Overcoming the Legacy of the Land Act Requires a Government That is Less Paternalistic, More Accountable to Rural People

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The 1913 Natives Land Act was one of a group of laws and policies within a long history of land dispossession of black people in South Africa. The act initially set aside only 7% of the country's land for legal occupation by black people. One of the main premises of the Land Act was that black people should not own land on an equal footing with white people. Hence only organs of state and traditional leaders were given decision-making power over land, ostensibly to protect the land. This practice obscured institutionalized racism in the language of paternalism. An attitude of paternalism is one of the continuities across the apartheid and post-apartheid policies of the state (with the caveat that the state is made of many actors and therefore not homogenous). However the logic and nature of power relations that underlie this attitude have shifted over time. Despite the post-1994 constitutional requirement that the state make secure the land tenure of people in rural areas, it has so far failed to do so. This article argues that if the government is to move towards realizing the right to tenure security, it should approach land reform with less paternalism and more accountability to rural people, giving serious consideration to the proposals they put forward.

Land laws and policies under white rule

The 1913 Land Act built upon a long history of colonial interventions that dispossessed Africans of their land as a means of domination and subordination.

These interventions sought to sideline the African farming class and to force black people into becoming mine labourers in the cities. The colonial government, in asserting European constructs of exclusive ownership, deemed indigenous systems of land rights not to constitute property rights, thereby justifying 'freeing up' vast areas of African-held land as 'Crown Land', which was then granted to white settlers. In addition, the 1927 Native Administration Act crystalized a set of rules that portrayed a distorted account of African customary law. This privileged the powers of chiefs over land in 'communal' areas, at the same time downplaying the usage, occupation and inheritance rights of ordinary people within indigenous systems of land rights.

The 1936 Native Trusts and Land Act slightly expanded the land available to Africans in the reserves (to 13% of the country), making available certain areas of 'Trust' land alongside the existing reserves as 'resettlement areas' for those to be removed from 'white' land. African occupation of Trust land was conditional on the payment of yearly fees or rents, with the ownership of the land vesting in the South African Native Trust (SANT).

The 1936 Act also established the '6 native rule', which provided that any group of more than six black people who had cooperated to purchase land had to constitute themselves as a tribe under a chief. This was to pre-empt land buying syndicates from constituting themselves democratically. The rule embodied the prevailing colonial assumption that all blacks were tribal subjects as opposed to active citizens, able to create their own identities and choose the legal arrangements that suited them.

The apartheid period saw the onset of more extreme congestion in the land. During 1960s the government enforced the Betterment Programme under the pretext of combating congestion, poverty, soil erosion and over-stocking, and improving agricultural production. But Trust and Betterment policies had little effect on reducing poverty, congestion and landlessness in the reserves (if that ever was the intention); if anything, they accelerated the process.

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A main feature of these laws and policies was that they prohibited black people from holding and managing land in a way that put them on an equal footing with white landowners. An example of this was the law of how a black person's property was administered when this person died. Upon the death of the person occupying Trust land, the land reverted to the Administration, which had the authority to re-allocate it. A Native Commissioner, Mr. Pike, likened government policy to customary practices of communal land tenure, arguing that the Minister of Native Affairs had replaced chiefs in the role of land 'trustee'. Implicit in Pike's statement was a paternalistic attitude that only the state could be trusted to administer and monitor African land.

Concomitant with the process of land dispossession and forced removal of black people to rural homelands was the imposition of chiefs and tribal authorities. The land laws were fundamental in this process. The apartheid government believed that chiefs were the sole African decision-makers in respect of 'communal' land. This version of power in land undermined customary practices that recognised the entitlements vesting in ordinary people and the role of groups in vetting and approving applications for land. In 1955, the Under-Secretary for Bantu Areas Mr. Young explained that under the Bantu Authorities Act, chiefs and headmen would help to administer 'Trust' (SANT) land on behalf of the government. He added that if there were no chiefs, "they could always be created". The SANT was also extensively used to buy up land adjoining the reserves that was then given to those chiefs who agreed to establish Bantu Authorities, while those who resisted Bantu Authorities were demoted or consigned to small areas.

