



RECOMMENDATIONS

- National and provincial policy and legislation should remove superimposed tribal boundaries based on the architecture of apartheid and allow people to define their own identities. Customary law must be recognised as consensual.
- The Department of Cooperative Government and Traditional Affairs and the Department of Rural Development and Land Reform should facilitate independent research to clarify the historical and customary entitlements of different groups. This would lead to more nuanced mining agreements reflecting the consent of those with specific interests in particular areas of land.
- The provisions of the Interim Protection of Informal Land Rights Act of 1996 must be actively enforced by the state.
- The state needs to intervene in litigation by traditional leaders to uphold the right to tenure security set out in s 25(6) of the Constitution and prevent threats to the basic land rights of poor people.

A Promise Betrayed: Policies and Practice Renew the Rural Dispossession of Land, Rights and Prospects

Aninka Claassens & Brendan Boyle¹

EXECUTIVE SUMMARY

South Africans assumed on 27 April 1994 that their vote for freedom would erase the ethnic enclaves known as 'Bantustans' or 'homelands' and guarantee a common citizenship with equal rights under one law. Officially, the 10 homelands were dismantled under the interim constitution that introduced democracy in 1994, paving the way for the reversal of the dispossession that had been entrenched by the 1913 and 1936 land acts. Instead, 20 years later, a series of laws, bills and policies proposes a separate legal regime for people within the boundaries of those former Bantustans. A version of 'customary law' that defaults to the tribal boundaries and ascribed identities of the Bantu Authorities Act of 1951 is used to justify continued segregation and unequal citizenship. The effect is to consolidate the unilateral authority of chiefs in relation to land ownership and to deny other rural South Africans the right to decide for themselves how to use and share the newly discovered mineral wealth of the land they have owned and occupied for centuries.

POST-APARTHEID REVAMP OF LAND LAWS

The Natives Land Act of 1913 largely confined South Africa's black majority to rural reserves comprising just 7% of the country – increased to 13% by the Natives Trust and Land Act of 1936. The rest was kept for white people. After the National Party came to power in 1948 it used these rural reserves as a starting point to create 10 ethnically defined 'homelands' for speakers of different African languages. Building on colonial distortions of customary law that gave previously unknown powers to traditional leaders, the apartheid regime denied South African citizenship rights to

those living within these so-called Bantustans and justified denying black people land ownership as upholding customary law.

The opening lines of the Interim Constitution of 1993 re-incorporated the homelands into a unitary South Africa.² It enshrined a system of elected local government, replacing chiefly rule over separate ‘tribes’ within the former Bantustans. Three years later, the 1996 Constitution, which was negotiated by all parties in the first all-race Parliament, reaffirmed the universally acknowledged democratic rights of freedom.³

The Constitution says, in Clause 25 (6): ‘A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.’ Twenty years later no comprehensive legislation exists to secure the tenure rights of those who bore the brunt of the land acts and forced removals, ie, the people living in the former Bantustans. Instead, the government has proposed a system of communal tenure⁴ in the former homelands, with chiefs holding title to the land and the inhabitants promised only a form of ‘institutional use rights’. These proposals must be understood in the context of simultaneous proposals to increase the authority of traditional leaders through interventions such as the Traditional Courts Bill and the pending Traditional and Khoi-San Leadership and Governance Bill.

Some of the most platinum-rich land in North West and Limpopo had been bought by groups of African purchasers long before its wealth was discovered – either before the 1913 and 1936 land acts or through exemptions from them. In some cases, buyers formed syndicates; in others clan members each contributed an agreed number of cattle to raise the purchase price for a particular farm. This adds a layer of legal complexity to past and current government attempts to make black-held land within the Bantustans subject to the overarching authority of chiefs. This most recent version of customary law is thus disputed by the descendants of the original purchasers and by others living on state land, who claim rights

of indigenous ownership vested in families over generations.

