

COMMUNAL LAND TENURE POLICY

The Constitution's promise

Under colonialism and apartheid, discriminatory laws deprived millions of black people of legal rights to land they had occupied and inherited over generations. Section 25 (6) and (9) of the Constitution instructs the government to adopt legislation that will address the current consequences of past racial discrimination in relation to tenure security:

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

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

The government has so far failed to comply with the Constitution's instruction to enact the legislation required by section 25 (9) for the 17 million South Africans living in the former Bantustans.

The new communal tenure policy

In fact the government has done far worse than that. The new Communal Land Tenure Policy (CLTP), like the Communal Land Rights Act (CLRA) of 2003 proposes to transfer the 'outer boundaries' of 'tribal' land in the former Bantustans to 'traditional councils' (the new name for the tribal authorities created during the Bantustan era). The policy proposes that the units of land transferred will be defined according to the tribal boundaries created in terms of the controversial Bantu Authorities Act of 1951.¹ The DRDLR proposes that 'traditional councils' will get title deeds (i.e. full ownership) of these blocks of land, while individuals and families will get 'institutional use rights' to parts of the land within them.

- **Institutional Use Rights and tribal ownership**

These institutional use rights, will however be subject to, and therefore trumped by the outright ownership simultaneously vested in traditional councils. The only way in law that government can create strong institutional use rights for families and individuals is against itself, on land that remains nominally state owned. Government is attempting to disguise its betrayal of ordinary people by pretending that it can give ownership to two opposing parties at once. It is clear however, that currently title deeds trump 'use rights' in law.

So-called 'use rights' are restricted to small areas such as house-hold plots, while the traditional council owns and controls all development related to common property areas such as grazing land and forests. The CLTP specifically states that the traditional council will own, and be in charge of investment projects such as mining and tourism ventures. Certainly not all chiefs are corrupt. Yet these are precisely the contexts in which corruption and versions of unaccountable chiefly power flourish. Examples include the sale of residential sites cut from grazing land by traditional leaders to outsiders, and massive community dissatisfaction with opaque mining and tourism deals that exclude and fail to benefit ordinary people in North West, Limpopo Mpumalanga and Eastern Cape.

Also of concern is that the new policy promotes 'Investment and Development' structures alongside traditional councils. We have experience of such structures on the platinum belt in North West and Limpopo. They provide a vehicle for elite alliances between traditional councils and politically connected BEE investors that exclude and fail to benefit the ordinary people whose land and livelihoods are being destroyed by mining.

¹ The 2003 Traditional Leadership and Governance Framework Act introduces the term 'traditional community' to replace the term 'tribe' of old, but section 28 sets in stone the tribal boundaries created in terms of the 1951 Act although they are much disputed in many areas.

These policy proposals undermine the capacity of ordinary people to hold traditional leaders accountable by giving chiefs landownership powers that they never had under apartheid as well as key involvement in investment opportunities. The new proposals also downplay, exclude and undermine countervailing indigenous, statutory and common law rights vesting in ordinary people.

- **Countervailing land rights vesting in ordinary people**

The CLTP conceives of all the land in the former Bantustans as subject to chiefs and ‘tribal tenure’. The reality is very different. Significant numbers of black people managed to club together and buy land historically by either pre-empting or subverting the restrictions of the Land Acts on 1913 and 1936.

Much of this purchased land was subsequently subsumed within the Bantustans and has been fiercely defended against counterclaims by superimposed traditional leaders in the intervening decades. However inconvenient to the chiefs, that history cannot be wished away. Nor can the property rights created during that process be destroyed without due process of law. The same applies to the property rights of the hundreds of elected communal property associations who claimed, and were awarded restitution and redistribution land under post-1994 land reform.

The customary land rights of people on state-owned “communal” land are also jeopardised by the new policy’s attempt to centralise ownership and power in “traditional councils”. This undermines decision-making authority at family, clan and village levels. Such decision-making authority is a key component of customary land rights and pivotal to indigenous accountability mechanisms. Land that is held and managed at different, coexisting levels of social organisation encourages accountability and mediates power. When unilateral authority is vested at the apex of superimposed “tribes”, these internal balancing mechanisms are undercut.

