

SUBMISSION TO THE PORTFOLIO COMMITTEE FOR LAND AND AGRICULTURE

THE COMMUNAL LAND RIGHTS BILL

Submitted by the PLAAS/NLC Community Consultation project on the CLRB

10th November 2003

INTRODUCTION

The National Land Committee (NLC) and the Programme for Land and Agrarian Studies (PLAAS) of the University of the Western Cape have been funded by DfID UK (Department for International Development) to undertake a process of community consultation around the Communal Land Rights bill. The project began in August 2003 and has engaged in consultation with representatives from over 90 rural communities in the different provinces of South Africa.¹ Various rural non-governmental organisations have been partners in the process of convening rural consultation meetings. These including AFRA, AnCRA, Masifunde, Nkuzi, TRAC North West, and TRALSO.

This submission is made on behalf of the joint PLAAS/NLC project and reflects the lessons the project has learnt about the bill during the consultation process. Land NGOs and rural communities will make their own submissions directly to the portfolio committee.

The submission is divided into various sections, being:

- 1 The need for tenure legislation
- 2 The problems with the bill
 - Rural people have no say in irrevocable decisions that affect their land rights
 - People are given no choice about who will administer their land rights ó instead traditional councils are imposed on them
 - The bill does not protect human rights in communal areas
 - The bill entrenches discrimination against rural women
 - The bill is not serious about unpacking overlapping rights
 - The content of land rights is not clear
 - Service delivery and development becomes more difficult
 - The bill cannot be implemented at scale ó what will happen in the interim?
- 3 The paradigm adopted by the bill
- 4 The solution
 - An alternative paradigm
 - A better process

¹ See "Community views on the Communal Land Rights bill" by Aninka Claassens for an account and list of consultations that took place before July 2003. PLAAS Research Report no 15. August 2003.

1 THE NEED FOR TENURE LEGISLATION

Tenure legislation is urgently necessary. There are serious problems in the communal areas in the ex-homeland provinces. These areas are characterised by severe poverty, overcrowding and isolation from economic growth and opportunity. One of the issues that inhibits development, is the lack of clarity about the status of land rights in communal areas. Who has what rights? Who must agree to changes? Who has the legal authority to transact land? One of the consequences of this confusion is that the people who actually use and occupy the land are often pushed aside and dispossessed when development and land transactions do take place. Others, purporting to act on their behalf, take the money and run.

The underlying confusion about the status of land rights, has been exacerbated by the breakdown of the land administration system in the ex-homeland provinces. In most provinces nobody has the legal power to allocate land rights, and there is no budget or staff to survey sites, maintain grazing camps, enforce dipping regimes or control the plunder of common property resources such as medicinal herbs and forests. Double and disputed land allocations are the order of the day, illegal and informal land sales are increasingly common and stock theft has reached alarming proportions. There is a serious and deepening crisis concerning land rights and land allocations in communal areas, which is impacting negatively on rural poverty. One of the inevitable results is that investors and formal and financial institutions avoid these areas. Local people find it almost impossible to raise loans for businesses, or to access housing subsidies.

Another problem in rural areas relates to infrastructural development and service provision. Local government planning and service delivery interventions are often thwarted or delayed by chiefs refusing to release land for development projects. There is no integration of the planning and service delivery role of local government with the systems of authority over land and land management in communal areas. It is very difficult to carry out development when the structure responsible for development is different from the structure that makes decisions about land. This stand-off has been exacerbated by the break-down of the old land administration system and the deepening chaos and confusion concerning land rights in communal areas.

A legislative intervention is urgently necessary - to clarify and secure the land rights of the people who occupy and use the land and thereby to facilitate development and economic activity. Because of forced removals and the legacy of the Land Acts, we are faced with conflicting and overlapping land rights in most communal areas. Thus tenure reform must also unpack conflicting rights if it is not to simply entrench past dispossession.

A viable and sustainable system of recording, enforcing and protecting land rights is urgently necessary and in other words a proper land administration system. Another challenge is to find a way of articulating a system of secure rights supported by a sustainable land administration system - with local government development and service

delivery functions so that development in rural areas can be expedited, and disentangled from the morass it currently finds itself in.

Developing tenure legislation is a very difficult job to get right especially given the legacy of intractable problems inherited from apartheid. Unfortunately the Communal Land Rights is not good enough. It is fatally flawed in various ways. If it were enacted in its present form, it would exacerbate, rather than ameliorate the problems in rural areas.

2 PROBLEMS WITH THE COMMUNAL LAND RIGHTS BILL

RURAL PEOPLE HAVE NO SAY IN IRREVOCABLE DECISIONS THAT AFFECT THEIR LAND RIGHTS

Transfer of title is an irrevocable step, which cannot be undone except by expropriation. This bill provides for the transfer of title of communal land, yet the people and communities whose land is at issue, are not consulted about whether they want title to be transferred, which land will be transferred, to whom, and what units of land will be created.

Section 18 sets out that the Minister will decide on the location and extent of the land to be transferred to a community or person (18(2)). The Minister will also decide on whether to transfer the whole of a communal area to a specific community, or to subdivide it into portions and individualise it (18(3)). Or s/he may transfer part of the land to the community and keep part of it for the state, including a municipality.

