



**UNIVERSITY of the
WESTERN CAPE**



**The
LAND INQUIRY
2017**



CONCEPT DOCUMENT

THE LAND INQUIRY 2017

BENCH MARKING IN SOUTH AFRICA

1 APRIL – 7 APRIL

**The Commission of Inquiry into the Effectiveness of Law,
Policies and Procedures of Land Acquisition, Land
Administration, Land Management and Land Registration in
Uganda**

1. Background

1.1 Purpose of the study

The Ugandan government is undergoing a legal process to reform the law, policy and practices related to four key areas of land, namely: (i) land acquisition, (ii) land administration, (iii) land management and (iv) land registration.¹

The current legal framework fails to adequately address many land related problems.² For example, four issues will be highlighted. First, the redress of land for indigenous communities who were deprived of their land during and post colonialism continue to be ineffective. Secondly, collusive land deals between state officials and businesses continue to promote lucrative developments that threaten the ecological sustainability of the wetlands and the environment. Thirdly, the security of land under customary law remains threatened as this system of land tenure is not equally protected in practice as the other prevailing systems of land ownership. Fourthly, claiming of land title and ownership is also difficult due to lack of a uniform land registration system throughout the country.³

As a consequence, a commission of inquiry was established during 2017, namely, the Land Inquiry 2017 to provide recommendations and guidance for the law reform process.⁴ The Land Inquiry 2017 therefore endeavours to learn from the law reform process, which the Republic of South Africa underwent in transitioning from the apartheid system of government to the democratic state.

The study will provide an opportunity to learn best practices as well as the obstacles confronting land related matters in South Africa. In this regard, the Land Inquiry 2017

¹ The Commission of Inquiry into the Effectiveness of Law, Policies and Processes of the Land Acquisition, Land Administration, Land Management and Land Registration in the Republic of Uganda, appointed on 8 December 2016 President in terms of The Commissions of Inquiry Act, Cap 166 and the 1995 Constitution. Hereinafter referred to as the Commission of Inquiry into Land 2017.

² Refer to the Terms of Reference (TOR) for the Commission of Inquiry into Land 2017.

³ Civil Society Coalition Oil and Gas (CSCO) 2017 'A Submission on a Commission of Inquiry into the Effectiveness of Land acquisition, Land Administration, Land Management and Land Registration' available at https://www.google.co.za/search?ei=uwd_WvmvO8nSUZDyt1A&q=Civil+Society+Coalition+Oil+and+Gas+%28CSCO%29+2017+may+Submission+commission+of+&gs_l=psy-ab.12...5795.12565.0.13756.15.12.0.0.0.804.2412.2-2j3j6-1.6.0....0...1c.1.64.psy-ab..9.0.0...0.goyghGUSJL0 (accessed 2 February 2018).

⁴ Uganda Government Media Centre 'Government constitutes a Commission of Inquiry into the effectiveness of the land law' available at <https://ugandamediacentreblog.wordpress.com/2016/12/23/government-constitutes-a-commission-of-inquiry-into-the-effectiveness-of-the-land-law/> (accessed 2 February 2018).

approached the Dullah Omar Institute (DOI) to develop a concept note in which the visit could be realized.

1.2 *Structure of the document*

- South Africa offers lessons that can inform the Ugandan law reform process. As such a motivation for the bench marking exercise in South Africa is provided in section two.
- The objectives that the study undertakes is set out in section three. Section 3 will provide the main objectives in terms of themes that also contain sub-themes. The purpose of these themes is to inform the draft programme.
- The expected outcomes will be outlined in section four together with the methodology of how this is to be achieved in section five.
- A draft programme (Annexure 5.2.2) and a proposed budget is annexed to section 5, as Annexure 5.3.A which includes actual disbursements together with services rendered by the DOI.

2. **Motivation for bench marking the Republic of South Africa**

2.1 *Multiple customary tenure systems and legal pluralism pre-democracy*

Under colonial rule tribal communities in South Africa experienced land dispossession and were denied recognition of their land title under customary law.⁵ Under the apartheid system tribal communities within the rural landscape were relegated to some pieces of land. But the boundaries and allocation of the land parcels were highly contested.

