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Land Issues in South Africa: Can Land Administration Save the Sinking Ship of Land Reform

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Abstract: This paper seeks to determine whether customary land tenure insecurity can be diminished by adopting sound land administration practices. In doing so, the link between a good land administration system and land tenure reform is established. This investigation is particularly probed by the Advisory Panel Report's recommendation to adopt land administration as a forth tier to land reform. The paper investigates whether land administration reform can save the sinking ship of land reform. Against this background, the first part of this article briefly analyses the two types of tenure in South Africa namely, statutory and customary tenure. The intention is to compare the two and substantiate that although they are two sides of the same coin, customary tenure suffers insecurity while statutory tenure is hailed for its efficacy globally. A further examination of the principles of good land administration is carried out to determine how the South African customary tenure fares in sound land administration principles. Subsequently, possible avenues that can at the very least, offer some degree of tenure security are explored. In this regard, a hybrid system of land administration that involves titles and record keeping in customary areas to improve tenure of security is recommended. These suggestions rest on the hypothesis that with good land administration, customary tenure reform and in turn security, is achievable. Finally, further research on customary land administration within the South African context is recommended.

Keywords: Land Administration, Customary Land Tenure, Tenure Security

1. Introduction

It goes without saying that land reform is not where it should be 25 years later [18]. In 1996, the Constitution of Republic of South Africa (the *Constitution*) promised to undertake a reformed land system. Section 25 (5) of the *Constitution* undertook and ensured that in this system, land would be redistributed equitably amongst all South Africans. In turn, the black people who were dispossessed of property by apartheid would regain it in terms of section 25 (7); and finally, those whose rights in land were insecure as result of apartheid would have secure tenure as provided for under section 25 (6) of the *Constitution*. This slow pace of land reform is largely attributable to attempting to reconcile land issues in an environment of inequality, poverty and unemployment. This cannot bear fruits. For these reasons, research on how best to fast-track land reform, so that it lives up to its promises has never been more imperative than it is now. The land question is still burning and politically charged [8, 18, 31]. The purposes of land reform as described in the White Paper on South African Land Policy are to redress the injustices of apartheid, stabilise and reconcile the nation, grow the economy, and alleviate poverty [28]. As a result of colonial and apartheid legacies in South Africa, land issues remain highly contested [2]. Since the democratic dispensation therefore, the focus has been on redressing inequalities in land tenure and access. The aim is to restore human dignity and social justice by enabling and resourcing restitution, redistribution and securing tenure in rural and peri-urban areas [9].

The main focus of this paper is the land that is administered in terms of customary law or communal land, as is commonly called in South Africa. South Africa is particularly a tricky jurisdiction when it comes to land administration because on the one hand, land administration under statutory tenure is said to be one of the best globally [8, 32], while on the other, its counterpart, customary tenure, is so harphazard that rights emanating therefrom are currently

informal.[1] Just as the "how to secure tenure" question under tenure reform, land administration is a particularly difficult topic to research on. First because it covers a wide range of beneficiaries ranging from farm labourers, to communities in the former "homelands" [17]. Second because different forms of tenure may exist within a given locality or even on the same plot of land [9, 18]. Back in 2011, the *Green Paper on Land Reform* identified land administration in customary areas as one of the biggest challenges that prompted the need for reforming land laws [11]. This is why the land policy debate in South Africa is still "remarkably lively and active, with extensive reforms being adopted since 1994" [8, 13].

Against this background, this paper seeks to determine whether customary land tenure insecurity can be reduced by adopting sound land administration practices. In doing so, the link between a good land administration system and land tenure reform may be established. This investigation is particularly probed by the Advisory Panel Report's recommendation to adopt land administration as a forth tier to land reform. Therefore, can land administration save the sinking ship of land reform?

Land administration refers to "the processes of determining, recording, and disseminating information about tenure, value, and use of land when implementing land management policies" [6]. It can cover a much wider range of systems, from formal systems established by the state to record rights in land, to informal community-administered systems [6]. Factors which determine a good administration in land are manifold. This is why any initiative to develop or strengthen a land administration system (LAS) must recognize the strong political, legal, and social environment it must operate within. Likewise, there are many stakeholders and many different points of view that need to be recognized [6]. As such, before delving into indicators of what constitutes an effective land administration, it is obligatory to step back and assess the policy and legal frameworks that support various LAS. Therefore, this paper adopts Burns *et al*'s conception of a sound LAS [6]. According to them, irrespective of the jurisdiction in question, a sensible LAS must be secure, clear and simple, accessible, cost-effective, fair, and timely [6, 15]. That said, these land administration principles are not claimed to be completely capable of solving all or most of the customary land tenure challenges. Instead, this is an attempt to highlight areas that are lacking in policy that are necessary for an enhanced land administration system.