The people whose land rights are at issue, are not consulted at any stage. Nor is their consent required to the cutting up of their land, the excision of parts, or to its transfer. The best they can do is participate in the Land Rights Enquiry that precedes the Minister's decision (16).

However the terms of participation in a **Land Rights Enquiry** are not spelled out. The Enquirer is not required to establish or report on community views concerning the proposed transfers. Nor does the bill require that an Enquirer's report be made public, nor that those affected can object to the report. This is very material as the Minister's determinations are based on the report of the Land Rights Enquiry (18(1))

The only way in which those affected could have stopped a land transfer would have been to refuse to adopt and register community rules. Without registered community rules the community cannot be a juristic person thereby capable of owning land in perpetuity. However even this avenue is closed by section 19 (5) which enables the Minister to simply adapt pro forma rules and apply these to any community that fails to adopt and have community rules registered.

Previous versions of the bill required the Land Rights Enquirer to establish and report on the views of the community with regard to proposed land transfers. They also required

majority community consent prior to transfer. In earlier versions the Minister did not initiate transfers, communities requested transfers.

In the current version, however, the entire process is driven by the Minister and there is no opportunity for communities or people who oppose transfers, or the terms of transfers to stop them. Why this about-face? The reason appears to be that the drafters are aware of the inexorable nature of the disputes concerning boundaries, identity and power that land transfers would elicit and that if the bill opens any space for community consultation the process will unravel and get locked in endless delays and disputes.

The issue is not only that of disputed boundaries between communities, for example the disputed boundaries between Tribal Authorities in Kwa Zulu Natal, is also one of disputed boundaries within communities, for example some groups were given compensatory land for forced removals but put under the jurisdiction of local chiefs. They now object to their compensatory land being incorporated into the property of the host community and their land being administered by Tribal Authorities that they reject. Furthermore there are people who dispute their identity as tribal subjects they assert that their land rights are independent and derive from their South African citizenship.

PEOPLE ARE GIVEN NO CHOICE ABOUT WHO WILL ADMINISTER THEIR LAND RIGHTS – INSTEAD TRADITIONAL COUNCILS ARE IMPOSED ON THEM.

The bill provides that where traditional councils currently exist, these will become the land administration committee responsible for representing the community and carrying out ownership and allocation functions in respect of the land. This is clearly set out in the definitions section, which states that a land administration committee means a traditional council, in respect of an area where such a council has been established and recognised; and a land administration committee in respect of any other area. Section 21(2) provides that if a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council.

Unfortunately may in this context does not mean that this depends on the community's choice. No procedure or option for enabling community choice is set out. May in this context, merely means that the bill authorises traditional councils to fulfil the powers and duties of the land administration committee. Communities are given no choice about who will administer and allocate their land rights. As long as a traditional council exists in the area, it must play this role.

The Traditional Leadership Governance and Framework bill provides that 30% of the members of traditional councils must be women, and that a percentage of their members must be elected. Thus perhaps this section will be justified on the basis that traditional councils will be different from the Tribal Authorities of old. However the TLGB is fatally flawed in that it contains a transitional arrangement which deems pre-existing

Tribal Authorities to be traditional councils (25(3)). While Tribal Authorities are meant to transform over time to meet the requirements about women and a percentage of elected members, the bill contains no sanction against those that do not.

Tribal Authorities were created by the Bantu Authorities Act, which sparked rural rebellions and mass arrests throughout South Africa when it was enacted. The TLGFB gives Tribal Authorities perpetual life and the Communal Land Rights Bill gives them powers over land that surpass any that they previously enjoyed.

The bill does not vest ownership of the land in Tribal Authorities, it vests ownership in communities. However if communities have no choice over who will administer and allocate their land rights, then they have no effective means of asserting or protecting their land rights against the structure that represents them. The Constitution provides that; "The state must respect, protect, promote and fulfil the rights in the Bill of Rights (7(2)). One of the rights in the Constitution is the right to tenure security (25(6)). Yet the bill puts the administration of the right to tenure security in the hands of a structure that rural people cannot choose, elect or replace. What is the point of making the community the owner of the land if the law imposes a structure on the landowners that they have no means of disciplining or replacing? Chapter 7 abrogates the states duty to respect, protect, promote and fulfil the right to tenure security. It also undermines rural people's ability to protect and fulfil their own land rights.

There have been problems of human rights abuse in some Tribal Authority areas for a very long time. Once traditional structures gain legal control over the allocation and administration of land rights, they have a guaranteed source of revenue and power far beyond anything they have previously enjoyed. Their traditional functions would be re-enforced by land-lord powers, with the result that those who oppose them could find their tenure security threatened.

There is a serious problem of chiefs and headmen charging for land allocations in many communal areas. Section 24 is likely to re-enforce this widespread practice because 24(3) provides that the land administration committee must take measures to ensure the allocation and registration of land rights. Section 24(2) provides that a decision by a land administration committee that "has the effect of disposing of communal land or a right in communal land", must first be ratified in writing by the Land Rights Board. This measure was presumably designed to curb the burgeoning practice of informal land sales by chiefs and headman. However there is a grey area about what constitutes land allocation and what constitutes disposal. Often the person who allocates the land (for a fee) calls it an allocation, while the person who pays, perceives it to be a land purchase. Invariably no formal sale or disposal has taken place, because the whole process is informal, but many buyers do not understand this. Section 24 (2) is not clear enough to fix the problem

THE BILL DOES NOT PROTECT HUMAN RIGHTS IN COMMUNAL AREAS

The problem of landownership structures abusing land rights in communal areas is unfortunately widespread and it is not restricted to traditional structures. There are also many instances of Communal Property Association committee members acting unilaterally, treated communally owned land as their private property and evicting members or restricting their access to the communal land.

