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INSIGHTS FROM ENGLISH LAW**

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## TENURE SECURITY REFORM AND ELECTRONIC REGISTRATION: EXPLORING INSIGHTS FROM ENGLISH LAW

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### 1 Introduction

A core function of land law is to ensure security of rights or interests in land.<sup>1</sup> Why and how this is to be achieved is a topic of much contestation.<sup>2</sup> Scholars have commented on the cyclical nature of land reform initiatives,<sup>3</sup> in which the political commitment to land reform is often followed by hesitance in implementation, as the costs and complexities of such ventures become apparent; until internal political pressure necessitates renewed commitment to the original initiative, or a rethinking of the "whats" and "hows" of land reform. This recognition is certainly endorsed by

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<sup>1</sup> Mostert and Pope (eds) *Law of Property* 343.

<sup>2</sup> See eg Cotula, Toulmin and Quan 2006 [www.iied.org](http://www.iied.org); Toulmin and Quan *Evolving Land Rights*; Cousins 2005 *Stell L Rev* 488; Sjaastad and Cousins 2009 *Land Use Policy* 1; Claassens and Cousins (eds) *Land, Power and Custom*; Cousins et al 2005 *Plaas Policy Brief* 1; Pienaar 2006 *TSAR* 435. The views expressed in the abovementioned sources are different from those in, for instance, Enemark, McLaren and Van der Molen 2009 [www.fig.net](http://www.fig.net); Pienaar 2000 *TSAR* 442; Deininger and Binswanger *Evolution of the Bank's Land Policy* and others. See also in general Alexander *Global Debate* 2-6.

<sup>3</sup> Adams *Breaking Ground* 59 as discussed in Palmer 2007 [www.gsdr.org](http://www.gsdr.org) 8.

the reactions<sup>4</sup> to the profound statement of the Bernstein report: that the grand project of land reform in South Africa was underestimated from its conception.<sup>5</sup> No one realised just how complicated this endeavour would be. The breadth and scope of the land reform project and the needs to be addressed by it are becoming clear only as the project progresses.

The scale of land reform is ambitious, and its practice complex. For example, reforms in the urban context have at least some imperatives that are different from those in the rural context. There is no scope in this paper to elaborate on the broader issues of reform or on the specific needs for reform in either the urban or the rural contexts. Instead, this paper focuses only on a single issue within the broader tenure security debate: how updating registration practices could contribute to resolving some of the issues about tenure security in a reform paradigm. It does so to make the argument that effecting changes to the mechanisms of registration would be irresponsible, if such changes were not accompanied by a thorough engagement with the land law underpinning them. To contextualise, this paper touches upon the notion of governance in the context of land tenure and considers its impact on the kind of reforms that are intended and undertaken. It reviews the debate about the types of tenure security interests that need to be served and exposes certain contradictions in this regard. A comparative law analysis demonstrates how demands placed on registration systems in this electronic age could assist the process of securing tenure. The conclusions reached contextualise the comparative law insights for South Africa and comment on what needs to be researched further. The paper is no more than an exploratory exercise. It does not propose to be comprehensive in its overview or solutions offered, and it does not deal with the specifics of different reform contexts.

## 2 Reform and good governance

Insufficient and inappropriate policy-making and law-making on land administration translate into difficulties and complexities that hamper satisfactory solutions to the

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<sup>4</sup> Seepe *City Press* 29 May 2005 2; Seepe *City Press* 5 June 2005 4; Mbongwa and Thomas *Natal Witness* 9.

<sup>5</sup> Bernstein, McCarthy and Dagut *Land Reform* 27-28.

social, economic, cultural and political relations embodied by land-holding and control.<sup>6</sup> Take the example of the recently fallen *Communal Land Rights Act*,<sup>7</sup> (*CLaRA*): It set out to provide secure title or comparable redress to millions of rural dwellers - those who live in the poorest parts of our country,<sup>8</sup> usually on land held for communities by designated community leaders, if not directly by the state<sup>9</sup> - whose tenure rights are insecure because of previous discriminatory laws or practices.<sup>10</sup> *CLaRA* set out to consolidate various forms of communal, indigenous land holding;<sup>11</sup> thus to ensure security of tenure.<sup>12</sup> It went through several drafts, before it was hastily signed into force in 2004, an election year, amidst severe criticism.<sup>13</sup> Given its very problematic content, commitments and conception,<sup>14</sup> it was hardly surprising that in the subsequent six years *CLaRA* was never implemented.<sup>15</sup> The surprise came the day its constitutionality was reviewed by the Constitutional Court, pursuant to a challenge by four indigenous communities, who were partially successful on the substantive issues raised in the *a quo* decision of *Tongoane v National Minister for Agriculture and Land Affairs*,<sup>16</sup> which averred that the Act undermined, rather than promoted, security of tenure. When the matter was referred to the Constitutional Court for confirmation of the order, half a day into the hearing of oral presentations, the Minister of Land Reform informed the presiding judge that *CLaRA*'s repeal was imminent.<sup>17</sup> The proceedings were cancelled, but the Constitutional Court subsequently confirmed the substantive objections; and upheld an appeal against

<sup>6</sup> See for example Verstappen 2010 [www.landentwicklung-muenchen.de](http://www.landentwicklung-muenchen.de) 1.

<sup>7</sup> *Communal Land Rights Act* 11 of 2004.

<sup>8</sup> It is estimated that approximately 13 million people or 2,4 million households still reside in the former "homelands" to which *CLaRA* would have applied. This amounts to almost 30% of the total population of South Africa. Pienaar 2004 *THRHR* 244-245; Mostert and Pienaar "South African Communal Land Title" 317, 319; Nonyana 2002 *BPLD* 7-8; Cousins 2003 [www.plaas.org.za](http://www.plaas.org.za); Love "Foreword" xii.

<sup>9</sup> Pienaar 2004 *THRHR* 244-245.

<sup>10</sup> S 4 *Communal Land Rights Act* 11 of 2004.

<sup>11</sup> It dealt with the content and vesting of rights to communal land, and established the powers and the functions of the structures assigned with administering communal land. Mostert and Pienaar "South African Communal Land Title" 317 ff.

<sup>12</sup> Claassens and Ngubane "Women, Land and Power" 154.

<sup>13</sup> Mostert and Pienaar "South African Communal Land Title" 317-319.

