

Tenure Reform: Communal tenure

A review of the findings of the High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change – December 2017

In terms of s 25(6) of the Constitution, parliament must enact legislation that would provide security to “a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices”. The HLP report acknowledged submissions made that in spite of the Constitution and tenure rights legislation, tenure continues to be insecure in communal areas, farms and urban informal settlements; and that tenure insecurity contributes to social, spatial and economic inequality and perpetuates divisions across race, class, gender and habitation.

Key issues at a glance

Core problems	Principal HLP recommendations
<ul style="list-style-type: none"> ● The tenure of people living on communal land held in trust by the State remains insecure. ● The state has failed to adopt to secure tenure in communal areas. ● The protections in IPILRA remains largely unimplemented. ● There has been a total breakdown in land administration. ● Traditional leaders have assumed powers to treat communal land as their own. ● Land rights holders in communal areas have no say in development on their land and receive little or no benefit from it. ● Elites have taken advantage of these insecure rights to make deals in mining and agriculture that marginalise the majority. 	<ul style="list-style-type: none"> ● Reject the CLTB and its default to ‘traditional community’ boundaries. ● Focus on securing the rights of individual and household rights holders through improved land administration and stronger consent requirements. ● Rights holders with insecure tenure must be properly consulted, and their consent obtained for others to use the land they occupy and use. ● If they withhold their consent, the investment company must be required to apply to court for the expropriation of their rights. ● IPILRA should state explicitly that the holders of informal rights are deemed to be the owners of the land in question for the purposes of any revenue from the land or any compensation for use of the land. ● Explicitly include IPILRA protections in other legislation, such as TLGFA, MPRDA etc.

Problem statement

The tenure of people living on communal land still held in trust by the State remains a prime example of insecure tenure, exacerbated by the government’s inability to adopt legislation that would fulfil their constitutional mandate to secure such tenure and the assumed powers of traditional leaders to treat

the land as their own. To make matters worse, the permission of land rights holders on communal land is not sought when their land is earmarked for development, for mining etc. They cannot refuse entry and they receive no compensation.

A speaker in Mpumalanga: *“Rural communities still do not own land. They continue to live under an old legal system”* and from KwaZulu-Natal: *“We are dispossessed of our land by development, by the mines, and we get no compensation or benefits out of the so-called development on our ancestral land. We are not consulted. We have turned into non-entities with nothing, and yet we are the rightful owners of the land.”* These impacts disproportionately affect women.

Government proposals/responses

The government intended with its post-constitutional legislation to move away from a permit-based system (that characterised apartheid land holding) to a rights-based approach. The legislation adopted, the Communal Land Rights Act (CLRA) of 2004, was to transfer land title of communal land from the state to communities; register individual land rights within communally owned areas; and mandate the traditional council to administer the land and represent the community as owner. The Act was declared unconstitutional in 2010.

In July 2017, the Department published the draft Communal Land Tenure Bill (CLTB). Key similarities between the CLRA and CLTB are:

- The definition of community reverts to the definition in the Framework Act, therefore a traditional community with a chief;
- Land will be transferred in title to the ‘community’, but the CLTB also provides for the possibility of “ownership” for individual community members (although this remains very unclear);
- Both only recognize two levels of land rights holding: at the community and the individual level;
- The Minister must consider a land rights enquiry will determine the land to be transferred to the community;
- The community is required to determine its own rules for the allocation, nature and content of land rights in their community;
- A general plan is required for the communal land area prior to transfer happening.

There are also significant differences. The most important differences are:

- The CLTB provides for the community to choose its land administration body, but from two options only: the traditional council or a Communal Property Association;
- The CLTB attempts to include households in decision making through establishing a “household forum”;
- The CLTB attempts to regulate decision-making in communities by providing for majority requirements;
- The CLTB does not apply to Ingonyama Trust land.

HLP Findings

The lack of legislative protection and/or lack of implementation of the strong protections in IPILRA that do exist, have enabled elites to take advantage of the insecure land rights of communities. These elites include transnational mining companies, foreign investors, traditional leaders, traditional councils, and

commercial farmers. The lack of tenure security has been exacerbated by a total breakdown in land administration.

Key HLP Recommendations

- Reject the CLTB and its default to ‘traditional community’ boundaries.
- Focus on securing the rights of individual and household rights holders through improved land administration and stronger consent requirements.
- Rights holders with insecure tenure must be properly consulted, and their consent obtained for others to use the land they occupy and use. If they withhold their consent, the investment company must be required to apply to court for the expropriation of their rights.
- IPILRA should state explicitly that the holders of informal rights are deemed to be the owners of the land in question for the purposes of any revenue from the land or any compensation for use of the land.
- Explicitly include IPILRA protections in other legislation, such as TLGFA, MPRDA etc.