Rural communities were subjected to a parallel legal framework over their land. Also, different governing structures applied to them. Women and children were further prejudiced due to the discriminatory manner in which the customary law was practiced and enforced by the state.

A different legal regime applied to urban and/or semi-urban land. Different governing structures were established to regulate the land in accordance with the racial groupings that

⁵ A Claassens & G Budlender (2016), Transformative Constitutionalism and Customary Law, *Constitutional Court Review*, 75–104. <http://www.saflii.org/za/journals/CCR/2016/5.pdf>.

used and/or owned the land. During the apartheid era Black people were prohibited from formally owning urban land. In this setup land laws were particularly designed to maintain social and economic inequality amongst the different race groups.

As a consequence, land acquisition, management, registration and security of tenure were regulated and governed in a fragmented and disjointed manner with numerous laws for spatial planning and land-use for the different race groups.⁶

During apartheid large scale arbitrary evictions were legally sanctioned by the state. Little or no consultation preceded the evictions and there were limited legal recourse available. Land ownership and tenure for the majority of citizens were tenuous. Moreover, land-use was used as a tool to enforce order and control particularly over black South Africans.

2.2 Constitutional framework for customary law and land

Transitioning into a democratic state required reform in the way land was acquired, administered, managed and registered. However, the planning law framework at the time was ill-suited for the developmental objectives.⁷

The fragmented land laws had to be rationalised. Land acquisition and tenure had to be reformed, as well as the registration of land title and/or communal holding to ensure uniformity across the country. The ultimate goal was to protect the dignity of all people particularly those previously marginalised.⁸

Both countries, for example, have constitutional imperatives for the protection of land ownership and land tenure written into its Constitution. Land title is recognised in terms of individual registration (secular law) and communal holding (customary law).

There are different customary tenure systems from community to community in South Africa. In addition, both countries have made relative economic strides in the last 20 years with relative stable democracies.⁹

⁶ The *White Paper on Spatial Planning and Land Use Management: Wise Land Use* (GG22473 OF 20 July 2001).

⁷ Abrahams, G. and Berrisford, S. (2012). *Addressing the crisis of planning law reform in South Africa*. Pretoria: South African Cities Network.

⁸ Berrisford, S. (2011). Unravelling Apartheid Spatial Planning Legislation in South Africa - A Case Study. *Urban Forum*, 22:247–263.

⁹ Manji A Land Reform in the Shadow of the State The Implementation of New Land Laws in Sub-Saharan Africa *Third World Quarterly*, Vol.22, No.3, (June) 2001, pp.327-42.

South Africa's customary law system seems to be more advanced in terms of structures and management. For instance, since 2003 a range of laws have been enacted or proposed to strengthen the power of traditional leadership in various ways. This includes the Traditional Leadership and Governance Framework Act 41 of 2003 and the Communal Land Rights Act 11 of 2004, struck down by the Constitutional Court in 2010.¹⁰ In 2014 the Communal Land Tenure policy was introduced.

The 2014 policy provided that traditional leaders gain full-ownership over land while individuals and communities maintained 'institutional use rights'. Scholars criticised the policy because it favoured the interests of traditional leaders over that of communities to choose the kind of land-holding entity that best suits their needs. For example, communities would no longer be empowered to establish Communal Property Associations (CPAs) in communal areas where traditional councils exist over land obtained through restitution, redistribution and land reform programmes where such communities challenge the authority of those traditional council.¹¹

Land ownership and control therefore remains a contested issue in South Africa particularly for traditional communities under customary law.¹² **The case study of the Makuleke community is a landmark case in South Africa** and demonstrates the manner in which local voice may be strengthened and re-enforced through the existence of CPAs.

