RURAL COMMUNITIES' RIGHT TO CHOOSE

"CAREFULLY CONSIDERED AND PRINCIPALLY DISCOURAGED"

By ***Nolundi Luwaya***

The author is a researcher with the Rural Women's Action Research Programme at the University of Cape Town

Nolundi Luwaya

Although the Constitutional Court has confirmed the right of communities in the former bantustans to choose how communal land is governed, government policy continues to promote rule by traditional councils.

Recent policies developed by the department of rural development and land reform (DRDLR) form part of a wide network of legislation and policies that seek to govern the lives of rural South Africans in relation to land and citizenship rights. At stake here are the rights of 18 million of the poorest South Africans, their rights to secure tenure, and their rights as citizens in a democratic South Africa. Fuelled by widespread poverty and rampant abuse of power, rural land and governance struggles are racing towards boiling point. The type of legislation being crafted by the state to govern customary land rights and governance structures in "communal areas" is a clear indication of who the state places at the centre of customary law.

The state is tasked with upholding and protecting the right to secure tenure, which is afforded to all South Africans under the Constitution. In the former homelands, where some communities eke out an existence that is deeply connected to land they have lived on for generations, these rights are of particular importance. It is therefore of concern that several of the DRDLR's policies are flagrantly out of sync with the Constitution, particularly the announced intention to transfer title of communal land to traditional structures. The department has recently tried to convey that it has reconsidered its approach, promising that the forthcoming Communal Land Bill will give rural communities the ability to exercise some choice over who owns their land and how it is administered. As this contradicts the department's existing policies, the current legal framework, and the reality of deeply embedded unequal power relations on the ground, this change of heart seems doubtful. Making community choice a reality would signal a fundamental change of direction in the department. ››

POLICY AND PRACTICE

In 2013, the department released its Communal Land Tenure Policy (CLTP). The policy proposes to transfer the outer boundary of communal land to traditional councils, which are headed by traditional leaders. It gives households only "institutional use rights". Communities living on communal land, together with land rights activists and researchers, have consistently warned that the 2013 CLTP conflicts with section 25 of the Constitution.

The legal requirements for valid traditional councils are set out in the Traditional Leadership and Governance Framework Act of 2003 (the Framework Act): 40 percent of the council membership must be elected and a third of the members must be women. Research commissioned by the Centre for Law and Society shows that there have been no elections at all in Limpopo, and the election process has been flawed in other provinces. This calls into question the legal status of many traditional councils and makes the plan to transfer land title to these bodies deeply flawed and potentially unconstitutional.

In addition, by ignoring the ownership status of African groups that purchased land historically, the proposal would essentially strip many people and families of their underlying indigenous ownership of land inherited over generations. Not to mention the fact that the rights held by individual households would be subject to the rights of the prevailing "tribal" titleholder. In spite of these flaws, the DRDLR's position showed no sign of wavering until very recently.

In August 2015, the Constitutional Court handed down judgment in the case of Bakgatla-ba-Kgafela Communal Property Association v Bakgatla-ba-Kgafela Tribal Authority and Others. This case concerned the correct reading of certain sections of the Communal Property Association Act of 1996 and the status of the Bakgatla-ba-Kgafela Communal Property Association (the CPA). At issue was whether the community's provisional CPA had lapsed when its formal registration was delayed beyond 12 months.

CPAs allow communities that hold land collectively to administer that land jointly in a democratic manner. They are subject to democratic processes including developing a constitution and holding elections for CPA leadership. Although not perfect, the model allows for much community involvement and joint decision-making.

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The Court ruled that a correct reading of the Act meant that the CPA did not cease to exist upon the expiration of the 12-month registration period. The Court also took the opportunity to endorse the right of a community to choose the vehicle for land administration and underscored the duty and responsibility of the department's director-general to give effect to that choice.

In its unanimous ruling, the court explains that the Communal Property Association Act envisages a pivotal role for the director-general in facilitating and supporting the registration of a CPA, thereby affirming the community's choice as to how its land is to be administered:

> It is clear from the scheme of the Act that once a traditional community expresses a desire to form an association, the Director-General must do everything permissible to assist the community to accomplish its goal … Where a traditional community or majority of its members … have chosen the democratic route contemplated in the Act, effect must be given to the wishes of the majority. (CCSA, 2015)

The court is also clear that the interests of traditional leaders should not be privileged over those of the majority or used to derail attempts to emphasise democracy: "The fact that a traditional leader or some members of the traditional community prefer a different entity to the association is not a justification for withholding registration."

The judgment goes on to criticise the director-general for failing to facilitate and support the registration of the Bakgatla CPA, thereby thwarting the community's attempts to have the land that was returned to them through restitution held by a democratic institution.

In the days following the judgment, Thami Mdontswa, the deputy land claims commissioner, used a social media platform to claim the judgment affirmed the position of the department in upholding people's ability to choose their landholding structure (CLS, 2015). He also revealed in a television interview that the forthcoming Communal Land Bill, which is not yet in the public domain, would offer communities a choice as to whether land is administered by a CPA or a traditional council.

Clearly the department's change of heart was forced by the Constitutional Court judgment. More than that, the judgment's reference to the duties and failures of the director-general and its categorical statement against privileging traditional leaders over communities sum up why there can be no real choice: in practice, the DRDLR undermines the registration of CPAs and favours the interests of traditional leaders. The experiences of numerous

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CPAs across the country are a clear testament that the department is failing to support communities in their choices for landholding and its administration.

