

Pitfalls of PTOs in Land Ownership and Control: Rethinking Access for Rural Development in South Africa

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Abstract: Permission to Occupy (PTOs) was viewed by the apartheid regime as an important mechanism for addressing inequalities in South Africa (SA). The African National Congress (ANC) government has ruled over SA for the past 30 years but has been unsuccessful in dealing with the country's racialised land inequalities. The land reforms introduced by the ANC government have not addressed the challenges of land in the country in a timely manner. Thus, tackling the issue of land inequalities remains crucial. A desktop review was conducted to critically examine the pitfalls of PTOs in the context of rural development and advocates for a re-evaluation of access mechanisms to promote more equitable and sustainable land tenure systems. The results show that these pitfalls perpetuate socio-economic inequalities, hinder investment in land improvements, and contribute to conflicts over land resources. In response, the article proposes alternative approaches to enhance access to land for rural development, such as community-driven land governance mechanisms, participatory land-use planning, and the recognition of customary land tenure systems. These alternative strategies prioritise rural local empowerment, strengthen tenure security, and foster inclusive decision-making processes.

Keywords: Access, apartheid, permission to occupy, rural development, segregation.

1. Introduction

It should be recalled that the mainstay of apartheid rule was property law. Thus, it is often argued that apartheid, in its entirety, was instrumental in defining property ownership and control, based on strict restrictions aimed at limiting other races (Weinberg, 2020; Strauss, 2019). Indeed, in South Africa, property rights significantly influenced land use and planning, serving to separate whites, regarded as the superior race, from the impoverished black population. The systematic exclusion of blacks from property ownership, through limited property rights, stifled investment opportunities that could have improved their living conditions (Katumba et al., 2021). Apartheid law also restricted the development of social networks and freedom of movement, leaving blacks with little opportunity to explore new ways of life. Furthermore, it fostered an atmosphere of intimidation through discriminatory and legally insecure occupations, facilitating exclusive control by white authorities.

One contentious legal instrument is the Permission to Occupy (PTO), a historical mechanism for granting provisional land rights, particularly in contexts where formal land tenure systems are lacking or inadequate (Hall & Mtero, 2021; Ngcobo, 2021). A Permission to Occupy (PTO) is a legal instrument used in South Africa to grant individuals or entities the right to occupy and use a piece of land, typically in rural or communal areas (Kingswill, 2017). It does not confer full ownership of the land but provides temporary and conditional rights to reside on and use the land for specific purposes, such as housing, farming, or small-scale business activities. This mechanism has been instrumental in propelling the erstwhile apartheid policies of segregation and racialism. As will be shown in this article, this was an attempt by the apartheid regime to continue its segregation policies. Akinola (2018) contends that the most drastic laws of discrimination, segregation, and racialism were exacerbated by the apartheid regime after 1948. He points out that practically all laws that

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discriminated on overtly racial grounds were repealed by 1994. Nonetheless, racial disparities persisted, and it would take time to reverse the effects of the past (Barry & Roux, 2018). It came as no surprise that there were great expectations for a decrease in economic downturn and poverty, alongside the democratic transition endorsed by the 1994 elections.

Segregation was not unique to South Africa; it was a hallmark of all colonial powers across Africa, aimed at portraying living conditions comparable to those in Europe and ensuring that 'native' Africans resided in well-defined areas that could be easily monitored (Gibbs, 2020). Bank and Hart (2019) further argue that the rationale for segregation was to pursue a polarised governance system, utilising psychological insecurity, political domination, and social control. Without such a legal framework, there was a likelihood of revolt among blacks, who would act in defiance of the system. This proved true, as early as the 1960s to 1994, when, despite all repressive measures undertaken by the apartheid regime, blacks demanded freedom and democracy at all costs.

