LARC
Land & Accountability Research Centre

07 August 2020

Chairperson and Honorable Members
Portfolio Committee on Agriculture, Land Reform and
Rural Development
National Parliament
c/o Ms Phumla Nyamza
per email: pnyamza@parliament.gov.za

LARC contact person: Nokwanda Sihlali; email: nokwanda.sihlali@uct.ac.za

Submission on the Upgrading of Land Tenure Rights Act Amendment Bill, 2020

Introduction

The Land and Accountability Research Centre (LARC) was established as a research and advocacy unit in the University of Cape Town's Faculty of Law in 2016. LARC's primary focus is power relations in rural areas and the impact of national laws and policy in framing the balance of patriarchal and autocratic power within which rural women and men struggle for democratic change at a local level. LARC is part of a collaborative network, constituted as the Alliance for Rural Democracy, which provides strategic support to struggles for the recognition and protection of rights in the former homeland areas of South Africa. One of LARC's areas of research relates to the impact of laws, policies, and practices of the state as well as the conduct of private parties on the rights protected in section 25(6) of the Constitution.

Sections 25(6) and (9) of the Constitution deal with security of tenure and provide that tenure that is legally insecure as a result of past racially discriminatory laws or practices must be made legally secure in terms of legislation. We work with vulnerable, marginalised and predominantly Black people and communities whose land rights were historically undermined and discriminated against. While these rights are now formally recognised in the Constitution and laws such as the Interim Protection of Informal Land Rights Act (IPILRA)[1] they are, in practice, constantly

[1] 31 of 1996.

threatened. These rights are undermined by both the state and private parties through laws, policies and practices that fail to appropriately recognise these rights as property rights enjoying constitutional and legislative recognition and protection.

This submission will comment on the Upgrading of Land Tenure Rights Act Amendment Bill (Amendment Bill) which is intended to amend the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA).

This submission will deal with a number of broad points that relate to LARC's work as set out above. Generally, our submission will deal with the following:

1. That in trying to ensure that Black people who were systemically deprived of opportunities to own land are protected not only by the Constitution but also by this law; the Committee must consider whether the new processes it intends to introduce will actually respond to the rights violations highlighted by the Constitutional Court. The Amendment Bill purports to introduce processes to upgrade tenure rights, but these processes are not explicitly set out and no guidance is given as when, and how, comprehensive processes will be adopted and how to ensure all aspects of it are accessible and easy to navigate. There are also incredibly important questions of capacity raised, specifically for the Department of Agriculture, Rural Development and Land Reform (the Department) and whether it is equipped to fulfil the obligations required to prevent the identified rights violations.

2. LARC supports the Committee's apprehension to move hastily with finalising the Bill without having explored the corresponding implications for existing and intended land reform laws and policies. In the wider context of trying to secure tenure, approaching this amendment process methodically and intricately, will allow a greater understanding of the interplay and interdependence of various pieces of legislation between various government departments and their entities; and

3. This amendment process provides the Committee with a great opportunity to consider and ensure that the various provisions of ULTRA, in practice, progress and do not undercut the fulfilment of the state's obligations in terms of section 25(6) and (9) of the Constitution. In dealing with the limitations on the geographical application of certain provisions in ULTRA as set out in section 25A, the Amendment Bill goes further than the order of the Court in *Graham Robert Herbert N.O. and Others v Senqu Municipality and Others*[2]. The

[2] *Graham Robert Herbert N.O. and Others v Senqu Municipality and Others* 2019 (6) SA 231 (CC) (*Senqu Municipality*).

Amendment Bill expands the entirety of section 25A, including section 19 and 20, to now apply in the whole of South Africa. It is then incumbent on the Committee to comprehensively to thoroughly consider the actual impact of the operation of sections 19 and 20 of ULTRA for tenure reform and the protection of informal tenure rights. Without clear restrictions and protections, the operation of these sections poses the danger of undermining or erasing existing customary and other individual, family, group, and community rights and interests in land falling under the jurisdiction of traditional leaders. The Department's 2020 plans for tenure reform should centre on shifting away from the idea that the recognition and recordal of tenure rights held by people in traditional communities can only be done in absolute and individualistic ways that undermine the rights held by individuals that make up these communities.

