

# THE CONTESTED STATUS OF 'COMMUNAL LAND TENURE' IN SOUTH AFRICA

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TARA WEINBERG



RURAL  
STATUS  
REPORT

**3**



UNIVERSITY of the  
WESTERN CAPE

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Institute for Poverty, Land and Agrarian Studies

Faculty of Economic and Management Sciences



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## The contested status of 'communal land tenure' in South Africa

May 2015

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# 1. INTRODUCTION

Twenty years have passed since the Bantustans were reintegrated into South Africa. Yet for the 17 million people still living in these former homelands, the struggle for full recognition of their land rights persists. The post-1994 government refers to the former homelands as 'communal areas' (Communal Land Tenure Policy 2013). For most people living in these areas, their rights to land are uncertain and vulnerable.

The right to security of land tenure – that is, the legal and practical ability to defend one's ownership, occupation, use of and access to land from interference by others – is enshrined in Section 25(6) of the Constitution. The Constitution further prescribes that the government should enact a law to provide for the realisation of the right to security of tenure in Section 25(9). Land tenure reform is one of the three main areas of the government's land reform programme – the other two are land redistribution (related to Section 25(2), (3) and (4)), which involves tackling the unequal distribution of land in the country resulting from the apartheid era, and restitution (Section 25(7)), which is about restoring land to or providing equivalent compensation to people who were dispossessed of rights to land as a result of racially discriminatory laws or practices.

While laws to promote tenure security for farm dwellers and labour tenants have been enacted, there is no legislation beyond the Interim Protection of Informal Land Rights Act (IPILRA) to secure the land rights of people living in the former Bantustans. The IPILRA was introduced in 1996 as a temporary solution that would protect people living in the former homelands from being deprived of their land rights. Despite the post-1994 constitutional requirement that the state should secure the land tenure of people in all of South Africa, it has so far failed to do so. This legislative 'vacuum' has contributed to the insecure nature of people's land rights in 'communal areas'. The 'state' or 'government' is referred to throughout this article with the awareness

that it is not homogenous but made up of different and sometimes contradictory actors (Cooper 2005; Berry 1992).

Communal land tenure is a strongly debated term. It was employed by the colonial and apartheid governments in a crude or simplistic way, to describe African customary land tenure systems as 'group-based', that is, opposite to individual property ownership in Europe. To reclaim the term 'communal land tenure', it is necessary to recognise that it is not a single system that can be legislated and centrally controlled. The term carries greater clarity when used to describe a variety of local, regionally specific land tenure practices that maintain common characteristics that set them apart from individual, private property (Cousins 2008). While communal tenure practices are common in the former Bantustans, they are not limited to these areas.

This paper focuses on communal tenure reform developments (or lack thereof), referring to law, policy and practice in rural areas in South Africa. It shows that communal land tenure is not in a healthy state and discusses the following recent laws and policies that are symptoms of this ill health:

- the Communal Land Rights Act (struck down by the Constitutional Court);
- the Traditional Leadership and Governance Framework Act (passed in 2003); and
- the 2014 Communal Land Tenure 'wagon wheel' policy (currently in place).

The paper also explores the historical roots of the insecurity of tenure with which millions of South Africans struggle, diagnoses some of the causes of the failures of communal land tenure reform and suggests some alternatives that might provide the remedies needed.

## 2. WHAT IS COMMUNAL LAND TENURE?

Before discussing contemporary interpretations of communal land tenure, it's useful to be aware of its historical baggage. Colonial administrators had a distorted perception of communal land tenure, believing it involved a system of collective land ownership at the expense of any individual interest (Cross 1991). Colonial administrators also interpreted the land to vest solely in a chief as the representative of the 'collective' (Bennett 2008).

The former Bantustans or homelands refer to the ten areas of land designated by the apartheid government in the 1950s as separate 'ethnic' zones where black people would live.<sup>1</sup> Historians have noted that the key idea behind the Bantustans was that black people would be citizens of 'ethnic' and 'self-governing' homelands rather than of South Africa itself (Evans 1997; Beinart 2001; Mager 1999). In addition, while being separate from South Africa, the apartheid government sought to keep black people close

enough to serve as a source of cheap labour for whites (Legassick and Wolpe 1976).

With the creation of the Bantustans, the apartheid government entrenched the link between communal land tenure and notions of tribal identity. The apartheid government tried to shut down the wide variety of land tenure practices in the areas designated as Bantustans. For example, they made it illegal for Africans to hold individual titles to property, arguing that this would erode 'communal land tenure' – that is, the government's version of it (Evans 1997). As the government's White Paper on the Tomlinson Report argued in 1956 (quoted by Evans 1994: 187): 'individual tenure would undermine the whole tribal structure. The entire order and cohesion of the tribe... is bound up with the fact that the community is a communal unit...' This misreading of communal tenure systems and its link to 'tribes' continues to confuse

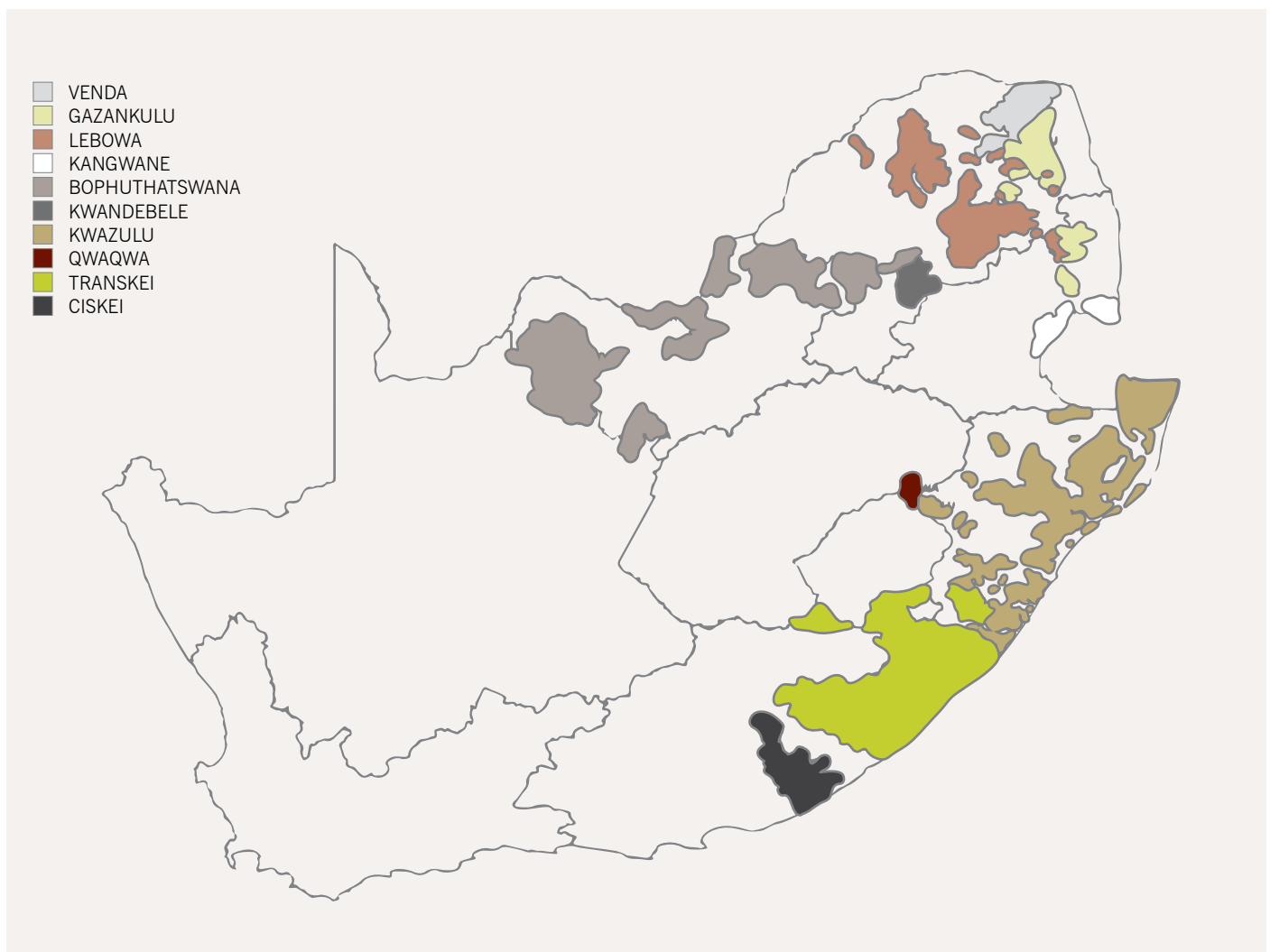


FIG. 1 Map of Bantustans in 1986 (courtesy of [www.customcontested.co.za](http://www.customcontested.co.za))



discussions around communal land tenure laws and policies in South Africa today.

