

Submission to the South African Human Rights Commission (SAHRC) on

# The Impact of Rural Land Use and Ownership Patterns on Human Rights

From the  
SURPLUS PEOPLE PROJECT (SPP)



20 March 2018

Attention: Pandelis Gregoriou, Head of Legal Service Unit: South African Human Rights Commission  
(SAHRC)

**Contact Details:**

Harry J May

Research, Information and Advocacy Manager

CAPE TOWN  
2nd Floor, 266 Lower Main Road, SALT RIVER 7925  
Tel: 021 448 5605  
Fax: 021 448 0105

Cell: 082 8994328  
Email: [harry@spp.org.za](mailto:harry@spp.org.za)

## **Introduction**

- 1.1 The Surplus People Project (SPP) is a non-profit organisation that facilitates pro-poor agrarian transformation and food sovereignty and support and promotes the implementation of agro-ecology as alternative to the dominant forms of production and builds and support social movements in their struggles for agrarian transformation and food sovereignty.
- 1.2 SPP engages in social mobilisation and movement building, organisation and institution building, natural resource management, rural governance, lobbying and advocacy, research, training, policy development and implementation in relation to agrarian transformation and food sovereignty. It is a multi-skilled, efficient, multi-skilled, radical and committed organization, instrumental in transforming the rural countryside.
- 1.3 SPP operates in 5 district municipalities in the Northern and The Western Cape Provinces. Most of the district municipalities are considered to be rural districts, with the exception of the City of Cape Town.
- 1.4 SPP has read the brief and considered the broad interrelated themes and the guiding questions in respect of the impact of rural land use and ownership patterns. We submit the following comments and recommendations to the Head of the Legal Services Unit of the South African Human Rights Commission.
- 1.5 Our comments and recommendations are based on the work that the organisation has done since the implementation of the democratic government's land reform programme and the White Paper on Land Policy (1997)<sup>1</sup>.

### **1.6 Background**

Since 1994, South Africa has embarked on a programme of land reform designed to redress the grave racial imbalance in land holding and secure the land rights of historically disadvantaged people. The Constitution of the Republic of South Africa sets out the legal basis for land reform, particularly in Section 25 of the Bill of Rights, which protects property rights from arbitrary interference but also places a clear responsibility on the state to carry out land and related reforms and grants specific rights to victims of past discrimination. The government has developed policies and passed several pieces of legislation with a view to redress inequalities in

---

<sup>1</sup> White Paper on South African Land Policy, (April 1997). According to the White Paper, the land policy was pronounced with four objectives, namely: to correct past injustices; to engender reconciliation and stability; to promote economic growth; and to improve lives through the alleviation of poverty.

land distribution resulting from the unjust laws of the colonial and apartheid governments. In 1994, the government adopted the Reconstruction and Development Programme (RDP)<sup>2</sup> which provided for the redistribution of 30 per cent of agricultural land over five years as one of its aims.

South African land reform policy has been pursued under three broad headings:

- restitution, which provides relief for certain categories of victims of forced dispossession;
- redistribution, a system of discretionary grants that assists certain categories of people to acquire land, largely through the market; and
- tenure reform, intended to secure and extend the tenure rights of the victims of past discriminatory practices.

For the government, tackling the land question would enhance poverty reduction. Thus, the right to gain access to land is based on the idea that there are people who need land and those who are not secure on the land they live on. It entails satisfying that need for the landless to acquire land and have resources to sustain a livelihood. The idea of gender equality in acquiring land for agrarian reform and land resettlement schemes is advanced by the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)<sup>3</sup>. The CEDAW position emanates from the fact that women have been treated unfairly where tenure reform is concerned. It is from this departure that we also look into the problem of land tenure in relation to women.

We will respond to the guiding questions in terms of the comprehensive work we have done with regard to the following: (1) Rural Land Claims, (2) The Municipal Commonage Policy, (3) Farm Worker/ Dweller Rights and (4) Tenure Reform in the Coloured Rural Areas in terms of the Transformation of Certain Rural Areas Act, Act 94 of 1998 (TRANCRAA). In addition we will comment on current policy and legislative processes that impact on civil and political rights, economic and social rights and equality.

- a) What is the impact of slow land reform on civil and political rights, with particular reference to forced rural evictions and 'land grabs'?

---

<sup>2</sup> The Reconstruction and Development Programme: A Policy Framework (1994). At <http://www.polity.org.za/govdocs/rdp/>

<sup>3</sup> Article 14(2)h of the Convention on the Elimination of all Forms of Discrimination Against Women (1979).

