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To Whom it May Concern,

Submission on the Restitution of Land Rights Amendment Bill

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6. The Bill reflects insufficient consultation, or time allotted for consultation, with rural people on the ground.

Recommendations
1. The Bill should be withdrawn. It must go back to the Department for further consultation with rural people, and should be enacted only once all existing and outstanding claims are resolved. At that point it should include provisions that put new claimants on a more equal footing with previous claimants.
2. If Parliament is intent on passing the bill now, significant amendments are necessary to avert the dangers and problems we outline. We put forward such required amendments, in particular that existing outstanding claims be prioritised and ring-fenced from interference by new claims. We argue that there are cogent reasons to ring-fence existing claims, and that the refusal to do so would confirm the seriousness of the problems we outline, and the intention to favour traditional leaders at the expense of people who were actually forcibly removed.

Introduction

The Centre for Law and Society was established in 1994 (under the name Law, Race & Gender Research 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 Programme (RWAR). RWAR is part of a wider collaborative initiative that seeks to support struggles for change by rural people, particularly women, in South Africa. The Programme 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 negotiate change at the local level. RWAR 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) 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 traditional leaders.

We concur with the Department of Rural Development and Land Reform that it is crucial that we roll back the legacy of land dispossession resulting from colonialism and apartheid. Addressing this legacy includes providing relief to people who were dispossessed of their land as a result of Betterment. This is especially important as the Chief Land Claims Commissioner initially wrongly advised people who lost land under Betterment that the Restitution Act excluded them. The problems that were meant to be remedied by the 1994 Restitution Act remain relevant and pressing in South Africa in 2013. But does the Restitution of Land Rights Amendment Bill (hereafter the Bill) provide hope for solving these problems?

In our view 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 Bill cannot be evaluated purely on the basis of its text. It must be read in the context of other laws and policies, especially the Communal Land Tenure Policy (August 24, 2013) and the Recapitalisation and Development Policy (23 July, 2013). The Bill comes at a time when land tenure reform and land redistribution are failing, and there is no integrated and comprehensive policy statement aligning the different aspects of land reform with one another and with rural development. 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 – the Interim Protection of Informal Land Rights Act) do not apply to people living in communal areas. These areas – mostly the former Bantustans – are home to at least 16.5 million people, of

whom 59% are women. As a result, women's already structurally precarious land rights are made even more so by the lack of legislation securing land rights in 'communal' areas.

Furthermore, there are beneficiaries of the current Restitution of Land Rights Act who have still not received their land titles, ostensibly as a result of opposition by traditional leaders, who claim that independent ownership rights undermine their authority. A recent Report by the Ad Hoc Committee on the Legacy of the 1913 Land Act shows that 50% of the total land acquired for restitution has still not been transferred to its identified beneficiaries.[1]

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

1. There are many outstanding claims that have not yet been finalised.
2. The financial cost of re-opening the restitution programme is going to put a massive strain on the Department's ability to process existing claims and attend to other land reform matters.
3. In the context of current policies and recent judgments, restoration of land will be made contingent on the cost of doing so.
4. In light of other recent policy, the Amendment Bill is likely to undermine independent ownership rights acquired through land reform after 1994, and held by CPAs.
5. 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.
6. The Bill reflects insufficient consultation with rural people on the ground.

These concerns are described in detail below, along with recommendations.

Problems

1. *There are many outstanding restitution claims that have not been finalised*

The Department has still not finalised many outstanding and backlogged restitution claims. According to the Ad Hoc Committee on the Legacy of the 1913 Land Act, 20 592 claims (or 25.87 per cent of the total land claims registered with the Department before 1998) have not yet been finalised or the settlement agreement has not been fully implemented.[2] Several claimant groups have been waiting for over ten years for the implementation of their settlement agreements. This includes the Cata and Mkhonde CPAs in the Eastern Cape and the Magokgwane CPA in the North West.

The backlog of existing claims raises concerns that claims filed under the new restitution period might jeopardise existing claims – including those claims that are already settled but where the land titles and development money have not yet been handed over. The re-opening of the restitution process will further complicate and delay the processing of existing

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[1] Report of the Ad Hoc Committee: Coordinated Oversight on the Reversal of the Legacy of the Natives Land Act of 1913 – A report to the National Assembly of the Parliament of South Africa. October 2013.
[2] Report of the Ad Hoc Committee: Coordinated Oversight on the Reversal of the Legacy of the Natives Land Act of 1913 – A report to the National Assembly of the Parliament of South Africa. October 2013.
[2] Report of the Ad Hoc Committee: Coordinated Oversight on the Reversal of the Legacy of the Natives Land Act of 1913 – A report to the National Assembly of the Parliament of South Africa. October 2013.

outstanding claims. This will violate claimants' constitutional rights to restitution, as well as to administrative justice.

