LRC

LEGAL RESOURCES CENTRE

Comment on Green Paper on Land Reform

1. The purpose of the Green Paper

Perhaps the most fundamental flaw of the Green Paper, we submit, is the failure to articulate a clear purpose. It is unclear whether the Green Paper attempts to represent a new comprehensive and overarching strategy for land reform – thereby departing from the model hitherto followed by the department – or whether the text should be read as a mere addition to the current approach. As such, it is difficult to comment on the main thrust of the document and as a result our comments will rather focus on the detail proposed.

In any event, we submit that the Green Paper should not only be clear and concise about its purpose. Moreover, that purpose should represent a coherent strategy for land reform that clearly departs from the principles currently underlying the piecemeal attempts at land reform that have clearly failed South Africans.

A coherent approach, however, does not amount to a simplistic one.

Merely reducing the complexity of land holding in South Africa to a single system, as the Green Paper seems to suggest, does not amount to creating an overarching system for land reform. On the contrary, as we argue below, such an overarching system should be able to accommodate (rather than eliminate) all the different forms of ownership and land holding based on common and customary law as these systems function in rural South Africa.

Such an approach is necessitated by the constitutional recognition of property rights and of customary law. The very authority to develop this policy comes directly from the Constitution and should be informed by it. The recognition of the constitutional imperative that should be the source of the current Green Paper is a glaring omission from the document. Finally, we submit that, even if the Green Paper is able to propose a coherent and overarching strategy for

land reform, such a strategy will amount to nothing if the legislation to give effect to the strategy is not in place. South Africa is a constitutional democracy based on the principle of the rule of law. Every action proposed in the Green Paper must thus be enabled by legislation which in turn must be enabled by the Constitution. The Green Paper does not give any indication of which legislation will be used to implement the strategy proposed – whether existing or new legislation. As such, in terms of the Constitution, the document has no authority to implement what it proposes.

2. Customary law and the Green Paper

A central concern with the Green Paper is that, while explicitly acknowledging the fundamental importance of culture to the land question and the significance of de-racialising rural areas, it then proceeds to announce that, "because of its complexity" communal tenure will be dealt with in a separate policy. This, we submit, is a fundamental flaw of the policy for the reasons outlined below.

We discuss communal tenure in the context of customary law because, as the Constitutional Court has acknowledged, "[c]ommunal land and indigenous law are […] so closely intertwined that it is almost impossible to deal with one without dealing with the other".[1]

1.1 The status of customary law tenure systems in Africa

The renowned scholar of customary law and related systems of tenure, the late Prof Okoth-Ogendo of Kenya, once recounted how, as the colonial era drew to a close in the 1950's and 60's, British legal scholars organised a series of conferences to discuss the 'future' of customary law in Africa and the need to 'construct a framework for the development of legal systems in the emerging states'.[2] These initiatives assumed that the 'indigenous' legal systems of African countries and peoples of which they were well aware, were *inadequate and inferior compared to the English common law*.

These scholars must have felt vindicated when, upon independence most African countries adopted the colonial legal framework wholesale – especially, as Okoth-Ogendo points out, in view of the development framework's "general

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[1] *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214; 2010 (8) BCLR 741 (CC).

[2] HWO Okoth-Ogendo, 'The nature of land rights under indigenous law in Africa' (2008) in A Claassens & B Cousins (eds) *Land, Power, Custom* (2008) p 95.

ambivalence as regards the applicability of indigenous law".[3] Indigenous law and customary legal systems were regarded as inferior, were never extended to areas covered by colonial laws and, when applied, it was done only to the extent that it was not repugnant to Western justice and morality or inconsistent with any written law.

It is trite that the post-colonial era sadly continued the relegation of customary law to a separate and unequal system of law that rarely found its way into the formal, 'Western' courts.

Whereas many African countries adopted constitutions towards the end of the twentieth century which recognise customary law as an equal source of law to be applied by the courts 'where appropriate', the application of customary law in the formal courts remains almost exclusively limited to issues of personal law, and rights claimed by individuals.[4]

The South African courts are a notable and significant exception.

The seminal case with regards to customary forms of tenure was that of the *Richtersveld* community which reached the Constitutional Court in 2003. In recognising the aboriginal title of the Richtersveld community, the Court held that

> *the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law.*[5]

This judgement confirmed the constitutional recognition and protection of customary law as found in sections 39(3) and 211 of the Constitution.