- **Property rights and the boundaries of ‘community’**

The crux of the problem is that the new policy imposes a tribal construct of ‘community’ on smaller pre-existing groups who often have strong countervailing identities and land rights, whether derived from common law, customary law or statute law. By transferring title at the level of the ‘tribe’ it seeks to trump these other smaller communities, who would then become structural minorities within larger super-imposed tribal boundaries. Constitutionally, the Department cannot get away with this. Not only because such a plan would undermine tenure security for the most vulnerable South Africans, contrary to the promise in the Constitution. But also because such smaller pre-existing communities often have property rights derived from sources - including customary law, quitrent titles, PTO regulations, the Upgrading of Land Tenure Rights Act, and title deeds – which are protected by s 25 of the Constitution.

- **Is customary law restricted to the Bantustans? Are chiefs its sole custodians?**

The CLTP differentiates between ‘conventional traditional communal areas that observe customary laws’ and communal areas outside the former Bantustans. The policy, like the CLRA, maps chiefs, customary law and the former Bantustans directly on to one another. It reinforces the traditional leadership lobby’s claim that independent ownership rights undermines chiefly authority, and so will not be allowed within the boundaries of the former Bantustans. It also reinforces their reading of chiefs as the sole custodians of customary law.

The Traditional Courts Bill (TCB) took much the same approach – that customary law is restricted to the former Bantustans as an adjunct of chiefly power, rather than a system of law that applies to all who use it in their daily lives, whether they live in urban or rural areas, whether the family or the clan is the source of custom. Yet the Constitution’s recognition of customary law is not restricted to the former Bantustans. And its recognition of traditional leaders is subject to customary law. In various judgements the Constitutional Court has rejected the official version of autocratic chiefly power inherited from apartheid, in favour a more democratic multi-vocal version of ‘living customary law’ that develops as society changes its modes of life.

That interpretation of customary law as an opt-in system, which applies across South Africa, was re-iterated by the Provincial Legislatures during debates about the TCB in the NCOP this year. Province after province said the model of centralised top-down chiefly power contained in the TCB contradicted actual customary practice in their areas. In the end, the TCB failed politically because the required majority of provinces refused to support it.

In that context it is very worrying that the new policy seeks to give traditional councils the role of dispute resolution by the back door, when a law designed to achieve the same outcome – the TCB – generated enormous rural dissent, and was rejected in parliament.

- **Do traditional councils have the legal capacity to own land?**

As discussed above, traditional councils are a product of the Framework Act of 2003. The Act deems pre-existing tribal authorities to be traditional councils provided that they comply with two transformation measures. The first is that 40% of traditional council members must be elected. The second is that one third of traditional councils members must be women. The time frame for meeting these requirements was initially one year, but this has been extended numerous times including retrospectively by a 2009 amendment to the Framework Act. Despite that, 10 years later there have still never been traditional council elections in Limpopo. And in many councils the women's quota has not been met. Those elections that have taken place have been mostly flawed. There have been numerous court judgments finding that the deeming provisions have not been complied with.

The crisis is so bad that the new Traditional Affairs Bill (TAB) seeks to repeal the Framework Act and introduce new provisions that remove the consequence of invalidity for traditional councils that fail to 'transform'. The TAB is likely to generate as much controversy as the Traditional Court's Bill in Parliament, if not more. It cannot pass constitutional muster for various reasons beyond the scope of this factsheet.

In the meantime most traditional councils are not validly legally constituted, and so do not have the legal capacity to take transfer of, or own land. Nor do they have the legal status to enter into the kinds of investment deals envisaged by the Investment and Development structures proposed by the new policy.

- **You can't give away what you don't have.**

Does the state own the land it is planning to give to traditional councils? It certainly doesn't own the land that groups of black people purchased historically or the land that was transferred to CPAs and Trusts after 1994. The CLRA sought to get around this by empowering the minister to endorse such title deeds over to traditional councils. As discussed above, s 25 of the Constitution would not allow for this.

