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Failing to learn from failed programmes? South Africa's Communal Land Rights Act (CLRA 2004)

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**Failing to learn from failed
Programmes?
South Africa's Communal
Land Rights Act (CLRA 2004)**

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Abbreviations

ANC	African National Congress of South Africa
CONTRALESA	Congress of Traditional Leaders of South Africa
CLRA	Communal Land Rights Act
COSATU	Congress of South African Trade Unions
CRLC	Commission on the Restitution of Land Claims
CPA	Community Property Association
DA	Department of Agriculture
DLA	Department of Land Affairs
LAC	Land Administration Committee
LCC	Land Claims Court
LRB	Land Rights Board
LRAD	Land Reform for Agricultural Development
LRC	Legal Resources Centre
LRP	Land Reform Programme
PLAAS	Programme for Land and Agrarian Studies
TLGFB	Traditional Authority and Governance Framework Bill
WB	World Bank

Abstract

The paper will discuss the Communal Land Rights Act 11 of 2004, which was signed into law by President Thabo Mbeki on 14 July 2004. The key objective of the Communal Land Rights Act (CLRA, 2004), is to legalise security of tenure in South Africa's former homelands, home to a third of South Africa's population estimated at 43 million. The logic behind this process is that efficient use of land utilization and investment inflows to one of South Africa's poorest regions (the former homelands) will be realized once security of tenure is recognized under statutory law. The paper will debunk some of the classical debates around indigenous/communal tenure systems vis-à-vis individual tenure systems with respect to their applicability to the "modernization" impetus they are perceived to uphold. A textual and sociological critique of the Act will be done to validate the inappropriateness of the Act, especially in relation to the replacement paradigm it adopts and the administrative, resource and conflict-based challenges it is bound to encounter in its implementation. It will be argued that the Act is a-historical and fails to come to terms with the sociological complexity and uniqueness that defines South Africa's rural societies with respect to land matters. This analysis will be complimented with some of the lessons learnt from a decade of land reform implementation experience in South Africa and Kenya's land titling experience that commenced in the pre-independence period (1955) right up to the post-independence era (1963).

Tenure Reform in Historical Perspective

The prospect of democracy in the 1990s raised expectations that the dispossessed African population would be able to return to their land, but the terms on which political transition was negotiated constrained how this could happen. Despite calls for a radical restructuring of social relations in the countryside, the constitutional negotiations on the protection of property rights and on the economy more broadly, ensured that land reform would be pursued within the framework of a market-led land reform model¹. The negotiated transitional arrangements were finally endorsed and reflected in the 1996 Constitution, which sets out the following framework for land reform:

The state must take reasonable legislative and other measures, within its available resources, to foster conditions, which enable citizens to gain access to land on equitable basis (Section 25(5)).

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 (Section 25 (6)).

A person or community dispossessed of property after June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress (Section 25 (7)).

There are three key pillars in South Africa's post-1994 Land Reform Policy that reflects the constitutional pronouncement around land matters. These are, restitution, redistribution and tenure reform. The key aim of land restitution is to restore rights to land to communities or individuals who were dispossessed off their land since June 1913 due to racially motivated laws or practice. This is a rights driven approach since its overall objective is land rights restoration. However, skeptics claim that this has been done at the expense of attaining socio-economic development for the claimants. Land redistribution aims to provide communities with a grant they can use to purchase land for agricultural purposes through the Land Redistribution for Agricultural Development (LRAD) programme. Access to land for residential purposes is

¹ A consensual view among academics is that the current land reform policy reflects the key economic and political imperatives that came to define South Africa's negotiated settlement to democratic transition, and the policy tenets are a reflection of the compromises that were made during the transition, which undermined its own leverage to engender a radical transfer of land. More so, the World Bank's document, Rural Restructuring Programme (RRP) formed the basis of South Africa's policy. Property rights, market-based and demand-led land reform are often cited as some of the key imperatives upon which the terms of transitional process were partly predicated upon. For more details see, Levin and Weiner (1997); Lahiff (2001).

financed through the Settlement Land Acquisition Grant (SLAG²) programme. The third pillar of the land reform policy is the tenure reform. The broad objective of tenure policy is to create a unitary non-racial system of legal tenure rights in South Africa's former homelands. This has recently been legislated through the Communal Land Rights Act (CLRA) 2004, which aims to accord legal recognition of insecure land tenure rights. Tenure and Restitution reforms are land rights based mechanisms established to either restore or accord legal recognition to informal land tenure regimes that African communities in South Africa hold. The mechanisms established in this processes are highly legalistic, judicious, and often disenfranchising for the target communities.

Given the aforesaid, critics have cast doubt on the extent to which a negotiated land reform can comprehensively address a century old system of land alienation processes that systematically denied ownership of land to the black majority. Within the tenure front, lack of secure land rights, chaotic land administrative systems, and the sheer lack of investment in the rural areas form part of the daily struggles that rural people have to endure in their struggles for social reproduction emanating from land-based livelihood provisioning strategies. These areas carry some of the worst forms of poverty in the country because of apartheid social engineering³ strategies. Lack of development, collapse of land administrative systems, overlapping and conflicting informal land rights regimes are key features endured on a daily basis by the rural population.

For instance, until the 1990s, it was government policy that black people should not own land. In townships and ex-homeland areas, the form that land rights took was generally subservient, permit-based or 'held in trust'. The land was generally registered as the property of the government or the South African Development Trust. Approximately 17 million hectares, which translates to 13% of the country, is held in this manner, including most of the so-called former homelands and colored reserves. In many areas, the administration of this land is inefficient and chaotic such that people who have lived on the same land for generations may find that they have no legal right to the land in question. Even if nobody disputes that, they are the rightful owners of the land (Thomas *et al.* 1999; Claassens 2000). Hence, one of the issues that inhibit development is the lack of clarity about the status of land rights in communal areas. Who has what rights? Who must agree to changes? Who has the legal authority to transact land? (PLAAS/NLC 2003).

² Initially, i.e. between 1994-1999, SLAG was used to purchase land for settlement purposes and agricultural purposes. In 2000, this was changed and SLAG become available only for applicants keen to purchase land for settlement purposes. Acquiring land for production purposes was dealt with through the LRAD programme.

³ Social engineering here is used to refer to the social and economic restructuring that was initiated by the former regime based on politically defined objectives.

As a result, insecurity of tenure in the communal areas is one of the greatest threats the land reform programme is yet to tackle in its attempt to de-racialize the dual property regime South Africa inherited. Even though rights that people hold seem “strong” in reality, they are often weak in terms of their jurisprudential validity. Since land is owned by the state, the people who hold these rights hold derivative or secondary rights. These forms of rights are not acquired on basis of membership, but rather on basis of occupation and use over a period of time and most of the time, these rights tend to be nested, i.e. operate at different levels of social organization that cut across the community, tribe and family (Cousins 2003). Rights held by women in this regard are even weaker than their male counterparts due to customary practice. The existence of male dominated traditional authorities exacerbates this situation. Most of these administrative systems tend to be corrupt and this worsens land use and allocation systems in these areas⁴. In addition, local government plans and service delivery interventions are thwarted or delayed by chiefs refusing to “release” land for development projects⁵ (Lahiff 2001; Adams *et al.* 2000: 117). With the dawn of democracy in South Africa in 1994, concerted attempts have been put into place in order to address the question of governance, and ownership in communal areas.

Certain interim measures were developed to improve the tenure securities of the former homeland people in the post - 1994 period. In 1996, the Interim Protection of Informal Land Rights Act 31 (IPILRA) was passed. This aimed to provide protection for the land rights of people living in the former “homelands” against abuses such as the sale of their land by corrupt chiefs (Ibsen and Turner 2000). This Bill was intended to be in force for two years but was subsequently renewed in 1998 and 1999 as the legal drafting of a more comprehensive tenure policy continued.

Other significant laws that were promulgated were, the Land Reform (Labor Tenants) Act, the Extension of Security of Tenure Act and the Communal Property Association Act. The Communal Property Associations Act 28 of 1996 provides for the establishment of legal entities that will enable groups of beneficiaries to acquire, hold and manage property on a communal basis within a supportive legislative framework. The Act requires that these primary objectives be

⁴ see Ntsebeza (2004: 10) He argues that in the early 1990s, corruption was its zenith in these institutions. For example, along the Wild Coast in the Old Transkei, ‘whites’, were illegally allocated cottage sites in exchange for a bottle of Brandy. These sites were termed as ‘brandy sites’ because it was imperative that applications were accompanied by a bottle of brandy.