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[3] As above p 99.

[4] Customary communities as 'peoples' and their customary tenure as 'culture': What we can do with the Endorois decision: Wilmien Wicomb and Henk Smith; African Human Rights Law Journal Volume 11 No 2 2011:

[5] The Draft Green Paper at paragraph 7.2 on page 84 quotes from the Richtersveld judgment to illustrate that various tenure forms existed amongst South Africans tenure systems, and that use rights trumped freehold titles and communal titles trumped individual titles in many communities in South Africa.

We submit that any policy document that purports to address the land question in South Africa should have as a central concern the recognition of customary law as a source of law equal to statutory and common law as a source of tenure rights in South Africa.

1.2 Communal tenure, customary law and culture

In *Richtersveld*, the Constitutional Court based itself on a finding by the Supreme Court of Appeal according to which **the mainstay of the community's culture was its customary land tenure laws and rules**.

Our courts have therefore recognised an inextricable link between communal tenure, customary law and culture.[6]

Within this context, the green paper's emphasis on culture and, in particular indigenous culture, is to be commended.

In the introduction, it is said that

All anti-colonial struggled are, at the core, about two things: repossession of land lost through force or deceit; and, ***restoring the centrality of indigenous culture****.*

It goes on to state that Ubuntu, as an expression of culture, is not merely a symbol, but

> *a part of a peoples' expression of themselves, for themselves and of themselves. It is a way of life, integrally linked to land. If you denied African people (a definition which includes the San and the Khoi) access to, and or, ownership of land, as has been the case under both colonialism and Apartheid in South Africa, you have effectively destroyed the very foundation of their existence.*

The significance of this truism for rural people especially is acknowledged.

Amongst the development indicators identified in the green paper is cultural progress.

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[6] This assertion should not obscure the fact that customary forms of ownership cannot be equated absolutely with the common law understanding of communal property. As Nhlapo has explained, the emphasis on the 'communal' nature of social organisation and property holding among customary communities often obscures the significance of the various levels of decision making power, jurisdiction and land holding within a traditional community.

Inexplicably, however, despite this recognition of the restoration of land and tenure rights as a function of cultural progress, the draft green paper then proceeds to exclude the most important aspect of land tenure – communal tenure – from the ambit of the document.

It cannot be argued that the issues arising with communal tenure are complicated as was recognised by the Constitutional Court in the *Tongoane* judgement. In any event, we submit that to separate the issue of communal tenure from the other forms of tenure in this, the central policy document on land reform in South Africa, is to once again relegate it to a separate and inevitably inferior system of tenure. Whereas the intention may be good in thinking long and hard about the question of communal land, the issue cannot be excluded from this document which purports to create a coherent system of tenure in South Africa.

As customary communities across the continent remain largely unable to assert their tenure rights within the formal courts precisely because the mainstream legal system struggles to accommodate the customary legal concepts foreign to common law, any separation of the customary/communal tenure question from the common law property system will only entrench the undermining of the former.

1.3 The legacy of Apartheid and the neglect of the homelands

The question of communal tenure is of course inextricably linked to the legacy of the homelands which not only created clusters of Africans with no citizenship rights, but denied these people any rights to resources thereby facilitating extreme poverty and inequality. The deep structural entrenchment of such inequality will inevitably remain a challenge for decades to come.

This is acknowledged by the Green Paper when it identifies in its first problem statement the need to instil shared citizenship as a primary reason why the State must continue to invest in the transformation of land relations (systems and patterns of land control and ownership) in our country.

There can be little doubt that the crisis of a lack of common citizenship status and the associated civil and political rights during apartheid were felt most acutely in the homelands. The focus on creating a shared citizenship must therefore start with these former ‘subjects’. These are precisely the people largely residing on communal land. We thus submit that the exclusion of the question of communal land from this policy directly contradicts its problem statement of creating a shared citizenship.