Land grabbing, in violation of people's civil and political rights and the principle of free, prior, and informed consent is a serious issue in rural area. The Northern Cape, and in particular the Namaqua District, where we have considerable mining operations, is affected by this. The Mineral and Petroleum Resources Development Act, 28 of 2002 does not fully recognise the rights of mining-affected communities and does not give them an adequate voice in mining decisions, sufficient protection nor adequate access to valid compensation. This concern has been raised in current debates about the proposed amendments to the MPRDA. In terms of the Act prospective mining companies/ individuals can apply for mining permits and licences on communal land which cannot be vetoed by the affected community. As a result of this, substantial portions of communal land in the Namaqualand have been "rendered" sterile to community use and development. This form of land grabbing, aside from resulting in the loss of land, leads to an overall lack of resources that impacts a community's ability to enjoy the benefits of the land.

We therefore recommend that the Interim Protection of Informal Land Rights Act (IPILRA), 31 of 1996 should be used as a mechanism to protect vulnerable communities against land grabs. SPP has used IPILRA in the communal area of Steinkopf to provide community approval for the development of a multimillion rand irrigation project on communal land. SPP has developed a procedure in terms of IPILRA of dealing with large-scale projects on community land that need community consent ([Annexure 1](#)). The IPILRA is aimed at disposing State land to people who actually own, but have limited rights to the land and at transferring the right to land to long-term communal tribal or traditional areas. IPILRA is an interim measure instituted to protect the position of people with untitled land rights.

b) How should the SAHRC understand land use and ownership patterns (tenure systems) in rural areas?

The tenure system in rural areas can be characterised as evolving and nested systems, in line with the broad features of land tenure systems derived from customary norms and values. For example, the municipal regulations that were developed in the municipalities in Namaqualand were derived from the customary norms and values of the respective communities ([Annexure 2](#)).

Therefore, the SAHRC should take cognisance of both individual rights and community rights. However, this should not occur at the expense of community ownership and community management – i.e. individualization without the 'communal' option for ownership and management, which many beneficiaries continue to feel is what they want and need.

c) What is your understanding of the role of the SAHRC on Restitution of Land Rights and is does that body perform in accordance with that role in your view?

The SAHRC is an institution established in terms of section 181 of the Constitution.<sup>4</sup> The SAHRC and other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy". In terms of section 184(1) of the Constitution, the SAHRC is specifically mandated to: promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in South Africa. Section 184(2) (a) of the Constitution empowers the SAHRC to investigate and report on the observance of human rights in the country. In addition, the SAHRC can carry out investigations concerning the observance of human rights in South Africa. Over the years the people that SPP work with, in particular farm workers and farm dwellers, have participated in SAHRC investigations. The

---

<sup>4</sup> The Constitution of the Republic of South Africa, Act 108 of 1996.

SAHRC does perform in accordance with this role. However, the process is more complex than the simple cut-off date of 19 June 1913 as will be illustrated in the excerpt from the Namaqualand District Planning Report (1999)<sup>5</sup> below:

“The original inhabitants of Namaqualand were the Khoi and the San people who occupied the whole of the Cape up to the mid-17<sup>th</sup> century arrival of the Dutch. The colonial governments chose not to understand the traditional nomadic nature of land use and gradually moved the northern boundary of the Cape Colony up to the Orange River, dispossessing the inhabitants of their land and forcing them to become dependent on mission stations for protection and access to land. The land was not granted to the indigenous people but held in trust for them by the churches. Despite claims from the people for the return of their land, large tracts were handed out to white farmers and the indigenous people had less and less access to their land. Namaqualand communities have always fought for the restoration of their land and rejected the limitations of Section 25(7) of the Constitution which makes 19<sup>th</sup> June 1913 the cut-off date for land claims. This effectively means that only Group Areas claims could be successfully taken forward in Namaqualand.

A series of meetings were held with the Land Committees of the Namaqualand communities and it was agreed that in terms of the provisions the Section 6(2)(b) of the Restitution of Land Rights Act 22 of 1994, the Land Claims Commission could only *“make recommendations or give advice to the Minister regarding the most appropriate form of alternative relief, if any, for those claimants who do not qualify for the restitution of rights in land in terms of the Act”*, and that the Namaqualand claims which do not qualify in terms of the cut-off date, would, at best be given priority in the Redistribution Programme. This would have subjected them to lengthy delays with little chance of securing more land than that which could be purchased in terms of the Redistribution Programme. It was therefore decided to make use of the Redistribution Programme in trying to buy back as much as possible of the land which had been lost through dispossession. All the affected communities would qualify for assistance and could clearly demonstrate their need for land.

The Melkboskuil community were the only community to reject this approach but their claim was rejected by the Land Claims Commissioner on 4/3/98 as the claim did not meet the requirements of article 2(1)(a) of the Act as the claimants lost the land in 1853. It was also noted that the land in question, a large portion of which currently belongs to the Okiep Copper Company, was in the process of being made available for redistribution and the establishment of townships. The processing of this claim, despite great pressure on the Commission, took over a year to be processed and this seriously affected the redistribution programme to the detriment of other potential beneficiaries”.

