Legislating traditional leadership:

A backlash against rural rights

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The South African Land Acts of 1913 and 1936 were used to cement the highly unequal and unstable outcome of prior black dispossession. Now a ruling elite has again reached for the law to bolster its contested authority and to monopolise land and other resources.

The confirmation of their rights to equality and democracy in the 1996 Constitution gave rural people room to take a range of initiatives to improve their lives. Development committees sprang up alongside traditional councils, rural people lodged restitution claims and women began to demand that residential sites be allocated to them on an equal basis with men.

The Congress of Traditional Leaders of South Africa (CONTRALESA) and the Inkatha Freedom Party put up a concerted opposition to these developments during the constitutional negotiations. They argued that the right to equality, more particularly gender equality, must be subject to customary law. Though their challenges to the final Constitution failed, traditional leadership laws introduced since 2003 constitute a backlash against the innovative versions of custom and alternative forms of authority that have evolved under the new Constitution.

BANTUSTAN RESTITUTION

These laws envisage a totally separate realm of customary law that is restricted to the boundaries of the former Bantustans and is coterminous with chiefly authority over both land and people. They reiterate the colonial premise that rural African people have never had, and still are not entitled to, property rights in respect of the land they have occupied and used for generations. Instead, they reserve ownership to "traditional councils", condemning most people to a system of state leasehold that is essentially the same as the "trust tenure" imposed by the South African Development Trust in terms of the 1936 Land Act. Related to the flawed assumption that long-term land rights inherited over generations do not constitute property rights is the misconception that decision-making authority and control within indigenous systems of land rights is centralised in the person of traditional leaders.

A Traditional Courts Bill was proposed in 2008 (see below). If passed into law, it would have:

- empowered traditional leaders to order community members to perform forced labour (clause (c))
- made it a criminal offence to fail to appear before a traditional leader once summoned (clause (c))

- allowed traditional leaders to strip those before them of customary entitlements, such as land rights and community membership (clause 10(2)(i))
- effectively enabled traditional leaders to determine unilaterally the content of customary law throughout the former homelands (clause 11(2) *(c)*, together with clauses 8, 9, 10 and 11).

The difference between the current and historical assaults on land rights is that the legal basis of discrimination is no longer race, but the very Bantustan boundaries that are the legacy of those Land Acts. The similarity is that recourse to an alleged "timeless custom" is used to disguise the ways in which resources and power are being concentrated in the hands of a small elite at the expense of the poorest South Africans. At the heart of the current contestation are questions concerning the nature and content of customary law, who makes it, and how it is ascertained. These in turn relate to fundamental issues concerning property and identity. In particular dispute is the scope of chiefly power relative to indigenous land entitlements vesting in families and individuals.

Promoters of the current Traditional Leadership and Governance Framework Act of 2003 (the Framework Act), the struck-down Communal Land Rights Act (CLRA) of 2004, and the stalled Traditional Courts Bill justified them as giving effect to customary law as required by section 211 of the Constitution. However, parliament's interpretation of custom, as represented by the new laws, stands in stark contrast to the Constitutional Court's rejection of the concept of "official" customary law on the basis that it embodies past distortions and discrimination.

The ConCourt has instead made use of "living customary law" jurisprudence:

- to strike down discriminatory codified customary law, in the Bhe judgement of 2003
- to recognise indigenous land rights as constituting ownership, in the Alexkor ruling of 2003
- to support the development of versions of customary law that give effect to the right to equality, in the Shilubana case decided in 2008.

These judgements stress the importance of protecting the vulnerable and redressing injustices of the past.

In contrast, the new legislation reiterates colonial and apartheid notions of unilateral chiefly power within re-imposed tribal boundaries, and reaffirms the colonial myth that indigenous land systems do not entail property rights. The very people who bore the brunt of the Land Acts are again subjected to the imposition of tribal identities that undermine their right to equal citizenship and constrain their capacity to enforce and protect their property rights.

