

HIGH LEVEL PANEL ON THE ASSESSMENT OF KEY LEGISLATION AND THE ACCELERATION OF FUNDAMENTAL CHANGE

REPORT OF WORKING GROUP 2 ON LAND REFORM, REDISTRIBUTION, RESTITUTION AND SECURITY OF TENURE

ROUNDTABLE 7

“AGRARIAN REFORM”

(Sandton, SAICA, 2 December 2016)

1. INTRODUCTION

Roundtable 7 was held in Sandton at SAICA on 2 December 2016, on the theme of agrarian reform. The Working Group was addressed by four invited experts and practitioners who presented papers on different aspects of the theme and then participated in subsequent discussion. The speakers represented research and academic institutions, civil society organisations and business people. The presentations were as follows:

- **Dr Rick de Satge and Dr Farai Mtero**, from Phuhlisani and Wits respectively, presented a commissioned report on agrarian reform and spatial inequality in South Africa, entitled *Tenure Inequality in Global Perspective*, drawing on research in Mozambique, Kenya and Tanzania to provide comparisons with the South African situation.
- **Ms Wilmien Wicomb** of the Legal Resources Centre presented a paper entitled *The impact of the TLGFA in relation to entrenching apartheid spatial boundaries and power relations*, raising questions of how safety valves built into the Act to counteract the power of chiefs have worked in practice.
- **Ms Gloria Serobe** presented the *Strategic interventions developed to address the slow pace of land and agrarian reform*, which focused on commercial and business models for support to land use and agriculture on communal land. The presentation was based largely on the practical experience gained in projects in Centani and Nqadu.
- **Mr Sunungukai Mabhera**, presented a paper co-authored with **Prof Michael Aliber and Tafadzwa Chikwanha**, entitled *Vision for Agrarian Reform*, with a focus on the questions: “What kind of ‘agrarian reform’ is envisaged in the Constitution and other key legal frameworks, and how does this compare with the ‘agrarian reform’ that has been underway”?
- Presented below is a consolidated summary of the issues raised by the presenters, and which emerged during the discussions, arranged by designated speaker. The summary is followed by a listing of the legislation (including draft legislation, and policy documents) referred to in the discussion. Each section concludes with a list of recommendations.

2. Summary of inputs received

2.1 Dr Rick de Sagte and Dr Farai Mtero

- The paper critically examined the evolution of laws, policies and practices relating to land governance and tenure across colonial, apartheid and contemporary eras aiming at identifying the processes and patterns of uneven development, examining the contribution of uneven development to structural poverty and systemic inequality. At the centre of this analysis was the effectiveness of policies and laws shaping land tenure and governance in the democratic era and assessment of the extent to which policy and law have been able to engage with these spatially differentiated legacies in order to promote spatial justice.
- The history of contemporary South Africa is founded on systematic and legally sanctioned spatial injustice through which land dispossession was carried out. Box 1 highlights some of the pieces of legislation that resulted in spatial segregation.
- The legacy of this history manifests in profound differentials which are yet to be redressed; namely, between the former homelands and the rest of the country, within the urban areas and those relating to land governance & administration systems and associated tenure security.

Box 1: List of some of legislation which accelerated spatial inequality

- Glen Grey Act (No 25 of 1894)
- Natives Land Act (No. 27 of 1913).
- The Native (Black) Urban Areas Act (No. 21 of 1923)
- Native Administration Act (No. 38 of 1927)
- Natives Trust and Land Act (No.18 of 1936)
- Betterment
- Native Laws Amendment Act (No. 46 of 1937)
- Native (Urban Areas) Consolidation Act (No. 25 of 1945)
- Group Areas Act (No. 41 of 1950)
- The Bantu Authorities Act (No. 68 of 1951)
- Native Laws Amendment Act (No. 54 of 1952)
- Promotion of Black Self-Government Act (No. 46 of 1959)
- The Black Areas Land Regulations (Regulation R188 of 1969) (Quitrent & PTOs)
- Bantu Homelands Citizenship Act (No. 26 of 1970)

The legacy of these pieces of legislation in terms of spatial injustice.

