



COMMUNAL LAND TENURE POLICY

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Minister Gugile Nkwinti

PREAMBLE

The Freedom Charter (1955)

We, the People of South Africa, declare for all our country and the world to know:

- that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people;
- that our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality.

Ready to Govern: ANC policy guidelines for a democratic South Africa (1992)

Restoring land rights, land reform and redistribution. Our approach to land issues must be placed in the context of our overall developmental strategy addressing problems of poverty, malnutrition, landlessness and unemployment.

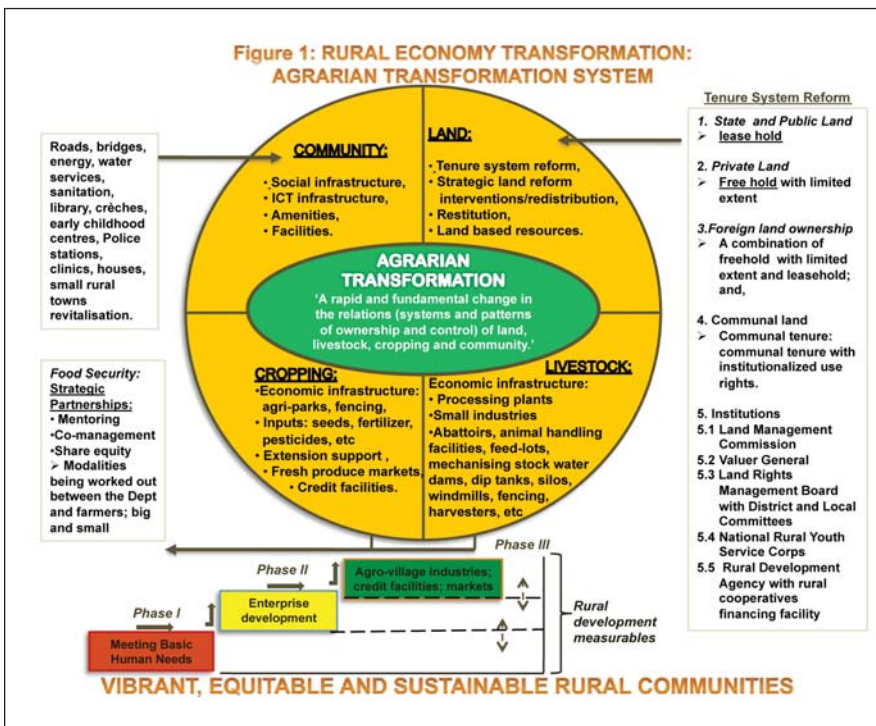
Our approach must ensure that the homeless and landless will have access to land, shelter and necessary services for family security.

The programme will include a policy

of affirmative action within a viable and sustainable economic development programme. The major beneficiaries of affirmative action should be the landless, rural poor and women who have been deprived of rights to land through patriarchal systems of land allocation and tenure.

Redistribution of land. The present pattern of land ownership which is the direct result of apartheid laws must be fundamentally changed to address landlessness and land hunger. The state >>

Figure 1: RURAL ECONOMY TRANSFORMATION: AGRARIAN TRANSFORMATION SYSTEM



will play a key role in the acquisition and allocation of land.

Access and rights to land. All South Africans are entitled to equitable access to land and shelter. In order to achieve the realisation of this entitlement, an equitable balance shall be established between the legitimate interests of the holders of rights to land, and the legitimate needs of those without land and shelter.

Preamble to the Constitution of the Republic of South Africa (1996)

We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and, Believe that South Africa belongs to all who live in it, united in our diversity.

We, therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

- Heal the divisions of the past and establish a society based on democratic

values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and, Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

THE PROBLEM STATEMENT

The general background to the evolution of land tenure in South Africa can be looked at in terms of following periods:

- a precursor period, from the initial Dutch East India Company settlement at the Cape, until the Great Trek in 1834
- the 19th century era of white usurpation, in which the future South Africa was shaped and the power structure determined
- 20th-century consolidation of white

- control on racial basis, until the early 1990s
- the beginning of segregation policy
- the apartheid era. (Carey Miller and Pope, 2000)

The aim of the Communal Land Tenure Policy is to reverse the legacy of colonialism and apartheid as set out in the problem statement; and, to ensure a “just and equitable” distribution of communal land among those who live in, and work, it. This includes offloading land from the 13 percent to the 87 percent.

POLICY MEASURES

With the advent of democracy in 1994, land in South Africa reverted to the ownership of all South Africans, in various forms – private, public, partnerships, trusts, and other forms of communal ownership.

With the dissolution of bantustans, their former land was transferred to national government with vestiges of patrimonial authority remaining in some parts of the country.

The 53rd National Conference of the governing party resolved on a single four-tier land tenure system:

- state and public land: leasehold
- private land: freehold with limited extent
- foreign land ownership: a combination of freehold with limited extent and leasehold
- communal land: communal tenure with institutionalised use rights.