<sup>14</sup> See for example Cousins *et al* 2005 *Plaas Policy Brief* 1; Cousins 2005 *Stell L Rev.* 488; Claassens and Cousins (eds) *Land, Power and Custom*; Hall (ed) *Another Countryside?*; Mostert and Pienaar "South African Communal Land Title" 317-340.

<sup>15</sup> Smith "Communal Land Rights Act" 35.

<sup>16</sup> *Tongoane v National Minister for Agriculture and Land Affairs* (11678/2006) 2009 ZAGPPHC 127 (N&S Gauteng); *Tongoane v National Minister for Agriculture and Land Affairs* (CCT100/09) 2010 ZACC 10 (CC).

<sup>17</sup> Hofstatter *Business Day* 33.

the court *a quo's* ruling against the procedural objections.<sup>18</sup> The outcome was that the procedural issues rendered the entire Act unconstitutional.<sup>19</sup>

The story of *CLaRA*, hence, is one of a law – an important one – which was dead in the starting blocks. It cost the South African tax-payer billions of Rands without changing the life of even a single rural, communal landholder. The moral of the *CLaRA* story is one that is also emphasised internationally: resolving the problems relating to land tenure in the South is a process dependent on "sound policy and manageable procedures".<sup>20</sup> Good governance in the private (corporate) and public (state) sectors is important; especially where it concerns policy, planning, decision-making, management and administration. In contemplating the issues around land tenure, and implementing meaningful reforms specifically, the utmost care must be taken.<sup>21</sup> Achieving tenure security is a "complex and evolving process".<sup>22</sup> It requires understanding and sensitive responses, and must adopt a long term perspective.<sup>23</sup> Slowness and care need to be practised for reform to be meaningful.<sup>24</sup>

Tenure security problems such as those described above raise the issue of governance. It is trite that secure tenure and access to land are necessary for economic growth and social development.<sup>25</sup> Yet, efforts to secure tenure, restore rights and enhance the negotiability of land have resulted - ironically - in the tenure insecurity of vulnerable groups, and further marginalisation of the poor.<sup>26</sup>

Weak governance is cited as the main culprit for such ironic outcomes. Weak governance may be recognised in phenomena such as tenure insecurity, informal property markets, reduced private sector investment, land grabs or illegal transfers, land conflicts, landlessness, social and political instability and exclusion, and

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<sup>18</sup> The latter related to the consequences of the incorrect tagging of the Act in a way that circumvented provincial input in the drafting of the Bill. *Tongoane v National Minister for Agriculture and Land Affairs* (CCT100/09) 2010 ZACC 10 (CC) paras 6, 36-37, 72-97, 111-112.

<sup>19</sup> *Tongoane v National Minister for Agriculture and Land Affairs* (CCT100/09) 2010 ZACC 10 (CC) paras 111-112.

<sup>20</sup> Pienaar 2009 *PER* 15.

<sup>21</sup> Walker 2005 *J SA Studies* 819-820.

<sup>22</sup> Palmer 2007 [www.gsdr.org](http://www.gsdr.org) 3.

<sup>23</sup> Palmer 2007 [www.gsdr.org](http://www.gsdr.org) 3.

<sup>24</sup> Walker 2005 *J SA Studies* 819-820; see further Mostert 2010 *J Afr L* 298 ff.

<sup>25</sup> Zakout, Wehrmann and Törhönen 2009 [www.fao.org](http://www.fao.org) 3.

<sup>26</sup> Zakout, Wehrmann and Törhönen 2009 [www.fao.org](http://www.fao.org) 3.

unsustainable resource management.<sup>27</sup> Good governance, on the other hand, refers to the following necessary elements: transparent processes of policy-making; a professional bureaucracy; an accountable executive arm of government; civil participation in public matters; and adherence to the rule of law.<sup>28</sup>

### 3 Registration practice as governance

Land registration practice seems to be a major indicator of the quality of governance in respect of land administration. Key questions used to evaluate governance in land administration focus on the registration process, its duration, its cost, and access to information.<sup>29</sup> To the extent that land registration practice is the "feature of a state with a centralised bureaucracy" in which "a settled civilisation is content to have ownership recorded and regulated by officialdom rather than by force",<sup>30</sup> it is crucial to our organisation of land holding and control,<sup>31</sup> and hence vital in establishing the standard of governance in the administration of land. Some South African studies on the topic make it clear that even within the context of the land reform initiative, a high premium is placed on the process of registration in achieving reform goals.<sup>32</sup>

Yet substantial arguments are made against reliance on the conventional system of registration when dealing with issues arising from land reform initiatives.<sup>33</sup> For one, affording primacy to registration in the process of assessing land administration practice assumes that good governance according to "Western" standards will address the remaining problems and inconsistencies underlying development. In fact, land administration is necessary but not sufficient for solving the problems underlying development.<sup>34</sup> In South African land circles, for one, there is considerable opposition<sup>35</sup> to the idea that land registration practices similar to those

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<sup>27</sup> Zakout, Wehrmann and Törhönen 2009 [www.fao.org](http://www.fao.org) 3.

<sup>28</sup> Pienaar 2009 *PER* 15.

<sup>29</sup> Zakout, Wehrmann and Törhönen 2009 [www.fao.org](http://www.fao.org) 18.

<sup>30</sup> Cooke *Land Registration* 2-3.

<sup>31</sup> Carey-Miller and Pope *Land Title* 48-49.

<sup>32</sup> Pienaar 2006 *TSAR* 444; Department of Land Affairs *South African Land Policy* para 4.19; Carey-Miller and Pope *Land Title* 566-567.

<sup>33</sup> See for example Cousins *et al* 2005 *Plaas Policy Brief* 1-6; Pienaar 2006 *TSAR* 437-439.

<sup>34</sup> Dale and McLaughlin *Land Administration* 4.

