Centre for Law and Society
Room 3.06 All Africa House
Middle Campus
University of Cape Town
Private Bag X 3 Rondebosch 7701

Tel: +27 21 650 5906
Email: aninka.claassens@uct.ac.za
www.cls.uct.ac.za

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The Director-General Rural Development and Land Reform
Attention: Mr Fanie Louw or Ms B R Naidoo
Private Bag X 833
Pretoria
0001

Fax: 012 324 2118
Email: restitution2018@ruraldevelopment.gov.za

Dear Sir/Madam,

Comments on the Restitution of Land Rights Amendment Bill

Introduction

The Centre for Law & Society was established in 1994 (under the name Law, Race & Gender Unit) as a research and training unit in UCT's Faculty of Law. Presently, the main project of CLS is the Rural Women's Action-Research (RWAR) project. The RWAR project is part of a wider collaborative initiative that seeks to support struggles for change by rural people, particularly women, in South Africa. The project focuses on land rights, but includes related issues of poverty, inheritance, succession, marriage, women's standing and representation in community structures and before traditional courts, rural governance, citizenship and access to human rights in general by rural women. An explicit concern is that of 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. The RWAR project seeks to understand the complexities and opportunities in the processes of contestation and change underway in rural areas and aims to provide targeted forms of support to those engaged in struggles that challenge patriarchal and autocratic power relations in former homeland areas.

In that context, CLS is concerned that the legislation regulating land rights best serve the needs of rural people. The Restitution of Land Rights Act (No. 22 of 1994) was passed to a standing ovation in 1994. Its goal was to provide remedies to people who had lost their land as a result of racially discriminatory practices such as forced removals. This included people who were dumped in Bantustans and put under chiefs. We concur with the Department of Rural

Development and Land Reform that the Restitution of Land Rights Act was devised to address problems that *remain* relevant and pressing in South Africa in 2013. We have a long way to go to roll back the legacy of land dispossession resulting from colonialism and apartheid. In addition, there is a strong case for re-opening the claims process in order to allow people who lost land under Betterment to lodge claims, as they were initially wrongly advised by the Chief Land Claims Commissioner that the Restitution Act did not include Betterment.

However, the Restitution of Land Rights Amendment Bill (hereafter the Bill) comes at a time when land reform and land distribution are failing, and both processes are devoid of policy directives and steeped in confusion. Meanwhile, millions of South Africans still lack security of land tenure, especially those living in rural areas and in the former Bantustans. While some protections have been put in place, these (with the exception of IPILRA) do not cover people living in communal areas. These areas - mostly the former Bantusans - are home to an estimated 16.5 million people, of which 59% are women. As a result, women's already structurally precarious land rights are made even more so by the lack of legislation around communal land tenure. Furthermore, there are beneficiaries of the previous Restitution of Land Rights Act who have still not received their land titles, ostensibly as a result of traditional leaders' land claims.

Unfortunately, in its current form and in the current context, the Bill will not meet the needs of rural people, and could well undermine their security of land tenure as enshrined in 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.

The main problems with the Bill may be summarised as follows.

1. The Bill reflects insufficient consultation, or time allotted for consultation, with rural people on the ground.
2. The conditionality of land restoration on "cost" and "productivity" undermines the right to restitution.
3. The Bill opens the door to traditional leaders to claim ownership of restitution land on behalf of 'tribes' that were delineated in terms of the Bantu Authorities Act of 1951.

These concerns are described in detail below.

Problems

1. Insufficient time allotted for consultation with rural people on the ground

The Bill was introduced with no comprehensive advance notice on May 23rd, 2013, allowing only 30 days for comment. The Western Cape leg of the public consultation about the Restitution of Land Rights Amendment Bill began on June 4th, only 10 days after the Bill was introduced. These timelines could not allow for wide-spread consultation with a wide range of constituents, especially with rural people who will be affected by it.