Now therefore, the first part of this article briefly analyses the two types of tenure in South Africa namely, statutory and customary tenure. The intention is to compare the two and verify that although they are two sides of the same coin, customary tenure suffers insecurity while statutory tenure is hailed for its efficacy globally. The third and fourth part of the article examines the principles of good land administration to determine how the South African customary land tenure fares. In the penultimate section, suggestions about a possible avenue that cannot guarantee to uproot the problem of customary tenure insecurity but can, at the very least, offer some degree of tenure security are made. These suggestions rest on the hypothesis that with good land administration, customary tenure reform is achievable. The last part of the article makes recommendations that customary land tenure registration should exist alongside the Deeds system, with none being more superior than the other.

2. Types of Tenure

2.1. Statutory Tenure

South Africa, much like its neighbours in Southern Africa, has two main forms of land tenure [8, 17].[2] Land tenure varies according to the type of area in which the land is located. In rural areas, land situated in former homelands is communal land [8], administered by a traditional council, with customary tenure and plots registered in the name of the state [8]. Alternatively, in many urban areas, land is registered and identifiable through the Deeds registration programme. As mentioned earlier, this tenure system is not the subject of discussion in this paper. However, it is necessary to discuss, if one is to show a true and wholesome picture of the complexities of a dual land administration system. In the same light, lessons might be learnt from a system that is notorious for its efficiency. According to Kitchin and Ovens [8];

> "more than 90% of ownership information in the land registry is accurate, up to date and readily identifiable on maps. The records in the registry are publicly available at a small cost and can be searched by both the rights holder's name and land parcel description."

The South African system of land surveying is equal to the best in the world because its cadastre [8], or parcel-based land information system, is highly accurate [32]. Boundaries in surveyed areas are secure and property co-ordinates are recorded in a national reference system, the Deeds Registry. More than 90% of urban properties are formally registered, even those where informal settlements are located [32]. Registration of deeds in South Africa originally referred to a process whereby deeds were recorded on face value, without regard to thorough investigations or referencing to the applicable cadastral systems [16, 24]. This has been amended

1There is currently no legislation that safeguards customary land rights besides the fact that customary areas accommodate about 20 million of South Africa's population. Customary land rights enjoy limited protection under the Interim Protection of Informal Land Rights (31 of 1996) which protects all land rights that are not protected formally or statutorily. Surely this protection cannot be sufficient if one considers their social embeddedness and overlapping nature. Customary land rights are informal because they are not recognised by the Deeds registry system.

2 Different authors categorise tenure differently; for instance, Kitchin and Ovens categorise land tenure into three broad categories namely; established tenure (in formal, mainly urban areas); evolving tenure; and emerging tenure. Established tenure is registered and secure, whereas emerging tenure is not registered and is insecure [9]. Others assert that there are two categories of tenure namely; statutory and customary tenure. This categorisation is similar to Kitchin and Ovens classification in that it recognises transitional tenure as well. Transitional tenure is a hybrid of statutory and customary tenure [7].

to result in a system of registration of title by way of deeds. A deeds registration system is one evidenced by a deed document which records an isolated transaction. Being a negative system, it is neither proof of the legal rights of the parties involved nor evidence of legality of the transaction, but evidence that a particular transaction between parties happened and was registered [21]. This system differs from others in that, most requirements that are normally regarded as part of the title registration procedure are incorporated so as to preserve the precision and consistency of the registered data [16].

Under normal circumstances, the deeds system is not very accurate [21], but in the case of South Africa, characteristics of the titling system have been infused, such that Simpson is convinced that indeed South Africa follows a title registration system [20]. He rightly argues that the only reason the system is categorised as "deeds" is not the fact that the registration proves title, but because the document of transfer is duly registered [20]. This does not make any real difference in practice since the Registrar is required to satisfy themselves that a deed is in order before they accept it for registration. More so because a registered deed has the effect of a certificate of title. Typically, a LAS consists of textual records that define rights and information as well as spatial records that define the extent over which these rights and information apply [32]. These records contain property ownership rights which form the basis for land valuation, land taxation, development planning, local authority demarcation and land administration. The major shortcoming of this system is its failure to recognise other less formal forms of land rights such as customary rights [23].