<sup>35</sup> See for example Cousins 2005 *Stell L Rev* 505-512; Cousins *et al* 2005 *Plaas Policy Brief* 4-5.

developed for market-based transactions will be sufficient and appropriate in the context of securing livelihoods and shelter.<sup>36</sup>

Spatial concepts differ, it is said, between "westernised" and "traditional" communities, and hence traditional communal tenure cannot be recorded in the same way as individual private ownership can.<sup>37</sup> Individual ownership relies on accurate demarcation of land parcels, to ensure certainty and clarity as to boundaries and the exclusivity of tenure.<sup>38</sup> Traditional communal tenure by its nature needs to be more flexible, it is said, to allow for overlapping rights in respect of the same land and the seasonal/climate-driven change in the use of land.<sup>39</sup> Scholars have argued strongly against formalising land holding to match the conventional patterns of landownership.<sup>40</sup> Such "titling", it is said, cannot appropriately address the demands placed on land reform.<sup>41</sup> The alternative is to recognise the diverse forms of tenure that have crystallised under customary law, but reinforce them statutorily.<sup>42</sup> It is argued that this approach, referred to as the "tenure" option in South African land reform circles,<sup>43</sup> affords greater security of title than was the case under apartheid.<sup>44</sup> However, preferring "tenure" over "titling" when it comes to livelihoods and shelter also raises some issues. The tenure/title distinction is fundamental for recognising the existence and validity of the parallel systems of common law title and customary tenure,<sup>45</sup> in accordance with the Constitutional Court's directive that customary tenure is to be treated as equivalent in status to conventional land title.<sup>46</sup> There is some concern, however, that users within the customary tenure paradigm may be confined to engaging with customary law only,<sup>47</sup> unless the law provides for the conversion of tenure arrangements within the communal, rural setting to individual title of the kind espoused by the prevalent

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<sup>36</sup> See for example Lahiff "With What Land Rights?" 95 ff.

<sup>37</sup> Cousins 2005 *Stell L Rev* 510-512.

<sup>38</sup> Badenhorst, Pienaar and Mostert *Law of Property* 206-207.

<sup>39</sup> Pienaar 2006 *TSAR* 441-442; Cousins 2005 *Stell L Rev* 500-501.

<sup>40</sup> Cousins *et al* 2005 *Plaas Policy Brief* 1-6

<sup>41</sup> Cousins "Contextualizing the Controversies" 15 ff.

<sup>42</sup> Pienaar 2006 *TSAR* 446-450; Claassens and Ngubane "Women, Land and Power" 180; Cousins "Contextualizing the Controversies".

<sup>43</sup> Pienaar 2006 *TSAR* 436-439.

<sup>44</sup> Cousins 2005 *Stell L Rev* 512.

<sup>45</sup> More closely described in Mostert and Pope (eds) *Law of Property* 341-343.

<sup>46</sup> *Alexkor (Pty) Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 62.

<sup>47</sup> Claassens "Customary Law" 357.

deeds registration system.<sup>48</sup> But putting such an "exit route" in place would perpetuate an hierarchical conception of land rights, with individual ownership at the pinnacle.<sup>49</sup> This is not in accordance with the Constitutional Court's directive.<sup>50</sup> Moreover, even securing interests *en masse* statutorily<sup>51</sup> would require mechanisms entrenching participation and eliminating discrimination:<sup>52</sup> a massive, multi-faceted effort along the lines of legislation such as that governing sectional titles would be necessary.<sup>53</sup>

The titling versus tenure debate in South Africa has its parallels elsewhere in the world. Cooke's persuasive argument is that commercial tension between the safety and marketability of land translates into the legal question of whether land law should tend towards dynamic security or static security.<sup>54</sup> For her, dynamic security represents those movements towards a simplification of the types of interests that may be held in land: a simplification of "title" to land. Static security, conversely, represents an emphasis in land law on the protection of all existing rights and interests in land.<sup>55</sup> Engaging land law in this way means that it can potentially become the "battle ground for a struggle between competing categories of rights and competing values."<sup>56</sup>

There are indeed distinctly different and opposing lines of scholarship as regard the type of security that should be afforded. The notions of dynamic and static security might differ depending on specific contexts, or might be encompassed in other jargon. The idea that there are opposing ways to establish security seems to be universal, however, one school of thought, informed by the social sciences, indicates that in Africa "the world of land is full of complexity, uncertainty, ambiguity, ongoing processes, and constant evolution of the 'traditional' and 'customary'".<sup>57</sup> Proponents argue that land relations should be organised by a decentralised system, rather than

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<sup>48</sup> See further Mostert and Pope (eds) *Law of Property* 342-343.

<sup>49</sup> Van der Walt *Constitutional Property Law* 338-340.

<sup>50</sup> *Alexkor (Pty) Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 62.

<sup>51</sup> Van der Walt 2001 *SALJ* 291-292.

<sup>52</sup> Van der Walt 1999 *Koers* 285.

<sup>53</sup> See in general the comparison drawn in Jacobs *Tenure Security*.

<sup>54</sup> Cooke *Land Law* 8.

<sup>55</sup> Cooke *Land Law* 8.

<sup>56</sup> Cooke *Land Law* 8.

<sup>57</sup> Palmer 2007 [www.gsdr.org](http://www.gsdr.org).



having uniformity imposed on them.<sup>58</sup> This is starkly at odds with another line of scholarship, informed by geomatics, which emphasises centralised and computerised land administration.<sup>59</sup>

Only a few lone voices argue the need to straddle the divide between these different approaches to governance in the context of land tenure.<sup>60</sup> The diversity of land use types and rights types that require legal and administrative support renders the debate more complex, and possibly accounts for at least some of the disjuncture in the way the issues are approached. Nevertheless, there may be merit in the argument that, in Africa generally but in South Africa specifically, much can be gained from establishing a forum for exchange between these different views on land tenure and law reform. To explore the possibilities, I focus below on the challenges that are already placed on our registration system, and compare them with developments in England specifically. That England is not typically seen as a "developing" country renders the comparison all the more informative, as will be explained below.

#### 4 Registration principles and practices compared

Essentially, the South African registration system is expected to be comprehensive, accommodating various forms of tenure such as those described above, and the nuances within them.<sup>61</sup> It must do so in a way that does not elevate one option of land control, such as titling, above another, such as tenure, or perpetuate hierarchies of land rights.<sup>62</sup> The trend, accordingly, is towards the recording of "more complex

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<sup>58</sup> Internationally, the different approaches to the land issue can be divided into so-called "soft" and "hard" groups. While widely accepted, the use of the "soft" and "hard" terminology is problematic, and will not be pursued beyond the following basic explanation: The "soft" approach entails the focus on the decentralised formalisation of customary practices surrounding land tenure and dispute resolution. See for example the scholarship of the International Institute for Environment and Development (IIED), eg Cotula, Toulmin and Quan 2006 [www.iied.org](http://www.iied.org).

