TENURE SECURITY DISCOURSE

An Analysis of International and South African Perspectives on Formalising Land Tenure

by

Samantha Woods (WDSSAM001)

Submitted to The University Of Cape Town
in fulfilment of the requirements for the degree LLB
Faculty of Law, University of Cape Town

Date of submission: 17 September 2010

Supervisor: Professor Hanri Mostert
Department of Private Law, University of Cape Town
DECLARATION

1. I know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one's own.

2. I have used the footnoting convention for citation and referencing. Each contribution to, and quotation in, this opinion from the work(s) of other people has been attributed, and has been cited and referenced.

3. This opinion is my own work.

4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Signature ____________________________________
Tenure Security Discourse

An Analysis of International and South African Perspectives on Formalising Land Tenure

by

Samantha Woods (WDSSAM001)

Word Count: 7944 words

This paper was written under the auspices of the LandLawWatch project. The views and opinions expressed here are the author's own and should not be attributed to the LandLawWatch project or the University of Cape Town.
ABSTRACT

This paper will embark upon an investigation of the problem of tenure insecurity in South Africa, arising out of the inefficacy of the current registration system to provide for the myriad of indigenous or customary land-use rights and entitlements. It will examine international discourse on the matter generally and then provide a detailed account of the South African position; its causes, characteristics, and proposals for or attempts at solution. Following this, it will determine the most efficient pathway to resolution by examining the propositions of Cadastre 2014 and the manner in which this system might be moulded to fit and correct the South African situation.
Table of Contents

1. Introduction .........................................................................................................................5
2. International discourse .........................................................................................................9
   2.1 Representative opinions .................................................................................................9
   2.2 Two schools ...................................................................................................................10
      2.2.1 The rigid approach ................................................................................................10
      2.2.2 The supple approach ............................................................................................11
   2.3 An international course of action ................................................................................11
3. The South African Perspective ..............................................................................................11
   3.1 Legislative failure ..........................................................................................................11
   3.2 Propositions for solution ...............................................................................................13
      3.3.1 The rigid approach ................................................................................................14
      3.3.2 The supple approach ............................................................................................15
   3.4 Preliminary Assessment .................................................................................................16
4. Practically speaking .............................................................................................................17
   4.1 E-Conveyancing: The e-DRS. ......................................................................................17
   4.2 Cadastre 2014 ...............................................................................................................18
   4.3 Relevance for discourse ...............................................................................................20
5. Conclusion ..........................................................................................................................20
Annexure .....................................................................................................................................22
Bibliography ............................................................................................................................23
   Literature .............................................................................................................................23
   Primary sources ....................................................................................................................24
      Cases ................................................................................................................................24
      Legislation ........................................................................................................................24
   Other ....................................................................................................................................24
1. Introduction

The aim of this paper is to provide a detailed analysis of the problem of tenure insecurity in South Africa, which has resulted from the inefficacy of the current registration system to provide for the multitude of existing indigenous or customary land-use rights and entitlements. The South African position regarding rural land tenure is one coloured by a myriad of factors, including amongst others, issues of race, culture and politics. This position is not a uniquely South African one and can perhaps be traced back further and attributed to the legacy of colonial rule, prominent in the history of the majority of African states.¹

A major problem facing this country, and other developing nations in this regard, is one recognised by Peruvian economist Hernando de Soto in his book *The Mystery of Capital.*² The problem is one based primarily on the reality that rural land occupancy or possession, where born of customary or indigenous practices has, practically speaking, very little place in the formal land law system of the country. The result is the startling reality that land administered in this ‘informal’ manner is unable to adopt a role in wealth creation and economic development.³

De Soto’s book was written in an effort to explain why, while countries in the West seem to flourish economically, those of the South and East (the global South) continue to find themselves in financial turmoil. In an effort to provide a reason for this lack of economic development in third world countries, de Soto highlights the need for wealth creation or capital generation. It is from this avenue that he considers the notion of land tenure and its potential ability to assist individuals or groups of individuals in creating wealth.⁴

To comprehend the problem from this angle one ought to understand the notion of land tenure in this context. Ultimately, land tenure can be defined as the relationship between people and land. This relationship may be identified as one of a legal or customary nature, and it may be between individuals and land, or groups of individuals and land.⁵ It is to be characterised as a set (or sets) of rules, created as a means of regulating people’s behaviour and protecting their interests, in relation to land. Regulation implies enforceability, and indeed such relationships generally are enforceable, whether legally, in a court of law, or at a customary level by whichever specific indigenous community or tribal

---

¹ Lavigne Delville “Harmonising Formal Law and Customary Land Rights” in Evolving land rights 98.
² De Soto *The Mystery of Capital.*
³ De Soto (note 2 above) 47-49.
⁴ De Soto (note 2 above) 47-49.
⁵ Land Tenure and Rural Development in FAO Land Studies 3 1.
authority. Tenure security therefore, refers to the protection or safeguarding of these relationships and the assurance that dispossession will not occur.

The trouble arises due to the fact that customary land tenure is not recorded in the same manner as formal or common law land tenure. Thus it is generally not viewed as possessing the same level of legitimacy and is consequently significantly less secure. The failure of customary or indigenous land tenure to act as a capital generating force stems from this deficiency or incapability; if a right cannot be registered, it lacks authenticity and ability to contribute to the wealth or estate of an individual or group. As a result of the fact that customary rights or entitlements over land are not formally registered, at least in the common law sense, to any specific individual, no individual or group of individuals who might have use, ownership or occupancy rights over the land can harness these rights as assets, thereby realising and employing their economic function.