⁵ In a study the author conducted between 1997-1998 in Mpumalanga Province, South Africa, the institutional conflicts that ensued between the local councillors, officials of Provincial Department of Land Affairs, and the Tribal Leadership of Emjidini with respect to the Emjidini Redistribution Project clearly captures the dilemmas that confronts Provincial, and Local Government in dealing with development matters in communal areas, where Chiefs are steadfast to consolidate their powers along land governance, ownership and development matters of their constituencies.

fulfilled in accordance with a written constitution embodying the principles of democracy, inclusion, non-discrimination, equality, transparency and accountability. The Act provides an important and necessary alternative for communities that aspire to hold and manage land on a communal basis (Makopi 1999: 144).

On the other hand, the Extension of Security of Tenure Act 62 of 1997 (ESTA) addresses the relationship between occupiers and owners, as well as the circumstances under which evictions can take place and the procedures to be followed. The Act is underpinned by the following principles: the law should prevent arbitrary and unfair evictions; existing rights of ownership should be recognized and protected; and people who live on land belonging to other people should be guaranteed basic human rights. In essence, this law promotes long-term security on the land where people are living now. None of these laws, however, deals with the complex system of administering tenure in the former homelands and state-owned land that is the result of a myriad of inconsistent laws, proclamations, regulations and procedures (Hornby 2000:312). Furthermore, the capacity, procedures and approaches of the institutions charged with protecting the rights of farm dwellers, and responding to threatened evictions, have substantially shaped the impact of ESTA. Most of the time, occupiers either do not know their rights or, even if they do, they are unable to exercise these rights. At worst, this Act combines weak substantive rights with strong procedural requirements and relies on institutions that are at worst hostile to ESTA such as the magistrates and police, which are inadequately resourced to enforce these procedural rights. The Land Reform (Labor Tenants) Act 3 of 1996, differs from ESTA in that it not only places restrictions on the eviction of labor tenants from farms but also gives tenants the right to claim stronger rights, including ownership to the land they use. For instance it allows labor tenants to obtain long term secure independent tenure rights through the purchase of the land they currently use or alternative land (Hall 2003: 9).

In the period of the first democratic government, 1994-99, an effort was made to develop the Land Rights Bill, which aimed to upgrade customary rights by giving them statutory recognition without changing their essential customary character (Adams 2001). However, immediately following the second general elections in June 1999, the proposed Land Rights Bill was shelved. The ostensible reasons for this change in direction were to place greater reliance for land administration on the traditional authorities and thus reduce the burden on the state. Legislation was to have been prepared to transfer state land in the former homelands to tribes (Adams 2001; Ibsen and Turner 2000).

The defunct Land Rights Bill had proposed that people in the homelands would be given “protected land rights”. The Minister of Land Affairs would remain the nominal owner of the

land. The protected rights would be under the management control of their holders. Again, these rights holders might be individuals or duly constituted groups. Groups would have to satisfy criteria with regard to their conformity to constitutional principles, and majority decision-making processes would govern their land management. Protected rights could be registered if their holders so desired, although they would exist even if they were not registered. If this Bill came into force, it would have conferred protected rights on all those currently holding land rights in the former “homelands” (Ibsen and Turner 2000, Adams 2001).

The other key aspect of the defunct Land Rights Bill was that it had a redistributive aspect. In cases where it was impossible to confer rights in areas where such rights are competing with others, “tenure awards” were to be conferred in the form of additional land (Ibsen and Turner 2000). However, the Bill was deemed too controversial to be passed at a time when South Africa was gearing up for the second democratic elections in May 1999. Part of the controversy centered on the Bill’s silence on the role traditional authorities⁶ had in the changes in land management systems in the former homelands.

The new Minister of Land Affairs—Thoko Didiza put a halt to this work in 1999 following a pre-election pact between the president-to-be, Thabo Mbeki, and the Congress of Traditional Leaders of South Africa (CONTRALESAs). This pact was critical for the African National Congress (ANC) if they were to secure the votes of traditional leaders and their subjects in densely populated areas such as those in Kwazulu-Natal, which is an IFP (Inkatha Freedom Party) stronghold. The CLRA therefore emerged as a response to these changing political contexts, and vested interests that ensured their concerns are enshrined in the making of the CLRA.

Since 1999, the making of the Communal Land Rights Act has been characterized by protracted tensions, mainly centering on the role of traditional authorities. At the heart of this contestation was; should land be transferred to Traditional Authorities or Communities, who will then decide on what kind of legal entity should administer their land? For instance as Ntsebeza (2004: 20-21) notes, the Communal Land Rights Act draft that was gazetted on 14th August 2002 proposed the transfer of registrable land rights to individuals, families and communities. On land administration, it divested traditional authorities of their land administration functions, including land allocation in favor of democratically elected administrative structures. Where applicable, legitimate traditional authorities were accorded *ex officio* representation not exceeding 25 per cent.

⁶ The position of the ANC towards traditional authorities has always been ambivalent despite the “pariah status” they hold in most of South Africa’s former homelands or within certain community quarters partly due to their historical role in the apartheid era and the corruption associated with some of them. The ANC strategy of broadening its support base in rural South Africa, coupled by the support of these institutions within some quarter of the ANC has partly created this dilemma and subsequent conflicts between elected government officials and unelected officials hailing from the tribal lineage.

The draft Act clearly attempted to strike a balance between the constitutional obligation to extend democracy to all parts of the country, including rural areas, and accommodating the institution of traditional leadership, which is recognized in the constitution. Traditional Leaders opposed the draft Act and even threatened bloodshed in their constituencies if the bill was to be passed in parliament.

Because of their pressure and contestation, the Act was amended giving traditional authorities significant powers about land allocation. The drafting process of this Act began in April 2001 (Adams 2001). Parliamentary hearings on the Communal Land Rights Act were held in November 2003, and a total of 34 submissions were made, and three of these called for the withdrawal of the bill⁸. This process came to completion when it was passed in parliament on February 2004 and signed into law by President Mbeki, on 14 July 2004. A consensual view that has emerged is that CLRA will not succeed because it is complex, gendered, and at dissonance with some of the fundamental principles of the constitution of South Africa such as the right to gender equality. The bill is based on the premise that South Africa has an advanced and well-resourced land administrative system, but experience with the implementation of land reform since its inception in 1994 proves otherwise.

Communal Land Rights Act, 2004: An Explanatory Overview

The key aims of the CLRA is to, give effect to section 25 (6) of the constitution which states that:

A person or community whose tenure of land is legally insecure because 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.

The Act aims to give legal recognition to land tenure rights⁹ on communal land. The Communal Land Rights Act also aims to provide for legally secure tenure in communal areas and accord comparable redress where necessary. Its overall aim is to enable the registration and transfer of communal land to communities to occur and recognized under statutory law. This process will be preceded through a process of land rights enquiry to establish the extent and location of land to be transferred to a person or community.

The starting point of the Act, which espouses its cardinal objective, is provided for in Section 4 (1) and (2) of the Act, respectively:

⁷ For more details on this process, see Ntsebeza (2004: 21-22)

⁸ see Cousins (2004: 1)

⁹ Land tenure rights entails the right to own, occupy, use or alienate communal land which is held collectively by the members of a community or individual households or persons.

A community or person is entitled to the extent and in the manner provided for legally secure or to comparable redress if the tenure of land of such community or person is legally insecure as a result of past racially discriminatory laws or practices.

An old order right held by a married person is, despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses in a marriage in which such person is a spouse, jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage and must, on confirmation or conversion in terms of Section 18(3), be registered in the names of all such spouse

The bill creates a mechanism for the Minister to institute a land rights enquiry as stipulated in Section 14 (1):

Prior to securing an old order right in terms of Section 4 or transferring communal land to a community or person in terms of Section 6 or determining comparable redress in terms of Section 12, the Minister must initiate a land rights enquiry.