Constitutional democracy in operation

LARC would like to congratulate Parliament, more especially this Portfolio Committee, for moving forward with implementing and complying with judgments of the Constitutional Court aimed at securing the tenure rights of the most vulnerable and marginalised South Africans through legislation. It is so important for the various arms of the state to work together in protecting the rights provided for in the Bill of Rights. It builds confidence in our constitutional democracy that, when legislative gaps that threaten constitutional rights are identified – which in this case related to discrimination against women[3] and equal protections under the law for those in the former Transkei, Bophuthatswana, Venda and Ciskei (TBVC) states[4] – steps are taken to remedy the potential for rights violations.

LARC therefore supports those amendments aimed at complying with the Constitutional Court judgments discussed below. However, we are concerned that the Amendment Bill misses vital opportunities to better protect tenure security and address the shortcomings in the law as identified by the Constitutional Court.

The objective of ULTRA is to allow certain rights in land held by people who were systematically subjugated by the apartheid government to be upgraded and converted into ownership. This was a pre-constitutional attempt to reform the tenure framework to which Black people were limited. In principle, the aims of the Act are in line with the tenets of the government's National Development Plan[5] of dealing with

[3] *Rahube v Rahube and Others* 2019 (SA) 54 (CC).
[4] Supra note 2.
[5] National Planning Commission, *National Development Plan 2030: Our Future – Make it Work* (2012) at Chapter 6 'An Integrated and Inclusive Rural Economy', retrieved from:

landlessness and restoring the dignity of the formerly oppressed. As this Committee and the Department of Agriculture, Rural Development and Land Reform (the Department) have previously stated, ULTRA is but one component of the state's intended comprehensive legislative framework aimed at achieving tenure reform.[6] In that vein, recent years have seen questions related to land and the achievement of land reform take centre stage in the national discourse. This is an important opportunity to comprehensively engage with ULTRA and consider where it fits into the general tenure reform framework that the state intends to adopt in complying with section 25(6) of the Constitution.

Amendments to section 2

Amendments related to the Rahube *judgment*

Ms. Rahube approached the Constitutional Court to challenge the constitutionality of section 2 of ULTRA, in that it automatically converted rights held in terms of Schedule 1. She argued that the operation of the Act recognised and converted rights that were obtained in terms of racist and sexist apartheid laws without notifying, and allowing submissions from, interested and affected persons.

The Constitutional Court in *Rahube* made the following order:

a) "Section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 is declared constitutionally invalid insofar as it automatically converted holders of any deed of grant or any right of leasehold as defined in regulation 1 of Chapter 1 of the Regulations for the Administration and Control of Townships in Black Areas, 1962 Proc R293 GG 373 of 16 November 1962 (Proclamation R293) into holders of rights of ownership in violation of women's rights in terms of section 9(1) of the Constitution;

b) The order in (a) above is made retrospective to 27 April 1994; and

c) In terms of section 172(1)(b) of the Constitution, the order in paragraph 2(a) and (b) shall not invalidate the transfer of ownership of any property which title was upgraded in terms of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 through: finalised sales to third parties acting in good faith; inheritance by third parties in terms of finalised estates; and the upgrade

https://www.nationalplanningcommission.org.za/assets/Documents/NDP_Chapters/devplan_ch6_0.pdf, last accessed 05 August 2020.

[6] Parliamentary Monitoring Group, Minutes of the Portfolio Committee on Agriculture, Rural Development and Land Reform, *2020 Legislative Programme & court judgments impacting this; Committee Programme; with Minister*, retrieved from: https://pmg.org.za/committee-meeting/29766/, last accessed 05 August 2020.

to ownership of a land tenure right prior to the date of this order by a woman acting in good faith."[7]

The Amendment Bill seeks to amend section 2 of ULTRA, which provides for the conversion of land tenure rights to registered ownership mentioned in Schedule 1.

Amendments to section 2 of ULTRA provide for the following:

(a) an application process to the Minister for the conversion of land tenure rights;

(b) a notice to be *Gazetted* by the Minister to inform interested persons of the application for conversion;

(c) an opportunity for interested persons to object to the conversion; and

(d) an inquiry to assist the Minister to determine facts relating to the application for conversion or objection to the conversion.

There are a number of immediate concerns that arise when considering the practicability of these proposed amendments and whether, in practice, they respond to the issues and struggles that the Constitutional Court's judgment aimed to remedy.