<sup>59</sup> The "hard" approach involves a precise and scientific approach to mapping and surveys focusing on centralised, computerised land administration systems. See for example the research of the International Federation of Surveyors (FIG), eg Enemark, McLaren and Van der Molen 2009 [www.fig.net](http://www.fig.net).

<sup>60</sup> Augustinus 2006 [www.fig.net](http://www.fig.net) 6.

<sup>61</sup> Department of Land Affairs *South African Land Policy* para 4.19; Carey-Miller and Pope *Land Title* 566-567.

<sup>62</sup> Van der Walt 1999 *Koers* 268; Pienaar 2000 *TSAR* 450-451.

arrangements of rights, restrictions and responsibilities"<sup>63</sup> than hitherto was the case. The standard against which the success of the registration system is measured is not if it is legally or technically sophisticated, but if it ensures adequate security and protection of such rights, and if its fulfilment of the publicity function is efficient, uncomplicated, expedient and affordable.<sup>64</sup> A tall order indeed!

The impetus for revising our registration system comes from various directions. On the one hand there is the increased demand for tenure security, which is - as explained above - indicated by proper land administration as a result of good governance, although this mode of measurement is contested. On the other hand, there is the drive to move with the times, especially as regards electronification of the register is concerned.

The "electronic deeds registration system" (e-DRS) is an initiative of the Chief Registrar to deal with the anticipated "dramatic growth" in the volume of registration acts in South Africa, to shorten the process and to improve its accuracy and quality.<sup>65</sup> The policy document was approved in June 2009. At present, the requirements and specifications of the electronic processes involved are being investigated. Once these are clarified, the *Deeds Registries Act* can be reviewed and the envisaged Electronic Deeds Registration Bill can be drafted.<sup>66</sup> Essentially, the process suggested in the policy document follows the current process for lodgement of paper deeds.<sup>67</sup> The policy document does not envisage systemic changes to the *Deeds Registries Act*. Only changes that would allow for the electronification of processes currently in place are envisaged.<sup>68</sup> This is not to say that the changes will not be far-reaching: e-DRS, if implemented in the manner suggested by the policy document, will catapult the system of registration into the twenty-first century and constitute a significant response to the pressures of e-commerce.<sup>69</sup>

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<sup>63</sup> Pienaar 2009 *PER* 42.

<sup>64</sup> Pienaar 2009 *PER* 42.

<sup>65</sup> Chief Registrar of Deeds and Law Society of South Africa, 2009 [www.ruraldevelopment.gov.za](http://www.ruraldevelopment.gov.za) 1, 9.

<sup>66</sup> Chief Registrar of Deeds and Law Society of South Africa, 2009 [www.ruraldevelopment.gov.za](http://www.ruraldevelopment.gov.za) 1.

<sup>67</sup> Chief Registrar of Deeds and Law Society of South Africa, 2009 [www.ruraldevelopment.gov.za](http://www.ruraldevelopment.gov.za) 14.

<sup>68</sup> Chief Registrar of Deeds and Law Society of South Africa, 2009 [www.ruraldevelopment.gov.za](http://www.ruraldevelopment.gov.za) 14.

<sup>69</sup> Kilbourn 1998 *BPLD* 5; Pienaar 1999 *BPLD* 3-4.

But more should be expected: the complicated tenure security issue demands a response from the angle of review and reform of the registration system. Different systems of tenure need to be recognised in a way that acknowledges both their diversity of preferences and their common need for security of land holding. The need raised by the "tenure" vs "titling" dichotomy in the land reform context,<sup>70</sup> and potential impact of the e-DRS initiative provides us with an opportunity to rethink the principles and practice of registration.<sup>71</sup> The experience of the English Land Registry, which is undertaking a similar exercise at present, is a useful comparator, especially as regards the expectations created. By comparing the reform venture of our registration system with similar reforms in a jurisdiction which is so patently different from ours, it is possible to gain insight into the indicators and benchmarks of reform.

#### 4.1 *Conceptual engagement*

Writing for the English setting, Pottage remarked that land registration is often perceived to be a topic of "little conceptual interest, involving only the complex but routine bureaucratic game of shuffling cautions, inhibitions, registered charges and other such devices."<sup>72</sup> Even in our jurisdiction, where the jargon for various property interests is different, the perception is similar.<sup>73</sup> Perceptions are, however, deceptive. The actions of land registration, its practicalities and logistics, are the results of intensive conceptual engagement with the idea of enforceability of rights, especially real rights.

The slow conversion from a system of private conveyancing (or "deeds registration") to a system of title registration in England almost a century ago<sup>74</sup> illustrates this well. Similarly, the codification of registration law in South Africa in the early twentieth century was the result of implementing general, fundamental principles about the transfer and recording of private ownership to land.<sup>75</sup> In both England and South

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<sup>70</sup> Kilbourn 1998 *BPLD* 5; Pienaar 1999 *BPLD* 3-4.

<sup>71</sup> Cooke *Land Registration* 158; Ladds 2004 *King's College L J* 482.

<sup>72</sup> Pottage 1995 *OJLS* 371.

<sup>73</sup> Mostert "Diversification of Land Rights" 4.

<sup>74</sup> Pottage 1995 *OJLS* 371 ff.

<sup>75</sup> Badenhorst, Pienaar and Mostert *Law of Property* 204-209 ff provides a more detailed account. See also van der Merwe *Sakereg* 2, 333-345, Heyl *Grondregistrasie* 1-48.

Africa, the practice of land registration is now so well developed, and so firmly embedded into the fabric of the law, that it occurs almost automatically, with very little reference to the principles underlying the process of acquiring and transferring land.<sup>76</sup>

It is only the occasional, unusual case that forces land registration practitioners and lawyers to return to the sources of the law that gave rise to the practice of registration. *Oudekraal Estates (Pty) Ltd v City of Cape Town*,<sup>77</sup> for instance, cast new light on the nature of our registration system. It draws attention to the fact that, because of our country's peculiar colonial past, South Africa has a registration system with characteristics so close to the positive systems of "title" registration that some tend to doubt its classification as a negative system of "deeds" registration.<sup>78</sup> The system is nevertheless held to be negative,<sup>79</sup> because of the fact that the register may well contain erroneous information<sup>80</sup> or may not be up to date<sup>81</sup> and because no formal protection is made for *bona fide* third parties who rely on the correctness of the register in their dealings with land.<sup>82</sup>

#### 4.2 Pressure to transform

<sup>76</sup> Mostert "Diversification of Land Rights" 4.

