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Chairperson and Honourable Members
Portfolio Committee on Justice and Correctional Services

National Parliament

c/o Mr V Ramaano

Per email: Landcourt@parliament.gov.za

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Land Court Bill, 2021

Introduction

The Land and Accountability Research Centre (LARC) is based in the University of Cape Town's Faculty of Law. LARC forms part of a collaborative network, constituted as the Alliance for Rural Democracy, which provides strategic support to struggles for the recognition and protection of rights in the former homeland areas of South Africa. An explicit concern of LARC is power relations, and the impact of national laws and policy in framing the balance of power within which rural women and men struggle for change at the local level. It is in this context that we would like to make a submission on the Land Court Bill, 2021 (Land Court Bill).

Before diving into the substance of our submission, LARC would like to express that we are extremely pleased that Parliament and the Department of Justice are making an effort to dedicate capacity and resources in the form of the Land Court to the resolution of land disputes. Such steps are incredibly important in the road to speeding up the achievement of constitutionally mandated land reform.

Land Court Bill and tenure security reform legislative gaps

In terms of section 25(6) of the Constitution,

> "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".

These obligations provided for in this provision are bolstered by section 25(9) of the Constitution that requires Parliament to adopt appropriate legislation to give effect to tenure security reform.

The aims of the establishment of the Land Court are related to giving effect to these rights. However, in terms of the Bill, the Court is empowered to act in terms of its constitutive legislation and legislation that specifically gives it jurisdiction. For people who have insecure tenure, particularly in South Africa's former homelands, no appropriate legislative framework properly exists that adequately gives effect to their section 25(6) rights exists for the intended Land Court to give effect to. There is currently a dearth of substantive legislation that adequately protects these rights to land, meaning that the Court will lack appropriate tools to legitimately protect and enforce these rights.

For millions of rural people, the only law that currently exists that explicitly provides protection for their incredibly vulnerable rights to land is Interim Protection of Informal Land Rights Act (IPILRA)[1]. IPILRA is an interim law that provides important recognition for previously unprotected rights to land held in the former homelands. However, IPILRA provides no substantive rights or relief – beyond recognising the existence of these rights and providing limited consent requirements for their dispossession – that are required in terms of section 25(6). This lack of substantive protection is exacerbated by IPILRA not being given effect to and not complied with by both the state and private individuals.[2] People who hold rights in terms of IPILRA have been waiting for decades for a law that provides appropriately protects their rights.

Another law that has huge implications for traditional communities in the former homelands is the Upgrading of Informal Land Tenure Rights Act (ULTRA). This law makes provision for the transfer of 'tribal' land to a 'tribe'.[3] In practice, this land is transferred 'free and clear' to the traditional council in the name of the traditional leader. This is done with no recognition or protection for the rights held by individuals, families, and groups within the 'tribe' – ULTRA itself provides no recourse or relief for affected community members. With no substantive laws that exist to protect these rights, communities are left with no protection and there is no protection that an institution such as the Land Court is empowered to give. For further details on the impact of the operation of ULTRA, below is the submission written by LARC for the ULTRA Amendment Bill, 2020.[4]

Above, I have referred to only a couple of laws to illustrate the point that current laws that regulate security of tenure in the former homelands provide inadequate protection for these rights, and thus provide no real tools of protection for the intended Land Court. A substantive legislative framework to give effect to tenure security is needed, otherwise a needed institution like the Land Court will find itself powerless to effect the change it was created to achieve.

Another important consideration in favour of prioritizing having substantive protections for these rights is that it gives us with laws that provide for various

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[1] Act 31 of 1996.

[2] See for a full discussion the High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf and report of Presidential Advisory Panel on Land Reform and Agriculture https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_0.pdf.

[3] Section 20 of ULTRA, Act 112 of 1991.

[4] LARC Submission to the ULTRA Amendment Bill, 2020: https://static.pmg.org.za/200818LARC_Submission_to_ULTRA_Amendment_Bill.pdf.

mechanisms to vindicate constitutional rights. Currently, with the failure and collapse of institutions such as the Land Claims Commission, the Land Claims Court; and with the failure of government institutions such as the Department of Agriculture, Land Reform, and Rural Development in giving complying with constitutional obligations related to land reform,[5] we are in a situation where in practice this court will end up being the only mechanism available for people to give effect to constitutional protections for their land rights.

For members of traditional communities, this will place them in positions where their only recourse for protecting their rights to land is to litigate against their traditional leaders and/or against communities they will have to continue to form part of. Without a conducive framework, even an important institution such as the intended Land Court could cause and entrench conflict within communities, making the achievement of land reform an even more distant dream.

A siloed and piecemeal approach to dealing with the problems that plague the achievement of land reform, where government departments and Parliamentary Portfolio Committees do not substantively collaborate in developing appropriate and comprehensive responses, will likely result in even welcomed efforts being incapable of achieving substantive progress. Even with the establishment of the Land Court, these communities would remain vulnerable, and the Court would not have the appropriate tools at its disposal to protect them.

Capacity of the Land Court

- Do we have the judges and lawyers we will need for this Court?

The Preamble of the Bill refers to the importance of having accelerated lawful and equitable land reform that is guided by progressive jurisprudence. We welcome the move towards permanent judges for this Court and the ringfencing of money for providing persons who need it with legal representation.

