

# WORKING Paper 18

## Rights without Illusions: The Potential and Limits of Rights-Based Approaches to Securing Land Tenure in Rural South Africa

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# Introduction

Dispossession of land belonging to black people was integral to the formation of modern South Africa and a key feature of the apartheid era. Legal frameworks to address the legacies of racialised dispossession and the insecure land rights of the majority were hotly contested during the mid-1990s in the transition to democracy.

One of the first laws passed by the first democratic parliament in November 1994 was the *Restitution of Land Rights Act 22 of 1994*, and its approval was 'greeted by cheers and a standing ovation in Parliament' (Walker 2008: 5). Contestation continued — the property clause of South Africa's new constitution, agreed upon at the last possible moment before the deadline for negotiations expired in 1996, expressed a historic compromise. Set out in Section 25 of the Bill of Rights, the clause protects existing property owners but also allows for property expropriation in the 'public interest' — defined as including land reform. The compromise has been a source of controversy ever since (Ntsebeza 2007).

After 1994, the Mandela administration developed an ambitious and wide-ranging land reform programme based partly on these constitutional provisions. Sixteen years later, land reform is in trouble. Only about 7% of commercial farmland has been redistributed or restored through land restitution, against a target of 30% by 2014 (*Umhlaba Wethu* 2009), and ownership of rural land remains highly skewed. Many land reform projects have seen declines in farm production, in part because of the absence of effective post-settlement support for beneficiaries. The land rights of many black South Africans, both in communal areas (the former reserves) and on commercial farms (where they reside as farm dwellers or farm workers), remain insecure (Greenberg 2010).

It is clear that 'the Land Question' remains largely unresolved. For many South Africans, this symbolises the broader limitations of post-apartheid transformation and renders the politics of land potentially volatile (Gibson 2009; Kepe et al 2008: 143–156). In May 2009, a new administration under Jacob Zuma announced land reform and rural development as key priorities for the ANC-led government. By early 2011 however, this new political impetus remained uncertain:

- new policy frameworks promised by the Minister for Rural Development and Land Reform had yet to be made public,
- budget allocations remained low, and
- in the absence of agreed policy direction, acrimonious debates on the weaknesses of land reform policy continue to erupt in parliament and the media (e.g. *Business Day*, 18 October 2010).

South African land reform policies strongly emphasise legally defined rights and duties in relation to land and its governance (DLA 1997). This may be largely because civil society organisations which helped rural communities fight forced removals in the 1980s made extensive use of legal and rights-based strategies to resist dispossession, and members of these organisations then played central roles in policy making in the 1990s (James 2007; Walker 2008). Securing the land rights of black South Africans against possible abuse by powerful actors and agencies — including the state — loomed large for these policy makers, given experiences of dispossession overseen or directly engineered by an authoritarian state.

This background also helps explain the inclusion of land reform provisions in the Bill of Rights, which explicitly refers to all three land reform programmes (redistribution, tenure reform and restitution):

*The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*

*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.*

*A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*

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Source: RSA 1996: Sections 25(5), (6) and (7)

This paper focuses only on tenure reform<sup>2</sup> and its aims to secure the land rights of:

- a. farm workers and farm dwellers living on privately-owned land, and
- b. residents of the former 'reserves' or *Bantustans*, now known as communal areas.

Summarising the trajectory of tenure policy and law making from 1994 through to the present, the paper shows how discourses of rights, citizenship and democracy shape policies and legislation. We assess the policies and outcomes, and argue that the degree to which legally defined rights to land have been realised in practice depends in large part on the outcome of local-level struggles within shifting relations of power. Local arenas are not, however, hermetically sealed off from wider power relations, discourses and institutional contexts (including those of law and policy) which mediate the operation of power. This means that the impacts of land rights defined in law can be direct and indirect, material and symbolic. Inadequate state capacity for implementing law and policy, and the nature of structural poverty in rural South Africa (which tends to weaken the substantive content of rights) constrain the direct impact of law and policy. Nevertheless, a focus on rights can help defend people from dispossession, open political space for mobilisation, provide a grounded critique of unjust social orders and help articulate a vision of an alternative social order (Cousins 2009). Although inherently limited in their *systemic* impacts, rights in law are a potentially useful 'weapon of the weak'<sup>3</sup>, along with other strategies, and should not be abandoned. Following Hunt (1991: 248), we term this a 'rights-without-illusions' approach, which can inform mobilisation, advocacy, litigation and research in relation to land tenure reform.

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<sup>2</sup> Space limitations preclude analysis of land redistribution and restitution policies, but our arguments are relevant in these contexts too, because the content, form and security of property rights strongly influences the effective use of land transferred through land reform (Lahiff 2009; Pienaar 2000: 322–329).

<sup>3</sup> See Scott 1985, for an illuminating study of the variety of indirect and disguised strategies employed by the poor and powerless to resist, subvert or deflect the actions of the rich and powerful, and relations of oppression and exploitation.

# I. Communal tenure reform

Insecure land tenure in communal areas is a key legacy of apartheid, but addressing it has proved to be one of the thorniest problems facing tenure reform policy makers. Government promulgated the *Communal Land Rights Act (CLARA) 11 of 2004* in response to Section 25 (6) of the Bill of Rights. By 2010, however, the Constitutional Court had declared the Act unconstitutional, and it was not at all clear how government intended to fill the legal vacuum. Fierce public debate and community mobilisation, which formed the basis of the successful legal challenge by four rural community groups some six years later, accompanied the passage of the Act through parliament in 2003 and 2004. Key controversies included:

- the powers over land to be wielded by traditional leaders and traditional councils,
- the nature and content of communal land rights, gender equality, and
- whether or not law-making processes and procedures had allowed for sufficient consultation.

Contrasting interpretations of rights, citizenship and customary law were at the core of these controversies (Cousins 2008: 15–27).

## 1.1 A contested terrain

According to a *White Paper on South African Land Policy* that set out the fundamentals of post-apartheid land reform policy, tenure reform in communal areas must confront the underlying problem of the second class status of black land rights in law (DLA 1997: 57–67). Rights of occupation and use in black rural areas were not adequately recognised in South African law prior to 1994, with limited rights being granted in the form of a conditional permit — usually a ‘Permission to Occupy’ (PTO) certificate. Weak legal status was exacerbated by overcrowding and forced overlapping of rights resulting from apartheid segregation policies of forced removals and evictions.

Groups of black South Africans who purchased farms in the late-19<sup>th</sup> and early-20<sup>th</sup> centuries (but who could not hold title deeds because of legal restrictions on black ownership) faced experience particular problems. Some owners were dispossessed and have lodged restitution claims; others still occupy their land, but title deeds continue to show the Minister as trustee-owner. Whether dispossessed or not, these groups were often placed under the jurisdictional authority of neighbouring chiefs, some of whom abused their authority by allocating land to outsiders in return for cash payments.