Legislative measures

The Communal Land Tenure Bill, 2015. A Draft Bill has been developed to give effect to the provisions of this policy. This Bill provides, inter alia, for:

- the regulation of communal land
- the transfer of communal land to communities
- the registration of communal land
- land rights enquiries
- the acquisition of more land for use as communal land
- choice on the administration of communal land



- dispute resolution mechanisms
- the provision of municipal services on communal land.

INSTITUTIONAL MEASURES

Three critical substantive issues are proposed, insofar as institutions are concerned: (a) testing the will of the people *with respect to the kind of governance, tenure form and investment and development model they prefer*; (b) the socio-economic impact of such an institution on the lives of the people; and (c) inclusivity (gender, race, class, everybody who has some form of ownership or claim on the land).

The authority of the state

South Africa is a constitutional democracy and this is what defines our state. Therefore, the Constitution is the supreme law in our country. With the dawn of our constitutional democracy, communal land was vested in the national sphere of government, and it became the responsibility of post-independence administrations to address the multitude of challenges facing these areas, such as developing the productive capacity of recipients of transferred land and establishing the necessary institutional infrastructure to ensure sustainability of transformation efforts.

The governance structure

The establishment of a number of governance structures is proposed to achieve the objectives of strengthened tenure rights, democratic and accountable land governance, equitable land access, food security and inclusive development.

Key to this approach, an independent body must workshop with the people prior to making a decision in respect of the type of governance structure they prefer. Such a governance structure must be accountable to the people.

The investment and development structure

Another key institution, which people must put in place, should manage and control their investment, development and financing facility. Such a facility could be managed either by themselves alone or with a strategic partner of their own choice.

The investment and development structure will be separate from, yet accountable to, the relevant governance structure undertaking land administration in the area. This is intended to ensure adequate accountability, management and oversight in respect of integrated landholding and development within the respective communal areas.

All the above throws into sharp relief the question of institutional roles, role relationships and security of tenure for communal land occupants.

In this regard, the department of rural development and land reform (DRDLR) has developed two “Wagon Wheel” models, representing static land-use frameworks for both forms of communal land: Figure 2(a) envisages the existence of a royal household within the community, while 2(b) is without a royal household.

Each “Wagon Wheel” is complemented and enhanced by clearly delineated administrative and development institutions, each with a defined role and designated responsibilities as illustrated in the Rural Economy Transformation Model (RETM): Institutional Role and Role Relationship Model.

The household

As active citizens, households have rights and responsibilities. The basic role of households, as holders of comprehensive or limited real rights over land, is the following:

- basic unit of production and retailing
- manufacturers and consumers of goods and services
- rate payers
- voters.

The accountability system

The RETM creates a cycle of institutional accountability, which is illustrated in >>

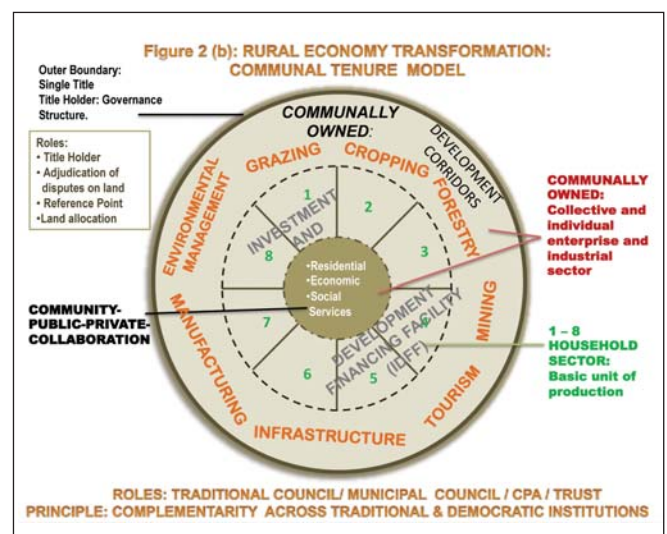
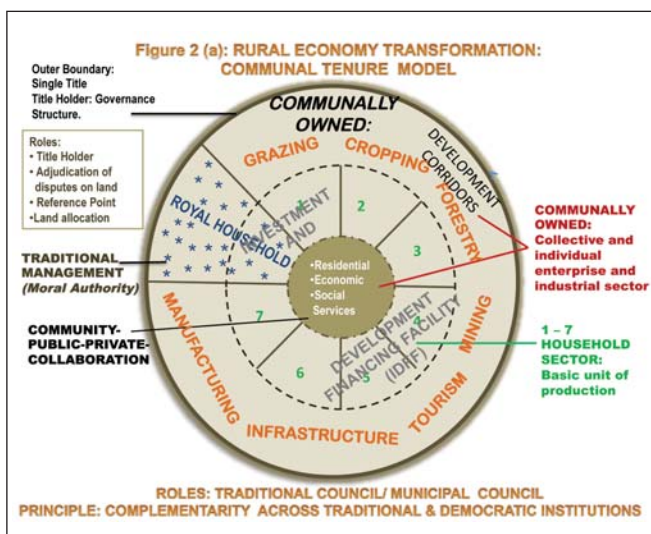


Figure 2(c):

- the governance structure is accountable to the state, in terms of the Constitution and the law
- it is accountable to the people, in terms of its own constitution, which must be based on relevant law
- the investment, development and financing facility, which must be established in terms of relevant law, is accountable to the governance structure, in terms of its own constitution.