The proliferation of apartheid laws, which restricted property ownership, forced blacks to migrate to towns in search of employment, as all arable land had been appropriated and livestock and other economic activities were prohibited (Tewelde, 2021). Moreover, the Deeds Act 97 of 1937 granted permanent property ownership rights to whites, as they could afford the process, which was designed in their favour. Discriminatory laws, such as the Group Areas Act 36 of 1966, which reserved the inner city exclusively for whites, led blacks to occupy open land on the periphery of cities, contrary to policy intentions (Ayubi, 2023; Makombe, 2019). Although blacks were legally permitted to inhabit land on the periphery, their property rights were still severely restricted by the apartheid regime. Additionally, the Sectional Title Act 95 of 1986 further entrenched discriminatory ownership of land in urban areas, ensuring that blacks did not occupy certain locales (Makombe, 2019). Such laws ensured that blacks remained temporary inhabitants in urban spaces. However, the exponential growth of informal settlements resulted in a shortage of formal housing. Some Africans began occupying open land and buildings near their workplaces as they could not afford the high transport costs (Carden & Lingle, 2022). A similar trend emerged in rural communities, igniting the demand for land for settlement and farming.

Upon the attainment of independence, the new Constitution of the Republic of South Africa afforded every citizen the right to property and housing, equality, and freedom to participate in economic activities. Although progressive efforts have been made to redress the errors of the colonial past, there are remarkable continuities in South Africa's land use planning and ownership that need to be corrected (Maylam, 2020). The government is mandated to take reasonable legislative and other measures to enable citizens to gain equitable access to land. The Land Restitution Act of 1994 and the Land Reform (Labour Tenants) Act provide for the restitution and redistribution of land to previously disadvantaged communities. However, the implementation of these legislations has been slow and relatively ineffective. As a result, an unprecedented backlog of land claims and insufficient land allocation to beneficiaries has emerged (Sihlangu & Odeku, 2021). With the ongoing debate regarding the permanence of land ownership and improving access to land, it is essential to interrogate whether the government will utilise the Deed of Grant to confer full ownership of land to spur rural development.

It is argued that the processing of the Deed of Grant involves high costs that impoverished rural communities might not be able to afford, thus perpetuating the perennial challenges of ownership if the PTO route is taken. Furthermore, the PTO is regarded as a type of leasehold ownership in which ownership lapses after a period. Additionally, granting poor communities the PTO does little to economically empower them because the land they occupy cannot be used as surety when acquiring loans. On this basis, the constitutionality of the PTO will be examined.

1.1 Theoretical framework

The current study is grounded in social justice and equity theory. This theory focuses on the fair distribution of resources, opportunities, and privileges within a society (Beukes & Beukes, 2023). It addresses inequalities caused by systemic discrimination or historical injustices and emphasises correcting imbalances through policies that promote fairness. In the context of land ownership and access, social justice involves recognising past wrongs, such as those inflicted during apartheid, and implementing measures to ensure that marginalised groups receive equitable treatment. Under apartheid, South Africa's laws deliberately restricted land ownership and access for Black South Africans, confining them to underdeveloped and overcrowded homelands (Ngcucaitobi, 2018). The Natives Land Act of 1913 and subsequent apartheid-era policies ensured that vast tracts of land were owned by the white minority, while Black communities were denied access to fertile and resource-rich areas (Ngqulunga, 2019). This history of dispossession has led to stark inequalities in land ownership that persist today.

Social justice theory supports the recognition of customary land tenure systems in rural areas, where land is governed by traditional leaders and community norms. Acknowledging these systems addresses the cultural and historical identities of indigenous and rural communities, ensuring that their ways of life are respected in the land reform processes. However, it is important to recognise that temporal measures such as PTOs continue to perpetuate inequality and poverty. In this paper, we argue that despite PTOs often being used as a means of providing access to land for rural communities, particularly those who were historically disadvantaged, the process of land redistribution must be conducted equitably, ensuring that such groups have genuine access to land for sustainable livelihoods and development. Moreover, social justice and equity theory advocates for the meaningful participation of rural communities, particularly those directly affected by land policies, in decision-making processes related to land tenure and development. PTOs should not be imposed top-down but should involve consultation, consent, and the empowerment of local communities to manage and utilise land resources in ways that meet their needs and aspirations..