Furthermore, the Act might open up a space for numerous claims by traditional leaders (as explained in detail below), which could overlap with and disturb already-existing claims by other community-constituted structures such as CPAs and Trusts. As Sekhuthe Sekgaphane of the Magokwgawne CPA in the North West stated, "We don't want to deny others to make a claim but we want a concrete undertaking from the government of how they will deal with the backlog."[3]

The *Memorandum* attached to the Bill cites a number of problems that justify re-opening the window for restitution claims. Most of the problems listed are administrative, such as poor filing systems for information on claims. However, there is no indication that the Department has conducted an extensive evaluation of some of the other problems experienced with the restitution programme. In particular, one of the issues raised most frequently by restitution beneficiaries is the poor level of accountability that characterises the way government officials engage with beneficiaries. Beneficiaries refer to officials making decisions about their land without consulting them, not responding to them when they raise issues and reneging on promises of post-settlement support. It is therefore essential that the Department deal with serious issues of staff capacity before re-opening the claims period.

Piet Nkuna from the Mawubuye Umhlaba Wethu CPA in Barberton, Mpumalanga explained how government officials have lacked accountability in their interactions with the community. The Department of Land Affairs came to verify their restitution claim in 1998. In August 2005, the Chief Land Claims Commissioner assured them that they would have their land restored to them. The CPA committee was informed by the Commission that officials would be arriving shortly to hand over the titles. The CPA and the larger community threw a party to celebrate their land restoration award and waited for the officials to arrive. The handover never happened. The CPA committee has written numerous letters to the Commission and the Department, but they have been fobbed off. In the meantime, the community has lost out on many economic opportunities. Mr. Nkuna explained that "this is a case of a restitution claim that is outstanding, which has been gazetted and the 42D signed but it has not been concluded ever since. The land claim involves a traditional authority, mining, forestry etc. Even though the gazetted land is not meant to have further developments on it until the land claim is concluded, there have been a number of business transactions since the claim was gazetted."[4]

2. *The financial cost of re-opening the restitution programme is going to put a massive strain on the Department's ability to process existing claims and attend to other land reform matters.*

Since 1995, the restitution programme has cost the state about R15 billion (for land acquisitions) and R7.5 billion in financial compensation (where land restoration was not possible).[5] The Department conducted a regulatory impact assessment which estimated that it

[3] Plenary session at the National Land Workshop for Civil Society, Stay City in Johannesburg, 2-3 October 2013.

[4] Plenary session at the National Land Workshop for Civil Society, Stay City in Johannesburg, 2-3 October 2013.

[5] Report of the Ad Hoc Committee: Coordinated Oversight on the Reversal of the Legacy of the Natives Land Act of 1913 – A report to the National Assembly of the Parliament of South Africa. October 2013.

will cost between R129 and R179 billion to settle claims lodged during the proposed new window for making claims – that is, if those claims are settled within 15 years.[6] It is not clear if this figure excludes the over 20 000 existing claims that have not been finalised – in which case the cost will be even greater.

The magnitude of these expenses raises issues of both intent and viability. The right to restitution is guaranteed by Section 25 (7) of the Constitution. However new policies make this right dependent on financial constraints, at the same time as they introduce unprecedented financial expenses.

In light of the jump from the R25 billion already spent on restitution to the R179 billion projected for the future, the new Bill is feasible only in the context of a far-reaching re-allocation of the national budget. In response to queries, the Minister of Finance has indicated that there is no plan to accommodate this jump in the budget. To proceed with re-opening restitution without an undertaking from Treasury that this budget is viable risks raising unrealistic expectations that cannot be met, and in the process derailing the finalisation of existing outstanding claims.

3. *In light of current policies and recent judgments, restoration of land will be made contingent on the cost of doing so*

In the initial draft of the new Bill, Section 33 was changed to make land restoration dependent on the feasibility and cost of the land transfer and the claimants' ability to use the land "productively".

This provision was removed from the Bill because of opposition during the commnt period and Nedlac negotiations, which is an important step in the right direction. Regardless, restoration of land will remain contingent on the cost of the land transfer and claimants' ability to use the land productively. This is because of the recent *Baphiring* SCA judgment and the new Recapitalisation and Development Policy (July 2013), which replaces pre-existing Restitution Settlement Grants. As a result it will be difficult for restitution beneficiaries to obtain restoration of land and receive the financial support they need to use the land restored to them.

The Restitution Act has always required that restoration of the land be "feasible". In *Baphiring* the SCA found that in deciding whether a restoration is feasible, the Land Claims Court (LCC) must look at the ***cost*** of doing so. The Court set out a list of factors to be considered, most of which relate to the financial implications of restoration. These factors include the:

- *Cost of expropriating the land, including compensation for the current owner's mineral rights.* This means that people claiming land in an area rich in minerals are unlikely to have the land restored because the cost of restoring the land with mineral rights will be prohibitively expensive.

- *Institutional and financial support that the government is going to make available to the claimants for them to resettle.* If the state cannot afford/chooses not to give the

[6] Restitution of Land Rights Amendment Bill, 2013. Presentation to the Portfolio Committee on Rural Development and Land Reform. Cape Town. 15 October, 2013.

claimants restitution money, the LCC will be very unlikely to recommend that the land be restored to the claimants.

