

## **Position papers for the National Land Tenure Summit**

**Johannesburg, 4<sup>th</sup> -6<sup>th</sup> September, 2014**

The attached position papers were written by researchers based at the Institute for Poverty, Land and Agrarian Studies (PLAAS), University of the Western Cape, and at the Centre for Law and Society, University of Cape Town. They were distributed to the 2000 people who attended government's National Land Tenure Summit in early September 2014.

Also attached is a newspaper article on aspects of the summit written by Ruth Hall of PLAAS and published in the Daily Dispatch on 10<sup>th</sup> September 2014.

## STRENGTHENING THE RELATIVE RIGHTS OF PEOPLE WORKING THE LAND

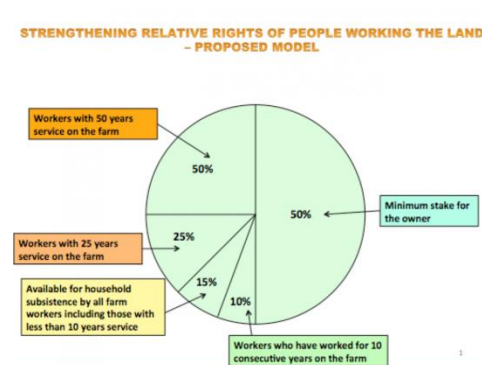
‘Strengthening the Relative Rights of People Working the Land’ is a misnamed policy. It does not strengthen people’s rights, but suggests equity schemes instead.

### What is being proposed?

Each farm owner is to retain 50% ownership of the farm, and will cede 50% ownership to workers, who would acquire shares in the farm depending on their length of service.

### Land or equity?

The policy states that 50% of the equity in the *business* will be compulsorily acquired by the state. But at other points in the document it conflates this with ‘land’.



**Who gets this 50% equity?** The policy suggests that allocation of equity among workers should be on the basis of the duration of ‘disciplined service’, which is not defined. Workers who have been employed for 10 years get 10% of the workers’ half of the business – ie. 5%, shared among however many of them there are. Those employed for 25 years get 25% of the workers’ half – ie. 12.5%. Those employed for 50 years get 50% of the workers’ half – ie. 25%. Those who have worked for less than 10 years get nothing.

### Obvious unintended outcomes

The policy creates a powerful incentive for employers to retrench workers after nine years. Except, and here’s more ambiguity, they will have 15% for ‘household subsistence’, which suggests again that the share is of the *land*, rather than equity in the *business*. It is likely to pit workers against each other, as the fewer workers there are on a farm, the more there is for the ones who remain.

### Equity sharing is the wrong model

After taking office in 2009, Minister Nkwinti placed a moratorium on farm equity share schemes, arguing that: ‘farmers in farm equity schemes do not part with their land — they receive financial injections into their enterprises — while farm dwellers’ lives, on the other hand, seem to remain ordinarily the same, with insignificant dividends being paid to farm dwellers’ The moratorium was based on the findings of a study commissioned by the Department (but never made publicly available) which indicated that on equity schemes ‘tenure security had not been completely or effectively addressed, as some beneficiaries remained faced with the spectre of eviction’ and that ‘of the 88 FES [farm equity share] projects implemented between 1996 and 2008, only nine have declared dividends’. The few workers who did receive an income from dividends got between R200 and R2000 per year – very little compared to the cost of the projects. Two years later, the Minister lifted the moratorium, but no changes were put in place to fix the problems identified. *Now, this problematic model is being advocated as the primary, or even the sole, form of land reform and worker empowerment in agriculture. Why?*

### How much would it cost?

A rough idea of the price tag is that the current market value of capital assets in agriculture is estimated in the region of R282 billion, and then there is R90 billion in farm debt. Half of all that is R141 billion.

### **A bureaucrat on every farm?**

The 50% compensation funds from government will go into an 'Investment and Development Fund' to be jointly managed by all shareholders (farmers and workers) and state officials will sit as *ex-officio* members to manage the financial interests of the workers. One official per farm. It is safe to say that the Department does not remotely have the capacity to do this – never mind on every farm in the country.

### **The money or the box?**

The policy suggests that this fund should pay out workers who wish to leave. Given the difference between 10% equity in a commercial farm and the current minimum wage, one would expect that all long-serving workers will immediately resign and leave the farm, quickly depleting this fund.

### **More conditions placed on farm workers' tenure**

The most dangerous aspect of these policy proposals is that workers and their families living on farms should not have *rights* to live where they are, but rather should *earn* their tenure by performing a set of 'duties and responsibilities'. The policy even suggests that land rights management committees will decide who stays and who goes. This provision would be disastrous, and represents a step backwards from the promise of tenure security made in the Constitution of 1996 and in ESTA in 1997.

## **THE ALTERNATIVE**

### **1. Scrap the policy proposal**

This is an illogical policy. It is also mathematically inept. While couched in apparently 'radical' language concerning the appropriation of labour power and exploitation of workers, it offers workers very little while promising farm owners a massive windfall of public money. (See more at: <http://www.plaas.org.za/blog/smoke-and-mirrors-government%E2%80%99s-farm-worker-policy#sthash.H9uZxUPl.dpuf>). There is no point in trying to refine the existing proposal, as it proposes massive state investment in private enterprises at the expense of land reform.

### **2. Publish the government review of equity schemes**

The government-commissioned review of equity schemes which led to the moratorium in 2009 has never been made publicly available. Publish this, and open up a debate about whether, or under what conditions, public money should ever be invested in privately-owned commercial farms.