Section 2 of ULTRA no longer automatically upgrades tenure and requires rights holders to make an application for the upgrade of their tenure rights to the Minister for consideration**. However, placing this obligation on the Minister raises questions about the Minister and Department's capacity to deal with these applications.** The Department, especially with the addition of Agriculture to its portfolio, is incredibly understaffed and under-resourced. The Committee has previously discussed issues related to numerous staff positions – including high-level strategic positions – that are either vacant or held by a person who is acting in that position or in multiple positions simultaneously.[8]

The amendment of section 2 also provides that the application be made "in the manner prescribed" without giving content to what that prescribed process will be. The Constitutional Court suspended its order of invalidity to give Parliament an opportunity to adopt a constitutionally permissible process to cure the constitutional invalidity. **More clarity is needed in this amendment as to what this process will look**

[7] Above note 2.

[8] Parliamentary Monitoring Group, Minutes of the Portfolio Committee on Agriculture, Rural Development and Land Reform, *DRDLR structure and staff establishment; with Deputy Ministers* retrieved from: https://pmg.org.za/committee-meeting/27885/, last accessed 04 August 2020.

like and how it responds to the identified constitutional invalidity. If the intention is that the Minister will be tasked with giving this clarity then this needs to be made clear, and appropriate time frames need to be given indicating when the Minister needs to pass Regulations to give this clarity and adopt a constitutionally permissible process.

The amendment goes on to provide that the Minister must publish a notice in the government *Gazette* to inform people that an application for the conversion of rights has been made. This process is meant to be easily accessible to some of the poorest and most vulnerable people, that have historically been unable to have their valid rights to land recognised. Thus, only publishing in a *Gazette*, to which this demographic of people are unlikely to have regular access, fails to ensure that holders of vulnerable land rights are protected from dispossession without their knowledge. At the very least, the notices must be published in local newspapers and posted at community halls in appropriate languages. **A more deliberate approach needs to be taken to ensure that holders of vulnerable rights are able to access the information that relates to processes that will irreparably impact their constitutionally protected rights to land.**

The Minister is required in terms of the amendment to section 2 to institute an inquiry into the facts of the application or objection in order to make a decision about a conversion application and the vesting of ownership. This is a useful addition, since it is incredibly important that there is an explicit obligation for such an inquiry, and that this is done before decisions are made. However, questions related to the Minister and the Department's capacity to undertake such inquiries need to be considered at this juncture. This provision also states that such an inquiry is to be done "in the prescribed manner". Again, no clarity is given as to what this prescribed manner is or what it should look like. If the intention is that the Minister must develop the process for this inquiry, then the obligations of the Minister in this regard need to be made explicit and time frames need to be provided for when the details of this process should be published.

The Amendment Bill also adds section 14A to ULTRA, which provides an opportunity for persons aggrieved by a conversion of a land tenure right that took place from 27 April 1994 to approach the court for appropriate relief. This proposed section also seeks to recognise the exceptions listed in the Court's order to the operation of the declaration of invalidity. These generally relate to transfers of converted rights to third parties that were done in good faith and those conversions which already favoured women. But, only providing for aggrieved persons to go to court to challenge automatic conversions in terms of ULTRA does not respond to the need for the protection of vulnerable tenure rights. This does not factor in the realities in a country like South Africa where access to courts and justice is an existing challenge. **We must be cognisant that the primary beneficiaries of ULTRA are poor and marginalised members of our society; of which most would not have the resources needed in**

approaching a court to bring a legal challenge. This is where the Committee should apply its mind to other more accessible dispute resolution mechanisms and processes that people relying on ULTRA could specifically approach to seek recourse when aggrieved.

Issues related to capacity to fulfil obligations imposed by intended laws, clarity of applicable processes aimed at protecting constitutional rights, and the accessibility of institutions aimed at giving effect to rights, must be settled at this stage to ensure that the violation of rights does not continue.

Amendments to Section 25A of ULTRA

Amendments related to the Senqu Municipality *judgment*

In the *Senqu Municipality* matter the Constitutional Court declared section 25A of ULTRA unconstitutional to the extent that it did not extend the applicability of section 3 of ULTRA to the entire Republic of South Africa.

The unamended section 25A does not only limit the application of section 3 to specific areas in South Africa, it also does so for sections 19 and 20 of ULTRA. The Amendment Bill extends the application of ULTRA in its entirety to the whole of South Africa. This includes section 3 of ULTRA in line with the *Senqu Municipality* judgment, and additionally also includes sections 19 and 20. Thus the Amendment Bill will activate the applicability of sections 3, 19 and 20 in the previously excluded former TBVC states.

