
SEEKING EQUILIBRIUM

Land Rights Adjudication in off-register,
formalising and non-formal contexts
in South Africa

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Expert Group Meeting on secure land tenure: 'new legal frameworks and tools'
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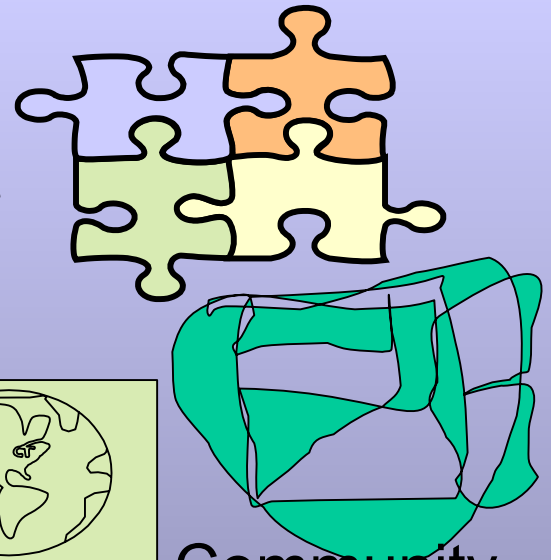
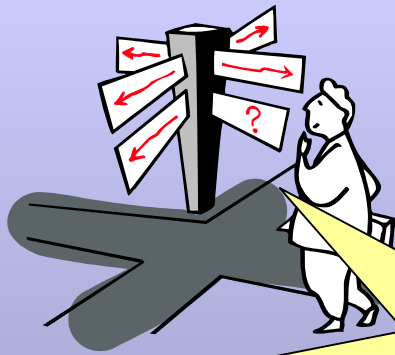
The setting

- The studies on which paper are based were undertaken for the purposes of **implementation of state land disposal** in a particular provincial tenure context
- We did not have (and still have only incomplete) policy on **adjudication** when the enquiries were done
- Thus it is not a case of having worked from a policy, or even theory, to implementation but the other way round. Working **backwards** to reconstruct the process and implications
- Are other very different **contexts** for rights adjudication in SA, e.g. communal areas in E.C. & Kwazulu-Natal (NGOs)
- In spite of differences, sufficient convergence to justify common approach, principles & institutional framework

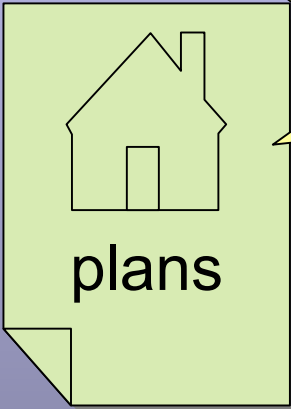
What we had and what we did

- State land with conflicting and overlapping rights between individuals and different social **groupings** of occupiers
- Surveyed land parcels (quite rare in rights enquiries)
- Initially hostile policy to extending protection of informal land rights to occupiers on state land – first lobbying using pilot. Then had legal tools (Int. Protection of Inf. LR Act IPILRA)
- Documentary evidence – claims and all people using the land
Documentation scattered across various organisations – NGO, government, SGO, Deeds Registry, private s., community, etc
- On the ground parcel-by-parcel audit of each and every household – structured & semi-structured interviews, mapping – started with spatial and “built in” the social or group dynamics