Most other land in the former Bantustans is registered in the deeds office in the name of the Republic of South Africa. But that nominal ownership does not mean the state actually owns the land. As eminent law professor Alistair Kerr set out in his book *The Customary Law of Immovable Property and of Succession* (1990) virtually all the land in the former homelands is owned by the families who have invested in, and inherited it over generations. Kerr analyses the content of customary law, and the content of statutory provisions such as Regulation R188 of 1969 (that applied to non surveyed land) and the quitrent regulations that applied to surveyed areas. He finds that both customary and statutory law creates real rights in land, that is – rights akin to ownership. That ownership vests in the ordinary people who have occupied, used and invested in the land over generations.

His conclusion was confirmed by the Upgrading of Land Tenure Rights Act of 1991 which provides for automatic upgrading of underlying real rights vesting in families and individuals to ownership. Kerr says there are two types of state trusteeship, a strong version in terms of which the state owns the land on behalf of the actual beneficiaries, and a weak version in terms of which the state's role is administrative, and does not amount to ownership. He concludes that the state's nominal ownership of land in the former Bantustans is the weaker administrative type. Ownership of land in the former Bantustans is not in the gift of the state. The state has no legal authority to give it to anyone but the people who are the underlying owners.

What is the alternative? IPILRA and a spectrum of tenure options

The South Africans living in the former Bantustans are the people who bore the brunt of the land acts and forced removals. Their structural vulnerability and deep poverty has been exacerbated by the breakdown in land administration. Many people no longer have valid documents to prove their land rights, and to protect them from land sales by traditional leaders, or investment deals that exclude them, while confiscating their land rights.

In order to protect such people the Interim Protection of Informal Land Rights was enacted in 1996. The Act provides that people may not be deprived of informal rights to land that they occupy, use or have access to, except with their consent or by expropriation with compensation. The Act was meant to be a temporary holding mechanism to ensure that those with informal rights are recognised as key stake-holders in subsequent development or tenure upgrades affecting their land. It was envisaged that IPILRA would fall away once the Land Rights Bill of 1999 was enacted. That Bill sought to go further than protecting existing rights, by elaborating their content in line with the underlying rights described by Kerr and others.

By its nature upgrading rights is a complex and time-consuming process which involves multiple interests and cannot be done overnight. It entails incremental processes that have been shown to be very vulnerable to elite-capture. Unless done with care, upgrading tends to undermine the rights of vulnerable groups such as women, and to unravel within a generation. This is particularly the case in Africa and Southern Africa. We have valuable lessons to learn from the 150 years of African freehold ownership in South Africa and how that has worked in practice. In practice African forms of freehold have tended to prioritise family interests over those of individuals. Contrary to western models of exclusive ownership, African freehold has tended to emphasise inclusive customary values. Upgrading therefore needs to build on African understandings and practices of ownership, rather than default to western models of exclusive ownership that are out of sync with the reality of shared and relative rights vesting not only in individuals and families, but also in user groups and communities.

The key assumption of both IPILRA and the Land Rights Bill was that existing underlying rights would be protected and enhanced through processes that incrementally transferred ownership and control from the state to ordinary people. In some circumstances people may opt to retain nominal state ownership while beefing up the content of their rights against the state. In other circumstances groups may opt for transfer of title and full ownership. Neither option can fly however, if the state has already transferred ownership to a third party as the Communal Land Tenure Policy envisages.

There are various shortcomings with IPILRA, which require amendment and strengthening. But it nevertheless provides a key mechanism to protect the rights of the most vulnerable and to build on, in enhancing and expanding those rights. Urgent additions are that protected rights must be recorded and registered, so that they cannot be sold from under people, and people have the security of written proof of their rights. Otherwise they will continue to resort to the invalid PTO certificates that people call their 'title deeds'. Of crucial importance is the creation of the office of a land rights ombud that ordinary people can approach when their rights are under threat.

Conclusion

It is ironic that laws and policies adopted over the past 10 years re-entrench two flawed colonial constructs that were pivotal to South Africa's history of racial dispossession. The first is that customary systems of land rights do not constitute property rights for their members. This was used to justify the appropriation of African land by the colonial state. The second is the colonial insistence that the chief's power was despotic. This was used to justify the power of the British governor general as the "supreme chief" to redraw tribal boundaries and appoint and depose chiefs at will. These distortions serve a similar purpose today, justifying the denial of the ownership rights of ordinary rural people, as well as the increasingly autocratic leadership style of the state.