The significance of this provision lies in the democratic values that post-apartheid South Africa espouses of building a unified and egalitarian society. Where factors such as race, gender, and location do not determine the applicability of laws aimed at fulfilling constitutional rights. **However, with the geographical expansion of the Act's applicability – which goes further than the reasoned order made by the Court in *Senqu Municipality* – Parliament must thoroughly consider the appropriateness of sections 19 and 20, and their implications for constitutionally protected rights in section 25(6) of the Constitution.** Sections 19 and 20 of ULTRA could have massive implications for the entire constitutionally mandated land tenure reform framework. As directed by section 25(6) and (9) of the Constitution, Parliament and the Department are obligated to ensure that in purporting to recognise and protect constitutional rights, they do not inadvertently undercut them. The potential impact of sections 19 and 20 of ULTRA is discussed further below.

Piecemeal approaches to the amendment of legislation

Previous deliberations of the Committee indicate that the amendment of ULTRA is relatively urgent since both Constitutional Court decisions were handed down in

2018.[9] But, as we elaborate below, **this amendment process provides the Committee with an important opportunity to closely engage with the implications of ULTRA, particularly sections 19 and 20, for the state's broader tenure reform project.** Indeed, by expanding the operation of sections 19 and 20 as explained above, this Amendment Bill already deals with these provisions and invites a closer consideration of their impact by the Committee.

LARC argues that sections 19 and 20 of ULTRA could have the effect of subverting the state's fulfilment of its constitutional obligation to give vulnerable South Africans secure tenure to land. It is vital to undertake a methodical review now to ensure that all potential legislative gaps are filled and unintended consequences related to the operation of ULTRA are dealt with timeously and wholly - instead of in a piecemeal fashion. The process of amending legislation is complex and resource intensive. It is thus important that the appropriateness of all aspects of ULTRA for the achievement of our constitutional project be determined now.

Further considerations that point to the need to comprehensively deal with ULTRA in this process relate to the possibility of the financial strain that might arise should the Department's annual budgets continue to be spent on defending litigation. The money spent on court cases takes away from programmes devoted to dealing with tenure reform, agrarian transformation, food security, and land redistribution. The Department is mandated to advance the government's land reform agenda, but how can this be done if the Department has limited financial resources because they are constantly defending lawsuits instead of implementing their crucial programmes?[10] Surely it is preferable to deal with ULTRA comprehensively now instead of facing further expensive constitutional litigation in the future?

Implications of sections 19 and 20 of ULTRA

There are very real dangers to not holistically engaging with how all the provisions in ULTRA – particularly as amended – play into one another. In responding to the judgments this Amendment Bill purports to put in place constitutionally permissible procedures for the conversion of rights under section 2 of ULTRA and expand the application of ULTRA to all of South Africa. The *Senqu Municipality* judgment only expanded the application of section 3 of ULTRA to South Africa as a whole. It did so

[9] https://pmg.org.za/committee-meeting/28712/

[10] In the current context of the Covid-19 pandemic, the Department has had to reprioritize funds from critical programmes with the addition of Minister Tito Mboweni cutting the budgets of every government department. DALRRD in February 2020 specifically was given a budget of R16.8 billion, but this was later cut to R14.4 billion during the supplementary budget on the 24th of June – this has resulted in a reduction of R2.4 billion. Minister Tito Mboweni, *Treasury Dept Budget Vote 2020/21*, July 2020, retrieved from: https://www.gov.za/speeches/minister-tito-mboweni-treasury-dept-budget-vote-202021-23-jul-2020-0000, last accessed 04 August 2020.

after a rigorous consideration of the provision, its purpose, and how its operation implicates and relates to the fulfillment of constitutional rights before its application was expanded. As previously explained, **Parliament and the Department have decided to go further than the judgment, as the Amendment Bill now also expands the application of sections 19 and 20 of ULTRA to the whole of South Africa. However, there has not been equivalent engagement with these sections**, their purpose, and how their operation impacts on and relates to protected constitutional rights under section 25(6). Why are the potential challenges that come with the operation of sections 19 and 20 of ULTRA not being engaged with?

The operation of sections 19 and 20 of ULTRA could have the impact of threatening the security of the rights recognised and protected by the Constitution. These provisions do not include appropriate or adequate mechanisms to prevent the undermining of the rights protected in the Constitution, IPILRA, and customary law.