In South Africa, the *White Paper on South African Land Policy* [28] introduced wide-ranging amendments in land laws. The rationale behind this paradigm shift was to broaden the basis of the cadastre so that it included more than the traditional "real rights" in land [28]. Likewise, the High Level Panel Report and the Advisory Panel Report have both re-emphasised the importance of recognising and formalising a wide range of rights land [18]. In this way, the system will debatably be adapted to suit the needs of the majority of people with informal rights in land. In particular, it needs to be "flexible enough to allow for upgrading of land tenure when the need arises. It is possible to extend the cadastral system to include the rural projects, without prejudicing the integrity of the cadastral system" [23].

2.2. Customary Tenure

Although the use of statistics may be misleading, South Africa currently has over 60% citizens whose rights in land are not recorded nor registered [9]. A central component of inequality within land inequality is insecurity of tenure that results in economic exclusion of the majority of South Africans, particularly those residing in the customary areas [18]. "Customary (land) tenure refers to the systems that most rural African communities operate to express and order ownership, possession, and access, and to regulate use and transfer [13, 30]. While the *Constitution* recognises customary land rights and tenure (sections 30, 31, 211 and 212), there is no legal mechanism to register or record rights in customary land. Instead, the state holds this land in trust for the communities [27].

The Interim Protection of Informal Land Rights Act (31 of 1996, hereinafter the IPILRA) acts as a temporary measure to ensure some degree of security in customary rights in these areas. Although futile, attempts have made to promulgate legislation that guards against insecure customary landholding [18, 21]. It is unclear why the Communal Land Tenure Bill (GN 2437 in GG 40965 of 7 July 2017, hereinafter the CLTB) has not been passed as an Act of Parliament since it was first presented before Cabinet in 2017. While the State dallies around conceptions of land ownership, proposing Bills that are unimplementable and serve to empower the few at the expense of the majority, most of the citizens of South Africa are living with insecure tenure [21]. This means that, not only is their landholding insecure, but they are also not able to reap the full benefits of the land they occupy [13, 21]. Therefore, there is an urgent need for a coherent legal framework to protect the rights held under customary tenure. Could the answer to this interrogation lie in sound land administration practices?

A good LAS must lead to a predictable, open and progressive policy-making process which can hold those in charge accountable for their actions [21]. This is because "land governance is about the policies, processes and institutions by which land, property and natural resources are managed, [therefore] sound governance requires a legal regulatory framework and operational processes to implement policies consistently within a jurisdiction in sustainable ways" [21]. As the pressure on land resources intensifies, land administration systems need to accommodate an increasing number of rights, responsibilities, and obligations in order to facilitate decisions that can support sustainable development [21].

Land administration in customary areas lies solely in the purview of traditional leaders. This mandate is informed by the *Constitution* as well as the Traditional Leadership Governance and Framework Act (41 of 2003 hereinafter the TLGFA). Section 211 of the *Constitution* legitimises and recognises the institution of traditional leadership. Similarly, section 212 (2) of same authorises traditional leaders to deal with any matters related to "customary law and the customs of communities observing a system of customary law". Against this background, traditional leaders ardently dismiss claims that they are undemocratic and or imposed on communities [9].

Land administration in customary communities is rooted in African communalism: The concept of individualism is virtually non-existent. Traditional leaders are of a strong feeling that there is a general lack of understanding of current and historical communal (customary) land tenure. They ascribe this ignorance to the pre-eminence that is given to individual land rights at the expense of communal (customary) rights [9]. These claims are largely substantiated by the exclusive registration of ownership rights at the Deeds

Registry. The traditional leaders argue that "the current Western-imposed legislative framework fails to appreciate the interplay of individual and group rights; how these live side by side in a mutually beneficial, inclusive and harmonious fashion rather than in a competitive manner" [9].

Consequently, the Advisory Panel Report has noted two divergent perspectives on customary land tenure and tenure security [7, 9, 13]. On the one hand there is a viewpoint that land tenure security should left as is and remain under the administration of traditional leaders [7, 9]. On the other hand, are proponents of land titling who assert that land tenure security can only be achieved through titling and registration in the Deeds Registry [7, 9]. Expectedly, the latter route is strongly opposed by traditional leaders. According to them, "land titling can only lead to further vulnerability of individuals and communities instead of providing them with tenure and economic security" [9, 18]. Importantly that, in customary areas, "land is an indivisible and inalienable sacred heritage to be passed on from one generation to the next" [18]. This is said to be the true basis of customary land security. There is no consensus now, and if we are being honest, there never will be, on how customary land tenure should be secured and protected. Delius and Beinart illustrate how this debate is still polarised among different lobbies and interests [7].