### **3. Pursue AgriBEE partnerships**

The AgriBEE charter provides for large commercial enterprises to acquire BEE accreditation in return for transferring shareholding to farm workers or to other previously disadvantaged people (although there is no guarantee that this will benefit farm workers specifically). This is an important route through which the existing commercial farming sector is required to transform itself – but not with public money.

### **4. Implement land tenure reforms for farm workers**

The Extension of Security of Tenure Act (1997) and Land Reform (Labour Tenants) Act (1996) already provide a solid basis to secure tenure rights for people living on commercial farms. Go back to the demands and resolutions of prior consultations which have not been implemented, namely from:

- the National Land Tenure Summit (2001),
- the National Land Summit (2005) and
- the National Summit on Vulnerable Workers in Agriculture, Forestry and Fisheries.



PLAAS Position Paper for National Land Tenure Summit, 2014  
Associate Professor Ruth Hall

## **EXTENSION OF SECURITY OF TENURE AMENDMENT BILL**

The Amendment Bill proposes six significant changes to the existing law.

### **1. The definition of a ‘dependant’ is changed to limit this to a legal dependant.**

This inhibits the right to family life for farm dwellers, as occupiers will only have the right to reside with a ‘dependant’ which now means ‘a family member to whom the occupier has a legal duty to support’ (emphasis added). This is what commercial farm owners have long argued: that tenure rights should not include adult children and other extended family to whom the occupier has no legal obligation, and that occupier rights should not therefore extend to the next generation. Effectively it means that the scope of the Act is narrowed to the primary occupier (often assumed to be a man) and children under the age of 18. This is an astonishing attack on the right to family life.

### **2. A new obligation is imposed on farm dwellers to maintain their dwellings.**

Rather than extend further secure rights to farm dwellers, the Amendment Bill imposes a new obligation on farm dwellers to ‘take reasonable measures to maintain the dwelling occupied by him or her or members of his or her family’. This shifts responsibility away from farm owners to provide decent living conditions to workers, as defined in the Sectoral Determination for farm workers. Providing accommodation is part of the cost of labour for enterprises such as farms which may be located far away from urban settlements. This cost is now to be transferred to farm occupiers themselves. How this obligation to maintain dwellings to be defined and enforced is not made clear.

### **3. ‘Subsidies’ are to be replaced with ‘tenure grants’.**

At first glance, the significance of this change in terminology is unclear – what is a grant and what is a subsidy? What these will mean in practices depends on policy yet to be developed in the DRDLR. The real reason for removing the word ‘subsidy’ is probably explained by the fact that now these subsidies are to be directed to farm owners rather than, as in the past, to farm dwellers. The terminology obscures this point, but this is precisely what is proposed (see point 4 below). The level of the new tenure grants is not defined, nor is the basis on which they will be made available. In this sense, the law empowers the DRDLR to pay money either to farm owners or to farm occupiers or to both, but provides no guidance on how much, when and under what circumstances. Who will make such decisions? The likely outcome is that land reform funds will be redirected away from farm dwellers towards farm owners – entrenching the old pattern of paternalism rather than realising people’s rights as citizens.

### **4. Farm owners are to be paid for providing accommodation and services to farm dwellers.**

Up until now, ESTA gave the Minister the power to allocate funds to enable farm dwellers to secure their tenure, including by upgrading their rights to ownership – either of a portion of the farm, or for acquisition of land and housing off-farm. These provisions of Section 4 of ESTA have been barely used. Now, these funds are to be shared between farm dwellers and farmers. The context is the stand-off between municipalities which are obliged to provide free basic services to indigent people, and farmers who maintain that they have no such obligation. In this Amendment Bill, the state is conceding that it will pay farmers for providing not only services but also accommodation. How this is to be costed is not made clear, nor how the state can provide farm dwellers with free basic services (like other citizens) if the farm owner is unwilling to provide these.

**5. The state is to pay for suitable alternative accommodation for evicted occupiers.**

Under the existing Act, courts must take into account the availability of suitable alternative accommodation before granting an eviction order. Now, the state will pay for such alternative accommodation. This reduces the obligations on farm owners to provide alternative accommodation for people they wish to evict and transfers this financial responsibility to the state.

**6. A Land Rights Management Board (and Committees at district level) are to be established.**

These new institutions are to take on the existing responsibilities of the DRDLR, which include identifying, monitoring and settling land disputes and establishing and maintaining a database of farm occupiers. Why does the DRDLR propose to create a new institution to perform the functions it has failed to perform to date? This is not made clear.

## ASSESSMENT

Farm dwellers and workers have been evicted in their droves despite the Extension of Security of Tenure Act. Only an estimated 1% of all evictions have been legal. Even where people have been legally evicted, most have not had legal representation or been provided with suitable alternative accommodation. ESTA is an important step towards securing the tenure rights of farm dwellers, but so far the DRDLR has been spectacularly ineffective in using ESTA both to (a) prevent evictions and (b) provide long-term tenure security on- or off-farm.

The ESTA Amendment Bill does not contribute towards rectifying these problems.

The Land Tenure Security Policy for Commercial Farming Areas is correct in saying that **the failure to enforce the Extension of Security of Tenure Act amounts to ‘total system failure’ (TSF)**. What explains this total system failure and what is to be done about it? This question has been answered several times in similar national summits, yet the answers have not been implemented. Doing so will require political leadership, investment in enforcing institutions, and funding.