To provide a practical example of this economic function, one might consider the basic scenario of employing one’s right over a piece of land as collateral; a means of securing, for example, credit from a financial institution. For this function to be fulfilled there needs to be some form of land registration that makes one’s entitlement binding and enforceable.

The intricacies of derivative acquisition as established in the Deeds Registries Act are familiar and aim to establish unambiguous, practical administration and regulation of individual rights over land. In line with the publicity principle one is granted, on registration at the deeds office, a real right of ownership over a specific piece of immovable property. This real right grants the most far-reaching control over a piece of property in its unencumbered form. One might also be granted a limited real right, in the property of another, this too capable of registration at the deeds office and thus binding and enforceable.

To have one of the aforementioned registered rights is to create great simplicity in the event that one desires to purchase a motor vehicle or piece of land, consequently requiring the provision of credit by a bank. To have a right registered in this manner provides legitimacy and security of one’s right over a specific piece of immovable property. Using this registered right as collateral, demonstrates to a

---

6 Land Tenure and Rural Development in FAO Land Studies 3 1-2.
7 De Soto The Mystery of Capital 47-49.
8 47 of 1937.
9 Mostert et al Silberberg and Schoeman’s The Law of Property 208.
10 Pienaar 2000 TSAR 467.
11 Mostert (note 9 above) 47.
12 Moster H & Pope A (eds) The Law of Property 44
financial institution that, in the event that (as debtor) one cannot honour a granted loan, one’s right may be parted with as a means of satisfying the debt.\textsuperscript{13} Securing tenure in this way, via registration, means that the specific right or entitlement over a piece of land has the potential to serve a primary and a secondary function, the former being that of acknowledging and protecting ownership, the latter, that of generating capital.

In the case of customary or indigenous land tenure regimes, the picture becomes less clear and the manner of obtaining and maintaining rights or entitlements over land is variable and uncertain.\textsuperscript{14} There is no requirement in customary law for the physical registration of land rights as a means of securing tenure.\textsuperscript{15} Thus difficulty arises when legitimating a claim over a piece of land becomes necessary. Where this necessity to formalise right may arise out of a desire to obtain credit, the occurrence of problematic scenarios with a basis in customary tenure insecurity is vast.

Customary land rights are abundant. Traditional leaders grant individuals, families, groups of families or groups of individuals, any number of rights over one or any number of pieces of land. These rights may denote occupancy, tending of the land, the taking of fruits or the grazing of animals, to name but a few. The rules by which these leaders administer the land and its resources are determined by the social and political structure of the community and the customary practices observed.\textsuperscript{16} Often legitimacy of occupancy or entitlement stems from long-standing prior occupation or familial relations and interactions. Thus it appears evident that social relations, community structure and politics play a critical role in tenure administration.\textsuperscript{17}

The varying rights over and entitlements to customary land are referred to by theorists as ‘fragmented’\textsuperscript{18} rights. This is so as result of the fact that they almost always overlap and are of differing strengths.\textsuperscript{19} One family may have the right of occupancy over a piece of land while another individual is entitled to develop the land for agriculture purposes.\textsuperscript{20} Where two (or more) rights exist over the same piece of land and where the rights are clearly diverse, imposing different rights and duties on the affected individuals, the dilemma arises as to which right ought to be deemed most powerful. In the event that the individual with agricultural development entitlements wished to develop the land to its greatest potential, and in so doing demolish the dwelling occupied by the family possessing occupancy rights,

\textsuperscript{13} Du Bois (ed) Wille’s Principles 630-631
\textsuperscript{14} Bennett TW Customary Law 381-384
\textsuperscript{15} Bennett (note 14 above) 407
\textsuperscript{16} Lavigne Delville “Harmonising Formal Law and Customary Land Rights” in Evolving land rights 97.
\textsuperscript{17} Lavigne Delville (note 14 above) 97.
\textsuperscript{18} Pienaar 2000 TSAR 448.
\textsuperscript{19} Pienaar (note 18 above) 448-450.
\textsuperscript{20} Bennett (note 14 above) 377 390
which right ought to be granted preference? Does the right of occupancy trump that of cultivation, or vice versa? Where arguments may exist in favour of the triumph of each, these arguments are case-specific. And where formal registration or documentation is absent, the complexity increases. Such an example, simple in relation to the innumerable cases that have the potential to arise, serves to show the intricacy of customary tenure regimes and the incompatibility with those of the common law.

Where traditional leaders or tribal elders of a community grant land rights to their members, it is also their duty to enforce these rights against the right-holder. The system is comprehended and understood by those individuals or groups concerned, yet there is no formal record of delineation, and thus on what basis are enforcement decisions made? The critical question is whether or not this system provides individuals or groups possessing rights or entitlements adequately secure tenure. Though those within the community and grips of the custom may recognise these rights or entitlements, what happens when those outside the realm of the custom become involved and question the legitimacy of right possession? Returning to the original example; where might a customary right holder stand when attempting to present his or her right as collateral?