The White Paper also identifies a key problem of partial breakdown of communal tenure systems due to lack of legal recognition, declining administrative support, accompanied by corruption and abuse by some traditional leaders (DLA 1997: 32). Lack of clarity on land rights and tensions between local government bodies and traditional leaders over land allocation for development projects constrain infrastructure and service provision in rural areas. Discrimination against women is a particular problem in land allocation: in the past, PTOs were issued only to men; widows and divorcees are often evicted from family land; and women are excluded from decision-making structures.

As outlined above, communal tenure reform in South Africa is a constitutional imperative. In 1996, an *Interim Protection of Informal Land Rights Act (IPILRA)* was passed as a ‘holding measure’, but an annual extension has been necessary since then due to the absence of any other law. IPILRA requires only consultation with occupiers and users of land with who have only informal rights to it before such land can be disposed of. IPILRA

provides no legal certainty on the nature of such rights and seems to have been used to secure rights in only a few cases (Henk Smith *pers. comm.*, September 2010).

In 2004, parliament approved CLARA but government never implemented it, in part because of the legal challenge mounted in 2005. The Act provided for the 'transfer of title' to a community, provided:

- the 'community' drew up and registered its rules in order to be recognised as a juristic personality legally capable of owning land (Smith 2008: 41),
- 'community' land boundaries were surveyed and registered, and
- a rights enquiry investigated the nature and extent of existing rights and interests in the land.

Individual community members would be issued a deed of communal land right, which could be upgraded to freehold title if the whole community agreed.

A land administration committee was to enforce rules and exert ownership powers on behalf of the 'community'. Section 21 (2) of the Act specified that a Traditional Council established under the *Traditional Leadership and Governance Framework Act 41 of 2003* (TLGFA) 'may' act as the committee (tribal authorities established under the *Bantu Authorities Act 68 of 1951* are reconstituted as traditional councils under the TLGFA (for more details, see Smith 2008: 60–65)). According to the Department of Land Affairs (DLA), people could choose which body — a traditional council or other institution — would act as the land administration committee, but in another interpretation of the relevant sections, traditional councils, wherever they exist, would automatically become the land administration committee, and rights holders would not be able to exert choice<sup>4</sup>. CLARA did not set out any procedures for exercising choice about who should act as a land administration committee, which suggests that the term 'may' was permissive only, allowing traditional councils to exercise land administration powers. The TLGFA specifies that the roles and functions of traditional councils may include land administration.

The passage of the Communal Land Rights Bill (CLRB) through parliament was stormy. Various civil society groups, including representatives of twelve rural communities, contested its appropriateness and constitutionality during portfolio committee hearings in 2003 (Claassens 2003: 262–292). The provisions for traditional leaders' land administration powers and gender equality were particularly contentious. Critics argued that the CLRB did not provide for democratic communal tenure, as it:

- did not allow rural people to *choose* either the overall nature of the tenure system to be adopted or which local institution would have responsibility for land administration;
- failed to provide for *downward accountability* of land administrators to rights holders; and
- failed to adequately *address gendered inequalities* inherent in the 'old order rights' (such as PTOs), which would be upgraded to 'new order rights' in the new law.

They also argued that traditional leaders would effectively have more powers over land than ever before (Cousins&Claassens 2004: 139–154). The traditional leader lobby, led by the Congress of Traditional Leaders of South Africa (Contralesa), fully supported the draft

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<sup>4</sup> This was a key argument in the constitutional challenge to CLARA; see Claassens (2008: 266–67) and Smith (2008: 60–65). The Department of Provincial and Local Government, also a respondent to the legal challenge, agreed with this interpretation, and not with that of the DLA. See the CD attached to the book by Claassens and Cousins 2008, for copies of these affidavits.

law, which they saw as recognising their customary role as 'trustees' of community land (see affidavits on CD attached to Claassens&Cousins 2008).

Government's 'inadequate' consultation with rural people before drafting the law was also contested, as the Constitution<sup>5</sup> requires parliament to facilitate public involvement in legislative processes. Civil society groups organised several large workshops in rural areas in different provinces, attended by about 700 people, and some communities selected representatives to make submissions to parliamentary hearings on the CLRB<sup>6</sup>. At the hearings, speakers from NGOs and community groupings alleged that government had clearly held several meetings with chiefs and members of Contralesa, but not with ordinary rural residents. In addition, contentious sections giving traditional councils powers over land were inserted into the draft only a few days before public hearings began, allowing no time for public discussion (Claassens&Ngubane 2008: 161–2). Several authors have argued that the rapid passage of CLARA through parliament was the result of a political deal between the ANC ruling party and the traditional leader lobby (Mokvist 2006: 302; Murray 2004).

In 2005, four rural communities — Dixie, Kalkfontein, Mayaeyane and Makuleke — launched a constitutional challenge to CLARA (Claassens&Cousins 2008). A history of interference by traditional leaders with the land rights of groups and individuals informed the applicants' arguments on the constitutionality of CLARA. In their view, transfers of title from the state to 'communities' following CLARA implementation would result in control of land being vested in traditional councils, rendering insecure the rights of current occupiers and users. In two of the communities, the jurisdiction of large tribal authorities over smaller groups or communities — an apartheid legacy — was deeply contested.

Legal papers also argued that CLARA was unconstitutional because the nature and content of the 'new order rights' being created were not clearly defined. CLARA gave the Minister wide and discretionary powers to determine 'new order rights', without clear criteria to guide decisions. CLARA failed to create opportunities for community members to participate in making crucial decisions or to challenge decisions made about their land rights. Another key omission was the lack of consultation with rights holders about whether or not they wanted transfer of title from the state. It was also argued that CLARA undermined tenure rights of female household members who occupy and use land other than as wives, such as mothers and divorced or unmarried adult sisters or daughters. A final core argument was that incorrect procedure was followed in passing the law, as the draft bill was wrongly tagged as a section 75 bill, instead of a section 76 bill, which would have needed wider public consultation and participation processes at provincial level (Murray&Stacey 2008: 72–91).

In October 2008, the North Gauteng High Court declared fifteen key provisions of CLARA invalid and unconstitutional, including those providing for transfer and registration of communal land, determination of rights by the Minister, and the establishment and composition of land administration committees (*Tongoane and Others vs Minister for Agriculture and Land Affairs and Others*). The judgment did not find the parliamentary process to have been procedurally flawed, and did not strike down CLARA as a whole. In May 2010, however, the Constitutional Court struck down the act in its entirety (*Tongoane and Others vs Minister for Agriculture and Land Affairs and Others*), having accepted the applicants' arguments about procedural issues, and therefore did not consider the applicants' substantive arguments or those contained in the findings of the High Court.

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<sup>5</sup> Section 59(1) of the Constitution applies to the National Assembly and section 72(1) to the National Council of Provinces.

