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# SEEKING EQUILIBRIUM

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**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'  
UN-Gigiri in Nairobi, Kenya, 10-12 November 2004

# The setting

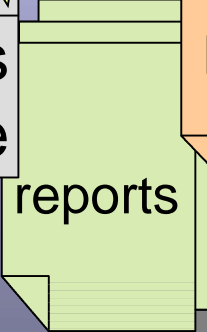
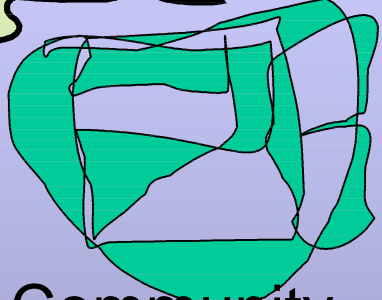
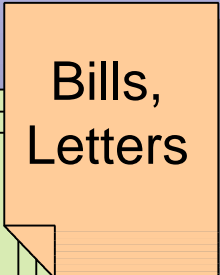
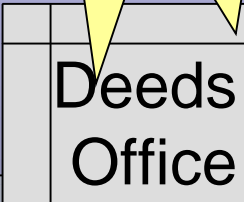
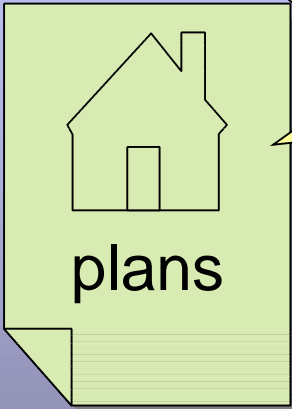
- The studies on which paper are based were undertaken for the purposes of **implementation** of **state land disposal** in a particular provincial tenure context
- We did not have (and still have only incomplete) policy on **adjudication** when the enquiries were done
- Thus it is not a case of having 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



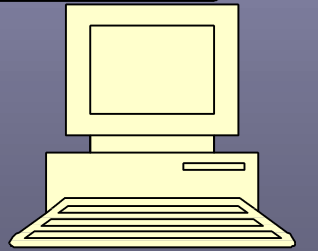
## What we had and what we did

- 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

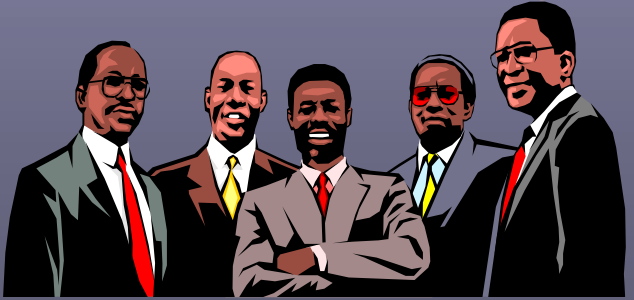
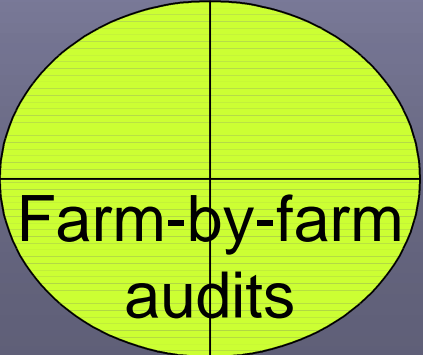
# Finding evidence