Based on the report of the land rights enquiry that will stipulate the recommendations with respect to rights determination, the Minister will invoke his/ her discretionary powers in determining the location and extent of the land to be transferred, nature and extent of the new order right and finally the holder or holders of a new order right. The Minister's determination of the rights will have to take cognizance of existing legislations governing spatial planning, local government, agriculture and the needs of old rights holders and gender equality¹⁰.

Once these rights are confirmed, converted, conferred or validated by the Minister, they are recognized as 'new order rights'. New order rights are to be recorded in a communal land register in terms of the Deeds Registries Act. Any subsequent land allocations or changes to rights are also to be recorded. These rights will be formally recognized through the creation of a 'Deed of Communal Land Right', and may be upgraded to freehold, which would require community approval. To achieve the objectives set by the Bill, two key institutions are to be established; the Land Administrative Committees (LAC) and the Land Rights Board (LRB).

Land Administration Committees

This committee will be tasked with the allocation of new order rights to persons including women, the disabled and the youth in accordance with law and the registration of communal land

¹⁰ Section 18(2)(3) of the Communal Land Rights Act provides a lengthy detail of the requisite conditions the Minister has to consider in his/her rights determination.

and of new order rights. It will also establish and maintain registers and records of all new order rights and any transactions affecting such rights. The committee will also be expected to facilitate development processes in the community through liaising with the relevant municipality, land rights board and any other relevant institution. It is also expected to unify community members and promote and safeguard their interests. In terms of its membership, the total number of its members will be determined by the community rules¹¹ but its composition must consist of:

- women have to constitute one third of the total membership;
- one member of land administration committee must represent the interests of vulnerable members i.e. women, children and the youth, the elderly and the disabled;
- the Minister, in respect of the Department of Land Affairs; and
- the chairperson of the relevant Land Rights Board;
- the relevant provincial Member of the Executive Council for agriculture;
- the relevant provincial Member of the Executive Council for local government matters; and
- every municipality in the respective jurisdiction may designate a person to be a non-voting member of a land administration committee.

However, no member of a land administration committee must be persons holding any traditional leadership position in the community. But if, a traditional council¹² exists within the respective jurisdiction, the functions and powers of the land administration committee of such community may be performed and exercised by the relevant traditional council¹³. Where traditional councils exist, and they have to execute the functions of a land administration committee they will have to make sure that the composition of their membership reflects that of the Land Administration Committees over and above the generic composition of a Traditional Council¹⁴.

¹¹ Section 19 and 20 of the CLRA deals with the content and making of community rules. It is mandatory for a community to register its own rules prior to any registration of communal land taking place.

¹² Traditional Councils are established under the Traditional Leadership and Governance Framework Bill, 2003. Once a traditional community is recognised under Section 2 of TLGF Bill, that community must set up a traditional council as stipulated under section 3 of the TLGF Bill.

¹³ Section 21 (2) of the Act provides this as an option.

¹⁴ As mandated in Section 3 (2) of the Traditional Leadership and Governance Framework Bill, a Traditional Council should have not more than 30 members in its council, a third of the members should be women, and the members of a traditional council must comprise traditional leaders and members of the traditional community selected by senior traditional leaders. Overall, 40% of its members must be democratically elected and should hold a term of office of five years.

Land Rights Board

The key functions of the land rights board are mainly to advise the Minister and the community affected by the Bill. The Board will liaise with all spheres of government and monitor compliance with the constitution and the CLRA. The membership of the Board should comprise of the following:

- one representative from each of the organs of State, as determined by the Minister;
- two members nominated by each Provincial House of Traditional Leaders having jurisdiction in the area of that Board;
- one member nominated by institutions or persons in the commercial or industrial sector; and
- seven members from the affected communities, of whom at least two must be women; one must represent the interests of child-headed households; one must represent the interests of persons with disabilities; and one must represent the interests of the youth.

However, the processes and structures set up by the bill have been heavily criticised by academics and NGOs working with rural community. They argue that the Act adopts an inappropriate paradigm in dealing with the whole issue of legalising land tenure regimes in South Africa's rural areas. Tenure reform has the potential to contribute to a successful land reform but unfortunately it has been one of the least success land reform stories South Africa can anchor on¹⁵. Creating a unitary system of a non-racial formal tenure rights has been one of the most daunting exercises DLA has had to grapple with. The Communal Land Rights Act is an attempt to respond to this lacuna but the means of doing so have elicited widespread disapproval.

A Critique of the Communal Land Rights Act

Definition of Community

One of the contentious issues facing the CLRA (2004) is that the basis for land rights reform is based on the bill's definition of "community." The community is defined in terms of "shared rules" as stated in Section 1 of the Act:

¹⁵ Current estimates from the DLA (2004), is that out of a total of 2.8 million hectares transferred between 1994-March 2004, land tenure reform (e.g. through ESTA and LTA) has accounted for a meagre 5%. Part of the reason for the low transfer is also because some of these legislations such as ESTA deal more with conflict resolution, regulating legal contexts that govern evictions, as opposed to an outright transfer of land, though the latter is sometimes considered as a recourse.

Community means a group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group.

Unfortunately, rural communities in South Africa are a product of the apartheid forced removals where people were dumped in areas under the jurisdiction of chiefs who were recognised by the government. The *de facto* rights of these people do not derive from “shared rules”, but from the fact of their established occupation and land use, and from acceptance of these by their neighbours. The nested character of most systems of communal land rights, within a hierarchy of neighbourhoods, sub-villages, villages, wards and chieftainships makes the definition of “community” intrinsically difficult in this respect. For instance, the Act is unclear as to what the limits of community boundaries should be (Cousins 2003). The danger in assuming that there exist easily identifiable “communities” with “shared rules” is that this works to shore up the traditional leaders, whom may or may not enjoy the support of people under their jurisdiction (AFRA 2002: 6). This is one of the classical examples of the policy makers inability to learn from the experiences of restitution process in South Africa¹⁶.

Communities who applied to the Restitution Commission for the restoration of their lost land rights to a piece of land soon realised that different factions within their community paid homage to different tribal lineages. The Restitution Commission encountered a number of challenges in settling rural claims. For instance, most of the land in the ex-homeland areas is unregistered and un-surveyed, and thus there are no titles or maps. This makes archival research very difficult. As a result, family and community disputes are often difficult to resolve in cases where multiple claims are made within one community. This delays the process of restitution and impacts negatively on community cohesion. In cases where restoration of rights was accorded statutory recognition, the process of socio-economic development was never realised. Rights without ensuing development do not improve the livelihoods of the beneficiary communities. Restitution process was based on the understanding that there exists a discernable community marked by a common concern for land to be shared by all within a particular group. Questions of power dynamics and vested groups were rarely considered in conceiving the target group of the policy. Similarly, the Communal Land Rights Act assumes a similar position in its understanding of what constitutes a community¹⁷.

¹⁶ See Du Toit (2000: 75-91) for a full account of the difficulties that impede the restitution process in South Africa

¹⁷ Kepe's (1998) work on “The Problem of Defining Community: Challenges for The Land Reform” elaborates on this ambiguity. It looks at varied conceptions of community spatially defined with a focus on spatial units, i.e., people who share a common locality, and but often enough they are conflicting notions of who belongs to which group or economically defined in economic terms where different groups share common interests, control particular resources or share similar economic activities to make a living. However the question of “belonging” in a community is often a vexed one.

In rural South Africa, the genesis of this problem lies in the historical legacy of the apartheid system. Most rural communities were essentially "invented" through social engineering. Due to the legacy of forced removals, dumping and jurisdictional controls, rights were derived from occupation and use as opposed to membership of a community based on shared values. Due to social engineering, land rights in such cases tend to conflict and overlap with those of other members who were physically relocated to the same jurisdiction. In essence, the Act deals with community members or beneficiaries as though they are empty of history¹⁸ rather than people caught up and living in existing social processes and structures that make day-to-day activities possible and meaningful (PLAAS/NLC 2003). Despite this shortcoming, the CLRA vests ownership in "communities" and yet community members do not have adequate leverage to determine the composition, and management of the new CLRA structures.¹⁹

Gender Inequality and Traditional Councils

The institutions set up by the Act will undermine the attainment of gender equality – one of the constitutional rights enshrined in the Bill of rights. Women face serious problems under communal tenure. Under customary law, only men are allocated land. Women can generally access use rights to land via relationships with men (PLAAS/NLC 2003). The unequal and discriminatory nature of women's access to land under customary law has been re-enforced by formal law. For example, most common record of land rights in communal areas is through Permission to Occupy²⁰ (PTO). Yet PTO regulations provide that they are issued only to men. PTOs are an example of an old order right. However, old order rights were highly gendered in the allocation of land rights in communal areas²¹.