In what seems to be a hybrid or middle ground of the two paths is an emerging category of those advocating for localised customary tenure with or without some form of registration. This view is supported by Hull and Whittal who aver that whatever the answer to "the how to secure" question is, it "will always involve some sort of property demarcation and recordation" [13]. Demarcation and recordation does not necessarily have to be complicated to be effective; it can "be simply sketching boundary lines on an aerial photo, erecting terminal cairns, demarcating fence-lines in consultation with the community, or recording locations using handheld GPS receivers" [13]. In the same manner, recording land rights-holders could take the form of a list of names in a notebook, scribbled onto the aerial photo, or kept in the collective memories of the community [13]. Alternatively, proponents of titling are not convinced that a less detailed survey can serve the purpose intended for the keeping of records. They maintain that a detailed survey is an important element in the recordation of rights [7].

The idea of mortgaging land seems instrumental in land administration. This is problematic because land rights and even "property boundaries in customary areas are not static but change with time and circumstance" [9, 13]. A piece of land may have multiple people or groups identifying as owners but without conflict [9, 13]. Importantly, this is not the intended goal as expressed by a sampled group of community members and their traditional leaders. In conducting interviews with people living in one of the customary communities in the Eastern Cape, Hull and Whittal found that the communities' biggest fear was the "loss of identity, the loss of ownership, and the threat of rates and taxes" [13]. To the communities, securing rights in land through individual titling would allow anyone to sell or buy their land, leading to the dilution of community identity and the eventual death of their customs and traditions [13]. In this way, defaulting on loan repayments could lead to a loss of ownership and further to increased tenure insecurity. For these reasons, they proposed various forms of group tenure, wherein families or kinship groups could own land as a collective as proposed in section 9 of the CLTB.

3. Principles of Land Administration

Williamson *et al* begin their analysis of land administration by imagining "a country without any basic administration of land" [29]. In it, they visualise insecure land tenure and property where mortgage loans cannot be established as a basis for property improvement [29]. Here, the use and development of land is not controlled through overall planning policies and regulations [29]. They end their fantasy on a cautionary note citing how that country would be chaotic and disastrous. Land administration programmes are designed to address such property rights insecurity.

Land administration refers to a system that is implemented by the state to record and manage rights in land [6]. It may take the form of recording and registration of private rights in land; recording, registration and publicising of grants or transfers of those rights in land; or the control of the use of land etc. [6]. Although the outcomes desired from a system of land administration are frequently common across communities, the means of achieving those outcomes, and the critical issues encountered, differ according to the respective environments. Against this background, this paper analyses Burns *et al*'s indicators of land administration. According to them, a good (LAS) must be secure, clear and simple, fair, accessible, cost-effective, sustainable and timely [6, 15, 16]. This view is supported by section 195 (1) (f) and (g) of the *Constitution* which provides that public administration must be accountable and transparency must be fostered by providing the public with timely, accessible and accurate information. These factors are scrutinized in greater detail below.

(a) Security

A good LAS must be secure such that the land market can operate effectively and efficiently. Burns *et al* contend that a LAS must be so secure, certain and easily identifiable such that financial institutions would be willing to mortgage land [6]. Although marketisation is not the sole purpose for running any land administration, the geographic extent of the jurisdiction of the system and the characteristics of the rights registered should be clear to all players. There exists an important link between economic efficiency and property rights of infinite duration that are fully tradable [9, 18]. A real life example of this is seen in the formal property rights recordation by the Deeds Registration. The Deeds Registry compiles, processes, approves and registers the title deeds and diagrams necessary to secure property rights [14]. Therefore proof of registration of rights (title) allows holders to deal with their property in different ways they deem fit.

This in turn implies that an absence of a comprehensive, up-to-date and accurate record of rights results in a lack of lucidity in the register and usually results in legal difficulties and conflict of interests.