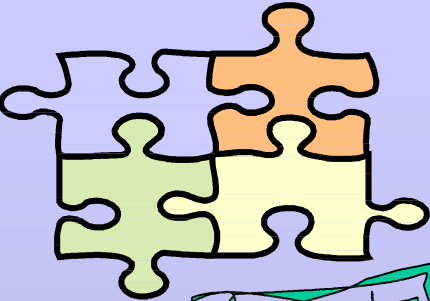
Interviews officials



Deeds Office digital access



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

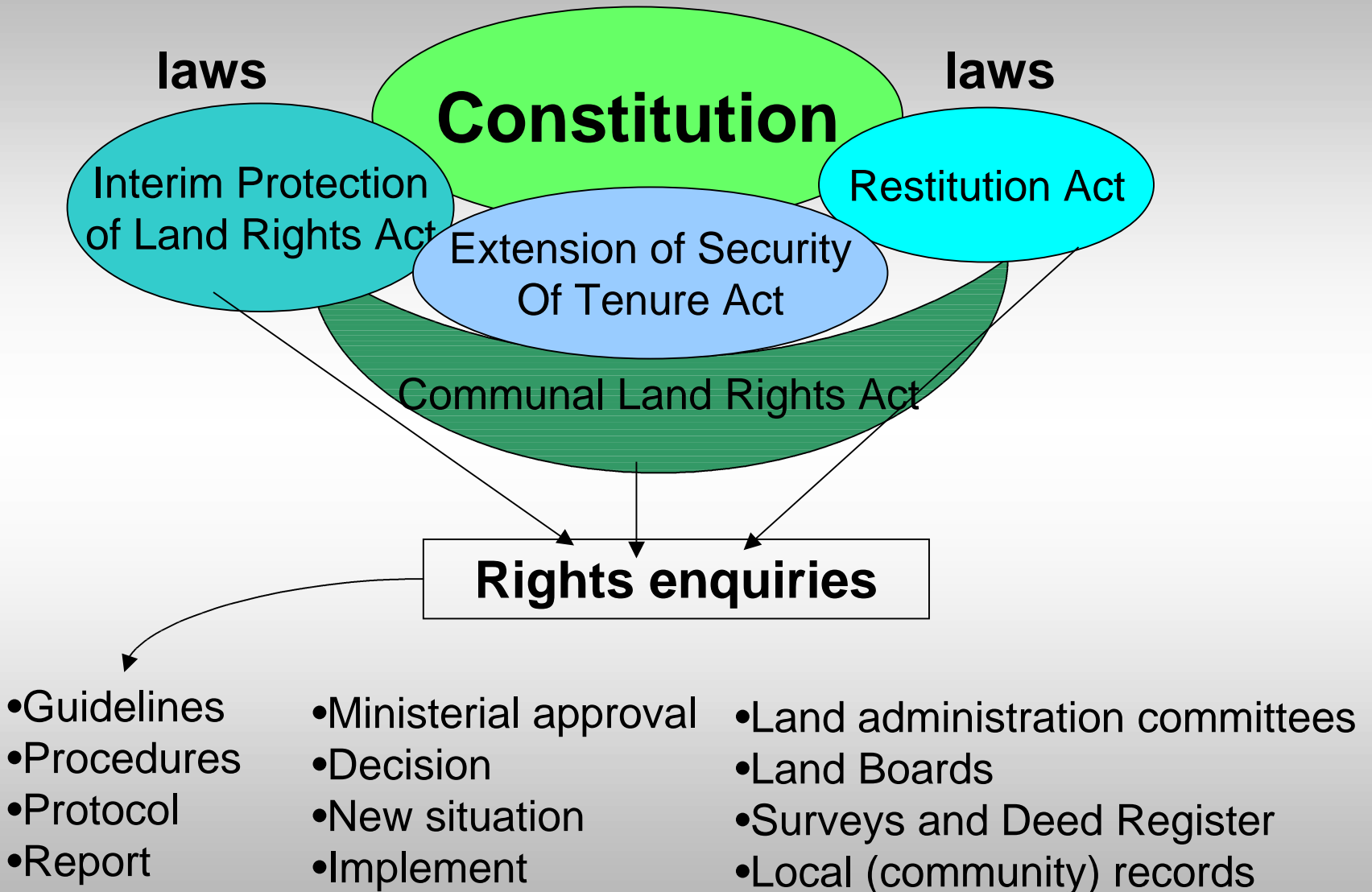
- A **range** of available evidence collected & examined – cadastral only one form – underlying principles and **values**
- Decisions must have local social **legitimacy** but should resist local political interference. “Balance of probability”/sustainable
- **Weight** the evidence according to a set 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”