<sup>6</sup> For details of these meetings and the wide range of views on communal land rights expressed at them, see Claassens 2003.

Prior to the hearing, the new Minister of Rural Development and Land Reform Gugile Nkwinti said government would not defend CLARA in court since it was no longer considered consistent with government policy. How government now intends to approach communal tenure reform is still unclear.

## 1.2 Impacts of the legal challenge to CLARA

Government made no attempt to implement CLARA at any time between its passage into law in 2004 and the constitutional court ruling in 2010, partly because of the pending legal challenge. Little information is available on the extent to which IPILRA was used to defend land rights in communal areas but it seems limited, so direct impacts of communal tenure reform policy and law since 1994 are minimal. The legal challenge to CLARA however, had a number material and symbolic impacts.

The Constitutional Court judgement means that Dixie, Kalkfontein, Mayaeyane and Makuleke residents have headed off immediate threats to their land rights, but the legal vacuum on communal land means the long-term security of their rights has yet to be addressed. Implementation of the TLFGA means that apartheid-era tribal authorities are now deemed traditional councils and still administer land in the jurisdictional boundaries laid down in the 1960s. The legal status of sub-groups or communities located within these boundaries against their will has still not been clarified, affecting many sub-groups — besides the applicant communities — under the authority of traditional councils. The direct material impacts of the legal challenge on tenure security are thus somewhat ambiguous.

Indirect impacts are likely, but evidence is somewhat impressionistic. In many local communities, claims to land or efforts to protect access to land are made with explicit reference to notions of freedom, democracy and rights (e.g. the Rakgwadi case analysed by Claassens 2001; 2008, and the submissions by community representatives to parliamentary hearings on the Communal Land Rights Bill in PMG 2003). Media reports on the legal challenge may have strengthened local-level appeals to democratic rights; recent submissions by community representatives to parliamentary hearings on the Black Authorities Act Repeal Bill (B9-2010) suggest this is so for those groups in contact with NGOs or public interest lawyers, but the reach of media reports on such matters is likely limited in deep rural areas.

Another indirect impact of the legal challenge may be government now proceeding cautiously on the Traditional Courts Bill, originally planned to be approved by parliament in 2009 and now likely to be delayed until 2011. Such caution is likely to be, at least in part, a response to the court's declaration of CLARA as unconstitutional on procedural grounds. It may also reflect the influence of Constitutional Court judgements on the importance of a 'living customary law' approach to the question of the compatibility of customary law and democracy. A legal challenge quoted these judgements at length to support an argument that chiefly control of land is a distortion of pre-colonial land tenure systems imposed by colonial and apartheid regimes, and is inconsistent with post-apartheid democracy and the Bill of Rights. A similar argument can be made on the Traditional Courts Bill, which Mnisi (2010) says:

- centralises control of a traditional court in the person of a 'senior traditional leader'
- fails to recognize a wide range of existing traditional dispute resolution processes and forums
- denies people choice of court jurisdiction when lodging a complaint

- constrains women's participation in hearings
- and allows draconian and oppressive sanctions to be imposed.

The successful legal challenge may also have encouraged civil society formations, such as the Rural Women's Movement and the Land Access Movement of South Africa, to continue to press for gender equality in land holding rights in communal areas. Representatives of these groups organised meetings in rural areas in 2009 and 2010 to discuss the Traditional Courts Bill and sent delegations to parliament to present submissions to portfolio committee meetings on both the Traditional Courts Bill and the Black Authorities Act Repeal Bill. Such mobilisation and advocacy may well not have happened if the legal challenge had not been successful.

Claassens and Ngubane (2008:181) argue that 'laws are powerful at a symbolic level, regardless of whether they are implemented or not'. Litigation may also have powerful symbolic impacts. Direct symbolic impacts of the legal challenge and associated public debates are, we surmise:

- a. increased public support for the idea that tenure reform in communal areas should be a democratised and adapted customary land tenure, rather than private, individual title; and
- b. increased levels of ambivalence in the ANC on the question of the role of traditional leaders in South Africa's democratic order.

ANC ambivalence is evident in recent contradictory statements from the party and senior government officials on traditional leadership. In the 2007 Polokwane conference the ANC (2007) resolution on land reform supports democratised communal tenure, stating that government must:

*[...]ensure that the allocation of customary land be democratised in a manner which empowers rural women and supports the building of democratic community structures at village level ... The ANC will further engage with traditional leaders, including Contralesa, to ensure that disposal of land without proper consultation with communities and local governments is discontinued.*

Yet the Traditional Courts Bill embodies an authoritarian and patriarchal 'traditional justice' and President Zuma and cabinet ministers recently stated government will seek to 'recognise and promote the institution of traditional leadership' (cited in Mnisi 2010). Following Minister Nkwinti's statement to the Constitutional Court in March 2010 that CLARA was no longer in line with government thinking, no new policy directions have emerged on communal tenure reform, possibly reflecting the ANC's ambivalence .

### 1.3 'Rights' as a medium of local struggle

Do people living in communal areas use the notion of socio-economic or human rights in efforts to claim or defend their rights to land? In contrast to the national policy engagement terrain, in everyday contexts people sometimes appeal to rights, but often invoke customary norms and values — no doubt because land rights are deeply embedded in various social identities, networks and relationships (Cousins 2008: 109–137). But 'custom' is not rigid and unvarying — it tends to evolve over time, its underlying principles being re-interpreted and adapted to fit altered conditions and circumstances. In communal tenure systems, claims to land are often relational and processual, rather than defined by a clear set of entitlements and duties (Berry 1993). This 'living customary law' of land or Oomen's (2005: 203, 233) 'living law', is an inherently flexible and dynamic hybrid of different ideas, identities and resources available to those who seek to secure their interests. The extent to which such claims can be successful, however, also depends

on the structure of power relations in which they are mounted (Claassens 2008: 262–292), Lund 2002: 11–43, Oomen 2005). Shifts in power relations in wider social and political contexts, and in expressed laws and policies, can also influence ideas, identities and resources.

Recent research in Msinga, KwaZulu-Natal illustrates the processes at work (Cousins forthcoming). Here, the patrilineal system cannot easily accommodate a pent-up demand for land by unmarried women with children (see *Box 1*). In response, local institutions are starting to re-interpret customary land allocation albeit contested and uneven. Wider political discourses on 'equal rights for women' can be discerned, subtly influencing local understanding and helping to shift local power relations.

#### CASE 1: A SINGLE WOMEN WHO WANTS LAND OF HER OWN

Hlengiwe Mbatha is 35 years old and lives at her father's homestead with her father, mother and three brothers, four wives and fourteen children. She has two children herself — a ten year old and two year old — the latter by her current boyfriend, who paid her father three cattle as damages. At some point she moved to live at her boyfriend's homestead, but her father called her back home because her boyfriend had not finished paying *lobolo*. She receives two child support grants and earns money by selling poultry. When she began to earn her own income, she asked her father if she could build her own house and cook separately, because of constant conflict between her and her brothers' wives over food and cooking.