<sup>77</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2002 3 All SA 450 (C). The case required a reconsideration of the principles underlying the negative system of registration prevalent in South Africa. In the court *a quo*, the legal question was if *the mere fact of registration itself* could save the right to develop land some 30 years after the original permission to develop was granted (and had subsequently expired). It was found that the act of registration itself, being deficient, could not immunise the registration from being set aside (at 465I-J). This confirms that even in a system of "deeds" registration, where *the deed* as a specialised document portraying a particular interest in land is underscored as "an almost sacred sign" of title, (Cooke *Land Law* 5) registration is not a separate, self-contained means of acquisition of rights in land. Instead, it is a specialised form of transfer. The requirements set for all forms of transfer must therefore also be met in the case of land registration. The *Oudekraal* decision was later confirmed on appeal, but not on the basis of the registration question. The Appeal Court did, however, confirm that the Registrar is not responsible for assessing the validity of township approvals before they are registered. See *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 39.

<sup>78</sup> See eg Simpson *Land Law* 105.

<sup>79</sup> *Knysna Hotel CC v Coetzee* 1998 2 SA 743 (SCA) 753A-E.

<sup>80</sup> As illustrated by the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2002 3 All SA 450 (C) 465f-470j.

<sup>81</sup> Because of the legal facts of the original acquisition of ownership (eg by prescription) and the automatic acquisition of ownership (by marriage in community of property or insolvency). Van der Merwe *Sakereg* 343.

<sup>82</sup> Badenhorst, Pienaar and Mostert *Law of Property* 231.

There has been considerable pressure to transform registration practices and principles.<sup>83</sup> The problems in the South African context have been described already.<sup>84</sup> Interestingly, it is not the pressure of land reform in the developing world only that creates the need for transformation. In England, the introduction of the *Land Registration Act 2002* was described as the largest single piece of law reform undertaken by the Law Commission.<sup>85</sup> On the one hand, the Act changes English land law substantively by replacing the 1925 *Land Registration Act*.<sup>86</sup> These changes achieve a movement from "a system of *registration of title* [towards] a system of *title by registration*."<sup>87</sup> On the other hand, the Act responds to the advent of the era of electronic information, communication and commerce by enabling (and eventually compelling) full-scale electronic dealings with land, and the recording of interests arising from such dealings.<sup>88</sup>

The following main changes are brought about by the 2002 Act:<sup>89</sup> First, the Act increases the variety of circumstances giving rise to the requirement of compulsory registration,<sup>90</sup> and establishes qualified indefeasibility of registered title.<sup>91</sup> Secondly, the registered owner of freehold land with an absolute title is bestowed with virtually unfettered powers of disposition, unless the register itself dictates otherwise.<sup>92</sup> Thirdly, the Act is said to significantly reduce the complicated range of overriding interests in land which, although not reflected in the register, used to affect the registered owner or other registered title holders' interests.<sup>93</sup> Scholars have indicated that the concept of overriding interests is in effect retained without the actual use of

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<sup>83</sup> Pienaar 1996 *TSAR* 205-226; 2000 *TSAR* 442-468.

<sup>84</sup> See s 3 above.

<sup>85</sup> Law Commission and HM Land Registry 2001 [www.lawcom.gov.uk](http://www.lawcom.gov.uk) para 1.1.

<sup>86</sup> The 1925 *Land Registration Act* is described as the consolidation of a series of laws that were aimed at introducing a system of title registration in England and Wales from 1844 onwards. See Anderson *English Land Law* 58, 63 ff. The first *Land Registry Act* of 1862 set up the system for registration, but it was implemented by the *Land Transfer Act* of 1875, which founded the Land Registry and the modern system of title registration. Before the law was consolidated in 1925, it was amended on several occasions, eg by the *Land Transfer Act* of 1897 and the *Law of Property Act* of 1922 (as amended in 1924). The *Land Registration Act* of 1925 met with considerable judicial and academic criticism. It was said, for instance, to be "legislation of exceptionally low quality, which is in need of a thorough overhaul" (Megarry and Wade *Law of Real Property* 196, cited and endorsed in *Clark v Chief Land Registrar* 1994 Ch 370 (CA) 382.

<sup>87</sup> Law Commission and HM Land Registry 2001 [www.lawcom.gov.uk](http://www.lawcom.gov.uk) para 10.43.

<sup>88</sup> Cooke "E-Conveyancing in England" 286-288.

<sup>89</sup> Clarke *Land Registration Act* 3-4.

<sup>90</sup> Cooke "E-Conveyancing in England" 289.

<sup>91</sup> Megarry and Wade *Law of Real Property*.

<sup>92</sup> Clarke *Land Registration Act* 59-61.

<sup>93</sup> Cooke *Land Registration* 164.

the term.<sup>94</sup> Fourthly, the Act enables the registration of substantial pieces of land for the first time.<sup>95</sup> In the fifth place, the Act introduces statutory provisions necessary for gradually introducing and regulating a system of electronic conveyancing.<sup>96</sup> In the sixth place, the Act fundamentally changes the law relating to adverse possession. It renders the acquisition of title by these means much more difficult,<sup>97</sup> in keeping with the objective of acknowledging that registration, and not possession, is the basis of land control. Finally, the Act also introduces an adjudicatory office to determine disputes over registered land, to be situated at HM Land Registry.<sup>98</sup>

The e-conveyancing process in England was rolled out, after initial successes with pilot projects in the course of 2006 and 2007.<sup>99</sup> It addresses many problems with paper-based registration. First, it eliminates the "registration gap", which refers to the delay between finalisation of a property transaction and the eventual registration of the property at the Land Registry. The registration gap has been a great source of difficulty in the English system.<sup>100</sup> Second, it gradually makes registration compulsory, whilst it simultaneously streamlines the system of registrable titles by reducing the number of unregistered interests that can override registered title.<sup>101</sup> Third, it will have a profound influence on the management of transaction or conveyancing chains through the imposition of the chain matrix, by which it will be possible to monitor the efficiency of the various persons involved in effecting a chain of transfers.<sup>102</sup> Further, it will change the manner in which the creation of contracts to transact is approached, and it will enable the electronic settlement of accounts.<sup>103</sup> The roles of both the Land Registry and solicitors effecting registration are also influenced. Electronification of the register will require that conveyancers be authorised to change the register directly. This demands strict rules on secure

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<sup>94</sup> Harpum, Bridge and Dixon *Law of Real Property* 151.