The Makuleke community was forcibly removed from the north of the Kruger National Park to vacant South African Development Trust land that had been assigned to the Mhinga Tribal Authority. Chief Adolf Mhinga, who was a Gazankulu Cabinet Minister, played a pivotal role in their removal, although the Makuleke's own traditional leaders strongly opposed the move. Since 1994, Mhinga has continued to claim the Malukele fall under his jurisdiction. Despite opposition from Mhinga, the people of Makuleke eventually managed to file a successful restitution claim and had the land restored to their CPA. The 2014 policy will thus undo these gains.

¹⁰ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10, 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC).

¹¹ Weinberg T (2015) the contested status of 'communal land tenure' in South Africa available at <http://www.plaas.org.za/sites/default/files/publications-pdf/PLAAS%20Rural%20Report%20Book%203%20-%20Tara%20-%20Web.pdf> (accessed 2 February 2018).

¹² Weinberg T (2015) 13-17.

A further contestation is the interplay between mining, traditional leadership and the protection of the ecological environment. The elevation of traditional leadership has resulted in a practice in the former Bantustans (that are rich in minerals) where traditional leaders and councils enter into negotiations with mining developers and government to sell off land without proper consultation. Moreover, the economic benefits are seldom evenly distributed with the community.¹³

The case study of the Mapela Trust in the Limpopo Province provides a good example of the manner in which the local community can lobby to ensure their economic and environmental interests are better protected. The Mapela Trust was set up to fund development projects for the communities at the Anglo American Platinum Mine in Mogalakwena (the world's largest platinum mine). The community protested that the way cash was spent had not been transparent and too much authority was given to the local chief, known as Kgoshi, to determine where money was invested. As a result of the protest action the mine was temporarily closed until the local community's demands for change was realised. The final outcome was that Anglo American Platinum Mine entered into an agreement with the tribal chief whereby the Chief's powers were significantly diluted.

2.3 Devolved land management systems

Another commonality between Uganda and South Africa is the devolved land management system that provides for local participation and input into land management. It should be noted that in South Africa land-use regulation is devolved while land registration remains a competence of the national government.¹⁴ The devolution of land-use however has resulted in contestation with respect to the administration and processing of developments which threatens local communities' well-being, unique agricultural land and environmental resources.¹⁵ During the period 2010 -2017 a number of cases were litigated that clarified the

¹³ Weinberg T (2015) 20.

¹⁴ De Visser J 'Devolution by Court Injunction: the case of Land Use Planning in South Africa'" (2016) 10 *Ugandan Journal of Management and Public Policy Studies* 1 84-99.
Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others 2009 1 SA 337 (CC); *City of Johannesburg Metropolitan v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC); *MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province In re: Minister for Mineral Resources and Swartland Municipality and Other and Maccsand (Pty) Ltd and The City of Cape Town and Others* [2012] ZACC 10; *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* [2013] ZACC 39; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others* [2014] ZACC 9; *Pieterse NO v Lephhalale Local Municipality (CCT184/16)* [2016] ZACC 40; 2017 (2) BCLR 233 (CC) and *Tronox KZN Sands(Pty) Ltd v The Kwa-Zulu Natal Planning and Development Appeal Tribunal and Others* [2016] ZACC 1.

role of local government in terms of land use. The jurisprudence together with the South African legal framework for spatial planning and land-use provide normative principles that shapes the manner in which competing interests can be resolved.¹⁶

The role of formal traditional structures are provided for in the framework of land-use regulation but subject to consultation and input. Therefore, the legal framework may offer a model that appropriately balances the scope for traditional authority on the one hand and the needs of the local community. Moreover, it provides insight into the way the intergovernmental structures amongst the different spheres of government and along the different sector departments are required to integrate planning authorisations and the management of land-use.¹⁷

3. Objectives for the bench marking

3.1 The objective of the visit is to understand the South African legal and policy framework on land administration and land management. The aim of the bench marking is further to explore policy imperatives that could improve the way land related problems are dealt with at a conceptual, institutional and practical level. Accordingly, objectives related to six broad themes are presented below.