(b) Clarity and simplicity

As noted above, any LAS must strive for clarity and simplicity to allow land administrators and the general public to understand and use it [6, 14]. Complicated procedures and regulations slow the system down and discourage its use. The public is less likely to believe in LAS that requires lengthy documents and processes. Consequently, simplicity also goes a long way in ensuring easy maintenance, the cost-effectiveness and accessibility [6, 14]. Likewise, the sustainability of the formal system is largely reliant on the level of community trust in the formal LAS and the affordability of participation [6, 14].

(c) Accessibility and cost effectiveness

Within the constraints of cultural sensitivities and legal issues, a LAS (DELETE the) should be capable of providing efficient and effective access to all users. Providing equitable access to the system is also valuable if a LAS is to operate successfully [6, 14]. This can be done by decentralising land administration, adopting simple procedures as well as reasonable fees. The costs of setting up a LAS should in no way rest on, or be absorbed by the users of the system.

(d) Timeliness

It is acknowledged that the reform of a land administration can take on numerous different roles, depending on the kind of reform being employed. For example, reforms can range from small redesigns of registries, cadastre digitization to a comprehensive re-engineering of the entire LAS [6]. Therefore, reform periods range from short -2 years, to very long-15 years if an overhaul of the entire national LAS. While it is easier to create new land administration laws (transformation or replacement theory) [6], cognisance of existing tenure should be taken if a LAS is to be effective and sustainable (affirmation or adaptation theory) [3]. This is because an understanding of existing local norms and practice, which may include intricate social dynamics, could also foster good land governance [14].

(e) Fairness

A LAS should always be fair in development and its operation. Not only that, but it should be perceived as being so. An objective LAS must also be separated from any sort of political processes [6]. Nepotism and corruption are the biggest threats to a just LAS.

(f) Sustainability

In terms of the sustainability aspect of land administration, mechanisms which ensure the system is maintained over time must be in place. "Sustainability implies the organizational and management arrangements, procedures and technologies, and the required educational and professional levels are appropriate for the particular jurisdiction" [6]. Over and above this, the LAS must be understood by and be affordable to the general population [6]. Importantly, community trust plays a crucial role in the sustainability of any LAS. This is why the community needs education and awareness programmes that extend beyond project public relations campaigns [6]. Community participation ensures the efficiency of the LAS since the "whole process depends on landholders being in the right place at the right time with the necessary documents and information" [6]. Therefore, gaining an understanding of community practices and concerns is an important first step if any system is to operate successfully. The success of a good LAS depends on its sustainability.

4. South African Customary Land Administration

In this section the intention is to assess the existing customary land administration practices against the above-mentioned elements of land administration. Fully aware that the observations cannot be true for all customary communities, the aim of this exercise is to determine whether these practices live up to the standard of typical LAS. In turn, this examination may shape the land tenure security question which arguably arises as a by-product of the abovementioned components of land administration. Now therefore, the Advisory Panel Report accurately summarised the land (in)administration as it currently exists in the customary areas of South Africa in the following quote:

> "The failure to resolve the contending philosophies around land tenure and the supremacy of the Roman Dutch Law in the shaping of land policy in contemporary South Africa remains a critical roadblock in forging out sustainable land reform. There is a need to champion and advance a land tenure formula which ensures that communal (customary) land tenure rights are not subservient to private property rights ownership. The logic of a new framework of land tenure in a democratic South Africa must move out of the constraints of the past if it is to offer a really meaningful solution. A progressive outcome would see the framework around land tenure move away from the spatial and cultural impositions, models, reference points and even language of apartheid and colonialism" [9].

a) Security

Unlike introduced landholding regimes, the norms of customary land tenure derive from and are sustained by the community itself rather than the state or state law [6, 13]. For instance, members of customary communities occupy and use land under a system of rights that is "conveyed through oral tradition and not documented under the formal cadastre" [14]. Oral evidence is said to be enough to guarantee tenure security since most rural residents do not have registered land rights [8]. Because rights in land are not formally recognized or recorded, indigenous knowledge systems are used to allocate land rights and define property boundaries [14]. DELETE]. In many instances, most community members from customary communities are without documentary proof of their land rights [18, 14]. The traditional authorities usually keep records to avoid double allocations of land [4, 14].

Depending on oral instead of documentary evidence is clearly not sustainable. The recent case of *Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others* [1] is proof of this unsustainability. In this case, the Rural Women's Movement, the Council for the Advancement of the South African Constitution, along with community members residing on the Ingonyama Trust land approached the court to challenge the Ingonyama Trust Board for requiring community members to change their Permission to Occupy (PTOs) into leases. The latter would require holders to pay annual rent (Ingonyama Trust Board residential lease programme). Therefore, the issue was whether the payment of these leases was lawful. It was held that the payment of the leases was unlawful. The court further instructed the Minister of Land Reform (cited as a co-respondent) to rectify the illegal payments by ensuring that all the rendered payments were reimbursed [1].