2. Methodological layout

This research adopts a desktop study approach to explore the limitations of the Permission to Occupy (PTO) system in land ownership and control, with a particular focus on its implications for rural development in South Africa. The desktop methodology entails a systematic examination of existing literature, policy documents, legal frameworks, and secondary data sources. By leveraging a diverse range of academic and institutional materials, this study critically evaluates the role of PTOs in shaping land access and scrutinises the broader implications for rural development. The initial stage involved delineating the research scope, which centres on PTOs, land ownership, and rural development. A desktop study approach was deemed appropriate, as it facilitates a comprehensive review of the available literature and policy documents. This method was selected to mitigate the logistical challenges associated with primary data collection in rural contexts and to utilise readily available, high-quality secondary sources that provide insights into historical and contemporary land governance practices.

The subsequent phase involved the initiation of a structured search conducted across several academic databases, including JSTOR, Google Scholar, and institutional repositories of South African universities, to gather pertinent scholarly articles, books, government reports, legal theses, and case studies. Additionally, legal documents such as the Communal Land Rights Act and other policy frameworks related to PTOs were examined to trace the evolution of land governance practices in South Africa. International reports from organisations such as the World Bank, FAO, and UNDP, alongside South African government reports and NGO publications, provided contextual information on rural land development policies.

2.1 Inclusion and exclusion criteria

To ensure a focused analysis, the inclusion criteria comprised scholarly articles, legal documents, and policy reports published within the last 30 years (1994–2024). Peer-reviewed journal articles focusing on land tenure, PTOs, and rural development in South Africa were consulted. The study included legal case studies and reports highlighting the use of PTOs by both the apartheid and post-apartheid governments. Articles that did not specifically address the PTO system in the context of land ownership, as well as materials more than five years old, were excluded.

2.2 Selected data and texts for review

The initial search yielded approximately 150 articles and reports. After applying the inclusion and exclusion criteria, 60 sources were selected for a more detailed review. Of these, 40 sources were directly relevant to the research questions and were used for analysis. The final selection included 25 peer-reviewed journal articles on land tenure systems in South Africa, 8 government reports on land reform and rural development, and 7 case studies and legal documents related to the application of PTOs in rural communities. The selected materials were categorised into thematic areas, with each theme summarised in detail, highlighting key arguments and findings from the reviewed literature. The focus was on identifying recurring patterns, inconsistencies, and areas where further policy intervention might have been necessary.

3. Synthesis and Critical Analysis

The synthesis of the collected data involved integrating findings from various sources to form a coherent narrative on the role of PTOs in land ownership. A critical analysis was conducted to evaluate the effectiveness of PTOs in facilitating equitable land access and fostering rural development. For instance, the literature pointed to several pitfalls of the PTO system, such as its inability to provide secure tenure, which has led to a lack of investment in rural land and infrastructure. Contradictions in the post-apartheid government's approach to land reform, which often perpetuated the inequities of the apartheid-era PTO system, were also interrogated. Case studies involving rural communities in Limpopo and KwaZulu-Natal illustrated how PTOs both helped and hindered local development efforts. These examples highlighted the limitations of PTOs in enabling meaningful land ownership and the potential for alternative frameworks, such as community-driven land governance and the recognition of customary land tenure systems.

3.1 South African land tenure system and the later impact on the PTOs

South Africa's land tenure system narrative cannot be separated from its history. Before colonisation, communal land tenure systems dominated land ownership and control. Although the ancient indigenous people had exclusive rights over land, their nomadic way of life, influenced by the search for favourable grazing and agricultural land, was critical in determining the land that was owned (Winkler, 2021; Mukarati, 2020). Barry (2020) argues that land was not an individualised commodity but constituted a joint interest under the custodianship of traditional leaders. To this day, land is a symbol of wealth for both local and foreign communities, making the issue of land tenure a contentious topic of debate.