<sup>95</sup> Cooke *Land Registration* 165; Harpum and Bignell *Registered Land* 7-43; and see further below.

<sup>96</sup> Cooke "E-Conveyancing in England" 286-288.

<sup>97</sup> It is now required that notices be served on the registered owner by the adverse possessor. A procedure is adopted in terms of which the adverse possessor's claim is adjudicated and then either permitted or refused. In the former event, the register must be altered to reflect the new position.

<sup>98</sup> Clarke *Land Registration Act* 142-148.

<sup>99</sup> For more information see Land Registry 2009 [www1.landregistry.gov.uk](http://www1.landregistry.gov.uk).

<sup>100</sup> Harpum, Bridge and Dixon *Law of Real Property* 242-243; *Abbey National Building Society v Cann* 1991 1 AC 56; Cooke "E-Conveyancing in England" 289.

<sup>101</sup> Cooke "E-Conveyancing in England" 290-291.

<sup>102</sup> Cooke "E-Conveyancing in England" 288.

<sup>103</sup> Cooke "E-Conveyancing in England" 291; Harpum and Bignell *Registered Land* 174-175.

electronic networking and regulated access. It also requires the Registry to become involved in a transaction much earlier than in the past.<sup>104</sup>

The changes brought about by the 2002 Act are regarded as a "conveyancing revolution."<sup>105</sup> Fundamentally, the Act aims to bring about a *conclusive* register,<sup>106</sup> that is, one in which all interests in land are recorded. It addresses the phenomena of slowness in the registration process and the compromised security of registered title. It is believed that the electronic conveyancing aspect of the "revolution" enabled the other, more general changes.<sup>107</sup>

The English conveyancing revolution is said not only to demand necessary changes to existing land law, but also to attitudes.<sup>108</sup> For a long time registration in England had been largely voluntary. Under the 1925 *Land Registration Act* it was not obligatory to register rights over land. The 2002 Act now supports a system in terms of which the register *and only the register* will confer title to land on an individual, so the success of the Act depends on, first, a change in judicial attitudes, and secondly a more general shift in perception to counteract the reluctance that accompanied the introduction of title registration in England for centuries.<sup>109</sup>

There is no scope to elaborate further on the details of this impressive, comprehensive and ambitious initiative. It suffices to remark that the 2002 Act's streamlining effect, visible especially through the e-conveyancing initiative, targets the complex, layered nature of English land law<sup>110</sup> to enhance title security and legal certainty. In this way, it improves governance related to an important aspect of land management.

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<sup>104</sup> Harpum and Bignell *Registered Land* 149-149.

<sup>105</sup> Law Commission and HM Land Registry 2001 [www.lawcom.gov.uk](http://www.lawcom.gov.uk) para.

<sup>106</sup> Law Commission and HM Land Registry 2001 [www.lawcom.gov.uk](http://www.lawcom.gov.uk) para 1.5; Harpum and Bignell *Registered Land* 151.

<sup>107</sup> Cooke "E-Conveyancing in England" 288.

<sup>108</sup> Clarke *Land Registration Act* 3.

<sup>109</sup> Cooke "E-Conveyancing in England" 292.

<sup>110</sup> Cooke *Land Registration* 4.

Changes in attitude are also necessary in South Africa. In the post-1994 era, when legal development is spearheaded by notions of "transformative constitutionalism,"<sup>111</sup> "development" and "good governance,"<sup>112</sup> it is the constitutional reform agenda that induces such shifts in attitude and inevitably influences land law. Though the paradigm of reform is often contentious,<sup>113</sup> it is fair to accept, for present purposes, that the deeds registry at least is an important (perhaps even crucial) institution in the implementation of land law reform. South African land reform law tends still to place priority on methods of transferring land and rights in land that require publicity in the form of registration.<sup>114</sup>

The prevalent land registration infrastructure and resources in South Africa provide for just about a third<sup>115</sup> of the legal relations with land that could serve to achieve financial security. Those land relations currently not reflected in the land register mostly represent interests to land which were precarious under the Apartheid regime.<sup>116</sup> Within the South African scheme of property law, with its hierarchies and hegemony,<sup>117</sup> these rights are by no means comparable with the English unregistered, overriding interests.<sup>118</sup> As already said,<sup>119</sup> the urgent need for these precarious rights to be reflected on the register stems also from the desire to enhance the register's function of ensuring security of title.

Because registered title to land enjoys so much support, even in the reform context,<sup>120</sup> success in the land reform context depends on the ability of the South African Deeds Registry to cater effectively for the increasing demand for the

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<sup>111</sup> Klare 1998 *SAJHR* 146-188. See also Botha, Van der Walt and Van der Walt *Rights and Democracy* vii; Van der Walt *Law and Sacrifice* 55 ff; Pieterse 2005 *SA Public Law* 155-166; Van Marle 2009 *Stell L Rev* 286-301; Roux 2009 *Stell L Rev* 258-285; Van der Walt 2006 *SALJ* 23-40.

<sup>112</sup> Pienaar 2009 *PER* 15-56; Leftwich 1994 *Development and Change* 363-386; Adams, Sibanda and Turner 1999 *ODI Natural Resource Perspectives* 1-15.

<sup>113</sup> See s 2 Reform and good governance above.

<sup>114</sup> Lahiff "With What Land Rights?" 95. There are exceptions, however. See for example *Land Reform (Labour Tenants) Act* 3 of 1996; *Provision of Certain Land and Assistance Act* 126 of 1993; *Extension of Security of Tenure Act* 62 of 1997.

<sup>115</sup> 6.4 million land parcels. Hattingh 2003 *Deeds Registration Law Newsletter* 2.

<sup>116</sup> Mostert "Diversification of Land Rights" 5-6.

<sup>117</sup> Van der Walt 1999 *Koers* 261-262; Mostert "Diversification of Land Rights" 5-6; Pienaar 2000 *TSAR* 446-448.

<sup>118</sup> Cooke *Land Registration* 76 ff.