The insecurity of documentary proof is also seen in cases of boundary disputes [14]. Disputes on customary land are not as rare as they are claimed to be. Disputes have particularly surged in the face of mining developments on customary land. This is why doubts about whether it is necessary to have the communities as "owners" of the land and not just administrators of customary land are unreasonable. Concerns mainly stem from the fact that usually, many threats to family landholdings emanate from the community's dealings with outsiders [22]. Nonetheless, over and above strengthening customary land rights at the level of individual and households, the community land must still be registered in the name of the community. Focusing on the former at the expense of the latter may defeat the purpose altogether because individual landholders can alienate the land singlehandedly. Instead, community land should be registered in the name of the community and at household and individual level as espoused by sections 9 and 12 of the CLTB. This can guard against the loss of communities' land rights as a result of the traditional leaders' collusion with mining investors [21, 22]. All the more reason why resolution of disputes should be prioritised since it also plays an integral role in the operation of LAS.

b) Clarity and simplicity

In one of the Eastern Cape case studies referred to above, Hull *et al* observed with interest how all the community members and outsiders knew the processes of land applications [14]. This implies that the application processes are well known and accepted practices- clear and simple!

c) Fairness

Most customary LAS are not objective since they are muddled in political ties and processes. Some traditional leaders' processes are not always fair when dealing with investors [26]. This does not mean that most traditional leaders dispossess rural people, but it shows that rural people are structurally vulnerable to abuse of power by traditional leaders, even when such leaders do not have the legal powers to do so [22]. Nonetheless, not all traditional leaders are corrupt and self-serving, the examples of case studies illustrated above are indicative of the unfair dealings between traditional leaders and outsider third parties, in this case mining companies [22].

d) Timeliness and cost effectiveness

In many customary communities, eligibility for land allocation is based on community membership. There are usually little to no hurdles when a member applies for land. This supports the notion that a LAS should be capable of providing efficient and effective access to all users [14]. The processes are clear and simple as stated above. However, for outsiders, their motivation for applying for plots must be reasonable and supported by land authorities from where they originate [14]. In terms of costs, there are little to no costs associated with land allocation applications in customary areas. However, if allocated with a plot, very low administration costs apply [14]. Furthermore, customary LAS are likely to provide up-to-date information in a timely fashion because no one can acquire land rights on customary land without the knowledge of the traditional authorities. Every allocation must by law be recorded albeit not on sophisticated recordation systems such as the Deeds Registry.

e) Sustainability

The abovementioned elements contribute to an effective maintenance of the LAS. Without simple, secure forms of tenure, service-conscious institutions, unambiguous laws, enforceable regulations, and smooth, inexpensive administrative processes, the climate of transparency and openness conducive to an effective land market will not exist [6]. All these components feed into the land tenure function of the land management paradigm. Any LAS must be sustainable to be effective; this means that there must be mechanisms in place to ensure that the system is maintained over time [14]. Community trust and cooperation also play a huge role in the success or failure of land administration. In hammering the issue of community trust home, Hull and Whittal contend that, to become successful, the process and outcomes of land reform should be significant for existing land rights-holders [13]. They refer to the process as the three Ss – success, sustainability, and significance [13].

Sustainability needs to be built into any LAS linked to land reform because they are mutually interdependent: Land tenure reform cannot succeed if it is not sustainable and significant. The success component is visible through the achievement of the goals of development [13]. In the same light, a land reform programme will be sustainable through its ability to keep the cadastral system successful. Therefore, if it is not sustainable it is bound to fail, and this failure denotes lack of success. "To be [S]uccessful and [S]ustainable, the goals of development should arise from the citizens' or communities' needs, which means that the goals will carry [S]ignificance for them" [13]. Consequently, communities are more likely to use a LAS with which they identify. If the goals of development are significant for the beneficiaries, they will "buy into the development" and this fosters its success and sustainability [13].

