and elected structures over governance and administration of land use and land tenure and development in communal areas	Use the SPLUMA rollout process as a basis for the DRDLR and provincial planning counterparts to clarify the roles of traditional and elected leadership as well as the administrative responsibilities of municipalities. Roles and functions must be based on local practices read with the Constitution which promotes democracy and accountability. Draw on the concept of living customary law, to help find appropriate roles for traditional structures and municipalities, where customary law is able to adapt to changing circumstances. There is also an opportunity to draw on IPILRA principles as a mechanism of developing local rules.	With SPLUMA roll-out
Conceptual		
12. Communal land tenure systems are often viewed as a second-class form of tenure compared to the high standards set by the formal property titling system	Recognise that there is a continuum of tenure forms, some providing more secure tenure compared to others. Establish a legislative framework that allows for the movement (conversion or transfer) from one form of tenure to another in any direction under strict conditions to prevent dispossession, land speculation and value capture	Immediately promote the record system within state departments and other stakeholders; in medium term develop legislation that can underpin this record system.
13. There are challenges with dealing with the transmission of land	Explore the full implications of promoting family and household property rights (including family title) for how these rights are held, managed and transmitted inter-generationally	Include this exploration for family property rights within the

Challenge	Recommended intervention	Timeframes
from one generation to another, especially when it comes to land rights for women - e.g. succession law		process of developing legislation for introducing a land record system. In medium term also explore the implications of family title within the conventional land registration system
14. There is a groundswell of opposition to recent attempts to develop communal land tenure legislation, leading to uncertainty of how to deal with land administration in communal areas.	Counterbalance this uncertainty by administrative steps including the development of a land administration framework that is public, neutral and removed from the heart of these contests yet which satisfies the demands of the existing social tenures.	Immediately promote the record system within state departments and with other stakeholders; in medium term develop legislation that can underpin this record system.
15. There are a multitude of differing local contexts and differing views on possible solutions to how to deal with land administration in communal areas. This often leads to confusion and paralysis on how to proceed in finding solutions to land administration challenges.	Conduct more research on how to develop a policy which accommodates locally appropriate solutions within a wider framework. Normative principles, applied properly are a possible way out of this. Undertake pilot projects to test various solutions and learn from this experience. Share these lessons with others so as to continually improve legislation and practice.	Conduct research in short term, and conduct pilot projects in short to medium term.
Location specific		
16. There is a lack of any formal control of land development in areas where there is an influx of new residents such as in communal areas next to growing urban centres.	Differentiate and prioritise the requirements of the land administration system based on the intensity of land tenure and use changes occurring in the area: For example: (1) stable areas which require less rigorous land administration systems • Land tenure – names recorded within administered area or against geo-referenced point • Land use - use broad mixed land use purpose (zone) (2) dynamic areas which require more rigorous	Incorporate these differentiations in the promotion and development of a locally administered system in the short and medium term.

Challenge	Recommended intervention	Timeframes
	land administration systems: • Land tenure – names recorded against plots • Land use – more specific land use purpose recorded against plot (3) Areas which are immediate targets for development should also be prioritised	
17. Public and private developers are unable to secure land tenure security on communal land. There is uncertainty as to how to deal with business and enterprise development in communal areas in a way that benefits the local community and business interests.	Consider immediately developing regulations for IPILRA that will provide for a local land-records system, and aligning these with other legislation that impacts on land use, such as NEMA, Mineral and Petroleum Resources Development Act No.28 of 2002 (MPRDA) and SPLUMA. Investigate options for how business developments can be accommodated on communal land, with special attention given to the ownership and decision making structures and systems; and how income, profits and other benefits from such businesses can be shared and distributed	In the short term as part of the process of developing a land-records system
18. Conflict over who should benefit from the proceeds of mining in communal areas in situations where mineral resources are found	Engagement with Department of Mineral Resources on clear policy development within the framework of current legislation: "South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof" – preamble to *Mineral and Petroleum Resources Development Act No.28 of 2002*	Commence immediately
19. There is uncertainty as to what procedures to use for the recording and administration of public infrastructure projects; and for community facilities (clinics, schools, police stations, post offices, etc.) in communal areas.	Make use of way-leave agreements as an interim mechanism to record the position of infrastructure investments and to obtain the necessary approvals for such interventions. Way-leave agreements should be recorded and be publicly available from the land information system. Expropriation of rights in land is permissible in terms of IPILRA and desirable for public infrastructure. This is currently being done in Sterkspruit in the Eastern Cape. Allow Occupation and Use Rights (OUR) certificates, that form part of a locally administered land record system, to be used as evidence of tenure security for such facilities as an alternative to the more complex and expensive requirement of land survey and registration	In short term pilot the use of way leaves, and expropriation. In medium term after developing legislation for a locally administered land record system, use this system in the context of rural development projects.
20. There is uncertainty as to what the	Review the "Rural Housing: communal land" chapter of the housing code, taking into account implications for such a programme as a result of	Undertake the review in short term,