Hlengiwe says: 'I want land to build my own house because the conflict does not end, and I do not know if I will get married any time soon. I approached my father and told him I wanted land, but he told me that people in the area do not allow a single woman to have her own house, even if she has children. I know two other single women in the area who also want land, but the community does not allow a woman to get land on her own.'

Local residents in Msinga readily describe the communal tenure system and its underlying principles and procedures appear widely understood and accepted. The key principle is that married couples with children should be allocated land so that they can establish a homestead (*umuzi*) and access natural resources to support their families. Single people cannot be allocated land and must live with their parents or other family members. A family is allocated land under the authority of the household head, rather than to individuals, and the household head is seen as a senior male (*umnumzane*). Land holding is strongly associated with the necessity of supporting a family from land-based livelihoods. Descent is traced primarily through men in a patrilineal kinship system deeply concerned with the 'surname' established at an *umuzi*. However, this idealised and normative version of land tenure, as with many other aspects of 'custom', is often contradicted in practice. The flexibility of 'custom' is also evident in relation to changing marriage practices.

Survey research indicates that marriage rates among black South Africans have been declining for many years (Mhongo&Budlender 2009) for complex reasons about which there is no consensus in the academic literature. In Msinga relatively few couples are now 'properly' married according to custom (known locally in Zulu as *ugidile*) — with a complete set of rituals and ceremonies around courtship, betrothal and marriage being performed, and *lobolo* (bride-wealth) of about eleven head of cattle paid to the bride's family by the groom's family. A truncated version of customary marriage (*uganile*) in which fewer animals pass from the husband's to the wife's family (from *gana*, an early stage in the marriage process described by Vilikazi (1965: 59) as a 'formal betrothal') is now far more common. If a woman falls pregnant, sometimes the man or his family only

pay a customary fine for damages (*inhlawulo*), in the form of two or three cattle, accompanied by the slaughter of three goats.

Today, in many cases the man pays no damages at all when a girl becomes pregnant and the couple simply starts living together. Many unmarried women live with their children at their parents' homes, which can create tensions in large and crowded homesteads. Some women are allowed to build their own home at the edge of the homestead (*umuzi*) — neither fully-integrated with nor totally independent from the homestead. Many single women with children now want land to establish their own homestead and some are starting to use the language of 'rights' and 'gender equality' to argue their case. Claassens&Ngubane (2008: 177) suggest that

*...single mothers are challenging tribal authority structures to allocate them land so they can establish independent households. Gradual, uneven processes of change in land allocation practice are under way... Women use a range of arguments to advance their claims. Many are couched in terms of 'customary' values... [but] often the principle of equality is asserted, and women refer to the Constitution and the new government.*

They urge attention to 'the nature of rights and claims as they are asserted, used and contested in practice' when new laws are formulated (*ibid*: 176). Law is important because 'people act within the constraints of local power relations, which are in turn significantly affected by the stance of government' (*ibid*: 181). This argument resonates strongly with Msinga research findings (Cousins forthcoming). The possibilities for change in land tenure practices arising from intersecting local pressures and external influences is well illustrated in one locality in Msinga:

In July 2009, a meeting of the Mchunu Traditional Council, the traditional leadership structure in the large *Mchunu insizwa* (nation or 'tribe') decided that single men and women, whether or not they have children to support, should be allowed to apply for land. This radical departure from custom was justified by councillors responding to the need to adjust land tenure systems to declining marriage rates and the country's changing laws and policies on gender equality.

In 2010 the Council further decided to facilitate the Department of Home Affairs's registration of customary marriages by providing couples with a letter attesting to the validity of their marriage under customary law — even when no customary procedures have been followed. The decision was in response to rural women's widely felt need to register their marriages so they can claim their husbands' death benefits or life insurance claims.

A series of workshops organised by a local NGO over the previous two years, focussing on new national laws and policies on land, traditional governance and customary marriage informed both Traditional Council decisions. The NGO workshops facilitated discussion on women's land rights and changing marriage practices, as part of a three-year action-research project on the potential impact of CLARA in Msinga District (Cousins forthcoming). The presence of several women on the Traditional Council as required by the TLGFA, may also partly explain the decisions.

#### 1.4 Advocacy, litigation, mobilisation and research agendas

Filling the legislative vacuum on communal tenure reform is urgent and pressure on government to do so is likely to mount. Civil society advocacy could well focus on four key issues:

- a. the rights of ordinary residents to exercise choice about the form and content of land rights, and the local institutions that administer land;

- b. mechanisms to ensure the accountability of traditional leaders and councils on land issues;
- c. acknowledging the contested boundaries of 'traditional communities' and sub-groups; and
- d. measures for gender equality.

These will probably be linked to advocacy on issues of traditional courts, traditional leaders imposing increased tribal levies, and community struggles in areas where mining companies have mineral rights. Litigation against aspects of the Traditional Leadership and Governance Framework Act, or its provincial versions, is a distinct possibility.

There is definite potential for larger-scale mobilisation efforts focused on securing communal land rights. Evidence from the community mobilisation preceding the legal challenge to CLARA suggests many people experience insecurity and are willing and able to present their case to government departments and traditional leaders. Representatives of community-based organisations are generally clear about the problems they face, able to relate these to policy and legal frameworks, and confident and articulate in presenting their views in settings such as parliament. The potential to influence decision-makers is greatly enhanced when such groups join forces or form issue-based alliances, as in recent lobbying of the Parliamentary Portfolio Committee on Justice about the Traditional Courts Bill, and recent effective networking, alliance-building and litigation about mining on communal land. However, local groups clearly need funds and external organisational support to link up and mount public events. Whether such support will be available is unclear.

Research is needed to document the full range of situations in which insecure rights are experienced, and to develop a clearer understanding of the scale of such problems. Further research on how and to what extent communal tenure systems adapt to changed circumstances and needs (in positive or negative ways) should further inform policy and law-making.

## 2. Farm tenure reform

About three million black South Africans (6% of the population) who live on privately owned farms in formerly white commercial farming areas are among the poorest South Africans — and in some districts their ranks are swelled by an influx of citizens from neighbouring states (Zamchiya&Hall forthcoming). Farm dwellers are not merely wage workers who happen to be employed and therefore live on commercial farms (though some are); many live on farms because they have always lived there and regard these farms as their only family home, the site of identity and a place to bury their dead.