Previous versions of the bill contained provisions that required the community rules governing land administration to meet human rights standards. The content of community rules is very important. They determine the powers and functions of the land administration committee (24(1)). They also set out who is entitled to hold new order rights (s 5(1)). The bill does not contain a requirement (as in previous drafts) that the majority of the community must agree to the content and adoption of community rules.

Nor does the bill clarify who, within the community, will be responsible for driving the process of drafting community rules? Given that the bill requires existing Tribal Authorities/traditional councils to fulfill the land administration function, it is likely that they will be the bodies that end up drafting community rules. Yet, the TLFGB, which creates and regulates traditional councils, repeatedly refers to traditional councils being governed by customary law.

The tension between customary law and human rights is well known. The problem of women's rights under customary law is set out below. There are other issues as well, to do with transparency, accountability and democracy. One way to handle this tension is to acknowledge it, and to set standards that require customary systems and group ownership systems to conform with human rights standards over time. That customary systems are flexible and capable of change is evidenced by changes that are already occurring in some areas: for example women with children being allocated land by some chiefs and headmen.

The state needs to encourage this process of change, and intervene where human rights are abused under customary systems or in communal areas. Tenure systems are a key area of interface between custom and the rights set out in the bill of rights. **Yet this draft of the bill sets no human rights standards or requirements with regard to land administration**, nor does it provide for accessible officials to support vulnerable rights holders, or to provide recourse where rights are abrogated.

The seriousness of this oversight is borne out by the problems currently being experienced by members within Communal Property Associations. Individual members land rights are vulnerable because they struggle to enforce their land rights against CPA committees who ignore them. Ironically it is often easier to enforce rights against the state, and to get responses from government officials, if you are poor, than it is to make local landownership structures abide by the law. The only way to enforce land rights against a communal ownership structure is to go to court, and most poor rural people do

not have the resources to do this. For poor people it is cheaper and easier to lodge a complaint at a government office, than to enforce rights through the courts.

THE BILL ENTRENCHES DISCRIMINATION AGAINST WOMEN IN COMMUNAL AREAS.

Problems faced by women in communal areas

Women face serious problems under communal tenure. Under customary law only men are allocated land. Women can generally access use rights to land only via relationships with men. Wives lose everything at divorce because the land is held by the husband, and the marital house attaches to the land. Furthermore on the death of husbands who have not made wills, the land (and thereby house) passes to male relatives; the widow and daughters inherit nothing. The fact that a woman's access to land is subservient to her husband's is also expressed by the fact that men can, and do, make unilateral decisions about how the land should be used during the course of the marriage.

The unequal and discriminatory nature of women's access to land under customary law has been re-enforced by formal law and court decisions. For example the most common record of land rights in communal areas is a PTO.² Yet the PTO regulations provide that PTOs are issued only to men. Current PTOs embody ongoing discrimination against women.

Another problem relates to customary marriages. The Black Administration Act (section 11 (3)) deemed wives in customary marriages to be minors, and subject to their husband's guardianship. They could not own property or contract in their own right. This provision has been repealed, but its legacy remains. The position is worse in Kwa Zulu Natal where customary marriages were not governed by the Black Administration Act, but by the Code of Zulu law. This remains in force and it prevents women from being able to acquire property in their own names: they remain legal minors, subject to their husband's guardianship.

A very serious consequence of the Black Administration Act is the impact on succession. The Act provides that 'black law and custom' governs intestate succession. Until the recent Cape High Court Bhe judgement this had been interpreted to mean male primogeniture. This has obviously had a major impact on women's land rights in communal areas. In the first place the PTO regulations reinforced the customary prohibition on allocating land to women. In the second place, property (including land) bypasses women on the death of their parents, even if the land belonged to their mother.

The legacy of past discriminatory laws, and the operation of some aspects of customary law, has created a situation where most women in communal areas do not have secure land rights. Their position remains vulnerable and unequal. Not only do they not have land rights, but customary practices restrict (and in some cases completely prohibit) their right to participate in decision making processes under communal tenure. What is at

² Permission to Occupy certificate issued in terms of proclamation R188 of 1969

issue, is not domestic family relations, but structural state sponsored discrimination against women.

The tenure system, together with racially specific laws, condemns women, particularly rural women, to unequal and subservient land and property rights. The lack of independent property rights and viable alternatives makes women and their children vulnerable to abuse, including sexual abuse.

What does the bill do to protect the rights of women in communal areas?

Representation in land administration committees/traditional councils

The bill provides (via the Traditional Leadership and Governance Framework bill) that 30% of the membership of traditional councils must be made up of women. The TLGF bill also provides that while 40% of the members of a traditional council must be elected, the remaining 60% must comprise traditional leaders and members of the traditional community selected by the principal traditional leaders concerned in terms of custom (3(2)(b)). Thus, apart from those women elected in terms of the 40% portion, the rest of the 30% women's quota will be selected by the principal traditional leader, and not by women in the community. As many rural women have pointed out, it is very likely that the 30% quota will come from the royal family, and be comprised of female relatives of the chief. Can women handpicked by chiefs really be relied on to represent the interests of ordinary rural women, and to address the legacy of gender discrimination against women practiced under customary law?

