



RURAL WOMEN'S
ACTION RESEARCH
PROGRAMME

RESTITUTION OF LAND RIGHTS AMENDMENT BILL

January 2014

THE RESTITUTION OF LAND RIGHTS ACT

The Restitution of Land Rights Act (No. 22 of 1994) was passed in 1994. Its goal was to offer a solution 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 must roll back the legacy of land dispossession resulting from colonialism and apartheid. But in the current context and in its current form, the new **Restitution of Land Rights Amendment Bill** is unlikely to meet the needs of rural people, and could well undermine their land rights as protected by Sections 25(6) and 25(7) of the Constitution.

THE NEW BILL

Key Dates

National public hearings will take place in Cape Town on January 28th 2014 at the Gugulethu Sports Complex and on January 29th in Parliament. The National Council of Provinces may hold hearings again later in the year.

Context

Definitions

Security of land tenure: The legal and practical ability to defend one's ownership, occupation, use of and access to land from interference by others

Beneficiaries: People whose land claims were settled by the government

The Bill comes at a time when land reform and land redistribution are failing, and millions of South Africans still lack "security of land tenure" - especially those living in rural areas and in the former Bantustans.

Furthermore, many beneficiaries of the Restitution of Land Rights Act have still not received their land titles because of delays by the Commission and also as a result of opposition by traditional leaders.

WHAT'S IN THE BILL?

- This bill makes changes to the Restitution of Land Rights Act of 1994.
- Re-opens the window for restitution claims to allow people to put in claims until 2018.
- Explicitly allows people dispossessed under Betterment to put in restitution claims
- The financial processes restitution claimants must follow are in other policies, like the Recapitalisation and Development policy, not in Bill itself. 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** and the **Recapitalisation and Development Policy**.

10 PROBLEMS WITH THE BILL

1. The Bill is a central element of a shift in government policy to do away with elected land holding associations and instead transfer restitution land to traditional leaders.
2. It can be understood only against the background of the Department's failure to transfer restitution land to qualifying and court-approved Communal Property Associations.
3. The Bill opens the door to traditional leaders to claim ownership of restitution land that could previously only be awarded to those actually forcibly removed.
4. There is a huge backlog of restitution claims yet to be finalised.
5. The financial cost of re-opening restitution will delay processing existing claims.
6. The grants that previously enabled people to return to, and re-establish themselves on their re-claimed land no longer apply. Instead associated financial support is made dependent on future productivity.
7. This also means that in practice restoration of land (rather than cash compensation) will be made dependent on how expensive or viable the transfer is deemed to be.
8. There will no longer be dedicated judges of the Land Claims Court.
9. The Bill reflects lack of consultation with rural people on the ground.
10. The Department confused people by saying restitution will allow pre-1913 claims. This is not actually in the Bill.

1, 2, 3: LAND TRANSFERS TO CPAs AND TRADITIONAL LEADERS

The Bill is likely to undermine independent ownership rights acquired through land reform after 1994, and held by CPAs. The minister has said that **Communal Property Associations (CPAs) should no longer be allowed to own land** acquired through restitution or redistribution within 'communal areas'. The new Communal Land Tenure Policy states that the "registration of new CPAs on traditional communal tenure areas should be *carefully considered and principally discouraged*".

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 defined in terms of the Bantu Authorities Act of 1951.

This is not just a matter of future policy. It is already happening, at least in the Eastern Cape, North West and Mpumalanga, where some CPAs have been waiting more than a decade for their land to be restored to them, despite agreements signed by the Minister. One example is the Cata CPA in the Eastern Cape, where claimants have been waiting since 2000 for their land title. According to a 2012 affidavit by a senior government official in the Cata litigation, the Cata CPA did not receive its land because:

“[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.”

In light of other laws, policies and recent statements by Minister of Rural Development and Land Reform Gugile Nkwinti, the Restitution Bill opens the door to traditional leaders to claim ownership of restitution land on behalf of ‘tribes’ that were defined in terms of the Bantu Authorities Act of 1951.

Attendees at hearings on the Bill in KwaZulu-Natal, Limpopo and Mpumalanga said they feared that **traditional leaders would make restitution claims on behalf of ‘communities’**. 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 help traditional leaders to make land claims:

“As your king, I will abide by the law and approach the government to regain all Zulu land.”

There is no historical basis for the argument that traditional leaders have exclusive authority over land. The colonial and apartheid governments used the idea that chiefs were the only African people who could make decisions in respect of ‘communal’ land as part of its way to dispossess black people of their land. This idea undermined customary practices that recognised the entitlements vesting in ordinary people and the role of groups in making decisions about land.

