Court challenge
to chiefs' land powers

Government took years to produce the Communal Land Rights Act, but its arrival has created more problems than solving them. **Ben Cousins** examines why communities reject the law and how they are challenging it.

The Communal Land Rights Act (CLRA) was approved by parliament in February 2004, despite strong opposition from civil society groups. Now communities are challenging the CLRA in court. Four rural communities are arguing that the law is unconstitutional since it makes their land rights less, rather than more secure as the Constitution requires.

In question are the roles and powers of traditional leaders in relation to a fundamental livelihood resource, land, and the degree of democratic accountability of institutions that administer land. Gender equality is another core issue. Court papers argue that the CLRA reinforces patriarchal power relations and fails to secure women's rights to land.

Addressing apartheid's legacy of dispossession and legal insecurity is key to giving our democracy real substance. Government's land reform programme includes restitution of land dispossessed after 1913; redistribution of productive farming land; and tenure reform which means protecting the land tenure rights of farmworkers, labour tenants and residents of communal areas. While restitution and redistribution are mired in problems, tenure reform suffers from almost complete neglect. Recent survey evidence indicates that almost a million people have been evicted from farms since 1994, which is more than the total number who have benefited from land reform.

Even more people are affected by the failure to secure land rights in the 'communal areas' of South Africa. According to government about 21 million people qualify for such rights in the rural and peri-urban areas of the former Bantustans. It took government ten years to pass the CLRA, a law required by section 25(6) of the Bill of Rights, and two years later, implementation has not begun.

The rural communities who are challenging the CLRA are Kalkfontein and Dixie (in Mpumulanga), Makuleke (Limpopo) and Makgobistad (North West). They are represented by the Legal Resources Centre and by attorneys Webber Wentzel Bowens. The communities argue that their challenge is a class action, since the problems they anticipate from implementation of the CLRA will affect many other communities.

WHY DO WE NEED TENURE REFORM?

The legacy of past policies on land in black rural areas is the 'second-class' status of land rights in law. People have few protections from decisions by those wielding authority over land allocation or land use. Underlying historical rights of occupation have never been adequately recognised by the state, and are still barely acknowledged by provincial departments and local government authorities. Closely linked to the weak legal status of black land rights is the overcrowding and forced overlapping of rights that followed conquest, forced removals and evictions.

In the past many people lost fields or residential sites to homeland 'development' schemes without receiving compensation. Currently, people are vulnerable to unilateral mining and tourism deals entered into by traditional leaders. Overcrowding and overlapping rights contribute to chronic disputes. Lack of clarity on land rights is holding up infrastructure and service provision in rural areas, and there are tensions between local government bodies and traditional authorities over the allocation of land for development

projects such as housing, irrigation schemes, business centres, and tourist infrastructure.

Tenure insecurity is increased by the near-collapse of land administration systems. Permits to occupy land, known as PTOs, are not issued in some areas, while in others the procedures followed are ad hoc and unclear and registers are not kept up to date. Women are particularly vulnerable because the apartheid-era permit system was restricted to male household heads. Single mothers struggle to access land, and many women are evicted from their homes when widowed or divorced.

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WHAT DOES THE CLRA SAY?

The CLRA applies to state land in the former 'homeland', as well as land acquired by and for a community through processes of land reform and currently registered in the name of a Communal Property Association. The Minister of Land Affairs can transfer title of such land from the state to 'communities', who will own the land legally governed by community rules that must be registered with the Department of Land Affairs. Communities must establish land administration committees, which must then allocate land rights, maintain registers and record transactions, assist in dispute resolution, and liaise with local government bodies.

Where they exist, traditional councils, established under the Traditional Leaders Governance Framework Act (TLGFA) of 2003 and provincial legislation, will exercise the powers and functions of land administration committees. The CLRA states that, "If a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council". Some interpret this to mean that people can decide for themselves which body will administer their land. However, the word 'may' appears to enable a traditional council to exercise the powers of a land administration committee, rather than creating a choice for rights holders. No other provision of the Act allows for such a choice.

'Community' is defined in the CLRA as "a group of people whose rights to land are derived from shared rules determining access to land held in common by such group". Senior government officials have stated that they view the population of areas under the jurisdiction of tribal authorities as such 'communities', and this interpretation is consistent with the provision that traditional councils established under the TLGFA will become land administration committees.