However, the reality is that there is an alarming scarcity in judges and lawyers who have the appropriate training and experience in the field of land rights matters. Not having appropriate judges will result in regressive judgments that fail to give effect to constitutional rights. Not having appropriate lawyers to represent people will result in cases brought before the court being litigated in such a manner as to result in jurisprudence that fails to give effect to constitutional rights.

The problems faced with the pool of lawyers and judges available comes from the very nature of legal training provided for in law schools and beyond. Many law schools, in providing legal education, do not appropriately and adequately train students on the constitutional imperative of land reform, to engage with customary law, representing communities or individuals within communities, and the challenges that come with that. Post-law school training does little to fill those gaps for most trainee lawyers.

The Bill needs to provide for, at the very least, clear guidelines of what is meant by 'expertise in the field of land rights matters' in terms of knowledge and training. The Bill needs to also contemplate mechanisms of providing appropriate training for

[5] For one example, see the judgment of Deputy Judge President Madondo in *CASAC and others v the Ingonyama Trust and others*.

inexperienced lawyer to continuously build the capacity of the Court and increase the pool of appropriate candidates for lawyers and judges.

- Will the Court's capacity be undermined by the sheer number of cases?

The Bill envisions that the Court will deal with matters that arise in terms of, amongst other laws, the Restitution Act, and the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act (PIE)[6]. These are matters that were respectively dealt with by the Land Claims Court and mostly magistrates courts in the relevant jurisdiction. Just in relation to these laws the intended Court will deal with an immense number of cases and moving cases that were previously dealt with by lower courts to be exclusively dealt with by a High Court will also raise the costs associated with initiating or defending against litigation.

The Court is welcomed; however, clear mechanisms are needed to ensure that existing backlogs are not simply being moved over to a new court, making this Court ineffective. The Bill needs to be clear about ensuring that the result is not that people are unable to defend themselves and their rights because of excessive costs related to defending or instituting litigation – even people that previously could have.

Money might be ringfenced to provide poor and vulnerable people with assistance, but the vast majority of the demographic of people that will end up relying on this court is poor and vulnerable people. The reality limitations of available state money and qualified representations must be dealt with.

The Land Court and other laws

In terms of the Bill, the intended Land Court will operate in terms provided for in its constitutive Act and legislation that specifically gives the Court jurisdiction. There are some laws, existing and intended laws, that are not referred to in the Bill which have implications for and are likely to give rights to land disputes.

The Traditional and KhoiSan Leadership Act (TKLA),[7] was recently adopted and in terms section 24 kingship or queenship councils, principal traditional councils, traditional councils, Khoi-San councils, and traditional sub-councils can conclude partnerships and agreements. These powers will have implications for the land rights held by members of the communities that fall within their jurisdiction. The Bill makes no provisions for empowering the Court to deal with any disputes that may arise and the TKLA does not give the Land Court jurisdiction over disputes related to land that may arise in the operation of the Act.

The Traditional Courts Bill, 2017 is currently before Parliament and this Committee. The Land Court Bill does not explain or contemplate how these institutions will co-exist or relate to one another. Traditional courts will potentially be given jurisdiction over land-related matters, how will such proceedings and decisions emanating from there relate to the processes of the intended Land Court?

[6] Act 19 of 1998.
[7] Act 3 of 2019.

As referenced above, millions of South Africans that live in the former homelands hold their rights to land in terms of customary law. But, the Land Court Bill does not explicitly contemplate the role of, and mechanisms for, the Land Court in the applications and development of customary law. Land rights held in terms of customary law have a long history of not being appropriately recognised and protected – hence obligations placed on the state in terms of section 25(6) and (9) of the Constitution. It is important for customary law to be appropriately and specifically provided for, and recognised as a source of law that the Land Court must have appropriate respect for and mechanisms to properly ascertain, apply and develop as is required by the Constitution.[8]

Is the Bill appropriately labelled?

The Bill has been labelled a section 75 Bill in terms of the Constitution, an ordinary Bill not affecting the provinces. However, in the memo attached to the Bill it is stated that the Office of the Chief State Law Advisor is of the preliminary view that the Bill would affect the customary law or customs of traditional communities. As a result, it is deemed necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders. However, considering its likely impact on customary law and customs of traditional communities it is important that members of those communities are appropriately and thoroughly directly consulted about this Bill. Members of traditional communities are routinely left out of processes that result in laws, policies, and practices that directly and uniquely affect them. Only providing specifically for consultation with traditional leaders is not enough, and not appropriate. This Bill needs to go to provincial legislatures to ensure that the members of communities who will be directly and uniquely affected by the operation of this Bill and the intended Court are properly consulted.

Conclusion

In conclusion LARC welcomes the Bill, however the Bill fails to take into account many aspects of the context in which the intended Land Court will operate. While not every one of the points raised above can appropriately be dealt with in this Bill, these realities need to be at the forefront of the considerations to be taken into account as this Bill going through the legislative process.

The creation of a court such as the one contemplated by the Bill is very important in building infrastructures to ensure constitutional rights can be given full effect to. However, legislating without context will place already vulnerable rights in even more danger. Through this process, Parliament has indicated its commitment to doing what is needed to deal with the problems that plague land reform and LARC is available to substantively assist in those efforts.

[8] In terms of sections 29 and 211 of the Constitution.

We would welcome the opportunity make a presentation to the Committee on the matters raised in our submission and answer any questions.

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