The malaise in land reform cannot be reversed overnight, therefore attempts to gauge the three legs of land reform against the three S's are futile- that ship has sailed. This is

why land administration was suggested in the first place; because it has been established that they are failing-unsuccessful [5, 9, 13, 31]. Nonetheless, is good LAS capable of binding all the other legs of land reform together? While it is not possible to deal with all three programmes in this paper, the discussion is limited to the tenure reform leg of land reform. This is because sound LAS deal with the relationships between people and land. This description also embodies land tenure security; it is about what one (in their different categories of landholding) can do with land [22]. Importantly, LAS seek to strengthen the rights of existing owners "through clarification and formalization of individual rights, legislative changes…" [10]. The realisation of this objective directly impacts on land tenure security since records and recognition of rights are the basis of land tenure security [6].

Tenure in land is secure when the duration, certainty/ assurance and breadth elements are satisfied [17, 19, 21, 22]. The breadth aspect of tenure security refers to the quantity or bundle of rights held. It signifies what one can or cannot do with the land [22]. Similarly, "duration refers to how long one can freely stay on a piece of land; the longer one can stay, the more secure their tenure in that land is [17, 19, 21, 22]. In other words, it can be the length of time that a given right is legally valid" [22]. Finally, "the assurance aspect of tenure security implies that rights in land and the duration are known and held with certainty [17, 19, 22]. Hence, no third parties can have valid legal claims in that particular land; that is, the holder must have the strongest rights over everyone in respect of his land" [25]. The abovementioned elements of tenure security are debatably direct consequences of a good LAS.

5. Building a Utopia: The Future of the South African Customary Land Administration

The COVID-19 pandemic has taught us to rethink the rules of normal because what seemed absurd in the past does not seem so irrational now. A LAS that embodies the above elements is possible; the intention is to paint a picture of what it may look like below- it may seem delusional at first, but it is not impossible. The desired outcome is a marriage of the two systems and this presents particular challenges to the legal and policy framework of land administration, but it is attainable. If we accept and reinforce this dual system which accommodates a side-by-side existence and parity between statutory and customary tenure with none being more superior than the other. This envisioned model should be able to accommodate "a continuum of rights from freehold and communal, as well as multilevel ownership arrangements" [9].

The Advisory Panel Report advised the State to convert the Land Claims Court into the Land Court with added powers and functions [9]. Such a conversion would allow all land disputes to be adjudicated before the Land Court instead of restitution claims only. At this stage, the Land Court Bill (B11 of 2021, hereinafter the LCB) has been approved by Cabinet and must still follow the usual parliamentary process for the processing and adoption of draft legislation [12]. In terms of the preamble of the LCB "land reform has not progressed at the desired pace, at times giving rise to expensive and protracted litigation, to the detriment of poor". Therefore, the LCB was created to accelerate land reform in a lawful and equitable manner guided by progressive jurisprudence. Its creation has the potential to surmount practices that locked customary communities under the sole jurisdiction of customary courts. For instance, the CLTB erroneously defaults to the assumption that people living in customary areas are primarily tribal subjects and not equal citizens. "The underlying assumption appears to be that people in the former homelands are more appropriately governed by traditional leaders rather than elected local government" [18]. Fortunately, the LCB is available to all South Africans irrespective of spatial differences (rural or urban) [12]. Therefore, the promulgation of the LCB has the potential to deal with land disputes expeditiously thereby supplementing the traditional dispute resolution methods and in turn assisting with the required expertise in land issues [12].

Fully cognisant of the injustices of the past, the preamble of the CLTB has also particularly noted the systematic dispossession of land belonging to African people by the apartheid government and the continued state of landlessness on the part of the majority of the people". According to section 28 of the CLTB, a community can, by a resolution supported by at least 60% of the households in the community, choose to have its communal land managed and controlled by either a traditional council; a Communal Property Association (CPA); a trust or any other entity of the community's choice. However, regarding CPA's this is an artificial choice because no new CPAs can be established in areas where traditional councils already exist. This position confirms Tlale's doubts about the possibility of any other institution administering land in areas where the traditional authorities exist [21]. In the same light, section 28 (4) (a) of the CLTB states that only traditional councils constituted under section 3 of the TLGFA will be recognised as valid land administration authorities. This also poses problems since many traditional councils have failed to transform as required by the said provision, hence will not be eligible for the task.