One of the areas in which traditional leadership is now being reinforced is the former Bophuthatswana homeland. Initially assumed to comprise low-value farms and towns, the scattered pockets of land that made up the notionally independent homeland produce around 80% of the world’s platinum. Even at today’s weak prices, those reserves represent almost unimaginable wealth.

MORE RECENT LEGISLATIVE CHANGES AND IMPACTS

Two bodies of law interact to govern relations on communal land in the platinum belt – the new traditional leadership legislation and the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

The Traditional Leadership and Governance Framework Act 41 of 2003 (Framework Act) and its provincial counterpart, the North West Traditional Leadership and Governance Act 2 of 2005, do not adequately capture the inherently participatory features of customary systems. These laws adopt the contested tribal boundaries inherited from the Bantu Authorities Act of 1951 and endorse the official status of apartheid-era chiefs. Other legislation such as the Communal Land Rights Act of 2004 (CLRA) and the Traditional Courts Bill of 2012 (TCB) also sought to accord significant power to ‘senior traditional leaders’ within these boundaries. None of these laws or proposals has included an option to opt out of these superimposed jurisdictions and choose to live by the laws governing other South Africans. After a sustained campaign by four rural communities, the CLRA was struck down by the Constitutional Court in 2010 because of the flawed legislative process. After an equally protracted campaign led by the Alliance for Rural Democracy, parliamentary approval of the TCB was blocked by a majority of the nine provinces in 2013. Both will be back before Parliament soon, although with slightly different names.

The MPRDA transferred private mineral rights to the state. However, it also provided – in Item

11 of Schedule II on transitional arrangements – for the continuation of all existing production-based royalties payable by a mining company to a rural community. These royalties, which are separate from the levies payable to the state, date back over decades and were paid in recognition of black people's historical ownership of the land, even if it was registered with the state as trustee. The MPRDA imposed a mine licencing system that included negotiated social and labour plans to ensure communities benefited from mining operations. The associated Mining Charter adopted by mine owners set a deadline of 31 December 2014 for companies to achieve at least 26% ownership by historically disadvantaged South Africans. This deadline has spurred mining companies to press communities still entitled to royalties to trade those rights for an ownership share, which counts towards the Mining Charter target. In many areas, including Marikana where 34 miners were shot and killed by police in 2012, the reinforced power of chiefs is being interpreted as giving them the right to convert these surviving mining royalties into shares held by traditional authorities, without their having to consult communities.

A series of North West High Court judgements involving the Bakgatla ba Kgafela and Bapo ba Mogale communities have blocked community attempts to demand direct consultation on deals concerning their land and to call provincial and traditional authorities to account for the use of community funds. Community groups are barred by court interdicts even from meeting to discuss their concerns unless they have the prior permission of a traditional leader. This interpretation of customary law was struck down by a majority of the Constitutional Court in 2013,⁵ but for now, reliance on apartheid versions of customary law continues.

THE MISSING ACCOUNTABILITY LINK

Concerned citizens seeking to review the web of laws, regulations and multibillion-rand mining deals on these lands are shut out. Approaches that acknowledge the complex and specific history

of land occupation and African land purchases in the North West are dismissed. Democratic practices that honour substantive and procedural customary entitlements are ignored in favour of a less nuanced version of custom. Traditional leaders, often by virtue of their position in councils, are being included in the distribution of equity and equity-based revenue such as dividends, with little or no guarantee that benefits will reach people on the ground. The recent conversion of the Bapo ba Mogale's royalty into a 3.3% Lonmin Plc equity holding guarantees ZAR⁶ 100 million (\$9.49 million) over five years for the general management of the community, but nothing for its development.