- Persistence of spatial inequalities and vulnerability of the land rights of people resident in the former homelands (this reflects complex relationships between past spatial-tenurial histories and the way in which these play out in the present);

- Locally distinct and differentiated systems of tenure and governance (in 'native reserves', later the homelands and Bantustans) e.g. PTO, historic quitrent, freehold and purchase 'tribal-trust' arrangements Colonial authorities built legal walls around Africans by subjecting them to an insulated and to some extent invented customary law designed to cut off African land and property relations from the oversight of the legislature and the recordal of their rights.
- Critical attention should be paid to transformation of the spatial divisions discussed above which are a result of centuries of social engineering, and cannot be easily undone.

Transformational processes

- **1994-2000:** the first phase of reform set out to establish a clearly defined platform of 'rights' for various categories of land holding of the formerly disenfranchised; i.e. rural commercial farmland (workers, occupiers and labour tenants); former homelands and Bantustans under communal systems; and the various urban settlements, formal and informal.
- The rights-based approach to reform replaced the notion of exclusive rights with the 'bundle of rights' approach
- Proposed legal reforms of communal tenure set out to challenge the entrenched power of apartheid-endorsed chiefly governance of tenure rights with the reconstruction of rights from the bottom up involving recognition of customary rights interpreted in terms of living norms and practices (i.e. 'living law'), accommodation of nested systems and flexible boundaries that characterise customary tenure systems, enabling choice of governance structure, and supporting negotiation and dispute resolution in cases of overlapping or contested rights.
- **2000 to date:** Private ownership in different forms remains the dominant tenure form in the urban areas and former white commercial agricultural areas.
- With regard to the land reform programme the state now retains ownership of land acquired through the proactive land acquisition strategy (PLAS) and leases it to redistribution beneficiaries.
- In the case of communal areas land allocation and common property management have remained firmly under the control of traditional authorities resulting in reinforcement of former apartheid spatial-tenurial boundaries and controls.

What is the best possible tenure arrangement: Trusteeship and tenure reform or titling?

- Research evidence shows that title deeds do not solve the property divides in our society, but may serve to exacerbate them. Titling fails to change the asymmetries of power in land transactions and the dispossessory effects of the market.
- Titling also fails to accommodate customary kinship or familial norms of access that continue to influence how land is held and passed on in practice.
- To date an appropriate policy and legislative framework for statutory recognition of rural communal land rights has not been put in place, thus rendering the land rights of people living within those areas vulnerable.
- With regard to urban spatial inequality, a number of pieces of legislation (listed in Box 2) were passed. However, the immense nature of spatial inequality and social exclusion from

formal access to land and housing continues to hold profound implications for South Africa's urban poor. South Africa is still wrestling with the resilience of apartheid spatial planning and the apartheid city.

Box 2: Post- apartheid policy and law relevant to urban settings

- ☒ Section 26 of the Constitution
- ☒ 1994 White Paper on Housing
- ☒ The Housing Act (No 107 of 1997)
- ☒ The Social Housing Act (No 16 of 2008)
- ☒ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (No 19 of 1998)
- ☒ Breaking New Ground
- ☒ The National Housing Code
- ☒ The Enhanced Extended Discount Benefit Scheme
- ☒ Upgrading of Informal Settlements Programme
- ☒ The Rental Housing Act (No 50 of 1999)