So, if the basis of the Act is to transform these gendered old order rights into new order rights, then the inherent gender inequality found in old order rights with respect to property relations will merely receive statutory recognition. However, the gendered nature of old order rights is recognised in the Act to the extent that, old order rights are deemed to be held by all spouses in a marriage, and not by the husband alone. This awareness is reflected in the Act in

¹⁸ For more elaboration, see Alcock and Hornby (2004: 2)

¹⁹ This refers to the structures set up by the Act namely the Land Administration Committees/Traditional Councils and the Land Rights Board that are mandated with the administrative aspects of the Act and the management of communal land. The shortcoming of these structures in terms of their terms of reference will be dealt with at a later stage in the paper to demonstrate community's marginality with respect to the operations of these structures.

²⁰ Permission to Occupy or PTOs as they are commonly termed was the main method of establishing rights under the regulations that governed land rights in communal areas. These regulations were the Black Areas Regulations R 188 of 1969, which were made under the Black Administration Act 38 of 1927 and the Development Trust and Land Act of 1936. The National Land Committee noted that by 1997, approximately 32% (12.7 million people or 2.4 million households) of South Africa's population lived in the former homeland areas with 63.6% having PTO, 26.8% lacked PTO, and the remaining 9.6% were uncertain whether they had PTOs or not.

²¹ This provision has been repealed through the Recognition of Customary Marriages Act No 120 of 1998 but its legacy remains in most rural areas.

Section 4 (2), and (3) respectively:

An old order right held by a married person is, despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses in a marriage in which such person is a spouse, jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage and must, on confirmation or conversion in terms of Section 18(3), be registered in the names of all such spouses.

A woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such person.

Irrespective of the gender awareness reflected in the Act, no explicit provision is made for securing the current use and occupation rights of single women (widows or unmarried women). Hence given the aforesaid, it will be difficult to create a balance with respect to gender inequality especially in areas where traditional authorities have assumed authority of land matters within their respective jurisdiction. In terms of its safeguard mechanism in establishing gender parity, the Act adopts a technical approach in attaining gender parity. The CLRA states the minimum number of women representation required in a Land Rights Board, Land Administration Committee, Traditional Council or the criteria the Minister should consider in his/ her determination of the land rights conversion. These are spelt out in various sections of the Act: 14 (g), 18 (4) (b), 22 (3), and 26 (3) (b). For instance, Section 14 (g) of the Act states that a land rights enquiry must in respect of an area enquire into:

The measures required to ensure compliance with section 4 and to promote gender equality in the allocation, registration and exercise of new order rights.

Once the Minister has received a copy of the land rights enquiry, He/ she is supposed to determine the nature of the rights conversion within a context that would promote gender equality. As stipulated in Section 18 (4) (b) the Minister could confer new order rights on a woman:

(i) who is a spouse of a male holder of an old order right, to be held jointly with her spouse;

(ii) who is the widow of a male holder of an old order right, or who otherwise succeeds to such right, to be held solely by such woman; or

(iii) in her own right;

The Act requires that at least a third of the total members of the Land Administration Committee must be women²². With relation to the Land Rights Board, the Act obligates the Minister to ensure that at least a third of its board members are women²³. One of the most contested aspects of the CLRA is Section 21 (2). It stipulates that in communities where Traditional Councils exist, these organisations may assume the functions and responsibilities of the Land Administration Committees. The word 'may' is most likely to be contested by traditional authorities who would want to automatically assume a responsibility of land management in their respective jurisdiction, hence undermining community preference between the choice of a Traditional Council and a Land Administration Committee.

Traditional Councils are structures that have been set up through the Traditional Leadership and Governance Framework Bill (TLGF) of 2003. They are principally tasked with assisting traditional communities on areas pertaining to their developmental needs, liaising with municipalities on these matters, and administering the general affairs of the traditional community²⁴. The irony however is, if there are no Traditional Councils in a particular jurisdiction, then Local Land Administration Committees will execute their functions. However, no traditional leaders are supposed to be included as part of this committee²⁵. This could be contested in a minority of cases where community members are willing to have a member from the traditional authority in their LAC structures. It denies communities a wide range of choice in selecting their land administrators based on the particularities of their social environment.

Another limitation of the Act as far as the administration of the Communal Land Rights Act is concerned, is that Traditional Councils, as mandated by the Traditional Council and Governance Framework Bill²⁶ (TLGF), are supposed to have not more than 30 members. A third of their members must be women. Members of the Traditional Council must comprise of senior traditional leaders and members of traditional communities who must be nominated by senior traditional leaders. Only a paltry 40% of its membership must be elected. In cases where it has to execute the functions of a Land Administration Committee, a Traditional Council must ensure that the composition of its membership satisfies the key requirements of the Land Administration Committee. These include having representative members from: Land Affairs, Land Rights Board, Agriculture, Local Government and Municipality. In essence this is an

²² Section 22 (3) elaborates on this issue

²³ Section 26 (3)(b) elaborates on this point

²⁴ Section 4 of the Traditional Leadership and Governance Framework Bill elaborates further on the functions of the Traditional Council. These functions and responsibilities are subject to customary law and practice and most critics are skeptical whether these structures will be gender sensitive in executing their role in traditional community.

²⁵ Section 22(2) of the CLRA, excludes the membership of any traditional leader in the Land Administrative Committees.

²⁶ Section 3 of the TLGF Bill outlines in detail the required composition of its members

additional layer of people over and above the normative composition of a Traditional Council stipulated by the TLGF²⁷.

It is evident from the composition of the Traditional Councils and Local Administrative Committees that women representation will be a minority, let alone challenging the leverage a membership of 30% can hold in effectively impacting decision making processes of these structures. The 30% composition is more likely to be made up of those members selected by senior traditional leaders within the council as required by the TLGF Bill than those who will hail from the elected officialdom (40%). If this holds, then it would be difficult for the nominated women into the council to wield an independent assertive voice that would differ from the “official” position, values or status quo of the traditional council members who nominated them into the council.

Without an explicit recognition of how skewed power relations structure access to and control over land in rural areas, it is unlikely that broad policy commitments such as the ‘numerical minimums’ set for women representation will have any impact in addressing gender inequality. Given these structural processes the CLRA sets in motion, it is likely that women may qualify for secondary rights even under the new tenure reforms proposed by the Act, especially in areas where Traditional Councils have assumed full responsibility of land management. The right to equality and protection from discrimination on the basis of gender²⁸ may be compromised as a result.

The institutionalisation of Traditional Councils will entrench unequal power relations in the rural areas, or using Mamdani’s (1996) characterization of traditional authorities, will further consolidate their “clenched fist”²⁹ that traditional authorities have had in colonial and post-colonial Africa. This is because, as unelected structures, their generic base of power i.e. land allocation and management remains intact. This puts prospects for democratic decentralisation of rural local governance at a bleak future.

Given the fact that Traditional Councils are mandated to execute the functions of the Land Administrative Committees where they exist, the effectiveness of these councils will not only be defined by the appropriateness of the CLRA but rather by the institutional support and applicability of the TLGF Bill within a given jurisdiction. In essence the success of the CLRA is

²⁷ *ibid.*

²⁸ This right is enshrined in section 9 of South Africa’s Constitution.

²⁹ Mamdani’s thesis is that traditional authorities are a construct of colonialism, and yet post-colonial states have not abolished these structures as part of their democratisation agenda. Traditional authorities exercised “decentralised despotism” which kept rural people ethnically divided, which they achieved from the fusion of various powers/responsibilities: judicial administrative, legislative and executive exemplified in his metaphor of “clenched fist”. The inability of post-colonial states to dismantle this institution has stalled the democratic process, and consolidated the rural-urban divide and ethnic pluralism that has marked most post-colonial states.

contingent on the success of the TLGF bill. The essence of the TLGF Bill is merely to provide for the formal recognition of traditional communities, and to provide for the establishment and recognition of traditional councils that would conduct the affairs of its subjects in accordance to customary law and practice³⁰. Given this statutory role defined for Traditional Councils, it is therefore imperative that the aims of the TLGF bill are realised with minimum conflicts or resistance at the local level if the expected functions of the Traditional Councils as defined by the CLRA is to be effective at the local level.