4: BACKLOG OF RESTITUTION CLAIMS

Definitions

Outstanding claims: Not yet settled at all

Finalised claims: All funds paid and all land purchased and transferred

Backlog: Outstanding claims + claims not yet finalised

There is significant backlog of restitution claims that have not been resolved. 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) have not yet been finalised or the settlement agreement has not been fully implemented. **Around 50% of the land already acquired for restitution has still not been transferred to the beneficiaries.** Several claimants have been waiting for over ten years for the implementation of their settlement agreement.

The backlog of unresolved restitution claims raises concerns that claims filed under the new restitution period might further undermine the fulfilment of existing claims – even those that are already approved but where the land titles and development money have not yet been handed over. The reopening of the restitution process will further **complicate and delay** the processing of existing outstanding claims.

5: COST OF RE-OPENING CLAIMS

Since 1995, the restitution programme has cost the state a total of R22.5 billion. The Department estimated that it will cost between R129 and R179 billion to settle claims lodged during the proposed new window for making claims. **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.

6, 7: RESTORATION OF LAND DEPENDENT ON NEW CONDITIONS

Definition

Restoration: return of a right in land or a portion of land to people dispossessed of their land as a result of past racially discriminatory laws or practices.

Although it does not directly say so in the text, **the bill makes land restoration dependent on the feasibility and cost of the land transfer and the claimants' ability to use the land "productively"**. This is because the Bill will reopen the restitution process in the context of the *Baphiring judgment* and the new **Recapitalisation and Development Policy** (July 2013), which replaces previous Restitution Settlement Grants.

No explanation is given as to how 'acceptable' costs will be determined or how "productivity" will be measured. **These conditions undermine the right to restitution, which is supposed to be a means of giving back to victims of past discriminatory practices, according to the Constitution.** They also introduce possibilities for arbitrary and corrupt decision-making processes, in the absence of explanations for how cost and productivity will be measured. Most seriously, the policies accompanying the new Bill and the Baphiring judgement mean that the government can ignore the restitution process' constitutional imperative to offer land, as opposed to money, to people who have been discriminated against.

8: CHANGES TO THE LAND CLAIMS COURT

After 1994 the Land Claims Court was created to deal with disputes regarding land claims, the finalization of land claims and other related land issues such as labour tenant and farm-worker evictions. The persons appointed as judges had to have a special knowledge of land law issues. The draft bill will make these claims and other land related matters all the more complicated – requiring more judicial attention and time. The proposed law will, however, **no longer require** that judges have specialist knowledge. Also, these judges will no longer deal with land claims exclusively, but will have to share their time with obligations to other courts.

9: BILL REFLECTS LACK OF CONSULTATION

The Bill was introduced with no comprehensive advance notice in May 2013, allowing only 30 days for comment. These timelines **did not allow for widespread consultation** with a wide-range of constituents.

Public hearings on the Bill thus far have been poorly publicised, leading to low turnout in the provinces. The locations of the hearings have also generally been **inaccessible to rural people**. Furthermore, at the hearings **government representatives did not explain the bill in detail and there were no copies of the bill available**. At the hearings in KwaZulu-Natal, some **attendees felt intimidated by presentations made by traditional leaders**. Mandla Mandela, a traditional leader and a member of the parliamentary committee conducting the hearings, regularly interrupted people who spoke about chiefs, arguing against generalisations.

The problems mentioned above reduce the possibility of government and parliament understanding people's concerns about the Bill and their suggestions about ways in which past injustices can be remedied.

10: CONFUSION AROUND PRE-1913 CLAIMS

Government officials have stated that one of the main goals of the Restitution Bill is to allow people dispossessed prior to 1913, like the Khoi San, to put in claims as part of the restitution process. However, **the bill contains nothing about pre-1913 claims**. The Department has not clarified its earlier comments, and has been reluctant to acknowledge that the bill does not address the concerns of people who were dispossessed pre-1913.

WHAT'S AT STAKE?

- Right to security of land tenure, as guaranteed in the Constitution.
- Livelihoods derived from land.
- Full enjoyment of citizenship rights in South Africa, especially for millions of black South Africans who were dispossessed of land and put into Bantustans.
- Control over land goes with control over the lives of people who live on land.
- The Bill entrenches the interests of chiefs and commercial farmers at the expense of those of ordinary people.
- Abuse of power by traditional leaders.

RECOMMENDATIONS

- The Restitution of Land Rights Amendment Bill is seriously flawed and should be withdrawn **OR**
- The Restitution Bill should be referred back to the Department for further consultation with rural people **OR**
- If the Bill is not withdrawn, significant amendments are necessary to avert the dangers and problems we outlined above