Unscrambling the apartheid map

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A law to reform the land tenure arrangements in the former 'homelands' is long overdue. The area involves about 13% of the country and home to about one third of the country's population. Provinces with large populations in the former homelands (Eastern Cape, KwaZulu Natal and Limpopo) are the poorest in the country, in part arising from a legacy of severe overcrowding and land-related conflict, unsurpassed elsewhere in the region.

During the apartheid period, blacks were forcibly moved to these areas without reference to their wishes or those of the established inhabitants. Africans had no legal rights to use and occupy the land, independent of the will of the state. Land was held in trust by the state premiers. With the democratic transition in 1994, the President delegated these powers to the Minister of Land Affairs, currently the registered 'owner' and the bearer of fiduciary responsibility for them. To this day, land relations remain fundamentally unchanged. Remnants of the old Bantu Areas Land Regulations, Proclamation No. R188 of 1969 are still in place. In theory, land is administered in each former homeland under different laws laid down during apartheid.

However, the situation within each of the former homelands varies greatly. In practice effective land administration has fallen away, record keeping has broken down and most land transactions are extra-legal. This breakdown includes loss of records, doubts as to which laws apply and the unauthorised issue of permits and other documents. Public sector investment is discouraged by the lack of legal clarity with respect to the necessary procedures for land acquisition and allocation. Numerous private sector initiatives are stalled by uncertainty as to who owns the land and who should enjoy the benefits.

In the five years of the first democratic government 1994-99, researchers and officials in government and non-governmental agencies were involved in a vigorous process of policy debate with a view to developing the necessary legal reforms, which would dismantle the apartheid map. During that period, the debate moved from the transfer of land in ownership to tribes to the granting of statutory rights to people using and occupying the land. The tenure reforms envisaged were outlined in the White Paper on South African Land Policy 1997. The proposed legislation was developed from numerous commissioned studies, workshops and meetings. The work attracted considerable interest in other countries of the region. International land tenure specialists commented favourably on the innovative nature of the proposals, which sought, among other things, to give customary rights statutory recognition without changing their essential character. The incoming Minister scuppered this work in 1999 following a pre-election pact between the president-to-be, Thabo Mbeki, and Contralesa. This pact was perceived to be crucial for the ANC to secure the vote of traditional leaders and their subjects in densely populated areas threatened by the UDM and IFP.

It has taken more than three years for the Minister and the Department of Land Affairs to come up with an alternative. Two previous draft bills have had to be abandoned before

they were gazetted because they were blatantly unconstitutional. The latest attempt represents a more serious effort but it is deeply scarred by the drafters' brief, namely to divest the State of its responsibilities as trustee and owner, minimise the budgetary costs of subsequent land administration, and keep Contralesa on side for the next election. Such is the panic to steer the legislation through the legislature that it seems anything will do.

There is little doubt about the need for the State to divest itself of its legal responsibility for the day-to-day administration of these areas and to transfer the land rights to the people. The time is long overdue when the former homelands can benefit from the statutory land rights enjoyed by the rest of the country. The issue is not whether, but how the reforms should be put in place. How can the rights of those who use and occupy the land be protected in the transition? Tenure reforms cannot be implemented on a broad front. In the course of such sweeping processes, poor and vulnerable people are harmed, especially female-headed households. Trends of land concentration, so hard to reverse without violence, are becoming glaringly apparent in southern Africa. The Bill as proposed would open the door to widespread abuse.

Disengagement by the State cannot happen overnight. It is not a case of parliament simply repealing all the old apartheid land laws and passing a new one that transfers rights to those people who are using and occupying the land. Without some systematic process of verification and recording the transfer of property rights would be meaningless. In the former homelands, large areas have never been accurately surveyed and as a result, it is not always clear where one land parcel begins and another ends, or where communal rights give way to individual rights. Thus it is very important that the content of the property rights being transferred simulate the rights that already exist. Unfortunately the Bill provides for the conversion of existing rights to absolute ownership, a form of tenure that is underpinned in South Africa by rigorous land survey and registration requirements. As it stands, the Bill provides a licence for an army of consultants, land surveyors and property conveyancers to print money.