Furthermore, as already stated, existing tribal authorities are deemed to be traditional councils. They are given one year to transform to include 30% women and 40% elected members. However what happens if they fail to transform their membership within this period? Neither the TLGF bill, nor the Communal Land Rights bill provides that Tribal Authorities who do not include women, will not be entitled to administer communal land.

Land allocation

One of the most serious problems for women in communal areas, is that most traditional leaders refuse to allocate land to women. They justify this on the basis of customary law; saying that land can only be allocated to married men. Yet the bill provides in section 24(3)(a)(1) that one of the powers and functions of land administration committees (read traditional councils) is to take measures towards ensuring the allocation by such committee, after a determination by the Minister, of new order rights

Thus the very structures that have consistently discriminated against women in land allocation are given the legal authority to allocate land. (The current legal situation in most provinces is that while traditional leaders have the power to recommend land allocations, land can only be formally allocated by officials.)

One would anticipate, in this context, that the bill would, at least, contain an explicit provision banning discrimination in land allocation, or requiring that women be allocated

land on the same basis as men. The August 2002 version of the bill, which was published for public comment had such provisions. For example the objects of the bill (at section 2 (h)) included -

to provide, in the context of this Act, for the protection of the fundamental human rights contained in the Bill of Rights in the Constitution, including -

- (i) the right to equality, especially gender equality in respect of the ownership, allocation, use of, or access to land;

This object has disappeared from the version of the bill currently before parliament. Furthermore section 7 (2) of the August 2002 bill specifically provided that;

A person or customary or communal system of land tenure may not unfairly discriminate against anyone, directly or indirectly, with regard to a community rule or practice or decision, which determines

- (a) the ownership, allocation, occupation, use or alienation of communal land for any purpose
- (b) participation in decision-making processes and fora concerned with the ownership, allocation, occupation, use or alienation of communal land; or
- (c) the membership of any institution or structure involved in the management or allocation of rights in the community's communal land.

The current version has no clear provision banning discrimination in land allocation, or in the community rules governing land allocation. Instead it has two obscure and ineffective provisions, which the drafters may try to use to justify that the bill is not in breach of the constitution.

One of these is section 24(3)(a)(1) which states that land administration committees must take measures towards ensuring the allocation by such committee of new order rights to persons including women, the disabled and the youth in accordance with law. The question is; what law? Surely this is the very law that should explicitly provide that women must be allocated land on equal terms with men. Yet nowhere does the bill provide that women must be allocated land on the same basis as men.

The bill also says nothing about the rights of others in this category, such as the disabled and youth. It is absurd to include women in the same category as the youth and the disabled. Young people cannot be allocated scarce and valuable land before they have established themselves as stable members of the community, and disabled men are allocated land. To lump women into this category is an indication that the specific problems faced by women in communal areas, are either not understood, or are not taken seriously.

The other ineffective provision that the drafters may try to rely on to defend the constitutionality of the bill, is section 19(4)(d). This provides that the Director General may not register community rules if he or she is not satisfied that they comply with the requirements of the constitution.

The community rules are very important. They will govern the administration of communal land (19(2)) and they govern the ownership and administrative powers of the land administration committee. Yet the bill does not require that community rules may not discriminate against women. Instead it merely says that the Director General cannot register rules that he deems inconsistent with the Constitution. Why not state clearly and explicitly that community rules cannot discriminate against women being allocated land? It would have been very useful to women challenging dismissed applications to be able to point to a provision in the law saying they are entitled to be allocated land on the same basis as men. Previous versions of the bill have explicitly prohibited discrimination in land allocation and community rules. What made the drafters remove these provisions? Why is there now only the back-handed provision that the Director General may not register rules that he deems to be inconsistent with the constitution?

Do the drafters really anticipate that traditional councils are going to write down and submit a rule that states they will not allocate land to women? Can they seriously believe that the way to deal with a pervasive discriminatory practice, justified in terms of unwritten customary law, is by a provision monitoring written rules?

Participation in meetings and decision making with regard to communal land

Despite the well known problem of some customary systems banning women from attending or speaking at community meetings there is no provision asserting that women have the right to participate in decisions affecting communal land.

The registration of “new order rights”

The bill provides for the transfer of title from the state to communities. It also provides for the determination and registration of “new order” rights vesting in individuals on communal land. The title deeds to the land would vest in the community but individuals living on the land would also have “new order” tenure rights. The bill provides for the conversion of “old order” rights such as PTOs into registered “new order” rights. As set out above, most existing “old order” tenure rights currently vest in men.

Once rights are registered in a specific person’s name this formalises not only that person’s rights, but also the exclusion of others who may have informally shared the land prior to registration, or had “secondary rights” to the land. The current de facto exclusion of women would be formalised and deepened with the registration of individual rights vesting in men. Where new order rights are transactable (18 (3)(d)), women would be doubly vulnerable. Men could then sell the land from under deserted wives or mothers, as a way of realising a profit from land they no longer use or occupy.