Recent policy direction – spatial justice

- The South African National Development Plan (NDP) lists ‘spatial justice’ as one of its overarching principles for spatial development.
- Spatial justice is the first development principle in the Spatial Planning and Land Use Management Act of 2013 (SPLUMA) which states:
- Practical definitions of the concept of spatial justice and its relation to tenure remain outstanding. Unless these are clearly defined, it would be difficult to concretely set policy agendas. For the concept of spatial justice to be meaningful it must engage with tenure issues and options with the potential to redraw the apartheid city.
- **The relationship between poverty and tenure security:** This is what is referred to as “market evictions”, i.e. formalisation frequently results in tenure arrangements that the new owners cannot sustain through poverty. For example, recipients of public subsidies may be displaced because they are poor, or subsidised properties sold for less than the capital the state invested. Therefore, the notion of property mobility through titling does not reflect the realities of land relations for most South Africans, where tenure security is a form of livelihood security. Given this, it is argued that –
 - The relationship between tenure and poverty is not resolved by simple recourse to titling and home ownership. Market-based evictions regularly occur on titled land or in the case of leases.
 - Providing title using the argument that this will enable the rights holder to secure access to credit can *undermine* the actual tenure security in local or customary tenure systems.

Recommendations

- Adequate recognition and securing of the land rights of communities and individuals living in the former Bantustans is yet to be achieved. This needs to take place in the

context of increasing dilution of rights; e.g. Ingonyama Trust where customary ownership rights are being reduced to tenancy. Research has shown that indigenous living customary law which recognises a web of reciprocal rights and obligations can afford individuals and communities real and substantive rights over land. Therefore, there is a need to -

- Review the Interim Protection of Informal land Rights Act (No. 31 of 1996) which facilitates some legal recognition of these rights in that it casts members of any relevant group, community or tribe as “co-owners” of the land who are required to take a majority decision to dispose of any of their rights. Such review must result in protection of the rights of rural citizens in former homeland areas and to actively draw in aspects of living customary law which increasingly recognise the rights of women.
- Review post-apartheid land administration in order to replace the various components of the discredited 'native administration' system with a modern land administration framework in line with both constitutional principles and customary norms and values which recognise and support social tenures.
- Spatial justice as articulated in the NDP and SPLUMA needs to integrate both tenure and land governance dimensions. The role of land tenure and governance in reproducing or transforming spatial inequality in a democratic South Africa remains complex and challenging to delineate. What seems clear is that advancing spatial justice can be served in part by finding viable alternatives to counter current paradigms which *de facto* promote
 - ownership for the wealthy,
 - informality/ title on the periphery for the urban poor,
 - vulnerability for farm dwellers and labour tenants
 - restricting many rural citizens to the confines of spaces delimited by colonial and apartheid policies and associated codifications of customary law
- Privileging of individual home ownership primarily on the periphery has inadvertently served to consolidate the geographies of the apartheid city
- An inclusive regeneration agenda needs to be developed which should prioritise the development of more private and public rental accommodation that is affordable for poor and working class people. This should prioritise inner cities areas and centrally located former white suburbs.
- Failure to effectively address the obligations required by Section 25(6) of the Constitution continues to render the tenure of many South African citizens in rural and urban areas insecure. Legislation such as the TKLB will serve to consolidate and deepen the stark spatial inequalities which characterise South Africa’s rural areas.
- Policy and legislation in the democratic era need to address the web of connection between spatial inequality, land governance and tenure insecurity to promote spatial justice

2.2 Ms Gloria Serobe (Agrarian Reform and Private Sector Investment)

- The presentation is based on WIPHOLD’s experience with an Agricultural Initiative in Mnquma (Centani) and Mbashe (Nqadu) in rural Eastern Cape. WIPHOLD focuses on development of a commercially sustainable and profitable model for farming on communal land in the former homelands.

What legal and non-legal requirements shape private sector engagements with agrarian reform?

- The lack of security of tenure for communal land in rural areas is a major challenge for private sector participation in rural housing and rural commercial agriculture projects.
- The major challenge is that there is no written proof of this Security of Tenure. The result is the lack of formal collateral or form of security for these families that will make it possible for any financial institution to advance funds towards house-building or agricultural activity.
- Approximately 35% of the population of South Africa live in rural areas, yet they have no meaningful access to funding or financial services to build wealth or even to preserve that wealth which they have managed to build while they were in active employment somewhere in big towns or mines.
- Private sector is hamstrung by the lack of stability in rural projects, especially due to lack of security of tenure.