Soon after 1994, the South African Law Reform Commission was tasked with identifying discriminatory laws that required repeal or amendment because they were inconsistent with the Constitution. The repeal of laws such as the Native Administration Act of 1927 and the Bantu Authorities Act of 1951 provoked strong chiefly opposition. Traditional leaders argued that their role was being usurped by elected local government councillors, and that they needed countervailing laws to reassert the status they had previously enjoyed.

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Another early flashpoint concerned the Restitution of Land Rights Act, which was passed with a standing ovation by the new parliament in 1994, and allowed for the transfer of land to elected institutions that represented those who had been forcibly removed, or their descendants. Complementary legislation – the Communal Property Associations (CPA) Act of 1996 – enabled those who had lost land historically (or their descendants) to constitute themselves as land-holding legal associations (CPAs) so that title to the land could be transferred to them. This drew vehement objections from traditional leaders, who oppose independent ownership of land within tribal boundaries. CONTRALESA's influence as a lobby group was bolstered by the high number of traditional leaders who are also ANC members of parliament. The establishment of the National House of Traditional Leaders on 18 April 1997, and the provincial houses thereafter, added further weight.

TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT

The department of justice and constitutional development's 1999 Status Quo Report on Traditional

Leaders and the department of provincial and local government's 2003 White Paper on Traditional Leadership and Governance anticipated key features of various laws on traditional leadership that followed: the Framework Act in 2003 and then the CLRA in 2004. During 2005, eight provincial traditional leadership laws were enacted under the Framework Act.

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The Framework Act, with its "transitional arrangements" (in section 28), has been the pivotal law in all this. These deemed existing tribal authorities to be "traditional councils", provided that they complied with new composition requirements: namely that 40 percent of the members of a traditional council must be elected and at least one-third of the members must be women. Ten years later, traditional council elections have never been held in Limpopo, and have been seriously flawed in other provinces. In many areas, the participation of women in traditional councils is still less than one-third – in some areas, there are none at all. This has compromised the legal validity of the conversion of apartheid-era "tribal authority" boundaries and institutions into post-apartheid "traditional councils". In effect, government paid so little attention to the "reform" components of the new laws that these have compromised the current legal status of traditional councils.

The Framework Act does not itself provide traditional leaders with much statutory power, but it opens the door to far-reaching powers by specifying (in section 20) that national or provincial governments may enact laws providing a role for traditional councils or traditional leaders on a wide range of issues, including land administration, welfare, the administration of justice, safety and security, economic development and the management of natural resources. It is thus other laws – such as the CLRA and the TCB – that have attempted to provide traditional leaders with substantive powers.

The CLRA built on the Framework Act by establishing traditional councils as land administration committees with far-reaching powers to represent "the community" as the "owner" of communal land, and to allocate and administer all land within their jurisdictional boundaries. This had very serious consequences for the many historically independent groups who had been forcibly subsumed into tribal authority boundaries under the Bantu Authorities Act. The CLRA effectively buttressed disputed chiefly power over these groups, including those with title deeds to their land. The Act also enabled the then minister of land affairs to transfer the title deeds of land held by CPAs and trusts to larger all-encompassing "traditional communities", regardless of opposition to such imposed identities.

In addition, the CLRA centralised land administration power in the hands of senior traditional leaders in a way that undermined internal decision-making processes at family and village levels. It enabled chiefs to override land rights held and controlled by families and to sidestep local participatory decision-making processes. One of the applicant groups in the case that challenged the validity of the CLRA disputed their chief's right to confiscate agricultural fields that families had inherited over generations. The traditional leader concerned, backed by the then department of provincial and local government, defended his actions on the basis that "inheritance" is a misnomer in the context of customary law – insisting, instead, that all land reverts to traditional leaders for reallocation on the death of the holder.