New scholarship argues that communal tenure practices have historically encompassed various characteristics, and continue to do so today (Lund 2002; Peters 2002; Berry 2002; Cousins 2008; Claassens and Gilfillan 2008; Kingwill 2008). The paragraphs that follow describe some of these characteristics, particularly regarding how they differ from the individual, private property model accounted for in the common law of South Africa.<sup>2</sup> They also refer to the variety of communal land tenure arrangements across time and place.

Cousins (2008) describes land rights in communal tenure as 'socially embedded' and inclusive, meaning that individuals and families hold relative rights to the same residential and agricultural land. These individuals and families also negotiate access, relative to other individuals and families, to 'common property resources such as grazing, forests and water' (Cousins 2008: 129). This is unlike private property rights in South African common law, which tends to involve a surveyed parcel of land and a person or legal entity who holds an exclusive title deed to that parcel. Perhaps one way to describe the 'socially embedded' nature of communal tenure arrangements is to conceptualise them as 'bundles of rights'.

The sticks in the bundles represent objects of value (such as land, houses or cattle), for which stakeholders (such as individuals, groups or parts of groups, states etc.) have rights and responsibilities regarding other stakeholders (Von Benda-Beckman et al 2009). For example, when people in Kalkfontein purchased land in the 1920s, they set up *dikgotla* (committees) made up of experienced men to negotiate the interests of individuals in relation to the wider group (Claassens and Gilfillan 2008). As a result of pressure from within Kalkfontein, over time women also became part of the *dikgotla* that make decisions about land, meaning that women's claims on land were also being weighed up in relation to men's and other women's interests (Claassens and Gilfillan 2008).



**Who is consulted in decisions about land?**  
**Individuals, families or households, kinship networks and wider communities.**

Wider network

In addition, whereas the rules as to who can make decisions about the use, transfer or disposal of private property tends to

*When the Kalkfontein co-purchasers secured the farms in the 1920s, they relied on familiar indigenous values and structures in setting up their internal relations and ownership rights. Both communities chose a kgotla of experienced and respected men to hear and decide internal disputes, and to mediate and balance the rights of individual heirs and their families against the interests of the wider groups.*

**Claassens and Gilfillan (2008: 305)**

be regulated by statute, under communal tenure these decisions are made at various levels of a community. Although the colonial and apartheid governments tried to concentrate decision-making power over land in a traditional leader, in practice administration of communal land is 'nested' or 'layered' in nature (Cousins 2008: 125). This means that people and groups who are consulted in decisions about land include individuals, families or households, kinship networks and wider communities. For example, Schapera describes the Tswana system as 'one of ever-widening jurisdiction extending upwards from the household' (Cousins 2008: 123).

He describes how a man intending to acquire land would first ask his father for permission to use family land, then if that land was unavailable, he would ask his neighbour for nearby land, and if that did not work he would consult the headmen for other land in the vicinity (Cousins 2008: 123). In other communal tenure situations, headmen and chiefs play a greater role in decisions about land. For instance, in parts of KwaZulu-Natal traditional leaders approve land allocations that have been decided upon at other levels of the group or community (Alcock and Hornby 2004). However, even in these situations chiefs are by no means the only people who make decisions about land (Alcock and Hornby 2004).

The examples show that communal land tenure is not as narrowly defined as colonial and apartheid administrators made it out to be. Communal tenure practices sometimes involved purchases, involved

*When at a meeting in Kalkfontein in 2004, a question about land allocation processes led to a spirited debate about the rights of women. In Kalkfontein there is an allocation sub-committee. At the time all the members were men. The women at the meeting challenged why this should be the case and extracted a promise from the trustees to the effect that the vacancies on the committee would be filled by women.*

**Claassens and Gilfillan (2008: 307)**



rights to land at the level of individuals and not just a 'collective', and involved decisions at the level of various social units, not just that of the chief. While communal tenure arrangements vary to the extent that a rigid set of rules would do them an injustice, they contain enough commonalities to establish a legal framework. However, such a framework would need to formally recognise the rights that people hold under communal tenure arrangements while remaining flexible enough to accommodate a variety of local communal tenure practices. A legal framework for communal tenure would need to draw on living customary law which largely informs de facto communal tenure arrangements.

Living customary law is different from official customary law, which, in relation to communal land tenure, was 'produced out of colonial misunderstandings and politically expedient appropriations and allocations of land' (Peters 2002: 85). One of the prevailing tendencies of colonial administrators was to interpret customary

*The justifiable reminder about the ambiguities and indeterminances in land tenure should not lead us to privilege cases of 'ongoing interpretation' of rights over those where only some people have the power to interpret, define and claim rights and where others lose out in the struggles over controlling interpretation and access.*

**Pauline Peters (2002: 55–56)**

land law through the lens of common law from their own countries (Bennett 2004). Their use of the concept of 'ownership' played a pivotal role in the distortion of customary land systems (Bennett 2004). The concept denoted the absolute concentration of interests in land in a single holder (Bennett 2004). Since they could not identify 'ownership' of this form in customary land tenure systems, colonial administrators declared 'ownership' foreign to customary law. Hence colonial officials developed the notion of customary land tenure as 'collective' in nature or as a form of 'trust' law (in which a chief held land in trust for a tribe) (Bennett 2004).

However, several scholars argue that living customary tenure systems are hybrid bodies of law, rules and practices (Peters 2002; Lund 2002). In Rabula in the Eastern Cape, for instance, titling became part of living customary law as black landowners adapted 'titling to their particular needs and continued to apply norms and practices based on customary principles of property management' (Kingwill 2008: 185). It is these sorts of shifting practices that have informed the variety of communal tenure arrangements in South Africa. Scholars have noted that while customary land tenure systems draw on various repertoires about land rights, they are also subject to the ebbs and flows of power (Cousins and Hall 2013; Peters 2002).

While 'communal land tenure' carries with it a great deal of historical baggage, the recognition of the land rights of millions of South Africans living in the former homelands depends upon an attempt to reclaim the term – and, in the process, to acknowledge the many, complex arrangements of rights in land existing in practice that make up communal land tenure.

### 3. A WEIGHTY BURDEN: LAND LAWS AND POLICIES UNDER WHITE RULE

A series of measures implemented under colonialism and apartheid have shaped the context in which communal land tenure arrangements operate. If the current government intends to secure the rights of people practising communal tenure arrangements, this is a burden it must understand and confront. As mentioned above, the Dutch and British colonial governments, in asserting constructs of exclusive ownership, did not recognise indigenous systems of land as property rights. Through the recognition of ownership rights at the expense of local or customary land rights, colonial regimes justified categorising vast areas of African-held land as 'Crown Land' (land owned by the British Crown). Some of this land was then granted to white settlers.

