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TRANCRAA and communal land rights: Lessons from Namaqualand

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The Transformation of Certain Rural Areas Act, Act 94 of 1998 (TRANCRAA) is the first comprehensive legislation to reform communal land tenure in South Africa. It aims to transfer land in 23 former 'coloured rural areas' to residents or accountable local institutions. The TRANCRAA process in Namaqualand holds lessons for wider processes of tenure reform, including the implementation of the proposed Communal Land Rights Act. This policy brief argues that the time, funding and institutional support required to carry out tenure reform have been seriously under-estimated, and that reformed tenure rights are ineffective and vulnerable if isolated from other entitlements such as training, finance and integrated development initiatives. A neo-liberal assumption that 'property rights' and 'markets' by themselves will transform rural areas where people are in deep crisis due to unemployment, corruption, food insecurity and HIV/Aids is ill-founded and dangerous.

Communal land tenure reform is probably the most intractable part of South Africa's land reform programme. Whether in former 'coloured reserves' or 'homelands', insecure tenure is an aspect of the persistent apartheid of space, assets and opportunities, hinders economic development and leaves people vulnerable in development processes (Kepe 2001; Lahiff 2001). An estimated 13 million people in the former homelands are still waiting for legislative changes to make their land rights secure. The 1999 Land Rights Bill was scrapped after opposition from various quarters. In August 2002 the government published the draft Communal Land Rights Bill (CLRB) for public review, leading to threats of violence from some traditional leaders who see reform of the current system as a challenge to their power base. Addressing the legacy of gender inequality remains a major challenge (Claasens 2003; Meer 1997).

TRANCRAA aims to transfer ownership of 23 rural areas covering 18 000km^2 in four provinces to residents or accountable local institutions and is the first comprehensive tenure reform in the special areas created for apartheid's oppressed and dispossessed groups. Moving beyond permit-based and authoritarian state control, the Act honours human and constitutional rights by mandating people to decide future land ownership, by requiring that their historical and current use rights be respected, and by requiring that land governance be democratic and non-discriminatory. TRANCRAA represents negotiated legal reform and could be said to epitomise 'the South African way'.

TRANCRAA has important implications for the implementation of the CLRB. Experience with implementation of the Act to date reveals that:

- links between tenure reform and development are weak or absent
- local government is reluctant to support land management in communities opting for communal property associations (CPAs) and has no formal obligation to provide services to people outside municipal township areas
- the process of consultation and participation demands time, skill and resources
- preparing and enforcing appropriate land management plans presents a major challenge to government and community institutions
- recording and mapping family and individual user rights is essential but requires a high degree of transparency and community involvement in order to avoid appropriation of common land by powerful individuals
- conflicts over control of communal land by vested interests, including local government, deeply affect the tenure reform process
- protecting and enhancing the rights of vulnerable groups requires special attention throughout the tenure reform process.

Tenure reform in Namaqualand

TRANCRAA grew out of popular pressure and civil society advocacy during and after the struggle against apartheid. The Act was drafted through a consultative process in the mid-1990s to pass through Parliament and be signed into law in 1998. The prescribed transitional phase of TRANCRAA was implemented in the six rural areas of Namaqualand from January 2001 to January 2003. After a delayed tender process, in October 2001 the Department of Land Affairs (DLA) selected the experienced land NGO Surplus People Project (SPP) as the official facilitator of the process. From November 2002 to January 2003 referenda over land ownership were held in five of the six areas (SPP 2002a). Based on reports by SPP and the municipalities involved, the Minister of Agriculture and Land Affairs must make the final decision about the transfer of land.

The main aim of TRANCRAA is to 'provide for the transfer of certain land' to (a) a municipality; (b) a communal property association (in terms of the CPA Act, Act 28 of 1996); or (c) another body or person approved by the Minister. The transfer of land applies to the so-called Act 9 Area used in common by the community and held in trust by the state, but not to township areas, which will continue to vest in the municipality (except residential plots, to which people may register private title). TRANCRAA provides resources to record and map family and individual use rights, including resolving of conflicts, and may therefore build on a diversity of rights to land rather than assuming uniform and equitable rights. It explicitly defines the accountability of a municipality to the right-holders, should it become the owner of the land (Box 1).

TRANCRAA allows for a process of facilitation and awareness building. Locally nominated or elected transformation committees

Box 1: Extract from TRANCRAA on municipal accountability

A municipality:

1. Must afford residents a fair opportunity to participate in the decision-making processes regarding the administration of the land;
2. Must not discriminate against any resident;
3. Must give residents reasonable preference in decisions about access to the land;
4. Must not sell or encumber the land, or any substantial part of it, without the consent of a majority of residents at a public meeting called for that purpose;
5. Is accountable to the residents;
6. Must manage and record effectively all financial transactions regarding the land; and
7. Has fiduciary responsibilities in relation to residents.