Traditionally, most farm workers lived on farms that employed them, but some live on commercial farms and undertake independent cultivation and grazing based on a range of tenure arrangements. The category of 'farm dwellers', as opposed to 'farm workers', therefore refers more generically to all who live on farms owned by others; the term is a discursive innovation deployed by dwellers themselves. As recently as the late 1990s, the term became widespread as a product of farm dwellers' struggles for recognition of their prior connection to land and, therefore, their right to remain on the farm. Farm dwellers use the term to de-emphasise the distinction between those who are and those who are

not employed, and mainstream use of the term in policy discourses constitutes a symbolic victory, although efforts to secure the rights of farm dwellers in practice have foundered.

## 2.1 Policies and progress since 1994

The White Paper on South African Land Policy framed the problem of tenure insecurity not only as a human rights issue, but also as an obstacle to political stability in rural areas. The policy aimed to prevent arbitrary and unfair evictions, recognise and protect existing ownership rights, guarantee basic human rights, and promote long-term security through government-brokered locally-based solutions to which all parties contribute (DLA 1997: 57). Farm tenure reform would aim to balance the rights and interests of owners and occupiers.

*Government has a duty to intervene to remedy the situation. It recognises that sweeping interventions to upgrade occupational rights could have unintended consequences and result in even more evictions by land owners and the casualisation of farm labour. It is seeking therefore to accommodate the mutual interests of both occupiers and owners*

Source: DLA 1997: 33

The Extension of Security of Tenure Act (No 62 of 1997) — widely known as ESTA — is the most significant law that reformed tenancy on commercial farms and is applicable to all people living on land zoned for agriculture with the consent of the owner. Its provisions regulate tenure conditions, set out the rights and duties of both farm occupiers (Section 6) and farm owners (Section 7), and prescribe procedures for evicting an occupier and the factors to be considered before granting an eviction order (Section 8). More restrictive conditions are established for evicting ‘long-term occupiers’ — those over 60 years of age who have resided on the farm for 10 years or more (Section 8.4). The earlier section of the Act (originally its main focus) is less well known and it provides for farm dwellers to acquire long-term independent tenure rights by purchasing land with state support (Section 4).

Another law, the Land Reform (Labour Tenants) Act 3 of 1996 (LTA), similarly regulates tenancy terms for those who have historically worked on farms in return for access to their own land on which to cultivate and to graze livestock. It affirms their rights to continued use of the land (Section 3–4), stipulating how and through what processes these rights may be legally terminated (Section 5–15). It allows labour tenants to obtain ownership of the land they currently use (Section 16–28) or alternative land, through an application or claim-based process — more akin to the land restitution process than to ESTA’s more discretionary and vague prescriptions. By the deadline for such applications in March 2001, 19 416 labour tenant applications had been lodged. By 2004, 41 791 hectares were transferred to 7 834 labour tenants (Hall 2004: 45), but no more recent data are available and it is not known how many applications have been resolved. Indeed, it appears that formal and procedural implementation of the Act ceased in the early 2000s, with government arguing that notifying landowners of claims initiated legal challenges — potentially about 20 000 court cases — for which the state was unprepared (Shabane 2004, *pers. comm.*). Arguing that the drafters of the LTA had not anticipated this, and with the apparent agreement of the Land Claims Court, in 1999 the Department ceased issuing notices informing landowners of claims on their land, which Section 17 of the Act had required be served ‘forthwith’. Nearly a decade after this tacit agreement, landowners in Mpumalanga managed to have claims to their land nullified by the courts on the basis that the state had not adhered to the steps prescribed in the LTA; the ruling could potentially unravel the entire labour tenant programme.

The impetus behind both these laws came from land rights NGOs converging with ex-colleagues who had become the new cadre of senior departmental officials. They

collaborated to frame these rights in law and, after promulgation, to implement them, conducting rights education campaigns, monitoring evictions, intervening in threatened evictions and brokering long-term solutions. With attention focused on evictions, though, the 'developmental' dimension of ESTA was most poorly implemented. Provision of long-term secure tenure rights involves upgrading in situ ownership rights, or providing for off-site settlement. The mechanism was meant to be available to all farm dwellers, but in practice has been provided almost exclusively in response to evictions — in the form of 'alternative accommodation' usually funded by the state — and even then, only to a very small percentage of all those evicted (probably less than 0.5% of those evicted). Several extensive grazing projects were established on 53 390 ha in the Northern Cape, while in five other provinces about 5 000 hectares was transferred to farm dwellers (Hall 2004).

At the same time, evictions gathered pace, in part prompted by the promulgation of the Acts themselves, but also by wider economic conditions and strategic concerns of farmers. The only major national survey on evictions by Nkuzi Development Association and Social Surveys found that about 940 000 people were evicted in the ten years from 1994 to 2003, out of 2.5 million who moved off farms for a variety of reasons (Wegerif et al 2005). Only about 1% were evicted legally through a court order as prescribed by Section 26(3) of the Bill of Rights. Those evicted lost access to their homes, to land and to assets like livestock. Evictions spiked in years coinciding with droughts and with the promulgation of tenure and labour laws. Farm sales, liquidations and changes in land use also led to evictions, as did cost price squeezes experienced in industries such as the apple industry in the late 1990s. Comparing the number of people evicted to those who benefited from land reform, it is clear that many more black South Africans have lost their tenuous hold on land in the white farming areas since 1994, through evictions, than have gained land through land reform. Some may have acquired residential or farmland through the redistribution programme, though it is not possible to say how many have been supported in this way. Others were able to stave off threatened eviction. Less well documented, but very significant, are unilateral changes in tenure conditions.

Until the 1990s, farm dwellers had very limited rights and those employed were excluded from labour legislation applying to all other categories of workers. Commercial farms were effectively excised from many areas of government regulation. Although policy attention with respect to farm dwellers' rights has focused on tenure (and labour) rights, access to other socio-economic rights, services and amenities widely accessed in urban areas (housing, health, education, legal representation, water and sanitation, electricity, transport) continues to be constrained and in some respects, has deteriorated since the advent of democracy (Wisborg et al forthcoming). Those remaining on farms live in insecure arrangements, insulated from government services. Policy is unclear about how public services are to be provided to indigent people living on privately owned farmland, and a stand-off is evident between line departments and municipalities on the issue of how to provide support and services to farm dwellers (Hall et al 2007). In practice, government has no coherent and coordinated response to the situation of farm dwellers.

## **2.2 Declining priority and shifting politics**

For the past decade, legal frameworks on farm tenure have remained in a perpetual state of review, so even implementers seem unsure to what degree they are expected to implement them — and if so, how. A 1998 review recommended revising the LTA, noting that it was prompting loss of tenure rights (e.g. the withdrawal of grazing land) and evictions. In 1999, a national review of ESTA concluded that problems experienced were inherent to the law, not just implementation problems. In 2001, at the National Land Tenure Conference, the Minister undertook to review ESTA and the LTA and to 'consolidate' them into a single law, hinting that this would strengthen substantive rights

and resolve legal loopholes. Between 2003 and 2005, successive drafts of a Tenure Security Bill proposed a category of ‘non-evictable occupier’, but even the Minister rejected this, arguing it would amount to *de facto* expropriation of farm owners’ property rights.

