CENTRE FOR LAW AND SOCIETY

RURAL WOMEN'S ACTION RESEARCH PROGRAMME

COMMUNAL LAND TENURE POLICY (CLTP)

September 2013

BACKGROUND

The Constitution's promise

Under colonialism and apartheid, millions of people were dispossessed of their land and livelihoods. The Constitution was written with the aspiration to restore to people some of what they lost. Section 25 (6) and (9) of the Constitution instructs the government to adopt legislation that will realise the right to security of land tenure or comparable redress:

25 (6): A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(9): Parliament must enact the legislation referred to in subsection (6).

This means that the government must come up with a law that will give people the legal and practical ability to reclaim or defend their ownership, occupation, use of and access to land. The government has so far been unable to realise the promises enshrined in Section 25 (6) in relation to the former Bantustans. While laws to promote tenure security for farm dwellers and labour tenants have been enacted, there is no legislation beyond the Interim Protection of Informal Land Rights Act (IPILRA) to secure the land rights of the estimated 16.5 million people living in the former Bantustans. IPILRA was introduced in 1996 as a temporary solution that would protect people living in communal areas from being deprived of their land rights. However, a more permanent and wide-reaching law is needed.

The CLaRA

The government framed the Communal Land Rights Act (CLaRA) as legislation that would help people secure their land rights. The law was enacted in 2004. However, as many rural people argued, the CLaRA in fact would have undermined their security of land tenure because it gave traditional councils (tribal authorities under apartheid) wide-ranging powers, including control over the occupation, use and administration of communal land. It therefore bypassed all other forms and levels of authority related to land – elected and customary.

After a lot of opposition from rural people, the Constitutional Court struck down the CLaRA in its entirety in 2010.

THE NEW COMMUNAL LAND TENURE POLICY (CLTP)

The Department of Rural Development and Land Reform (DRDLR) introduced its new Communal Land Tenure Policy (CLTP) at a workshop hosted by the DRDLR's parliamentary portfolio committee on August 23rd-24th, 2013. The DRDLR plans to create a piece of legislation based on the CLTP. To fully understand the CLTP, one must read it together with the Rural Development Framework and the State Land Lease & Disposal Policy. In

particular, the State Land Lease & Disposal Policy applies to most of the same land as the CLTP but says different things. It seems the two policies were written independently of each other, which causes a lot of confusion.

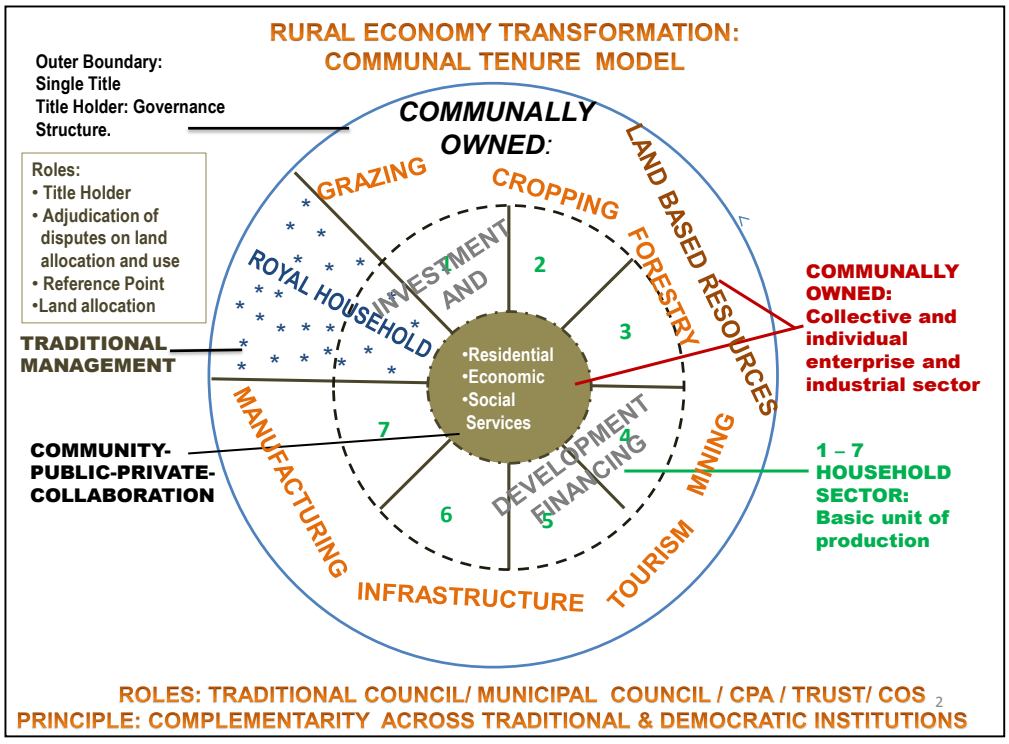
The CLTP contains many contradictions and confusing statements. On the one hand, it sets out a nuanced history of land tenure insecurity in South Africa, and states an impressive vision for improvements. But on the other hand the solutions proposed in the same policy document speak neither to this nuanced history nor to the vision proposed. Examples of these contradictions are described throughout this factsheet.