Source: TRANCRAA, section 4

played a key role in carrying out the tasks of the transitional phase, in co-operation with *meent* (commonage) committees (established earlier to assist municipalities with managing the 'new farms' acquired through the land redistribution programme). SPP had to deliver both adult education (for lawyers, politicians and developers with no knowledge about the Act) and basic democracy training for residents. Together with the local committees they prepared and published regulations regarding livestock and cropland management. Working with professional surveyors they recorded family claims to cropland based on historical use, which proved to be a dynamic and problematic process of negotiating rights and boundaries. Tenure reform turned out to require time, resources and skills beyond the imagination of even experienced facilitators. Activities proceeded through monthly meetings between SPP and transformation committees, quarterly *loods* (pilot) committee meetings (bringing together DLA, municipalities and SPP for a review of progress and decision making), community consultations, plus a series of crisis management meetings at various levels.

The Act leaves open the means of expressing the community preferences and the decision to hold advisory referenda was arrived at through consultation between SPP and the transformation committees. From November 2002 to January 2003, community referendums were held in five of the six areas (due to conflicts, Komaggas did not vote). People voted on three ownership alternatives: 1) CPA, 2) municipality or 3) option of own choice (including trust ownership and individual title).

The results show a majority for CPAs in four of the five areas (Table 1). Few people voted for the 'own choice' option (1%). A majority for the CPA option was pronounced in Richtersveld (94%), where community mobilisation had been vigorous as a result of court cases dealing with land claims, and where a CPA was already formed. Excluding Richtersveld, the results are almost evenly divided between CPA (50%) and municipality (47%), showing a close race in divided communities. The African National Congress (ANC) at district and municipal level campaigned in favour of municipal ownership, arguing that only publicly-owned commons could expect state support in future. SPP tried to appraise the options in a balanced way but also stressed arguments in favour of municipal ownership. Residents generally rejected individual of commons as impractical and socially irresponsible: the term '*eienaarskap*' (ownership) has strong cultural connotations and is more associated with community than government. This attitude was reinforced when people saw the redistribution farms deteriorate because the municipalities did not maintain them, while users on short-term lease contracts had few incentives to repair existing infrastructure. The referendum victories for CPAs may also express a distrust of municipalities for failing to deliver on past election promises.

Although the Act recognised a range of tenure options, the referendum could not capture the differences between tenure practices in the old communal areas and new redistribution farms, or whether people would have preferred special tenure arrangements for family dryland plots and irrigation gardens. The referendum turnout of around 35% of registered voters might suggest that many are not active land users or the common perception that past consultation processes such as those on minerals and municipal demarcations were effectively ignored. Some thought that having to vote only for a CPA or for the municipality offered little real choice. CPAs were known to have a poor track record around the country and the municipal option would merely shift ownership to a lower and poorer level of the state.

New municipalities

The demarcation of new municipal boundaries in the run-up to the local government elections of 2000 was a blow to the TRANCRAA process. From 1995 to 2000 the boundaries of the transitional local councils coincided with those of the reserves as geographical and social units. Today, the new enlarged municipalities include 'Act 9 areas' as well as privately owned farms and large towns. For instance, the Nama-Khoi Municipality (Springbok) includes the three former reserve areas of Komaggas, Steinkopf and Concordia, about 16 000 people and 6 300km^2 of communal land. To meet the costs of servicing such vast areas and scattered people, municipalities are trying to increase the collection of rates and taxes, something resisted by residents of the rural areas.

TRANCRAA could have simplified the institutional complexity that communities face as users of 'old Act 9 land', 'new farms' (managed by the municipalities in which they fall) and 'promised' state farms. Residents were informed through a newsletter that all these lands could be transferred to the entity of people's choice following the referendum (SPP 2002b). This was in accordance with a government notice in terms of the Local Government: Municipal Systems Act of 2000. A senior DLA official confirmed that it was

