Article for Mail and Guardian, 23.11.01

NEW LAND LAW: Democracy or neo-feudalism?

Ben Cousins

In the run-up to a national conference on land tenure reform in Durban next week, the department of land affairs has circulated a draft Communal Land Rights Bill. Activists and analysts are carefully scrutinizing the proposals for signs of government thinking and an indication of who is likely to benefit – traditionalist elites, or ordinary people who depend on land for a significant part of their livelihood?

Control of communal land is a key issue for millions South Africans. The deepest and most persistent poverty is found in rural areas. Rural development efforts since 1994 have made little difference to the lives of the rural poor, despite a few success stories.

In the densely settled former 'homelands' a major constraint on development is lack of clarity around land. Disputes over land and governance result in long delays in planning and implementation. Potential investors are often unclear as to who they should negotiate with: central government (which still owns the land), local government (responsible for integrated development planning) or traditional leaders (who claim to represent communities)? Local residents are often excluded from decisions about the land they occupy and depend on for their survival.

Clarification and strengthening of the land rights of the occupants and users of communal land is urgently required. Together with complementary measures such as improved infrastructure and accessible finance, tenure reform can help promote more productive use of land and other natural resources, as one cornerstone of local economic development.

Reform of communal tenure has been on the agenda since 1994, but little progress has been made. The Constitution requires government to enact legislation to provide secure tenure or comparable redress to people whose tenure of land is legally insecure as a result of past racially discriminatory laws and practices. To date government has passed only an interim law that provides protection against dispossession, but no long-term clarity.

When Minister Didiza assumed office in 1999 she put on ice a near-complete Land Rights Bill that provided clear and certain tenure rights to occupiers of communal land within a framework of democratic decision-making and dedicated support structures. The Minister later announced her intention to transfer the title of state land in communal areas to 'tribes' or 'African traditional communities'. Since then she has repeatedly promised new legislation, but no official announcement has materialized. Lack of progress on tenure reform come son top of much negative publicity around the slow pace of land restitution and redistribution, and her perceived bias towards an emerging black farmer class.

The principles of tenure reform were set out clearly in the 1997 White Paper on land policy. Permits must give way to enforceable rights within a unitary non-racial system, and people must be able to choose tenure systems appropriate to their circumstances. All systems must be consistent with the Bill of Rights. Ownership of communal land will be transferred from the state to its present occupants.

But to precisely whom should the land be transferred? Land rights legislation has to grapple with many complex issues, such as where rights vest, forms of ownership, and, where people desire to hold land as a group, defining the boundaries of the 'community'.

Traditional leaders have long proposed that land rights vest in themselves, or alternatively 'the tribe', or even the tribal authorities created under apartheid.. They argue that under customary law they were the custodians of land rights, and must now be legally recognized as such.

In contrast, the White Paper proposed that land rights should vest in land users, that is, in people, not in institutions. Rights holders within group systems would be empowered to choose a local body to administer their land rights – either an elected committee, a civic, or perhaps a traditional structure. The chosen body would remain accountable to the rights holders, and could have its authority revoked if found wanting.

The draft bill allows 'traditional communities' operating under 'customary law', as well as authorised representatives (chiefs), to be recognized as 'juristic persons' for the transfer of state land in full ownership. It does not make clear how people currently under the authority of chiefs and tribal authorities, will be able choose a local body *other* than the traditional leadership to administer their land rights.

Legal recognition of existing informal rights to land, which often do *not* derive from shared rules or customary law, is crucial. Apartheid saw hundreds of thousands of people removed from farms and 'black spots' and dumped in areas under the jurisdiction of chiefs. Their rights to land flow from their established occupation, and from informal agreements with neighbours, not from a 'tribal identity'.

Recent history illustrates the importance of these issues. In the dying days of apartheid the National Party pursued a policy of transferring state land to 'tribes', and many such transfers were implemented in the former Lebowa 'homeland'. The deals were brokered directly between chiefs, the Lebowa cabinet and the government, without popular consultation. This has resulted in widespread abuse and corruption by the chiefs. In theory the land belongs to the whole 'tribe'; in practice it is operated as a feudal fiefdom. The rule of law has been replaced by a 'rule of fear'.

The Ministry of Land Affairs has had seven years to fulfill its Constitutional obligation to secure the rights of millions of people. On the eve of a major national conference officials have circulated a poorly drafted document that, if it became law, would greatly strengthen the powers of unelected traditional leaders at the expense of ordinary rural

dwellers. Will tenure reform create a democratic and rights based system in communal areas, or will it re-create the ‘neo-feudalism’ of the apartheid era?

Professor Ben Cousins directs the Programme for Land and Agrarian Studies (PLAAS) at the School of Government, University of the Western Cape.