3. The nature of ownership

The separation of communal land from individually held land raises another important question that is applicable to agrarian land in South Africa. The Green Paper purports to 'integrate the current multiple forms of land ownership', namely communal, state, public and private, into a single system. This is ironic, as South African law *in fact* only recognises one form of ownership – whether owned by the State, a company, a group of individuals or a single individual. In other words, such an integrated system of ownership *already exists in our law* – but is precisely central to the difficulty of asserting the rights of the millions of South Africans whose access to land is not regulated in terms of the single concept of ownership recognised by a legal system that was created to secure the absolute rights of the privileged few. Rather than a solution, it is part of the problem.[7]

When the Green Paper continues to suggest some restrictions to the common law form of ownership in order to realise optimal land-use in South Africa, it is attempting to undermine this integrated system of ownership that our Roman-Dutch legal heritage created. To then assert that this document once more creates such an integrated system without engaging with how ownership is understood in South African law as opposed to how landholding actually functions on the ground, is confusing at best.

We submit that the Green Paper must tackle the issue of the legal definition of ownership head-on if it is to suggest changing the nature of the legal concept (by imposing restrictions) or to integrate all forms of ownership – which means

[7] As Pienaar, citing Van der Walt, explained: "In a nutshell, the apartheid land rights regime was based on the relative strength and security of white land rights, combined with the relative weakness and insecurity of Black land rights". My point is that this division of strong and weak rights may look like a purely political creation, but in fact it was founded on (and, legally speaking, exacerbated by) a highly valued legal institution, namely the traditional civil-law hierarchy of property rights. The 'fragmentation' of land rights have to be understood against this background: the land reform programme should break out of (and break down) the traditional, civil-law hierarchy of land rights, and create land rights that are strong and valuable because they suit specific needs and requirements, and not because they assume a privileged position in an abstract hierarchy of stronger and weaker rights. This will help to undermine the hegemony of the traditional system of property rights and its privileging of existing, mostly white, land rights. Stated very simply this amounts to saying that land reform should consider the reform and redistribution of land rights and not just (or simply) the redistribution of land. Land reform should amount to more than a merely superficial, mechanical reshuffling of land – if it is to be effective, it has to change the 'background law' that formed the basis on which apartheid land law was constructed." Pienaar, JW *South African land reform at the cross road / Securing the land rights of poor people* Keynote speech delivered at the First International Academic Partnership for Environment and Development in Africa (APEDIA) Conference on Sustainable Land Use in Africa in Kampala, December 2009. He cites Van der Walt, A J 1999 *Property Rights and Hierarchies of Power: An Evaluation of Land Reform Policy in South Africa*: Koers 259-294

the integration of rights sourced from different legal concepts (in common and customary law). The Green Paper should acknowledge these tensions and suggest a way forward on dealing with these.

At the very least, it must interrogate the hegemony of the traditional system of property rights that continue to exist in South African law and its inadequacy for securing the various tenure rights of South Africans who remain marginalised and even excluded from that system. .

4. The African context

On p 10-11 of the Green Paper, examples are cited of 'land reform experience elsewhere'. It is unclear what this adds to the document as no conclusions are drawn or observations made about these examples. However, it is worth commenting on the examples chosen.

Whereas the introduction to the document places it within the greater context of the 'anti-colonial struggle' and the 'restoration of indigenous culture', notably the culture of Ubuntu as the 'over-arching way of life of the African people', the comparative examples chosen later on in the document completely ignore the Sub-Saharan African context of this document. Instead, examples are cited from Asia and Latin America. The single exception is Egypt, which is not a sub-Saharan country and thus do not represent the African cultural context boldly evoked in the introduction.

This inconsistency is not merely rhetorical. We submit that one of the central concerns of the anti- or post-colonial struggle for land reform and equity is the challenge of dealing with the conflict between indigenous legal systems and the common law systems of ownership imposed by the colonists. As pointed out earlier, this document ignores this struggle by attempting to create a 'single coherent' narrative of ownership without engaging with the difficulties that entails.

The Green Paper must acknowledge South Africa's geographical, political and strategic position on the African continent. It must acknowledge that, as in South Africa, one of the key issues facing the entire sub-Saharan continent of Africa is the problem of access and use of land. As in South Africa, the issue is a complex and layered one greatly informed by the persistence of customary law systems of land holding even despite the severe distortion of these systems by colonial and apartheid impositions. Today, the majority of Africans live on land held in terms of a customary system, while South Africa – through

its Constitutional Court - is arguably the only country that has started to grapple successfully with the difficult relationship between state law and customary law thereby ensuring the security of tenure of these customary communities. While the battle is far from over as the Green Paper acknowledges, South Africa must see its potential leadership role within the continental context and unite with its African brothers and sisters to resist the continued marginalisation of indigenous forms of land holding.