#### The Land Acts

The 1913 Land Act was one of a series of laws that dispossessed black people of their land and rendered their rights to land

insecure. One of the Act's intentions was to further sideline the African farming class and to force black people into becoming labourers in the cities or on the mines (Bundy 1979). About fifteen years later, the 1927 Native Administration Act codified African customary law in a distorted way. This version of customary law gave traditional leaders powers over land they had not historically enjoyed, while simultaneously downplaying the usage, occupation and inheritance rights of most people within indigenous systems of land rights (Delius 2008).

The 1936 Native Trusts and Land Act consolidated the African reserves slightly (from 7% to 13% of the country), making available certain areas of 'Trust' land alongside the existing reserves as 'resettlement areas' for black people whom the government planned to remove from 'white' land (Mager 1999). African occupation of Trust land was conditional on

the payment of yearly fees or rents, with the ownership of the land vesting in the South African Native Trust (SANT).

The 1936 Act also established the 'six native rule', which again distorted indigenous tenure systems in favour of an autocratic model that was easier for the state to control (Claassens 2008). According to the rule, any group of more than six black people who had cooperated to buy land had to constitute themselves as a tribe under a chief or they would lose their land. This was to pre-empt land-buying syndicates from constituting themselves democratically. The 'six native rule' was rooted in the prevailing colonial assumption that all blacks were tribal subjects as opposed to active citizens, able to create their own identities and choose the legal arrangements that suited them.

*The legal fallacies and assumptions used to justify appropriation of land by colonial governments and post-colonial elites were, and remain, essentially ideological in nature.*  
**Okoth-Ogendo (2008: 98)**

## The 'Betterment' Programme

The apartheid period saw the onset of more extreme congestion on the land. During the 1960s, the government enforced the Betterment Programme under the pretext of combating congestion, poverty, soil erosion and over-stocking, and improving agricultural production (De Wet 1995). But Betterment policies had little effect on reducing poverty, congestion and landlessness in the reserves (if that ever was the intention); if anything, they accelerated the process. Furthermore, Proclamation R188 of 1969 introduced 'Permission to Occupy' (PTO) certificates to be issued to black people. However, these certificates, like other land categories available to black people, made their land rights conditional and precarious (Okoth-Ogendo 2008). The material conditions of life

in the homelands, combined with rigid state land laws imposed on black people, made it increasingly difficult for people to survive off the land. A main feature of these laws and policies was that they prohibited black people from holding and managing land in a way that put them on an equal footing with white landowners (Okoth-Ogendo 2008).

***A main feature of these laws and policies was that they prohibited black people from holding and managing land in a way that put them on an equal footing with white landowners.***

## Imposed system of authority

At the same time that the apartheid government dispossessed black people of their land and forcibly removed them to rural homelands, they imposed on them a particular system of chiefs and tribal authorities. The apartheid government believed that chiefs were the sole African decision-makers in respect of 'communal' land. This version of power over land undermined customary practices that recognised the entitlements vesting in ordinary people and the role of groups in vetting and approving applications for land – in other words, the many bundles of rights that characterise communal tenure (Delius 2008). Apartheid's legal, military and economic apparatus helped chiefs protect their positions by suppressing structures that threatened their power, including social movements and organisations (Ntsebeza 2008).

## Exclusion of women

In the context of severe land shortages and insecure land rights, women were increasingly excluded from access to land. Unwilling to recognise the reality of unequal distribution of land between blacks and whites as a problem of its own making, the state aimed to address land scarcity and congestion by excluding women from access to land in the reserves, on the basis of a distorted version of customary law (Weinberg 2013). Magistrates and Bantu Affairs Commissioners increasingly told complainants that women



The history of land purchasers who identified as 'Bafokeng' in the north of the country (today's North West province) shows how chiefs and their advisors came to be seen as the sole 'representatives' of 'tribes' – even before the 1936 Act was passed. In a court case in 1906 (Hermansberg Missionary Society vs. Commissioner of Native Affairs and Daniel Mogale), Judge Innes determined that in order for a purchaser to buy land from a tribe, they must receive the tribe's consent (Eberhard 2014). But he defined 'consent' as the chief's agreement in consultation with his councillors – this despite a Bafokeng chief testifying that the entire *pitso* (gathering of all the married men in the tribe) should be consulted to give 'consent' (Eberhard 2014). In the cases that followed, groups identifying as part of the Bafokeng contested their right to hold land as groups separate from the chief. However, the judges in these cases found that a 'section of a tribe' could not hold land apart from the Bafokeng 'tribe' yet still identify as 'Bafokeng' (Eberhard 2014).

could not inherit or manage land in their own right because it was not 'customary' to do so. Instead, they said that the head of a household, who they believed was always a man, would make decisions about land for the benefit of the family (Weinberg 2013). In this way, officials used the notion of 'communal' and 'customary' tenure to justify the exercise of state power over black people, as well as discrimination against women.

### Inherited legacy

Although black South Africans interacted with and resisted the legal institutions imposed on them, as well as the discourses informing these institutions, a situation of conditional land tenure nevertheless became the norm for black South Africans under apartheid (Cross 1991). When it came to power in 1994, South Africa's first democratic government inherited this legacy.

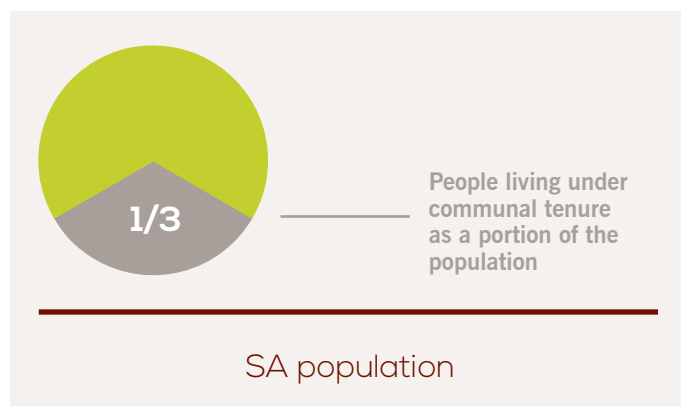


**PHOTO 1** Women discuss land reform at a meeting organised by the Land Access Movement of South Africa in Mpumalanga (2014)

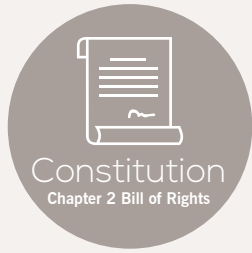
## 4. COMMUNAL TENURE LEGISLATION: WHAT'S AT STAKE?

The former Bantustans – where the government understands 'communal tenure' to be the norm – are home to an estimated 16.5 million people. As a result, the government's failure to carry out widespread tenure reform in these areas affects about a third of South Africa's population. Since 59% of those living in the former homelands are women, they are particularly affected by uncertainty around 'communal tenure' arrangements.

During the negotiations for a democratic South Africa in the 1990s, there was much debate about the extent to which the existing property regime should be protected, since it was skewed in favour of existing (mostly white) landowners. A compromise was reached in terms of which the Constitution would protect private property rights, but this would be balanced by measures intended to redress racial imbalances – specifically in the form of restitution and redistribution of land, as well as land tenure reform in the country as a whole. Sections 25(6) and (9) of the Constitution



are particularly relevant (although not limited) to the 16.5 million people living in the former Bantustans. Those sections need the enactment of legislation to secure the tenure rights of people who are insecure because of past racial discrimination.



**Section 25(6):** A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

**Section 25(9):** Parliament must enact the legislation referred to in subsection (6).

If the government does not develop legislation to secure the rights of millions of people living in the former Bantustans, it risks renegeing on the constitutional requirement in Section 25(6) – and could be found wanting if challenged in court. Beyond breaking a promise preserved in the Constitution, it will also rub salt into the wounds of people nursing the economic and psychological injuries of over 100 years of dispossession.