Thus there is a real danger that this bill, by formalising and registering individual rights within communal areas, could worsen the position of women, by confirming the exclusive rights of men, at the expense of the “secondary” rights of women. Titling and registration programmes throughout Africa have often had the unintended consequence of weakening the tenure security of women, by registering rights in the name of the “household head” - who is generally a man.

The bill provides that the Minister **may** confer a new order right on a woman who is a spouse of a male holder of an old order right, to be held jointly with her spouse (s 18 (4) (b)).

However this, like so many provisions of the bill, is discretionary. There is no guarantee that the Minister will do so. There are no criteria setting out under what circumstances she must vest or register new order rights jointly in the name of both spouses. There is no **requirement** that when the state converts old order rights into new order rights, it must ensure that the security of tenure of the women who occupy the land is protected. There is only a provision enabling the Minister to vest rights jointly if she chooses to do so. This is not good enough. The state by intervening to upgrade old order rights into registered new order rights, will inadvertently worsen the tenure security of women relative to men. Thus a provision to mitigate any negative consequences of the state's intervention must be incorporated into the process to protect the tenure security of women.

Section 18(1) provides that when the Minister makes determinations about land and land rights she must have regard to various things, including the old order rights of affected rights holders and the need to promote gender equality in respect of land. It could perhaps be argued that this is sufficient to protect women because the Minister **must** have regard to the need to promote gender equality in respect of land rights, and that the **must** in section 18 (1) directs the **may** in section 18 (4) (b).

However there are various problems with this possible interpretation. The Minister must also have regard to old order rights - and these generally vest in men. They vest in men because that is what the Black Areas Land Regulations required them to do. They also vest in men because that is how customary law works in practice; men are allocated land when they marry and establish families. Thus it is inevitable that some men will challenge the joint vesting of their land in the names of their wives and say that this deprives them of the full enjoyment of the old order rights that the Minister must also take into account. They could argue that the joint vesting of rights constitutes an uncompensated expropriation of their property rights.

This is an inherently complicated issue, as are all issues of vested interests and conflicting rights. What will guide the Minister or her delegate in striking a balance between the interests of the holders of old order rights, and the interests of women? What can she rely on to protect her determination against legal challenge by either party?

The bill fails to set out adequate criteria and factors to guide the Minister's discretion, and thereby secure her decisions. The law could have stated that, insofar as the process of formalising and registering rights, may render secondary users (such as women) more vulnerable than before, the process must also include special measures to protect the use and occupation rights of secondary users (particularly women) against the registered owner of the right.

It could also have stated directly that one of purposes of the bill is to secure the rights of people who use and occupy land on a *de facto* basis ó a ðland to the tillerö approach. This would have strengthened the position of women, who are *de facto* users and occupiers even when they do not hold ðold orderö rights.

Another basis to justify the joint vesting of rights is that, insofar as current old order rights vest in men, this is as a result of the perversion of customary law. It has been argued that when men are allocated land at marriage, this land is for their wives to use for fields and to build houses on. Each wife in a polygamous marriage should have her own separate house and field, to use for supporting her children. It may be argued that, under ðproperö customary law, the wifeö right to the land is at least as strong as her husbandö and that, indeed, he would not have been allocated it, were he not married to her. However customary law has been ðpervertedö both by the PTO regulations (Proclamation R188 of 1969), various court decisions, and by the current practice of allocating land rights to men.

The bill fails to address these issues and does not include them as factors to be taken into account when balancing ðold order rightsö and the need to promote gender equality in determinations about new order rights. It is inconceivable that the Minister will be able to make determinations in respect of millions of new order rights. She will have to delegate this function. The bill does not provide sufficiently clear direction or criteria to guide those making determinations about land rights. In this context the fact that the Minister ömayö confer new order rights on women in section 18 (4) (b) is not strong enough to adequately protect the tenure security of rural women.

Instead of the drafters dealing with the difficult issue of womenö land rights comprehensively, they have passed the burden to the Minister to decide öat her discretionö. It is not for the Minister, or officials, to determine whether any particular rural woman should have land rights on a case by case basis. It is for the law to set out clearly the basis, extent and limits of womenö tenure security in rural areas.

We support the legal opinion submitted by the Commission on Gender Equality that the bill is unconstitutional because it does not provide for equality for women in communal areas, and because it does not adequately secure the land rights of black women, whose tenure is vulnerable as a consequence of racially discriminatory laws and practices.

COMPARABLE REDRESS - IS THE BILL SERIOUS ABOUT UNPACKING OVERLAPPING RIGHTS?

Section 25 (6) of the Constitution provides that:

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.ö

This clause creates a constitutional imperative on the government to introduce a law that secures tenure rights and that provides comparable redress where rights cannot be secured *in situ* because they overlap or conflict with one another. Communal areas are characterised by overcrowding and the overlapping of land rights caused by consecutive waves of people being removed or evicted from white South Africa and dumped in the reserves, often in areas where others had pre-existing rights to the land.

Previous drafts of the bill had extensive provisions dealing with comparable redress including criteria and procedures for determining how and when it should be awarded. The current draft has only two sentences. The first says that the Minister may award comparable redress where she determines that section 25(6) tenure rights cannot be secured. The second says that the Minister may cancel old order rights, but requires the consent of the holder of the right.

