Land Tenure in Communal Areas

Progress and Policy Constraints

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UCT

The right to tenure security in the Constitution

- S 25 (6) 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

- S 25(9) provides

Parliament must enact the legislation referred to in subsection (6)

Interim Protection of Informal Land Rights Act IPILRA 1996

- Section 2(1) provides that people cannot be deprived of “informal rights” to land unless they consent, or the land is expropriated and suitable compensation is paid.
- Informal rights to land include the right to use, live on or access the land. This includes people’s rights to their household plots, fields, and grazing land or other shared resources.

IPILRA

- IPILRA provides protection for all people living on communal land in the former Bantustans, people living on trust land, people who previously had Permissions to Occupy (PTOs) and anyone living on land uninterrupted since 1997 “as if they were the owner”.

IPILRA is routinely ignored and undermined

- Mining deals in which those who lose land are not directly consulted NW, Limpopo, KZN
- Mapela school in Limpopo. Traditional leader made deal with mine.
- People who object interdicted from holding meetings

Ingonyama

- Ingonyama Trust Land. People told the land belongs to king – they have no rights to refuse re-location of graves and houses.
- Chairperson says only consent he needs is written permission by traditional council
- Yet IPILRA applies in respect of Ingonyama land
- And Ingonyama Act specifies that existing rights are preserved
- Trust converting indigenous rights to leasehold – subject to payment of rent
- All revenue to Trust as opposed to communities whose land is leased. Trust ‘may’ reallocate back to communities at its discretion

Ingonyama leases

- Lease condition that if rent is not paid the Trust (lessor) will notify lessee, and if still no payment after 7 days then the lessor will “retake” possession of the property
- Example of man who has lived on land since 1982 – told only way to secure his rights would be take out lease
- ‘Rent’ R3000 per year – 10% increase per year
- ‘Rent’ over 40 years (lease period) R1 466 758
- No longer owner, but evictable tenant

Lack of financial oversight

- Ingonyama Trust gets qualified audit every year – where is revenue going?
- NW – massive platinum boom over last 15 years
- Opaque deals between traditional leaders and mining houses – terms kept secret eg Bapo, Bakgatla
- AG no auditing of tribal accounts since 1994 yet a clear legal requirement in terms of trad leadership laws. Province fails to provide, or intervene when people complain.
- Those who challenge – no legal standing – punitive costs

Power relations

- Some trad leaders insist they have sole authority to represent ‘the community’ or call meetings
- This interpretation struck down by con court in Pilane and Sigcau
- Other customary authorities and systems co-exist – along with basic rights
- Increasing violence and intimidation

Levies

- Massive amounts charged for ‘khonza’ fees (land allocation) R60 000 in some areas.
- Also annual levies and various fines
- Those who cannot or will not pay denied proof of address letters which are needed in order to obtain ID, social grants, bank accounts etc
- This practice not authorised by law – but people held to ransom by power relations

CLTP

- Proposes transferring outer boundaries of communal land to traditional leaders/councils in freehold ownership
- Freehold ownership would trump the informal land rights vesting in families and sub-groups that s25(6) and IPILRA seek to protect
- Principle of ‘upgrading’ such informal rights even prior to end of apartheid.
- ULTRA of 1991 – upgrades PTOs and other certificates to ownership – IPILRA was to hold the space while new law developed – make people stakeholders in developments that affect them

Implications

- Parliament in breach of s 25(9)
- No law yet – for poorest S Africans, in former Bantustans notwithstanding that they bore the brunt of forced removals and Bantustan manipulation
- To transfer title without securing land rights in a context where individual rights are vulnerable would be in direct violation of duty on govt to respect, protect, promote and fulfill the rights in the Bill of Rights – cf actual practice in Ingonyama area.
- Cf DRDLR strategic plan pg 15 practical difficulties in relation registering Institutional Land Use Right

Who actually owns the land now?

- Most of former bantustans registered in deeds office under name of RSA.
- This is because much of the land previously ‘held in trust’ by Minister
- Different kinds of trusts – some equivalent to ownership on behalf of specific beneficiaries
- But most only administrative trusteeship created by various laws such as Development Trust and Land Act of 1936 which created trusts for black people as general group, not named and specific people

Administrative Trusts

- Administrative trusts don't provide government with ownership of the land
- They vest only administrative functions in the Trustee which are subject to the underlying rights held by the people living on the land
- Eg SADT and Ingonyama Trust, but Trust treats the land as its own property.
- You can't give away what you don't have. Govt cannot transfer ownership to TCs because it does not have this itself.

The crux of the problem – The definition of community

- TLGFA deems traditional communities to be the ‘tribes’ of the apartheid era
- As brought into being by Native Admin Act of 1927 and Bantu Authorities Act of 1951
- It sets in stone deeply contested history and boundaries eg Pondo Rebellion, Zeerust and Sekhukhune uprisings against Bantu Authorities
- Approx 900 traditional communities. Over 1400 disputes lodged with Nhlapo Commission

‘Tribes’ v communities

- Inherited tribes often very big eg 300 000 people, 32 villages
- Within their boundaries various other identities
  - Multi-ethnic groups who purchased land historically
  - Clans with no chiefs
  - Land reform beneficiaries after 1994 who own specific areas through CPAs and Trust
  - Villages with village level councils and land allocation committees
  - Elected community authorities co-existed with tribal authorities historically. Typically communities without chiefs

Vesting ownership in tribes subsumes and undermines countervailing land rights

- The CLRA was opposed by 4 groups who argued that their particular land rights would be trumped and undermined by tribal ownership
- Kalkfontein Trust –historical buyers, Makuleke CPA – restitution beneficiaries, Dixie village – communal tenure on SADT land and Mayayane farmers – communal tenure on scheduled land -1913 Act
- In each case land rights vesting in smaller groups would be diluted by being transferred to much bigger groups, who would also get unilateral control
- Contrary to 25(6) and also to 25(1) basic property rights

Related problem - legal status of existing traditional councils

- Land can be transferred only to valid legal entities
- Many, if not all, provinces have failed to comply with the provisions of the TLGFA of 2003 and the provincial traditional leadership laws enacted in 2005 – thereby undermining the legal status of traditional councils.
- These laws provided that pre-existing apartheid-era tribal authorities would be deemed to be traditional councils only if 40% of the members of a TC were elected and 30% were women.