From 2006 to 2010, the Departments of Land Affairs (later Rural Development and Land Reform) and Housing took initiatives to revise the urban-focused Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE), aiming to produce one consolidated ‘evictions’ law applicable across urban and rural contexts. PIE amendments were spurred by Bredell land occupations in 2001 and the ANC’s call to criminalise land occupations and those who initiate and lead them. A PIE Amendment Bill to this effect was sent back by Parliament in 2008 and by 2010 had not been reintroduced. Even so, it seems the government currently wants to standardise eviction procedures by collapsing the three laws into one. If this were to happen, other provisions in ESTA and the LTA — their regulatory function (regulating tenure relations) and developmental function (to promote long-term secure tenure options) — could be excluded. By late 2010, the South African Law Reform Commission (2010: 19–20) recommended ESTA be repealed in its entirety (and the LTA retained), but no revised evictions legislation has been published.

How is one to explain this dramatic reversal of 1990s efforts to secure tenure rights? Despite the growing importance of farm dwellers in political discourse, fundamental ambivalence about how (and even whether) to address their situation remains. Farm dwellers are not an important political constituency, yet the patent failure on farm dwellers’ rights has proved a political embarrassment — a liability. Growing evidence on the scale of illegal evictions has proved useful to the ANC, embattled over its wider failures in land reform, as signifying the hostility and intractability of white farmers and their unwillingness to support reform and be ‘willing sellers’. New directions in the ruling party’s thinking about land reform raise questions about who should benefit, with farm dwellers frequently mentioned among the categories of potential beneficiaries of wider redistribution efforts, apparently instead of (rather than in addition to) renewed efforts to make tenure reform work.

Tenure reform and the language of rights have been on the wane in the land reform programme in recent years. The primary focus of newfound political energy around rural development and ‘agrarian reform’ focuses on dualism between commercial and communal areas — on production and employment in the former, and on small-scale farming in the latter. The widespread recognition of ongoing evictions from (and poor conditions on) farms has prompted proposals to:

- organise and unionise farm ‘workers’
- deliver services to them (raising questions about how to divide labour between farm owners and municipalities in rendering such services on private land)
- enforce or amend tenure laws.

### 2.3 Why the slow progress on realising rights?

Why has the right to secure tenure on farms been so widely violated, and why is there so little progress on upgrading and securing long-term rights? In answering these questions, we distinguish between policy design (and the resources and institutional capacity deployed in implementing it) and the wider context — the structural constraints, power relations and inequalities — in which this sphere of rights is to be realised.

#### *Resources, capacity and policy design*

ESTA is best described as an ‘unloved law’: several enforcement and implementation mechanisms have been undeveloped, and even rolled back in recent years. For example,

although by the late 1990s designated 'ESTA officers' were appointed in each provincial land reform office, by the mid-2000s these posts had been disestablished and project officers dealing with land redistribution projects were expected to address evictions issues. Their performance appraisals, though, were based on hectares transferred and budgets spent, rather than the slow and complex work of resolving tenure disputes or preventing evictions, which produced less tangible outcomes. This was compounded by the failure to create any dedicated budget line for tenure reform: funding is fungible within a wider 'land reform' budget, which *de facto* proved to be a redistribution budget. Where actual land transfers to farm dwellers have taken place, this was seldom through legally prescribed processes in ESTA or the LTA. The requirement that the Minister 'shall' make available funds to secure and upgrade tenure rights (Section 4 of ESTA) has been equated in practice with redistribution grants — but given that any black South African can access these funds, those who are better placed than farm dwellers to know about such opportunities are better able to pursue them effectively. In the late 1990s the DLA established provincial ESTA forums to promote cooperation among line departments (Land Affairs, Labour, Justice, Housing, Agriculture, and Social Development) as well as between them and land rights NGOs, the Human Rights Commission, rural advice offices, farm worker trade unions and farmer associations. These forums monitored evictions, enabled referrals, coordinated responses to threatened evictions, liaised with relevant local authorities, and initiated training of SAPS officials and prosecutors. By the mid-2000s these had ceased to exist in any of the nine provinces.

#### *Structural and contextual constraints, inequality and power*

Major structural transformation in the agricultural sector has been underway for two decades, and is a key defining impediment to realising rights on farms. As farmers adjust to deregulated markets and the removal of centralised marketing boards, subsidies and trade protection, they have adopted risk mitigation strategies in the face of volatile demand and pricing in input and output markets. Reducing and casualising employment is the prime risk mitigation strategy adopted — aggravating long-term job-shedding trends and leading to the rapid inversion of the ratio of permanent to seasonal labour.

Widespread agreement that ESTA has 'failed' — a view now shared by the Ministry, farm worker unions, land rights NGOs and commercial farmer associations — has fed into scepticism about the transformative potential of imposing a rights framework on farm tenure relations. Atkinson's (2007) study on farm workers in 'arid South Africa' epitomises this view when she laments the ways ESTA contributed to rupturing 'organic and inclusive' social systems on farms. She depicts farm social relations as naturally cooperative and mutualistic, and argues that the international competitiveness of commercial farmers is a vital precondition to improving the situation of farm workers. The terminology is instructive; in this economistic view, people on farms are 'workers' not 'dwellers'.

Shifting demographics and changes in patterns of household formation also constrain the rights framework. Farm school closures and increased demand for access to schools and other services has led, in some parts of the country, to households 'split' between commercial farms and communal areas. Wisborg et al (forthcoming) document the common practice of Limpopo farm owners and managers evicting children (usually teenagers, but often also pre-teens), ostensibly for their own benefit, so that they can attend school in nearby communal areas. Neither the owners nor the farm dwellers (the parents of those evicted) used any language of rights to explain or object to this practice. Evictions of teenagers prevent claims to independent tenure rights by non-workers and the transfer of tenure rights to a new generation. It also resulted in ensuring, as some farm owners and managers conceded, that those living on farms were more directly under their control through employment.

A more general and enduring constraint is that the social relations into which this sphere of 'rights' has been inserted remain fundamentally untransformed. Mngxitama (2001) describes farm dwellers in South Africa as 'citizens without rights' embedded in 'semi-feudal' relations with landowners. Alluding to Mamdani's (1996) delineation of 'citizen and subject', he concludes that '... [m]ost South African farm dwellers remain subjects in the new democracy. It is only when countryside relations have been altered that we can speak of them as part of the nation' (Mngxitama 2001: 14). So how is the presence of rights evident in daily relations and power struggles on farms?