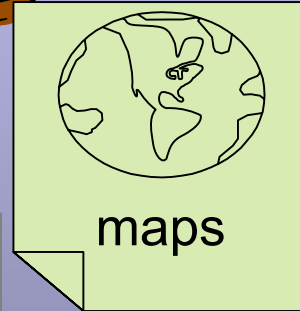
Finding evidence



Community meetings



plans



maps

Community mapping

Deeds Office

Bills, Letters

reports

Govt files

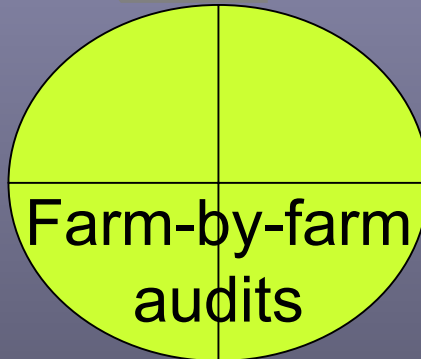
Title deeds



Interviews officials



Deeds Office digital access



Farm-by-farm audits



Interviews Lessees, purchasers

UNDERSTANDING ADJUDICATION

- Adjudication means a “process whereby all existing rights in a particular parcel of land are authoritatively ascertained”. Also the “resolution of a dispute by the application of pre-existing rules”
- In SA, LM is structured around the **formal sector** using the **cadastral system**. Govt and private sector service components within a hierarchically structured system, including surveying, conveyancing, etc
- In the cadastral system adjudication refers to the checks by surveyors and conveyancers of all information prior to survey or transfer
- In the informal systems these methods and tools for adjudication do not work as the cadastre is missing or broken, and therefore new conceptual frameworks, methods and tools are needed.
- Off-register systems require uncovering a wide range of evidence from different sources (not cadastre only) mostly in the field, using new legal frameworks, forms of evidence and negotiation – balancing rights

Thus the ordinary course of adjudication of off-register rights does not necessarily imply a legal process, but rather a highly defined, **predictable** process that should apply standard procedures and rules regarding: what evidence is examined; how evidence is examined; and what criteria to apply to assess what evidence is admissible and in terms of what hierarchy of evidence.

In the absence of complete **certainty**, there must be predictability, namely that rights will be investigated and disputes will be resolved.

Not to be confused with the process whereby which existing rights are altered or new rights are created.

Also not to be confused with public planning processes in land reform, etc.

However, adjudication is closely associated with development projects/ programmes – processes run hand in hand and therefore need to guard against conflating them – examine ‘old situation’ before introd. ‘new situation’.