Some lessons from the WIPHOLD initiative

- Non-commercial models that are simply grant-funded are not sustainable. But, grant-funding located within a commercial funding model is essential for start-ups. This a role that can be played by government which can become an important partner to the private sector.
- Private sector funding should in the early years offer favourable terms (i.e. low cost or zero-interest loans).
- The land tenure issue, the main reason for the private sector not to provide funding to farmers on communal land, can be overcome through 'land use agreements'.
- Much effort needs to be put into community mobilisation and engagement as much as is put into the farming (community mobilisation is central to thriving enterprises on communally-owned land).
- Having a player such as WIPHOLD involved provides a measure of security to banks. This role could also be played by government.
- The notion of dealing directly with the community (ie, the "no middleman" approach) works but needs constant cultivation and mobilisation of the community and, if possible, the buy-in of traditional leaders. Where there are chiefs, their existence should be respected but title must not be handed to them: their subjects are fully capable of making their own decisions.

Recommendations

- Communal land tenure act must be concluded without delay in order to give effect to the constitutional requirement for tenure that is legally secure. Tenure insecurity perpetuates poverty of rural dwellers.
- SPLUMA must be implemented in order to improve land use planning, development and management. (guard against housing development on prime agricultural land)

- Government must be a catalyst for development funding and crowd investment capital into these rural areas. There is a need for a combination of grant funding or use of a facility to promote funding by private sector investors should be considered.
- Trained human capacity to support development. For example, trained agricultural extension officers. Further, well trained staff are needed to actively engage in social mobilisation which is a daily job.
- Rural Communities should consider the following:
 - Understand that they are playing catch-up to the rest of South Africa and the world, therefore they must be organised, demonstrate discipline and a willingness to learn and work hard.
 - Look to save whatever financial resources they can and commit these toward the financing of the agricultural activities to which they would like to attract private sector funding.
 - Willingness to engage in long-term investment, with the bulk of proceeds from a harvest re-invested for the next season so that the activity can become sustainable.

2.3 Sunu Mabhera (University of Fort Hare)

Mr Sunu Mabhera presented a paper co-authored with Prof. M Aliber and Mr T Chikwanha. The paper forms part of a series of commissioned papers for the Working Group on Land Reform.

- It is important to start by acknowledging the duality of the South African agrarian structure, i.e. a relatively small number of large-scale commercial farms (LSCF), mostly white-owned, co-existing with a large number of small-scale farmers (SSF), mostly black. LSFC occupy the vast majority of SA's agricultural land whereas SSF occupy only limited areas. These presents a case for *agrarian transformation* in a country whose history is characterised by brutal dispossessions and systematic marginalisation of the majority.
- Agriculture as a source for livelihoods has been well documented, however changes over time have also shown the significance of the retail sector. This change forms part of the global changes that have been seen in the agricultural sector, i.e. exit of some farmers resulted in consolidation by others leading to expansion of farm sizes. Data shows that as the number of farm units declined between 1930 and 2007, there has been an increase in the farm sizes.
- What has been observed is that agriculture has been shedding jobs. This is explained in terms of structural changes that have taken place in the industry, including the introduction of a minimum wage for agricultural workers. However, it is important to note that minimum wage improved pay for farmworkers but discouraged employment. There were also other significant non-monetary benefits linked to the introduction of a minimum wage.

It is thus important to note that agricultural land reform and wider processes of agrarian change takes place under circumstances that are already extremely hostile to smallholders or new entrants to agriculture.

Farm or project level planning in land reform contexts.

