



Land, Law and Traditional Leadership in South Africa



More than two decades after the end of apartheid, land remains an emotive fault line in South Africa. Many in rural communities have lost patience with the paternalistic approach of traditional leaders, commercial farmers and mining corporations. The African National Congress (ANC) has assiduously courted the interests of these groups at the expense of the rural poor. By over-promising and under-delivering on land reform, the ANC has provided fuel to militant activists, who are calling for the expropriation of land without compensation.

In April 2016, ARI was invited to attend a symposium on land, law and traditional leadership that the Nelson Mandela Foundation (NMF) and Council for the Advancement of the South African Constitution (CASAC) hosted. On the 103rd anniversary of the Natives Land Act, which precipitated widespread dispossession and forced relocation of black South Africans, this Briefing Note summarises the provocation papers discussed at the symposium and sets out recommendations for a bold new approach to land reform.¹

Section 25 of South Africa's constitution, which deals with the land question, was the last to be agreed by negotiators. It defines land reform as being in the "public interest", albeit in a context where existing property rights are respected. Tension between individual freedom to hold property and the imperative to address historical injustices persists. While recognising that indigenous populations were driven off the land, redress for past wrongs has to be balanced with the need to provide security of tenure, maintain food security, promote economic growth and foster national reconciliation.

Some 8 million hectares of formerly white-owned land has been transferred to black South Africans through land reform.² The state has purchased farms put up for sale *ad hoc*, on a "willing buyer, willing seller" (WBWS) basis at market value. However, little has been done to match demand with supply or devise a purchase programme with the potential to transform the agrarian economy and rural livelihoods.

The WBWS approach is more conservative than the constitution requires. The basic law empowers the state to take "reasonable measures" to foster "access to land on an equitable basis". It provides for expropriation with compensation. The Constitutional Court has ruled that there are no consistent means of determining the amount of compensation, leaving the door open to negotiated settlements.³ In May 2016, however, parliament passed the **Expropriation Bill**, which, if enacted, would establish the office of valuer-general and provide scope for the government to determine "just and equitable" compensation for compulsory purchases of land, subject to court appeal. The legislation could expedite the acquisition and redistribution of land that is subject to historical claims.

Land redistribution: tinkering at the edges

If expropriation is pursued, a major challenge will be to prevent the enrichment of the politically connected at the expense of the rural poor. Under the **Proactive Land**

Acquisition Strategy (PLAS), which began in 2006, the state purchased farms and leased them to applicants for 3-5 year terms, during which their productivity was monitored. The beneficiaries were for the most part not from the "rural masses", undermining the purpose and potential of land reform.⁵ In 2010, a minister at the Department of Rural Development and Land Reform (DRDLR) claimed that 90% of redistributed farms were no longer productive, although researchers have contested this pessimistic assessment.⁶

In 2013, President Jacob Zuma applied a **State Land Lease and Disposal Policy** to farms leased under PLAS. This provided medium- and large-scale farmers with 30-year leases, renewable for a further 20 years, after which they would have the option to purchase the property. Small-scale farmers and households with limited access to land were overlooked. The apparent bias in favour of a relatively small elite was further replicated in the **Recapitalisation and Development Policy Programme** (Recap) in 2014, with its insistence on land reform beneficiaries having business plans and mentors from the private sector. Aspirant black commercial farmers have taken government grants and bank loans, and hired consultants, but done little to alter the structural imbalance in the agrarian economy.

The concentration of agricultural production in a small number of commercial farms remains by and large unchallenged. Over the past two decades, such enterprises have become integrated into the global economy, increasingly specialised and much less labour intensive. In addition to its drastic reduction of formal jobs, the large-scale farm model has failed to boost non-farm livelihood opportunities. At the other end of the scale, some 200,000 small-scale black farmers who supply informal markets, often via *bakkie*⁷ traders, have been neglected. Redistributing land from the former to the latter could promote agrarian transformation, especially if coupled with reform of water provision. This has been ignored, despite irrigation being a critical factor in agricultural productivity, and access to water being a constitutional right and a focus of the National

Development Plan.

The emphasis in land reform on large-scale farms and racial inequality has been at the expense of satisfactorily addressing underlying grievances or the root causes of rural poverty. Issues of class and gender have been overlooked. The emergence of a new party, the Economic Freedom Fighters, led by former ANC Youth League president, Julius Malema, prompted the ANC to adopt a more radical position on land ahead of the 2014 elections. A “50/50” policy⁸ proposed that those holding title to commercial farms would retain 50% ownership while ceding the balance to workers, with shareholdings determined by length of service, starting at 10 years. This followed a moratorium on farm equity share schemes based on an inquiry by the DRDLR into their effectiveness. Perversely, such a model creates an incentive for farm owners to lay off workers before they reach milestones to qualify for a shareholding. It provides landowners with a windfall of public funds and does nothing to protect farm dwellers from eviction.