Perhaps ironically, international and regional human rights institutions are increasingly moving towards the idea that proper recognition of customary law tenure systems may be a solution to Africa's problems of poverty and unequal resource distribution – and indeed to realise the right to land. An emphasis on customary principles is also found in many international, regional and sub-regional soft law documents promoting sustainability. Significantly, in its recent *Framework and Guidelines on Land Policy in Africa*,[8] the African Union Commission, the African Development Bank and the UN Economic Commission for Africa encouraged countries to 'acknowledge the legitimacy of indigenous land rights' and 'recognize the role of local and community-based land administration/management institutions and structures, alongside those of the State'. The Green Paper in its current form does not even acknowledge the existence of this document central to the land question in Africa.

In addition, the interpretation of Section 25 of the Constitution must be informed by the international instruments to which South Africa is bound.[9] Perhaps most relevant to this policy document is the African Charter on Human and Peoples' Rights to which South Africa is a party. The African Commission on Human and Peoples' Rights, the institution mandated with

[8] LAND POLICY IN AFRICA: A FRAMEWORK TO STRENGTHEN LAND RIGHTS, ENHANCE PRODUCTIVITY AND SECURE LIVELIHOODS. FRAMEWORK AND GUIDELINES ON LAND POLICY IN AFRICA Revised Version March 2009.

In 2006, the AUC, the UNECA and the AfDB initiated a process for the development of a framework and guidelines for land policy and land reform in Africa with a view to strengthening land rights, enhancing productivity and securing livelihoods for the majority of the continent's population. That initiative was carried out by way of extensive consultations involving the participation of RECs in all the five regions of the continent, civil society organizations, centres of excellence in Africa and elsewhere, practitioners and researchers in land policy development and implementation, government agencies and Africa's development partners. The final outcome of the initiative was then presented before the formal decision-making processes of the AU for approval and adoption by the Assembly of Heads of State and Government in July 2009.

President Zuma attended the session in Tripoli when both the land declaration, noting the framework and guidelines, and the Sirte declaration on agricultural investment were adopted.

[9] In terms of section 39 of the Constitution.

giving content to the Charter, has interpreted Section 14 of the Charter (the protection of the right to property) to include 'rights guaranteed by traditional custom and law to access to, and use of, land and other natural resources held under communal ownership'.[10]

It is further worthwhile to explore what the continental policy measures did and are doing to develop the social and economic rights in the Charter. Apart from the right to property, the Charter contains specific peoples' rights, including

b) The peoples' right to development;
c) The peoples' right to exploitation of natural resources.

[10] ACHPR 2009 *Principles and Guidelines to the Socio-Economic Rights contained in the African Charter* available at www.lrc.org.za.

5. The systems approach

In the 'Summary and Conclusion' of the document on p 12, it is asserted that

A systems approach seems necessary and appropriate in addressing complex and emotive challenges such as land reform. The failure to protect the rights and security of tenure of farm workers and dwellers is a good illustration of this point. There is a strong view that the real problem in land reform in general; and, in the protection of the rights and security of tenure of farm-dwellers, in particular, may be that of a total-system failure (TSF) rather than that of a single piece of legislation […].

We submit that this is a significant and valuable insight. In the LRC's comments to the Draft Land Tenure Security Bill submitted in March this year, we made a similar point.[i]

We would like to elaborate as follows upon this point and in particular an approach to dealing with complex issues such as the land reform question.

As the Green Paper suggests, when faced with complex problems, we need diversity in order to approach them. Having just one, simple answer to every question works well when the questions themselves are simple. But the question of land reform which includes the tension between different forms of land holding with varying statuses and different legal systems, is so complex that simple answers are inadequate. Faced with the complexity of the South African tenure systems, for example, a rich diversity of legal cultures may well offer us the best chance of finding workable solutions – if these cultures are treated with equal recognition. Similarly, faced with the complexity of difference of local communities in rural South Africa, allowing for diverse local solutions, may be the key to answering the complex question of land reform.