Key elements of the accountability system include:

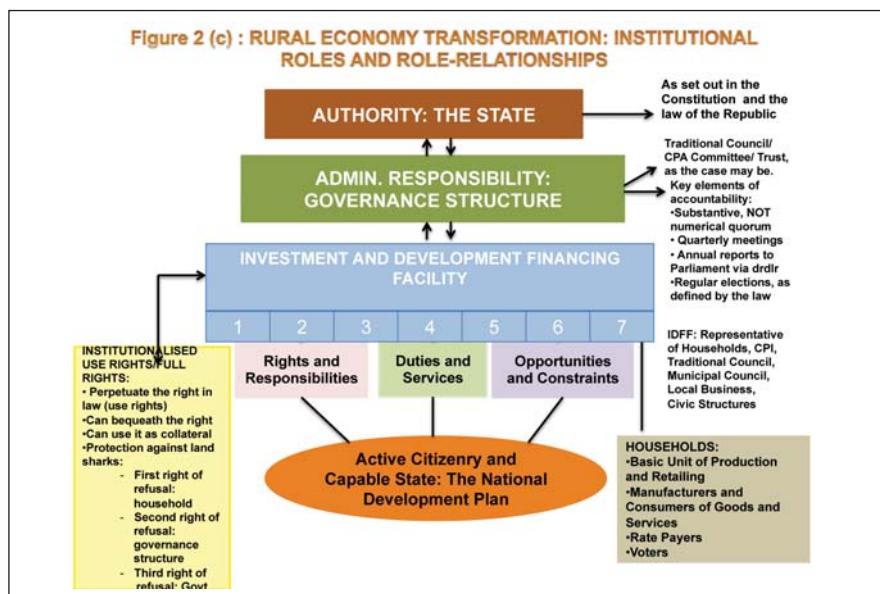
- quarterly community meetings
- the quorum at these meetings is substantive, NOT numerical – at least 60 percent of households with rights to the land in attendance
- quarterly reports to the DRDLR, which must, in turn submit annual reports to parliament
- regular elections, to be conducted in compliance with relevant law and its own constitution, which must itself be legally compliant.

A BRIEF OVERVIEW OF ROLES AND ROLE-RELATIONSHIPS

- The state’s authority is derived from the Constitution and the law.
- The governance structure’s authority is derived from the will of the people.
- The investment, development and financing facility (IDFF) is the creation of the people.
- It is strongly proposed that the royal household, as distinct from either tribal councils or traditional councils, should revert to its historical role of being a moral authority, which must be above politics.

The government, particularly the municipal sphere, will perform roles and responsibilities as mandated by the Constitution and other relevant legislation.

Local government is required to “give priority to the basic needs of the community, and to promote the



social and economic development of the community” through specific responsibilities that will include:

- duties and services to the community
- the creation of opportunities for residents
- through by-laws, create the environment for the exercise of constitutional rights by residents and the provision of duties and services to communities by itself.

To protect communally-owned land from land sharks, communal land rights shall be protected from alienation or and other form of infringement by instituting the following regime:

- first right of refusal shall be given to the household
- second right of refusal will be enjoyed by the governance structure
- third right of refusal to be given to the state.
- the establishment of an inter-ministerial committee (IMC) comprised of DRDLR (as convener) and the departments of small business development; environmental affairs; cooperative governance and traditional affairs; agriculture, forestry and fisheries; transport; water and sanitation;

telecommunications and postal services; human settlements; trade and industry; public works; and economic development.

CONCLUSION

We conclude by drawing the reader’s attention to the principle, as contained within our policy and legislative framework, that was concretised in the recent Bakgatla-Ba-Kgafela Constitutional Court judgement: “Where a traditional community or the majority of the members ... have chosen the democratic route contemplated in the Act, effect must be given to the wishes of the majority”.

This system of institutional roles and role relationships speaks to the National Development Plan’s platform of “active citizenry and a capable state”. The state cannot merely act on behalf of the people: it has to act with the people, working together with other institutions to provide opportunities for the advancement of all communities. ^{NA}

REFERENCE

Carey Miller, DL and A Pope. 2000. *Land Tenure in South Africa*. Kenwyn: Juta and Company.