Challenge	Recommended intervention	Timeframes
implications of a locally administered land record system would be for who is eligible for housing subsidy approvals.	the new locally administered land record system. Use OUR certificates as evidence of tenure. The implications of 'family' title in relation to qualifications for housing subsidies will need to be investigated and guidelines developed and tested	incorporating the findings in the medium term into any review process for the housing code.
21. It may be unlawful for the state to continue building housing without any public land administration system in place to enable accounting for public expenditure	Introduce locally administered land records systems in all new state funded 'rural housing' projects or any housing project undertaken on communal land.	Immediately and on-going
22. Some subsidised rural housing projects are criticised for being build in areas where housing is not a community priority and where there are limited socio-economic opportunities for the people living there.	Ensure that new rural housing subsidised (or any other housing subsidised projects) in communal areas are only approved if such projects form part of the Municipalities SDF, housing sector plans and Integrated Development Plans. Develop guidelines for municipalities that assist them in the production of these plans to determine where rural housing and settlement projects should be located. Introduce proactive land identification and land assembly programmes in communal areas as part of a broader land assembly strategy of Municipalities that is linked to SDF's and IDP's, so as to get ahead of the demand for land and ensure development occurs in appropriate locations. Allow for more incremental settlement approaches on this land, such as Managed Land Settlement that has been motivated by Afesis-corplan and others.[28]	Immediately and on-going
23. Land claims in communal areas often lead to confusion and uncertainty around development in communal areas	This requires engagement with the Chief Land Claims Commissioner as to case by case approaches and solutions, and so building a set of precedents	On and on-going basis highlight the need to not allow restitution claims to hamper land record processes.
24. When communal land is privatised, private land owners are able to capture the	Conduct more research into how any increases in the land value could benefit land rights holders and the general public and/or fiscus. There is precedent in existing legislation such as the Cape Provincial Ordinance No.33 of 1934	Conduct research in short to medium term and in medium to long term feed the

[28] See http://www.incrementalsettlement.org.za/ accessed 6 November 2015

Challenge	Recommended intervention	Timeframes
full value of any land value increase due to rezoning etc with limited benefits accruing to the original communal land owners	which is still applicable in the towns in the Transkei	findings into broader planning and land finance legislation.
25. The Ingonyama Trust Board has or is considering issuing residential leases to households living on ITB land, which can be argued is a weaker form of tenure then that found under IPOILRA.	The Ingonyama Trust Board must be engaged and be part of a process of formulating a uniform national framework for land administration. There appears to be a backlash against the Board for extracting and consuming rental incomes.	Starting as soon as possible
26. In many areas where quitrent applies PTO's have been issued over quitrent title. The records of quitrent title have not been kept up to date.	Given the complexity of the problems with quitrent, a set of specific recommendations would need to be formulated with respect to districts/localities where quitrent rights exist in communal land areas. The recommendations would be in addition to, but not necessarily different from, the recommendations in this report. This is an outstanding issue which is largely specific to the Eastern Cape.	Once basic land record systems are established in an area, skills and capacity must be developed to investigate and resolve such conflicts
27. There is a complex array of legislation governing development and resource use in coastal and forestry areas. Enforcement of this legislation is very weak	The only sustainable control method for forestry and coastal areas is if communities are supported to help manage and control these areas themselves. Local environmental management must be encouraged within national frameworks and linked to the extension of SPLUMA	With roll-out of SPLUMA
28. Government sometimes erroneously uses the state land release policy in communal land	Raise awareness within government that communal land is state trust land and is not subject to the procedures as outlined in the state land release policy but subject to *IPILRA* and the *Interim Procedures*	Immediately and on-going
29. In many African states, communal land is being 'sold' to foreigners and elites often without	Thus far the issue of foreign land ownership is being debated in South Africa as it relates to private land. The Department of Rural Development and Land Reform should investigate how prevalent the issue of foreign	Immediately and on-going

Challenge	Recommended intervention	Timeframes
following proper procedures, and often at the expense of the existing occupants of the land. The foreign and elite land owners often develop the land for export and/or cash crops in a way that does not benefit the local population or country.	and/or elite purchase of communal land is in South Africa.[29] The state needs to ensure that, as they are acting as a trustee of the land on behalf of the people living in that area, they consult with the existing land rights holders before making any decision on selling (or even leasing) any communal land to foreigners and elites.	

5.3 Addressing land administration in communal areas in phased manner

The recommendations outlined in the previous section cannot all be implemented at once but will need to be introduced in a phased manner.

5.3.1 Phase 1: immediate – up to 1 year

Bring stakeholders affected by the challenges in communal areas together to share information on these challenges and open up space for them to agree on a way forward. This conversation should focus on short, medium and long term national goals for land administration on communal land and should also be translated into provincial goals.

The core challenge that needs to be addressed is to deal with the administrative void by agreeing to the implementation of a locally administered land record system. A political agreement within government is needed to urgently address this core challenge.

Conduct an appraisal of the location and the state of land records in each municipal area. Once the appraisal is available, develop a strategy and a plan to rescue existing land records in various ways, including safe storage and or digitisation of data.