A systems approach suggests that one must be cautious about attempting to formulate simple solutions. The Green Paper's attempt to configure a 'single, coherent four-tier system of land tenure' (p 6) may well be such a simple solution that negates the complexities of rural landscape in South Africa. It is precisely the way to make a sensitive systems-approach impossible.

To then push the question of communal tenure out of the discussion (because of its 'complexity') only confirms this fear.

We submit that, firstly, a systems approach entails being far more careful to confirm the differences between tenure systems and upholding the tensions that these entail – rather than overemphasizing one (eg common law individual ownership) above the other (customary communal ownership). This will entail rethinking the concept of ownership, the status of customary law forms of tenure and how these may be protected – especially when in conflict with common law forms of ownership – and above all, seeking local solutions.

Secondly, therefore, we submit that creating single, overarching concepts as the basis for a land reform policy denies local communities the opportunity to negotiate solutions that work for them. If anything, this Green Paper must allow the space for such local solutions to be possible. That means refraining from creating top-down, one-size-fits-all solutions that have no relation to the realities communities face on the ground.

At the same time, it should be said that an over-emphasis on the difference between tenure systems runs the danger of disregarding the identity or sameness that legal systems share. Identity is implied by difference because it is impossible to speak about the difference between two things if they were absolutely different. There needs to be an element of identity in order to give content to difference. We can talk about the difference between communal and individual tenure or customary and common law ownership because these concepts share things – ie, they both define the relationship of people to land and to the rest of the world in relation to that land. If there is nothing that we share, there is no basis for cross-fertilisation.

In order to recognise the diversity of tenure systems in South Africa, the Green Paper needs to assert the sameness of all these tenure systems in the sense that they all give rise to rights – whether user rights, access rights or the right to sell the land. The recognition of their customary tenure systems as at the same time different to common law tenure, but the same in status, will provide communities the opportunity to negotiate better lives for themselves.

At the same time, we reiterate that accommodating the diversity of the land needs of South Africans does not necessitate an incoherent approach. On the contrary, a systems approach precisely entails creating a coherent and overarching system able to engage with all these differences.

Facilitated land acquisition, expropriation and land demand identification

The Green Paper of September 2011 does not debate or give guidance on expropriation and the importance of expropriation of privatised land, water and natural resources. Instead it proposes a simplistic centralized institutional or bureaucratized solution to the unidentified and unexplained challenge. The office of the valuer general is to be responsible for:

> *(a) the provision of fair and consistent land values for rating and taxing purposes;*
>
> *(b) determining financial compensation in cases of land expropriation, under the Expropriation Act or any other policy and legislation, in compliance with the constitution;*
>
> *(c) the provision of specialist valuation and property-related advice to government…*

Above, we have pointed to the shortcomings of such a simplistic and top-down approach in dealing with complex problems.

The Green Paper fails to address the critical issues necessary to reconsider the context for expropriation and the willing buyer willing seller approach adopted by your department for much of the previous decade. The relevant considerations listed by your department[11] include:

- policy framework towards a pro-active acquisition of land
- efficacy of land acquisition policy component and instruments
- approaches for land demand identification
- land tenure constrictions on land redistribution
- land related economic and social policies
- State Capacity

[11] Toward the Framework for the Review of the Willing Buyer-Willing Seller Principle; Third Draft Discussion Document; 17th September 2006; Department of Land Affairs

By contrast the National Development Plan[12] issued last month explores new directions. It proposes a model starting at district level to involve current owners in the delayed and stepped purchase of productive land at scale.[13]

Indeed the district based approach of the NDP is reminiscent of the Expropriation Bill of 2008[14] which proposed inter alia:

a) investigation and gathering of information for purposes of expropriation including the existence of unregistered rights such as customary law rights of occupiers and the need for land, water and related reform in order to redress the results of past racial discrimination [clause 10];

b) the extension of the purposes for which property may be expropriated from the narrow term of public purpose to include expropriations in the public interest. Expropriation in the public interest, for instance, provides government with a tool to achieve its commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources;

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[12] National Development Plan, Vision for 2030, National Planning Commission 11 November 2011

[13] Each district municipality with commercial farming land in South Africa should convene a committee (the district lands committee) with all agricultural landowners in the district, including key stakeholders such as the private sector (the commercial banks, agribusiness), government (Departments of Rural Development and Land Reform, the provincial departments of agriculture, water affairs and so on), and government agencies (Land Bank, the Agricultural Research Council and so on).