It has become evident that valuable natural resources are present in the former Bantustans. This is particularly the case along the ‘platinum belt’ in the North West province. In this region people have been locked in battles with traditional leaders like Nyalala Pilane of the Bakgatla ba Kgafela, who has entered into lucrative deals with mining companies apparently on behalf of the tribe. In the process many other people who identify as Bakgatla ba Kgafela have been excluded from the wealth Pilane has accrued (Matlala 2013).

## 5. GOVERNMENT’S TRACK RECORD: LAND LAWS AND POLICIES POST 1994

### The Mandela government (1994–1999)

To realise the right to security of tenure, South Africa’s first democratic government needed to pay attention to the historical baggage accumulated by the communal land tenure model, strengthen land rights in law and practice, and move towards the fulfilment of the population’s basic needs (Cousins 2008).

Under the first Minister of Land Affairs, Derek Hanekom, the strategy was to consult widely and incorporate many of the suggestions put forward by people in rural areas. Bearing in mind the role of the apartheid government in dispossessing black people of their land, policymakers in the Department of Land Affairs saw an urgent need to secure the land rights of black South Africans against powerful actors, including the state (Cousin and Hall 2013). This led to the enactment of the **Interim Protection of Informal Land Rights Act (IPILRA) in 1996** and development of the **Land Rights Bill (LRB) in 1999**.

Informal rights to land are defined broadly, and include those who *use, occupy or access* land in terms of:

- customary laws and practices;
- beneficial occupation; or
- land vested in the South African Development Trust, or a so-called self-governing territory, or the governments of the former Bantustans, or any other kind of trust established by statute.

The IPILRA also covers any person who holds a right to land in terms of the Upgrading of Land Tenure Rights Act but who was not

### DEFINITION

#### **Beneficial occupation:**

This is when people occupy land for a long time ‘as if they were the owner’, but without formal, legal rights. It is an important category in South Africa where many black people were denied legal rights to land, but had, in practice, occupied and used it as if they were the owners for many years.

formally recorded as such in the register of land rights (Land Rights Bill 1999).

The IPILRA remains a crucial law that can be used to protect people against deprivation of their informal rights to land, except under very exceptional circumstances. But the IPILRA was only intended as temporary legislation that would provide a safety net to people who did not have land titles (Claassens 2000). What is truly needed is tenure reform legislation that will legally recognise informal land rights held according to ‘living’ land tenure practices, so that they are on an equal footing with individual property titles (Okoth-Ogendo 2008). At the same time, this legislation must take account of and allow for enquiries into the contestations (claims



*What is truly needed is tenure reform legislation that will legally recognise informal land rights held according to 'living' land tenure practices, so that they are on an equal footing with individual property titles*

**Okoth-Ogendo (2008)**

and counter-claims) and inequality of power relations involved in determining 'living' land law (Claassens 2000).

The LRB moved to create relative 'protected rights' vested in individuals who use, occupy and have access to land (Claassens 2000). Protected rights would be secured by statute, making them enforceable immediately, even before the complex processes entailed in enquiring into, and resolving cases of overlapping and disputed rights on a case-by-case basis was completed (Claassens 2000). Minister Thoko Didiza withdrew the LRB when she took office, on the basis that it was too complicated and costly to implement (Claassens 2000).

*...more effort is required to ensure that the empirical reality – that is, the persistence of indigenous principles, values and institutions, to the extent that they do not impede social, cultural and economic progress – is reflected in and forms part of the living law in Africa.*

**Okoth-Ogendo (2008: 107)**

## The Mbeki and Zuma governments (1999–2014)

Four main issues have characterised most land laws and policies since 1999:

- the government's failure to introduce a law to secure the rights of people living in the former homelands;
- the extension of traditional leaders' power over land;

- a lack of support for land reform beneficiaries, including Communal Property Associations; and
- an attitude of paternalism towards people in rural areas – that is, excluding people with limited resources from the ability to make decisions about land matters.

## Failure to secure the land rights of people living in the former homelands

Between 1999 and 2014, power over land has been removed further from the hands of people in rural areas, and placed in the hands of elites. An example is the Mala Mala restitution claim, where the landowners received nearly R1 billion (around a third of the total annual budget for land reform) from the state in compensation for their land (Ashton 2014). Analysts have argued that, particularly in terms of restitution, the state has paid landowners inflated prices for their land (Aliber 2015). This could be tackled by the state offering to compensate landowners (most of whom are white) at below the market rate and expropriating if the owners dig in their heels (these strategies are both in line with the Constitution) (Aliber 2015). Some analysts have argued that the 'willing buyer, willing seller' policy has made obtaining land for restitution prohibitively expensive, slowing down the pace of land reform and exhausting the state's budget (Lahiff 2007; Ntsebeza 2007). Lahiff (2007) argues that since most landowners of commercial farms in South Africa are still white, the 'willing buyer, willing seller' policy has failed to adequately tackle the structural causes of racial inequality in landholdings. The high sums paid over to landowners have also reinforced a hierarchy of land tenure systems, with private property at the apex as the most powerful and most valuable.

Michael Aliber argues that analysts have overstated the role played by 'willing buyer, willing seller' in the failure of land reform. He argues that the biggest problem with South Africa's land reform programme is how it approaches compensation of land owners, not the pace at which it works (Aliber 2015: 159). While a slow pace is difficult to remedy, compensation might be easier to tackle. He suggests that the state expropriate in the case of restitution but stick with 'willing buyer, willing seller' in the case of redistribution



In the **Mala Mala restitution claim**, the 'Mhlanganisweni community' lodged a claim for land from which they were dispossessed in the 1950s. The land under claim includes the MalaMala Game Reserve, a world-renowned game park owned by the Rattray family. Since the claimants, state and landowners were unable to reach an agreement, the claim went to the Land Claims Court. There, Judge Antonie Gildenhuys found that it would not be in the 'public interest' to restore the land to the claimants, as the cost required for the state to compensate the landowners would be too great. The cost was set at a market rate of R791 million. The claimants disagreed with this judgment and were intending to take the matter to the Constitutional Court when the Department of Rural Development and Land Reform intervened. Despite the Constitution allowing the state to compensate landowners for less than the market rate, the state ended up paying the Rattrays R1 billion for the Mala Mala reserve, wiping out most of the land restitution budget in the process.

as the state is able to shop around for better prices (Aliber 2015: 159). However, he does not explain exactly how this will address the structural racial inequalities in landholdings that persist today.

As well as treading carefully with commercial farmers, the government has put in place land policies and laws that serve the interests of traditional leaders (in the belief they can secure the rural vote). The problem is not that these laws recognise the institution of traditional leadership, but that they condone traditional leaders' abuses of power. This was most clearly evident in the **Communal Land Rights Act (CLRA)**, enacted just before the general elections in 2004. Many rural people argued that the CLRA would have undermined their security of land tenure because it gave traditional leaders and councils wide-ranging powers, including control over the occupation, use and administration of communal land.

The CLRA reinvigorated the combination of economic and political subjugation that existed under apartheid's Bantustan system. The Department of Land Affairs (as the Department of Rural Development and Land Reform – DRDLR – was then known) said that chiefs would make decisions on behalf of people because it would be 'customary' for them to do so – even though the historical evidence disputes this (Delius 2008).

In 2010, the Constitutional Court struck down the CLRA. The Court found the Act unconstitutional on the technical ground that Parliament had followed an incorrect consultation process in terms of the Constitution. Although the Court avoided the substantive issues raised by the applicants, the discussion generated as a result of the case made it clear that many people in rural areas were against traditional leaders holding absolute power over the land on which they lived (Cousins and Hall 2013). For example, Stephen Tongoane from Kalkfontein explained that people in his area wished to manage their land independently of the traditional council in their jurisdiction, as that council was derived from a tribal authority imposed on them under apartheid (Claassens and Gilfillan 2008).