## THE ALTERNATIVE

Civil society organisations proposed to the National Land Tenure Summit in 2001<sup>1</sup> that a National Task Team be established with these Terms of Reference:

1. Assess the reasons for failure to date and develop new mechanisms to enforce ESTA
2. Use not only its protective provisions that govern evictions but also Section 4 that compels the Minister to make available funds to enable farm occupiers to acquire secure and independent long-term tenure rights, either on-farm or off-farm.
3. Ensure that the justice system becomes responsive to ESTA. DRDLR must work with the departments of Justice, Public Prosecutions, the Commissioner of Police and the Legal Aid Board to providing training on ESTA.
4. Ensure that the distinction between labour and tenure rights is upheld: DRDLR must work with the Department of Labour and the CCMA on this (note: the ‘Strengthening the Relative Rights’ policy does the opposite, by making land tenure rights dependent on employment and ‘disciplined service’).
5. Oversee the establishment of a monitoring and evaluation system for ESTA and link this to an alternative dispute resolution (ADR) system to intervene in threatened evictions.
6. Reform the justice system to ensure that Section 9(3) reports are drafted at the commencement of an application and the clerk of the court should request it at this stage; DRDLR monitors the recommendations accepted by the courts and intervenes where it is

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<sup>1</sup> These proposals have been ignored for the past 13 years but remain relevant due to the non-enforcement of ESTA.

apparent that magistrates' judgements are biased towards property owners; DRDLR monitors settlement agreements contrary to ESTA through the 9(2)(d) notices and taken up with CCMA structures; rescission of judgement applications in relation to common law evictions should be funded by legal aid as a priority; justice forums and labour forums need to be created provincially by all provincial offices of DRDLR so that an integrated approach is promoted between the government departments; Section 23 charges should be captured on the national database of the SAPS and decentralised; and the Senior Prosecutor must authorize withdrawals of eviction charges.

7. ESTA officers should be required to proactively intervene when 9(2)(d) notices are served as a 2-month probation period is given in terms of the Act.
8. DRDLR should acquire land for ESTA evictees and evicted farm dwellers must be explicitly prioritised in the implementation of land redistribution. DRDLR should clarify how its budget will be apportioned to provide evicted ESTA occupiers with access to land on which to base a livelihood, whether through agriculture on a subsistence or small-scale commercial basis, or through non-agricultural uses of land.
9. DRDLR must clarify how it proposes to provide emergency shelter and/or housing to evicted farm dwellers who have not been provided with suitable alternative accommodation.
10. Notice periods for termination of employment and for ESTA are distinct requirements of different pieces of legislation, protecting different rights. Notice periods must not run concurrently.
11. Impose a moratorium on evictions until such time that a National Task Team has reported that the systems are in place for effective implementation and enforcement of ESTA.

The answer is clear: implement and enforce the existing law.

## COMMUNAL LAND TENURE POLICY

### **The Constitution's promise**

Under colonialism and apartheid, discriminatory laws deprived millions of black people of legal rights to land they had occupied and inherited over generations. Section 25 (6) and (9) of the Constitution instructs the government to adopt legislation that will address the current consequences of past racial discrimination in relation to tenure security:

*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 tenure policy**

In fact the government has done far worse than that. The new Communal Land Tenure Policy (CLTP), 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). The policy proposes that the units of land transferred will be defined according to the tribal boundaries created in terms of the controversial Bantu Authorities Act of 1951.<sup>2</sup> The 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.

- **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 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.

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<sup>2</sup> The 2003 Traditional Leadership and Governance Framework Act introduces the term 'traditional community' to replace the term 'tribe' of old, but section 28 sets in stone the tribal boundaries created in terms of the 1951 Act although they are much disputed in many areas.

These policy proposals undermine the capacity of ordinary people to hold traditional leaders accountable by giving chiefs landownership powers that they never had under apartheid 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 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 communal property associations 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 an adjunct of chiefly power, rather than a system of law that applies to all who use it in their daily lives, whether they live in urban or rural areas, whether the family or the clan is the source of custom. 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. In various judgements the Constitutional Court has rejected the official version of autocratic chiefly power inherited from apartheid, in favour a more democratic multi-vocal version of ‘living customary law’ that develops as society changes its modes of life.



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 policy 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 Framework Act of 2003. 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.

The crisis is so bad that the new Traditional Affairs Bill (TAB) seeks to repeal the Framework Act and introduce new provisions that remove the consequence of invalidity for traditional councils that fail to 'transform'. The TAB is likely to generate as much controversy as the Traditional Court's Bill in Parliament, if not more. It cannot pass constitutional muster for various reasons beyond the scope of this factsheet.

In the meantime 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.

- **You can't give away what you don't have.**

Does the state own the land it is planning to give to traditional councils? It certainly doesn't own the land that groups of black people purchased historically or the land that was transferred to CPAs and Trusts after 1994. The CLRA sought to get around this by empowering the minister to endorse such title deeds over to traditional councils. As discussed above, s 25 of the Constitution would not allow for this.

Most other land in the former Bantustans is registered in the deeds office in the name of the Republic of South Africa. But that nominal ownership does not mean the state actually owns the land. As eminent law professor Alistair Kerr set out in his book *The Customary Law of Immovable Property and of Succession* (1990) virtually all the land in the former homelands is owned by the families who have invested in, and inherited it over generations. Kerr analyses the content of customary law, and the content of statutory provisions such as Regulation R188 of 1969 (that applied to non surveyed land) and the quitrent regulations that applied to surveyed areas. He finds that both customary and statutory law creates real rights in land, that is – rights akin to ownership. That ownership vests in the ordinary people who have occupied, used and invested in the land over generations.