There is nothing to guide or limit the Minister's discretion to decide whether pre-existing rights can or cannot be secured, and who would qualify, under what circumstances, for what comparable redress. There are no criteria to guide her or his decisions; nothing about who should be prioritised: what factors to take into account in determining the amount of comparable redress: or how to differentiate between those whose land rights should be confirmed *in situ*, and those who must move away and get comparable redress instead.

This would make it virtually impossible for anyone to challenge the decisions of the Minister. It would be very difficult for a person to prove that they had a right to comparable redress, and it would be impossible to challenge the Minister's decision on the basis that she or he had disregarded particular criteria or historical circumstances.

It is very unlikely that this clause would pass constitutional muster. The Constitution does not require an individual to decide the extent of rights and comparable redress. It requires an Act of Parliament to do so.

The constitutional right to comparable redress provides a key opportunity for the law to ensure that tenure reform does not simply confirm the boundaries of past dispossession, but has a re-distributive element. This opportunity is thrown away by the Communal Land Rights Bill.

PROBLEMS WITH THE CONTENT OF LAND RIGHTS

The bill gives the minister the power to determine new order rights and to cancel old order rights (18(3)(d)). This is an enormous task. All the land in communal areas is already subject to overlapping claims, interests and rights. Thus new order rights cannot be allocated before the status of old order rights is resolved. Cancelling old order rights will not be a simple task.

In any event what are old order rights? Who decides whether an old order right exists or not? What is the difference between the content of old order rights and new order rights?

What exactly are new order rights? Section 9 indicates that they are not ownership, but nowhere does the bill state what they are. Section 18 (3) (d) (ii) says that Minister must determine the nature and extent of such rights. Section 18(4) says the Minister must determine the holder of or holders of new order rights.

These sections place a tough, probably impossible burden on the Minister. One cannot help feeling that the drafters having tried and failed to define new order rights, and having tried and failed to develop criteria and procedures for transforming current interests in land, into legally secure land rights, have simply taken the easy way out, and dumped the entire impossible task on the discretion of the Minister.

The most striking and absurd provision in the bill is section 4, which states:

An old order right which is legally insecure as a result of past racially discriminatory laws or practices as contemplated in section 25(6) of the Constitution must be legally secured in terms of this Act.

Nowhere does the bill provide for a procedure or criteria to establish whether old order rights are legally insecure as a result of apartheid, let alone legally secure them. All it does is give the Minister unlimited discretion to decide these things. **The Constitution requires an Act of Parliament to determine the extent of the right to tenure security, and the extent of the right to comparable redress.** It does not require an Act of Parliament to authorise the Minister to determine (as he or she sees fit) the extent of rights in the bill of rights.

On this basis alone the bill is probably unconstitutional.

SERVICE DELIVERY AND DEVELOPMENT BECOMES MORE DIFFICULT

The bill proposes transferring title of large tracts of rural land from the state to communities. The effect will be that the land becomes privately owned. It is well known that government does not pay to put infrastructure into privately owned land – it takes road, pipes or whatever to the boundaries of private land – internal reticulation is the responsibility of the landowner. This is because the ownership of infrastructure or buildings attaches to the owner of the land.

Apart from this issue, the experience of the 500 Communal Property Associations established since 1996 shows that local government generally refuses to provide services on privately owned land – even when this land is communally owned. Not only is there the problem of the ownership of the infrastructure passing to the landowner, there is the problem of recovering service costs in areas where local government does not have the legal authority to levy residents for costs. Generally the authority to charge for services derives from township establishment laws, which assume state ownership of public spaces and individual ownership of residential sites.

The danger that transferring title of communal land, may effectively sterilise communal areas from service delivery and development has been recognised by the drafters of the bill. New provisions have been inserted to try to address the problem. For example the provisions in section 18 (4) (a), which enable the Minister to reserve parts of the communal land to the state –including a municipality–. This would enable parts of the communal land to be excluded from the transfer so that the municipality could develop rural townships on them. This is a cumbersome solution to an intrinsic problem – it means that prior to every transfer of communal land, a land use planning and consultation exercise must have taken place to identify and exclude areas of potential development. This will have multiple effects: it will lock land transfers into endless delays; it will put land use planning processes under severe pressure, thereby diminishing the possibility of proper participatory processes; and often the result will be –wrong– – land will be transferred to private ownership that should have been developed – sometimes for reasons that will only come to light after the transfers have taken place.

The other new provision is section 37, which states:

–Despite the other provisions of this Act and the provisions of any other law, no law must prohibit a municipality from providing services and development infrastructure and from performing its constitutional functions on communal land however held or owned.–

This provision completely misses the point. It is not because of laws prohibiting them from doing so, that government departments and local government are reluctant to install infrastructure on privately owned land. It is for practical reasons to do with losing control over the infrastructure when it become the property of the land owner, and the difficulties of billing people, and recovering service costs on land which is communally owned.

THE BILL CANNOT BE IMPLEMENTED AT SCALE

As with the previous drafts many steps have to be followed before land can be transferred or rights can be registered. There must be a rights enquiry, the community must adopt and register community rules. The Minister, in making her determination around boundaries, must take into account old order rights, other legislation, the Integrated Development Plans of municipalities, and consult with both the Minister of Local Government and with municipalities. Furthermore a communal general plan must have been approved, registered and opened, as must have a communal land register. New order rights must have been determined and transferred to the identified people within communal areas.