Tenure insecurity

Land tenure, or the legal right of ownership, has yet to be meaningfully reformed. There is a misguided sense that private property rights remain the “gold standard”; anything else is perceived as a second-tier category of ownership. Yet around 60% of South Africans hold rights to land and property outside of the formal system. The 50/50 policy would not provide title documents to the estimated 2 million labour tenants on commercial farms.

Approximately 5 million South Africans have been awarded Reconstruction and Development Programme (RDP) social housing without title deeds, while some 1.5 million possess inaccurate deeds to an RDP property. Siyabulela Manona, a director at Umhlaba Consulting Group, told ARI that some South Africans decided to accept RDP houses because that was what was on offer, even though it was not what they wanted.

“In Mqanduli, Eastern Cape, I spotted hundreds of RDP houses without curtains,” says Manona. “On further inquiry, I was informed that the houses have been left empty because the majority of beneficiaries had migrated to cities in search of work. Those who remained used the homes as goat sheds.” Without title deeds, beneficiaries of RDP houses are unable to sell the property. Many reside in city slums, unable to access housing grants because government records list them as owning an RDP property in their home district.

An estimated 3.3 million South Africans live in informal settlements without any formal proof of land rights, while a further 1.9 million inhabit backyard shacks in similarly precarious locations. Every year, parliament must renew the **Interim Protection of Informal Land Rights Act** of 1996 to secure the rights of about 17 million citizens residing on communal land.

Many groups that were forcibly relocated to the Bantustans – or so-called black “homelands” – during the apartheid era have established Communal Property Associations (CPAs) to hold restored or redistributed land.⁹ Yet, in some locations traditional leaders have opposed such arrangements, sensing a challenge to what they perceive as their own rights to the land. On the platinum belt in North West province, for example, the Bakgatla-ba-Kgafela community had to litigate against

their chief to preserve their rights to administer restored land under a CPA.

Courting the chiefs

For seven decades the ANC objected to the institution of chieftaincy, promising its abolition when it took power. In 1988, however, the party’s position changed when it aligned with the newly established Congress of Traditional Leaders of South Africa, spying an opportunity to extend its support in rural areas. During its first decade in government, the ANC entertained demands from traditional leaders to become a fourth tier of government alongside national, provincial and municipal authorities.

In 2000, Zuma, then deputy president, promised to amend Chapter 7 of the constitution, which deals with local government, to reinstate certain historical powers and functions of traditional leaders. Although this never occurred, a 2015 ANC party paper presents traditional leaders as “a key driver of development in rural communities” and adds that their “closeness to the people’ is typically regarded as one of the key advantages of the institution.”¹⁰ These are attributes more usually associated with local government.

In rural South Africa, municipal government is responsible for service delivery but traditional leaders continue to play an important role, for example in conflict resolution. The legitimacy of contemporary traditional leadership is hotly debated. At the NMF-CASAC symposium, Jackie Dugard, associate professor at the University of the Witwatersrand, questioned whether South Africans realise that “traditional leadership, as it is today, was consolidated by colonial power and the apartheid regime”.

Such power struggles are in part the legacy of a deal the ANC struck with chiefs ahead of the 2004 general election. In what was widely interpreted as vote-buying, parliament passed the **Traditional Leadership and Governance Framework Act** (TLGFA) in November 2003, and the **Communal Land Rights Act** (CLaRA) in February 2004. Traditional leaders in KwaZulu-Natal shifted their support from the Inkatha Freedom Party (IFP) to the ANC, enabling the ANC to win elections in the province for the first time. This came at a cost to genuine land reform, entrenching rather than dismantling apartheid-era divisions over land rights and ownership.

Echoes of apartheid

Controversially, the TLGFA reinstated, in the guise of traditional councils, the tribal authorities created under the 1951 Bantu Authorities Act, and provided scope for them to administer land. CLaRA proposed to transfer land and title deeds within areas defined by the 1951 legislation from the state to traditional councils led by chiefs. Individuals and families were to have tenure rights under customary law downgraded to “institutional use rights” to communal land. This would in effect have made rural citizens subjects of the chiefs – as they were in the Bantustans during apartheid.

As a potential “land grab”, CLaRA attracted widespread opposition. Four groups that the Act would have deprived of formal land rights brought a case challenging the legislation. Two appellants had purchased land and two had been awarded land through restitution before finding it subsumed within an area subject to the jurisdiction of a chief.¹¹ In 2010, CLaRA was ruled unconstitutional, albeit

on a technicality: South Africa's provinces had not been properly consulted about the legislation.