The criticism levelled at the CLRA with respect to traditional authority structures is symptomatic of the national paradox that characterise South Africa's fledgling democracy. On the one hand, South Africa's liberal democracy boasts an impeccable attempt to uphold civic and political liberties while on the other, a wide range of political and social imperatives have compelled the government to accord constitutional credence to tribal authorities³¹. The latter is viewed as anti-modern and unable to uphold the virtues of a modern liberal democratic model enshrined in South Africa's constitution, which commits itself to a representative, accountable and democratic mode of governance. Traditional authorities that exist in South Africa today function on the principle of hereditary rule institutionalized by previous regimes. This means that elected representatives of local governments have to contend with the presence and powers of non-elected traditional authorities whose functions, recognition and powers, have been defined in the constitution, the White Paper on Local Government, Traditional Leadership and Governance Framework Bill, and the Communal Land Rights Act.³² One of the major challenges facing the Communal Land Rights Act is rooted in this 'legislative dialectic' that accords competing and overlapping functions around land management matters between elected representatives and unelected representatives at the local government level.

The other contradiction implicit in according this dual acknowledgment of representative and unrepresentative mode of governance at the sub-national level, is that it undermines gender

³⁰ Section 4 of TLGF Bill provides an elaborate role of Traditional Councils. For instance, the Bill defines the role of traditional leaders in municipalities and also provides for the establishment of the Commission on Traditional Leadership, Disputes and Claims resolution. The role for traditional leadership, is also extended beyond local government to include provincial and national government.

³¹ Ntsebeza (2004: 23) gives an account of why the ANC has conceded to the concerns of Traditional Authorities despite their chequered past. Within the ANC, there are pro-and-anti-chiefs factions. For instance, former President Nelson Mandela is a pro-chief, while the late Govan Mbeki, the father of President Thabo Mbeki, was a strong critic of chieftainship. It seems that the pro-chief lobby has always pushed for their interests, partly because traditional leaders are seen as important institutions to garner rural votes, since they are seen as legitimate and popular. The Inkatha Freedom Party (IFP) has always pushed for the constitutional acknowledgement of traditional leadership in the constitution. Threats by IFP to boycott the 1994 elections if traditional authorities were not given constitutional acknowledgement is a case in point. The weak existence of rural civil society to agitate against unpopular traditional leaders has also created a "monopoly" of negotiation on the part of traditional leaders, as a key interest group in rural South Africa, as exemplified in the role CONTRALESA plays in advancing their interests.

³² See Rangan and Gilmartin (2002: 639); Ntsebeza (2004: 14-19); and the 1996 South African Constitution on the Bill of Rights and Local Government.

equity rights enshrined in South Africa's constitution. The endorsement of traditional authorities within the constitution and the other legislative documents implies that customary law and practice which is often associated with patriarchal practices, will not uphold gender equity concerns as reviewed earlier in the paper. Customary law and practice offers few formal means through which women's independent needs or claims to land can be addressed (Rangan and Gilmartin, 2002: 639).

Comparative insight from Kenya's attempt with her titling strategy in the pre-independent period (1955) as part of the Swynnerton programme³³ which continued in the post-independence period (1963) proved to be a failure in so far as protecting the rights of women was concerned. This is because the statutory registration of title did not replace customary law. Rather, customary and statutory strategies were used in tandem to secure rights to land and control the disposal of land at inheritance. As land became scarce, the claims of lineages were asserted to keep or recover control of land. The recreation of components of customary law led patrilineal groups to exclude women's claims to land lest this lead them to lose land to others (William and Francis 1993; Gertzel 1970). This explains why women accounted for less than five per cent of the total registered landholders. Those who gained were heads of households, who in many communities were adult males (Kibwana 1990).

Constitutional Concerns of CLRA

The Communal Land Rights Act also raises constitutional concerns given the wide discretionary powers vested in the Minister as the sole determinant of how the conversion of land rights will be undertaken based on the report of the land rights enquiry process³⁴. This is viewed as unconstitutional in the sense that Section 25 (6) of the constitution provides:

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.

³³ The 1954 Swynnerton Plan aimed at transforming customary land rights to individual freehold. The twin pillars of the programme was the institution of freehold land tenure and the selective loosening of restrictions on African cultivation of high value crops such as coffee and tea. Transforming customary land rights to freehold land tenure was achieved through the process of adjudication, consolidation and registration. It was hoped that creating a landed gentry would act as a bulwark against the anti-colonial revolt that had emerged during the MAU MAU revolt in the early 1950s.

³⁴ Section 18 (1) of CLRA states: If the Minister, having received a report by a land rights enquirer, is satisfied that the requirements of this Act have been met, he or she must, subject to subsections (4) and (5) and having regard to: (a) such report; (b) all relevant law, including customary law and law governing spatial planning, local government and agriculture; (c) the old order rights of all affected right holders; (d) the need to provide access to land on an equitable basis; and (e) the need to promote gender equality in respect of land make a determination as contemplated in subsections (2) and (3). Section 18 (2) states: The Minister must, where applicable, determine the location and extent of the land to be transferred to a community or person.

The Act does not offer an upfront right or entitlement to secure tenure or comparable redress. Instead the minister is vested with wide discretionary powers to provide secure tenure or redress. This is in contrast to other land reform legislation, such as Restitution of Land Rights Act 22 of 1994 and the Extension of Security of Tenure Act 62 of 1997 (ESTA), which provide for the entitlement of the right. Through these Acts³⁵, to secure one's rights was an entitlement and did not depend on a Ministerial discretion. With the Communal Land Rights Act, the determination of the extent of the right to be secured or comparable redress to be accorded is left to the Minister to decide. The unconstitutionality of this is based on the fact that the constitution states, "an Act of Parliament" as specified in section 25 (6) of the constitution and not the Minister should give effect to the rights and determine the nature and extent. Such unlimited powers could be open to abuse or are simply viewed at dissonance with constitutional principles. The Act seeks to transform constitutionally guaranteed rights into a discretionary benefit based on a Ministerial decision³⁶.

Community participation in the land rights enquiry is partially protected by the Act³⁷, since majority decisions regarding land tenure will inform the basis of the land rights enquiry report. However, there is no requirement that majority consent is necessary for the decision to transfer title, or when a Land Administration Committee is established, or prior to the Minister reserving part of communal land for state use³⁸. The Act³⁹ outlines general issues to be included in a land rights enquiry such as nature of old order rights, conflicting rights, interests of the state, options available for legally securing any insecure rights, comparable redress, equity issues, gender issues and spatial planning requirements. Such open-ended factors are bound to be interpreted differently by officials concerned in this process, hence introducing inconsistencies in decision-making. Critics⁴⁰ of the Act claim that one of the reasons why the bill has taken such a unilateral approach with respect to the land rights enquiry process and the determination thereof, is due to the fact that the drafters are aware of the inexorable nature of the disputes concerning

³⁵ These Acts refer to some of the land reform tenure legislations the Government set up in post-1994 as measures to protect the vulnerable farm workers/labour tenants/people residing on land without recognised statutory rights.

³⁶ This aspect of the Act was emphatically stated in the submissions made by the Congress of South African Trade Unions (COSATU), National Union of Mine Workers (NUM), The Legal Resource Centre (LRC) and National Land Committee and Programme for Land and Agrarian Programme (NLC/PLAAS).

³⁷ Section 17 (2) states: A land rights enquirer must adopt measures to ensure that decisions made by a community are in general the informed and democratic decisions of the majority of the members of such community who are 18 years of age or older and are present or represented by a proxy at a community meeting of which adequate notice of not less than 21 days was given.