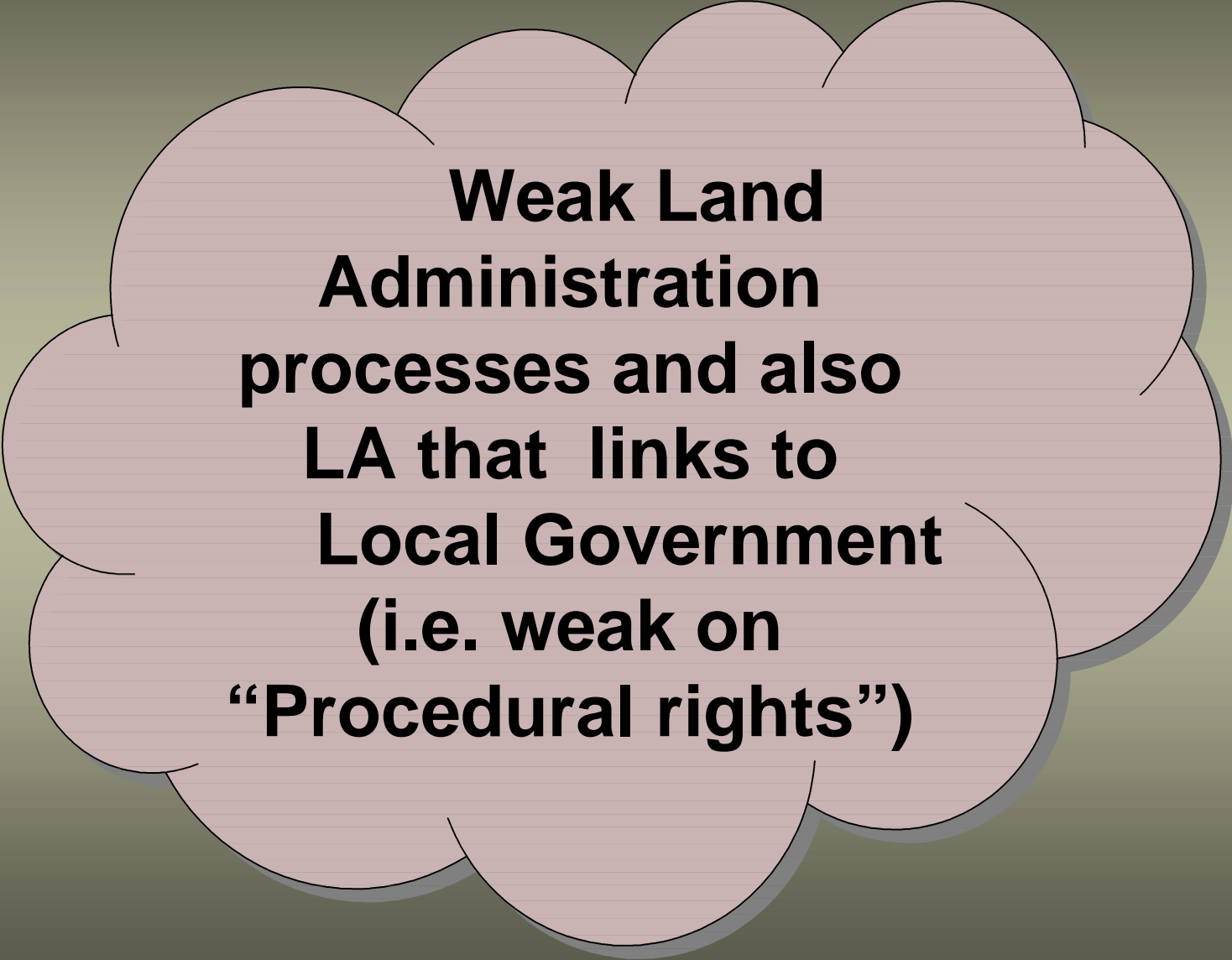
# Disjuncture

- 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:

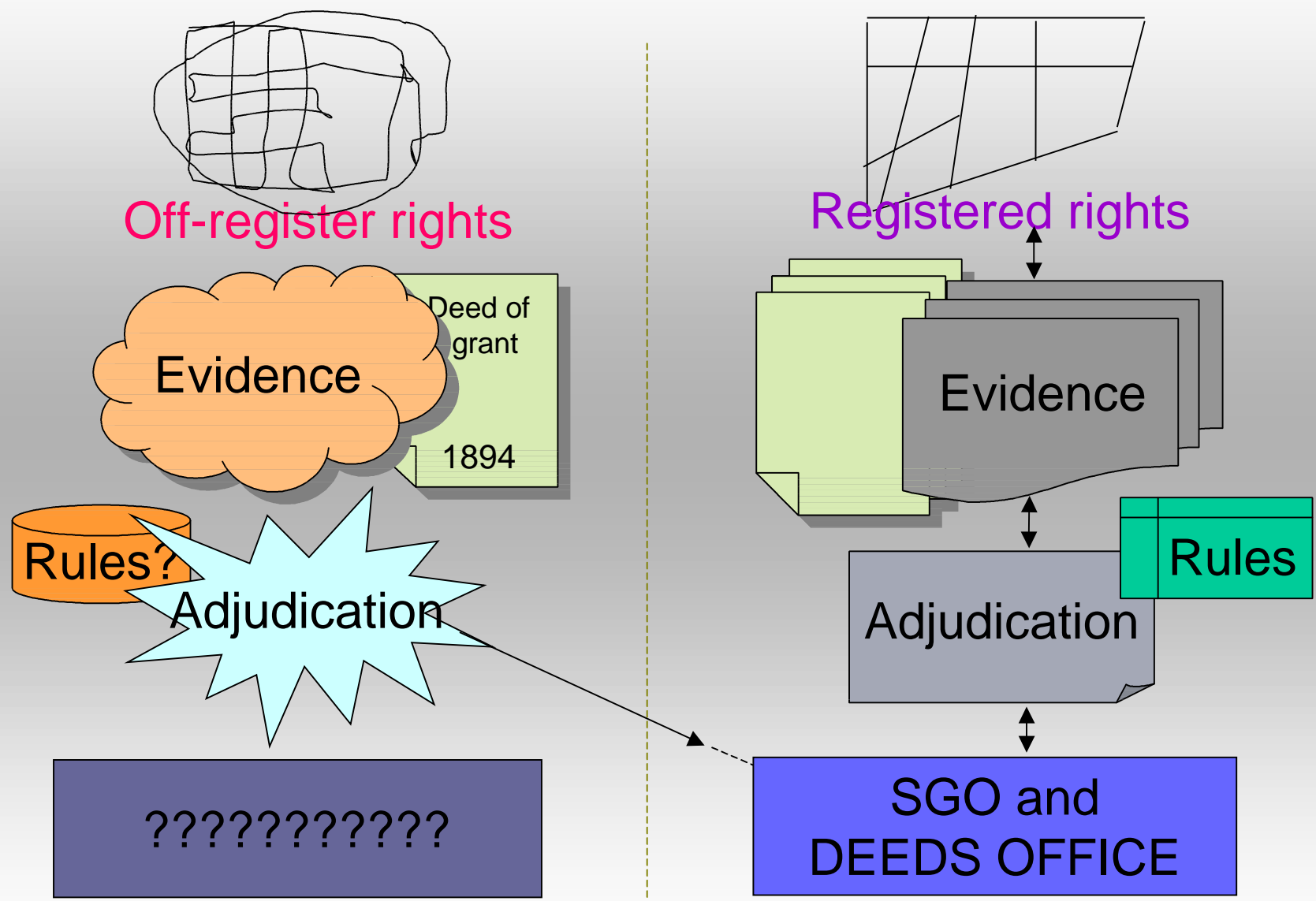


**Legal framework that links to Deed Registry**



**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:**

Ø 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

Ø 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