#### **2.4 'Rights' as a medium of struggle among farm dwellers and owners**

Even where rights may not be realised, their existence nonetheless has impacts. Widespread ignorance among farm dwellers and owners about the details of their rights and duties in law, the details of ESTA, and the awareness that certain tenure rights and restrictions on evictions exist, contributes to a range of new engagements among these asymmetrically located actors. Legal drafters did not anticipate the widespread 'marketisation' and monetization of rights: in documented cases landowners induce farm dwellers to 'voluntarily' vacate their homes and the land they occupy in return for cash payments (enough to buy a Reconstruction and Development Programme (RDP) home or to be allocated a stand in a communal area) and instead of pursuing a legal route to contest their eviction. The rates vary markedly across the country and even within provinces, with Western Cape households paid R2 000–R10 000 to give up their homes; while some KwaZulu-Natal families were offered up to R40 000 when they could plausibly claim stronger rights as labour tenants (Hall 2003).

The phenomenon of people contracting out of their tenure rights appears to be a function farm owners' aversion to pursuing court processes for legal eviction — although as Shirinda (forthcoming) argues dwellers may also prefer to avoid alienating legal proceedings. So the interests of owners and dwellers converge in recognising in broad terms that some kind of rights exist and negotiating settlements rather than abiding by the letter of the law. In this way, he argues, farm dwellers use ESTA to leverage out-of-court negotiation with landowners, with some success — but only because of awareness of rights and mutual aversion to courts. The growing ease with which landowners are able to secure eviction orders, and the reduced time and cost required, could well affect 'going rates', and owners might prefer the court route, from which they are likely to emerge without major costs. This translation of rights into bargaining between owners and occupiers signals not only the success of legal rights in changing practices, but also their inability to find traction and the unlikelihood of many occupiers invoking their full rights, given absent and weak official enforcement mechanisms.

Struggles over tenure rights are embedded in wider struggles for survival and for livelihoods. 'Rights' might leverage power and enable negotiation, but delinked from wider livelihood entitlements, tenure is liable to be rendered unsustainable. The story of the Mathabane family in Limpopo illustrates these connections between rights to tenure and wider socio-economic rights and livelihoods in practice (Wisborg et al forthcoming): In their unusually successful case, ESTA has been repeatedly invoked to insist on rights being respected. Legal support from a land rights NGO, a legal NGO and, through them, DLA officials, enabled the family to reverse illegal and unilateral changes in tenure conditions in the face of repeated threats. It is a story of the ultimately a hollow victory of resisting eviction and rejecting cash offers to move, in favour of continuously threatened access to a homestead, water and land for grazing livestock and growing food.

## 2.5 'Rights' as a medium of struggle: civil society strategies

Civil society organisations use three key strategies to support farm dwellers' tenure (and other) rights:

- testing the law through litigation and securing precedent-setting judgments;
- challenging the justice system to provide greater support to farm dwellers in the form of state-provided legal representation; and
- through campaigns, building local area-based farm-dweller committees (and discursively appropriating the term 'farm dweller'), supporting mobilisation and shifting the terrain of political engagement between farm dwellers (and their organisations), farm owners (and their organisations) and state institutions.

Each strategy is discussed briefly below.

### *Testing the law through litigation*

Much strategic litigation on ESTA, particularly by Lawyers for Human Rights, focused on gender equality and the rights of women farm dwellers. The precedent-setting case of *Hanekom v. Conradie* clarified that women's tenure rights are not contingent on their husbands' or partners' rights and that their rights cannot be extinguished because their partners receive eviction orders in terms of ESTA (LCC 1999: LCC8R/99). Further jurisprudence undermined this victory: when a state institution (the Agricultural Research Council) applied for an eviction order in the case of *Landbounavorsingsraad v. Klaasen*, the LCC's ruling restricted the precedent of *Hanekom v. Conradie*. Judge Gildenhuys found that women farm dwellers not (regularly) employed (i.e. most women on farms) are not ESTA occupiers themselves, having not received 'actual consent', but reside on the basis of derivative consent via a family member (LCC 2001b: LCC83R/01). Despite concerted legal activism to redress gender inequalities in tenure rights, and some successes, the framing of the law and its interpretation by the courts has missed the mark.

### *Contesting rights to legal representation*

Using the courts effectively as a forum to contest evictions hinges on access to legal support. In a context where farm dwellers were being evicted following legal proceedings without any legal defence, the 'Nkuzi judgment' was a successful bid to shift the onus for access to legal representation for farm dwellers (and other indigent people) onto the state. This was the focus of an application by Nkuzi Development Association to the Land Claims Court in 2001 for a declaratory judgment on the state's responsibility to provide free legal representation to farm dwellers, citing the Government of the Republic of South Africa (as first respondent) and the Legal Aid Board (as second respondent) (LCC 2001a: LCC10/01). Judge Moloto upheld the application.

In response, and in view of the demise of the Legal Aid Board (LAB), NGOs, with government support, formed the Rural Legal Trust (RLT) in 2000 as a pilot project to provide farm dwellers with immediate access to affordable or free legal services, with a view to lobbying the state to provide such services through Justice Centres in the future. The RLT placed attorneys in land rights NGOs and university legal aid clinics across most provinces to mediate and litigate land rights cases, and extend paralegal services. After several NGOs withdrew from the RLT, the model declined and the state's new 'Land Rights Management Facility' is based on a judicare model, paying private non-specialist attorneys to take on cases. Neither initiative has been able to mount a coherent response to the 'Nkuzi judgment' to assure farm dwellers affordable or free legal services, and undefended court proceedings continue.

*'Farm dweller' identity: Reframing rights beyond tenure*

Civil society strategies in support of farm dweller rights emphasised the indivisibility of tenure rights from wider civil and political and socio-economic rights. In 2006, a national 'Farm Dweller Campaign' was launched by local farm worker committees and some trade unions, with support of land NGOs. With reference to Mngxitama's arguments about 'citizens' and 'subjects', campaign leaders took the unusual step of publishing draft legislation, a 'Farm Dweller Citizen Bill' to be forwarded to Parliament. It aimed to establish that 'farm dwellers' are the construct and legacy of apartheid — and that citizenship rights cannot be realised in absence of independent tenure.

*Recognition that because of their particular history transformation of farm dwellers tenure rights must provide the right to exclusive real rights to land rather than 'negotiated or dependent' rights. Only exclusive access to and control over use of land in farming areas for family life and provision of food and other natural resources will achieve a change in the unequal power relationships in farming areas*

Source: Farm Dweller Campaign 2006

Its strategic purpose was to set the terms of debate and identify principles that should underpin new legislation. Despite being endorsed at the launch of the Farm Dweller Campaign, it did not gather national momentum due little campaign funding, contested leadership (particularly the role of the Landless People's Movement) and strategic differences over whether to focus narrowly on eviction and the (unlikely) demand for a moratorium, or to locate this in a wider alternative vision for social justice and livelihoods turning on alternative economic development priorities, land uses, production systems and settlement patterns.

