

THE CONSTITUTION'S PROMISE

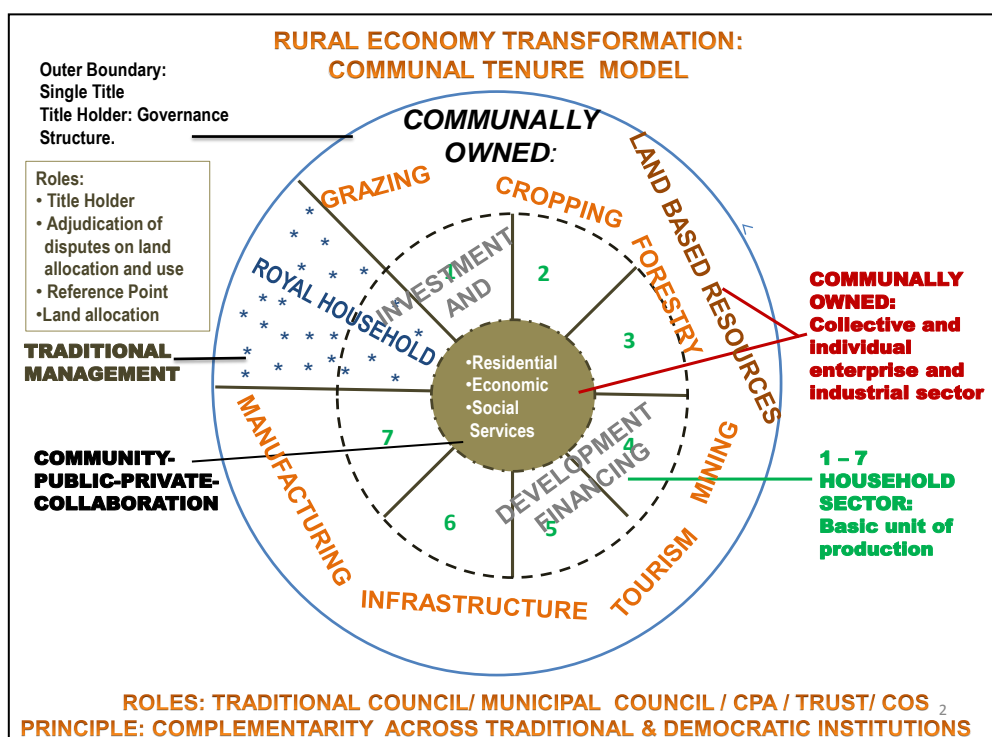
Under colonialism and apartheid, millions of people were dispossessed of their land and livelihoods. The Constitution was written with the aspiration to restore to people some of what they lost. Section 25 (6) and (9) of the Constitution instructs the government to adopt legislation that will realise the right to security of land tenure:

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

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

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

THE NEW COMMUNAL LAND TENURE POLICY – THE 'WAGON WHEEL'



The new Communal Land Tenure Policy (CLTP) of September 2014, like the Communal Land Rights Act (CLRA) of 2003 proposes to transfer the 'outer boundaries' of 'tribal' land in the former Bantustans to 'traditional councils' (the new name for the tribal authorities created during the Bantustan era). In theory, the wagon wheel also provides for Communal Property Associations (CPAs) or trusts to own land titles, with input from members (as prescribed in the CPA act and in trust law). But the

new CLTP and the government's new CPA policy says that no **new** CPAs will be established in areas where traditional councils already exist – that is, most of the former Bantustans.

The CLTP proposes that the units of land transferred to traditional councils will be defined according to the tribal boundaries created in terms of the controversial Bantu Authorities Act of 1951. The Department of Rural Development and Land Reform (DRDLR) proposes that 'traditional councils' will get title deeds (i.e. full ownership) of these blocks of land, while individuals and families will get 'institutional use rights' to parts of the land within them.

PROBLEMS WITH THE NEW COMMUNAL TENURE POLICY

- **Institutional Use Rights and tribal ownership**

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

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

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

These policy proposals undermine the capacity of ordinary people to hold traditional leaders accountable by giving chiefs landownership powers as well as key involvement in investment opportunities. The new proposals also downplay, exclude and undermine countervailing indigenous, statutory and common law rights vesting in ordinary people.

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

The CLTP conceives of all the land in the former Bantustans as subject to chiefs and 'tribal tenure'. The reality is very different. Significant numbers of black people managed to club together and buy land historically by either pre-empting or subverting the restrictions of the Land Acts on 1913 and 1936. Much of this purchased land was subsequently subsumed within the Bantustans and has been fiercely defended

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against counterclaims by superimposed traditional leaders in the intervening decades. However inconvenient to the chiefs, that history cannot be wished away. Nor can the property rights created during that process be destroyed without due process of law. The same applies to the property rights of the hundreds of elected CPAs and Trusts who claimed, and were awarded restitution and redistribution land under post-1994 land reform.

