

REFORMING COMMUNAL LAND TENURE IN SOUTH AFRICA - WHY LAND TITLING IS NOT THE ANSWER

Critical comments on the Communal Land Rights Bill, 2002

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The need for tenure reform

The long-awaited draft Communal Land Rights Bill sets out government's proposals to resolve urgent land tenure problems in the former 'homeland' areas, where most rural South Africans still live, and where land is registered in the name of the state. These problems derive from lack of adequate legal recognition of communal tenure systems, abuse by powerful elites, breakdown of the old permit-based system, and gender inequalities.

They result in conflicting claims to land and bitter disputes over authority. Development efforts are severely constrained by lack of clarity on land rights, and the tensions that result. Tenure insecurity also results from the forced overcrowding of these areas under apartheid. This means that *de facto* rights often overlap and are in conflict.

The draft CLRB does not provide appropriate solutions

Does the draft Bill provide appropriate solutions to these problems? The answer is 'no'. In fact, it will probably exacerbate them. Despite some real improvements over earlier versions, the draft Bill adopts a wholly inappropriate approach to communal land tenure reform, based on the issuing of land titles, to either groups or individuals, after transfer of ownership from the state. The consequences of this policy could be disastrous.

In adopting the titling model government has ignored clear lessons to be drawn from wider African experience, as well as from its own experience of transferring ownership of land to Communal Property Associations in restitution and redistribution projects. Viable alternatives to titling, now being implemented in Mozambique and Tanzania, and widely discussed and debated in South Africa since 1997, have also been ignored.

The draft Bill does contain a few useful provisions, such as those for 'unpacking' situations of forced overcrowding and conflicting rights through acquiring additional or alternative land. This allows government to meet its constitutional obligations to provide either security of tenure or 'comparable redress', and gives tenure reform a welcome redistributive thrust. Also, the draft Bill now applies to Ingonyama Trust land in Kwazulu-Natal (although it still excludes land transferred to groups under restitution, for unknown reasons).

The published draft Bill is also much less overtly pro-chief than earlier versions, with a maximum of 25 percent of positions on local administrative bodies to be occupied by traditional leaders, in an *ex-officio* capacity. Perhaps in response to widespread public criticism, the transfer of state land to ‘tribes’ (or ‘traditional African communities’), effectively under the control of traditional authorities, is no longer overtly provided for. The danger of land grabs by elites still exists, however, as a consequence of the land titling model adopted.

Learning from the African experience

What can be learned from experience elsewhere on the continent? The most extensive land titling programme has been attempted in Kenya. Beginning in the 1950s and continuing after independence, communal land was registered in the names of individuals, and title deeds were issued. In addition, group titles to extensive ranches were issued to pastoralists. However, the anticipated consequences of titling have not been achieved.

A free market in land has not materialized, the availability of credit to small farmers has not increased, and land registers have rapidly become outdated. Land concentration, inequalities in agricultural income, landlessness and rural-urban migration have all increased, and local elites have benefited at the expense of the poor. Increases in agricultural production have occurred in some areas, but these are not correlated with the holding of individual title, and it has become clear that communal tenure does not constrain productivity.

An ambitious attempt to replace the indigenous tenure system with Western-style property rights has failed. Community-based patterns of allocation and inheritance have persisted even where all land is nominally under individual freehold.

Where titles to ranches were issued to groups of pastoralists, the result has been boundary disputes over seasonal grazing, fragmentation of communities, and growing inequality following elite manipulation of titling processes. The costs of both individual and group titling programmes have been enormous, and the net benefits minimal. Amidst growing agitation in Kenya over inequality and corruption, a commission has now been appointed to review land policy.

Learning from the South African experience

In South Africa, group titles have been issued to over 500 communal property associations and community trusts since 1996, but many of these are now dysfunctional. Constitutions were poorly drafted and misunderstood by members, rights for individual members were poorly defined, and infighting has resulted. Members have often retained strong ties to their original communities, rather than seeing themselves as a new social entity. In some cases traditional leaders have contested the authority of elected trustees, and in others elites have captured the benefits of ownership. There are notable exceptions

of course, but overall the experience has been disillusioning for many in the land reform sector.

The cause of these problems is not the fact that CPAs are a form of shared land holding. Many people desire a system of group tenure, and these have proved resilient and persistent in Africa and elsewhere. The real reasons are twofold. Firstly, as in Kenya, there is a fundamental mismatch between the titling model and the realities of African land tenure. Secondly, the support provided to these groups by government, both in the initial stages of establishment and subsequently, has been completely inadequate to date.

There are a few situations where CPAs or community land trusts may be appropriate forms of group land holding. Some groups (eg. the Bafokeng tribe) bought land with their own monies early last century, and were never allowed to own that land because of discriminatory laws. If such groups now desire full title, then this should be an option open to them. They may be prepared to bear the costs and undergo the arduous process of obtaining a title deed. But these are a minority of cases of tenure insecurity, and solutions that are relevant to them should not form the main thrust of tenure reform policy.

Why titling is generally inappropriate and ineffective

Why is the titling model generally inappropriate and ineffective in the African context? Titling is based on Western notions of ownership, which assume that property rights are absolute and exclusive. Surveyed boundaries show where land rights begin and end. Title deeds are held in a central registry, are updated when ownership changes hands, and provide certainty in case of disputes, which are resolved through the courts. Such systems have proved effective vehicles of economic development in societies organized around market principles, in which private individuals or entities such as companies hold most property.