- *Whether or not restoring the land to the claimants cause a loss in "food production" or disruption in farming activities.* This implies that if claimants want to use the land for something other than commercial farming, they will not receive the land.

The effect of the SCA judgment is that land will not be restored unless the government provides financial support to restitution beneficiaries. The Recapitalisation policy provides however, that the cost of restoration may be capped and financial support may be subject to partnerships and business plan prescripts. In the context of this judgment the Bill will greatly increase the need for litigation by restitution claimants, and the burden on the state and the LCC. Claimants will need to continually contest the feasibility requirements set down in *Baphiring* in order to have their land restored to them. But only those with the resources to hire lawyers will be able to argue for restoration as opposed to financial compensation.

If cost and productivity become conditions for restoration of land, many claimants will find themselves between a 'rock and a hard place'. If claimants lobby for significant post-settlement support in order to be 'productive', they might be told that restoration is too costly. But if claimants downplay the support they need, the LCC might find that they will not be able to use the land productively, and so decide not to restore the land to them. As a result, an incentive is created for claimants to opt for (and be awarded) forms of restitution other than the restoration of land.

Furthermore, consistent with current land policies, restitution claimants will no longer be able to apply for financial support directly through a fund set aside for restitution beneficiaries. Instead, they will have to apply via the Recapitalisation and Development Fund. In order for these funds to be released, applicants must show that they have a business plan and a "strategic partner". Restitution beneficiaries will also be subject to a "use it or lose it clause", which could discriminate against people who cannot keep up with the business plan. The requirement of a business plan and strategic partner does not bode well for poor people who are restitution beneficiaries. Business plans for land reform projects have been notoriously inappropriate and strategic partners do not always act in good faith or with competence.

Under the new set of policies, the only way to acquire support is through the Recapitalisation and Development Fund, which requires that beneficiaries prove "productivity" on the land. If claimants are not productive they will lose their land. In this way, recent policies make people's tenure less secure and provide less choice about restitution and their own development.

The policies accompanying the new Bill and the SCA's *Baphiring* judgment ignore the restitution programme's constitutional imperative to provide redress to people who have been discriminated against in the past. Instead of opening up the process of restitution in the interests of benefitting people who were dispossessed of their land (the majority of whom are poor), the Bill will limit the right to redress by making restoration conditional on cost and productivity. This is contrary to findings by the Constitutional Court that "*the starting point is that the whole of the land should be restored, save where restoration is not possible due to compelling public interest considerations.*"[7]

[7] *Mphela and Others v Haakdoornbult Boerdery CC and Others* [2008] ZACC 5; 2008 (4) SA

Productivity is indeed an important factor to consider. However, it is open to manipulation and to being defined by subjective criteria. For example, the Ad Hoc Committee on the Legacy of the 1913 Land Act has pointed out that land reform is not about agriculture only, and productivity should not be measured in terms of commercial agricultural viability only. The Committee added that "it is vitally important that land reform should address the various needs of the beneficiaries, for example, those that want land for residential purposes."[8] Post-settlement support "should also not only be seen in terms of the Farmer Support Programme (FSP) or the existing Recapitalisation and Development Programme which targets farming with strategic partnerships."[9]

By making restoration conditional on cost and productivity, the implication of the new policies (including the Communal Land Tenure Policy, Recapitalisation policy, State Land Leasing Policy, and Agricultural Land Holdings Policy) is that land ownership is neither appropriate nor allowed for the majority of people living in the former homelands.[10] Instead ownership is reserved for a small elite, condemning most people – including those who suffered most as a result of the legacy of the 1913 Land Act – to a system of provisional tenure and state leasehold that is essentially the same as the 'trust tenure' imposed by the South African Development Trust in terms of the 1936 Native Trust and Land Act.

The ownership status of most of the land in the former homelands is reflected in the Deeds Registry as owned by the Government of the Republic of South Africa. Much of this land is, in fact, held in trust by the state on behalf of specific groups of people who were prohibited by law from owning it outright because of their race. In some instances the state is the nominee owner on behalf of groups with specific legal rights to the land in question. There is a variety of such trust and nominee arrangements, some providing rights equivalent to ownership for groups who had purchased the land historically, others acknowledging long-term historical occupation of the land, others providing lesser occupation rights.[11] The White Paper on South African Land Policy (1997) charted a plan for securing the *de facto* and customary rights described above by vesting them in ordinary people. In this way, people who held these rights would be regarded as "owners" of their land.

The new policies, by contrast, attempt to convert such rights to conditional leasehold or 'institutional use rights'.[12] The CLTP states that if land is transacted, households will be compensated only for 'land-related investments rather than the land itself'.[13] This flies in the

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488 (CC); 2008 (4) BCLR 675 (CC) at para 32.

[8] Report of the Ad Hoc Committee: Coordinated Oversight on the Reversal of the Legacy of the Natives Land Act of 1913 – A report to the National Assembly of the Parliament of South Africa. October 2013.

[9] Report of the Ad Hoc Committee: Coordinated Oversight on the Reversal of the Legacy of the Natives Land Act of 1913 – A report to the National Assembly of the Parliament of South Africa. October 2013.