- This committee will be responsible for identifying 20 percent of the commercial agricultural land in the district, and giving the commercial farmers the option of assisting in its transfer to black farmers.
- This can be done as follows: Identify land readily available from the following categories: land already in the market; land where the farmer is under severe financial pressure; land held by an absentee landlord willing to exit; and land in a deceased estate. In this way, land could be found without distorting markets. Obtain the land through the state at 50 percent of market value (which is closer to its fair productive value). The 50 percent shortfall of the current owner is made up by cash or in-kind contributions from commercial farmers who volunteer to participate. In exchange, commercial farmers are protected from losing their land in future and they gain black economic empowerment status. This should remove the uncertainty and mistrust that surrounds land reform and the related loss of investor confidence.
- A stepped programme of financing would address most of the financing problems of land reform beneficiaries, give the implementers reassurance that beneficiaries have the necessary skills for successful farming and spread the cost of the programme between the future earnings of the farmer and the pockets of the taxpayer.

[14] B16 of 2008 dated 15 April 2008 and introduced by the minister of public works; it has now become imperative that this bill be re introduced and considered by parliament

c) expropriating authorities and affected parties to exchange technical reports and other relevant information, in endeavouring to reach agreement on compensation;

d) establishment of Regional Expropriation Advisory Boards to advise all expropriating authorities on all aspects of expropriation, including the determination of fair prices and compensation, and may investigate and identify suitable property for land, water and related reform.

Facilitated purchases and strategic expropriation should be planned and executed at district level and the establishment of a national valuer office may undermine such an approach. The Draft Green Paper recognised this truism.[15]

Spatial Development Frameworks and the draft Spatial Planning and Land Use Management Bill

The word planning appears once in the Green Paper. At paragraph 3.4 reference is made to the importance of "effective land use planning and regulatory systems which promote optimal land utilization in all areas and sectors; and, effectively administered rural and urban lands, and sustainable rural production systems."

By contrast the National Development Plan emphasises the utmost importance of planning for spatial justice and spatial sustainability as the foundation for rural transformation and spatial governance.

The question is whether the department is intending to prioritize the role of local government and communities in effecting their own land use planning and whether the department is going to contribute to the capacitation of local stakeholders in this exercise.

A few weeks after the publication of the Green Paper, the spatial development framework guidelines appeared on the department's website.[16] The guidelines

[15] acquire strategically located land and land above the prescribed ceilings in a given district [page 113]

[16] res://ieframe.dll/acr_depnx_error.htm#ruraldevelopment.gov.za,http://www.ruraldevelopment.gov.za/DLA internet//content/document_library/documents/SpatialPlanningInfo/SDF%20GUIDELINES%20WORKING%20DRAFT%207.pdf

are comprehensive and informative and provides for participatory planning processes. It is commendable. The guidelines list the wide array of national and sector plans relevant to SDFs.[17]

But where does this leave us with regard to the much vaunted draft Spatial Planning and Land Use Management Bill and the department's obligation to address the constitutional constraints to the Development Facilitation Act identified by the court?[18] We have addressed the shortcomings of the SPLUMB in our submissions to you in June this year. We propose the following to deal with the interim situation and give credence to the undertaking in paragraph 3 of the Green Paper:

1. Revive the Development and Planning Commission under the Development Facilitation Act, co-appointed by Ministers for National Planning, Rural Development and Land Reform and Human Settlements, plus Cooperative Government (TA) – for long term law reform.

2. Link the new planning initiative to the National Spatial Vision and NDP by the NPC

4. Consider amendment to the Development Facilitation Act that simply requires Development Tribunals to observe Integrated Development Plans and Spatial Development Frameworks (and amend the Less Formal Township Establishment Act similarly) in order to satisfy the requirements of the constitutional court.