Altogether, the LCB has the potential to deal with disputes expeditiously and in the specialised Land Courts and the CLTB can also play a huge role in ensuring a sound customary LAS. Although the CLTB is extremely complicated in terms of a land administration body (section 28 of the CLTB), communities must be in a position to choose one of their liking, but whichever they choose should be constituted legally and be elected democratically. Similarly, the principles around which the CLTB must be implemented align with those discussed in part 3 of this article. Ideally, the promotion of the rule of law, good governance, accountability and equality should be at the forefront as required by section 3 (f) of the CLTB. In support of a localised land administration institution with some kind of

registration illustrated above, section 12 of the CLTB requires for customary land to be registered in the name of the community. Over and above this, subdivided portions must in turn be registered in the names of the families and households occupying them, this promises greater security of tenure. After all, the objective is to provide groups of families who live on customary land with security of tenure. Coupled with the recordation of all existing customary rights in land under the land records legislation, what could go wrong?

The Advisory Panel Report and the High-Level Panel Report interestingly recognise that "[d]esigning an integrated land records system as a component of a strong land administration system is an ambitious but necessary task" [9, 18]. After long deliberations about how the majority of South African's (a greater percentage of these being people residing in customary communities) have no recorded land rights thus placing them in precarious position of dispossession and evictions, the High-Level Panel Report's recommended an adoption of a Land Records Act [18]. The content of which would be to provide for records of all existing off-register (informal) rights to give holders more content based on inclusive decision-making processes involving local stakeholders [18]. This proposed legislation should be able to support an inclusive and robust LAS that caters for all South Africans across a full spectrum of co-existing land rights. Further that these rights must be recorded in a way that reflects customary understandings of land rights as family property [18]. This would be a crucial component of a LAS that provides robust forms of recourse to ordinary people seeking to assert and protect their land rights. Instead of upgrading to title, advocates of a localised land administration rightly propose a recordation and cementing of customary tenure rights as they exist on the ground alongside real rights registerable at the Deeds Registry. What is more, even proponents of titling appreciate the difficulty of overhauling the entire customary LAS to conform to the current Deeds Registry system [7].

Against this background and while awaiting these two Bills to undergo the necessary stages before being assented, the conversation around the IPILRA stays the same. IPILRA, offers a degree of land tenure security but it must be made permanent to ensure greater security. All other laws must be subject to IPILRA if it is to have any real impact. Although limited in its protection, the IPILRA still plays an important role in protecting customary communities [21, 22]. However, to expand its strength, it needs to be amended and enforced properly. IPILRA also needs to be made permanent so that any other legislation that enables land grabs can be made subject to it.

6. Conclusion

There are two parallel systems of landholding in South Africa; the statutory tenure and customary tenure. To place them at par, the state engaged in the exercise of reforming land laws of the country. This has not been an easy task, such that some believe that land reform ship has sunk. Nonetheless, as a last resort, the Advisory Panel Report has suggested that land administration be adopted to expedite and restore the other three legs of land reform. Therefore, this paper sought to investigate whether land administration reform can achieve the desired results of redistributing land equitably amongst all South Africans, restoring land back to the black people who were dispossessed of property by apartheid and securing the land rights that were made insecure as result of apartheid.

It is important to note that there are no quick fixes to land tenure problems. As hypothesised earlier in the paper, the link between a good land administration system and land tenure reform has been established. It was important to establish this nexus because there exists an important link between economic efficiency and property rights of infinite duration that are fully tradable. It was shown that securing tenure will always involve some sort of property demarcation and recordation. Legislation that can arguably cater to most of the customary land issues is already underway and if executed properly can secure the currently informal customary land rights. It is very unfortunate that many problems facing people living in customary areas do not arise from the terms of the law *per se*, or even from the absence of comprehensive protective legislation but rather from failures of implementation and enforcement thereof. Those who benefit from chaos will obviously be reluctant to support any sort of change, but this should not deter legislators from fixing the identified problems.

So, under this proposed utopia, will the elements of land administration namely secure, clear and simple, accessible, cost-effective, fair, and finally it should be timely be realized? Probably not, but there is some comfort in knowing where to look, or where to run to in case of an infringement of tenure rights. Legislatively protected rights are better enforced than informal ones. In the same manner, having specialty courts promises expediency in resolving land disputes. The land records legislation can in turn avail documents to serve as proof of title before the Land Courts. As asserted above, the recordation of land rights and demarcation of boundaries does not have to be as sophisticated and world class, akin to the Deeds Registry system. This land records legislation should cater for a full spectrum of co-existing customary land rights. In this way, the tenure reform leg of land reform will arguably be realised. Finally, it is anticipated that this article can stimulate further intellectual argument and debate on how land administration can enhance the other two legs of land reform, restitution and redistribution.

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