When one considers this in light of the Constitution of the Republic, specifically sections 9(1) and 9(3), which read that ‘everyone is equal before the law and has the right to equal protection and benefit of the law’ and that ‘the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including…culture’ respectively, it is all too apparent that there is a legislative shortfall. These sections categorically stipulate that all persons are to be treated equally before the law, and it is from these sections, and the rest of the Bill of Rights, that customary law gains its validity and legitimacy. Customary law is to be viewed and applied in a precisely equal manner to statute and the common law. Coupled with the (section 25) property clause of the Constitution, which extends protection of property rights to every individual beyond ownership to use-rights, and specifically subsection 6 requiring legislative enactment in this regard so as to counteract apartheid legacies, the necessity for egalitarianism is essential.

In 2004 the Constitutional Court ruled in favour of the land claim of the Richtersveld community. In concluding that the community was entitled to land restitution, the court demonstrated the constitutional obligation for the recognition of land rights with their basis in the traditional laws and customs of the

21 Bennett TW Customary Law 381-389
24 Claassens & Cousins Land, Power and Custom 25.
25 (note 22 above).
26 Pienaar 2004 THRHR 245-246.
Indigenous South African people. This landmark case thus confirmed the theoretical position set by the Constitution, thus serving as an indication that equality in land tenure is constitutionally enforced. The resultant dilemma in the land tenure sphere arises because, though the tenure system of customary law ought in theory to be recognised and interpreted in line with the Constitution and Bill of Rights, and thus notionally treated as equivalent to formal or common law land tenure, in practice these parallel schemes do not hold the same weight. Thus the critical problem lies in having two incompatible tenure systems that, in the social, economic and political setting of current day South Africa and the international arena at large, demand a certain kind of compatibility to ensure impartiality in land tenure security.

2. International discourse

The problem of inequity in land tenure regimes and administration is one recognised and considered extensively by players in the international arena, and the necessity for tenure security reform extends far beyond that contemplated in the introduction of this paper. The following discussion outlines the specific views on the issue of land tenure and the need for land tenure security in a globalising world.

2.1 Representative opinions

The importance of secure tenure and access to land has been expressed, most significantly, by a number of international organisations whose accounts yield noteworthy similarities. These organisations are the Department for International Development, the United Nations Food and Agricultural Organisation and Oxfam.

The Department for International Development (hereafter DFID) team for Renewable Natural resources and Agriculture stated in 2004 that "There is widespread evidence that, whether a tenure system is communal or individual, freehold or leasehold, farmers are more likely to invest in their land – and achieve productivity gains – when they have secure land rights." Similarly in its 2007 report on Access and Tenure of Natural Resources, The Food and Agricultural Organisation of the United Nations (hereafter the FAO) recognised the need for the identification and implementation of competent land administration systems, to ensure secure tenure, when it stated that ‘providing secure access to land and other natural resources is essential for the achievement of the
World Food Summit Plan of Action and the Millennium Development Goals’, and further, that ‘inadequate rights of access to land, and insecure tenure of those rights, often result in entrenched poverty.’

In the same year, Oxfam identified as one of its key principles on land rights that ‘Access to land and security of tenure are necessary for people to raise and stabilise their incomes and to participate in economic growth.’

Acknowledgement of the importance of tenure security by organisations at this level, and indeed the links established between tenure security and the alleviation of poverty and economic growth, highlights the relevance of the current South African situation in the global context. Though it might serve as reassurance, in that other nations are faced with similar predicaments, more significant is the need to produce a viable and effective solution that is affordable, nationally applicable or adaptable, and does not countermand customary and informal land tenure institutions.

2.2 Two schools

In pursuance of such a solution in the international arena, it appears as though there have emerged two schools of thought with divergent backgrounds, bases, and approaches to the issues surrounding security of tenure; more specifically, those issues resulting from the attempted interactions of divergent formal and informal (or customary) tenure regimes.

2.2.1 The rigid approach

On the one side, there are those who believe that the optimal functioning of any tenure regime, and the most efficient manner in which security might be achieved, is via the implementation of a certain and precisely formalised administration system, based primarily on the surveying and mapping of entire states. Rights are recorded and administered electronically, and certainty, accessibility and transparency characterise this position. One might label this approach the ‘hard’ or rigid approach, if only for the fact that it seems to advocate a single, specific manner in which a multitude of distinct rights and entitlements are to be administered. Proponents of the ‘hard’ approach are most generally linked to the International Federation of Surveyors (hereafter FIG), and it is the success of this organisation in

---

31 FAO 2007b.
33 Augustinus in UN-Habitat 2005 4.
implementing the illustrated system in a number of Eastern European states, that has resulted in its gaining considerable support.  

2.2.2 The supple approach

On the other side, there is the International Institute for Environment and Development (hereafter IIED) and their ‘soft’ or supple approach to the functioning and administration of competing land tenure regimes. This school of thought recognises the complexity of land relations resulting from the varying systems that govern it. Customary or traditional land rights cannot be compared with those formal or common law rights, as their roots are in a system far more intricate and evolving. Delineation, dispensation, and dispute resolution is approached in a wholly diverse manner, and requires equal recognition in whichever system is to successfully secure land tenure for all. Thus there exists the need to construct a scheme that goes beyond conventional survey and documentation; possessing the ability to accommodate a myriad of rights or entitlements from whichever various sources.