[10] Department of Rural Development and Land Reform, *Communal Land Tenure Policy* (August 2013), distributed at 'Land Reform Policy Workshop' held by the Department of Rural Development and Land Reform in Stellenbosch (23–24 August 2013), p. 12.

[11] G. Budlender and J. Latsky, 'Unraveling Rights to Land in Rural Races Zones', in M. de Klerk (ed), *A Harvest of Discontent: The Land Question in South* Africa (Hill House, Institute for a Democratic Alternative for South Africa, 1991), pp. 115–137.

[12] The *State Land Lease Policy* (July 2013) envisages leasehold, while the *Communal Land Tenure Policy* (August 2013) envisages institutional use rights. Both policies apply to all the land in the former Bantustans – apart, interestingly, from KwaZulu-Natal (2.1.1 of *State Land Lease Policy*). Neither policy references the other.

[13] *Communal Land Tenure Policy* (August 2013), p. 21.

face of IPILRA's guarantee that people be compensated for any loss of occupation, use or access rights to land. In a similar vein the State Land Lease Policy provides that tenure awards granted to labour tenants and farm occupiers should take the form of long-term leases conditional on the payment of a nominal rent.[14] Yet the intention of previous land reform laws was to recognise and secure the underlying rights of these categories of people, not render them tenants in perpetuity.

H.W.O. Okoth Ogendo and others[15] have written about the fundamental misconception that indigenous land rights do not constitute ownership. Okoth Ogendo refers to 'juridical fallacies' imposed by the colonial and apartheid state and subsequently internalised and used for similar purposes by post-colonial governments. The central fallacy is that indigenous law confers no property rights in land. This enables government to justify the indiscriminate declaration of customary land as ownerless, and so 'to transfer title to parts of the land to chosen elites, using the mechanism of imposed and imported constructs of western property law'.[16] In addressing the legacy of the Land Acts, recent land reform policy must not mimic the Land Act's *modus operandi* – they should avoid the mistake that Okoth Ogendo describes.

In addition to undercutting and denying the ownership rights of that relatively small class of rural people who managed to buy land before or through exemptions from the Land Act, the new land policies are likely to override or reverse the land transfers made to CPAs after the transition to democracy in 1994. There is a huge amount at stake in this process, including access to very valuable natural resources.

4. *The Bill is likely to undermine independent ownership rights acquired through land reform after 1994, and held by CPAs.*

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 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".[17] This view is reinforced in the Department's Communal Land Tenure Policy, which states that "registration of new CPAs on traditional communal tenure areas be *carefully considered and principally discouraged*" (CLTP's emphasis)[18].

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 failed to transfer title to

[14] *State Land Lease Policy* (July 2013), p. 34, paragraph 41.

[15] T.W. Bennett, *Customary Law in South Africa* (Cape Town, Juta, 2004); M. Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge, Cambridge University Press, 2001); P. Peters, 'The Limits of Negotiability: Security, Equity and Class Formation in Africa's Land Systems', in K. Juul and C. Lund (eds), *Negotiating Property in Africa*, (Portsmouth, Heinemann, 2002), pp. 45–66.

[16] H.W.O. Okoth-Ogendo, 'The Nature of Land Rights under Indigenous Law in Africa', in A. Claassens and B. Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town, UCT press, 2008), p. 98.

[17] Minister Nkwinti, Speech at Land Divided Conference, University of Cape Town, *24 March 2013*

[18] Communal Land Tenure Policy, p. 29. Presented at Policy Workshop for the Ad hoc Committee on the Legacy of the Natives Land Act, Protea Hotel, Stellenbosch, 23-24 August 2013.

at least 34 CPAs where restitution awards and signed agreements are in place.[19] 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 defaulted on a court order that compelled it to transfer land title to the Cata CPA by May 20th 2013.

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.

The model of CPAs was developed to allow the beneficiaries of the land restitution process to own land collectively. The White Paper on Land Policy explains that in the context of land reform, where many beneficiaries accessed land as groups, it was essential to establish a legal mechanism to recognise group ownership systems.[20] The CPA Act provided beneficiaries living in the former Bantustans with a mechanism through which to constitute themselves as legal entities to receive land. At the same time the CPA Act was not intended to preclude beneficiaries who wished to form other structures of their own choosing (such as Trusts) to do so in order to acquire and manage land as a group.

There have been some problems with CPAs over the last decade. For instance, some CPAs have not held annual general meetings as required by the CPA Act and so the election of new committees has not happened as it should have. As a result there have been some leadership disputes.[21] However, these problems can be overwhelmingly attributed to the DRDLR's failure to implement the provisions of the Restitution Act and CPA Act. This includes failure to transfer land to CPAs, despite agreements signed by the Minister and court orders instructing them to do so. It also relates to the lack of "support structures offered by the DRDLR" to CPAs – for instance, failure to respond to requests for oversight from CPA members and the failure to compile regular annual reports.[22] The Department has only tabled two annual reports – for the years 2009/2010 and 2011/2013 – even though it is required by the CPA Act (Section 17) to table a report every year. It seems straightforward that in order to remedy the problems with CPAs the Department should play a more proactive and

[19] Presentation to the Portfolio Committee on Rural Development and Land Reform: Communal Property Associations Annual Report 2009/10, presented 31 August 2011.