In contrast, African systems of land tenure are based on the principle that everyone within the community of origin has rights to land, but that individual rights are balanced against their obligations to the social group. Rights are thus shared and relative. Systems tend to be inclusive, not exclusive, and rights and obligations are held at a number of levels of social organization, from the neighbourhood to the village to the larger community.

Rights in community-based land tenure systems can be very secure, and ensure that access to land is available as a vital safety net for the poor. They are not necessarily a barrier to investment and development, or to land transactions such as sharecropping, leasing or sale. They tend to evolve over time, adapting to changing social and economic conditions. The key to their resilience in Africa is people's preference for socially regulated access to resources.

The unintended consequences of titling programmes

Private ownership of land, whether for the individual or the group, contradicts the principles underlying African tenure. In particular, it assumes that clear and exclusive boundaries can be defined, both socially and physically. The nesting of rights at different levels of social organization is denied. This means that the inevitable result of titling is to create massive boundary disputes, between adjacent communities and within levels of social and political organization. These have been evident in many of the tenure reform 'test cases' investigated by the department of land affairs over the past seven years.

Private ownership is dominant in South Africa's economy, and communal tenure is at present a very poor cousin. This means that private ownership of land by groups conveys significant advantages to those who have power within the group. This is even more so when all initial survey costs are borne by the state, as proposed in the draft Bill. Land titling thus creates very high stakes, generates power plays within groups, and creates the possibility that tenure reform will be hijacked by powerful interest groups (including chiefs).

Why the draft Bill will not be able to be effectively implemented

The other reasons that titling programmes in Africa have proved ineffective are the high costs involved, their time-consuming character, and the capacity demands they make on government. The draft Bill is no exception. It sets out a complex process, involving some thirty administrative steps, before land can be transferred from the state to a community or to individuals. These involve rights inquiries, consultations, mediation, and survey and registration.

Given its experience in relation to Communal Property Associations, it is unlikely that the department of land affairs, already suffering from a severe staff shortage, will be able to process more than one hundred transfers per year. At this rate it will take two hundred years to transfer land to the estimated 20 000 rural communities in the ex-homeland areas. In the meantime, land rights for the majority will continue to enjoy only the minimum of recognition and protection afforded by interim legislation passed in 1996, which the draft Bill seeks to make permanent.

These estimates of delivery time are, however, over-optimistic. More likely is a scenario in which debilitating boundary disputes and power plays for authority over land overwhelm the capacity of a weak and understaffed department already battling to meet its targets for land redistribution and restitution.

A policy of transferring title from the state to its rightful owners seems attractive at first sight. It appears to close the gap between the 'first world system' of private ownership enjoyed by the rich and the middle class and the 'second class' system of communal

tenure forced upon poor black South Africans in the past. However, experience indicates that titling would be expensive, time consuming, dominated by land grabbing elites, and not create tenure security. The results would be unlikely to ‘stick’, creating a new gap between the law and realities on the ground. As with RDP houses, transactions in land would continue to take place outside the deeds registry system.

The alternative to land titling

What is the alternative to titling? New land tenure laws in Mozambique and Tanzania, in both cases adopted after lengthy and painstaking processes of public consultation, demonstrate the way forward. They recognize and protect existing occupation and use of communal land, and give them the status of property rights, *without* requiring their conversion to Western, exclusive notions of private ownership. Rights are vested in the people who occupy the land, and the law enables the rights holders to further define and record these rights at the local level. An ongoing balancing act between group and individual rights, at different levels of social organization, is supported and facilitated.

Security of tenure in legal terms is not created case by case, as the draft Bill requires, but everywhere at once, after enactment of the law. To become realities on the ground, however, support must be provided to local processes of defining, negotiating and administering rights and obligations. Officials have to be available to assist local bodies and group members to define and record their rights, and to resolve disputes. This is costly, but not as expensive as titling.

Would such an approach reproduce the two-tier and discriminatory tenure systems of apartheid? If all land vested in the state, as in Mozambique and Tanzania, this would not be an issue, since one system would govern all citizens. Nationalisation of land may not be a feasible option in South Africa, but neither is the draft Bill’s proposal to extend the model of exclusive ownership to the whole country.

Recognizing existing rights and providing institutional support for community-based systems should be one of the options available to South Africans within a unified but diverse system of property rights. Alternatives to exclusive ownership already exist, such as sectional title and share-blocks, which allow forms of shared property rights. Legislation protects tenants and occupiers from the arbitrary actions of owners. All these tenure options need to be placed on an equal footing, supported by the law, government, and an array of service providers.

Major shifts in understandings of property rights are now taking place within Western societies. Environmental law, in particular, increasingly places owners of property under a variety of obligations to society at large, as our shared interests in the commons begins to be acknowledged.

Notions of exclusive and absolute ownership are giving way to ideas about shared and relative rights, socially regulated through institutions of democratic governance. Community-based systems and locally held records, rather than titling, need not be seen

as second-rate – but the state needs to provide these with appropriate legal recognition and dedicated institutional support.

The draft Communal Land Rights Bill does not do this, and instead promotes a land titling approach that has failed throughout Africa, and will do so here as well. It should be roundly rejected.

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