DOUBTFUL CHOICE

There are real questions as to whether communities will be able to exercise any choice in practice. Firstly, given skewed power dynamics, choosing a CPA over the traditional council may never amount to much more than an option on paper. The struggle of the Bakgatla went all the way to the Constitutional Court because their traditional leader wanted the land held in a trust rather than a CPA. In some cases, traditional leaders opposed to the formation of a CPA or other community structure have stalled the process through expensive court challenges. In some rural communities, going against the traditional leader can put one's personal safety in jeopardy.

Secondly, communities who want to legally register a CPA are likely to find themselves in a never-ending disheartening process. The Bakgatla case was by no means an exception. Communities across the country have been trying for years to register their associations with little to no support from the department. Considering that

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CPAs are a vehicle through which people who have been dispossessed of land can access their constitutional rights to secure tenure and restitution, the failure to provide appropriate support is a failure to enable those rights.

Lastly, it is unclear how the department's purported change of position could be enacted in the context of their expressed position on CPAs in areas under traditional authority. An affidavit by the chief director of the DRDLR in 2011 indicates that a moratorium has been imposed on the transfer of land to CPAs in the Eastern Cape because of objections from traditional leaders (cited in RWAR, 2013a). In a 2013 speech, Minister Gugile Nkwinti said, "It is an exaggeration to think that it is only traditional leaders who have a problem with the CPA. It's not entirely correct. It is a wrong model from us as government, which we introduced" (cited in RWAR, 2013a). More recently, the minister assured traditional leaders that they are the "'de facto' owners of the land" (cited in Gasa, 2015). This in spite of the fact that traditional leaders were never the "owners" of the land under customary systems and that their elevation to owner was a colonial construct.

This trend continues in the most recent versions of the department's policy documents regarding the former Bantustans. The August 2013 version of the CLTP states that "the registration of new CPAs on traditional communal tenure areas [will] be *carefully considered and principally discouraged*" (p. 29, original italic, cited in RWAR 2013b). The September 2014 version makes it clear that traditional councils will hold title in "conventional traditional communal areas" while communal property institutions will hold title in "non-traditional communal areas": i.e. outside the former bantustans. The May 2014 draft policy paper on CPAs proposes to resolve the tension between CPAs and traditional leaders in communal areas in a manner that seems to favour the latter: by attempting to harmonise the relationships and by clarifying the role of traditional leaders and supporting them ››

to be moral authorities. It goes on to state that new CPAs will only be established "where no traditional authorities exist". In this context, the department's statements about plans to give people a choice ring hollow, as does its claim that the Constitutional Court judgment supports its recently revealed position.

CUSTOM LEGISLATION

While this article is primarily concerned with choice as it relates to rural South Africans' land rights, the picture would be incomplete without a brief mention of other bills dealing with important aspects of rural democracy. They all come together to lock rural people into ascribed tribal identities and lock democracy out.

The Traditional and Khoisan Leadership (TKL) Bill introduced on 25 September 2015 builds on the problematic boundaries used in the Framework Act, which deems any "tribe" or "tribal authority" that existed prior to the Act to be a "traditional community" or "traditional council". These structures were created by the Bantu Authorities Act of 1951, an Act against which rural communities waged a long and hard struggle. By consolidating structures based on boundaries delineated by apartheid legislation, the Framework Act locks people into the jurisdiction of traditional leaders they do not necessarily recognise or may have been forced under during the Bantustan consolidation period. This deprives them of the ability to choose who they affiliate with and goes against the well-documented principle of customary law being an opt-in system. The Framework Act is set to be replaced by the TKL Bill. Unfortunately, the Bill does not take the opportunity to align itself with customary law as an affiliation-based system.

Recognition as a traditional community under the Bill is subject to the community having a traditional leader. This potentially places people under traditional leaders they may never have had in the past or compels them to affiliate with a leader they may not recognise. Historically, there have always been communities that did not subscribe to the hierarchy and authority of a traditional leader. The draft bill erases this history.

The version of the Traditional Courts Bill that was resoundingly rejected by rural South Africans and withdrawn in 2014 attempted to give traditional leaders a role in the administration of justice as envisaged by section 20 of the Framework Act. The Bill made it an offence for a person summoned to the traditional court to not appear before it, thereby depriving rural communities of the ability to opt into the jurisdiction of these courts instead of, or in addition to, the statutory courts. Worse still, the Bill did not give women the right to represent themselves in front of these courts. The clauses dealing with representation created a situation where women could be represented by male family members, some of whom would be the very people against whom these women were seeking justice. It is common sense that community members will use a traditional court if it offers the kind of redress that they seek. Locking people into the jurisdiction of the court serves no one's interests except those whose interests are self-serving. Given the indications that legislation to govern traditional courts will be introduced later this year, the department of justice should well be mindful of this.

CONCLUSION

It is unclear what exactly the department's communal land bill will look like, or whose interests will shape it and the other bills and policies aimed at governing rural South Africa. What is clear is that rural communities continue to live in limbo, struggling to secure their rights and make their choices a reality. Government documents currently in the public domain do not reflect the opt-in nature of customary systems. If departments continue this trend of depriving people of meaningful choice, their drafts will find no legitimacy with rural communities and they will be rejected.

Communities living under customary law are clear that what they see reflected in the laws, bills and policies is not the customary law that they know, nor is it the democracy that they fought for. They are equally clear that traditional leaders are a part of their way of life in many areas, and so is the ability to choose.

The issue is not about certain groups wanting to undermine or oppose traditional leaders. It is not about critics rejecting or undervaluing customary law in favour of Western law. It is about celebrating customary law as a system that people can opt into and affirm. It is about recognising systems and leaders that work with and for people. It is about providing real choice for all South Africans. NA

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