In several cases, courts have issued crippling punitive cost orders against community leaders who have sought to challenge these exclusive arrangements. One such leader, community lawyer David Pheto, has been bankrupted by punitive cost orders.⁷

Using legislation in this manner entrenches dispossession. It undermines the legitimacy of the law, the law-making process and public confidence in the impartiality of the courts. It is an approach to customary law that contradicts the rich anthropological literature⁸ on the participatory and democratic aspects of living customary law. That literature stresses the multiple levels of authority and decision-making extending upwards from the household, through the extended family, the clan and the village to the wider polity. In these systems, which have common features across traditional communities, power is mediated by competing centres of authority that exist in a state of constant tension.⁹ These interlocking layers of consultation and decision-making ensure a level of accountability that is fundamentally undermined when power is vested exclusively in a chief.

The exclusion created by these new laws is not sustainable. It undermines the survival of the very institutions it seeks to support. There are regular explosions of anger and frustration among local people in the platinum belt against their exclusion. The National Union of Mineworkers was displaced by the Association of Mineworkers and Construction Union as the dominant union

on the platinum belt in the wake of the Marikana shooting and strike. The official support for traditional authority discussed in this briefing may be intended to encourage electoral support for the African National Congress, but it is not clear whether traditional leaders in North West won or lost votes for the ruling party in the 2014 elections.

The scale of violent protest on and around platinum mines has triggered fears for the country's financial stability. Ratings agencies have cited the issue in several downgrades. In addition, the structure of traditional authority created by the Framework Act, including its requirement that 40% of traditional council members be elected and that one-third should be women, may be crumbling. Ten years after it was enacted there has still been no attempt to elect the required quota in Limpopo. In North West, the government inexplicably waited 10 months to formally appoint the councillors elected in January 2014. According to research by O'Donovan and Redpath,¹⁰ traditional council elections in other provinces have been so deeply flawed as to call into question whether the election stipulation had been met at all. It is possible that many traditional councils currently supported and paid by the government are vulnerable to legal challenge.

CONCLUSION

Apartheid's Bantustans trapped millions of people in poverty they did not have the freedom to flee. Now these same people are again being locked into segregated judicial and legislative regimes inside these old enclaves. Previously the basis of discrimination and segregation was race – now it is the tribal authority jurisdictions put in place by the Bantu Authorities Act and reimposed by the Framework Act. Parliament has the power to prevent this double dispossession by reviewing

interpretations of custom and tradition that have the effect, even inadvertently, of endorsing policies and laws that undermine the promise of progress.

ENDNOTES

- 1 Aninka Claassens has been a land activist for 30 years. She currently leads the Rural Women's Action Research Programme at the Centre for Law and Society, University of Cape Town. Brendan Boyle is a former South African journalist and newspaper editor and now a senior researcher with the Rural Women's Action Research Programme.
- 2 South Africa, Constitution of the Republic of South Africa, Act 200 of 1993, Chapter 1, s1(1).
- 3 South Africa, Constitution of the Republic of South Africa, 1996, Preamble.
- 4 South Africa, Department of Rural Development and Land Reform, Communal Land Tenure Policy (CLTP), August 2013.
- 5 *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3 (28 February 2013).
- 6 Currency code for the South African rand.
- 7 *Pilane and Another v Pheto and Others* (582/2011) [2011] ZANWHC 63 (30 September 2011).
- 8 Schapera I, *A Handbook of Tswana Law & Custom*. Oxford: James Currey Publishers, 1994 [1938]; Comaroff J & Roberts S, *Rules and Processes: The Cultural Logic of Dispute in an African Context*. Chicago and London: University of Chicago Press, 1981; Molema SM, *The Bantu Past and Present*. Edinburgh: WE Green & Son 1963 [1920].
- 9 Delius P, 'Contested terrain: Land rights and chiefly power in historical perspective', in Claassens A & B Cousins (eds), *Land Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act*. Cape Town: UCT Press, 2008.
- 10 O'Donovan M & J Redpath, *Traditional Council Elections in South Africa: A Critical Review* (unpublished).

The Governance of Africa's Resources Programme (GARP) is funded by the Norwegian Ministry of Foreign Affairs. SAIIA gratefully acknowledges this support.

© SAIIA 2015 All rights reserved. Opinions expressed are the responsibility of the individual authors and not of SAIIA.