One of the net effects of the government's land tenure system and its Betterment policies was to contribute to women's exclusion from access to land. Unwilling to recognise the reality of unequal distribution of land between blacks and whites as a problem of its own making, the state aimed

to address land scarcity and congestion by excluding women from access to land in the reserves, on the basis of a distorted version of customary law. Magistrates and Bantu Affairs Commissioners increasingly told complainants that women could not inherit or manage land in their own right because it was not 'customary' to do so. Instead they said that the head of a household, who they believed was always a man, would make decisions about land for the benefit of the family. State officials again used the language of paternalism to justify the exercise of state power over black people, and discrimination against women.

Land laws and policies post-1994

During the negotiations for a democratic South Africa in the 1990s, there was much debate about the extent to which the existing property regime should be protected, since it was skewed in favour of existing white landowners. A compromise was reached in terms of which the Constitution would protect property rights, but this would be balanced by measures intended to redress racial imbalances - specifically in the form of restitution and redistribution of land, as well as land tenure reform in the country as a whole. Sections 25(6) and (9) of the Constitution are particularly relevant (although not limited) to the 16.5 million people living in the former Bantustans. Those sections require the enactment of legislation to secure the tenure rights of people who are insecure because of past racial discrimination.

Constitution, Chapter 2 - Bill of Rights
Section 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)

The government has so far failed to enact laws and policies that would truly give effect to rural peoples' right to tenure security, as enshrined in the Constitution. Security of land tenure entails the legal and practical ability to defend one's ownership, occupation, use of and access to land from interference. While some protections have been put in place to give effect to Section 25(6), most of these do not cover people living in communal areas. These areas - mostly the former Bantustans - are home to an estimated 16.5 million people, of which 59% are women. Uncertainty around communal land tenure law and policy has therefore impacted disproportionately on women.

The government's failure to realise the right to tenure security is not an oversight. Under the first Minister of Land Affairs, Derek Hanekom, the strategy was to consult widely and incorporate as many of the suggestions put forward by rural people as possible. This led to the enactment of the Interim Protection of Informal Land Rights Act (IPILRA) in 1996 and development of the Land Rights Bill (LRB) in 1999. IPILRA remains a crucial law that can be used to protect people against deprivation of their informal rights to land[1], except under very exceptional circumstances. The LRB moved to create relative 'protected rights' vesting in individuals who use, occupy and have access to land. Protected rights would be secured by statute, making them enforceable immediately, even before the complex

processes entailed in enquiring into, and resolving cases of overlapping and disputed rights on a case-by-case basis was completed. But IPILRA was only intended as temporary legislation that would provide a safety net to people who did not have land titles, and Minister Thoko Didiza scrapped the LRB when she took office, on the basis that it was too complicated and costly to implement.

In the mid-1990s, the government came up with laws and policies that could have put us on the path to genuine redress for some of the legacies of the 1913 Land Act. But from 2000 onwards, many of the government's laws and policies have frustrated the move towards tenure security and have been characterised by a new form of paternalism. While paternalism in the past was underwritten by a belief system that black people were racially inferior, the current paternalistic discourse seems to be based on the notion that rural people are inferior. The similarity between the two is the assumption that poor rural people are not entitled to landownership, and cannot be trusted, and that the government 'knows what is best' for rural people. Seemingly government is more comfortable acting on 'behalf of' rural people than giving them the power to make their own decisions.

Over the last decade, power over land has been removed further and further from the hands of rural people, and placed in the hands of elites (black as well as white). This is clearly embodied in the 'willing buyer, willing seller' land redistribution policy, which the state has only recently begun to question. This policy, which pandered to white elites, made obtaining land for redistribution and restitution prohibitively expensive, and failed to take into account the structural causes of racial inequality in landholding.