Civil society organisations have been unable to mount a concerted and multi-faceted intervention on farm dweller rights at national level, combining impact litigation with policy advocacy and political organisation. Jara and Hall (2009:217) argue that obstacles to organisation in pursuit of rights among farm workers include:

- political obstacles, in an environment where control over private land has traditionally involved extensive control by farmers over all aspects of life for those living on farms
- logistical and geographical factors: as most parts of the country typically have a low concentration of workers, the population is dispersed and access to farms is difficult (and sometimes dangerous) for outsiders supporting worker organisation and
- restructuring of the rural labour force and demise of permanent employment, which renders organising 'farm workers' a limited strategy.

More creative area-based movements of people in farming districts, along the lines attempted by Sikhula Sonke in the Western Cape, link demands of farm workers to wider sets of socio-economic rights and livelihood opportunities both for those living on and off farms.

In a study on farm dwellers' tenure, livelihoods and social justice in Limpopo province, Wisborg et al (forthcoming) suggest tenure security may be conceptualised as nested within livelihoods and in turn framed by wider concerns about and contestations over social justice. The problem of insecure tenure has been conceived in a narrow and limited way — in legislation and, more markedly, by those tasked with implementing it. The 'rights' discourse on tenure is markedly unevolved among farm dwellers, owners and institutions responsible for rights enforcement and realisation (*ibid*). Invoking tenure rights on farms has turned out to be risky where the very existence and content of these rights is still contested, and the likelihood of them being enforced 'from above' is low.

## 2.6 Agendas for litigation, research, activism and advocacy

In the struggle to realise the rights of farm dwellers to secure tenure, and to a spectrum of rights and entitlements which hinge on secure tenure, large-scale organisation and mobilisation is the essential (and missing) prerequisite. As discussed above, building such momentum is complex, faces structural and strategic challenges, and will take time. Ultimately, only farm dwellers themselves will be able to counter the political turnabout on the question of rights as the foundation for a new dispensation for farm dwellers. At the same time, legal interventions to challenge the state to give effect to rights already enshrined in law are still necessary and possible, if pursued in alliance with social movements, supported by rigorous research and on the basis of carefully selected cases. Three issues stand out as priorities for joint action:

- a. The state's failure to take reasonable steps to enforce the provisions of ESTA and take action where violations have occurred is arguably a criminal justice issue, in which the widespread and systemic violation of Section 26(3) of the Constitution constitutes the breakdown of the rule of law.
- b. The positive obligation on the state to provide 'tenure which is legally secure or ... comparable redress' (Section 25 (6)) in relation to farm occupiers has not yet been legally tested. Section 4 of ESTA states that: 'The Minister shall...' make funds available for this purpose; in this context, legal opinion is that 'shall' is prescriptive, as opposed to permissive.
- c. Core to realising rights for those living on privately owned farms is to challenge the limits of the 'private': farm dwellers are isolated from the 'public' and from entitlements to services due to living on private land. Questions must be asked about how the state is delivering on its obligations to enable farm dwellers to access basic services, and the implications of the state approach of using farm owners as 'service delivery agents', as evident in the intermediary approach to water services and housing that has gained ground in recent years. The premise must be to recognise the rights of farm dwellers to the same entitlements as other citizens (and non-citizens) and in this way link struggles in two directions:
  - to extend the demands for secure tenure to wider socio-economic rights and
  - by establishing partnerships and alliances, link the struggles of farm dwellers to those of other poor people living with insecure tenure in other contexts, in communal areas and in urban and peri-urban informal settlements.

## 3. Evaluation: Potential and limits of a rights framework

Realising land rights — the systemic violation of which has been so central to the evolution of the modern South African countryside — was bound to be complex and fraught with political and practical difficulties. Doing so in a society characterised by rapid change and striking continuities with the past has produced unanticipated complexities, involving inherent tensions between rights imperatives on the one hand and the constraints of economic structures and processes on the other.

In communal areas, continued marginality and structural disadvantages mean that securing land rights is only one amongst many interventions needed to improve livelihoods. In contrast, commercial farming is marked by dramatic shifts in land

ownership and values, agricultural production and employment, most of which are in directions antithetical to the redistributive vision of tenure reform embraced in the 1997 White Paper. For both contexts, institutional inertia in many state institutions responsible for defending and realising rights, is a major constraint. The inertia is permitted by political priorities of appeasing white landowners (in commercial farming areas) and black traditional leaders (in communal areas of the ex-Bantustans).

As indicated above, we distinguish between the realm of 'rights' as contained in law and policy; the wider economic contexts of a changing commercial agriculture and communal areas with few economic opportunities; and the local contexts and personal relations in which rights are to be realised. Experience over the past sixteen years suggests that at the intersections between these realms are opportunities to form new connections and build institutions capable of ensuring that rights have traction at local level. To date, however, the absence of even the basic institutional architecture envisaged by the drafters of legislation and policy has led to a profound disconnect between the realm of 'rights' and local realities inhabited by 'rights holders'. Land rights and legal NGOs have tried to address this gap through litigation, rights education, service provision and mobilisation; the range of activities has produced valuable insights and often defended rights in practice, but their reach has been limited and a degree of substitutionism has taken place. A more strategic link between legal activism and local strategies for mobilisation might open the way to more productive outcomes.

Structural and contextual constraints are real and need to be more widely acknowledged, but they are not iron-bound. They are shaped by choices — most fundamentally, political choices — about the trajectory of rural South Africa, and its core productive sector: agriculture. Such choices, at the time of writing in 2010, were being made behind closed doors, as the two most relevant departments, Rural Development and Land Reform, and Agriculture, Forestry and Fisheries, developed new policy frameworks which are yet to be published for public comment. These policy-making institutions would do well to bear in mind the very real trade-offs that exist between different development paths, as shown in the agricultural employment scenarios developed by Aliber et al (2009: 133–163). Discussion about the choices about the country's economic growth path needs to be challenged to engage with the ways in which these choices are also about rights.

In our view, rights are a useful weapon in the politics of agrarian change, and a necessary component of agrarian reform policies. But they should not divert attention from the need for deeper, structural change, which would give substantive content to the rights defined by law — in this case, by redistributing access to high quality land and other resources, as well as enhancing market access, so that secure rights become one base for improved incomes and livelihoods for the rural poor. As Hunt (1991: 247) writes:

*Rights take shape and are constituted by and through struggle. Thus, they have the capacity to be elements of emancipation, but they are neither a perfect nor exclusive vehicle for emancipation. Rights can only be operative as constituents of a strategy of social transformation as they become part of an emergent 'common sens' and are articulated within social practices ... They articulate a vision of entitlements, of how things might be, which in turn has the capacity to advance political aspiration and action.*

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