- Economic rationale for land reform has never been made clear, except in the ANC policy document known as the RDP (i.e. making this programme a central and driving force for rural development programme; to address injustices of forced removals and historical denial of access to land...through implementation of this programme, government will *build the economy by generating jobs, increasing rural incomes and eliminate overcrowding*).
- An underpinning principle was that of ‘inverse farm size productivity relationship’, i.e. small-farmers tend to be less capital-intensive and more labour-intensive – more appropriate in a labour-abundant environment¹.
- How will land reform be a driving force for rural development? Assumption is that it will stimulate local economy through consumption and production linkages

So, how has redistributive land reform fared in relation to these ideals, i.e. fundamental agrarian transformation?

- Redistribution has gone through significant changes over the last 10 to 15 years (refer to redistribution round table report). From pro-poor programme (SLAG) to commercial-oriented programme of PLAS. (Note the “one hectare, one household” policy and that there is very little information available in the public domain about this programme)
- Restitution is constrained by the size of beneficiary groups which is basically outside the control of government; and lack of strategies to support large groups (note failures of government to implement CPA Act and other post settlement support mechanisms).

Project Planning

- There has always been emphasis on the use of consultants to plan for beneficiaries of land reform. Making use of the settlement planning grant (SPG) and restitution discretionary grant respectively (RGD). The use of consultants and obsessions with business plans became a stumbling block to successful land reform.
- Planning and decision-making were very much top-down and detached from people’s realities. In a way, redistributive land reform became bogged down in bureaucratic planning exercises that in many ways prohibited access and use of land until government was satisfied about the planning documents.
- Despite detailed manuals for service providers to develop business plans, which allowed for a great deal of flexibility in project type and design, many designs were a continuation of the farming systems of the previous owner.
- Key characteristics – how business plans were developed:
 - (i) Goal was to provide maximum cash income to each member
 - (ii) Continue with farm activities of the previous owner

¹¹Those who argue for this hypothesis argue that in the absence of market distortions, SSF use land more intensively and thus productively and use more labour (per unit area). The larger the farm, the more difficult the supervision (esp. when labour is hired relative to family members, thus compelling farmers to introduce labour-replacing technologies and machinery.

- (iii) Run the farm as a group, and to compensate for lack of management skills and farming expertise, the group would hire a farm manager. (or partnership)
- But now when we look at these problems like the LARD and the PLAS, they focus on large scale black commercial farmers. So in essence what they really did was simply to change the colour of commercial farming rather than empower the people at the grassroots level.
- There was no subdivision at all, no establishment of small scale farmers or farming and the system therefore simply continued with the approach of previous farmers. If one farm was belonging to a white male, it is now belonging to a black male. Nothing has changed about it.
- What happened was that group dynamics led the collapse of many of the projects hence a shift to LRAD in 2000 and 2001. Since then, there has been a bias toward LSCF. Despite policy pronouncement of smallholder development, programmes have tended to support LSCF. For example, the ‘Recap’ programme or RADP.
- Other planning approaches such as Area-based planning, stakeholder-based land reform, agricultural master plan, and rural development plans (e.g. spatial planning) tend to treat land reform as a parallel activity that has to be taken into account rather than a fundamental tool to promote rural development.

Smallholder agriculture, poverty reduction and capital accumulation

- Key question is: what do we know about contribution of farming to household-level food security?
 - Black rural households that participate in agriculture tended to be poor & are in rural areas. Poverty has a rural face.
 - Households which are involved in agriculture are poorer than those which are not involved in agriculture.
 - Those who are in agriculture and depend on agriculture must thus be the poorest of them all. So agriculture might be a route out of poverty for some households but for most it is just a coping strategy that compensates for lack of alternatives despite minimal government support.
 - Access to markets whether formal or informal, tenure security, good infrastructure, adequate access to water are the key determinants to successful SSF and food production.

Agricultural development and poverty reduction

- These should take into consideration programmes for support in land reform (e.g., ‘Recap’) and outside of land reform (e.g. CASP, MAFISA).
- Programmes should include:
 - Information and knowledge management
 - Technical and advisory assistance
 - Technical and capacity building
 - Marketing and business development
 - On- and off-farm infrastructure
 - Partnership potential
 - Food security interventions, and

- Various forms of land-based livelihoods.