<sup>119</sup> See s 3 Registration practice as governance above.

<sup>120</sup> See s 3 Registration practice as governance above; Mostert "Diversification of Land Rights" 24-25.



formalisation of land holding.<sup>121</sup> The challenge for the registration system is to deal with an increase in the number of registration activities of up to 300% of its current capacity,<sup>122</sup> without compromising its characteristically meticulous and dependable qualities. Moving away from the paper-based registration system is one way to address the possible burden on Government resources and man-power,<sup>123</sup> if it involves electronic systems that accommodate some of the currently manual tasks associated with the lodgement, processing and delivery of deeds.

Despite the urgency of reform, however, progress has been painstakingly slow.<sup>124</sup> The plans for electronification are now over ten years old.<sup>125</sup> The importance of overhauling the registration processes for a transformed system necessitates careful, thoughtful progress, even if this is slow. What is worrying, however, is that the current policy does not propose to deal with the principled discussion, emanating from the reform agenda, about *what* to register and *how* this should be done in the context of hitherto unregistered rights. It notes only that provision needs to be made for electronifying the sectional title register.<sup>126</sup> No recognition has thus far been given the possibilities offered by modern technology in creating, for instance, a land information system for the recording of traditional indigenous rights, which are as yet invisible on the register.<sup>127</sup> Scholars have raised the issue many times to no avail.<sup>128</sup>

One may speculate on whether the reluctance to explore the possibilities offered by electronic registration and a multi-dimensional electronic cadaster is based on an inability to envisage more ambitious reform, along the lines of the English Land Registry's exercise as described; or whether it is informed by the "soft" line of scholarship, described above, which maintains that the kinds of communal tenure relations that must be secured cannot be secured in reliance upon existing

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<sup>121</sup> Mostert "Diversification of Land Rights" 24-25.

<sup>122</sup> Badenhorst, Pienaar and Mostert *Law of Property* 585 ff.

<sup>123</sup> Badenhorst, Pienaar and Mostert *Law of Property* 585; Hattingh 2003 *Deeds Registration Law Newsletter* 3-4.

<sup>124</sup> The first investigations and recommendations were made in the course of 2003. Hattingh 2003 *Deeds Registration Law Newsletter* 3-4.

<sup>125</sup> The initiative of electronification of the Deeds Registry has been on the cards since 1997. See Kilbourn 1998 *BPLD* 5 ff.

<sup>126</sup> Chief Registrar of Deeds and Law Society of South Africa, 2009 [www.ruraldevelopment.gov.za](http://www.ruraldevelopment.gov.za) 12.

<sup>127</sup> For a possible approach, see Steyn *Challenges to the Implementation* 22-23.

<sup>128</sup> Pienaar 2006 *TSAR* 453-454; Pienaar 1990 *TSAR* 29-43; Pienaar 2000 *TSAR* 442-468; Pienaar "Fragmented Use-Rights" 114-115.

registration practice. Either way, the risk here is that an opportunity at truly meaningful reform, harnessing the trappings of the electronic age, and the possibilities opened by it, will be lost. Given the government's recent U-turn in respect of the implementation of the notorious *Communal Land Rights Act*,<sup>129</sup> there now again is a real opportunity to reflect on alternatives to the existing paper-based system of registration, especially insofar as the land rights of those in the rural, traditional communities are concerned.

In short, it would be pointless for the venture of e-DRS to establish an electronic land information system which reflects only the current situation and does not cater better for new forms of registerable title. To do so would be to perpetuate the circumstances in which currently "invisible" rights remain subordinate. It would be remiss not to consider the options offered by e-registration for dealing with the publication of such new forms of title. Continuing to ignore the publicity issue would merely reaffirm established perceptions of hierarchical notions of land rights. This would not be in accordance with the Constitutional Court's directive as described above.<sup>130</sup>

## 5. Complexity and simplicity as bases for reform

Comparing the South African e-DRS venture and the English experience with e-conveyancing raises our awareness of the tension between dynamic and static security.<sup>131</sup> What should be stressed is the motivation behind introducing such initiatives. Electronifying the land register is not merely a response to the demands of modern commerce, although it certainly achieves this goal too. Notably, it presents an opportunity to reassess the character of land registration and the principles upon which it is based. This is very clear from the English experience.

In England, the move towards an electronic land registration system is aimed at *simplifying* the intricate system of land rights and interests that developed over centuries. It is also a means to achieve the far-reaching reforms of the 2002 Act in a

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<sup>129</sup> See the discussion at s 2 above.

<sup>130</sup> As discussed above.

<sup>131</sup> As discussed above.

speedier manner.<sup>132</sup> In South Africa, by contrast, e-DRS provides an opportunity to rethink the current concept of registration and address the need for a *more nuanced and layered system* of registrable rights, to address the need expressed above in the context of land reform.<sup>133</sup> This presupposes, however, that e-DRS will go beyond mere endorsement of the hierarchical conception of landownership and land rights at the root of South African land law.

Such are the tensions that land law breeds between complexity and simplicity. This presents challenges for the implementation of the principles of good governance, and drives reform processes. The English legislature has over centuries battled to contain and control the complexities of common-law land holding,<sup>134</sup> yet the complex English system of *tenures* and *estates*<sup>135</sup> enabled a legal environment that permits various types of land control and holding to co-exist.<sup>136</sup> English land law has eloquently been compared with a chocolate flake bar.<sup>137</sup> Flake bars have genuinely uncountable layers and a splittable, sharable substance.<sup>138</sup> English land law yearns for simplification, as the 2002 *Land Registration Act* demonstrates.

By contrast, the civil-law concept of property as it is known also in South African land law is aptly described as a "black box" of interests,<sup>139</sup> to stress the unified, even compact nature of ownership in civil law and thereby draw attention to the simplicity

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<sup>132</sup> Harpum, Bridge and Dixon *Law of Real Property* 250-252.

<sup>133</sup> See s 2 Reform and good governance above.

<sup>134</sup> See eg Simpson *History of the Land Law* 2 ff; Thompson *Modern Land Law* 20 ff; Cooke *Land Law* 13 ff; Ladds 2004 *King's College LJ* 482; Gray and Gray *Land Law* 379.