In 2014, a **Communal Land Tenure Policy** (CLTP) was prepared to address ongoing land tenure insecurity in the former Bantustans. The policy largely echoes CLaRA. Rather than legally securing land rights based on custom, or allowing land to be vested in CPAs, with their ostensibly democratic structures,¹² it proposed handing authority over land administration to traditional councils, which would be provided with legal title and award institutional use rights to individuals and families.

Under the CLTP, traditional councils would also become responsible for overseeing local investment and development, as well as natural resources on communal land. The implicit bargain was that chiefs would benefit from greater authority over local mining, infrastructure, and forestry projects in return for delivering rural votes for the ANC by wielding, if necessary, their discretionary power over land distribution in their communities.¹³ This clientelist approach to governing was reminiscent of that adopted by the National Party in the Bantustans.

Opportunities for enrichment

The government continues to connect land issues with the electoral cycle rather than seeking to resolve an issue that has the potential to be politically destabilising. Despite the fact that in August 2013 more than 20,000 land restitution claims were "settled" but not yet finalised or implemented, and about half of the land already acquired for restitution was still to be transferred to its intended beneficiaries, less than six weeks before the April 2014 general election the ANC re-opened the window for lodging new claims. The window had been closed on 31 December 1998.

The **Restitution of Land Rights Amendment Act** (RLRAA), which the National Council of Provinces passed on 27 March 2014, allows for claims until 30 June 2019. A month before its enactment, speaking at the opening of the National House of Traditional Leaders, Zuma told the chiefs to "find good lawyers" and "to look at the claims on behalf of your people".¹⁴ The decision to allow new claims that are likely to be settled with cash compensation or provide opportunities for traditional leaders belies a greater interest in "vote-catching and political theatre [than] meaningful rural change."¹⁵

King Goodwill Zwelithini is the most prominent leader to announce his intention to lodge a claim under the RLRAA. In his case, it may possibly be for the entire province of KwaZulu-Natal, including the city of Durban, and parts of neighbouring provinces. The king already administers one-third of the land in KwaZulu-Natal – some 2.8 million hectares – through the Ingonyama Trust, of which he is the sole trustee. Legislation stipulates that the trust must administer land "for the benefit, material welfare and social well-being" of local communities. However, it has tended to impose leases on those who have customary rights to the land – usually a weaker form of tenure that forces people to pay rent for land they in effect "own". In June 2016, King Zwelithini announced plans for those residing on Ingonyama Trust land to be awarded title deeds. Judge Jerome Ngwenya, chairman of the trust board, subsequently clarified that the task would take many years to conclude, and would require funds from central government to cover the cost of surveys and land audits.

The Ingonyama Trust has been criticised for authorising

mining activities without popular consultation. One well-known example is in Makhasaneni, near Melmout in northern KwaZulu-Natal, where the local chief granted permission for prospecting to the Indian mining company, Jindal, and its local partner, Sungu Sungu, without the written consent of the community.¹⁶ The people confronted the chief, Thandazani Zulu, following the destruction of crops, death of livestock from poisoned water and damage to ancient family graves. Their leader apologised to the community for not consulting them, but insisted that Jindal be allowed to continue prospecting. The chief's brothers, employees of Jindal, have subsequently been accused of intimidating local activists.

This type of confrontation is not unique to KwaZulu-Natal. In Eastern Cape, Xolobeni, part of the Transkei homeland during apartheid, is now under the Amadiba Tribal Authority. Here, rural activists have opposed attempts by Australian company Mineral Commodities Limited and its local partner – in which the chief has an interest – to develop a titanium mine. In March 2016 Sikhosiphi 'Bazooka' Rhadebe, chairman of the Amadiba Crisis Community, was shot dead outside his home.

There is a growing feeling in South Africa that customary land rights are only respected in the absence of lucrative business opportunities. When presented with a choice between personal profit and rural livelihoods, some traditional leaders evidently opt for the former. By advancing the authority of traditional leaders at the expense of ordinary rural landholders, the proposed CLTP would only exacerbate the risk of chiefs ignoring the interests of citizens.

Aninka Claassens, a former adviser to the minister of land affairs now at the University of Cape Town, argues that "current policies are entrenching [the] legacy of exclusion, by bolstering the power of a small elite at the expense of the majority of rural South Africans."¹⁷ This may help the ANC to secure votes, but in doing so the government is neglecting its constitutional obligation to address land tenure insecurity caused by apartheid discrimination.¹⁸

Inkosi yinkosi ngabantu – "A chief is a chief by the people"¹⁹

Parliament is currently deliberating the **Traditional and Khoi-San Leadership Bill** (TKLB), which is intended to replace the TLGFA. The TKLB would empower Khoi-San leaders to administer the affairs of their people, wherever they are. As with the TLGFA, it would give chiefs jurisdiction over defined geographical areas, thus entrenching Bantustan-era boundaries and policies rather than reflecting customary practices. It provides no safeguards for land tenure and instead risks locking rural citizens into the tribal structures established under the 1951 Black Authorities Act. The TKLB exhibits many of the same shortcomings and potential to stir controversy as CLaRA, which the Constitutional Court struck down in 2010.