It is recommended that the SAHRC should investigate restitutions of land rights cases that fall outside of the constitutional provisions and explore possible solutions from affected communities.

- d) To what extent has the State adopted reasonable legislative and other measures to foster conditions which enable citizens to gain access to land on an equitable basis, in terms of section 25(5) of the Constitution?

---

<sup>5</sup> Surplus People Project, 1999: Namaqualand District Planning and Management Project. Final Report.

Over the last number of years there have been concerning policy developments with regard to access to land and land rights. In terms of access to land I will discuss this issue of access to land by using the example of the Commonage Policy. The issue of land rights will be addressed through the proposed amendments to the Communal Property Associations Act where I will demonstrate how land rights will be eroded in the proposed amendment.

The municipal commonage policy afforded poor people in municipalities' access to agricultural land on an "equitable basis". Through this process hundreds of poor households in Namaqualand, the Hantam-Karoo and the West Coast towns and elsewhere in South Africa could get access to agricultural land. The advantages of the Commonage Policy are:

- Individuals in communities are still able to access the Housing Subsidy which many people need as they are inadequately housed.
- There is no need to set up new legal entities as the land is transferred to the local authority
- Local authorities have the infrastructure to administer the commonage
- Local authorities are subject to legal checks and balances through the Department of Local Government and Housing and can only use the land for the purpose for which it was given
- Land which would have been claimed by a community, had it not been removed before 1913, can now be returned to the community as a whole rather than only to those who qualify for a subsidy.

The Department of Land Affairs (DLA) required a local authority, to which the commonage is given, to manage the land in co-operation with a Management Body or Commonage Committee which is made up of the local authority, the users and experts such as extension officers from the Department of Agriculture. This committee made recommendations to the local authority around the allocation of rights and sustainable management of the land. SPP has been involved in the setting up of a number of these committees, the drafting of constitutions, grazing agreements and administration systems. SPP has been working on a number of problems which have arisen concerning the powers of these committees and their relationship to the local authority.

In August 2001, the Department of Land Affairs introduced the Land Redistribution for Agricultural Development (LRAD): a sub-programme of the Land Redistribution Programme (LRP). The DLA introduced this policy to stimulate development and to encourage commercial farming by African farmers. With the introduction of LRAD it effectively limited the rights of poor people to get access to public agricultural land.

For the last number of years no budgetary allocation has been made to this program, and therefore it limited the access of poor people, in particular women to agriculture land. For the last few months SPP has been following up with the Deputy Director-General: Tenure Systems, Department of Rural Development and Land Reform (DRDLR – successor to the DLA) about the status of the commonage program, but has not yet received an official reply from her.

We therefore recommend that the SAHRC should investigate the status of municipal commonage land.

- 1.1. The CPA Amendment Bill<sup>6</sup> is a clear indication of a shift in land reform policy, where it proposes that black South Africans, who are land reform beneficiaries, should not be allowed to own land. Section 8 (b) substitutes 'hold land' (i.e. ownership) with 'administer and manage land'

---

<sup>6</sup> Communal Property Association Amendment Bill, 2017.

(i.e. not ownership). These were one of the issues that SPP raised at the public hearing on the Bill in August 2017 in George. This is also evident in the Proactive Land Acquisition Strategy of 2006 (as amended in 2011 where the beneficiaries lease the land from the state. The CPA Amendment Bill will also change the legal status of all the CPA's who are land holders (owners) to land managers/administrators.

As SPP we reject this position. At the public hearing we suggested strongly that the Bill not be passed in its current form and recommended that it be withdrawn.

- e) Why has rural land policy and legislation not succeeded in addressing the urgent concerns of the majority of (landless) South Africans thus far? What are the rights implications of this delay?

There are mainly three reasons that have been evident over the last decade:

- (1) Policy Direction from government (Inappropriate policies);
- (2) Lack of institutional capacity and skill in the Department of Rural Development and Land Reform;
- (3) Political will (Inadequate Budget).

- f) What are the potential and the challenges of using rural land to address and alleviate unemployment and poverty in South Africa?

There is enormous potential for using rural land to address unemployment and alleviate poverty, however, our experience over the last 20 years suggest that land reform (the transfer of land from white people to black people) is insufficient. What is required is a comprehensive agrarian reform policy/strategy which will address broader issues of the rural economy ((e.g. housing, infrastructure, roads, health care, education, inputs, research, extension, markets, processing, and infrastructure, etc.). One of the key challenges in rural areas is the way that people's land rights are violated in developing large scale projects.

We recommend that IPILRA should be used as an instrument to regulate development projects on communal land.