<sup>135</sup> Very briefly, "tenure" refers to particular forms of land holding, such as freehold or leasehold. Under the feudal system, various types of tenure in respect of land were possible. See for instance the explanations of Thompson *Modern Land Law* 21-22 of terms such as "chivalry", "spiritual tenancy", "socage" etc. Tenure goes hand in hand with the doctrine of estates, in terms of which the extent of specific instances of land ownership is defined and delimited. The doctrine of estates is based on the idea that the Crown owns all land, and that all other rights to or interests in land are derived from this original form of control. These derived forms of control are referred to as estates. They are limited in time. In essence, therefore, the incidents of ownership can be divided among different people at different times. Thompson *Modern Land Law* 25 explains further that estates are further defined according to their duration. They were also defined in respect of their content. So, for instance, there is a distinction between "fee simple" and "fee tail", which relates to the circumstances under which an estate could pass to a person's descendants. There are various other versions of these forms: see the description in Thompson *Modern Land Law* 27 ff of "qualified fees simple", "life estates" etc.

<sup>136</sup> See eg Thompson *Modern Land Law* 31 ff for descriptions and examples.

<sup>137</sup> Cooke *Land Registration* 4.

<sup>138</sup> Clarke and Kohler *Property Law* 297.

<sup>139</sup> The metaphor stems from Merryman 1974 *Tul L Rev* 927, but has been cited frequently thereafter: Panesar *Property Law* 113; Cooke *Land Registration* 3-4.

of the rule that title to land traditionally cannot be shared, divided or layered, except in the guise of co-ownership.<sup>140</sup> The trouble with this concept is that in South Africa under apartheid its sleekness was abused to such an extent that the largest part of the population was precluded from holding any rights in land that could even closely resemble civil-law land ownership.<sup>141</sup> For a long time, much of the South African scholarship on property law, embarrassed even by the possibility of spatial racial segregation under apartheid, turned a blind eye to the fact that under the common law radar, another system of interests in land was operative, and that this effectively amounted to a layered approach to land title.<sup>142</sup> It was only in the late nineties that some scholars started taking notice of the possibilities offered by an approach acknowledging the fragmentation of land rights.<sup>143</sup> Fragmented title in South Africa, hence, is not a creature of the land reform initiative. It comes from the sphere of necessity created by apartheid land law. It causes complexity, in that land reform measures must marry a unified, hegemonic notion of landownership with the practical consequences of fragmentation under apartheid land law.

## 5 Conclusion

When developing a response to both e-commerce and good governance in the transformative context, it is important to understand the dichotomy between complexity and simplicity in reforming land administration, and to keep in mind the different possibilities offered by static and dynamic approaches to tenure security. It is, furthermore, important to understand the historical context of formal and informal title in South Africa, and to be aware of the ironies of the land system developed under apartheid.<sup>144</sup> Another necessity is a solid understanding of the differences between various systems of registration (such as "positive" title registration systems and "negative" deeds registration systems).

What is apparent from a study of the challenges of governance in the context of land administration and reform in South Africa specifically is that the cyclical nature of

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<sup>140</sup> More detail in Mostert and Pope (eds) *Law of Property* ch 5.

<sup>141</sup> Mostert and Pope (eds) *Law of Property* 12-15.

<sup>142</sup> Van der Walt 1999 *Koers* 262; Mostert and Pope (eds) *Law of Property* 13.

<sup>143</sup> See for example Van der Walt 1992 *SAJHR* 431-450; Van der Walt 1999 *Koers* 259 ff.

<sup>144</sup> For further details, see LAWSA vol 14 *Land* (second reissue, 2010, by Mostert H, Pienaar J and Van Wyk AMA).

reform and its alignment with politics creates tensions which may become debilitating. The English and South African reform initiatives are poles apart in their aims and purposes. Comparing them nevertheless aids an understanding of the direction of intended reforms in South Africa and the possible outcomes thereof.<sup>145</sup> It raises the awareness that tendencies towards more complex or simpler structures underlying land management are naturally part of the cyclical nature of reform.

At this point it would be premature to seek finality as regards the direction that reform in South Africa needs to take. Further work is needed to allow meaningful exchange between the different, presently disjunctive approaches to tenure security. For instance, further investigation into the possibilities offered by electronification in creating a multi-dimensional cadastral system and land register is necessary in the South African context. This could address the concern that layered and overlapping land rights, as they are encountered in the customary land law context, cannot be described in a two-dimensional mode<sup>146</sup> on paper. Moreover, a thorough revision of the principles underlying South African registration practice is necessary, if more productive reforms are to achieve than simply electronifying the existing land register. However, this would require some rethinking of the current theoretical bases of registration.

Policy reforms<sup>147</sup> have been announced and are urgently awaited in South Africa. The process of reforming tenure security would certainly benefit by taking into account the various stances to be encountered while performing comparative research and lessons that can be learned from conducting such research.

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<sup>145</sup> See s 4 above.

<sup>146</sup> Cousins 2005 *Stell L Rev* 489.

<sup>147</sup> Kitshoff *Rapport* 6.

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### **List of abbreviations**

|                    |   |
|--------------------|---|
| BPLD               | Butterworths Property Law Digest                        |
| CLaRA              | Communal Land Rights Act                                |
| Commonw Comp Polit | Commonwealth & Comparative Politics                     |
| e-DRS              | Electronic Deeds Registration System                    |
| FAO                | Food and Agriculture Organisation of the United Nations |
| FIG                | International Federation of Surveyors                   |
| IIED               | International Institute for Environment and Development |
| J Afr L            | Journal of African Law                                  |
| J SA Studies       | Journal of Southern African Studies                     |
| JMAS               | Journal of Modern African Studies                       |
| King's College LJ  | King's College Law Journal                              |

|             |   |
|-------------|---|
| OJLS        | Oxford Journal of Legal Studies   |
| PER         | Potchefstroom Electronic Law Journal  |
| PLAAS       | Programme for Land and Agrarian Studies (as from 2009 Institute for Poverty, Land and Agrarian Studies), School of Government, University of the Western Cape |
| SAJHR       | South African Journal on Human Rights   |
| SALJ        | South African Law Journal   |
| Stell L Rev | Stellenbosch Law Review   |
| THRHR       | Tydskrif vir Hedendaagse Romeins-Hollandse Reg  |
| TSAR        | Tydskrif vir die Suid-Afrikaanse Reg  |
| Tul L Rev   | Tulane Law Review   |