³⁸ See Cousins, 2004. p. 5

³⁹ Section 14 (2) of the Communal Land Rights Act elaborates on these issues

⁴⁰ For instance the Programme for Land and Agrarian Studies/National Land Committee, 2003 submissions were quite vocal in expressing the unilateral nature of the decision making process enshrined in the Act. Similar views were expressed by other NGOs such as the Legal Resource Centre (LRC) and the South African Council of Churches (SACC).

boundaries, identity and power that land transfers would elicit. In this regard, it seems the principle of a majority consensus will be used in shaping the recommendations made through the land right enquiry process.

Institutional Capacity to Implement CLRA

The institutions required for the Act to function effectively are beyond the current capacity government, civil society and communities are able to marshal for its effective implementation. Institutional incapacity especially at the third tier of Government i.e. Local Government has proven to be one of the weakest points of development delivery in South Africa and yet these are some of the closest contact points the government has with its constituency. This is often exacerbated by the three tier system of governance defined in Chapter 3 of the Constitution which mandates the central, provincial and local government to engage with each other in a cooperative governance mode on issues pertaining to development. This often raises a whole range of complexities especially with government agencies that suffer from acute manpower shortages. For instance, the composition of the Land Rights Board, Land Administrative Committees, and Traditional Councils are supposed to have representatives from different organs of the state. It is expected that useful developmental synergies will be gained if line departments such as local government, municipalities, and agriculture, work in cohort in these structures. Unfortunately, the dismal lack of post-transfer support and development with past redistribution and restitution projects was precisely because this kind of vertical and horizontal institutional coordination was never achieved between government agencies as stipulated in the policy⁴¹.

The inclusion of new structures such as the Land Rights Board and Land Administration Committees will further complicate the “institutional matrix” that is supposed to enforce the delivery of policy. The challenge is that Traditional Councils or Land Administrative Committees will constitute a new tier of government with heavy developmental and public land administrative functions and powers. In principle the provincial government, municipalities, provincial agriculture department, industrial and economic sector representatives are required to occupy the different structures established by the Act such as the Land Administrative Committees, Traditional Councils and the Land Rights Board. It is assumed these different structures will work in cohort in the realisation of the objectives of the Act.

⁴¹ Elsewhere in the author's work (Kariuki 2004) he has compared two models of land redistribution projects between 1997-1999 and between 2000-2004, and came to the conclusion that both models of land reform projects have failed precisely because the expected post-transfer support required by community beneficiaries was not forthcoming from the government agencies tasked with this responsibility. Post-transfer support services is a multi-sectoral government process which is often hindered by the weak institutional structures and limited resources required to carry out the process.

The challenge here is the extent to which this Act may conflate its developmental vision with those of the local government agencies in the respective jurisdiction affected by the Act. Local Government are supposed to provide developmental services to their local communities.⁴² In the past, municipal services were usually delivered up to the boundary of a private landholding⁴³. Often enough, the local authority that effect improvements of land for the purposes of services would want to own the land on which the improvements are made. The extent to which municipalities will be willing to accord services to land which it does not own is yet to be seen in this case because the CLRA accords municipalities unequivocal powers to initiate development within the communal areas irrespective of any labyrinth of laws that may possibly hamper rapid development of communal areas from taking place⁴⁴.

Hence, the CLRA is bound to fall prey to these kinds of institutional dynamics. The Act is premised on a flawed assumption that South Africa has an advanced and well resourced land administration system capable of implementing these complex reforms envisaged in the communal areas. Despite institutional weakness that is bound to stifle the success of the Act, costs implications are bound to be even of a greater challenge. To provide support services in the areas of land administration, land management, rights enquiries, and the provision of alternative land or comparable redress will have far-reaching resource implications. Recent estimates by the Department of Land Affairs (DLA) suggest that that this will cost at least R 1 billion a year, over five years, equivalent to over 70% of its current budget for all aspects of land reform⁴⁵. An actual breakdown of the costs of implementation is unavailable and the DLA is currently commissioning work on systems and procedures for implementing the Act. It is therefore likely that the implementation of the Act will only begin in 2005⁴⁶.

Beyond the cost factor, for tenure reform to become a reality on the ground, rights holders need information on their rights and access to a wide range of support systems at local, district, provincial and national level. They will require ready access to government officials or non-governmental agencies to assist them in the administration of their land, dispute resolution, and maintaining records of rights holders. Monitoring of decision making by dedicated officials is vital, to ensure that rights are respected and community administrative structures do enjoy the support of a majority of rights holders (AFRA 2002: 8). Safeguard mechanism against possible

⁴² This is clearly stated in section 152 of the constitution which states that one of the objectives of local government is to ensure the provision of services to communities in a sustainable manner

⁴³ In section 37 of the communal Land Rights Act, this acknowledgement is indirectly alluded to when it notes that no law must prohibit a municipality from providing services and development infrastructure on communal land however held or owned

⁴⁴ This is elaborated in Section 37 of the Communal Land Rights Act.

⁴⁵ See Hall and Lahiff, 2004, p. 3

⁴⁶ See Cousins 2004, p. 1

abuse of power within the CLRA is partially recognised. For example CLRA explicitly state that any decision by the Land Administration Committee to dispose the land must be ratified by the respective Land Rights Board within its jurisdictional control⁴⁷. Given this challenge, what has been the institutional experience of implementing previous tenure legislations such as: ESTA, LTA, and CPAs in South Africa?

Tenure Reform Experience in South Africa

Capacity shortage at government level, coupled with a dismal lack of land rights awareness among rural communities has encumbered the success of previous land tenure reform legislations in South Africa. For instance, the Extension of Security of Tenure Act (ESTA) was meant to provide for long-term security of tenure to farm occupiers, regulate the terms that should govern eviction process, and where necessary provide alternative land to the affected people. As noted earlier in the paper (see p. 8-9), this Act relied on institutions that are at worst were hostile to ESTA such as the magistrates and police, which are inadequately resourced to enforce these procedural rights. Rights awareness within the communities threatened with eviction was low and in most cases community members did not know where to seek legal advice or support with respect to their demands.

Government's inability to invoke its power enshrined in some of these legislations is evident. For example, Section 26 of the ESTA Act gives the Minister powers to expropriate land for purposes of development for the affected communities. These clauses create a perception that farm occupiers will get secure tenure from the legislation, but the reality has been very different. Since its inception in 1997, this section of the Act has not been used⁴⁸. Coupled with low levels of land rights awareness by the community and the sheer lack of institutions to represent the vulnerable labor tenants and farm occupiers, their precarious state, and threats of evictions continue unabated within a context of weak rights enforcements. For instance, the only ironical achievement of ESTA is that it has established a legal framework for regulating farm evictions, without any inbuilt developmental component into the process to support farm dwellers legally evicted from farms.

On the other hand, the Communal Property Associations Act of 1996 established a legal framework for communal ownership of land. However, the majority of Communal Property Associations established since then, have subsequently collapsed, sometimes due to financial problems, but more often owing to insufficient attention being paid to the tenure arrangements

⁴⁷ Section 24 (2) of CLRA elaborates on this issue

⁴⁸ Nkuzi Development Association (2003: 2) For more details on this account, see, Submission to the Portfolio Committee for Land and Agriculture.

encompassed by such associations. Group titles have been issued to over 500 Communal Property Associations (CPAs) and community trusts since 1996, but many of these are now dysfunctional. Constitutions were poorly drafted and misunderstood by members, and rights of individual members were poorly defined. These inadequacies have resulted in endemic infighting. In some cases, traditional leaders have contested the authority of elected trustees. In others, elites have captured the benefits of ownership. The cause of these problems is not the fact that CPAs are a form of shared land holding. Most people desire a system of group tenure. This system has proved resilient and persistent in Africa and elsewhere but rather the support provided to these groups by government, both in the initial stages of establishment and subsequently, has been completely inadequate (Cousin 2002). The committees of these associations were not capable of compiling and maintaining records of land tenure rights. In cases where CPA were weak, they were often subsumed under by the stronger local government structures. In fact, most of the CPAs were seen to double as surrogate local authorities⁴⁹. The experience with CPAs in South Africa demonstrates the inherent difficulties of creating legal entities to manage land communally without attending to the question of institutional capability and their appropriateness to the social environment. In essence CPA combined strong procedural rights⁵⁰ with weak substantive rights⁵¹.