In what looks to many like further electioneering, the ANC appears intent on again trying to push the **Traditional Courts Bill** (TCB) through parliament, despite failed attempts in 2008 and 2012-13. The TCB would enable traditional courts to withdraw land rights from rural citizens without respecting existing accountability mechanisms such as the need for a *pitso* (community meeting). Widows would become particularly vulnerable to expulsion from land, because the legislation would maintain current patriarchal practices that restrict women from representing

themselves in traditional courts.

According to Mbongiseni Buthelezi from the Public Affairs Research Institute, the TCB would establish “a segregated legal system, subjecting rural citizens to traditional leaders who, in many cases, were complicit in forced removals in order to gain power.”²⁰ On 19 April, Justice and Correctional Services Minister Michael Masutha announced that a re-drafted version of the TCB could be introduced in parliament in June ahead of elections on 3 August 2016. While it may be politically expedient for the ANC to rule by proxy in the former Bantustans and in Khoi-San communities across Northern Cape, the TKLB and TCB would only undermine structural land reform and agrarian development. If the ANC wants to address rural poverty rather than use land to its political advantage, it needs a new approach.

A way forward

Land reform has failed to address the structural realities of rural poverty, and economic and gender inequality in South Africa. A Bantustan-era approach to rural “development” has been employed that has not brought about the radical agrarian transformation required. At the NMF-CASAC symposium, Prof. Ben Cousins, chair in Poverty, Land and Agrarian Studies at the University of the Western Cape, made the following policy provocations:

1. Support smallholders

It is estimated that the top 20% of commercial farms – around 7,000 highly capitalised operations – account for 80% of South Africa’s total agricultural production by value. The land belonging to the remaining 80% of commercial farmers could be expropriated and redistributed to 200,000 market-oriented smallholder farmers. They already produce crops and livestock for sale, and have scope to expand in peri-urban areas by supplying informal food markets. The top producers should be left undisturbed for two decades to avoid putting urban food security and agricultural exports at risk. Large farms could be subdivided, where feasible.

2. Invest in the future

Changing section 25 of the constitution is unnecessary when the law already provides for expropriation with compensation. The state could achieve more “bang for its buck” if a formula for “just and equitable compensation” was agreed on that brought the price of land down to 15–20% below market value. The ANC’s proposal for a valuer-general might be a step in this direction. If the government were to allocate greater financial resources to land reform, increasing the sum by a factor of five – from 0.4% to 2% of the national budget – it could finally resolve the emotive and potentially destabilising “Land Question”. The increase in financial resources would need to be accompanied by additional investment in bureaucratic competence, additional extension staff, revising institutional structures and procedures, and improved systems for data collection and analysis.

3. End rather than extend

The majority of land restitution claims should be settled through cash compensation. The process has consumed a disproportionate amount of state capacity while yielding few sustainable benefits. The vast majority of claimants have no interest in returning to rural land, nor the skills to tend to the plots taken from them. A pragmatic approach would be to seek closure by paying compensation through standard settlement offers, as has been the practice for most urban land claims. In instances where claimants genuinely want to farm, restoration of some of the land could be considered. The decision to extend the period for lodging land claims until 2019 should be abandoned rather than further raising expectations on a sensitive issue.

4. Leave rural development to local government

The Comprehensive Rural Development Programme that the Cabinet adopted in 2009 has proved to be an expensive and ineffective distraction. Municipal governments should be responsible for the co-ordination of developmental investment in rural areas. Strengthening the capacity of local authorities would yield greater returns than the current restrictive Bantustan-era approach to rural “development”. Pilot projects to test what works in a given context should be encouraged and the results shared widely. In communal areas, efforts to enhance household food security should be the main focus of support and aimed at women in particular.

5. Secure informal land rights

Private ownership through individual titles remains too costly for most citizens. They could gain secure property rights through social tenures²¹ – a continuum of land rights afforded to individuals or groups, but which transcend individual ownership of parcels of surveyed land – provided these were properly recognised and supported. This would require a step change from the cadastral system to an approach that adopted lower levels of precision in surveying plots of land; flexible social and territorial boundaries; means for registering co-ownership by family members; changes to township development procedures; new systems for the collection of rates; and the retraining of lawyers, surveyors and planners. New sets of skills would have to be developed to support the processual dimensions of land holding: facilitation, mediation, dispute resolution and oversight of governance.

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SOURCES

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