[20] Department of Land Affairs, *White Paper on South African Land Policy* (April 1997), available at http://www.polity.org.za/polity/govdocs/white_papers/landwp.html, retrieved on 23 October 2013, paragraph 4.17.

[21] Report of the Ad Hoc Committee: Coordinated Oversight on the Reversal of the Legacy of the Natives Land Act of 1913 – A report to the National Assembly of the Parliament of South Africa. October 2013; Presentation to the Portfolio Committee on Rural Development and Land Reform: Communal Property Associations Annual Report 2009/10, presented 31 August 2011.

[22] Report of the Ad Hoc Committee: Coordinated Oversight on the Reversal of the Legacy of the Natives Land Act of 1913 – A report to the National Assembly of the Parliament of South Africa. October 2013; Presentation to the Portfolio Committee on Rural Development and Land Reform: Communal Property Associations Annual Report 2009/10, presented 31 August 2011.

responsive role. This would serve to ensure that CPA members have a form of redress if their rights within the CPA are undermined, and that people who abuse the system can be sanctioned.[23]

Instead of dismissing CPAs as a failed vehicle for collective land ownership, the Department should provide dedicated support to build the capacity of CPAs. Proposals have been put before the Department in response to complaints from some CPA members that their land rights are being trampled on. One of the options which has been on the table for a long time is that CPA Act should be amended so that CPA members have 'real' rights in relation to CPAs, and the ability to call for support from the state to enforce these rights.

The alternative to CPAs that the Department suggests – that of transferring land to traditional councils – will result in problems that are far more intractable than those in CPAs (this will be discussed below in 5.)

CPAs and customary land-holding structures are not mutually exclusive. Many CPAs recognise and promote existing customary law rules that work for them. The institutions of customary law may be recognised and participate in CPA activities. There are traditional leaders in various provinces that support and are members of CPAs – this includes the Cata CPA in the Eastern Cape and Makuleke CPA in Limpopo.

The notion that CPAs should only be allowed to operate in "non-customary" or "non-communal areas" beyond the boundaries of the Bantustans reflects an ahistorical assumption that customary systems are coterminous with the former Bantustans and with traditional authorities. Even the apartheid government was forced to acknowledge that this was not the case – that a range of rural groups jointly own 'communal' land through arrangements that have some customary elements but no traditional leaders. These include the land-buying syndicates who bought land before or through exemptions from the Land Act of 1913,[24] clans with a long tradition of elected leadership,[25] people living on what were mission farms, as well as groups of former labour tenants who have managed to retain a toe-hold on their ancestral land.[26]

There is no historical basis for the argument that traditional leaders have exclusive authority over land. Pre-colonial customary structures were characterised by decision-making about rights in land at various different levels of the community.[27] The colonial and apartheid

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[23] These provisions were suggested in the White Paper. Department of Land Affairs, *White Paper on South African Land Policy* (April 1997), available at http://www.polity.org.za/polity/govdocs/white_papers/landwp.html, retrieved on 23 October 2013, paragraph 4.17.

[24] H. Feinberg, 'Challenging the Natives Land Act: African Land Acquisitions between 1913 and 1936', paper presented at the *South African Historical Society*, 16th Biennnial Conference (6–9 July 1997); P. Harries, 'Exclusion, Classification and Internal Colonialism', pp. 82–117; S. Marks, 'Patriotism, Patriarchy and Purity: Natal and the Politics of Zulu Ethnic Consciousness', in L. Vail (ed), *The Creation of Tribalism in South Africa* (London, James Currey, 1989).

[25] L. Ntsebeza, *Democracy Compromised: Chiefs and the Politics of Land in South Africa* (Leiden, Brill, 2005).

[26] Claassens and Hathorn, 'Stealing Restitution and Selling Land Allocations', pp. 315–352; A. Claassens, 'It's Not Easy to Challenge a Chief: Lessons from Rakwadi', (Research Report 9, PLAAS School of Government, University of the Western Cape, 2001).

[27] H.W.O. Okoth-Ogendo, 'The Nature of Land Rights under Indigenous Law in Africa', in A. Claassens and B. Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town, UCT press, 2008).

governments believed that chiefs were the sole African decision-makers in respect of 'communal' land. This version of power in land undermined customary practices that recognised the entitlements vesting in ordinary people and the role of groups in vetting and approving applications for land.[28] By opposing community land-holding structures like CPAs, the current government risks entrenching distorted versions of customary land-holdings promoted during colonialism and apartheid. If CPAs can no longer own restitution land, the door is open 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.