Alignment of land and water allocation reforms

This section was not discussed because the intention was to host a round table dedicated to this theme.

Recommendations

The presentation, and the paper did not include clearly spelled out recommendations. The authors were requested to consider submitting written recommendations to the HLP.

- The legislation relating to sub-division of agricultural land, especially land reform, need to be implemented without delay to enable processes of transformation of the property rights holding in South Africa, enabling change in rural parts of the country and support for the development of smallholder agriculture.
- A need for a law to enforce settlement support and small-holder development. Could it be in a single piece of legislation? Or could this be infused in a range of laws and policies?
- Planning and support for LSCF and SSF – not a blanket approach, but a clearly targeted approach which promotes production for food security as well as capital accumulation.
- Strategies to counter the collapse of agriculture, an agrarian process which locates rural labour within wider processes of de-agrarianisation, i.e. complementation of agricultural livelihoods, retail sector and wage labour. Acknowledge the multiple livelihood strategies of rural dwellers.
- Invest in rural infrastructure to incentivise production in rural areas, especially abandoned fields on communal lands. Climate change and other environmental changes must be given attention, hence a need for investment in technologies and research to support production under changing environmental contexts.
- BBBEE – and development of LSFC among blacks, how to support it without marginalising smallholder production and support systems.

2.4 Ms Wilmien Wicomb (Impact of TLGFA in relation to entrenchment of apartheid spatial boundaries and power relations)

- The presentation critically examined the Traditional Leadership and Governance Framework Act, how it relates to spatial inequality and social exclusion. (The homelands system facilitated extreme spatial inequality and social exclusion). Apartheid government preferred to think of chiefs as autocratic owners of land and communities as subjects and second class citizens. This is a useful way of thinking about chiefs in the apartheid government.
- From 2000 up until 2003, there was acknowledgement that the 1951 boundaries and the structure that was created were an extremely problematic product of apartheid manipulation and distortion and that there was a need to get rid of them. However, through the negotiations from 2000 to 2003, South Africa somehow ended up with a peculiar system which kept the exact boundaries and leadership positions created under the 1951 Act

- But in terms of the Act two mechanisms were created which were intended to address the history of distortion and manipulation by the apartheid government.
 - A commission would be created to hear traditional leadership disputes and claims. The commission has not been a successful mechanism in transforming the deeply problematic manipulations of traditional authorities.
 - Democratisation of Traditional Councils through provision for election of 40% of the traditional council, and a third of the traditional council should be women.
- Traditional Council elections have been a failure. In provinces such as KZN there have been no more than 2 percent of eligible voters participating in the elections.
- This takes place within the context of the constitutional recognition of customary law. The Constitution recognises customary law as a source of law equal to common law, and equal to statute law.
- A case study of the community of Makgodu, Moletji in Limpopo. A traditional leader was imposed on them in 1980 and formalised in 2003 with the TLGFA. They were forced to pay rent and a lot of levies to the traditional leader. The TLGFA does not provide for mechanisms to opt out.
- There is nothing wrong with the Constitution on this; there is a need to make it explicit what parts of the law should be repealed or amended.

Recommendations on how to improve the governance of rural communities in South Africa? (given that the Traditional and KhoiSan Leadership Bill, that is to replace the Framework Act, is currently before parliament).

- Government must return to the principle of the White Paper that “measures [must be] taken to ensure that people in rural areas shape the character and form of the institution of traditional leadership at a local level, inform how it operates and hold it accountable”. Traditional leadership positions and incumbents should no longer be decided by government or other outside entities; it should be a decision taken by the community.
- Scrap the transitional provisions and allow communities to self-identify and to assert and shape their own customary institutions.
- Allow communities to hold their structures accountable through opting in to the system if it works for them; create mechanisms of independent dispute and complaint that do not involve the relevant royal family or House of Traditional Leaders.
- We must stop discriminating against rural people and ensure equality of citizenship.