In addition, on June 11th, Minister Nkwinti announced that the new restitution legislation would not be in place by June 20th, 2013. He said that the process had been delayed in the "spirit of

inclusive decision making". Minister Nkwinti's comments added further confusion to the process of commenting on the Bill. Many organisations and groups were under the impression that the window for comments had been extended or that the comment window for the Bill had been postponed. As a result of this confusion, many organisations may not submit their comments within the window.

The window for comments was too short and marked by confusion to offer a meaningful opportunity for rural people to be informed of, meet about and comment on the Bill. This is ironic in light of the fact that the Bill claims to remedy the issue that the "window period that was provided to lodge claims was too short and that the communication campaign to inform citizens about the requirement to lodge claims did not reach every corner of the country."

2. *The conditionality of land restoration on "cost" and "productivity" undermines the right to restitution*

Section 33 of the Bill is amended to establish new conditions for land restoration awards. Land restoration awards are now explicitly conditional on the feasibility and cost of the land transfer and the claimants' ability to use the land "productively". No explanation is given as to how "acceptable" costs will be determined or how "productivity" will be measured. Consequently the Bill makes it extremely difficult for claimants to successfully obtain the land from which they were removed and use it as they see fit. These conditions undermine the right to restitution, which is framed in the Constitution in terms of redress for past discriminatory practices. This provision also introduces scope for arbitrary and corrupt decision-making processes, in the absence of explanations for how cost and productivity will be measured.

The inclusion of "productivity" as a ground for land restoration opens the way to restoration being rejected in many claims, as most poor communities claiming high-value land may not be able to demonstrate "productivity". Furthermore, requirements of productive use are discriminatory because continued ownership is not contingent on productive use, but restoration of land rights is. It is also an arbitrary measure that will affect different claims differently: it may mean that if the land is not being used productively by the current owner, the claimant will not have to show they will use the land productively either. The measure of productivity as a ground for restoration therefore undermines the historical basis of the right to restitution.

If the conditionality of land restoration is dependent on the cost of a transfer, it could put many (especially poor) claimants between a rock and a hard place. If the cost of land restoration will be too "great", the government will pay compensation instead (usually the value of the land itself but excluding additional support or development costs associated with land restoration). In order to receive their land as opposed to compensation in lieu of the land, claimants will be encouraged to downplay the cost of the land transfer – they will likely underestimate the cost of the development and support necessary to make the process viable. This way, they will be able to bring the land price down a level that is "acceptable". This will lead to very ineffective land restoration, as the beneficiaries may receive insufficient support to develop their land because of the restraints set up by the condition of cost.

3. *The Bill opens the door for traditional leaders to claim ownership of restitution land on behalf of 'tribes' that were delineated in terms of the Bantu Authorities Act of 1951*

In light of other laws and recent statements by Minister of Rural Development and Land Reform Gugile Nkwinti, the Bill risks opening the floodgates for traditional leaders to claim vast amounts of land. The minister has gone on record as saying that independent private landholders organised in entities such as Communal Property Associations (CPAs) should no longer be allowed to own land acquired through restitution or redistribution within 'communal areas'. In his view 'a communal area within a communal area' is "wrong". The model of CPAs was developed to allow the beneficiaries of the land restitution process to own land collectively. It provided claimants living in the former Bantustans with the ability to constitute themselves as legal entities to receive land. If CPAs can no longer own restitution land, the door is open for chiefs to claim ownership of restitution land on behalf of 'tribes' that were delineated in terms of the Bantu Authorities Act of 1951.

This is not just a matter of prospective policy. It is already taking place, at least in the Eastern Cape. The Department of Rural Development and Land Reform has not transferred title to at least 34 CPAs where restitution awards and signed agreements are in place. This has caused major suffering and division as CPA members question what happened to the land and grants they were promised. One example is the Cata CPA in the Eastern Cape, where claimants have been waiting since 2000 for their land title. The government recently ignored a court order that compelled it to transfer land title to the Cata CPA by May 20th.