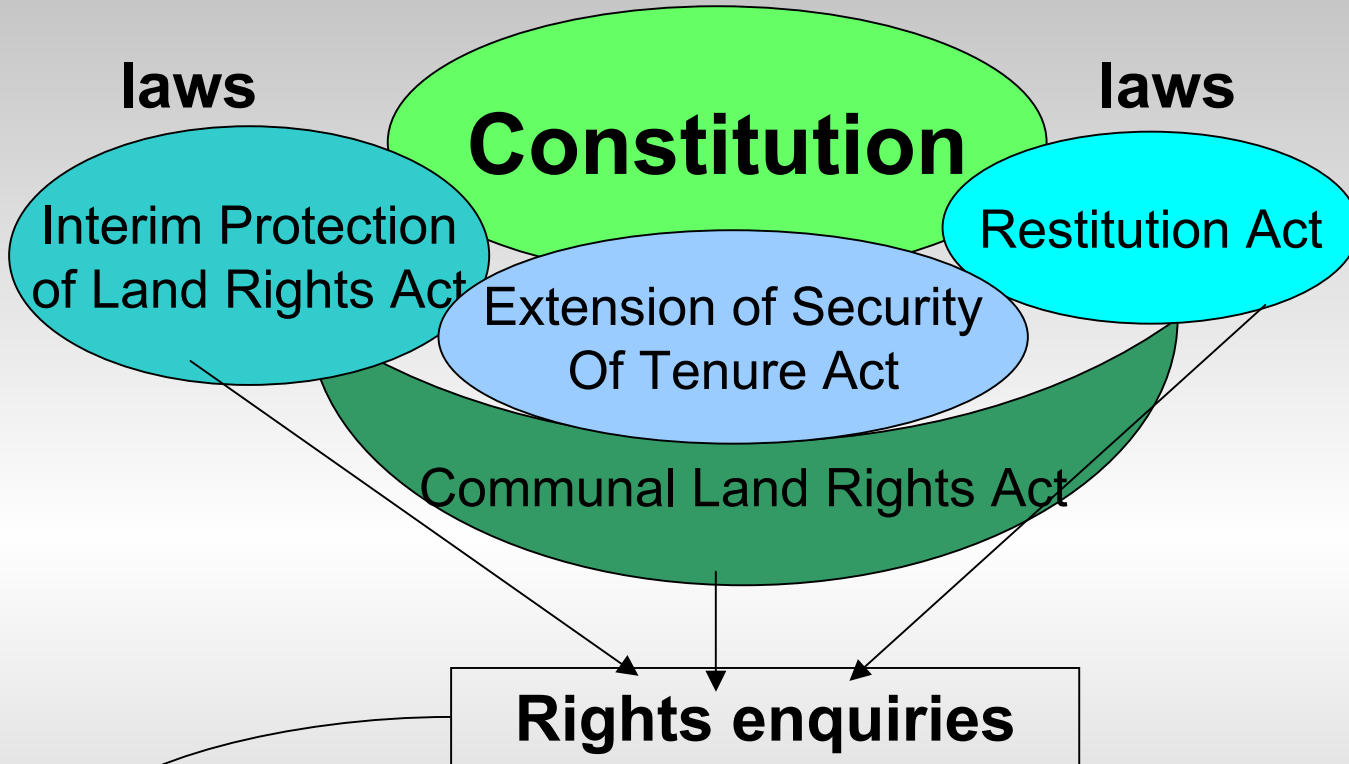
Convergence across regions

- A **range** of available evidence collected & examined – cadastral only one form – underlying principles and **values**
- Decisions must have local social **legitimacy** but should resist local political interference. “Balance of probability”/sustainable
- **Weight** the evidence according to a set of principles. Can be conflicting interpretation of local rules around rights allocation and the termination of a right. Need “hierarchy of evidence”?
- Adjudication needs **institutional** home – policy, law, organisational framework, rules on admissible evidence
- Focusing on **predictability** and a **normative** approach allows convergence of methodology in different tenure contexts where a common factor is “fluidity/variability/social process”

Disjuncture

- Disjuncture between the formal system and informal system
- There are institutional mis-fits between the dominant land management framework and informal/off-register systems
- LM in off-register is not based on land parcels. Customary tenures are based on social tenures – relationships between people – access via membership of social group – use rights attach to people not independently to parcels – evidence of rights will be less fixed, more fluid, inclined to be mediated
- A big missing link between the formal and informal therefore concerns the nature, collection, examination, storage, use & dissemination of this unconventional evidence/information
- What happens to it once it has been collected in this way?

What we have:

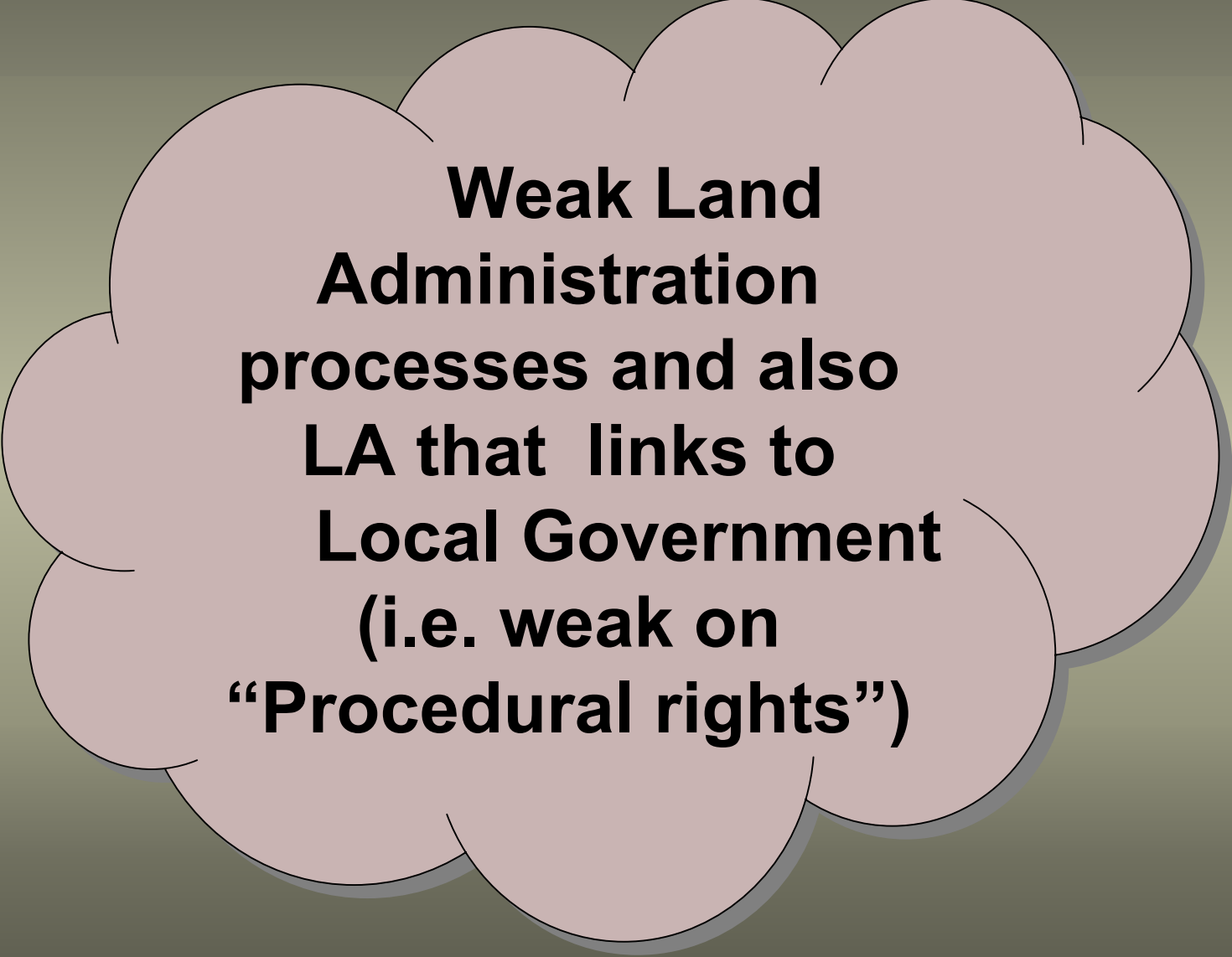


- Guidelines
- Procedures
- Protocol
- Report

- Ministerial approval
- Decision
- New situation
- Implement

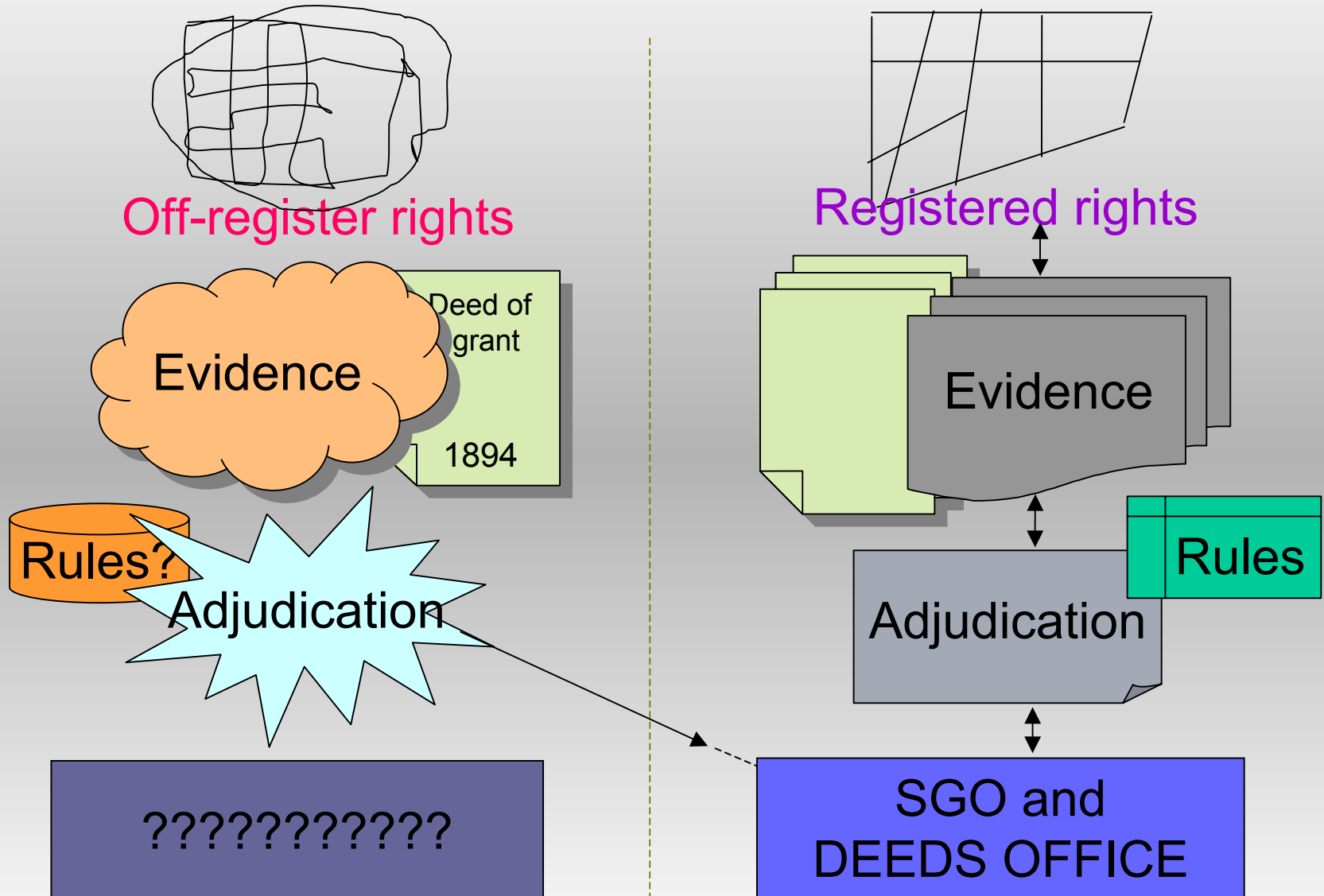
- Land administration committees
- Land Boards
- Surveys and Deed Register
- Local (community) records

Legal framework that links to Deed Registry



**Weak Land
Administration
processes and also
LA that links to
Local Government
(i.e. weak on
“Procedural rights”)**

The formal/informal compared



What we don't have

- **Institutional home** for 'unconventional' evidence/dispute res.
 - new framework incomplete – missing pieces of puzzle. The integrity of the adjudication process is compromised
- **A body of impartial Adjudicators with regulatory fwk.**
- (In the formal system rulings are made based on “rules” and evidence can easily be tracked – it is stored in the system)
- In off-register, there are no **clear rules on admissible evidence**. Also, evidence goes back to where it came from – different, files, departments, shelves, computers – when another new situation arises, implies starting from scratch
- **Integrated Information system** for maintaining body of evidence. Lend weight to the process (trans-local legitimacy) & start process of developing a **“library of evidence”**

What we need!

A critical component of an evolving and integrating LA system is developing an approach to evidence e.g **a library of evidence:**

- building up a policy on evidence
 - ❖ Develop pre-existing rules – normative to allow flexibility
 - ❖ Explore hierarchies of evidence – weighting of evidence
 - ❖ Use existing pilots to build policy from practice
- designing an information system for the collection, storage and retrieval of the evidence – decentralised integrated information systems alongside decentralised registries
- More resources for adjudication function relative to technical components during “development phase” of LM bridging
- Need adjudication as ongoing back-up performed by body of impartial, trained & regulated specialists; and not once-off product-oriented exercises auditing people’s names and IDs

A predictable process using pre-existing rules:

Good governance

Reduces local
Political mobilisation
by elites/leaders

Greater certainty
of rights

Citizens rights to openness,
fairness and impartiality

Greater confidence
In the system for local
investment

Reliability

Good evidence

Weighting
evidence

A library of evidence can help with:

Storing, using,
disseminating

Security of T

B.P.s

Keep informati
current

Keeps down costs
from repeats/loss

Integrate over time
With other information
systems

Use for other development
programmes eg housing,
infrastructure etc

Scale of
del.

Conventional Land Management systems fail to “read” informal systems where land parcels are absent or dysfunctional