Undertake research on how to augment IPILRA and ways for alignment with other land use legislation. The process of augmenting IPILRA should be two pronged. The first thrust should focus on the main legislation (IPILRA) drawing on United Nations Food and Agricultural Organisations Voluntary Guidelines on Responsible Governance of Tenure[30] which South Africa has endorsed. The second thrust should be geared at developing a set of regulations that use the *Interim Procedures Governing Land Development Decisions* as a basis.

Identify the full spectrum of old order legislation and undertake in-depth research to identify elements of those that need to be repealed and elements of those that need or should be carried forward into new legislation.

Undertake preliminary research and planning for a range of pilots in different provinces. Mechanisms should be put in place for coordination of pilots between different provinces.

[29] see for example http://www.plaas.org.za/blog/land-grabbing-southeast-asia-%E2%80%93-what-can-africa-learn

[30] see http://www.fao.org/nr/tenure/voluntary-guidelines/en/ accessed 28 October 2015

National and provincial workshops and conferences should be called involving government, rural communities, traditional leaders, civil society, academics and development practitioners to reflect on and learn from past local and international experiences with locally administered land record systems.

5.3.2 Phase 2: short term – 1 to 2 years

Adopt amendments to and a set of regulations to the IPILRA that introduce a locally administered land record system.

Undertake a series of geographically limited land administration pilot projects that highlight the linkages between IPILRA, SPLUMA, NEMA, Mineral and Petroleum Resources Development Act (MPRDA) in dealing with:

- simpler or standard cases
- difficult or special cases
- stable situations
- fast changing situations

Develop a capacity building and training programme for land administration personnel through partnerships with institutions of higher learning.

Draw lessons from these pilots and share and replicate best practice.

5.3.3 Phase 3: Medium term – 2 to 5 years

Initiate the process of consolidation of lessons from the pilots and step up the rollout the pilots incrementally.

Step up the training of new land administration personnel.

Based on the pilot projects roll-out further phases of the locally administered land record system.

Work on further laws and legislation as required such as, for example, a more comprehensive communal tenure act if this is seen as necessary that can be more tailored towards more social forms of tenure.

Develop adjudicatory capacity from pilots: what evidence are people using to define their rights within and across families. Extrapolate principles from these and develop a set of adjudicatory principles (ideally to inform an Adjudication law) to guide both land rights holders and land administration officers in weighing up rights.

5.3.4. Phase 4: long term – greater than 5 years

Step up implementation to universalise implementation of the locally administered land record system.

Continue to implement the laws and regulations as outlined in IPILRA and SPLUMA, decentralising many of the functions associated with the locally administered land record system to municipalities.

Implement any new social tenure or other acts as developed by new legislation.

6 Conclusions

In conclusion and summary, what we are proposing is a mind-shift in thinking from key decision makers and informers involved in communal land administration from one where government is expected to exclusively focus on attempts to transfer communal land mainly to traditional leaders but also to a lesser extent to Common Property Institutions and to private individuals, to a mindset in thinking that recognises that government is able to recognise and accommodate existing forms of social tenure.

This is achieved by introducing a nationally constituted and locally administered land record system to sit alongside and complement the existing land registration system (that involves the Survey General's office and the Deeds Registration system).

Land administration is a cross cutting issue involving land tenure, land transfer and succession, land custodianship, land adjudication, spatial planning, land use management, land taxation and fees, and land enforcement; and as such finding a way forward for land administration in communal areas cannot be left to one department.

The Departments of Rural Development and Land Reform, Human Settlement, Cooperative Governance and Traditional Affairs, Environment, and Treasury amongst others all need to come together and present their respective perspectives and suggestions for how they could contribute to addressing the land administration challenges found in communal areas. A jointly agreed on way forward needs to emerge from this collaborative engagement, including commitment from all parties involved to work together to establish and incrementally role out a locally administered land record system.

The chaotic and unregulated land administration system in communal areas can not be allowed to continue. The introduction of a nationally constituted and locally administered land-record system (preferably administered at the magisterial district level) will go a long way to satisfying governments constitutional mandate to secure the tenure rights of those living in communal areas. Residents of communal areas will be finally able to call themselves full and free citizens of South Africa.

7 Annexures

See separate annexure document for the following annexures:

- Annexure 1: Terminology and definitions
- Annexure 2: Legacies, current legislation and policies
- Annexure 3: Issues of jurisdiction on state trust land in the Eastern Cape Province
- Annexure 4: Perspectives on land rights and inheritance
- Annexure 5: Locally administered land record system
- Annexure 6: international and local experience with land administration
- Annexure 7: Interim Procedures Governing Land Development Decisions which require the Consent of the Minister of Land Affairs as Nominal Owner of the Land, as amended
- Annexure 8: Eastern Cape Planning Commission Diagnostic Study on Land Administration (extracts)
- Annexure 9: List of interviewees
- Annexure 10: Reading list

These annexures can be found at www.thehda.gov.za/communal_land_research