Section 28(4)

- Section 28(4) of the 2003 Framework Act provided
- Any tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council contemplated in section 3 and must perform the functions referred to in section 4; Provided that such a tribal authority must comply with section 3(2) within one year of the commencement of this Act.

Section 3(2) of TLGFA

- Section 3(2) provides that 40% of the members of a TC must be elected. 60% are to be appointed by the senior traditional leaders
- 30% of the members of TCs must be women
- But even this low threshold was not met so in 2009 the Act was amended to extend the date of compliance for 7 years to 2011

Limpopo and NW

- Despite that, a full 13 years after TLGFA was enacted, no elections have yet been held in Limpopo. Cut off date came and went. All TCs not legally constituted – no legal status.
- Three judgments have come to same conclusion for NW.

Traditional Leadership and Khoisan Bill of 2015

- Stakeholder consultation today
- Removes the deeming provision so that TCs valid even if fail to transform
- Attempts to delegate powers directly to TCs after failure of CLRA and TCB in Con Court and in Parliament
- Such laws doomed to failure – attempt to give TCs governance powers. But Constitution reserves governmental power to three tiers of government, national, provincial and local.
- Trad leaders have ‘roles and status’, <u>not</u> ‘powers and functions’ cf Certification judgment

SPLUMA

- Con court judgment that planning and land use functions vest with Municipalities not Provinces
- Some trad leaders upset – want planning and land use powers
- Draft regulations provided for service level agreements in terms of which municipalities could contract with trad councils to play this role
- Submissions pointed out that this inconsistent with Constitution – so regulation was scrapped

SPLUMA 2

- BUT regulations provide TCs with sole power to issue certificates confirming proof of customary land allocation
- Deeply contested in areas where land allocation is not by TC but takes place within the smaller groups who are now subsumed within TC boundaries.
- Deep seated debates and disagreements about the scope of chiefly power v the content of indigenous entitlements to land. Even Dept says does not have capacity to issue and register communal land rights
- Much litigated since the 1860s. Fascinating historical record. Plaatje, Molema, Moshoeshoe gave evidence about the strength of land rights vesting at family and village level

Land allocation debates

- Potentially exacerbates problems of traditional leaders selling land allocations as ‘khonza fees’. Amounts of up to R60 000 in parts of KZN
- Cf Polokwane ANC 2007 resolution

“Ensure that the allocation of customary land be democratised in a manner which empowers rural women and supports the building of democratic community structures at village level”

- Certificates may elicit same levels of extortion as ‘proof of address letters’ in context of tribal levies.

Power relations

- Ongoing debate about content of customary law
- Con court has said we must be cautious of distorted versions inherited from our colonial and apartheid past – favours living law – actual practice
- Scope of chiefly power over land and apartheid boundaries deeply disputed – many assert their birth right to indigenous ownership
- Claim customary law to be inherently participatory – as opposed to autocratic

Constitution

- Any law or policy that attempts to transfer title of communal land to traditional leaders or councils is vulnerable to attack in terms of section25(1) and 25(6) of the Constitution
- Currently Parliament is in breach of s25(9) for failing to give effect to 25(6) in communal lareas
- Would be relatively simple to fix by amending IPILRA and could have immediate impact on power relations on the ground – averting processes of dispossession that are currently underway

Current Problems with IPILRA

- It is not take seriously by officials – many do not even know it exists
- It has to be renewed annually
- The SALRC has pointed out that ss 2(2) and 2(4) allow for 'the community' to over-ride individual rights if that accords with custom and usage
- There are no specific protections for women within the household – yet women are structurally vulnerable because of colonial and apartheid distortions of custom

Possible Solutions

- The Act should be amended to make it permanent
- Ss 2(2) and 2(4) should either be deleted or modified to protect people ‘directly affected’
- The use and occupation rights of women should be explicitly protected, along with their procedural rights to participate in decisions pertaining to the family land

Advertisement and Enforcement

- The RDLR's track record with IPILRA is poor
- For the Act to serve its purpose it would need widespread advertisement and stronger enforcement mechanisms
- Possibilities include
  - Make deprivation of IPILRA rights a criminal offence
  - Making transactions and steps that contravene IPILRA rights void in law
  - Employing land rights officers to enforce IPILRA rights

Conclusion

- Tenure reform complex and difficult
- Basic rights at issue
- Constitution clear and unequivocal
- TC democratisation agenda has failed in practice
- If RDLR proceeds with transfers to TCs will run into major legal problems – including legal status of TCs and sections 25(1) and 25(6) of Constitution
- Amendments to strengthen IPILRA are possible, would give effect to ss 25(6) and 25(9) of Constitution, and protect people from the processes of dispossession that are currently underway especially in areas where mining is taking place