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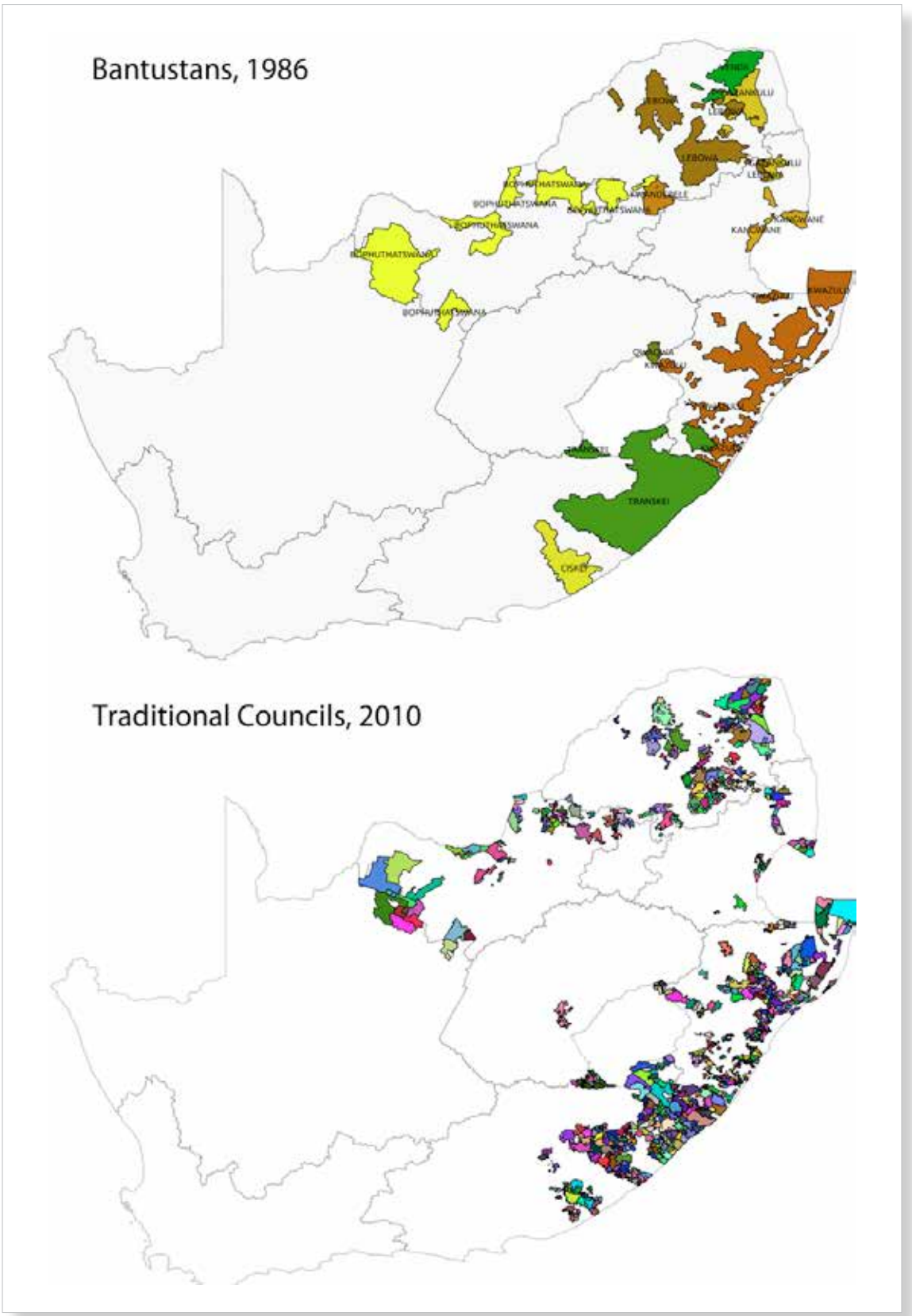
In addition to treading carefully with white commercial farmers, the government has put in place land policies and laws that favour traditional leaders (in the belief they can secure the rural vote).[2] This was most clearly evident in the Communal Land Rights Act (CLRA), enacted just before the general elections in 2004. Many rural people argued that the CLRA would have undermined their security of land tenure because it gave traditional councils and chiefs wide-ranging powers, including control over the occupation, use and administration of communal land.

The CLRA reinvigorated the combination of economic and political subjugation that existed under apartheid's Bantustan system. It basically wooed chiefs in an attempt to win the rural vote. It was also very convenient for mining companies who could negotiate with a single individual to acquire land, and avoid the 'messy' and complex process of negotiating with a whole community. The Department of Rural Development and Land Reform (DRDLR) said that chiefs would make decisions on behalf of people because it would be 'customary' for them to do – even though the historical evidence disputes this.

In 2010, the Constitutional Court struck down the CLRA.[3] But other laws and bills that vest power in traditional leaders remain a threat to rural peoples' security of tenure. The Traditional Leadership and Governance Framework Act (TLGFA) reinforces the boundaries of the tribal authorities established under the Bantu Authorities Act of 1951. Laws like the TLGFA and Traditional Courts Bill (TCB) marginalise women's voices, shifting the balance of power more towards male


Bantustans, 1986
LEBOWA
KWAZULU
TRANSKEI
CISKEI
Traditional Councils, 2010

household heads and traditional leaders. This context affects single women the most, particularly those without male family members, who have little status in the eyes of some traditional leaders and structures. The traditional leadership laws, like the CLRA, attempt to foreclose the ability of groups in the former homelands to constitute themselves independently of traditional authorities.