The irony here is that the CLRA envisages that the Land Administration Committees that are established based on the same constitutional principles as those of the CPAs should now be capable of maintaining records and allocating new order rights⁵². Land Administration Committees under the CLRA are given complex and difficult functions to perform, yet they are comprised of unpaid community members who will most probably lack the capacity to undertake these tasks on their own⁵³. Existing tensions between land administrations, and local institutions (such as municipality) will be inevitable given the far reaching management powers these committees are accorded by the CLRA. Experience from Kenya also attests to the difficulties faced in establishing freehold tenure based on a group context.

⁴⁹ See Williams (2003: 5) for a fuller elaboration on this concept.

⁵⁰ Cousins and Hornby (2003: 135), define procedural rights as rights relating to the governance of the common property. These include rights to: attend, speak and vote at meetings, be elected to an official position, rights defining recourse for dispute settlement, fair and equal treatment and information about the management of the common property.

⁵¹ *Ibid.*, Substantive rights refer to the content of land tenure rights. These would include rights of access to and use of different areas of land, rights of access to and use of different resources on the land, group mineral rights and rights around benefits that flow from property ownership e.g. profit-sharing

⁵² *ibid.*

⁵³ See Cousins and Claassens (2003: 71)

Kenya's Experience with the Group Ranch Concept

The concept of collective rights within a statutory context was achieved with the pastoralists' tribes in Kenya through the Group Ranch concept⁵⁴. The registration of group ranches was viewed as a compromise between individual ownership and the need for access to wider resources in dry lands. Under this system, "communal lands" are divided into smaller units (ranches) which are then registered in the names of group representatives (three to ten members) elected by the members of the group. Every member of the group has rights in the ownership of the group land in undivided shares (Mugabe and Ogolla; 1996:98-99; Okoth-Ogendo 1998; Rutten 1992: 474).

The administration of the group registration areas accentuated problems of conflict and accountability during the implementation process. This is because the authority of the land was exercised through the group representatives. Although the Land Act was fairly general about who may hold office as a group representative, the emerging practice appeared to be that those elected to office were people who were at least able to read and write. Those assuming office tended to be younger and less influential members of indigenous society. This tended to slow down decision-making in many areas, since most decisions taken by the representatives still carried very little weight unless they were also channelled through indigenous levels of authority (Okoth-Ogendo 1998) and more so, most of the group ranch committees were accused of corruption, they mostly allocated land to themselves and friends above average sized ranches (Rutten 1997: 80). In total they were about 17 agencies whose operations had an impact on the group ranch in one way or the other. There was a serious lack of co-ordination between the several institutions involved in the group ranch project (Rutten 1992: 286). In essence the Group Ranch concept as proposed by outsiders was an artificial creation which lacked a firm traditional, sociological, as well as an ecological basis (Rutten 1992: 475).

Based on the Kenyan experience, the South African experience with the CLRA is bound to be a challenging one. The Land Administrative Committees and Land Rights Board under the CLRA are bound to face similar problems experienced with the Group Ranch concept in Kenya – leadership problems and community conflicts are bound to impact on the functioning of the CLRA structures. For instance, the Land Administrative Committees are tasked with the allocation of new order rights, managing the records of new order rights, creating cooperation within community and playing a conflict resolution role within the community. These are mammoth tasks which they are not remunerated to do, but rather work on a voluntary basis.

⁵⁴ The Group Ranch concept was established through the Land (Group Representatives) Act Cap. 287 of 1968 in Kenya (cited in Mugabe and Ogolla 1996: 98-99)

CLRA Approach to Land Tenure Model

The Communal Land Rights Act (2004) has been criticized in its paradigmatic approach to tenure models. The CLRA ascribes to the desirability of according statutory recognition to communal/indigenous land rights as part of their modernization project. It is viewed as an 'ideological captive' of antiquated debates that have raged on about the best tenure regimes to have for agricultural development.⁵⁵The debate on the effectiveness and appropriateness of communal rights vis-à-vis freehold tenure has confronted many social scientists (Okoth-Ogendo 1998, Kanyinga 2000) in Africa during the colonial and post-colonial epoch.

At the epicentre of the debate is an old ideological inclination that freehold tenure, whose origin lies in Western jurisprudence, is seen as more conducive to agricultural development than communal tenure systems, which are seen as anti-modernist to economic development. This kind of dualistic analysis where one form of tenure regime was juxtaposed against the other failed to recognise that communal tenure arrangements could be as effective as freehold tenure arrangements which could actually co-exist with one another within a formalised legal arrangement. However, other scholars (Okoth-Ogendo 1998; Migot-Adholla *et al.* 1994; Ondiege 1996) note that indigenous tenure systems were not as static as western-based conceptions of African property systems had made them appear. They believed that there was always a spontaneous individualization of land rights over time, which allowed families to acquire a broader and more powerful set of transfer, and exclusion rights over their land as population pressure and agricultural commercialization proceeded. These differing views dominated the debate on the efficacy and superior status gained from western-style freehold property systems as opposed to indigenous property systems found in African communities. This narrow view of tenure reform obscures opportunities for reforms which strengthen the land rights of local people and ensure that their land cannot be alienated or otherwise used without their consent by government, developers or other third parties (Adams *et.* 2000: 112). The CLRA succinctly reflects on these debates, through its attempt to transform communal land systems to freehold systems.

Did Kenya Achieve Agricultural Productivity through the Titling Strategy?

As we have noted earlier, South Africa's CLRA is premised on a failed hypothesis other African countries have attempted (e.g. Kenya) which tends to link freehold tenure with increased investment and production. This link is not as axiomatic as often perceived. There are multiple

⁵⁵ In this debate, one of the commonly cited titling strategy is The Swynnerton Plan initiated in 1954 in Kenya aimed at introducing freehold rights.

factors that define the success of farming; land titling is only one of them. However, comparative analysis warns us that formalising tenure regime is not a guarantee to improved productivity. The debate on tenure seems to be couched in a technicist mould in the sense that productivity and efficiency within the black agro-sector is taken to be a normative output of freehold tenure arrangements. Without restructuring the agro-support services such as rural agricultural market, access to credit, extension services etc, the envisioned productivity and efficiency hypothesis is bound to fail.

The Kenyan tenure individualization reform⁵⁶ has been the subject of radically different evaluations. Land tenure reform in the Native Reserves under the Swynnerton Plan gave rise to unique but related sets of problems regarding access and control of land thereby laying the basis for a rather complex and unresolved land question⁵⁷. In terms of purely economic indicators, land tenure reform in Kenya was viewed to have led to the overall increase in productivity in 1960s, 1970s and early 1980s among the African middle class and peasantry - mainly the result of the lifting of colonial legal restrictions on access to land, growing of cash crops and access to agricultural inputs (Gutto 1995: 38-39). For instance, as a result of tenure reforms, there has been a marked improvement in land-use and environmental management in many areas after registration. A notable example in both Central and Western provinces is the development of agro-forestry both for commercial and domestic purposes. There was an increase of tree planting after the registration process was complete. This was partly due to the fact that land registration eliminated communal sources of wood and therefore forced landholders to develop individual sources (Mugabe and Ogolla 1996:103-104).

Some have argued that agricultural production may have increased due to the transition, in some cases by force, from pastoralism to intensive agriculture. For instance, in Machakos district, a colonial de-stocking campaign pushed the Akamba into intensive agricultural production. The massive de-stocking that was forcefully undertaken as part of the colonial conservation campaign marked the irreversible change in land use from that of agro-pastoralism to agriculture. However, the agricultural boost that was experienced from 1960s-1980s was heavily debated as to whether the emergence of freehold tenure was solely responsible for the boom (Ondiege 1996). For some, the great transformation of Kenyan agriculture was not brought by changes in the legal status of rights to land. At best, it could be argued that

⁵⁶ Due to its expansive scope, the wider politics associated with land reform in post-independent Kenya and the impact of land reform programmes such as the Million Acre Scheme are not considered in this paper. The value of Kenya's comparative insight with its titling strategy is to illuminate on the problems associated with replacing indigenous land rights with individual freehold rights and the ideological basis underpinning this mode of replacement paradigm. The social political aspects of land, and its wider impact on national politics is beyond the scope of this paper to discuss but the author does acknowledge this limitation.