The epitome of land-related disputes began during the 17th century when a wave of colonisation swept across the African continent by European powers (Ngcukaitobi, 2018). In the south, the genesis of colonisation can be traced back to 1652 when Jan Van Riebeeck landed on the Cape Coast (Murata et al., 2023; Mawere et al., 2021). Through the Dutch East India Company, the colonisers gradually dispossessed and displaced the indigenous people occupying land from the Cape to the interior of Africa. It is a fact that colonisation and apartheid led to the annexation of more than 90% of land being controlled and owned by only 15% of the population (Akinola & Kaseeram, 2020).

The draconian apartheid policy enacted after 1948 exacerbated land tenure issues, and more stringent land ownership mechanisms continued to serve the interests of the minority white communities. The creation of the Bantustans, which separated black African communities on ethnic bases from white-dominated areas, made it even more difficult to achieve equitable land ownership and control (Andrew, 2020). By 2009, about 2.57 million hectares, initially reserved for other purposes, were still being controlled by minority groups (Beinart & Delius, 2021). Meanwhile, in 1968, Proclamation R188 was instituted to guide the management of open spaces, which were controlled using PTOs and quit rents (Xaba, 2022).

Despite holders' rights to occupy the land, it was noted that such rights were not consistent with common law (Xaba & Akinola, 2022). The legal implication was that the holder of a PTO or quit rent needed to seek administrative consent before making any developments. Thus, the PTOs attracted natural contention because they added to the already cumbersome and disputed land issues prevailing in South Africa.

3.2 Constitutionality of PTOs in the post-apartheid era

Although pre-colonial land tenure was dynamic, it was modified over a long period through various legislations and government proclamations. As noted earlier in the current review, significant formal demarcations occurred during and before apartheid. However, the PTOs slowly permeated the legal system to resolve customary land tenure disputes and were implemented on a piecemeal basis (Melba, 2020; Mlambo & Maserumule, 2019). Moreover, the introduction of PTOs was haphazard and not considered common law, as it involved estimated and random measurements of land allocated to individuals. Only a certificate from a magistrate's court bearing the holder's name could indicate the right to occupy the land.

Klaaren (2022) posits that despite the abolition of the old apartheid regime, the continued existence of PTOs raises concerns within the land tenure legal framework due to their lack of constitutional recognition. The PTOs appear disjointed in relation to common law. Meanwhile, all land owned under PTOs is often referred to as off-register because it does not appear in the deeds register, meaning that its legal status is questionable (Ubink et al., 2021). Despite their lack of legal authenticity, land held under PTOs constitutes a staggering 13% of the total land in South Africa. Such a portion is significant, and the government cannot continue to grant people this type of tenure, as it violates the basic right of access to property (Hall & Mtero, 2021; Daramola, 2020).

Although the apartheid government recognised that black individuals needed land, the Provision of Certain Land for Settlement Act of 1993 was invoked to acquire land closer to their homeland countries (Van der Merwe & Pienaar, 2021). This was another step towards reinforcing the existing provisions of the Glen Grey Act of 1984, and it thrived because most landholders within the former homeland areas did not possess full ownership rights. Moreover, the fact that these populations held PTOs as proof of ownership meant that their rights were limited, preventing them from freely buying or selling such land (Kingwill, 2019).

The Upgrading of Land Tenure Rights Act (ULTRA, No. 112 of 1991) provides that holders of PTOs can potentially convert them into unencumbered titles, such as title deeds. However, it is argued that this still lacks the merit to make it a constitutional requirement. The prevailing evidence shows that most homelands have not moved away from the PTO and quit rent land tenure system. However, in the case of *Graham and Others v Senqu Municipality and Others*, it was argued that reliance on PTOs obscures the real need to transfer ownership to previously disadvantaged communities, and is therefore declared unconstitutional (Kingwill, 2017).