5. *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. It betrays the promise of restitution to re-incorporate the former Bantustans into a unitary South Africa.*

The intention of the Restitution Act was to provide redress for those forcibly removed into areas adjacent to the former Bantustans. Since the creation and consolidation of tribal and Bantustan boundaries was a major driver of forced removals, it is ironic that Nkwinti'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. As the White Paper on land policy notes, "the goal of the restitution policy is to restore land and provide other restitutionary remedies to people dispossessed by racially discriminatory legislation and policies, in such a way as to provide support to the vital process of reconciliation, reconstruction and development."[29]

The Restitution Act was developed specifically to target people who were forcibly removed. Restitution beneficiaries are defined in Section 2(d) of the Restitution Act "a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices". Community is defined in Section 1 as "any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group". Restitution beneficiaries are therefore bound by their shared experience of land dispossession. However, the Traditional Leadership and Governance Framework Act (2003) or TLGFA defines communities according to the tribal boundaries established under apartheid. The TLGFA therefore poses a fundamental threat to the Restitution Act because it threatens to subsume beneficiaries defined in terms of the Restitution Act into traditional communities defined by the distorted boundaries of the TLGFA.

The White Paper warned that "the Department's acceptance of group based land holding systems and the recognition of historical land rights" should not be "construed by some chiefs as an opportunity to consolidate their own personal power".[30] As a result, "the ownership of

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[28] P. Delius, *A Lion Amongst the Cattle: Reconstruction and Resistance in the Northern Transvaal* (Heinemann/Ravan/James Curry, 2006).
[29] Department of Land Affairs, *White Paper on South African Land Policy* (April 1997), at 4.13 available at http://www.polity.org.za/polity/govdocs/white_papers/landwp.html, retrieved on 23 October 2013, paragraph 4.13.
[30] Department of Land Affairs, *White Paper on South African Land Policy* (April 1997), at 4.13 available at http://www.polity.org.za/polity/govdocs/white_papers/landwp.html, retrieved on 23 October 2013, paragraph 4.13.

the land will vest not with chiefs, tribal authorities, trustees or committees but in the members of the group as co-owners of the property."[31]

However, the new Restitution of Land Rights Bill, read together with Nkwinti's statements, potentially enables traditional leaders 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."[32]

Traditional leaders' claims are likely to further complicate existing restitution claims especially in cases where the traditional leader was complicit in the initial forced removal. Traditional leaders 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 include these claimants.

However, in the context of amendments to exclude CPAs from land transfers this new provision could also elicit the abuse of chiefly power. If Betterment land goes to traditional leaders instead of CPAs it will put those who suffered from Betterment directly under the authority of traditional leaders who agreed to Betterment in the first place. Betterment took place in the context of the South African Native Trust and Land Act of 1936, which amended the Natives' Land Act of 1913 and created the South African Development Trust (SADT). The SADT was the primary mechanism used to create and maintain the resettlement areas adjacent to the reserves. Only one homeland leader refused to incorporate resettlement camps into his Bantustan – Enos Mabuza of KaNgwane. The others accepted both the additional land, and the people who came with it. The more people, the higher the revenue from tribal taxes – including the annual levy that migrant workers had to pay chiefs in order to renew their yearly contracts. Trust officials ensured that SADT land was laid out according to Betterment regulations before people were dumped on it, and that rangers were in place to arrest those who failed to pay their yearly trust 'rents' or tribal taxes.[1] An example of a case where a traditional leader was complicit in Betterment planning is the Makuleke Community in Limpopo province.

The Makuleke community was moved from the North of the Kruger Park to vacant SADT land that had been assigned to 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'. As the Ad Hoc Committee on the Legacy of the 1913 Land Act remarked, "The case of Makuleke CPA illustrates how a community and its local traditional leadership can work together post restoration of land reform but remain in conflict with the traditional council and the chief of

[31] Department of Land Affairs, *White Paper on South African Land Policy* (April 1997), at 4.13 available at http://www.polity.org.za/polity/govdocs/white_papers/landwp.html, retrieved on 23 October 2013, paragraph 4.13.

[32] Quoted in 'Zulu king vows to help with land claims' by Lungelo Mkamba in *The Mercury*, May 29 2013. http://www.iol.co.za/news/politics/zulu-king-vows-to-help-with-land-claims-1.1523666#.UmRI35S6R8s.

the area (who is regarded as an outsider) who wants to exert his authority over the CPA."[33] 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.

Lamson Maluleke reiterates the fears of people living in communities like Makuleke, asking: "Who is to benefit from the re-opening of the restitution process? Is there a hidden agenda in re-opening the restitution process and if so, what is the hidden agenda? Are CPAs not functional and if they are not then why are they not functional? What is government's role in the CPA's dysfunctionality? How many CPAs have been in existence without their title deeds? Are we not looking to create new backlogs upon existing backlogs? There is suspicion that there are those who want to benefit from the re-opening of the restitution process."[34]

Communities in the Eastern Cape are also worried that traditional leaders will capture the restitution process for their own benefit. Mbulelo Tokwe from the Amathole District feels that "there is also an issue with policies that do not speak to the issues and needs of community. Traditional authorities have more rights than community members – community members are subjects of traditional authorities rather than citizens of the country. The voice of CPAs is not adequately heard."[35]

There are major problems with the government's plan to transfer land to traditional councils through restitution and land tenure reform. The Ad Hoc Committee on the Legacy of the Land Act acknowledged that land could only be transferred to valid legal entities. However, it noted that "many, if not all" traditional councils have failed to comply with the provisions of the Traditional Leadership and Governance Framework Act (2003) or TLGFA.[36] Specifically, the TLGFA requires that 40% of traditional council members must be elected and at least a third must be women. The government established these provisions in order to distinguish the new traditional councils from the old tribal authorities – and align them with our constitutional democracy. Since most traditional councils in South Africa do not have legal status, the government cannot transfer land to them.