- g) What formal mechanisms are necessary to recognise the property rights of the poor and previously excluded in respect of rural land, and which actors are best placed to implement them?

Agreed rules derived from customary norms and values and records of the rights and rights holders. In our recommendations to the DRDLR our principle recommendations for the tenure reform process in terms of the Transformation of Certain Rural Areas Act, Act 94 of 1998 was that the state should provide support for the administration of the land rights of communities/ groups. In addition, they should also provide infrastructural support to the Coloured Rural Areas.

- h) How should we address rural land ownership patterns that exclude black women?

The agency of women and men is important to challenge these kinds of land and property relations. Through social mobilisation and direct forms of action (e.g. land occupations, appropriation of land parcels, use of land parcels by women, etc.) women and men can start

challenging the institutional systems that contribute to rural land ownership that exclude women. This is a very complex institutional issue that is deeply rooted in the traditions and practices of that needs to be challenged. In this regard we need the solidarity from men in this struggle. So what about legislative imperatives? For example, the Traditional Courts Bill which people have argued is rolling back on advances concerning women. Legislation seems to be failing women, and therefore we cannot use the same instrument that excludes women to address rural land ownership patterns.

- i) How do we assess whether land law and policy is enabling citizens to gain access to land on an equitable basis?

This is difficult because it has never been defined, not even by the High Level Panel on the Assessment of Key Legislation<sup>7</sup>. In terms of a policy framework we need to clarify what we mean by this. Clearly, a key aspect of what constitutes 'equitable' should be based on the needs of poor landless people. The issue of land cannot just be limited to farm land but we need to also address residential land, urban farming, informal settlements, access to cities, etc. The white paper on land policy says nothing on "urban farming". However this raises further question about how does the governments find out about peoples' needs and whose needs will be prioritised. It is clear that we will need a conversation about this.

- j) Do the legislative gaps that persist in respect of security of tenure demonstrate an anti-poor stance in respect of rural dwellers?

Yes. The only comprehensive tenure legislation that has been successfully promulgated and partially implemented is The Transformation of Certain Rural Areas Act (TRANCRAA) of 1998. Although the legislation was promulgated in 1998 and the final reports were submitted to the Minister in 2001 ([Annexure 3](#)), thus far no trust land has been transferred to the affected communities. The 2004 Communal Land Rights Act was challenged by four rural communities in 2006, arguing that it would undermine their right to tenure security as set out in the South African Constitution. In 2010 it was declared unconstitutional by the Constitutional Court.

- k) Why has the approach to land shifted away from a rights-based one that prioritises equitable access to land, towards a state ownership model?

It is unclear whether the state will retain ownership of land it acquired through land reform, or whether it intends to transfer ownership to traditional councils. As indicated earlier the CPA Amendment Act, 2017 and PLAS point in this direction.

- l) What is the role of land in achieving substantive equality in South Africa?

Land has the potential to transform the lives of people as we have seen over the last 20 years. Access to land created livelihood opportunities for the poor and vulnerable in the areas that we work, and enhanced the opportunities of residents. Land should be used for

---

<sup>7</sup> Report Of The High Level Panel On The Assessment Of Key Legislation And The Acceleration Of Fundamental Change, November 2017

social and economic transformation. Land should be used to address historical injustices. It should not be restricted to land for productive purposes, but should address the housing needs of people in rural areas and informal settlements. Land should be used to address issues of inequality and segregation and the marginalisation of black people, farm workers, farm dwellers, women, youth, people with disabilities and rural dwellers and to provide for futures characterised by social justice, dignity, equal opportunity regardless of gender.

- m) What are the prevailing patterns of structural discrimination in the context of equitable access to land?

Rights to land, housing and property are essential to women's equality and wellbeing. Women's rights in, access to and control over land, housing and property is a determining factor in women's living conditions especially in rural economies, essential to women and their children's daily survival, economic security and physical safety. Despite the importance of these rights for women and women headed households, women still disproportionately lack security of tenure. In the last 15 years we have made substantial progress in ensuring that there is equality of land rights between men and women in the areas where we work. In the areas women can have independent land rights from their male spouses. We have codified this in the regulations on grazing, dry land plots ([Annexure 4](#)), garden plots, irrigation plots, etc.

- n) Can secure land tenure overcome the clear and continuing systemic discrimination and injustice various groups face in terms of land ownership patterns?

Yes, particularly in the former Bantustan areas.

- o) To what extent can addressing land ownership inequality address socio-economic exclusion in South Africa

Currently 80 % agricultural land of the land is owned by 20 % of white commercial farmers/corporations. If the land issue (ownership) is addressed we will also be able to deal with economic exclusion. However, as indicated earlier, land redistribution is not sufficient to deal with socio-economic exclusion but a broader agrarian reform agenda.