While the CLRA no longer exists, other laws and bills that vest power in traditional leaders remain a threat to rural peoples' security of tenure. The **Traditional Leadership and Governance Framework Act (TLGFA)** entrenches the boundaries of the tribal authorities established under the Bantu Authorities Act of 1951. Laws like the TLGFA and the Traditional Courts Bill (TCB) marginalise women's voices, shifting the balance of power more towards male household heads and traditional leaders (Thipe 2013). This situation affects single women the most, particularly those without male family members, who have little status in the eyes of some traditional leaders and structures (Thipe 2013). The traditional leadership laws, like the CLRA, try to foreclose the ability of groups in the former homelands to constitute themselves independently of traditional authorities.

The DRDLR introduced several new proposals in 2013 and 2014, which will impact the communal tenure situation

## DEFINITIONS

### **Communal Property Associations (CPAs):**

CPAs are landholding institutions that were established so that groups of people could come together to form a legal entity to acquire, hold and manage property received through the restitution, redistribution and land reform programmes. Since millions of black people had been dispossessed of their land and their land rights under colonialism and apartheid, it was an urgent priority of the new democratic government to restore land to black South Africans. CPAs and other communal property institutions therefore occupy an important role in land reform.

### **Communal Property Institutions (CPIs):**

CPIs refer to a category of institutions that hold and manage land collectively. CPAs and Trusts are just two types of CPIs.

in South Africa. These include policies on communal land tenure itself, land redistribution, state land leasing and recapitalisation and development, as well as laws like the **Spatial Planning and Land Use Management Act** and the **Restitution of Land Rights Amendment Act**. The new laws and policies reflect few of the suggestions put forward during the various consultation meetings and working groups often referred to by the DRDLR. In addition, they often contradict each other, take little account of past mistakes and have the potential to undermine rural peoples' security of tenure.

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## Expanded power for traditional leaders and traditional councils over land

The new **Communal Land Tenure Policy (CLTP)** (also known as the 'wagon wheel' policy – see Figure 2 below – published 8 September 2014), like the CLRA, proposes to transfer the 'outer boundaries' of 'tribal' land in the former Bantustans to 'traditional councils'. The CLTP suggests that title deeds will be transferred to other entities like Communal Property Associations (CPAs) only in communal areas where traditional councils do not exist. Traditional councils will be title holders in 'conventional traditional communal areas' while Communal Property Institutions (CPIs) will exist

# Draft Communal Land Tenure Policy (CLTP) 'Wagon Wheel'

## USE RIGHTS (HOUSEHOLD PLOTS)

- subservient to title owner's decisions

## MANAGED BY: TRADITIONAL COUNCIL

## INVESTMENT & DEVELOPING FUNCTIONS (overlaid on top of title-owning function)

mining

tourism

forestry

## OUTER BOUNDARY TITLE

**TITLE OWNER:  
TRADITIONAL COUNCIL**  
(only CPA where no  
traditional council exists)

## TITLE OWNER'S ROLES:

- Adjudicates land disputes
- allocates land
- manages 'communal areas' like grazing, forests

## NOT SHOWN IN DIAGRAM:

- individual and group rights to acquire business entities
- rights to residential areas
- role of Municipality in providing services

**FIG. 2** Simplified version of Wagon Wheel Diagram produced in the Communal Land Tenure Policy, published by the Department of Rural Development and Land Reform, 8 September 2014. (diagram by Tara Weinberg).

only in 'non-traditional communal areas' (CLTP 2014: 10–11). The policy envisages that 'traditional councils' will get title deeds (i.e. full ownership) of pieces of land, while individuals and families will get 'institutional use rights' to parts of the land within traditional councils' land. While the DRDLR says these institutional use rights will allow people to hold traditional councils accountable, there is no indication of how this will be possible if titles are first transferred to traditional councils (Claassens 2014). The CLTP also states that the traditional councils will own and control all development related to common property areas, such as grazing land and forests. Traditional councils will furthermore be in charge of investment projects such as mining and tourism ventures (CLTP 2014: 4).

***The CLTP privileges the demands of the traditional leadership lobby over people's desire to choose the kind of land-holding entity that best suits their needs, such as CPAs.***

There is an indication that CPAs will be phased out in some parts of the country. According to the DRDLR's most recent policy on communal land tenure and on CPAs (published 8 September 2014), CPAs will be discouraged from forming on any land where traditional councils already exist (mostly the former homelands). In February 2014, Minister Nkwinti told the Portfolio Committee on Rural Development and Land Reform that CPAs and Trusts were 'sophisticated institutions imposed on our people' (Weinberg 2014). Such statements belittle the struggles of people around the country who want to be able to choose the property institution that best suits their needs, and who have pointed out that traditional leaders' lack of accountability is at odds with living customary law. People in rural areas have expressed alarm at the DRDLR's intention to preclude Communal Property Associations (CPAs) from forming in the former homelands (National Land Workshop 2013).

The idea that new CPAs should not be established in areas where traditional councils exist began to inform government policy after the publication of the *Status Quo Report on Traditional Leadership*





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

*and Institutions* (2007). This report recorded traditional leaders' objections to CPAs on the basis of their claim that only traditional leaders are the rightful landowners in the former homelands and that the existence of land-holding CPAs undermines their authority. By denying people the ability to choose the land-holding entity that best fits their tenure practices and needs, the DRDLR's policy on CPAs and communal tenure forces people living in the former homelands to live under the thumb of traditional leaders while other South Africans can choose to opt in or out of this system.

The refusal to allow CPAs within the former homelands, read together with the Communal Land Tenure Policy (2014), indicates that government intends to transfer title to traditional councils as opposed to other land-holding entities or individuals. Yet the Restitution Act provides for restitution for those who lost land because of prior discrimination. Therefore the intended beneficiaries of land restitution might be a different group of people from those making up 'traditional communities' which, according to the TLGFA, is composed of people whom the traditional leader claims to fall under his or her jurisdiction.

In its current form, the Communal Land Tenure policy proposal of 2014 threatens groups like the Makuleke, who do not identify with the traditional council boundaries from the apartheid era. The policy therefore undercuts a primary purpose of the Restitution Act, which was to identify and provide redress to those who suffered forced removal.

By the middle of 2014, the wheels of traditional leaders' claims had begun to turn. President Jacob Zuma told the House of Traditional Leaders on 27 February 2014 to line up their lawyers and prepare to lodge claims for land restitution. King Goodwill Zwelithini kaBhekuzulu announced in July 2014 that he would make a large land claim ostensibly on behalf of the Zulu nation. King Zwelithini's claim will be managed by the Ingonyama Trust Board (ITB), which was the outcome of a deal between the National Party and the Inkatha Freedom Party during the dying days of apartheid. The ITB already holds close to 3 million hectares of land in KwaZulu-Natal. Through its proposed new land claim, the Trust intends to acquire much more land in KwaZulu-Natal, as well as in the Eastern Cape, Free State and Mpumalanga. In addition to King Zwelithini, traditional leaders of the Hlubi (KwaZulu-Natal) as well as the Rharhabe and Thembu (both Eastern Cape) have also stated their intentions to lodge restitution claims. These claims may be found to be invalid on the basis that most of them take as their date of dispossession, a date before the Restitution Act's cut-off date of 1913. The claims are nevertheless likely to create confusion and uncertainty on the ground, making the security of tenure of people in rural areas, especially women, even more vulnerable.