His conclusion was confirmed by the Upgrading of Land Tenure Rights Act of 1991 which provides for automatic upgrading of underlying real rights vesting in families and individuals to ownership. Kerr says there are two types of state trusteeship, a strong version in terms of which the state owns the land on behalf of the actual beneficiaries, and a weak version in terms of which the state's role is administrative, and does not amount to ownership. He concludes that the state's nominal ownership of land in the former Bantustans is the weaker administrative type. Ownership of land in the former Bantustans is not in the gift of the state. The state has no legal authority to give it to anyone but the people who are the underlying owners.

### **What is the alternative? IPILRA and a spectrum of tenure options**

The South Africans living in the former Bantustans are the people who bore the brunt of the land acts and forced removals. Their structural vulnerability and deep 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 order to protect such people the Interim Protection of Informal Land Rights was enacted in 1996. The Act provides that people may not be deprived of informal rights to land that they occupy, use or have access to, except with their consent or by expropriation with compensation. The Act was meant to be a temporary holding mechanism to ensure that those with informal rights are recognised as key stakeholders in subsequent development or tenure upgrades affecting their land. It was envisaged that IPILRA would fall away once the Land Rights Bill of 1999 was enacted. That Bill sought to go further than protecting existing rights, by elaborating their content in line with the underlying rights described by Kerr and others.

By its nature upgrading rights is a complex and time-consuming process which involves multiple interests and cannot be done overnight. It entails incremental processes that have been shown to be very vulnerable to elite-capture. Unless done with care, upgrading tends to undermine the rights of vulnerable groups such as women, and to unravel within a generation. This is particularly the case in Africa and 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, rather than default to western models of exclusive ownership that are out of sync with the reality of shared and relative rights vesting not only in individuals and families, but also in user groups and communities.

The key assumption of both IPILRA and the Land Rights Bill was that existing underlying rights would be protected and enhanced through processes that incrementally transferred ownership and control from the state to ordinary people. In some circumstances people may opt to retain nominal state ownership while beefing up the content of their rights against the state. In other circumstances groups may opt for transfer of title and full ownership. Neither option can fly however, 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 and registered, so that they cannot be sold from under people, and people have the security of written proof of their rights. Otherwise they will continue to resort to the invalid PTO certificates that people call their 'title deeds'. Of crucial importance is the creation of the office of a land rights ombud that ordinary people can approach when their rights are under threat.

### **Conclusion**

It is ironic that laws and policies adopted over the past 10 years re-entrench two flawed colonial constructs that were pivotal to South Africa's history of racial dispossession. The first is that customary systems of land rights do not constitute property rights for their members. This was used to justify the appropriation of African land by the colonial state. The second is the colonial insistence that the chief's power was despotic. This was used to justify the power of the British governor general as the "supreme chief" to redraw tribal boundaries and appoint and depose chiefs at will. These distortions serve a similar purpose today, justifying the denial of the ownership rights of ordinary rural people, as well as the increasingly autocratic leadership style of the state.

## COMMUNAL PROPERTY ASSOCIATIONS (CPAs)

### What is the policy and law on CPAs?

Communal Property Associations (CPAs) are landholding institutions established under the Communal Property Associations Act No. 28 of 1996. Beneficiaries of the land reform, restitution and redistribution programmes who want to acquire, hold and manage land as a group can establish legal entities to do so. The CPA Act provides for government registration of CPAs and also government oversight to enforce the rights of ordinary members.

### Challenges with CPAs

- CPAs can and do work, especially for poorer members, but socio-economic pressures on them are huge. While the CPA Act has been poorly implemented, it remains an important option.
- CPAs are extremely under-resourced legal entities compared to sectional title estates and companies; and they operate in a wide variety of social contexts.
- There has been very limited support and oversight of CPAs from the government, and a lack of communication between officials and CPAs.
- In some areas where traditional authorities are present, traditional leaders have tried to undermine the functioning of CPAs as they see them as challenging their authority.
- Long delays in transfer of title to a CPA undermine the authority of a CPA committee, and the uncertainty that ensues allows opportunists to challenge or take control of the CPA.
- In some CPAs there is abuse of power by the committee and powerful CPA members and neglect or abuse of ordinary members. Committees are sometimes unaccountable. But it is not clear who CPA members can appeal to when conflict or abuse occurs.
- Substantive rights of CPA members are often not clearly specified. Women's land rights are often particularly vulnerable and insecure.
- The processes by which CPAs are set up and offered assistance pay little attention to land tenure realities and dynamics on the ground. Many CPAs have constitutions that have been 'cut-and-pasted' from other CPAs, and are therefore out of sync with local land tenure practices. They establish rules that are impossible for people to comply with.