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

The Bill was introduced for public comment 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 widespread consultation with a wide range of constituents, especially with rural people who will be affected by it. At a civil society conference on land reform in October 2013, delegates from rural areas around the country expressed their frustration at not being given notice that consultation meetings would be taking place.

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[33] Report of the Ad Hoc Committee: Coordinated Oversight on the Reversal of the Legacy of the Natives Land Act of 1913 – A report to the National Assembly of the Parliament of South Africa. October 2013.

[34] Plenary session at the National Land Workshop for Civil Society, Stay City in Johannesburg, 2-3 October 2013.

[35] Plenary session at the National Land Workshop for Civil Society, Stay City in Johannesburg, 2-3 October 2013.

[36] Report of the Ad Hoc Committee: Coordinated Oversight on the Reversal of the Legacy of the Natives Land Act of 1913 – A report to the National Assembly of the Parliament of South Africa. October 2013.

The window for comments was too short and marred by confusion to offer a meaningful opportunity for rural people to view, meet about and comment on the Bill. This is disappointing 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."[37]

Solomon Mabuza from Nkomazi in Mpumalanga explains that the DRDLR's lack of engagement with rural communities on new bills and policies "means that rural communities do not enjoy the same rights, post 1994, as other communities in South Africa. The previous government put rural communities under the administration of traditional leaders which ruled rural communities without agreement on the laws that are administered. Even when rural communities do engage with it [the DRDLR] their views are not considered."[38]

Recommendations

1. The Restitution of Land Rights Amendment Bill is seriously flawed and should be withdrawn. The Bill should go back to the Department for further consultation with rural people. We have no objection in principle to the restitution programme being re-opened in the future. However, it should only be re-opened once all outstanding claims are resolved, and it should then include particular provisions (listed below) to put new claimants on a more equal footing with previous claimants.

    1.1. Open up the legislative process for a longer period of time for consultation, in order to provide opportunities for people dispossessed of their land to be heard, and their needs addressed. This will allow for a more meaningful discussion about land restitution and to plan for the way forward.

    1.2. The Bill should be enacted only once all outstanding claims have been finalised. Before the re-opening of claims is considered, the current claims must be dealt with in an effective, efficient and transparent manner. There must be clear targets and publically available implementation programmes.

    If the restitution programme re-opens as things currently stand, claimants will find themselves in a difficult position in relation to applying for land. This is because the Recapitalisation and Development Fund has an enormous impact on all current and future claimants. Claimants now have to apply for financial support to accompany restoration via the Recapitalisation and Development Fund. This will undermine these claimants' right to restitution, as restoration of land is meaningless without financial support to move to and make use of the land.

    Restitution claimants should not have to apply for post-settlement support through the Recapitalisation and Development Fund. They should have the opportunity to

[37] Memorandum to the Restitution of Land Rights Amendment Bill.
[38] Plenary session at the National Land Workshop for Civil Society, Stay City in Johannesburg, 2-3 October 2013.

receive financial support for their projects through a specific restitution fund. Restitution beneficiaries are currently not receiving the funds and support that they need. The government should commit to providing dedicated support to beneficiaries.

If a person wants to challenge a settled claim it necessitates applying for a court order as envisioned in s 5(a) and (b)[39], which is often costly and inaccessible for rural people under the law at present. If Parliament does decide that the window for restitution claims should be re-opened once outstanding claims have been finalised, it should do away with this cumbersome requirement and instead explicitly authorise the Commission to investigate and support valid new claims that overlap with previous claims.

The route described above would enable past mistakes to be rectified through a transparent and well-sequenced set of steps and result in the best-case scenario for existing claimants and future claimants.

1.3. By the time a future Bill comes into effect, the Department should have ironed out existing delays and capacity constraints including compliance with its statutory obligation to protect, support and build the capacity of community-constituted land-holding structures like CPAs.

1.4. Meanwhile, there are ways of redressing the legacy of land dispossession that are less restrictive and specific than set out in the Bill. The Department should focus on alternatives in the form of land redistribution and tenure reform, rather than putting further strain on these programmes by re-opening the restitution programme now.

Obed Mokgatle from the Bafokeng Land Buyers Association in North West warns that “the Restitution Act is a can of worms. The focus should be on the land going back to us. We don’t need a restitution bill to tell us this. I cannot live another 50 years to wait. I’m going to die without seeing the land I fought for.”[40]

1.5. Regarding land tenure reform, immediate interventions to secure the rights of women and vulnerable communities are necessary. Instead of prioritising the amendment of the Restitution Act, the Department should focus on amending the Interim Protection of Informal Land Rights Act (IPILRA) to strengthen the procedural and substantive rights of the most vulnerable.