***The discouragement of CPAs in the former homelands is not just a matter of prospective policy; it is already happening.***



In the Eastern Cape, at least three CPAs have been waiting for their land titles since 2000, even though all the necessary forms were signed by the Minister. Despite a court order in May 2013 compelling the DRDLR to transfer the land to the Cata CPA, it has still not done so. The Masakhane and Iqayiyalethu CPAs, located south of Alice in the Eastern Cape, have also waited fourteen years – and they continue to wait. While lack of capacity and poor management within the DRDLR are certainly related to the delays in land transfers to CPAs, it seems that there is also another agenda at play. One of the underlying reasons for the non-transfer of land to CPAs emerges in an affidavit from the Cata CPA's court case:

*The practicalities in the facilitation of the transfer of the land have been cumbersome and have now encountered fierce objections by the traditional leaders who state that the agreements transferring ownership of rural land to community-based associations undermined their authority. In various discussions with traditional leaders they are resolute in objecting to the transfer of land falling under their authority to CPA. The land in question falls under Chief Ulana and in order to get a long lasting solution it is imperative that Chiefs should accept the process.<sup>3</sup>*

Members of the Cata CPA have barely heard of Chief Ulana. The traditional leaders they recognise have been fully supportive of the transfer of title to the CPA. Some of them sit on the CPA committee.

The Cata case suggests that one of the main reasons for the delay in transferring land to CPAs is that the government is committed to pandering to the demands of the traditional leader lobby, including the Congress of Traditional Leaders of South Africa (Contralesa). This lobby wants exclusive ownership and control over land in the former homelands. At the same time, the government's attitude towards CPAs reveals a serious reversal of policy commitments that emerged during the 1990s, which supported black people's right to choose how to best to constitute themselves as groups.

### A lack of capacity (human and financial) to support land reform beneficiaries

The re-opening of the window in July 2014 to lodge restitution claims has re-initiated conversation about the DRDLR's poor track record in supporting and communicating with restitution beneficiaries, including CPAs. It is commonly believed within the DRDLR that CPAs have failed, exemplified by Minister Nkwinti's speech at a Land Tenure Summit convened by DRDLR in Johannesburg in September 2014 (Weinberg 2014). CPAs are indeed struggling. In its 2011–2012 report on CPAs, the DRDLR surveyed around 1 000 CPAs in the country and noted that they were struggling to function and needed more support.

However, scholars and community activists alike have pointed out that CPAs have struggled because of a lack of support from the government and not because they are so inherently flawed that they cannot succeed. As a participant in the first session on CPAs at the Land Tenure Summit argued, 'it is not that CPAs have failed agrarian reform, but agrarian reform that has failed CPAs'. The current CPA registrar's office is small and under-resourced. This has led to a range of problems. Government officials tasked with helping to set up CPAs often cut and paste constitutions from other CPAs, leading to a lack of connection between land tenure practices on the ground and the CPA's constitution. The CPA office has not communicated adequately with land reform beneficiaries or with parliament – since it was established eighteen years ago, it has published only three annual reports (2009–2010; 2011–2012; 2013–2014).

The delay in the transfer of title deeds to CPAs has been a result of the DRDLR's bias towards agreeing to traditional leaders' demands, as well as a major symptom of the DRDLR's failure to support CPAs. CPAs still waiting include the Magokgwane, Bakubung ba Ratheo, Bakwena ba Molopyane and Goedgevonden CPAs in North West, the Mawubuye Umhlaba Wethu and Mahubahuba Bakone CPAs in Mpumalanga, and the Tladi and Gamawela CPAs



**PHOTO 2** Members of the Mawubuye Umhlaba Wethu CPA from Barberton, Mpumalanga, inspect the land they have claimed (2013)

in Limpopo (LAMOSA 2013). In a report on CPAs released by the DRDLR in 2011–2012, the DRDLR admits that the failure of most CPAs is related to lack of support – in terms of human capacity, training programmes and financial aid – from the side of the government. But since this admission is not widely publicised, CPA committees often find themselves faced with angry members who question why the development money has been so long in coming and accuse the committee of ‘eating the money’ themselves (Interview with Mawubuye Umhlabu Wethu CPA 2013). The delay in the transfer of title generates an atmosphere of distrust within the CPA, which generates new conflicts and worsens existing conflicts within the group.

*CPA committees often find themselves faced with angry members who question why the development money has been so long in coming and accuse the committee of ‘eating the money’ themselves.*

### Exclusion of most people in rural areas from the ability to make decisions about land

Under the DRDLR’s new set of policies, people’s land rights under communal tenure have been made more conditional and less secure. The DRDLR’s justifications of the conditions attached to communal tenure rights are paternalistic (i.e. they exclude people from the decision-making around land). According to the new policies, the only way to acquire financial support for land received through a land reform programme is through the **Recapitalisation and Development Policy Programme (RDPP)**. The RDPP needs applicants to prove ‘productivity’ on the land. ‘Productivity’ is not defined, meaning that the process is open to arbitrary decisions and manipulation by officials. In this way, recent policies allow people less choice about restitution and their own development.

Regarding restitution, the Parliamentary Ad Hoc Committee on the Legacy of the 1913 Land Act pointed out that land reform is not about agriculture only, and productivity should not be measured in terms of commercial agricultural viability only. The Committee added that ‘it is vitally important that land reform should address the various needs of the beneficiaries, for example, those [who] want land for residential purposes’ (Ad Hoc Committee 2013: 21). Post-settlement support ‘should also not only be seen in terms of the Farmer Support Programme (FSP) or the existing Recapitalisation and Development Programme which targets farming with strategic partnerships’ (Ad Hoc Committee 2013: 21).

*...the intention of previous land reform laws was to recognise and secure the underlying rights of these categories of people, not render them tenants in perpetuity...*

By making restoration conditional on cost and productivity, the implication of the new policies is that land ownership is neither appropriate nor allowed for most people living in the former homelands (DRDLR 2013). Instead, ownership is reserved for a small elite, condemning most people to a system of provisional tenure and state leasehold that is essentially the same as the ‘trust tenure’ imposed by the South African Development Trust in terms of the 1936 Native Trust and Land Act.

The ownership status of most of the land in the former homelands is reflected in the Deeds Registry as owned by the Government of the Republic of South Africa. Much of this land is held in trust by the state on behalf of specific groups of people who were prohibited by law from owning it outright because of their race (Budlender and Latsky 1991). There are a variety of such trust arrangements, some providing rights equivalent to ownership for groups who had purchased the land historically, others acknowledging long-term historical occupation of the land, and others providing lesser occupation rights (Budlender and Latsky 1991). The new policies try to convert such rights to conditional leasehold or ‘institutional use rights’.<sup>4</sup> The CLTP states that if land is transacted, households will be compensated only for ‘land-related investments rather than the land itself’ (DRDLR 2013). This flies in the face of the IPLRA’s guarantee that people be compensated for any loss of occupation, use or access rights to land. In a similar vein, the State Land Lease Policy provides that tenure awards granted to labour tenants and farm occupiers should take the form of long-term leases conditional on the payment of a nominal rent (DRDLR 2013: SLLP). Yet the intention of previous land reform laws was to recognise and secure the underlying rights of these categories of people, not render them tenants in perpetuity.

The central fallacy of colonial thought on customary land tenure was that it confers no property rights in land. This fallacy has been subsequently internalised and used for similar purposes by post-colonial governments (Okoth-Ogendo 2008). Instead of addressing the legacy of the 1913 Land Act and other such laws, recent land reform policy appears to mimic some of the Land Act’s modus operandi. Unfortunately, Catherine Cross’ (1991: 95) assessment of the government’s approach to communal land tenure in the 1980s has resonance with land laws and policies introduced over the last decade: ‘Faced with collapsing policies and apparently desperate, the state has turned towards sweeping tenure innovations of a free market character within the homelands framework.’