2.3 An international course of action

It would seem that to fall upon a most effective solution to the problem of tenure security would be to encourage a collaboration of the two opposing schools. However, as of yet, it appears as though neither side has made any significant attempt at cooperation. As a member of UN-Habitat's Land and Tenure Section and one of the few people with a vested interest in the approaches of both the IIED and FIG, Clarissa Augustinus admits that the two factions “are still mostly talking past each other”... an undesirable state of affairs if the best possible result is to be attained.

3. The South African Perspective

Shifting the focus from the international discourse surrounding the security of tenure dilemma to that of South Africa highlights various similarities. In exploring and assessing the South African position, specifically the legislative attempts at rectification, one notices certain characteristics and, from these, may ultimately come to deduce that there have, once more, emerged two schools of thought on the matter.

3.1 Legislative failure

The incompetence of current tenure security regimes and the inequality stemming there from are not topics ignored by legal theorists and politicians in post-apartheid South Africa. There have been numerous legislative attempts at achieving some semblance of justice and system correspondence, the

---

35 Palmer Literature Review 9.
36 Palmer (note 35 above) 10.
37 Palmer (note 35 above) 10.
majority of which have focused on the redistribution of land and land rights, so as to right that which is the apartheid legacy.

In this regard the Department of Land Affairs has promulgated several statutes including the Communal Property Associations Act\textsuperscript{38} and the Extension of Security of Tenure Act,\textsuperscript{39} both of which affect rural land primarily and thus the land on which customary land tenure principles generally apply. The former calls for the creation of associations to own, control and deal with communal or common property which has come about generally as result of apartheid dispossession and consequent post-apartheid redistribution to a specifically favoured group or community.\textsuperscript{40} The latter Act serves to protect farm labourers who occupy the land on which they work.\textsuperscript{41} Though both these acts denote legislative enforceability, they do not call for the type of individual registration that matches that of real or limited real rights of ownership.

Possibly the most significant piece of legislation relating to customary land tenure is the Communal Land Rights Act\textsuperscript{42} (hereafter CLaRA), promulgated in 2004 and declared unconstitutional in May this year. Simply put, the aim of the Act was “to provide for legal security of tenure by transferring communal land … to communities”\textsuperscript{43} More explicitly, the act can be defined by its three main features; its application to communal land and the tenure thereof; the transition of ‘old order’ indigenous or customary rights to ‘new order’ rights confirmed or converted by the minister in terms of section 18 of the act; and the implementation of a new administration system where traditional councils are given wide-ranging powers and functions.\textsuperscript{44} The case was brought to the Constitutional Court by members of a community to which the provisions of CLaRA were to apply, on the basis of both substance and procedure. Though the Act was ultimately declared unconstitutional on procedural grounds, there is extensive evidence that had there been no procedural failure, the substance of certain provisions of the act would have resulted in the court reaching the same conclusion.

The substance of the act was challenged by the applicants on the basis that the act called for the implementation of a new system of tenure administration and the conversion of pre-existing rights and entitlements, both of which would amount to the undermining of indigenous or customary law systems and practices. CLaRA would essentially be replacing the indigenous or customary regimes regulating use, occupation and administration.\textsuperscript{45} In so doing, traditional leaders would assume positions of power.

\textsuperscript{38}28 of 1996.
\textsuperscript{39}62 of 1997.
\textsuperscript{40}Communal Property Act 28 of 1996.
\textsuperscript{41}Extension of Security of Tenure Act 62 of 1997.
\textsuperscript{42}Communal Land Rights Act 11 of 2004.
\textsuperscript{43}(note 42 above) preamble.
\textsuperscript{44}Tongoane and Others v National Minister for Agriculture and Land Affairs and Others (CCT100/09) [2010] ZACC para 82.
\textsuperscript{45}Paras 33 & 96.
now statutorily enforced and this would ultimately have the effect of diminishing security of tenure beyond that already experienced. 46

In reaching its conclusion a propos the procedural failures of the act and its promulgation, the court was forced to consider the extent to which the act would affect indigenous and customary law and traditional leadership; 47 this so as to assess whether the act fell within the functional area of schedule 4 of the Constitution or not, thus classifying it as a section 75 or 76 bill, denoting specific enactment. 48 The court concluded that the provisions of CLaRA fell within the functional area of schedule 4 of the Constitution on the basis that it would affect, substantially, indigenous and customary law and traditional leadership, and thus that it had been enacted according to the incorrect procedure and was consequently unconstitutional. 49 It based this classification on the fact that the current customary or indigenous systems in place would be repealed, replaced or amended by CLaRA; 50 this amounting to substantial affect.

Repealing, replacing or amending existing customary tenure administration regimes in favour of a regime suggested by CLaRA would be to hold such systems in lower regard. Without hesitation, undertakings of this nature are to be deemed unconstitutional; trying to unify a system of formal registration with one of a less formal, customary character, by replacing the one with the other makes no recognition of the Constitutional necessity to treat all land rights or entitlements as equal, regardless of their source. 51 The failure of such legislation, originally implemented as a means of combating the problem of customary tenure insecurity, means that attempts at formalising those rights that are informal have not been successful. Consequently the dilemma of insecure tenure at a national level remains.