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

[39] (5)(a) If after an order has been made by the Court as contemplated in section 35 or an agreement has been entered into as contemplated in section 14(3) or 42D, it is shown that another claim was lodged in terms of this Act in respect of the land to which the order or agreement relates, any interested party may apply to the Court for the rescission or variation of such order or the setting aside or variation of such agreement.
(b) The Court may grant such an application, subject to such terms and conditions as it may determine, or make any other order it deems fit.

[40] Plenary session at the National Land Workshop for Civil Society, Stay City in Johannesburg, 2-3 October 2013.

honour existing commitments and court awards to CPAs, before introducing a measure that will only elicit more claims and further complicate existing problems.

1.6. Existing restitution awards need to be protected against counter-claims by traditional leaders who rely on the imposition of the TLGFA's traditional council boundaries derived from apartheid. If this does not happen and land titles are transferred to traditional councils, the ownership rights held by trusts and CPAs would be subsumed within the ownership and control of overarching traditional communities regardless of opposition to such super-imposed identities. The Ad Hoc Committee on the Legacy of the 1913 Land Act has also highlighted the issue, calling for "legal protection of the rights of individuals prior to the transfer of title to the Traditional Councils to counter the trumping of the rights of households and families, thus undermining their security of tenure and stripping them of any redress against abuse of power."[41]

Humphrey Mugakula of the Makuleke community in Limpopo reiterates the fears of restitution beneficiaries: "First the TCB, and now the Restitution Bill with traditional leaders benefitting. Chiefs and boundaries are major issues. If the Restitution Bill goes ahead we are worried that Mhinga will take over the Makuleke community. We need to look at the effect of the TLGFA. The Department of Land Affairs must work together with COGTA to solve this problem of boundaries."[42]

1.7. The Department should establish a specific programme for Betterment that is designed to address the particular history and problems generated by this particular form of dispossession. The Restitution Act is not necessarily well suited to addressing the legacy of Betterment. For instance, in many cases it will be difficult to restore the original land to people dispossessed under Betterment, as the nature of Betterment was that it internally reorganised the social and physical landscape of an area. A programme designed to address the specific nature of Betterment could be simpler and easier to implement than one bogged down by all the other aspects of the Restitution Act and regulations. In conjunction with a specific restitution component for Betterment, the Department could use the land redistribution programme to provide comprehensive support to communities who suffered under Betterment.

1.8. The Restitution Act was promulgated with the qualification that "although dispossession took place during the colonial era prior to 1913 through wars, conquest, treaty and treachery", these injustices "cannot reasonably be dealt with by the Land Claims Court" and through the formal restitution Programme."[43] For people dispossessed of their land prior to 1913, such as the Khoi San, the White Paper is again useful. It suggests that "historical claims arising from dispossession prior to 1913 should be accommodated within the discretion of the Minister. Preferential

[41] Report of the Ad Hoc Committee: Coordinated Oversight on the Reversal of the Legacy of the Natives Land Act of 1913 – A report to the National Assembly of the Parliament of South Africa. October 2013.

[42] Report of the Ad Hoc Committee: Coordinated Oversight on the Reversal of the Legacy of the Natives Land Act of 1913 – A report to the National Assembly of the Parliament of South Africa. October 2013.

[43] These provisions were suggested in the White Paper. Department of Land Affairs, *White Paper on South African Land Policy* (April 1997), available at http://www.polity.org.za/polity/govdocs/white_papers/landwp.html, retrieved on 23 October 2013, paragraph 4.13.

status could be granted to such claims in land redistribution and development programmes providing they are disadvantaged and will benefit in a sustainable manner from a land based support programme."[44]

2. If the Department is intent on passing the bill now, significant amendments are necessary to avert the dangers and problems we have outlined. We suggest amendments and processes that should take place.

   2.1. Ring-fence (finalise – that is, fully resolve) all existing outstanding claims. At the same time, provide support to new claimants whose claims have merit but hold off on processing new claims that overlap with existing claims.

   2.2. Productivity should not be considered as a condition for restoration of land.

   2.3. Protect, support and build the capacity of community-constituted structures like CPAs.

      2.3.1. The Department should support initiatives within communities to democratise land-holding structures, and to make an informed decision about the structure they wish to use to manage land.

Conclusion

We laud the Ad Hoc Committee for its engagement with efforts to redress the legacy of land dispossession in South Africa, and for the report it tabled. However, in our view the Restitution of Land Rights Amendment Bill will cause more confusion and problems than it remedies. We would appreciate the opportunity to make an oral submission to the portfolio committee and are happy to provide any necessary clarification or further details on the points made in our submission.

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[44] These provisions were suggested in the White Paper. Department of Land Affairs, *White Paper on South African Land Policy* (April 1997), available at http://www.polity.org.za/polity/govdocs/white_papers/landwp.html, retrieved on 23 October 2013, paragraph 4.13.