## 6. EXPLAINING THE FAILURES OF THE CLTP

There is an ongoing debate among analysts as to why the government has failed to introduce legislation that would lay the foundation for resolving land issues faced by millions of people living under communal tenure. One of the difficulties is that the government does not act as a single body – officials within the government often hold differing views that are in tension with one another. Bearing that in mind, this section discusses some of the factors that might inform the state's poor record on communal tenure reform.



### Land reform lacks resources

Land reform in general is underfinanced and lacks adequate human capacity (Cousins and Hall 2013; Ntsebeza 2008). It makes up only 1% of the national budget, most of which goes towards the land restitution programme, in which thousands of claims must still be settled (Cousins and Hall 2013). The budget figures indicate that the government is not prioritising this aspect of development, despite its rhetoric to the contrary (Cousins 2013; Cousins and Hall 2013).

### Government prioritises investors

The failure of communal tenure reform has occurred in the context of the government's 'neoliberal' economic turn. Since 1999, the government has increasingly taken on board proposals by lobby groups like AgriSA, which have argued that investors would be scared off by any systemic changes to South Africa's property system. They have emphasised the importance of private property rights as the most secure and attractive form of land tenure to investors. The government's latest land laws and policies make it

clear that it intends to prioritise investor security over the security of tenure of most people living in the former homelands. White commercial farmers – and to a lesser extent, emerging black commercial farmers – are the only groups reaping the benefits of South Africa's land reform programme (Cousins 2014).

*... government's latest land laws and policies make it clear that it intends to prioritise investor security over the security of tenure of most people living in the former homelands.*

These trends are outlined in the **National Development Plan (NDP)**, which states that the priority for land reform will be the 'transfer of agricultural land to black beneficiaries without distorting land markets or business confidence in the agribusiness sector' (NDP 2011: 206). The trends are also evident in the RDPP, which is now the only form of financial support for land reform (including restitution) beneficiaries (Cousins 2013). In order for these funds to be released, applicants must show that they have a business plan and a 'strategic partner' (Cousins 2013). Strategic partners are usually commercial farmers and BEE-accredited business people from the private sector (Cousins 2014). Many of the business people involved in strategic partnerships, especially around mining, are also closely tied to traditional leaders. The requirement of a business plan and strategic partner does not bode well for beneficiaries with limited resources. Research has shown that money released through the RDPP has sometimes benefitted strategic partners at the expense of land reform beneficiaries (PLAAS 2013).

### Government and experts 'know best'

As this article has mentioned, an attitude of paternalism has characterised much of the government's response to questions of land tenure reform in communal areas. In the process, the government consolidates the power of economic and political elites (black as well as white) and further excludes people in rural areas from decision-making about land reform. This has led to an assumption that government and 'experts' know what is best, and a failure to adequately consult people in rural areas about what laws and policies would work best for them.



## Political insecurity drives policy

A sense of political insecurity on the part of the ruling party, the African National Congress (ANC), could also be behind some of the DRDLR's decisions. This was particularly relevant with the reintroducing of the Restitution Act just before elections. In the context of claims by opposition parties like the Economic Freedom Fighters (EFF) that land reform has failed, the ANC was pointing to the Restitution Act (and simultaneously distracting from the failure of land reform more generally) to say it is taking action.

## Perceived power of traditional leaders

The ruling party's insecurity has also played a major role in the rise of traditional leaders in South Africa, including attempts through laws like the CLRA to give them increased power over land. Marais (2011: 424) argues that the ANC is trying to get the public to buy into their version of custom and tradition, in the hopes of preventing the development of rising dissatisfaction with the government, leading to a 'crisis of authority' and threatening the ANC.

Mahmood Mamdani (1996) has argued that South Africa is experiencing the continuation of 'decentralised despotism' (indirect rule by the state through traditional leaders), which was entrenched by colonial and apartheid governments. Since other African countries have experienced similar spurts in traditional leaders' powers post-independence, South Africa is not exceptional. However, traditional leaders' powers in post-apartheid South Africa are not merely a continuation of their positions in the previous era. The government's tendency to give more power over land to traditional leaders is linked to South Africa's specific economic and political conditions over the past twenty years (Ntsebeza 2008).

The government (and this includes many opposition parties in parliament) has the impression that traditional leaders have widespread support in rural areas and therefore can bring them votes (Ntsebeza 2008; Oomen 2005). For example, in 2013 South Africa's main opposition party, the Democratic Alliance (DA), announced across multiple media platforms that AbaThembu King Buyelekhaya Dalindyebo had left the ANC to join their ranks (SAPA 2013). It is unclear why the DA would create a media frenzy around recruiting Dalindyebo, opposed to any ordinary member, unless they saw him as a significant figure who could bring them votes. Research has long disputed the assumption that traditional leaders carry widespread support in rural areas (Ntsebeza 2008; Oomen 2005). Regardless, political parties' impression of rural areas as in the hands of traditional leaders has persisted.

Political parties' belief in the power of traditional leaders is informed by a number of factors:

- The ANC's desire to placate traditional leaders initially (in 1994) came from a fear that the IFP would mobilise traditional leaders to respond violently and boycott elections, as they had done in the lead up to the 1994 election (Oomen 2005; Ntsebeza 2008).

- The ANC's brushes with the IFP in the early 1990s have led the ANC to try to woo the IFP's voters in KwaZulu-Natal by pandering to traditional leaders (Oomen 2005).
- During the anti-apartheid era, the ANC struggled to establish democratic structures in rural areas that challenged traditional leaders. (Oomen 2005; Ntsebeza 2008). This had made the ANC uneasy about its knowledge of and reach within rural areas, especially the former Bantustans (Oomen 2005).
- The ruling party's uneasiness with its rural base has increased as people in rural areas have become more and more disenchanted with local government officials and the failure of service delivery. There has been a spike in service delivery protests since 2009 (Municipal IQ 2014).
- In the absence of responsive local government, some people in rural areas have turned to traditional leaders – often out of desperation (Ntsebeza 2008). As a result, some traditional leaders have gained greater authority, as without them people cannot get, for example, proof of address letters that are necessary to apply for social grants. But many people also have not approached traditional leaders, even though government officials have failed them.
- When the ANC first came to power, its initial assumption was that traditional leaders who were 'allies' (that is, those who resisted the Bantustan system and supported the ANC) would work with them and accept 'ceremonial' roles (Ntsebeza 2008). However, it soon became clear that traditional leaders would not accept the replacement of tribal authorities with democratically elected structures to manage land in the former homelands (Ntsebeza 2008).
- Traditional leaders have very strong lobbying power in the form of *Contralesa*. This has meant that traditional leaders' views have infiltrated the government's thinking on communal land tenure reform, while the voices of people in rural areas have either gone unheard, been ignored or aggressively silenced. An example is the former president of *Contralesa*, Phatekile Holomisa, who is an ANC MP and has been vocal in his support for the TCB.
- There are significant economic interests at play in the government's courting of traditional leaders. Over the past ten years, it has emerged that many of the former Bantustans are much richer in minerals than the apartheid government believed (Claassens 2014). In particular, there is a rush for platinum, chrome and titanium in Limpopo and North West. There are also deposits of coal in Mpumalanga and KwaZulu-Natal and rare earth metals in the Eastern Cape.
- The government also favours traditional leaders because it is very convenient for themselves and mining companies to negotiate with a single individual or institution to acquire land for mining – that is, a traditional leader or traditional council – and avoid the 'messy' and complex process of negotiating with all the components parts of a community who can later hold them to account (Claassens and Matlala 2014).

In the process of traditional leaders' elevation, people living in the former homelands have become 'subjects' with second-class land rights (Claassens 2014).