### Recommendations

1. *Land reform beneficiaries should be able to choose the kind of landholding entity they want to form.* Counter to the DRDLR's Draft Policy Paper on CPAs, people should not be prevented from forming CPAs in communal areas or where traditional authorities exist, as this would deny people's ability to choose the landholding entity that best fits their needs and their land tenure practices (including customary practices). The problems with land conflicts will not be solved by isolating CPAs from traditional authorities, as there are many situations where traditional leaders are active CPA members and where land disputes exist in the absence of traditional authorities and CPAs.
2. *DRDLR's emphasis should be on ensuring that skilled facilitation is available for setting up and assisting CPAs - not just on CPAs' legal compliance with the CPA Act.* Achieving security of tenure for CPA members is more important than submitting a report to DRDLR every year. Amendments to the CPA Act should make explicit the kinds of support and capacity needed for CPAs to function.
3. *Establish institutions with capacity to support CPAs within the Department of Rural Development and Land Reform.* The DRDLR's Policy Paper on CPAs moves in the right direction by suggesting the establishment of the CPA Office and the

appointment of a Registrar of CPAs, and by strengthening the capacity of these offices. The focus of these institutions should be to strengthen the capacity of the CPA office by bringing in experts to train officials, improving communication between officials and CPA members, and deepening the expertise of officials so that they can provide strong oversight and support to existing and new CPAs. There is need to allocate sufficient DLA staff and resources to render support on an ongoing basis to CPAs.

4. *Put resources and capacity into processes for establishing and running CPAs.* The principles of these processes, as set out in the CPA Act, are that they are democratic and transparent. The project cycle of the CPA must incorporate the preparation of a land administration plan (LAP) which will include defining CPA membership, specifying individuals' procedural and substantive rights to land and benefits arising from the land (production, mining, leases etc) relative to others and to the group, the land use preferences of individuals within the group, and identifying recourse mechanisms for when internal negotiations and adjudication fail. These processes can be used to resolve issues in existing CPAs and must be put in place when new CPAs are formed.
5. *Implement mechanisms to allocate and secure individuals' and groups' substantive rights to land and accompanying benefits, in relation to other members of the group and the CPA as a whole.* The allocation of substantive rights to use land is a basic requirement in the CPA Act. Individuals' substantive rights must be protected within a group ownership setting. During the LAP process, and ideally before the land is transferred to the CPA, define the nature and content of different parties' substantive rights in relation to others, which will be informed by local land tenure practices and systems (ownership rights, use rights, occupation rights, access rights, grazing rights etc). Put in place guidelines for the recognition of different land use needs within the group, allocation of rights and how to bind the actors involved to recognise these rights. Later, individual members or particular groups within the CPA can assert these rights for protection in the face of power abuses by the CPA as a whole or by strong members. (See the report commissioned by DRDLR in 2005 for more detail on this.)
6. *Define individuals rather than households as members when forming CPAs.* Adult individuals and not households should vote in CPA decision-making processes. This protects and empowers members of households who are often particularly vulnerable, such as women, from making decisions that other more powerful actors, such as men, may not agree with.
7. *The CPA Office and CPA Registrar should be accountable to CPAs themselves and not just to parliament.* This means the DRDLR must produce annual reports to be tabled in parliament, but must also open communication channels through which CPA members can reach them for report-backs.
8. *As the DRDLR's Policy Paper on CPAs suggests (2.1.3.), businesses and economic entities must be separate from CPA committees.* Ensure that when a business is to be established on CPA land, it should operate through a separate legal entity, whether individuals or independent companies.
9. *Subdivide or split CPAs into smaller groups and smaller CPAs where appropriate, and in line with local land tenure arrangements and land use patterns of individuals within the larger group.* The LAP can be a place to intervene in this respect or to foresee possible future interventions.
10. *Provide for sub-division of farms* if that is what CPA members choose to do.
11. *Devise detailed regulations to accompany amendments to the CPA Act.* Regulations will flesh out what is meant by each part of the Act and guide implementation of the Act.
12. *Establish an additional independent external recourse institution in the form of a land ombudsman.* The role of this institution can be to trouble-shoot intractable land tenure issues (not just in CPAs) and can step in to negotiate protracted disputes in CPAs when other processes have failed.



## AGRICULTURAL LANDHOLDINGS POLICY

### 1. What is the policy?

The policy draws its inspiration from the 2011 Green Paper: one of the four ‘tiers’ of land tenure in South Africa will be ‘freehold with limited extent’. It proposes that *government designate maximum and minimum land holding sizes in every district, and take steps to bring all farms either up to the specified minimum size (a ‘floor level’) or below the maximum size (a ‘ceiling’)*. The rationale is to attain higher levels of efficiency of land use and optimize ‘total factor productivity’. Opportunities in value chains will be assessed as part of the exercise. District land reform committees will determine landholding floors and ceilings by assessing a wide range of variables (including climate, soil, water availability, water quality, current production output, commodity-specific constraints, economies of scale, capital requirements, numbers of farm workers, distance to markets, infrastructure, technology, price margins, and relationships between different on-farm resources).

Holdings in excess of the ceiling will be trimmed down through ‘necessary legislative and other measures’. What this means is unclear, but may include purchase (e.g with the state having the right of first refusal on land offered for sale), expropriation, or equity shares. The policy document reviews international experience of setting land ceilings as a land reform measure, in the cases of India, Egypt, Mexico, the Philippines and Taiwan. In almost all cases the impact of land ceilings has ‘not lived up to expectations’, and in some cases have had almost no effect on disparities in land-holdings. The document also states that ‘optimum levels of productivity’ (i.e. both floor and ceiling) are ‘dynamic and continuously changing upwards and downwards’.