5. Support amendments of each provincial ordinance to devolve decision making to local government and appeals to inter-municipal structures

[17] National policies and programmes relevant to SDF: National Spatial Development Perspective [NSDP] 2006; Breaking New Ground 2004; Neighbourhood Partnership Development Grant 2007 CRDP; Land Reform District Area Based Plans; DWA Best Practice Guidelines; National Biodiversity Framework;
Sector plans: SEA and EMFs under NEMA; Bioregional plans NEM: Biodiversity Act; IEMP; Human Settlement Plans [housing chapter of IDP]; ITPs; Heritage Resources Register; Integrated Waste Management Plan; Social Development Programme [section 153 of constitution]; Health Sector Plan [section 33 of National Health Act; Disaster Management Plan; Integrated Energy Plan and Integrated Resource Plan; Local Economic Development Strategy section 26 of MSA Area Based Land Sector Plan DLA; CRDP

[18] City of Johannesburg Metropolitan Municipality and Others v Gauteng Development Tribunal and Others CC requires the department to address the shortcomings to the DFA by June 2012.

The following admission is glaring and challenges all communities, urban and rural: "There are few examples of communities mobilising to initiate their own planning and problem-solving, and these efforts are often stalled due to government's lack of capacity to engage and respond."[19] What is needed is a planning system that encourage publicly funded, citizen led community vision and planning processes.

[19] NDP page 245

Key challenges in relation to planning

Finally, our experience and that of our clients show that key planning challenges that need to be addressed in any policy framework or Green Paper purporting to deal with rural development to be the following:

1. Development planning in South Africa is located in a vast, uncoordinated, unsychronised and, at times, contradictory policy environment and legal framework. A key factor further undermining the prospects of effective interventions that will alter the spatial structure that is our apartheid legacy relates to inadequate policy with regard to the management, administration and use of communal land.

2. Communal land is found within all provinces, including the Western Cape.

Very small portions are included in the Gauteng Province within to the Tshwane Metropolitan area. Communal land areas are largely located within areas which have hilly topography (KwaZulu-Natal, Eastern Cape, parts of Limpopo and Mpumalanga) or areas with low agricultural potential.

Consequently, food security is at best precarious and there is a major need to look to other natural resources to enable development in these areas. It is estimated that around 20 million people are based in these areas.

3. While internal migration is occurring, land within the communal land areas is retained by the migrant through household or family structures. Thus, the increase in pressure in the urban areas is not offset by a decrease in land pressure in the rural areas.

4. For different forms of tenure most appropriate for land use and social purposes to operate effectively, a number of measures need to be put in place such that land-use is independently recorded and administered in a similar manner to the management of freehold title. Without this, servitudes - which government must be able to register as a land-use in the public interest without reference to land owner's rights - cannot be properly managed and planning and securing of essential public facilities such as water, electricity and rights of way become almost impossible for municipalities to plan, finance

and implement. This is particularly the case when private sector finances are involved.[20]

5. The Extension of Security of Tenure Act (No 62 of 1997), the Land Reform [Labour Tenants] Act (No 3 of 1996) and the Interim Protection of Informal Land Rights (Act No 31 of 1996) confer rights on persons occupying land registered in the name of another person. Historically, black people are located in a wide number of areas on farms and other land parcels all over the country. Key questions remain about how, within the limited municipal resources, services can be provided to such farm dwellers: should 'agri-villages' be established; should they become co-owners of the land they occupy; or should there be incentives provided to encourage to migration to urban (including small-town) centres? In each case, the questions remain of how municipal services, such as water electricity, transport will be extended to them. Current occupiers may not have access and information - but their descendants will have acquired education, been exposed to new ideas and will have developed expectations that must be met.

6. The township establishment process is still regarded as the basis for municipalities to engage with communities that have benefitted from restitution and these can involve onerous administrative and bureaucratic processes, with delays at every turn. Various provincial land use planning laws allow for township establishment, as well as the Less Formal Township Establishment Act, 113 of 1991. The Development Facilitation Act, No 67 of 1995 (DFA) involves Tribunals to determine land use changes, and allows for fast-track development applications for land use changes and township establishment, rezonings, subdivision, etc. This Act is also not used uniformly in all provinces and we have made proposals above to address the concerns of the Constitutional Court with regard to the DFA.

7 The State has failed to undertake the registration process required in terms of the Communal Property Associations Act No 28 of 1996 and regulations in terms of the Interim Protection of Informal Land Rights Act have not been promulgated. Both of these steps would have provided some

[20] While freehold land has recognised rights with full range of entitlements which can be allocated/sold to others, it is not suggested that this is the desirable or sole form of ownership. On the contrary, ownership is often less important than land-use rights and the security of these rights and their ability to be transferred. The Department of Rural Development and Land Reform (DRDLR) has launched a programme to survey all the outer boundaries of the Communal or tribal authority areas, in preparation for eventual transfer to the communities. The surveying is approximately 75% completed but no transfers can take place until the necessary legal provisions have been established.

certainty over tenure and use of land in the short and medium term thus facilitating development.