3.2 Propositions for solution

It appears evident from the preceding discussion, that the problem of tenure security specifically in South Africa is characterised by the incompatibility of two individual systems, both attempting to administer identical scenarios. The only difference is that the groups over which the systems attempt the exercise of authority are of differing cultural backgrounds and thus the rights and entitlements under administration entail different powers and duties. This points once more to a unification of some sort; characterised by compromised compatibility and cohesive, equal administration of land tenure from

48 (note 47 above) Ss 75 & 76; Tongoane and Others v National Minister for Agriculture and Land Affairs and Others (CCT100/09) [2010] ZACC paras 73 & 76.
49 Tongoane and Others v National Minister for Agriculture and Land Affairs and Others (CCT100/09) [2010] ZACC para 80.
50 Para 79.
51 Alexkor (Pty) Ltd and Another v Richtersveld Community and Others 2004 (5) SA 460 (CC).
every source. The South African dilemma, enhanced by legislative incompetence and failure, has produced discourse that, predictably, has the ability to be separated into two schools of thought.

3.3.1 The rigid approach

Pienaar recognises that customary practices and statute are insufficient to ensure security of tenure.\textsuperscript{52} He proposes the implementation of a synchronized system of registration where all rights over rural land, whether afforded by custom or statute, are registered in a manner similar to that in which limited real rights are registered.\textsuperscript{53} In this way, the “fragmented”\textsuperscript{54} use-rights of multiple individuals over a certain single piece of land can be secured and administered with efficacy. Title is no longer only characterised by real rights of ownership or limited real rights of usufruct or lease, but by the myriad of use-rights existing within the customary land tenure system.\textsuperscript{55} The existing deeds registry system can remain in play but for certain additions and modifications necessary for the management of the newly registered use-rights, and extensive land surveying and mapping of rural areas will be embarked upon.\textsuperscript{56}

This proposed structure is not one wholly foreign to the South African legislature as a similarly structured system was proposed in the White Paper on South African Land Policy in 1997.\textsuperscript{57} In this regard, the primary aim established in the paper was to develop a system of registration so as to secure the informal land-use rights of those in rural and urban areas. A list of needs was identified and a strategy suggested however little progress was made.

Where doubt in Pienaar’s proposal existed; as to how precisely such registration of such a multitude of use-rights over a single piece of land might practically be accomplished, he turned to the work of Ventura and Mohamed.\textsuperscript{58} Ventura and Mohamed proposed a model suitable for the registration of the multiple and varied use-rights or entitlements characteristic of indigenous or customary land tenure. The model provides for the registration of use-rights at every level; from those most primary or dominant, to the most basic secondary use-rights. Every detail relating to the possession of the right can be established and recorded and thus consulted and administered whenever necessary.\textsuperscript{59}

\textsuperscript{52} Pienaar 2000 TSAR 443-445.
\textsuperscript{53} Pienaar (note 52 above) 450-451.
\textsuperscript{54} Pienaar (note 52 above) 448.
\textsuperscript{55} Pienaar (note 52 above) 451.
\textsuperscript{56} Pienaar (note 52 above) 452.
\textsuperscript{57} 1997 106-107.
\textsuperscript{59} Pienaar 2000 TSAR 461-463.
On close examination of the proposed model (see Appendix attached), application in the South African context might successfully achieve the desired unification of the two systems of tenure, so that customary use-rights gain legitimacy and can compete on the same level as those formal real rights of the common law. The record’s are to remain in the possession of the deeds office and are to be updated when change occurs.

In suggesting a scheme of this nature, Pienaar recognises that the immensity of the use-rights and transactions possible means that recording every minute detail would present a feat of substantial time, effort and money. As a solution he suggests that registration take place only where demanded or desired by individuals implicated, perhaps, as example, in circumstances where a desire exists to employ a particular right as a means of securing credit.\(^60\)

If the solution were as clear-cut as the mere implementation of a registration system similar to that identified above, then the fundamental question is why has the situation not been remedied? The White Paper on South African Land Policy\(^61\) recognised that the cost and administrative logistics of implementing such a system would be immense and perhaps it is this reason that has prevented any action to date. The alternate reality is that just as is the case amongst international theorists, this rigid approach to the solution of land tenure insecurity does not go unchallenged.

### 3.3.2 The supple approach

The approach of Ben Cousins to the issue of land tenure and the security of those informal use-rights and entitlements delineated through customary or indigenous practices, opposes that of Pienaar, similarly to the manner in which the IIED appears to be anti the outlook of FIG. His argument centres on the fact that by their very nature, rights and entitlements conferred under customary law regimes cannot be recorded and registered in the formal manner, understood and accepted as such under the common law.\(^62\) He refers to these rights as being ‘embedded’ in the social and political relationships and historical practices of the community concerned and suggests that this in itself provides security of tenure as these relationships and practices are understood, recognised and accepted by those individuals to whom they apply.\(^63\) As result of this layered, relative character, the obligations and entitlements that these rights convey mean very different things when considered alongside formal real

---

\(^{60}\) Pienaar (note 59 above) 462-463.
\(^{62}\) Cousins 2005 STELL LR 489.
\(^{63}\) Cousins (note 62 above) 488-490.
or limited real rights over land. For this reason it would be impossible to attempt to register these rights in the manner in which one would register such formal land rights; a suppler regime is required.