The communal general plan is necessary so that the Minister knows where services are likely to go, so that she can reserve this land to the state or municipality and exclude it from the land transfer.

However developing a communal general plan entails a massive amount of work that combines both an exercise in plotting existing rights and also development planning. By their nature both these processes are intricate and must be undertaken by local institutions

with community participation. The bill requires that a major town planning function must take place before formalisation of rights is possible. This requirement is added to the enormous difficulties associated with determining the boundaries of communal land, and determining new order rights and whom they vest in. Boundary disputes alone, will tie up land transfers for many years.

Given the existing capacity constraints within the department, and the complex and explosive issues at stake, is there really any prospect that the bill could be implemented at scale? Even if the Department managed 100 community transfers a year ó a tall order given their record with restitution and redistribution projects, it would take 200 years to transfer title to all the estimated 20,000 rural communities in South Africa.

What would happen in the interim?

The status of old order rights

In the first place the status of land rights would remain vulnerable. The constitution requires parliament to enact a law that provides for security of tenure. Yet old order rights will remain for centuries under the schema of the bill. What is the content of these rights? What is their legal status? The bill provides no answers.

Land administration

There are currently serious problems concerning land administration in communal areas. In most provinces nobody has the legal power to allocate land rights, and there is no budget or staff to survey sites, maintain grazing camps, enforce dipping regimes or control the plunder of common property resources such as medicinal herbs and forests. Double and disputed land allocations are the order of the day, illegal and informal land sales are increasingly common and stock theft has reached alarming proportions. There is a serious and deepening crisis concerning land rights and land allocations in communal areas, which is impacting negatively on rural poverty. One of the results is that investors avoid these areas, as it is almost impossible to establish who has what rights, and who to deal with in negotiations concerning development.

It has already been argued that there are major problems in imposing un-elected traditional councils as land administrators. However it should be noted that the section that vests powers and functions in land administration committees, applies only to communities **owning** communal land (25 (1)). The yawning vacuum in land administration powers, functions and execution remains for areas where title still vests in the state.

Development in rural areas

A fundamental problem in communal areas, is that development initiatives are delayed by lack of clarity about the nature of underlying land rights.

The bill does not clarify the nature of existing informal rights to land, instead it prescribes a long and cumbersome case-by-case transfer and registration process, that would take so long to implement that any development opportunities would be lost during the long wait.

Previous drafts of the bill contained a chapter on interim lease provisions that would have enabled three way contracts between the Minister, as the nominal owner of the land, the community and investors prior to transfer of communal land. This chapter provided that the community must be consulted regarding development initiatives affecting their land rights, and that the benefits from the investment must be fairly distributed within the community. However the chapter on interim lease provisions has been scrapped from the current draft, and so the obligation on the Minister to consult communities and distribute any profits from investment in communal areas, falls away.

3 THE PARADIGM ADOPTED BY THE BILL

Choice?

Why is the bill so authoritarian? Why are communities excluded from having any say in irrevocable decisions that will impact on their land rights? Why did the drafters scrap the provisions in previous drafts that required community consultation, community consent for transfers, choice about land administration structures and human rights standards in land rights administration?

When one compares this version of the bill, and the version that was gazetted in August 2002 it becomes clear that there was a conscious change of direction at some point. Consultation, consent and human rights protections were not left out by an oversight. They used to be there. They were taken out.

The reason seems to be that the government has realised that it will not be able to achieve its objectives with this bill if rural people are allowed to make choices, and allowed any say about the future of their land rights. This interpretation is consistent with the way in which this legislation is being rushed through the parliamentary process ó allowing no time for rural people to find out about the provisions of the bill before it is enacted.

If rural people had a choice, would they agree to this bill? Weød never know because they donø have a choice. They are not aware of the contents of this bill. The provision giving traditional councils the legal authority to administer communal land, was inserted only on the 9th of October 2003.

Rural people are not given a choice about whether they want their land to be administered by traditional councils. The lack of choice ó and the fact that councils are imposed ó implies that the government is not confident that rural people would have chosen traditional councils to administer their land rights of their own free will.

The same applies to land transfers. Why is the consent of the people whose land rights are at issue, no longer required? Is it because of the provisions that authorise the Minister to unilaterally exclude portions of communal land? Is it because the government is aware that the transfer process will generate boundary disputes on an unprecedented scale? Or is the government worried that, given the choice between service delivery and infrastructure on state owned land, or privately owned land managed by chiefs, rural people would choose the former?

The government's objectives

The government is faced with a very difficult situation and a constitutional imperative to intervene and secure tenure rights. The approach it has adopted is to transfer title from the state to communities, and to transfer the responsibility for land administration from itself onto Tribal Authorities, or traditional councils, as they will be renamed. Its motivation seems to be an attempt to absolve itself of its legal responsibility for land rights in communal areas and an attempt to absolve itself of the responsibility and expense of administering communal land rights effectively. The bill does not provide that the Traditional Councils who take over this government function, will receive any funding whatsoever.

If this bill is enacted rural people will not be able to enforce their land rights against the state, they must attempt to enforce their land rights against communities and traditional councils. Not an easy task - as indicated by the experience with the 500 Communal Property Associations created since 1996 and the decades spent under Tribal Authorities during apartheid.

Furthermore communal land will become privately owned, and it is notoriously difficult for poor people living on private land, to secure services or development from the state.