### 2. Is the policy appropriate?

South African agriculture is highly diverse in its products, systems and scales of production, partly in response to high levels of environmental variability, both between and within large district municipalities, but also to market realities. Environmental and market conditions are dynamic and fluctuating, and as the policy document states, ‘optimum productivity’ is a constantly moving target. Successful farmers, both large and small, are those who are able to improvise flexible and effective responses to dynamic variability. To imagine that officials who have never farmed themselves could designate landholding sizes that make economic sense in South Africa today is a fantasy. The task itself is probably inherently infeasible, but it is definitely beyond the capacities of DRDLR officials at present.<sup>3</sup>

**‘Land floors’:** the notion that farms below a designated size are ‘not viable’ is highly problematic, given a history of the state using racially-biased criteria to designate target farming incomes in the past. In South Africa today, planners often use criteria drawn from large-scale commercial farming to assess smallholder farming systems that are very different in objectives, methods and outcomes. This results in inappropriate plans, funding mechanisms and support.

**‘Land ceilings’:** many of the problems experienced in attempts to designate farm ceilings elsewhere in the world could well be replicated in SA, e.g. fragmentation of holdings, reduced

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<sup>3</sup> Michael Aliber, 2013, ‘Discussant notes on redistribution policy’, Land Reform Policy Workshop, organised by parliament’s Ad Hoc Committee to Exercise Coordinated Oversight on the Legacy of the Natives Land Act, 1913, Stellenbosch, 23-24 August 2013.

investment, evasion via family landholdings, corruption, barriers to entry by the landless, poor implementation capacity and ineffective enforcement of policy.

### 3. Are there alternatives to the landholdings policy?

South Africa urgently requires practical agrarian reform policies that transfer land to black farmers who can use it productively to sustain their livelihoods and to supply markets.

**(a) Land acquisition:** Decentralised area-based planning and purchase of appropriately located land at or slightly below market value will be more effective than attempts to regulate farm size. The budget for land acquisition would need to dramatically increase.<sup>4</sup> Small and medium-scale back capitalist farmers and large numbers of market-oriented smallholders should be key beneficiaries, but additional land for supplementary food production by the poor should be provided as well. Sub-division of large farms should be allowed. Land could be acquired through expropriation in extreme cases where negotiations stall.

The many problems experienced to date with area-based planning (ABP) for land reform must be addressed. These include the lack of appropriate skills in both the department and in consultants, and in-depth training and accreditation are necessary. ABP must be integrated into the routine procedures of the department and of local government. Planning should be participatory and aim to match demand and supply of appropriate land.

Large-scale expropriation and payment of compensation at much less than market value is seen as desirable by many, but could lead to costly, drawn-out and potentially inconclusive and court processes initiated by landowners.<sup>5</sup>

**(b) Support to land reform beneficiaries:** a large-scale farmer and livelihood support programme for land reform beneficiaries is urgently needed, through provincial departments of agriculture and other relevant government bodies. Partnerships with NGOs and the private sector can assist as well.

Area-based planning could indeed identify opportunities and constraints in existing value chains, but meeting the practical needs of market-oriented smallholders should be the key focus. The comparative advantage of smallholders in specific types of agricultural production (e.g. labour-intensive fresh produce and extensive livestock) should form the basis of planning. These producers must be supported by appropriate levels of capital funding, together with extension and advisory services from trained officials who understand the differences between smallholders and large-scale commercial farming systems.

Procurement by public institutions can provide markets for smallholder fresh produce, and retailers must adopt less stringent standards and acquire from smallholders on a larger scale than at present. Informal markets could be actively supported by municipalities, e.g. by providing improved road access to farms and supporting auction sales of goats. Farmer co-operatives to purchase inputs in bulk and to market collectively should be promoted more effectively.

A key policy issue urgently in need of attention is water: is another 500,000 hectares of irrigation feasible in South Africa, as proposed by the National Development Plan, or not? Smallholder irrigation has enormous potential as a key thrust of agrarian reform.

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<sup>4</sup> Aliber, Michael, forthcoming, 'Unravelling the Willing Buyer, Willing Seller Question', in Cousins and Walker (eds) *Land Divided, Land Restored. Land Reform in South Africa for the 21<sup>st</sup> Century*, Jacana Books.

<sup>5</sup> Spoor, Richard, 2014, 'Land reform – and the Law of Unintended Consequences', Daily Maverick, July 7, 2014.



PLAAS Position Paper for National Land Tenure Summit, 2014  
Associate Professor Ruth Hall

## STATE LAND LEASE AND DISPOSAL POLICY

This policy signed by the Minister in July 2013 introduces profound changes in tenure rights in the land redistribution programme. Now, beneficiaries of land redistribution are not to acquire ownership of land, but are instead to lease land from the state. The state is the willing buyer, purchasing farms from willing sellers. In recent years it has provided farms on leasehold for 3 years at a time, but due to widespread non-payment of rent, and experience that farmers leasing land are unable to develop their enterprises in this time so as to pay rent, the DRDLR developed this new policy in 2013.