Cousins identifies as a key feature of customary land tenure regimes, the entitlements (e.g. rights of access and use-rights) of a number of individuals or groups, to a shared set of resources. Specific rights or entitlements of individuals depend on the membership of those individuals to, or status within, a particular group observing specific indigenous or customary practices. That membership or status results from social interactions or transactions such as marriage, or it is prescribed on the basis of customary observance and long-standing tradition. Where Western systems are characterised by clearly defined relationships between specific individuals and specified pieces of land, customary tenure relationships do not possess this same attribute and are rather concerned with, the relationships between individuals or groups and the surrounding environment. These factors denote the reality that customary tenure is, by its very nature, immensely complex and thus requires a comprehensive understanding of every level in order for the totality of its duties and privileges to be established and comprehended.

3.4 Preliminary Assessment

Perhaps it is not the registering of these intricate rights that is impossible, rather their formal registration, as the term is universally understood, in a manner that reflects their true nature and unavoidable distinctiveness without alteration and misrepresentation. In this regard, the Ventura and Mohamed model acknowledged by Pienaar fails, as it attempts to apply a system embodying formal rights registration in the physical documentation sense.

For the same reasons resonating in inflexibility, the propositions of FIG are to be deemed insufficient in administering customary tenure relations satisfactorily as, with the knowledge of the complexity of customary tenure practices and regimes, physical documentation in such a manner, similar to that employed by the deeds office, would result in the inevitable distortion of innately layered and relative customary entitlements.

The liberal approach of Cousins recognises the nature of customary rights and the consequent insecurity of tenure, and draws the accurate conclusion that it is to be impossible to subject

---

65 Cousins (note 62 above) 492.
66 Cousins (note 62 above) 489-499.
67 Bohannan P in Pottier J ‘Customary Land Tenure’ in From the Ground Up 60.
entitlements of a wholly different character to a system designed specifically for the administration of rights governed by the common law and defined as such.\textsuperscript{69}

4. Practically speaking

Up to this point, the focus of this paper has remained fixed on the theoretical propositions as to the manner in which the issues surrounding the security of customary tenure ought to be approached and the problems resolved. How might one practically reach a solution that combines the essential elements of each of the two schools of thought on the matter and successfully implant it in the South African context?

4.1 E-Conveyancing: The e-DRS

The first step for South Africa in this regard, is one previously contemplated by the Chief Registrar of Deeds in South Africa and one already in operation in a number of countries.\textsuperscript{70} In order to make progress in securing previously insecure land tenure the registration system needs to be updated to one using the technologies of the 21\textsuperscript{st} Century; a system of electronic registration ought to be implemented and employed at every level.

Currently, the registration system in South Africa is one primarily paper based and thus the aim of an electronic system would be to transform this paper-based system into one characterised by electronic documents, requests and signatures.\textsuperscript{71} In 2009 a Policy Document on the Electronic Deeds Registration System (e-DRS) was approved by the Chief Registrar of Deeds, the aim thereof to consider specific requirements and functions that the proposed e-DRS ought to possess. The aim of such a system is primarily to 'enhance the efficiency within the deeds registration environment'.\textsuperscript{72} In the context of the post-apartheid land reform process, the demand on registration capacity, accuracy and efficiency is increased and thus a system is required to handle a greater volume of registrations while shortening the process and increasing the accuracy and quality of the records.\textsuperscript{73} The purpose of a proposal of this nature is ultimately to smooth the road to the drafting of the Electronic Deeds Registration Bill and the implementation of the subsequent Act, which would serve not to alter the provisions of the existing Deeds Registries Act\textsuperscript{74} but rather as a manifestation of the growth and

\textsuperscript{69} Cousins 2005 STELL LR 492.
\textsuperscript{70} Land-Registry e-Conveyancing; O’Sullivan J ‘eRegistration and eConveyancing in Ireland – the story so far...’ (2007) 3-7.
\textsuperscript{71} Land-Registry e-Conveyancing.
\textsuperscript{72} Policy Document on the Electronic Deeds Registration System 1.
\textsuperscript{73} (note 72 above) 1.
\textsuperscript{74} 47 of 1937.
transition to e-commerce. E-commerce in this regard refers to transactions conducted electronically, using computers and frequently involving the World Wide Web.

Though the transformation to electronic land rights registration is critical in the 21st Century, the implementation of a system such as the e-DRS will not solve the problem of tenure insecurity as related to customary land rights and entitlements. The system would certainly be modernised, however registration would be of the same rights afforded registration under the Deeds Registries Act; those land rights defined and recognised as such by the common law. While there is recognition in the e-DRS Policy Document for a system that provides for the registration of different types or forms of deeds, as well as possible encumbrances against a piece of land, these are not extended to include the myriad of customary tenure possibilities. A system demonstrating greater sophistication and complexity is required.

In the South African context, the absence of an existing system (or even one specifically proposed), possessing the requisite construction to accommodate the innumerable customary tenure possibilities, serves only as additional evidence of the immense complexity of the problem of securing customary land rights or entitlements in a manner that might enable competition with land rights of the common law. Internationally however, there may exist a fitting proposal.

4.2 Cadastre 2014

Between 1994 and 1997 Commission 7 of FIG embarked on a mission aimed at the reformation of the traditional cadastral system. Technological developments, social change and globalisation have meant that traditional systems have become insufficient and their once characteristic reliability and guarantee of security, no more. Cadastre 2014 is a system proposed by the international proponents of the rigid approach, FIG; this ironic considering that it may provide the most practicable solution to the complexity dilemma.