This bill pulls the plug on rural people living in communal areas.

4 THE ALTERNATIVE

Turn the process around and begin by securing rights

The current structure of the bill creates many problems and would be very difficult to implement at scale. Why not turn it around and begin by securing individuals rights, rather than have this as the end product of a time consuming and unrealistic process? The alternative would be for the bill to recognise existing use rights in land and convert them into property rights on a blanket basis. People would immediately get legal protection for existing use and occupation rights. The process of defining and registering users and plots or fields would take place on an incremental basis, as and when the need arose in specific areas.

Furthermore whilst the initial blanket creation of rights would secure existing land uses and so hold the status quo and secure people from eviction, at the second stage, that of defining and registering rights, the comparable redress process would kick in. It would be counter productive (and so contentious as to be impossible) to formalise and record rights that overlap on the same land. Thus, in situations of overlapping land rights, the comparable redress investigation and award process would take place prior to the formalisation of rights.

Measures to secure rights should be complemented by provisions to support and regulate group management of common property resources, allocation processes, dispute resolution and other land matters of common concern. There is no contradiction between strong individual rights and communal systems. Individual rights have always existed

and will always exist within communal areas. The more clearly the rights of individuals are defined and understood, (including exclusive use rights to homestead plots, shared rights to grazing land, and procedural rights to participate in group management decisions), the better group based systems work.

Vesting rights in people as opposed to institutions

A very serious problem with many communal systems is that the structure representing the community begins to act as the owner of the land, and disregards the rights and views of the members or residents. The structure begins to treat the land as its private asset and may even threaten residents with eviction if they challenge it, or refuse to ðpop outð levies and other contributions. Abuse of power is unfortunately common both in CPAs and in some traditional authorities.

Where property rights are vested in the occupants, as opposed to in a structure or institution, the institution has to be responsive to the rights holders in order to survive. The rights holder are able to choose which people or institution they want to manage their land rights, and to replace it if they are not satisfied with its performance. The issue is not simply one of choice. It is one of power. The power over communal land should not vest in institutions, it should it vest in the people who use and occupy the land, thereby giving them real authority over the institutions that purport to represent them.

Maintaining state responsibility for service delivery and development

This approach of vesting rights in occupants and users has another key benefit, which is that it would not be necessary to transfer underlying title away from the state. The land could remain nominally state-owned with strong statutory rights for residents. This does away with all the difficulties of service delivery and development on private land. The government would continue to be a key stakeholder in rural areas, while the residents would have secure statutory rights.

However this model should not preclude the option that should people opt for transfer of title to their residential sites, or should groups opt for communal title, the transfer option should remain available, but on the basis of informed choice.

Maintaining state responsibility for land administration

Finally, experience with both Communal Property Associations and with Sectional Title schemes has shown the danger of underestimating the support necessary to make group based tenure systems work effectively and fairly. The rural provinces have been neglected and under resourced for decades. Ongoing decentralised support from government is necessary both to ensure that the any new tenure system is properly implemented, and to assert and protect the rights of vulnerable groupings such as women and the very poor. The current draft of the Communal Land Rights Bill, does not provide for any ongoing administrative support, or recourse where rights are abrogated. It provides instead for ad hoc interventions to facilitate land transfers of large tracts of land to big groups of people.

It is a normal role for governments around the world, to secure, support and maintain systems of property rights. If the majority of citizens of a country are excluded from appropriate, affordable and effective systems of tenure rights, an inherently unstable situation is created, leading to cycles of land occupation and eviction become inevitable. Secure tenure, together with a degree of stability and predictability are pre-requisites for sustainable development.

Integrated tenure reform

There is an urgent need for tenure reform, not just in the communal reserves, but also throughout South Africa. For many people freehold title is inaccessible and too expensive to maintain. Many communal tenure institutions are in trouble, others are not recognised, but operate in practice, for example street committees authorising and witnessing informal land sales in RDP townships. Increasing numbers of people simply cannot afford the high transfer costs associated with acquiring, maintaining and bequeathing individual title, so they resort to informal transactions and institutions and fail to transfer title to heirs on the death of the registered owner.

People in all these categories would welcome a cheaper and simpler tenure option that provides secure high content land rights for individuals, together with systems of group management and control over common property resources, allocations or sales, and dispute resolution. Such an option would require an ongoing role for government in maintaining and guaranteeing registers of individual rights, as well as providing locally accessible recourse to deal with instances of abuse by group management institutions.

The Communal Land Rights bill sends us in the opposite direction. It is not a unitary measure. It is a special measure for one race group and one category of land. It isolates areas and solidifies boundaries. It does this not only between communities, but also between the old reserves and the rest of South Africa. The areas that the bill targets are severely overcrowded and eroded. The people living there need to expand into the rest of South Africa, not be boxed into old colonial boundaries. By focussing only on these areas the bill further isolates the reserves from the rest of South Africa. It rearranges tenure relations within this area rather than expanding and integrating it with the rest of the country.

WAY FORWARD

To develop an appropriate tenure reform law it is necessary to first reach agreement on the problems that the law seeks to address. What are the burning problems experienced by rural people living in communal areas? What do rural people want from tenure reform?

This is the question that should be moved to centre stage. We propose that the bill be shelved and that a Commission be established to investigate the problems in communal areas, and establish the views of rural people about land rights and tenure reform.