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

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

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

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

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

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

That interpretation of customary law as an opt-in system, which applies across South Africa, was re-iterated by the Provincial Legislatures during debates about the TCB in the NCOP this year. Province after province said the model of centralised top-down

chiefly power contained in the TCB contradicted actual customary practice in their areas. In the end, the TCB failed politically because the required majority of provinces refused to support it. In that context it is very worrying that the new CLTP seeks to give traditional councils the role of dispute resolution by the back door, when a law designed to achieve the same outcome – the TCB – generated enormous rural dissent, and was rejected in parliament.

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

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

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

IPILRA

The people living in the former Bantustans were the most affected by the Land Acts and forced removals. Their structural vulnerability and poverty has been exacerbated by the breakdown in land administration. Many people no longer have valid documents to prove their land rights, and to protect them from land sales by traditional leaders, or investment deals that exclude them, while confiscating their land rights.

In 1996, Parliament passed the **Interim Protection of Informal Land Rights Act (IPILRA)** to provide protection for such people. Section 2(1) of IPILRA provides that people cannot be deprived of “informal rights” to land unless they consent to being deprived of the land (or the land is expropriated by the government and suitable compensation is paid).

Informal rights to land include the right to use, live on or access the land. This means that people’s rights to their household plots, fields, grazing land or other shared resources (like forests) are protected by IPILRA.

IPILRA provides protection for all people living on communal land in the former Bantustans, people living on trust land, people who previously had Permissions to Occupy (PTOs) and anyone living on land uninterrupted since 1997 “as if they were the owner”. The law also states that the Minister of Rural Development and Land Reform can make regulations in terms of IPILRA to provide more detailed processes and procedures. This has never been done.

IPILRA was meant to be a temporary law. It was put in place to make sure that vulnerable people’s informal land rights were protected and that these people are recognised as important stakeholders in any development or tenure upgrades on their

land. IPILRA was therefore aimed at protecting people's rights while Parliament passed another permanent law that would strengthen people's land rights. The former Land Rights Bill of 1999 would have replaced IPILRA, but was never introduced in Parliament. This has meant that IPILRA has been renewed by Parliament every year.

THE WAY FORWARD? ENHANCING IPILRA AND A SPECTRUM OF TENURE OPTIONS

Finding a solution to recognise or 'upgrade' people's 'informal' and 'customary' rights entails incremental processes. Unless done with care, 'upgrading' processes tend to undermine the rights of vulnerable groups such as women. There is ample evidence supporting this from Africa and the rest of Southern Africa.

We have valuable lessons to learn from the 150 years of African freehold ownership in South Africa and how that has worked in practice. In practice, African forms of freehold have tended to prioritise family interests over those of individuals. Contrary to western models of exclusive ownership, African freehold has tended to emphasise inclusive customary values. 'Upgrading' therefore needs to build on African understandings and practices of ownership instead of relying on western models of exclusive ownership. The main reason for this is that the western models of exclusive ownership are largely out of sync with the South African reality of shared and relative rights.

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

There are various shortcomings with IPILRA, which require amendment and strengthening. But it nevertheless provides a key mechanism to protect the rights of the most vulnerable and to build on, in enhancing and expanding those rights.

Urgent additions are that protected rights must be recorded in some form so that they cannot be sold from under people, and so that people have the security of written proof of their rights. Otherwise they will continue to resort to the invalid PTO certificates.

The fact that IPILRA needs to be renewed annually is also a burden to the system of land administration. We propose that IPILRA be enhanced and made permanent, with a view to replace it later with a more elaborate piece of legislation. Two points of intervention are proposed to enhance IPILRA:

- i. The Food and Agriculture Organisation (FAO) of the United Nations (UN)'s Voluntary Guidelines on Responsible Governance of Tenure provide much needed content to enhance IPILRA. The guidelines are founded on:
 - o **Recognition and respect** of all legitimate tenure rights and the people who hold them;
 - o **Safeguarding** legitimate tenure rights against threats;¹
 - o **Promoting and facilitating** the enjoyment of legitimate tenure rights;

¹ The proposal for the state to set up the office of a Land Rights Ombud is one option for consideration.

- **Providing access to justice** (including the courts) when tenure rights are infringed; and
 - **Preventing** tenure disputes, violent conflicts and opportunities for conflict.
- ii. The development of a set of legally binding regulations as envisaged in IPILRA should be considered. The Interim Procedures provide the first layer of content for such regulations and will need to be elaborated on. The regulations should set out a legally binding process to be followed on all development decisions pertaining to informal land rights, applicable to different contexts.