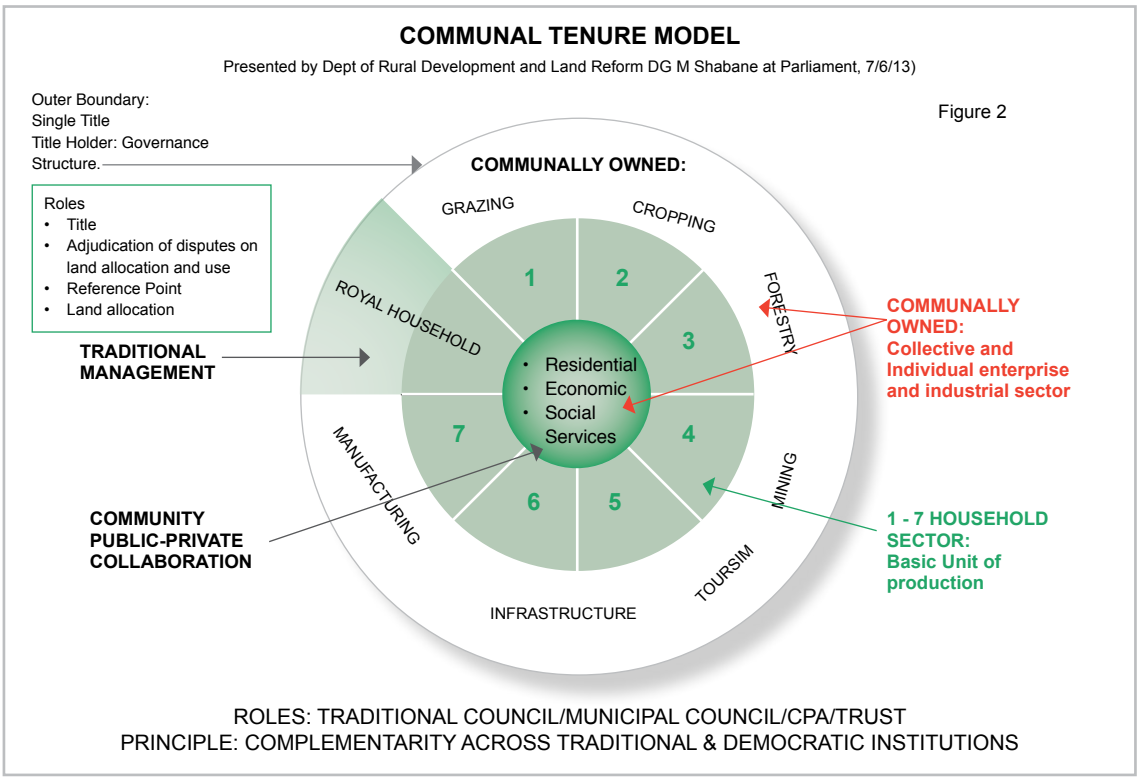
The centenary of the 1913 Land Act provided an impetus for the government to review and redraft a number of important land laws and policies. The majority of the new policies published in a cacophony in August this year, reflect almost none of the suggestions put forward during the various consultation meetings and working groups often referred to by the DRDLR. In addition the new draft laws and policies often contradict each other, take little account of past mistakes and have the potential to undermine rural peoples' security of tenure. They include policies on redistribution, communal land tenure, state land leasing and recapitalisation and development; and laws like the Spatial Planning and Land Use Management Act and the Restitution of Land Rights Amendment Bill.

In the absence of title deeds and development funds, people in Masakhane are vulnerable to invasions on their land by other stock farmers, cannot take out bank loans or invest in new agricultural schemes and cattle dipping tanks, encounter serious housing difficulties and water shortages and travel long distances to take their children to school.

The introduction of the Restitution Bill is particularly worrying in the context of the Department of Rural Development and Land Reform's attitude towards Communal Property Associations (CPAs). CPAs are landholding institutions that were established so that groups of people could come together to form a legal entity to receive title deeds to land under the restitution and redistribution programmes. The Department's de facto policy now is to discourage the formation of CPAs and freeze the transfer of title deeds to CPAs, in light of objections by some traditional leaders who believe themselves to be the rightful owners of all land in the former Bantustans. The DRDLR is currently looking at amending the CPA Act so as to make it impossible for CPAs to exist on communal land.