The main content of the policy is as follows:

1. **No ownership:** All land acquired for redistribution will be owned by the state.
2. **Long-term leases:** Such properties will be made available on 30 years leases, renewable for a further 20 years if there is evidence of 'production discipline', a new and undefined criterion in land reform.
3. **Rent:** Rent is to be determined on the basis of net turnover (ie. profit). The policy requires that beneficiaries pay 5% of their net turnover to the state each year. Such rental arrangements are available only to medium-scale and large-scale commercial farmers.
4. **Conditional tenure and evictions:** The way rent is to be determined creates an incentive for lessees to keep profits low and to re-invest in production – but not too low or they may put their leases at risk. This is because beneficiaries who are not deemed (through a process apparently still to be established) to be adhering to 'production discipline' and not successful in farming will have their leases cancelled. To date, some beneficiaries have been evicted from farms acquired for redistribution on this basis, but the DRDLR has not made public how many 'beneficiaries' have been evicted, why, and through what legal procedure.
5. **Option to purchase:** After 50 years of paying rent to the state, beneficiaries will be able to apply for (but not have an automatic right to) an option to purchase their farms from the state. Again, only medium to large-scale commercial farmers are to be allowed to apply for this option and only after 50 years.
6. **Poor to be perpetual tenants:** Farm workers, former farm workers and small-scale or semi-subsistence farmers will not have the option to acquire ownership – unlike medium- to large-scale commercial farmers. This re-establishes the apartheid idea that certain categories of progressive farmers should acquire title, having proved themselves, while the poor should remain tenants of the state. Farm occupiers including labour tenants may, though, qualify for long-term leases at a nominal rental of R1.00 per year (note: this effectively affects the implementation of Section 4 of the Extension of Security of Tenure Act which provides for upgrading and securing long-term tenure rights, including ownership; that option of ownership is now removed).
7. **Rates, improvements and inheritance:** Beneficiaries will be required to pay rates after the first five years, on termination or expiry of leases any fixed improvements they have made on the land will become state property, for which they will not be compensated. On the death of the lessee (assuming this is an individual rather than a CPA, Trust, CC or cooperative), the lease will not be inherited by the family; rather state officials will be able to decide whether or not a spouse or other heirs will be able to get a lease to continue to live on and use the leased property.
8. **Absence of land rights:** The extent of 'absent leases' is unknown but recognised by the Department as a challenge. Limited research in the Eastern Cape (Hall and Kepe 2014, forthcoming) shows that this policy is not yet being applied, and instead that beneficiaries are being left either with expired short leases; with caretakerships (in terms of which 'beneficiaries' can be given 30 days to vacate the property); or with no legal

documentation but simply verbal agreements that they can occupy and use a farm. This leaves them in legal limbo and without any secure tenure rights. This is not tenure security. It is difficult even to understand this as land reform.

9. **State land administration:** State land administration is the key to supporting this model of land reform. Does the state have the capacity to manage leases effectively? At present, provincial and district offices of DRDLR have taken on this role without suitable expertise and apparently also without additional posts, meaning that staff responsible for land acquisition now also are responsible to implement the Recapitalisation and Development Programme (to provide farming support), to subdivide farms (in terms of the Animal and Veld Management Programme) and to conclude and manage leases and rent payments.

This policy has already been signed by the Minister in July 2013, without prior public consultation.

### **ASSESSMENT**

This is a policy that says that black people are not to be trusted with land.

While state leasehold can be a feasible tenure system, some of the reasons why the current policy is deeply problematic are that it:

1. Creates a conditional system of tenure in which rights to land are allocated or removed by state officials
2. Relies on state officials' assessments of beneficiaries' land use and production as a basis for their continued access to land
3. Hinges on state land administration capacity that does not exist, which means that for now many (but an unknown number of) beneficiaries do not have secure tenure in the form of long-term (or any) leases.
4. Rests on a fantasy of cost recovery, namely that the state will accrue income in the form of rent from beneficiaries, which ignores the experience of implementing state leasehold since 2006, which included non-payment of rent and the suggests that the state has little capacity to distinguish between people not paying rent
5. Creates inequalities in tenure rights between the poor and the better-off, with only the better-off having the opportunity to ever get ownership (and only after 50 years)
6. Imposes obligations on beneficiaries without securing their rights to, for instance, to be paid compensation for fixed improvement at the end of a lease or
7. Exposes land reform to patronage, as there is no system to ration the allocation of public resources or any limit the amount or value of land that can be allocated to any person.

### **THE ALTERNATIVE**

1. The question of what land rights people should get in the redistribution programme should be opened up to public consultation, especially with existing and prospective beneficiaries of land redistribution. Is state land ownership preferable to private ownership for beneficiaries of land redistribution, and under what circumstances can it work?
2. If this is to be the model of the future, a massive investment must be made in developing dedicated and highly-skilled state land administration capacity within the DRDLR. This requires creating new senior posts in each provincial and district office.
3. A register of which properties have been allocated, leased or transferred, to whom, and their tenure status should be made public and reported to Parliament on a regular basis. Without this, there is no transparency in the allocation of state properties bought with public money in the name of land redistribution.
4. Establish written guidelines containing 'transparent and fair criteria for the assessment of lease applicants' and a 'district database of potential lessees' as proposed in the policy, on the basis of broad public consultation.



## Secure tenure rights or share-holding for farm workers: will government listen?

Oped in Daily Dispatch 10<sup>th</sup> September 2104

By RUTH HALL

The Department of Rural Development and Land Reform achieved something momentous at the three-day National Land Tenure Summit in Boksburg last week - it united farm workers and farm owners in opposition to its proposal to split the ownership of commercial farms 50-50 between them.

Delegates called instead for government to implement existing laws to regulate evictions – mainly the *Extension of the Security of Tenure Act* promulgated in 1997 - and to provide tenure security for people living on commercial farms.

“The government does not implement. It does not listen. These policies of equity are just a piece of nonsense,” said one farm worker.