8. Challenge occurs within the traditional authority areas particularly around the servicing of such areas. There is often a conflictual relationship between the traditional authority and the municipality with regard to actual and perceived roles and responsibilities in relation to planning and development.

9. The process for obtaining and managing concessions needs to be more transparent and open to public scrutiny. Particularly problematic are mining concessions and the implications for communities directly impacted by the awarding of thereof. Environmental and social impact studies often lack credibility.

10. The sale of municipal land is open and transparent and is concluded in terms of the Municipal Finance Management Act. Public land owned by Provincial and National Government and the parastatals is subjected extensive regulations outlined in the Public Finance Management Act No 1 of 1999. There is a lack of transparency within these two spheres of government in relation to the disposal of land.

11. There are no set national standards for the quality and the contents of the town planning schemes in South Africa. Consequently, wide variations are found between municipalities.

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[i] Extract from the Legal Resources Centre's submission to the Portfolio Committee on Rural Development and Land Reform dated 18 March 2011:

"This Bill [the Draft Land Tenure Security Bill] will replace ESTA and the Land Reform (Labour Tenants) Act 1996 as the legislation giving effect to section 25(5) and (6) and section 26 of the Constitution. Both pieces of legislation have been in existence for slightly more than 10 years and have been tried and tested and litigated in our courts - and subject to their jurisdiction. As a result, a certain understanding of these Acts has developed and there are (to a lesser or greater extent) rights realized and generally accepted processes implemented in terms of these Acts. When contemplating replacement legislation we submit that it is necessary to be clear as to exactly what failings of the to be repealed legislation require attention to comply with constitutional requirements and progressively realize rights.

The draft Land Tenure Security Bill does not seem to have been drafted taking these considerations into account and may well – if the current draft is adopted – lead to a situation where those people whose activities and lives have been governed by the provisions of the (to be

repealed) Acts are confronted by a less certain, less secure, more litigious environment than they currently occupy

Having said that, the greater context within which these two Acts operated may well have doomed these Acts to failure from the start – and must thus at all costs be reviewed in order for new legislation to have a chance of success. The inadequacy of ESTA to effectively protect farm dwellers is well documented. Commentators have invariably noted, however, that ESTA's failures were not merely the result of internal problems with the Act; rather, it was the context of the shortcomings of the greater land reform project within which ESTA attempted to protect tenure security, that set it up to fail. As Michael Roth noted following a National Land Tenure Conference in Durban in 2001,

Commercial farms in South Africa are highly commercial and indebted operations. Any legal action to increase workers' rights to land, upgrade housing, or provide minimum wages will typically be interpreted as increasing labour costs and decreasing farm returns. In anticipation of farmworker legislation being enacted, farm owners typically respond by evicting workers to control labour costs and preserve wealth. Governments in turn respond with further legislation to close loopholes and tighten legal enforcement. To which in turn the commercial farm community enters into another round of worker layoffs or illegal evictions. One might eventually reach the point of a minimum core staff whose working conditions might very much have been improved by this legislation. However, one often observes other unintended consequences that offset these benefits. As communicated at this conference, increases in worker costs or perceived actions to increase farmworker rights to land can instead drive commercial farms to pursue strategies that seek to displace workers altogether.

A report commissioned by the World Bank and released in August 2005 confirmed these findings and indicated that, while the actual impact of ESTA was not yet clear, it was clear 'that only a few cases have actually been settled under [ESTA and the Prevention of Illegal Evictions Act], and that they have done little to stem the secular decline of farm employment on South Africa's commercial farms. In fact, it appears that these laws have contributed to pre-emptive evictions by land owners'.

We submit that the conditions that made the successful implementation of ESTA difficult if not impossible, continue to exist and may well mean that the new Land Tenure Security Bill is doomed to the same failure. This Bill – or any Bill – will simply not be able to close the loopholes of tenure insecurity without a significant overhaul of the land reform process.