The overlay of customary land tenure rights is the genesis of contestations surrounding land ownership. Several cases have adopted a non-uniform approach when dealing with PTOs. For example, in 2017, the holder of a PTO was granted land ownership against new claimants under the

name of the Ingonyama Trust (Monana & Keep, 2023). The authors argue that although the judgment confirmed that this right was still valid, there is more to be desired if the case is subjected to a constitutional test. Relying on the same judgment brings confusion, as it is challenging to confer a real right when something lies outside the constitutional mandate. In another case, *Nandipha v Irfani Traders cc*, the judge ruled that the rights of the holder of a PTO should be upheld to protect the Constitution and the Interim Protection of Informal Land Rights Act (IPILRA, No. 31 of 1996) (Ubink et al., 2021). The incoherencies and contrasts arising from the discussion of the above judgments spark the legal appetite to explore the constitutionality of PTOs in South Africa.

3.3 Pitfalls of PTOs in property ownership and control

Following the colonial tactics of segregation, land administration and tenure among SADT lands, self-governing territories were chiefly regulated under the PTO system. This status quo has persisted and fuels ongoing territorial disputes among chiefs, communities, and the urban-based populace (McLanlan, 2019). Doubtlessly, the PTO system continues to exhibit skewed property ownership and control in favour of the wealthy, as it confers lesser rights even where land is rented for life and payments are made to the government through homeland authorities. From a rural development perspective, PTOs serve merely as instruments of suppressing the poor through temporary land or property holdings.

Although the former land administration institutions were dismantled following reconstruction and restructuring after the attainment of democratic rule, more is still needed regarding land access and control in rural South Africa. The main objective of the new democracy was to develop and strengthen laws that empower individual and collective rights, particularly focusing on communal land control in the former homelands (Cousins et al., 2018). The shortcomings of the PTOs have not offered any hope of legal recourse, as communal ownership is also flawed in certain ways.

The new democratic policy and lawmakers have, in general, not addressed the urgent task of rebuilding and redesigning an appropriate administrative infrastructure capable of adjudicating, holding, and transferring all rights in the country, including off-register customary and 'informal' rights (Mnwana & Bowman, 2021). An effective land-administration infrastructure should allow for and deal fairly and consistently with all types of land rights in both rural and urban areas. For instance, the *Ndaba vs Thonga* case suggests that land rights are generally secure at the local level (McLachlan, 2019). It is argued that the prevailing norms governing tenure are well understood at familial and community levels. However, there is a consensus that the rights conferred to communities remain insecure (Masuku et al., 2022; Rusenga, 2022).

The weaknesses of PTOs are further exposed when land developments arise where state-regulated administrative processes at higher levels of authority (from municipal to national levels) are needed to balance local property rights with those of third parties who wish to invest financial or political capital. These may include the government investing in infrastructure or local property rights holders wishing to invest in productive enterprises. These processes lack transparency and exhibit some level of inconsistency or are entirely absent at times. Kingswill (2017c) argues that elitism takes centre stage through social capital and patronage networks of traditional leaders who operate outside a clear system of land management. A similar system thrives in the claims of real or potential investors in the agrarian and commercial economy (Akinyemi & Mushunje, 2022). The existence of these shortfalls in using PTOs thwarts concerted efforts to propel several rural development initiatives in South Africa. Consequently, land procedures are mired in obfuscation, competing spatial and administrative jurisdictions, and sources of authority, as well as lacking legal definition (Anstey, 2022; Mnwana & Bowman, 2021). In cases of land development, the lack of clarity results in lengthy, unresolvable processes of adjudication, negotiation, and ongoing contestation.