Table 1: Results of community referenda on land ownership

	Mun.	%	CPA	%	Own	%	Spoilt	%	Total
Leliefontein	526	59 %	327	37 %	5	1 %	31	3 %	889
Richtersveld	42	4 %	939	94 %	2	0 %	17	2 %	1 000
Pella	271	42 %	375	53 %	1	0 %	6	1 %	653
Concordia	183	44 %	221	53 %	1	0 %	14	3 %	419
Steinkopf	922	45 %	1 074	52 %	22	1 %	46	2 %	2 064
Total	1 944	39 %	2 936	58 %	31	1 %	114	2 %	5 025

the intention that all the lands should be included in the same transfer process. This became a contentious issue during October-November 2002, when the municipalities of Khâi-Ma and Nama-Khoi chose not to follow SPP and DLA advice to include the 'new farms' in the TRANCRAA process. This happened so late that, apart from ANC leaders, voters in Pella and Concordia assumed that the new farms were included. Those leaders in Pella who advocated CPA ownership, and won the referendum, were incredulous when they learnt this and said it would cause uproar among those supporting the CPA option. The only municipality that 'won' the referendum, Kamiesberg (Leliefontein), had included the 'new farms' in the referendum in line with SPP advice.

The state and the new commons

TRANCRAA offered an exceptional opportunity to re-design the system of common property management. However, DLA did not appear to be committed to supporting a new system of community-based governance and TRANCRAA offered no development assistance. Asked about the 'uncertainty' of future institutional support, a SPP facilitator responded by saying 'the only thing that is for certain... there is not going to be any support!' Former DLA employees who had worked with tenure reform expressed frustration about the lack of resources for adequate implementation, service provision and sustainable development after the transfer of land. 'TRANCRAA is a chance for the state to bail out', said a lawyer from the Legal Resources Centre.

Whereas tenure reform was intended to complement and support land redistribution, during the late stages of TRANCRAA implementation insecurity and uncertainty actually increased. State-owned farms 'approved' for transfer to Act 9 communities have remained under the control of the provincial government and thus unaffected by TRANCRAA. In late 2002, NGO staff expressed fear that publicity around the commercial potential of state farms allocated to Pella residents could tempt bureaucrats to explore joint ventures with commercial developers instead of completing the transfers. In another area, a commercial project on community land disregarded the land rights local people held under both apartheid legislation and TRANCRAA.

Leaders advocating local government ownership argued that CPAs would be treated like the private farm sector, exacerbating people's fear of isolation, additional property taxes and institutional conflicts. Political leaders suggested that municipal ownership would protect people against losing land after mortgaging it for loans and would secure access for vulnerable groups such as women, small stockowners and the infirm. While central government is interested in divesting itself of land and financial responsibilities, local government showed considerable resistance to 'handing over', most likely because of the role land plays in patrimonial governance by politicians closely involved in commercial activities in agriculture, tourism and mining.

From tenure reform to transformation

TRANCRAA refers neither to the obligations of the Constitution to provide legally secure tenure nor to the government's goal of 'transforming' South African society. Some are relieved to be spared the gloss and praise a slim action-oriented Act. Others feel a reference to the constitutional commitment to social change would have been appropriate. The lack of vision is liable to affect such a process if people are not sure what the legal reform is actually trying to achieve. Fairness in property relations is a function of capabilities and achievements rather than simply access to resources such as land. Tenure reform is vulnerable if isolated from a broader process of social change and only contributes to restructuring the patterns of property and opportunity if people can substantially enhance existing livelihood practices (such as livestock farming), enter new ones (such as grape cultivation) and expand into other economic sectors. When farmers in Pella start to export dates and grapes from their currently barren lands on the Orange River, their new rights will make a material contribution to their families and to the national economy. But they are receiving little support to acquire the skills, financial resources and appropriate technology that may enable them to do so. Without these, the less powerful, particularly women, will be left behind.

Tenure reform becomes irrelevant when people cannot use their rights to enhance their productive capabilities or when only a few are empowered to exploit the endowments of many. A neo-liberal celebration of 'property rights' as a factor of change *per se* underestimates how much individual and social capabilities depend on collective responsibility and action, and plays down the impact of power relations on how people use and benefit from new rights. Arguments in favour of private property (individual, group or corporate) assume that individuals become more motivated and capable by having such rights but also that other enabling conditions, such as investment, will materialise once the property rights have been 'corrected'. However, these are the links that are the most contested in the fierce competition for resources in areas like Namaqualand where municipalities experience that available resources do not match devolved responsibilities (Hart 2002). The process of 'transformation' must therefore link land to human entitlements including education, market conditions, technology and public support. Tenure reform should strengthen, not abandon, the commitment to transform the legacy of the colonial and apartheid past with its racist and patriarchal human rights violations.