The Constitutional Court struck down the CLRA in 2010 on the basis that the legislative process followed in enacting it had been foreshortened and inadequate. However, major tensions continue to bedevil the interface between land restitution and chiefly power. These tensions are inevitable, given that restitution seeks to undo the impact of forced removals, whilst the new laws entrench and protect the very Bantustan boundaries and tribal jurisdictions that are their outcome. Moreover, restitution awards provide beneficiaries with a measure of independence by conferring ownership rights on them. Chiefs, however, insist that customary law forbids independent ownership rights to land within "their" tribal boundaries.

The Traditional Courts Bill (TCB) was introduced in parliament in 2008 but ran into substantial opposition from civil society. It was reintroduced in

the same form in 2011. Because the subject matter of the Bill impacts directly on matters that fall under the jurisdiction of the provincial governments, the legislative process requires that it be debated and approved by the majority of provinces in the National Council of Provinces. In an unprecedented development, after public hearings at which rural residents had overwhelmingly rejected the Bill, the majority of provinces voted against it in October 2013. It was ultimately withdrawn from parliament during the heated build-up to the 2014 elections. Justice Minister Jeff Radebe and his deputy John Jeffrey insisted that the unchanged 2008 version of the bill would be re-tabled in the new parliament after the elections.

Now looming on the horizon is the Traditional Affairs Bill (TAB), which would replace the Framework Act and ostensibly elevate certain Khoi-San claimants to the paid hierarchy of government-appointed traditional leaders. The TAB is envisaged as a solution that will repeal the Framework Act and set the clock back to 1994, so that the controversial tribal authority boundaries established under the Bantu Authorities Act of 1951 will remain the default boundaries for the future.

POLICY REVERSALS

Despite the fact that that the CLRA was declared invalid and that efforts to enact the TCB since 2008 have not succeeded, the provincial laws passed in 2005 have already had a significant impact on power relations in rural areas. There has been a resurgence of demands for people to pay "tribal levies", with serious consequences for those who cannot, including being refused the proof-of-address letters that are required to apply for identity documents and social grants.

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The re-imposition of apartheid tribal boundaries is key to the coercive impact of the new laws. These boundaries lock 16.5 million people into

ascribed tribal identities and simultaneously attempt to exclude alternative institutions, such as CPAs, thereby pre-empting rural people's ability to constitute and organise themselves on any other basis than as tribal subjects. Apartheid laws similarly locked people into Bantustan boundaries, while simultaneously undermining their capacity to resist unaccountable forms of chiefly power.

There has also been a major policy reversal in respect of the land rights of ordinary people living on communal land. The 1997 White Paper on Land Policy had recognised established occupants as the "rightful owners" of communal land, notwithstanding the state's nominal ownership. The Interim Protection of Informal Land Rights Act (IPILRA) of 1996 provides that no one with *de facto* occupation, use and access rights to land can be deprived of those rights without their consent. Disposal of these land rights without consent requires compensation on a similar basis to expropriation. The cornerstone of the 2011 Green Paper on Land Reform and subsequent land policies is that "state and public land should remain under leasehold".

The new policies, by contrast, attempt to convert underlying rights and de facto occupation to conditional leasehold or "institutional use rights". The 2013 Communal Land Tenure Policy states that, if land is transacted, households will be compensated only for "land-related investments rather than the land itself". This flies in the face of IPILRA's guarantee that people be compensated for any loss of occupation, use or access rights to land. In similar vein, the State Land Lease and Disposal Policy, issued in June 2013, provides that tenure awards granted to labour tenants and farm occupiers should take the form of long-term leases conditional on the payment of a nominal rent. Yet the intention of previous laws was to recognise and secure the underlying rights of these categories of people, not to render them tenants in perpetuity.

The department of rural development and land reform (DRDLR)'s 2013 Rural Development Framework indicates that title deeds to the "outer boundaries" of communal land will ordinarily be transferred to traditional councils. Ordinary rural people are to obtain only "institutionalised use rights", subject to the overarching ownership of traditional councils. Allowing CPAs only beyond the boundaries of the Bantustans illustrates the DRDLR's ahistorical assumption that customary systems are coterminous with the former Bantustans and always under chiefly authority.