The word ‘cadastre’ refers to an official register of the quantity, value and ownership of real estate, generally comprising land surveys or maps and accompanying records, primarily for the purposes of taxation. In embarking upon a process of transformation, the FIG Commission 7 recognised a

---

76 Definition: e-commerce.
77 47 of 1937.
80 Kaufmann et al Cadastre 2014 1.
81 See definition by: Merriam-Webster online.
82 See definition by: Merriam-Webster online.
number of essential modifications that would enable existing cadastre systems to be reborn for the 21st Century.

Cadastre 2014 is characterised primarily by the redefinition of the substance of land tenure; that is the classification of a piece of property as a legal land object under the modernised system, as opposed to a land parcel under the traditional regime (own emphasis). The concept of a cadastre is also to be redefined; no longer referring to a public inventory of data concerning properties, but rather a public inventory of data concerning all legal land objects.

A land object is to be defined as ‘a piece of land in which homogenous conditions exist within its outlines’, and it is in relation to this definition, and the examples presented by FIG in the original Cadastre 2014 proposal, that the relevance of the system to the problem of customary tenure insecurity is apparent. Establishing that one piece of land may potentially present itself as the object of more than one condition (right or restriction), recognises the fact that there exists a vast and varying quantity of possible rights and restrictions. Recognition denotes the acknowledgement of land rights beyond those of the common law; more specifically, the acknowledgement of those rights and restrictions of indigenous or customary law.

In the examples of legal land objects presented in the Cadastre 2014 proposal, there is reference made to ‘areas where traditional rights exist’ as well as ‘areas…where tribal land use rights exist…[That] can overlap other legal land objects’. It is acknowledged that such ‘traditional, customary rights are often not documented in a manner that creates the necessary legal security’ and thus that the situation ought to be corrected. From the outset, the applicability of Cadastre 2014 to the current South African dilemma is blatant; however practical assessment is necessary so as to ensure that the relevance is not misplaced.

A significant physical attribute of Cadastre 2014 is the fact that registration of rights and mapping of land will no longer be administered by separate systems; rather combined under the modernised cadastre. Possibly more noteworthy is the fact that traditional maps will now become models. The original two dimensional character of traditional cadastral maps and land surveys will no longer exist,

83 Kaufmann (note 80 above) 6.
84 Kaufmann (note 80 above) 7.
85 Kaufmann (note 80 above) 13.
86 Kaufmann (note 80 above) 14.
87 Kaufmann (note 80 above) 14.
88 Kaufmann (note 80 above) 17.
89 Kaufmann et al Cadastre 2014 17.
and instead a three dimensional model of the land object in question will be produced and recorded. In this way, the simultaneously existing private, public and traditional law rights over a land object may be correlated and documented, in the new electronic-sense of the word. The fact that the land object is now represented as a three dimensional model, means that it is possible for varying customary use-rights and entitlements to be recorded in the equivalent manner to those rights and restrictions of the public and private law. The critical feature in this regard is that the land tenure type does not change, but simply becomes part of the Cadastre 2014 in whichever pre-existing form it finds itself. If the land is the object of an individual rights, it remains individual land tenure; equally, where the land right is one belonging to a traditional clan or tribe, tenure is customary in nature. It is this specific feature of the Cadastre 2014 that makes its application to the South African so appealing.

4.3 Relevance for discourse

The Cadastre 2014 system is appreciably relevant to the solution to the problem of tenure insecurity relating specifically to the challenges of customary law land right registration. The reason for this is that the system is comprised of elements that speak to advocates of both the supple and rigid schools of thought. Where the rigid approach calls for the implementation of a precisely formalised system of administration characterised by the surveying of land and drawing up of maps, Cadastre 2014 satisfies with the introduction of modelling. Where the supple approach demands the recognition of every right or entitlement over land including those of indigenous or customary law, Cadastre 2014 satisfies once more with its recognition of land objects and three dimensional record structures. The system provides a practical solution to the problems associated with the lack of cooperation between the two schools of thought, and the reality is in fact that with primary proponents of the rigid approach, FIG, as authors, perhaps Cadastre 2014 is to mark the beginning of international collaboration. The anticipation is that it will encourage cooperation on a national level too, consequently solving the tenure dilemma.

5. Conclusion

From the preceding discussions one might deduce a number of pertinent conclusions. In the first place, the dilemma relating to the insecurity of indigenous or customary tenure is one recognised internationally, and indeed one not simply applicable in the South African context. Colonial legacy, and more importantly the legacy of apartheid, has left South Africa in a troublesome position when it comes

---

91 Kaufmann (note 89 above) 20-21.
92 Kaufmann (note 90 above) 26.
93 Kaufmann (note 90 above) 26-27.
94 Kaufmann (note 90 above) 27.
95 Kaufmann (note 90 above) 10.
96 Kaufmann (note 90 above) 8-9; Kaufmann J et al Cadastre 2014 20.
to the distribution of land, and the equal recognition of land rights and entitlements of all South African nationals. As international opinion acknowledges, the necessity for tenure security is immense if nations of the third world are to advance economically. As the introduction to this paper showed, the applicability of this statement to South African circumstances is exact.

Though there is significant national and international recognition of the problem and the necessity for solution, up until recently the issue has only been compounded by the inability of opposing theorists to find a common ground from which to proceed. Though collaboration may have originally appeared impossible, the introduction of Cadastre 2014 presented a scenario in which the interests of both parties were addressed and provided for. And thus it is from this point that the South African legislature ought to proceed.