According to a 2012 affidavit by a senior government official in the Cata litigation, the Cata CPA has not received their land because of objections from traditional leaders. She said "[d]espite the optimism with which the settlement agreement was done [the process has now] encountered fierce objections by the traditional leaders who state that the agreements transferring ownership of rural land to community-based associations undermined their authority". She added that "the Minister has issued an instruction that …discussions for the implementation of CLaRA are still continuing and no state land [should] be transferred until this process has been finalised". This despite the fact that CLaRA, or the Communal Land Rights Act of 2004, was struck down by the Constitutional Court in 2010.

Since the creation of tribal and Bantustan boundaries was a major driver of forced removals, it is astounding that the Minister's statements and recent laws reinforce these boundaries in the name of land reform. Over three and half million South Africans were forcibly removed from their homes and land in order to clear "white" South Africa of "black spots" and to consolidate the Bantustans. The Restitution of Land Rights Bill, read together with the Minister's statements, potentially enables chiefs to claim restitution on behalf of "traditional communities" while simultaneously stripping restitution beneficiaries of independent ownership rights.

Within days of the Bill's introduction King Goodwill Zwelithini promised a gathering of 40 traditional leaders in KwaZulu-Natal that the Ingonyama Trust would assist traditional leaders in instituting land claims, including providing legal support. He said, "As your king, I will abide by the law and approach the government to regain all Zulu land."

Chiefs' claims are likely to further complicate existing restitution claims especially in cases where the chief, on behalf of the "tribe" was complicit in the initial forced removal. Chiefs were often implicated in Betterment processes, one of the new categories for restitution

included in the Bill.

Betterment was indeed tantamount to land dispossession and the Restitution Act should always have been interpreted to include it. Instead, potential claimants were advised that Betterment was not a ground for restitution under the original Restitution Act. As a result, people who suffered under Betterment did not lodge land restitution claims. It is therefore important that the restitution process is reopened for Betterment claims.

However, in the context of amendments to exclude CPAs from land transfers this new provision could also open room for the abuse of power by chiefs. If betterment land goes to chiefs instead of CPAs it will put those who suffered from betterment directly under the thumbs of traditional leaders who agreed to betterment in the first place. To get the "compensatory land" that went with forced removals chiefs had to agree to betterment. And those who did were given larger Bantu Authority jurisdictional areas. An example is that of the Makuleke Community.

In the case of Makuleke, the community was moved from the North of the Kruger Park to another area within the Mhinga Tribal Authority. Chief Adolf Mhinga, who was a Gazankulu cabinet minister, played a pivotal role in their removal, although the Makuleke's own traditional leaders strongly opposed the move. The Makuleke CPA applied for and received restitution of land. But Adolf Mhinga's successor, Chief Cedrick Mhinga, objects to the Makuleke CPA on the basis that the Makuleke fall within the boundaries of the Mhinga tribe and their land should therefore belong to the Mhinga tribe. If the Restitution Bill goes ahead in the current context, the people of Makuleke face the very real possibility of Chief Mhinga claiming their land in the name of the Mhinga traditional council.

The Department should focus on the urgent and serious problems facing rural communities in relation to the protection of their land rights, including its failure to honour existing commitments and court awards to CPAs, before introducing a measure that will only elicit more claims and further complicate existing problems.

Proposed alternative frameworks / Recommendations

- It is vital that the legislative process opens up a longer period of time for consultation, in order to provide opportunities for people dispossessed of their land to be heard, and have their needs addressed.

- Immediate interventions to secure the rights of women and vulnerable communities are necessary. Instead of prioritising this amendment the Department should focus on amending IPILRA to strengthen the procedural and substantive rights of the most vulnerable.

- Concomitant with the process of land dispossession and dumping of black people in rural homelands was the imposition of chiefs and tribal authorities. This version of power in land undercut customary land tenure practices, that recognised the entitlements vesting in ordinary people and the role of neighbourhood groups in vetting and approving applications for land. Any bill related to land must take this dual legacy of land dispossession and loss of citizenship into account.

Conclusion

In our view, this Bill will cause more confusion and problems than it remedies. While we support the re-opening of land claims for Betterment communities, for a limited and specific period, on balance we oppose the Bill. We would appreciate the opportunity to discuss our concerns further with the Department and are happy to provide any necessary clarification or further details on the points made in our submission.