There is a need to expedite administrative accountability of land to protect local rights and encourage appropriate social and economic development. Currently, the Interim Protection of Informal Land Rights Act, intended as a temporary piece of legislation, is precariously poised. It provides only a thin veil of protection for ordinary people's land rights, usually held in inter-generational family structures, against the predations of traditional elites and commercial interests when land developments, including mining and tourism, are proposed. In the absence of strong institutions that can adjudicate the respective claims, inevitable contestations are likely to arise, ultimately discouraging investment. Furthermore, existing rights are susceptible to systematic erosion by the superior and power-driven evocation of the supposedly customary idea of collective interests (Anstey, 2022). This further dampens the spirit of shared economic growth and exacerbates spatial inequality.

It is crucial that the government invests in improving administrative processes to resolve land-related issues, as these contestations not only involve individuals within families and communities, but also extend to conflicts with national and local government institutions responsible for infrastructure and service delivery. This situation creates a complex web of competing interests and claims over land, further complicating the resolution of land-related issues in urban settings. Moreover, South Africa is already engulfed in an incessant mushrooming of informal settlements, which further adds to the burden of conferring ownership (Sibanda, 2019). Providing documentation for informal dwellers is a prerequisite for various aspects of civic life, including exercising the right to vote.

In addition, the administration of land and control of property involves multiple authorities, which further complicates the ability of the holder to gain full ownership. Under traditional systems, there is a reasonable application of the PTO system, as it is easy to give another occupier a chance after one has died or decided to relocate (Bank & Hart, 2019). However, Sibanda (2019) argues that involving the Department of Agriculture and the magistrate does not add value to the existence of PTOs because the issue of lesser rights still applies. The scrapping of racist land legislation during the early 1990s further created a vacuum within land administration in both communal and urban settlements. It is also disputed that the change in land legislation rendered PTOs useless; rather, it strengthened their use. For example, in the Northern Province, PTOs have remained the cornerstone of land administration, ownership, and control.

It is understandable that many land reform beneficiaries and policymakers believe that the most effective way to address historical and ongoing differences in tenure rights is to issue more title deeds. With its sophisticated administrative framework, the South African deeds registration procedure is among the strictest globally. It is reasonable to imagine that granting title deeds to every South African could address the issue of an unequal land tenure system. However, the Deeds Registry has not demonstrated the capacity to accommodate all the different rights holders' requests for tenure.

Considering the purposes and systematic complexities, it is entirely fair that policymakers, as well as many beneficiaries of land reform, regard the extensive issuing of title deeds as the best form of redress for past and continuing disparities in tenure rights. The South African system of deeds registration, with its highly developed administration system, is regarded as one of the most rigorous in the world. It is no wonder that the aspiration is to extend it to all South Africans in order to solve the problem of a discriminatory land tenure dispensation.

Davis asserts that the Deeds Registry has not demonstrated the necessary capability to meet the tenure needs of various rights holders. A major weakness of the deeds system lies in its failure to recognise the social norms that many off-register rights holders depend upon. Additional challenges surrounding the issue of the transfer of PTOs into deeds include the eligibility of the landowner and the potential recipient.

4. Conclusion

The study aimed to unpack the pitfalls of PTOs regarding land ownership and control in rural communities. The results show that the Permission to Occupy, albeit a legally valid form of ownership, has failed to provide a remedy for land access in marginalised communities. It was further revealed that although the democratic government inherited a skewed land ownership and control system, the use of temporary measures, such as PTOs, does not provide long-lasting solutions for redress. Overreliance on PTOs further elongates and deepens the existing societal problems of poverty, inequality, and underdevelopment in rural communities. The current study attempts to expose how the era of colonial repression presented the suffocation and manipulation of traditional territories through clandestine and forceful methods. We argue that the existence of temporary tenure in both urban and rural communities using PTOs poses yet another legal mirage within various societal groupings. It is suggested that more robust land ownership and control legal instruments should be used, together with title deeds, to expedite the acute shortage of land and the complications associated with it to spur rural development. Such legal instruments are indispensable for effectively harnessing redistributive policies, such as land reform, land restitution, and land reclamation.

5. Declarations

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