Section 19 deals with the legal capacity of a 'tribe' to obtain property and section 20 deals with the 'transfer of tribal land to a tribe'. Section 19 provides that a 'tribe' can own land and, subject to section 19(2), dispose of that land. Section 19 provides for two limitations on the ability of a 'tribe' to dispose of its land – consent from a court and that the consent can only be given if the disposal is authorized by a 'tribal resolution'. **As of 2001, the limitations on the valid disposal of land that had been transferred to 'tribes' automatically lifted, and no limitations or judicial oversight exists on the ability of a 'chief' to dispose of 'tribal land'.**

Section 20 sets out the process of transferring land to a 'tribe'. If the land is surveyed, nothing more is required – the Minister can decide to simply transfer this land. Nothing is described about how a request by a 'tribe' is to be made to ensure individual, family, group, and community rights and interests are protected. It is only in instances where the land is not surveyed that an investigation and report into the feasibility of the transfer is possible. Even then, whether such an investigation is launched is within the complete discretion of the Minister. How the investigation is conducted is also completely within the discretion of the individual designated by the Minister. Only general guidelines are given, and these do not emphasis the identification, recognition, and protection of existing individual, family, group, or community rights.

No recourse is provided to anyone who holds rights on the land that is to be transferred should they be aggrieved by decisions in this regard. The Minister, in terms of section 20(8) is only required to notify the 'tribe' in writing of the reasons for his or her decision not to accede to the request for transfer.

The Constitution, the Interim Protection of Informal Land Rights Act (IPILRA), and customary law apply on the land these provisions of ULTRA purport to regulate. IPILRA provides that no person can be deprived of any informal right to land without his or her consent obtained in terms applicable laws and customs. The impact of the

operation of sections 19 and 20, as described above, would be to deprive holders of rights recognised and protected by the Constitution, IPILRA, and customary law. As a minimum, IPILRA requires that a decision to deprive persons of their land rights be taken by a majority of the rights holders in a specifically convened meeting with sufficient notice and a reasonable opportunity to participate. ULTRA makes no mention of IPILRA and does not provide for protections that are at least equivalent to those in IPILRA.

Section 20 of ULTRA makes no provision for the recognition and protection of individual, family, and group rights to land that have been transferred to a 'tribe'. These are rights to land that section 25(6) recognises as being vulnerable because of a history in which they were erased or ignored. The impact of the operation of section 20 is to entrench the impact of colonial and apartheid laws and policies that failed to recognise and protect rights to land held in areas under the jurisdiction of traditional leadership in terms of customary and other forms of tenure.

Sections 19 and 20 of ULTRA instead undermine the fulfillment of section 25(6) and any comprehensive tenure reform framework that the state may attempt to adopt. The rights that the *Rahube* and *Senqu Municipality* judgments aim to protect are also compromised by the operation of sections 19 and 20 of ULTRA. A case study is set out below to illustrate an example of the challenges inherent in the operation of section 20 of ULTRA.

Communal land does not mean collective rights

ULTRA came into effect before the Constitution was adopted, which frames its particular lens around tenure rights on communal land very differently to sections 25(6 and 9) of the Constitution. **ULTRA thus bases its understanding of communal land ownership on the distorted belief that customary tenure systems are systems of collective land ownership which are devoid of individual or family interest.** In other words, the belief that land vests in indeterminate conglomerates of people as 'tribes' and not individuals, families, or parts of communities. Moreover, that the conglomerate must be represented by a single authority in the form of a traditional leader – a 'chief' in ULTRA's terms. Academics, such as Professor Hastings Okoth-Ogendo[11] and Professor Ben Cousins[12], reject the notion that communal tenure denotes 'collective' ownership vesting in an entire group with decisions made by or for this indeterminate group with no recognition or protection of existing rights of individuals, families and parts of communities[13]. Instead these scholars find that "land

[11] Hastings W. O. Okoth-Ogendo, 'The Nature of Land Rights under Indigenous Law in Africa', in Aninka Claassens and Ben Cousins (eds.), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town, 2008), pp. 95-108.

[12] Ben Cousins, 'Characterising "Communal" Tenure: Nested Systems and Flexible Boundaries', in Aninka Claassens and Ben Cousins (eds.), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town, 2008), pp. 109-137.