## 7. AN ALTERNATIVE VISION FOR LAND REFORM: THE ROLE OF COMMUNAL LAND TENURE

### Engage with rural people

The challenges facing communal tenure areas are complex and difficult. The law can only take us so far, as tenure security derives as much from 'locally legitimate landholding' sites as from legislation (Okoth-Ogendo 2008). By 'locally legitimate landholding' sites, Okoth-Ogendo means that people depend on friends, relatives and residents in their local area to recognise and reaffirm their land claim – and to protect their claim from being thrown out. However, this does not justify the government pretending to consult, but in reality ignoring inputs by people in rural areas. The government must fundamentally change its approach towards land reform if it is to honour the Constitution's principles and meet the needs of people in the former Bantustans, who make up nearly a third of the country's population. A key priority would be to engage constructively and transparently with the suggestions for land reform put forward by people in rural areas.

***The government must fundamentally change its approach towards land reform if it is to honour the Constitution's principles and meet the needs of people in the former Bantustans, who make up nearly a third of the country's population.***

Recent research shows that people in the former homelands are engaged in attempts to find positive ways to reconcile citizenship rights and indigenous precedents. An example of this is the way in which rural women are redefining land rights in the context of living customary law. According to the stereotypes of official customary law, men were the only people entitled to inherit and manage land (although this was contested as far back as the 1930s) (Weinberg 2013). Using evidence from surveys, parliamentary submissions and interviews at community workshops, Claassens and Mnisi-Weeks argue that single women in the Eastern Cape, KwaZulu-Natal and the North West have increasingly been allocated residential sites since 1994 (Claassens and Mnisi-Weeks 2009). These changes have occurred as a result of local processes of struggle and negotiation around land rights led by women.

As the nominal owner and trustee of most communal land, the state has a fiduciary duty to act in the best interests (and not on behalf) of rural people. To do so it must relinquish some of its decision-making and landownership power to people living in rural areas, while at the same time playing a support or facilitation role where necessary.

### Build on the IPILRA

A combination of stakeholders, including non-governmental organisations (NGOs) and community-based organisations (CBOs), have suggested that to strengthen and recognise rural people's land rights we can build on an already existing law: the Interim Protection of Informal Land Rights Act (IPILRA). The IPILRA helps to protect people whose informal rights to land are threatened, but its impact has been limited in practice because some traditional leaders believe that they own the land and this is not disputed by the DRDLR. The IPILRA's enforcement has also been difficult because many DRDLR officials do not know what it is or how to work with it. To more effectively protect rural people against the deprivation of their land by traditional leaders and private enterprises such as mining companies, the act would need to be amended so as to:

- be made a permanent law (it is currently renewed annually);
- protect individuals within families and households from decisions being made without their consent;
- explicitly recognise and protect women;
- allow for inquiries if there are disputes about the disposal of land.

Ultimate authority for the enforcement of the IPILRA lies with the state, which is the nominal owner of most of the land in the former Bantustans.

### Make different land tenure options available

An additional important tenet of a new communal land tenure policy would be to offer people a spectrum of land tenure options from which to choose, including the involvement of communal property institutions and rights on state-owned land that are legally protected. The spectrum of land tenure options should not be narrowed to traditional councils, as this article has already argued. It should also not be narrowed to individual title deeds.

As Cousins et al (2005) have argued, a blanket push for individual property rights can lead to a single household member gaining exclusive access to and control of land, to the detriment of other household members. Individual titling can therefore lead to greater insecurity for people who have less power in the household, such as women. At the same time, since individual title deeds are still often the most valued kind of property-holding – due to the historical factors outlined in the first section of this article – they cannot be discarded as an option for land reform beneficiaries only, while still retained as an option for other people. Such a policy would be discriminatory.<sup>5</sup> The spectrum of land tenure options should be broadened and should apply equally to all South

Africans. If the state threw its authority behind forms of tenure other than only private property and traditional council ownership, it would go at least some way to strengthening the security of those forms of tenure.

### Strengthen the system of land administration

The state also has a responsibility to set up a better-capacitated and more stable land administration system. This would include increasing capacity to resolve the urgent and serious problems facing groups in rural areas regarding the protection of their land rights via communal property institutions – including its failure to honour existing commitments and court awards to CPAs. The DRDLR should support initiatives within communities to

democratise land-holding structures, and make an informed decision about the structure they wish to use to manage land.

### Put pressure on the state

While the state is an essential role player, others play an important function in putting pressure on the state to change its agenda. NGOs, CBOs, as well as groups and individuals in communal areas, have vital roles to play in this regard. They can open the political space for mobilisation around the realisation of security of tenure, provide visions for an alternative social order, and support people in rural areas in their struggles against laws and practices that undermine their land rights (Cousins and Hall 2013).

## 8. CONCLUSION

People living in the former homelands – in areas where the government understands ‘communal land tenure’ arrangements to exist – continue to have insecure land rights. Instead of introducing legislation to secure the rights of people living in these areas, the post-apartheid government has courted commercial farmers (with their economic clout) and traditional leaders (with their supposed ability to bring in votes). The state has also failed to engage in a transparent and accountable way with the solutions put forward by rural constituents. Legislation on its own will not solve the problem of insecurity of land tenure but it will provide people in rural areas with a much stronger base from which to make claims on land.

There is a great deal at stake in developing communal tenure legislation that meets the needs of people living in the former homelands. In areas like the platinum-rich North West, traditional leaders and mining companies are lining their pockets while most people lack access to basic services. In many other rural areas, most people are in limbo, unsure of whether they can use the land on which they live and are vulnerable to ‘exploitation through the abuse of custom or denial of access to state institutions’

(Okoth-Ogendo 2008: 99). In this environment of uncertainty women have suffered most – as they did in the past.

The reason for the government’s approach seems to be rooted in its sense of political insecurity in rural areas and the lobbying power of economic interests and traditional leaders. The government has not seriously interrogated the property system it inherited in 1994, with its skewed emphasis on the superior nature of individual property rights and its negation of alternative forms of land holding. Instead, the government has reinforced the existing property system by making the rights of people in the former homelands conditional on ‘good behaviour’ while reserving ownership for powerful elite partners such as traditional leaders. A deep irony is that the restitution programme, which was designed to provide redress to those who suffered forced removal and bore the brunt of the Land Act, is now being reconfigured in a way that might consolidate the power of elites.

While land reform is complex, NGOs, CBOs and people in rural parts of the country have already played an important role in articulating some solutions. It is up to the government to engage with these visions respectfully and transparently.



## 9. ENDNOTES

<sup>1</sup> While the Bantustans had their roots in the reserves established by the 1913 Land Act – and even earlier – the boundaries of the Bantustans were defined according to the 1951 Bantu Authorities Act and consolidated with the promulgation of the Promotion of Bantu Self-Government Act of 1959.

<sup>2</sup> South African property law is a hybrid body of law, drawing on the Constitution, statute and common law. South African common law includes elements of Roman-Dutch law as well as the legal rules and practices developed by South Africa's own courts over the years.

<sup>3</sup> Affidavit in Support of an Application for Postponement, by Ntombizodwa Mashologu, Chief Director of the Department of Rural Development and Land Reform in *Cata Communal Property Association vs. Minister of Rural Development and Land Reform and Others* (June 2012).

<sup>4</sup> The *State Land Lease Policy* (July 2013) envisages leasehold, while the *Communal Land Tenure Policy* (August 2013) envisages institutional use rights. Both policies apply to all the land in the former Bantustans – apart, interestingly, from KwaZulu-Natal (2.1.1 of *State Land Lease Policy*). Neither policy references the other.

<sup>5</sup> If the government prevented land reform beneficiaries from acquiring individual title deeds, that would be discriminatory on the ground of race. Since most land reform beneficiaries are black or coloured people who would not have been allowed to possess title deeds under colonialism and apartheid, it would be discriminatory to allow whites to continue to hold individual title – which is presently the most secure form of tenure – but not land reform beneficiaries.

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