WAGON WHEEL MODEL – LAND OWNERSHIP & DECISION-MAKING POWER

Most communal land land in the former Bantustans is registered in the name of the state. The Minister of Rural Development and Land Reform holds this land in trust on behalf of the people who use and occupy it.. The CLTP envisions that ownership of communal land will move from the government to traditional councils. In theory the policy provides that land outside the former Bantustans may be transferred to CPAs and Trusts. This is articulated in two "wagon wheel" diagrams in the CLTP. The first wagon wheel (Figure 2(a)) speaks to a context where traditional councils "operate" and the second wheel (Figure 2(b)) where CPAs "operate". There are a number of problems with the wagon wheels, which will be explained below.

The CLTP also proposes that the government retains the "ultimate authority" to make decisions about "land rights and land use in communal areas". This power is exercised at a practical level by municipalities. However, since land ownership and decision-making power of land go hand-in-hand, this proposal for the government to make decisions around land becomes hollow once land is transferred out of the hands of the government.

Figure 2(a)



Traditional councils

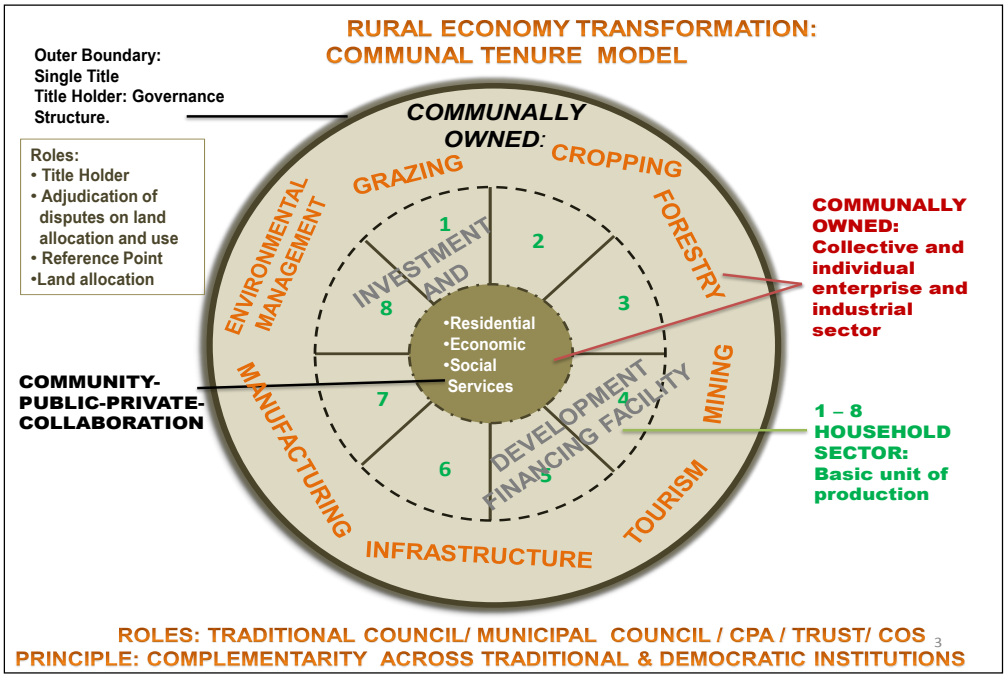
Wagon wheel 2(a) shows that land titles (marked by the "outer boundary" of the wheel) will be transferred to traditional councils. Once a traditional council is in possession of the title, ownership will vest exclusively in the council. The CLTP therefore proposes that traditional councils and traditional leaders should play the role of owners and managers of land. At the same time it excludes countervailing structures like Communal Property Associations (CPAs), trusts and household level role-players from land ownership and the power to make decisions about land.

The CLTP acknowledges that traditional leaders were imposed on people under colonialism and apartheid, and there is "much tension concerning the role of traditional leadership institutions in land administration" (p. 27). But the CLTP's wagon wheel in Figure 2(a) contradicts this acknowledgement.

CPAs and Trusts

In theory, the second wagon wheel (Figure 2(b)) provides for CPAs or trusts to own land titles in communal areas, with input from members (as prescribed in the CPA act and in trust law). However, in reality this is very unlikely because the government is opposed to land in communal areas going to CPAs. This is explicit in the CLTP, which states that "registration of new CPAs on traditional communal tenure areas be *carefully considered and principally discouraged*" (CLTP's emphasis) (p. 29).