“When you lose your job, when you are evicted, where do you go? This is what tenure reform is meant to address – not equity. Don’t give us equity. We don’t want equity. Give us rights. Enforce it. Focus on ESTA. That is all.’

A representative of the farmers’ association, Agri South Africa, concurred: ‘A big part of the problem is non-implementation of existing policies and laws, so there should be a very strong focus on that.’

More than 2000 delegates from most affected sectors gathered for three days to discuss Rural Development and Land Affairs Minister Gugile Nkwinti’s proposals to give workers security on the land they farm. On Friday, they divided into eight commissions with two discussing each of four topics in parallel.

The commission on ‘Land Tenure Security on Commercial Farms’ that I attended slammed the flagship proposal for Strengthening the Relative Rights of People Working the Land, also known as the 50% policy, which would see the state buying shares in farming enterprises for farm workers with 10 years or more of so-called ‘disciplined service’.

One delegate voiced the fear of many when he said the proposal had already triggered evictions in anticipation of the split. “What mechanisms have you built in to allay those fears? They throw them off the farms so there will be nobody to share with. Has this even been thought about as you embarked on this?”

When alternatives were reported to the summit on Saturday that outright rejection had been watered down, perhaps on the basis of a less strident opinion from the second commission on the same topic.

But it was still enough to cause Nkwinti to explode. Making the commission members stand and identify themselves, he told them: “Get out”. He said the twin commissions had failed to engage on the detail of his proposals and told them to go away and try again.

Later in the day, a different spokeswoman for the two groups presented a revised set of recommendations, no longer rejecting the 50% proposal but urging further discussions before it is finalised.

While described as a ‘radical’ policy to realize the Freedom Charter’s vision that ‘the people shall share in the country’s wealth’, the policy rests on a model of equity sharing that has been shown to be ineffective in the past.

Nkwinti suspended an existing equity sharing scheme when he took office in 2009, saying ‘farmers in farm equity schemes do not part with their land’ and that of 88 schemes in force at the time, only nine had paid any dividends and never more than R2000 a year.

He lifted the moratorium two years later without making any policy changes and now advocates the same problematic model as the primary, or even the sole, form of land reform and worker empowerment in agriculture.

The proposal would exclude women and children who are not employed on the farms and the growing number of temporary workers as well as labour tenants.

Half the farm workers’ share would be reserved for people with 50 years of ‘disciplined service’ – likely to be a very small number. While shares would be heritable, future allocations would dilute the value of those already distributed.

With the cost of the scheme estimated to be at least R141-billion, the proposal would see a massive windfall of public money into privately-owned farms without securing jobs or homes and with no guarantee of increased incomes for farm workers.

Amongst the comments made by farm workers were these:

- ‘The problem is the need to bring back the dignity of the black man on his own land, not on another man’s farm. We need our own land,’ said an elderly Free State farm worker;
- ‘With your document here, you are still defending the white farmers, but you say it is radical. This is the *dompas* [pass book] of apartheid. In South Africa, we are not owning any land, we are not owning any car, we are not owning nothing. Tell the Minister to take this document and throw it away, this is an apartheid document,’ said a Western Cape delegate; and
- ‘I want to propose that we have been having good policies... It is a matter of ensuring that it is being enforced... If a farmer decides to evict a farm worker and he has not followed a court process, the farmer must be penalized,’ said a KwaZulu-Natal delegate.

Representatives from several provinces alleged that the publication of the draft proposals have already sparked mass evictions across the country.

Many delegates focused on the failure to enforce ESTA, the 1997 attempt to secure the rights of occupiers on commercial farms. An estimated one and a half million people have been evicted from farms since then, and available research has estimated that less than one percent of these have complied with the legal process. In a separate policy paper presented to the commission, the Department conceded that the past 17 years have seen a ‘total system failure’ to implement and enforce this legal and policy framework.

Commissions resolved to reject the 50-50 proposal and call instead for the government to enforce the existing law and to prioritise farm dwellers in the land redistribution programme so that those who want it can get land of their own.

Participants also pointed out that they had provided input to government summits in the past – in 2001, 2005 and 2010 – and that the Department had failed to implement agreed resolutions.

‘The government has not implemented what it was supposed to have done, in terms of land redistribution and in terms of ESTA. We will be coming here again in some years and produce more documents. None of this matters unless government implements ESTA,’ said one delegate.

The commission recommended that ‘total system failure’ requires a total system re-design, with adequate resourcing. Participants identified several measures to secure tenure on farms:

- A ring-fenced budget for securing farm dwellers’ rights and farm dwellers should be prioritized in land redistribution;
- Staff posts in the department exclusively responsible for securing tenure on farms;
- Training of the SA Police Service, prosecution authorities and magistrates to make the justice system more responsive;
- Task teams of all relevant departments to respond to threatened or actual evictions;
- A national tripartite forum of government, farmers and farm workers and similar forums at provincial level; and
- A moratorium on evictions while institutions are being strengthened to implement ESTA.

Here is the irony, then: at an elaborate and expensive summit called to consult people on proposed policy, the responses of many delegates were not heard.

A clear message emerged from this commission: it rejected the proposed policy; it called on government and farm owners to implement and comply with the existing law; and it urged action to enable farm dwellers to get their own land.

But that message was not clearly conveyed to the Minister, who insisted that participants return to discussions to focus on the detail of the policy he had proposed. The result is a government-convened task team to hammer out the details of a policy that those consulted had just rejected.

When will their message be heard?

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