The Department's most recent policy on communal land tenure (the 'wagon wheel' policy, published 24 August 2013) brings back the gist of the CLRA. It shows traditional councils as the titleholders of the outer boundary of land occupied by traditional communities. If the Restitution process is reopened, but CPAs cannot hold land, most land claimed through the process will inevitably be transferred to traditional leaders or traditional councils. As soon as the government announced it planned to reopen the Restitution process, King Goodwill Zwelitini addressed a group of traditional leaders in KwaZulu-Natal and committed to helping them claim all the communal land in that province. If chiefs are to be the beneficiaries of land claims in communal areas it would severely undermine rural people's security of tenure – rendering women, in particular, even more structurally vulnerable.

This is not just a matter of prospective policy, it is already happening. Of the 887 CPAs that the Department investigated in a report in 2010, at least 34 had still not received their land titles and accompanying development funds.[4] While this list has not been released, we know CPAs still waiting include the Magokgwane, Bakubung ba Ratheo, Bakwena ba Molopyane, and Goedgevonden CPAs in North West, and the Moreipuso, Matibidi, Moletele and Setlhare CPAs in Mpumalanga.[5] In the Eastern Cape, at least three CPAs have been waiting for their land titles since 2000,



even though all the necessary forms were signed by the Minister. Despite a court order in May 2013 compelling the DRDLR to transfer the land to the Cata CPA, it has still not done so. The Masakhane and Iqayiyalethu CPAs, located south of Alice, have also waited thirteen years – and they continue to wait.

These delays have a serious impact on the lives of the people in the areas they affect. In the absence of title deeds and development funds, people in Masakhane are vulnerable to invasions on their land by other stock farmers, cannot take out bank loans or invest in new agricultural schemes and cattle dipping tanks, encounter serious housing difficulties and water shortages and travel long distances to take their children to school. Their land claim is key to their attempt to secure other natural resources – in particular, the plant Pelargonium – in light of the attempts of multinational companies and the local Imingcangathelo chieftaincy to gain control over harvesting the plant.[6]

Officials from the DRDLR have given the following reasons for the delay in the transfer of land to CPAs: that additional surveys of relevant land are required; documents are missing from files or still need to be put into electronic form; alternatively there are conflicts within 'the community'. It is not clear why it takes more than thirteen years to complete surveying or scanning of documents. In the cases of the Cata and Masakhane CPAs, there is no evidence of conflicts within the communities. The underlying reason for the non-transfer of land to CPAs emerges in an affidavit from the Cata CPA's court case:

"The practicalities in the facilitation of the transfer of the land have been cumbersome and have now encountered fierce objections by the traditional leaders who state that the agreements transferring ownership of rural land to community based

associations undermined their authority. In various discussions with traditional leaders they are resolute in objecting to the transfer of land falling under their authority to CPA. The land in question falls under Chief Ulana and in order to get a long lasting solution it is imperative that Chiefs should accept the process."

Members of the Cata CPA have never heard of Chief Ulana. The traditional leaders they recognise have been fully supportive of the transfer of title to the CPA. It is clear that the main reason for the delay in transferring land to CPAs is that the government is committed to pandering to the demands of traditional leader organisations, such as CONTRALESA, who want exclusive ownership and control over land in the former Bantustans. At the same time, the government's attitude towards CPAs reveals a serious reversal of policy commitments that emerged during the 1990s, which supported black people's right to choose how to best to constitute themselves as groups.

Furthermore, under the new restitution process set in motion by the Restitution Amendment Bill and complemented by the Recapitalisation and Development Policy, land restoration awards will be explicitly dependent on the feasibility and cost of the land transfer and the claimants' ability to use the land 'productively'. These criteria open the way to restoration being rejected in many claims, as most poor communities claiming high-value land may struggle to prove 'productivity' (the definition of which is also unclear in government policies). These criteria, combined with the attack on CPAs, are justified in the language of paternalism. When poor, rural people object to these policies, they are told that traditional leaders and government officials are best equipped to make decisions concerning rural land use. The Restitution Amendment Bill appears to be a ploy to attract votes and not a genuine attempt to remedy the problems faced by rural people.