Figure 2(b)



Households

The CLTP acknowledges that in the past, the government has ignored rural people's ability to make decisions about land (p. 6). But the CLTP then goes on to propose that rural people's roles in land management processes will be very minimal. The CLTP says that the responsibilities of rural people are to pay taxes, obey laws, consume goods and services, and vote (p. 19; 21).

Problems with the "wagon wheel"

In addition to those already discussed above, the wagon wheel involves a huge conceptual mistake in that it describes CPAs and traditional councils as "governance structures". If the CLTP articulates traditional councils as "governance structures", this would create a 4th level of government, which is unconstitutional. The Constitution provides for only three levels of government - national, provincial and local – all of them elected. At other points the CLTP states that the government will delegate certain governance responsibilities to traditional councils (i.e. they do not have inherent governance powers) (p. 13). So the CLTP is uncertain about whether traditional councils are governance structures or not.

Furthermore the CPA Act (1996) states that CPAs were established specifically to enable groups to own land as legal entities. They were never intended to play a governance role and it is unfair to expect them to do so.

IMPLICATIONS OF GIVING LAND TO TRADITIONAL COUNCILS

> *In terms of customary land allocation, the traditional leader generally distributed land parcels to headmen who, in turn, distributed the land to households…*
>
> *In order to reconstitute the deteriorated accountability of traditional community structures to the communities and households they service as found in original forms of African tenure, the "Wagon Wheel model" for communal tenure reform, emphasizes that, these institutions are responsible for land administration as outer boundary title holders.*
>
> Communal Land Tenure Policy, August 24, pp. 18-19

On the basis of the white paper on traditional leadership and governance the CLTP places traditional leaders at the centre of questions of land management (p. 8). The CLTP proposes that it will solve the problem of insecurity of land tenure and unaccountable land management structures by transferring land titles to traditional councils (p. 17). However, the CLTP gives no explanation as to how this proposal will solve these problems, especially in the context of rural people expressing wide-spread resistance to traditional councils as land holding institutions in the context of the CLaRA.

The CLTP assumes that all 'customary' land is the preserve of traditional councils, and that democratic structures can exist only outside the former Bantustans (p. 12; 13). It states that:

> Land shall be administered by traditional councils in areas that observe customary law, or communal property institutions *outside these* (emphasis added) (p. 12)…
>
> The administrative responsibilities associated with communal area land rests with traditional leadership councils in areas that observe customary law, or CPAs or Trusts *outside of these areas* (emphasis added) (pp. 21).

The CLTP reserves communal land for control by traditional councils, while CPAs and other structures are expected to operate only outside of communal areas. This repeats one of the central assumptions and problems of the CLaRA - that customary land tenure exists only with and under the control of chiefs. Historical evidence shows this to be false.

PROPOSALS FOR PROVIDING SECURITY OF LAND TENURE

The CLTP ignores the fact that the Interim Protection of Informal Land Rights Act (IPILRA) provides people with a number of legal protections against being deprived of their land. Instead of building on IPILRA, it tries to 'reinvent' the wheel by creating protections that already exist in IPILRA. For example, the CLTP aims to "prevent the loss of land by communal area inhabitants" and allow people to "reserve the right of first refusal" (paragraph 2.7., p. 16). Meanwhile, IPILRA already provides that "no person may be deprived of any informal right to land without his or her consent" (Section 2.1).

Moreover the CLTP and the Rural Development Framework recognise informal rights[1] to land on much narrower basis than under IPILRA. Unlike IPILRA, it works on the basis of a "hierarchy" of rights, where "use rights" are viewed as the lowest form of rights. In this way, it weakens rather than strengthens people's security of tenure.

The CLTP marks a major step backwards from IPILRA in terms of its land compensation provisions. The CLTP states that households will only be compensated for "land-related investments rather than the land itself" (p. 21). This means people will only receive compensation for their "investments" (for example, houses on the land) and not for the value of the land, and the land's use and occupation benefits. IPILRA, on the other hand, provides for compensation for these other factors when people are deprived of land.

GOING FORWARD

The Constitution's section on property was controversial when it was written because it entrenched existing property rights. But, to balance this, it also obligated the government to devise provisions that would remedy the country's legacy of inequitable distribution of land. Thus balancing rights to restitution, access to land, and tenure security were included. By failing to give effect to these balancing obligations, the government risks betraying people living in rural areas as well as the principles of the Constitution and the protections it sought to introduce.

[1] Informal rights to land include those who *use*, *occupy* or *access* land in terms of: customary laws and practices; beneficial occupation; land vested in the SADT, or the governments of the former homelands, or any other kind of trust established by statute; or any person who is the holder of a right in land in terms of the Upgrading of Land Tenure Rights Act but who was not formally recorded as such in the register of land rights.