Even the apartheid government was forced to acknowledge that this was not the case – that there is a range of rural groups that jointly own "communal" land through arrangements that have customary elements but no chiefs. These include the land-buying syndicates that bought land before or through exemption from the Land Act of 1913, clans with a long tradition of elected leadership, people living on what were mission farms, as well as groups of former labour tenants who managed to retain a toe-hold on their ancestral land. Moreover, customary law has purchase far beyond the boundaries of the former Bantustans – many urban families ascribe to key elements of customary law which they use regularly in their daily lives.

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Another feature of current policy is that rural people are no longer considered to be rights-bearing citizens with the capacity to enforce and defend their land rights against the state and others. Instead, we have a model of development by government largesse – for instance, through state-issued mining permits and land leases for those who "qualify". Inherent in the largesse-based model is government retention of ownership and control of key natural resources, such as land and minerals. Land thereby becomes a resource that can be dispensed and reclaimed at will and a key means of exercising patronage.

The sting in the tail is found in the DRDLR's Recapitalisation and Development Policy, unveiled in July 2013. Previously, land reform grants were designed to provide targeted support to specific categories of land reform beneficiaries in fulfilment of constitutionally guaranteed rights. The restitution settlement grant, for example, covered the costs of people moving back and re-establishing themselves

on restored land. Under the Recapitalisation Policy, however, applicants must now show that they have a viable business plan and an external "strategic partner". The criteria are geared to assess potential productivity, rather than to fulfil rights.

This creates the opportunity and incentive for businesspeople and companies to acquire grant funding as "strategic partners" on the back of land reform. They are likely to be traditional leaders in many instances, but there is also room for other wealthy and politically connected individuals with black economic empowerment credentials to operate alongside. Instead of examining the structural biases against production and marketing in the former Bantustans, including the failure of extension services and the moribund state of the Land Bank financing system, the government has chosen to elevate "productivity" over rights.

CHALLENGE OF LEGITIMACY

Of all the powers the new laws promise traditional leaders, control over land is the jewel in the crown. People who have secure customary land rights or independent ownership of land cannot be threatened with the cancellation of their rights; they have the standing to challenge unilateral investment deals brokered by chiefs; and, in theory at least, they have the means to stop chiefs allocating sites for private profit. Recourse to draconian laws and the re-imposition of apartheid-era tribal boundaries indicate that the traditional leadership lobby is not confident that chiefs enjoy popular legitimacy throughout South Africa. If they did, they would be able to rely on consensual affiliation.

Opposition to the new laws in the former Bantustans does not, in general, reflect a rejection of custom per se. Instead, it challenges the version of unilateral chiefly power that the laws reinforce, as well as the systematic privileging of chiefly voices over those of ordinary people in both the legislative process and the content of the laws. At stake is who controls the land rights of the 16.5 million people living in the former homelands, and who will profit from investment deals involving key mineral resources and valuable tourism land.

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Dealing with the legacy of the 1913 and 1936 Land Acts requires going beyond land redistribution to confront the dual legacy of unequal citizenship in the former Bantustans and its impact on struggles over land and minerals. Instead the maintenance of the separate jurisdictions first put in place by the Land Act of 1913 remains pivotal to law and policy 100 years later. Now, as in the past, government is using law to re-impose disputed tribal boundaries and a segregated system of land rights for those living in the former Bantustans, insisting that "custom" can only mean unilateral chiefly authority over both land and people.

Redistribution is never only about quantifiable indicators: it requires tackling vested interests and confronting power, which requires close attention to structural patterns of poverty and exclusion and a commitment to reintegrate people living in the former Bantustans as equal citizens, on terms that acknowledge and redress their exclusion in the past. The new laws and policies, by contrast, seek to hide and entrench both past and current inequality under the cloak of "timeless custom".

As long as post-apartheid laws entrench the boundaries of the Bantustans and prop up autocratic versions of chiefly power, they pre-empt the land reform and democracy promised by the Constitution.