3.2.1 *Theme one: Socioeconomic transformation through inclusive and equitable access to land for women.*

- Empowerment of women through strengthening land rights;
- Technology and innovation for securing customary-based land rights; and
- Transparent and sustainable land based investments.

3.2.2 *Theme two: An efficient and just land administration system*

- A neutral and authoritative system for the demarcation of boundaries, registration of rights and interests in land, recording and distribution of

¹⁶ Kidd M 'Country Report: South Africa- The Spatial Planning and Land Use Management 16 of 2013' (2014) 5 *IUCNAEL E Journal* 242-243. Available at <http://www.iucnael.org/en/86-journal/issue/491-issue-20142> (accessed June 2017).

¹⁷ Van Wyk J *Planning Law: Principles and Procedures of Land Use Management 2 ed* (2012).

information about ownership, and for the valuation and use of land and its associated resources;

- Determination of rights and other attributes of land, survey and description of parcels and their documentation; and
- Adjudication and resolution of conflicts to achieve efficiency, equity and socially optimal service delivery, with a particular focus on alternative land tenure systems.

3.2.3 Theme 3: Intersection of mining as a land use on land falling under Traditional leadership and community consultation

- Promotion of a legal framework around mining that supports rather than burdens historically disadvantaged citizens created by mineral extraction;
- To protect the rights and dignity of those living in traditional communities the legal framework should address: (i) problematic discrepancies in the negotiating position of surface rights holders and mineral rights holders and (ii) governance issues; and
- A proper and nuanced understanding of customary law in traditional communities is required.

3.2.4 Theme 4: Striking the right balance between wildlife conservation and land reform

- Acquisition of conservation lands by disadvantaged communities;
- Adoption of appropriate management models for the protection of wild life; and
- Sustainable governance to ensure livelihoods for the whole community.

3.2.5 Theme 5: Land use management and protection of wetlands- preserving the dignity of the most vulnerable

- Relevance of wetlands and their contributing drainage areas in an environment continually subjected to urban development;
- A role for small non-government organizations in wetlands conservation; and
- Local government and wetland conservation

3.2.6 *Theme 6: Land-use management of agricultural lands- ensuring wise land use*

- Utilisation of land and natural resources for productive purposes and preventing the fragmentation of agricultural land;
- Improve and introduce new production practices and methodologies to support an increase in agriculture; and
- Minimise the negative impact of developments that threaten agriculture

4. Expected outcomes

4.1 *Essentially there are six outcomes that the visit will achieve. These outcomes are listed below.*

4.1.1 *An understanding of the legal and policy framework regulating various aspects of land in South Africa;*

4.1.2 *Adequate knowledge and information about the institutional framework in the South African processes and procedures of land registration, land administration and land management;*

4.1.3 *An appreciation of the way in which informal traditional mechanisms for land control operate along the formal state mechanism of land administration in South Africa;*

4.1.4 *An understanding of the intergovernmental working relations between the national government land controlling authority and the decentralised institutions of land management in South Africa*

4.1.5 *Insight into local community's involvement in the land acquisition processes of South Africa; and*

4.1.6 *Sufficient knowledge of the informal dispute resolution mechanisms in the land sector.*

5. Methodology

5.1 Approach to execute to the visit

5.1.1 The visit will be executed through a combination of approaches. For example:

- locus visits to selected government offices and/or institutions and establishments traditional and/or cultural nature;
- Seminars or lecture methods;
- Participatory learning and discussion with experts and non-governmental organisations;
- Case studies; and
- Consultation through interviews with selected respondents as well as focus groups.

5.2 Funding

5.2.1 The Land Inquiry 2017 will meet all the arranged seminar, meetings and locus visits while the host institution shall identify the human resources (facilitators) and locations.

5.2.2. Draft Programme (Annexure 5.2.2)

5.2.3 Budget (Annexure: Budget 5.3.A)

5.3 Logistical information

5.3.1 Proposed timeframe date 1 April – 7 April 2018

5.3.2 Contact persons:

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