⁵⁷ For more details on this, see Kanyinga, 1998.

registration of title has not in itself prevented agricultural growth, perhaps in part because people have circumvented its rules. The boom in smallholder farming was made possible by a combination of circumstances. International capital became increasingly important in the political economy of Kenya, and the influence of European settlers declined. This facilitated inflows of investment in transport, processing, and marketing and was associated with new patterns of class formation and emergent class alliances, which underpinned the land question at independence. Buoyant external and internal markets encouraged the expansion of agricultural production and industrial investment (William and Francis 1993:390-391).

Empirical evidence from rain-fed farming areas in sub-Saharan Africa (Ghana, Rwanda and Kenya) shows that traditional African tenure systems have been flexible and responsive to changing economic conditions. For instance where population pressure and commercialisation have increased, these systems have evolved from communal rights to systems of individual rights. For example, by 1930 in Machakos, customary tenure already recognised private rights, particularly in cultivated land (Migot Adholla *et al.* 1994). Further analysis by Migot Adholla's and Bruce's (1994) incisive work challenges the very foundation of the land titling programmes, concluding that the effects of indigenous tenure institutions, through their impact on land rights, do not appear to constrain agricultural productivity. It was likely that farmers felt more secure in their ability to cultivate their land continuously, regardless of the type of rights they had. They concluded that there is a very weak relationship between individualisation of land rights and agricultural yields in the regions they studied in Ghana, Kenya and Rwanda.

Clearly there is little consensus among scholars on the impact of individualised land tenure on productivity in Kenya. Conclusions tend to vary depending on the period of analysis. For instance, between 1960 and the early 1970s production rose at a high rate which some scholars have attributed to land reform. In the highlands and high-density settlement schemes, small scale farmers realized higher yields than those in the low-density, large scale farms. In the 1980s and 1990s, production levels have failed to match increases in population due in part to land tenure problems such as continuous uneconomic land subdivisions and poor agricultural and land use policies (Ondiege 1996:126). The decline in agricultural production which was experienced in the late 1980s and 1990s was partly due to political instability, lack of redistributive strategies and the connected phenomenon of official corruption (Gutto 1995). Overall, the titling reforms led to more problems than those it aimed to solve. It generated more disputes over landownership and resulted in a more skewed distribution of land. It also produced and re-inforced ethnic-based interests in land, and made the land question more complex than ever. The post-independence government simply retained the colonial land laws and pursued the

same land reform objectives without any major alterations. The land policy did not change in spite of the complex issues that developed around it, and despite the fact that the government, after independence, identified landlessness as a major constraint to the national goal of self-sufficiency in food. The debate on the efficacy of individual titling was driven more by “economic reductionism” that tended to link individual tenure as a key prerequisite to agricultural modernisation⁵⁸. This approach ignores the wider social and political contexts that shape access to land and the inherent and often resilient power relations that define property relations within communal land systems

Given the above analysis, it is evident that South Africa’s CLRA will most likely not achieve its full objectives. Based on some interviews the author conducted in April 2004 for a Land Reform Programme in South Africa (The Land Redistribution for Agricultural development⁵⁹, LRAD), interviewees were quick to mention the CLRA as a greater challenge they were going to face once implementation of the Act commenced. For instance, a senior member of Land Affairs, made it evident that officials within the Land Affairs are skeptical about the success of the Act:

I do not believe in the communal land rights Act. I do not believe that is the development path one has to take but never the less I am going to implement it because that is my job. We are going to face many problems in implementing this policy. In rural communities, you have people who support the chief and those who do not support the chief, we anticipate these problems. Why don’t you upgrade existing rights, do we really need new rights. If the chief is told he cannot administer land, it is going to be a problem. The chief will think his powers are been taken away. The administrative aspects of this Act are going to be insurmountable. It seems we have not applied our minds carefully; we have just copied a model. Our DLA personnel are yet to develop systems to implement the Act. Shakespeare is in charge of looking at the institutional structures required to drive this process. Once logistics and budgets are in place, then the implementation will begin (Interview with Mampho Malgas, Deputy Director, Lowveld Region, Provincial Department of Land Affairs, 18/04/2004).

From the above quote, it is most likely that Provincial Offices of DLA do not seem to have been involved in the drafting of this Act, reflecting on the national competency status of land reform policy-making role currently vested with the National Department of Land Affairs, Pretoria Office. A director of a local NGO working in Mpumalanga Province had this to say with respect to the Act:

⁵⁸ Kanyinga’s (2000) study, “Re-Distribution from Above, The Politics of Land Rights and Squatting in Coastal Kenya” provides a clear account of these debates.

⁵⁹ This programme (LRAD) was initiated in 2000 and its key aim is to generate a stratum of black commercial farmers in South Africa.

The provincial leadership will face serious challenges with respect to this new Act. They don't have a clue about it and they were not even aware that there was this Act, they were never work-shopped on it, they don't know the implications. Recently I addressed some councillors and I asked them if they know this Act and they said no, they did not know the implications of the Act and yet it will impact on their administrative responsibilities. The councillors felt they were sold out (Interview with Chris Williams, Director, the Transvaal Rural Action Committee, Mpumalanga, 19/04/2004).

Similarly, the above assertion reflects the non-participatory character that marked the drafting of the Act. Different tiers of Government are unaware about the Act and its implications and this is bound to create problems during its implementation. This is despite the fact that for the last ten years, land reform experience has proven that developing policies without reforming or capacitating existing institutions tasked with implementation will be a flawed effort.

Conclusion

This paper has reviewed the historical basis of South Africa's Tenure Reform and its legislative genealogy. It argued that Tenure Reform in South Africa is one of the thorniest issues the Land Reform Policy is yet to grapple with. The drafting of the tenure reform legislation has been a protracted process partly reflecting the complexity of tenure problems in rural South Africa. Insecure tenure rights afflict around 13% of South Africa's rural population estimated at 43 million. The Communal Land Rights Act will therefore affect about 14 million South Africans residing in the homelands, some of the worst underdeveloped regions in South Africa, that harbour 72% of the total population considered poor. These people hold insecure, conflicting and overlapping rights to land, the basis of which are acquired through occupation and not through a statutory process. Conflicts abound in these areas due to the messy "tenure matrix" the rural poor have to contend with. A poorly drafted tenure policy is therefore bound to exacerbate on these historically ingrained underdevelopment problems facing the rural population.

Unfortunately, the evaluation done on the Act reveals there is limited scope of it succeeding. The Act fails to learn from its own institutional experiences with land reform implementation process and Kenya's titling strategy. Aspects of the Act which were unconstitutional were elaborated and their implications considered. The Act also lacks a firm sociological base in understanding the "rural community" it targets to "develop" but will instead end up disenfranchising in the process. Weak institutional structures e.g. ineffective land management systems will encumber the implementation of the Act. Intractable conflicts within the community will further derail the Act's success. These problems have also come to define the key features of South Africa's institutional experience with regard to Land Reform implementation process in the past decade (1994-2004). It is therefore unlikely that the

Department of Land Affairs will be able to process more than one hundred transfers per year. At this rate critics (e.g. Cousins, 2002) estimate that it will take 200 years to transfer land to the estimated 20 000 rural communities in the ex-homeland areas. The lessons learnt from Kenya's flawed land registration programme seem to have had a minimal effect in informing the current orientation adopted in the Communal Land Rights Act. Writing way back in 1976, Okoth Ogendo, one of Kenya's renowned land law experts, noted that Kenya's registration process will only near completion by the year 2050 (1976: 1). The implied assumption is that it will have taken 100 years (1950 - 2050) for Kenya to complete its registration process. Prospects of achieving this is highly questionable given the fact that by 2001, only 6% of the total land area⁶⁰ in Kenya has so far been registered under individual titles. These statistical estimates reflect the bitter gap that exists between the rhetoric of land reform policies in Kenya and South Africa, and the structured land inequality patterns these policies aim to restructure. Subsequently, these programmes will continue to generate a normative and curious paradox and a milieu for the academy to continuously pursue albeit with little success in debunking the paradox of land reforms: why do they perpetually fail in contexts of stable liberal democracies that respect the due process of law and rights? Why bother with Land Reforms anyway if agrarian justice has proved unattainable in Africa's land reform programmes?

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⁶⁰ Total land area in Kenya stands at 576 700 km². For more details on this, see, Konimbih, 2004, p. 11.

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