So long as there is no need to prepare detailed plans for the registration of the land, the uncertainties attached to current land holdings do not matter too much. But, once formal maps are needed for registration of ownership, the process of land survey will inevitably spark off numerous disputes, especially where 'tribal' boundaries are contested. Apart from the difficulties of determining the dimension and location of land parcels, it will also be hard to identify the legitimate holders. Judging by past experience, there must be doubt about the capacity of the administration to handle the process and effect land transfers at a pace which will satisfy applicants. Because of the very high transactions costs involved, it is a reasonable assumption that land will be transferred in very large parcels, probably encompassing many thousands of informal holdings and tens of thousands of people. In those circumstances the so-called rights holders will be exchanging the Minister in Pretoria for another decentralized authority, but one that is not answerable to any democratically elected body. As has been pointed out by Ben Cousins and the Legal Resources Centre, solutions based on the well-intentioned Communal Property Associations Act are unlikely to work. In many cases, especially in the densely settled areas, people in the former homelands will want to register their rights individually. Although the Bill makes provision for this, it is not clear how it will be possible in

practice.

The Communal Land Rights Bill provides for the transfer of land from the State in ownership to 'communities'. The definition of community provided in the Bill (*inter alia* 'a group of people who possess historical social cohesiveness') leaves little doubt that the intention is to provide for the transfer of land in ownership to tribes (as was stated by the Minister when she was appointed in 1999). For 'tribes' read chiefs'. Transfers of land in ownership to 'tribes' under the National Party (also to collect votes in 1994), in what is now Limpopo Province, under the Upgrading of Land Tenure Rights Act, has been shown by UWC researchers to be disastrous for the communities concerned.

The other problem with the transfer of land in absolute ownership is that, under Roman Dutch law, the ability of the State subsequently to intervene on behalf of any aggrieved members of the 'community', or to take the land back, will be extremely limited. The so-called Land Rights Boards envisaged in the Bill, to safeguard the rights of the people, would appear to be no more than window dressing. In terms of their proposed powers and responsibilities they bear no relation to land boards in Botswana which administer and allocate customary land.

If the Bill is rejected, as it should be, is there an alternative? It is necessary to respond in general terms because anything one says about the land tenure situation in the eleven former homelands is going to be at once both true and false. So different is each one: rural and urban; legal and administrative; and in regard to the entanglement of land relations with the social, cultural, and political-economic situation. Despite the valiant efforts of the drafters, one law covering some 100 pages is unlikely to be sufficiently comprehensive, understandable or workable across the board. Neither is the draft Land Rights Bill of 1999, that was prepared under the aegis of the Mandela government, likely to fly today because it was based on the now questionable assumption that the Department of Land Affairs would be able oversee the reform process.

The very limited capacity of government's over-centralised land administration has been the bugbear of land reform in South Africa. Over-optimistic predictions of the speed and scope of envisaged reforms continue to return to haunt the officials and politicians who make them. The Communal Land Rights Act would no doubt rapidly get bogged down in administrative confusion that we have come to expect.

I have no doubt that what is needed is enabling framework legislation to provide for the conversion of customary land rights to applicable statutory rights (and where appropriate the granting of individual/family land titles), based on the principles of the 1999 draft Land Rights Bill (some of which appear in the 2002 Communal Land Rights Bill). The enabling instrument would provide for the incremental implementation of the legislation on a limited basis, municipality by municipality (as gazetted by the Minister). Initially, the law would apply where there was the commitment, the need and the capacity to drive it forward. By proceeding area by area on a limited basis in each former homeland area, it should be possible to update the accompanying regulations to the circumstances, without having to return to Parliament for amendments. It would be possible to learn by doing and

avoid the inevitable difficulties created by hurried and careless drafting to meet the short term goals of the current administration.

If experience gained from elsewhere is any indication, it is in the nature of things that the land tenure reform process will be manipulated by the powerful in their own interests and against those of the rural poor. The rush to put in place an all-encompassing reform in the so-called communal areas will undermine the opportunity to strengthen the land rights of the great majority of poor citizens and ensure that their land cannot be alienated or otherwise used without their consent, either by government, traditional élites, developers or other third parties.