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An alternative vision for land reform

The government must fundamentally change its approach towards land reform if it is to honour the Constitution's principles and meet the needs of rural people - who make up nearly a third of the country's population. A key priority would be to engage constructively and transparently with the suggestions for land reform put forward by rural people.

The challenges facing rural areas are complex and difficult. But this is no excuse for pretending to consult but, in reality, ignoring inputs by rural people. Recent research shows that rural people are engaged in attempts to find positive ways to reconcile citizenship rights and indigenous precedents. An example of this is the ways in which rural women are redefining land rights in the context of living customary law. According to the stereotypes of official customary law, men were the only people entitled to inherit and manage land (although this was contested as far back as the 1930s).[7] Using evidence from surveys, parliamentary submissions and interviews at community workshops, Claassens and Mnisi-Weeks argue that single women in the Eastern Cape, Kwa-Zulu Natal and the North West have increasingly been allocated residential sites since 1994.[8] These changes have occurred as a result of local processes of struggle and negotiation around land rights led by women.

A combination of stake-holders, including NGOs and CBOs have suggested that in order to strengthen and recognise rural peoples' land rights we can build on an already existing law: the Interim Protection of Informal Land Rights Act (IPILRA). IPILRA helps to protect people whose informal rights to land are threatened, but its impact has been limited in practice because some traditional leaders believe that they own the land and this is not disputed by the DRDLR. IPILRA's enforcement has also been difficult because many DRDLR officials do not know what it is or how to work with it. In order to more effectively protect rural people against the deprivation of their land by traditional leaders and private enterprises such as mining companies, the act would need to be amended so as to:

- be made a permanent law (it is currently renewed annually).
- protect individuals within families and households from decisions being made without their consent. In this sense, women should be explicitly recognised and protected.
- allow for inquiries if there are disputes about the disposal of land.

Ultimate authority for the enforcement of IPILRA lies with the state, which is the nominal owner of the most of the land in the former Bantustans. As the nominal owner and trustee of most communal land, the state has a fiduciary duty to act in the best interests (and not on behalf) of rural people. To do so it must relinquish its decision-making and landownership power to rural people.

Conclusion

Under the name of land reform, the post-apartheid government has courted commercial farmers (with their economic clout) and traditional leaders (with their supposed ability to bring in votes) and failed to engage seriously and openly with the solutions put forward by rural constituents. As a result, rural people, and especially women, have suffered most, as they did in the past. The reason for the government's approach seems to be that it is intent on using land as a vehicle for political patronage, making the rights of rural people conditional on 'good behaviour' while reserving ownership for powerful elite partners such as traditional leaders. A deep irony is that the restitution programme, which was designed to provide redress to those who suffered forced removal and bore the brunt of the Land Act, is now being reconfigured as a means to consolidate the power of elites. A language of paternalism animates the government's attitude towards land reform, in a way that is damaging, even though it is different from the way it was applied in the past. While land reform is complex, rural people in numerous parts of the country have already played an important role in articulating some solutions. Unless the government engages with these processes respectfully and transparently, the legacy of the 1913 Land Act will not be addressed.

NOTES

1 Informal rights to land are defined broadly, and include those who use, occupy or access land in terms of: Customary laws and practices; Beneficial Occupation; Land vested in the SADT, or a so-called self-governing territory, or the governments of the former Bantustans, or any other kind of trust established by statute; 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.
2 This is not a critique against the institution of traditional leadership but rather against the abuse of power by traditional leaders.
3 In 2010, the Constitutional Court heard the Tongoane case which concerned the constitutionality of CLaRA. The Court avoided the substantive issues raised by the applicants, finding the Bill unconstitutional on the technical ground that Parliament had followed an incorrect process in terms of the Constitution.
4 DRDLR, Annual Report on CPAs (2010). Note that despite a requirement that the Department publish an annual CPA report showing the state of CPAs in the country, they have only ever tabled one – the one listed from 2010.
5 Website of Land Access Movement of South Africa (LAMOSA): http://www.lamosa.org.za/
6 Morris, C. 'Failed Deeds: The Masakhane CPAs and State Negligence Under Customary Land Reform Policies', presentation at Land Divided Conference, 27 March 2013.
7 Weinberg, T. 'Contesting customary law in the Eastern Cape: gender, place and land tenure' in Acta Juridica special issue on marriage (forthcoming, 2013)
8 Claassens, A. and Mnisi-Weeks, S., 'Rural women redefining land rights in the context of living customary law' in South African Journal of Human Rights 25 (3), 2009.