Before a transfer of land to a 'community' can take place the minister must institute a land rights enquiry. An official or consultant is appointed to investigate the nature and extent of existing rights and interests in land, including competing and conflicting rights, and options for securing such rights. After receiving a report, the minister determines the location and extent of the land to be transferred, whether or not the whole of an area or some portion of it should be transferred to the 'community', with an option of subdividing a part of the land and transferring it to individuals, and whether or not a portion should be reserved for the state.

The minister must also make a determination on whether or not old order rights, land rights derived from past laws and practices including customary law and usage, should be confirmed and converted into new order rights, and must determine the nature and extent of such rights. Community rules must be drawn up to regulate the administration and use of communal land. The Act does not specify the process whereby such rules are to be drawn up and agreed, nor its timing.

The CLRA contains a general provision that women are entitled to the same tenure rights as men, and no laws, rules or practices may discriminate on the grounds of gender. New order rights are to be held jointly by all spouses in a marriage.

WHY CHALLENGE THE CLRA?

In Kalkfontein people from diverse ethnic groups bought land in 1922 and farmed it peacefully until the Nationalist government incorporated it into KwaNdebele. A tribal authority was imposed and the chief treated the land as his private property. He brought in outsiders and sold stands and natural resources. The community obtained a court order requiring the tribal authority to stop interfering with their property rights and declaring that the community is entitled to ownership, but transfer of the title has not yet occurred. The Kalkfontein community is concerned that the CLRA entrenches the power of the disputed tribal authority over their land.

The Makuleke community were brutally removed from their land in the 1960s when it was incorporated into the Kruger Park. After a long battle they won restitution, on the basis that their land would remain in the Park but ownership would be transferred to their Communal Property Association. During the forced removal they were placed under the Mhinga Tribal Authority. They assert that they are, and always have been, a separate community with their own traditional leader. Recent problems include a headman under Chief Mhinga 'selling' allocations of Makuleke land to outsiders. The community is concerned that the CLRA entrenches and expands the power of the Mhinga Tribal Authority over their land.

In Makgobistad people do not dispute the legitimacy of the tribal authority or its boundaries, but argue that it does not have the right to make unilateral decisions that deprive families of the fields that they have inherited over generations. In Dixie, which borders on the Kruger Park, the tribal authority entered into an agreement with a tourism operator without consulting the community. Community leaders managed to reverse the agreement, but not before people had been harassed and detained. They fear that the CLRA gives the tribal authority, reconstituted as a traditional council, the legal authority to act unilaterally and undermine the decentralised control over land that currently exists.

Common to these communities is a concern that the CLRA confirms disputed tribal authority boundaries and undermines indigenous accountability mechanisms, compromising the ability of communities to exercise control over their land and resources.

LEGAL GROUNDS FOR CHALLENGE

Court papers challenge the CLRA on several additional grounds. These include its failure to provide equality to women, the land rights of single women, for example, remain insecure. Also the CLRA includes racially discriminatory features as it consolidates apartheid-era institutions imposed only on black South Africans, and further it undermines decision-making powers over land by social units other than very large 'communities'. Court papers argue that incorrect parliamentary procedures were followed when approving the draft law, and that the powers given to land administration committees make them a fourth tier of government.

Legal processes are slow and cumbersome and it may take years before the outcome of the challenge is known. In the meantime communities are likely to make their feelings about the Act known in other ways. For example, land activists and community members affiliated to the Alliance of Land and Agrarian Reform Movements (ALARM) are planning to burn copies of the CLRA on National Women's Day.

At stake are some of the fundamentals of South Africa's new democracy. As Christina Murray in her book *South Africa's troubled royalty: traditional leaders after democracy* points out, "It may be possible to marry the idealised notions of an older, different democratic order eulogised as an intrinsic part of an original, untainted, form of pre-colonial traditional leadership with the requirements of a modern, democratic state. But such an amalgamation should not be the product of either short-term horse trading or transparently sectional interests for whom tradition is little more than a shield from the demands of democratic accountability. We must guard against the possibility that a new order revelling in its emancipation from (neo) colonial rule will abrogate its responsibility to its citizens in the name of a new Africanisation. The danger is that settlement with the lobby of traditional leaders will be a smokescreen for the failure to implement democracy where it really matters: at grassroots, in the material conditions of the ordinary existence of women and men."

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