Policy lessons

TRANCRAA provides a flexible legal framework that can adapt to the diversity of conditions and needs of the 23 'Act 9 areas'. Its brevity and openness are virtues which commend it in relation to the more prescriptive and detailed approach of the CLRB. However, to move beyond the state's current approach of 'getting rid of liabilities' requires political leadership and consideration of the basic values and purpose of the reforms. TRANCRAA is a sensible Act but it lacks a proper policy to support its implementation.

TRANCRAA and the CLRB share the ambition of 'transferring land to communities', implying that rights are handed from one owner to another. However, the process should be about creating a new system of governance with a mix of adaptable and open-ended rights rather than a narrow concept of 'ownership' (Cousins 2002). The use of the concept 'community' within each of these debates is also problematic because there is rarely such an easily defined 'unit' to take charge of land governance. Workable arrangements to negotiate and find productive and just solutions to diverse interests and potentially divisive conflicts might be attainable if the institutions which take charge of transferred land are given power and capabilities that go beyond 'land' and link them to appropriate levels of local governance.

Stakeholders

The dynamic and mature relationship between Namaqualand communities, SPP and Legal Resources Centre is probably unique and therefore hard to reproduce. On the other hand, in Namaqualand there was no social movement to co-ordinate the

different areas and put pressure on government and other stakeholders. To some extent the ruling ANC at district and local level fulfilled this function, but it was slow to mobilise around the land tenure issue and ultimately did so with little consultation and debate. The role of municipalities, as both interested parties and as key implementers of the reform, was problematic. Quarterly *loods* committee meetings ensured a degree of co-ordination between major stakeholders but a broader stakeholder forum involving business, neighbouring farm owners and other government departments could have been useful to pursue development opportunities created by tenure reform.

Power

Power struggle is inherent in land governance; power relations shape the impact of tenure reform and create local winners and losers. One must consider what capacity people under the pressures of poverty, HIV/Aids and food insecurity have to influence and derive benefits from new land rights and protect themselves against corruption. TRANCRAA did not realise the constitutional right to 'comparable redress' for people who failed to gain, or even lost out, from the process. Many vulnerable households continue to derive little or no benefits from land because they have neither the money to buy livestock nor the labour to work the land. Incapacity to participate in a tenure reform process may easily translate into a loss of rights for rapidly expanding groups of vulnerable households, including those headed by children and old people.

Resources

SPP's budget for facilitating the TRANCRAA process in Namaqualand was about R1 million per year for the two-year transitional period 2001–2002. In addition, the state incurred expenses for the surveying of family croplands and for its own limited involvement. The total financial expenditure by the state may be in the region of R3 million or about R100 for each of the 30 000 inhabitants of the six Namaqualand rural areas. The budget has been tight, and was further constrained by rising petrol prices. Tenure reform in the former 'homelands' of South Africa is going to be far more demanding due to the size and complexity of the populations, areas and institutional structures. If we assume substantial economies of scale, and efficient DLA-NGO partnerships, it may be possible to do the job for 50% of the per capita cost that was incurred in Namaqualand. Even under this optimistic scenario, tenure reform in the homelands is likely to require expenditure of at least R650 million – two thirds of the total annual land reform budget. It is questionable whether South Africa wants to invest this much in communal land tenure reform, and currently budgetary allocations are clearly not sufficient. Although the CLRB promises to provide institutional support, where the funding for this will come from is far from clear. The TRANCRAA experience in Namaqualand shows that both institutional support and adequate funding are essential to the tenure reform process.

By and large, communities affected by TRANCRAA in Namaqualand live in municipal townships and will therefore continue to receive municipal services. Many communal areas throughout South Africa, however, are dispersed across communal areas and not aggregated in villages: the CLRB does not make any provision for continued service provision to such communities after transfer. Transferring title from the state to 'private' owners also implies transferring responsibility for desperately-needed water, electricity, sanitation and other services. Communal tenure reform is going to be a major test case for the South African developmental state, and there are good grounds for warning against any approach that attempts legal reform in isolation from other forms of support.

Context and follow-up

TRANCRAA became most meaningful when local people started exploring and planning new ventures that they felt were facilitated by tenure reform. This in turn led them to identify other constraints that needed to be overcome. It is unreasonable to load the challenge of poverty eradication onto the tenure reform process alone. Property rights are not the solution to all problems, nor do they exist in a policy vacuum. Coupled with support for democratic local governance and enterprise development, legally secure tenure may help people enhance their properties and incomes. Judged by the experiences in the contested commons of Namaqualand, it will take many workshops, debates, backstage meetings, compromises, surveys, plans and good ideas to make tenure reform happen and contribute to healing the divisions of the past.

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