Cadastre 2014 provides the basis on which a distinctively South African system for the registration of varying land rights and entitlements may be developed. The revised definition relating to portions of land, and the modernised mapping system fulfil the necessary conditions for a viable registration system, as established by the discourse. Considerations of cost are not ignored by the proposed system, in fact included as the sixth statement of Cadastre 2014 is the reality that the system will be cost recovering as investment opportunities will be eased.98

Thus it is to be concluded that the way forward with regards the dilemma of tenure insecurity is in employing Cadastre 2014 as a guide to the creation and implementation of a revived South African system of land rights registration. The new system will permit the recognition of land rights beyond those of the common law, establishing equality in this regard and promoting the values of the Constitution.99

Annexure

Venture and Mohamed’s proposed registration-record model.100

<table>
<thead>
<tr>
<th>DIMENSION</th>
<th>INSTANCE</th>
<th>PARTICULARS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right-holder</td>
<td>individual</td>
<td>Name gender</td>
</tr>
<tr>
<td></td>
<td>family</td>
<td>name head/decision-maker</td>
</tr>
<tr>
<td></td>
<td>household</td>
<td>name head/decision-maker</td>
</tr>
<tr>
<td></td>
<td>group/community</td>
<td>name spokesperson decision-making structure</td>
</tr>
<tr>
<td>Space</td>
<td>cadastral description of land (communal or other)</td>
<td>registered data</td>
</tr>
<tr>
<td></td>
<td>precisely defined</td>
<td>surveyed data</td>
</tr>
<tr>
<td></td>
<td>imprecisely defined</td>
<td>land allotment description</td>
</tr>
<tr>
<td></td>
<td>location</td>
<td>metes and bounds</td>
</tr>
<tr>
<td></td>
<td>other</td>
<td>description</td>
</tr>
<tr>
<td>Time</td>
<td>lifetime</td>
<td>refers back to right-holder</td>
</tr>
<tr>
<td></td>
<td>seasonal</td>
<td>seasons</td>
</tr>
<tr>
<td></td>
<td>fixed duration</td>
<td>time-period</td>
</tr>
<tr>
<td></td>
<td>cyclical</td>
<td>definition of cycle</td>
</tr>
<tr>
<td></td>
<td>other</td>
<td>description</td>
</tr>
<tr>
<td>Grantor</td>
<td>legally defined</td>
<td>description</td>
</tr>
<tr>
<td></td>
<td>community defined</td>
<td>name of community</td>
</tr>
<tr>
<td></td>
<td>individual</td>
<td>name of primary right-holder</td>
</tr>
<tr>
<td>Rights</td>
<td>unrestricted</td>
<td>activities allowed</td>
</tr>
<tr>
<td></td>
<td>unspecified</td>
<td></td>
</tr>
<tr>
<td></td>
<td>enumerated</td>
<td></td>
</tr>
<tr>
<td></td>
<td>restricted</td>
<td>activities prohibited</td>
</tr>
<tr>
<td></td>
<td>obligations</td>
<td>requirements consequences of failure</td>
</tr>
<tr>
<td></td>
<td>group-related</td>
<td>description</td>
</tr>
<tr>
<td>Mortgages</td>
<td>mortgagee</td>
<td>amount</td>
</tr>
<tr>
<td>History</td>
<td>transfer medium</td>
<td>sale inheritance donation</td>
</tr>
<tr>
<td></td>
<td>chain of transactions</td>
<td>description</td>
</tr>
<tr>
<td></td>
<td>conflicts and resolutions</td>
<td>description</td>
</tr>
</tbody>
</table>

100 Pienaar 2000 TSAR 461.
Bibliography

Literature

Augustinus C 'Global Network for Pro Poor Land Tools' UN-Habitat 2005
www.fig.net/commission7/bangkok_2005/papers/1_2_augustinus.pdf (accessed on 10.09.2010)
Bennett TW Customary Law in South Africa 2010 Juta & Co Claremont
International African Institute, London
Bohannan P in Pottier J ‘Customary Land tenure’ in Sub-Saharan Africa Today: Meanings and Contexts
Claasens A & Cousins B More than simply ‘socially embedded’: recognizing the distinctiveness of African land rights in
keynote address at the international symposium on ‘At the frontier of land issues: social embeddedness of rights and public policy’ 2006 Montpellier
(accessed on 12.09.2010)
www.capri.cgiar.org/wp/..%5Cpdf%5Cbrief_lan...pdf (accessed on 13.09.2010)
http://www.participation.org.za/docs/whitepaper09.doc
DFID Land reform, agriculture and poverty reduction Working paper for the Renewable
Natural Resources and Agriculture Team (2004a) London, DFID.
Economist Intelligence Unit Overview of E-Commerce in South Africa iBLS 2007
FAO’s Land Tenure Service 2007b Rome.
Land tenure and rural development in FAO Land Studies 3 2002 Food and Agricultural Organisation of the United
Nations Rome
www.fao.org/docrep/005/y4307e/y4307e05.htm (accessed on 24.08.2010)
Butterworths Durban
Primary sources

Cases

*Alexkor (Pty) Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC)
*Tongoane and Others v Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC

Legislation

Deeds Registries Act 47 of 1937
Communal Land Rights Act 11 of 2004
Communal Property Associations Act 28 of 1996
Extension of Security of Tenure Act 62 of 1997

Other

Policy Document on the Electronic Deeds Registration System