[12] Hastings W. O. Okoth-Ogendo, 'The Nature of Land Rights under Indigenous Law in Africa', in Aninka Claassens and Ben Cousins (eds.), Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act (Cape Town, 2008), pp. 95-108; and Ben Cousins, 'Characterising "Communal" Tenure: Nested Systems and Flexible Boundaries', in Aninka Claassens and Ben Cousins

tenure was [and is] both 'communal' and 'individual' and can be seen as a system of complementary interests held simultaneously" by different people and groups. These relative rights may even overlap because individuals and families have to negotiate access to common resources such as land for grazing, rivers and forests. Communal tenure systems are therefore *nested* or *layered* with different people or groups holding varying degrees of rights and interests over land and resources. [14]

Therefore, in expanding the application of sections 19 and 20, through the amendment of section 25A, it is crucial to consider the bigger picture of the state's intended tenure reform framework. This will ensure that the operation and implementation of these sections does not violate the land rights of vulnerable people living on communal land in the former homelands. These rights are recognised and protected by the Constitution, customary law, IPILRA, and ULTRA, and they would be jeopardised by the wholesale transfer of land to 'tribes' with no clear recognition or protection of individual, family, and community rights to land.

The *Rahube* judgment speaks to solidifying the protection of women and vulnerable people's rights, but sections 19 and 20 potentially threaten those very rights. **By allowing transfer of land to a 'tribe' with no explicit recognition and protection of individual and family rights to land, the issues surfaced in *Rahube* are replicated. The use of title vests exclusive ownership in one owner – in this case the 'tribe' – to the exclusion of other persons with rights and interests in the land.** This is very different from how customary systems of tenure actually operate – they are inclusive and allow for multiple, overlapping rights to co-exist at the same time. By transferring title at the level of 'tribe' with no clear protections for the rights recognised in section 25(6), the Amendment Bill allows for a situation where rights are erased and a system of centralised decision-making is established. Thereby erasing the various levels of decision-making that exist in most customary, and other, tenure systems. This may result in larger groups undermining other individuals, families, and smaller groups, who would then become structural minorities within greater super-imposed 'tribal' boundaries.[15]

This lack of appropriate recognition and protection of individual, family, group, and community rights to land in favour of large and indeterminate 'traditional communities'– in the language of ULTRA, 'tribes' – formed the basis of the substantive

---

(eds.), Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act (Cape Town, 2008), pp. 109-137.

[14] Hastings W. O. Okoth-Ogendo, 'The Nature of Land Rights under Indigenous Law in Africa', in Aninka Claassens and Ben Cousins (eds.), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town, 2008), pp. 95-108.

[15]This was illustrated by an example given by the North Gauteng High Court in *Tongoane v National Minister for Agriculture and Land Affairs* 2010 (6) SA 214:

> "Logically it follows that the community which acquired the land and which until now has been recognised as the owner of the land would find that its ownership rights are subject to decision of a larger group and it may only have a minority voice."

challenges to the Communal Land Rights Act that was struck down by the Constitutional Court.[16] This lack of appropriate recognition and protection is unconstitutional as it weakens the right to tenure security of vulnerable people and smaller groups within traditional communities. These tenure rights are derived from different sources - including customary law, quitrent titles, PTO regulations, ULTRA itself and title deeds - which are protected by section 25 of the Constitution.

Language in ULTRA and the Traditional Leadership and Governance Framework Act

LARC would like to note the language used in ULTRA, specifically the use of 'tribe' – a term that has a disgraceful history in South Africa and no longer has a legally acceptable definition. If sections 19 and 20 and references to tribal conglomerates are to be retained, this language would at least need to be updated to align with the Traditional Leadership and Governance Framework Act (TLGFA).[17] Section 28 of the TLGFA deems the 'tribes' that were produced by the colonial and apartheid regime to be officially recognised '*traditional communities'* today. It also deems the 'tribal authorities' created in terms of the Bantu Authorities Act of 1951 to be officially recognized '*traditional councils'* today - provided that they comply with new composition requirements. Is the intention for sections 19 and 20 of ULTRA to apply to these same structures that have been carried through from colonialism and apartheid?

Case Study: Dinabakubo

The problem with giving exclusive ownership to traditional communities using sections 19 and 20 of ULTRA is exemplified by the experiences of people from Dinabakubo. These are community members that LARC has been working with for the better part of two years after they reached out to us upon discovering that their traditional authority, with the consent of their traditional leader, had been disposing of land without obtaining the consent of members of the community.

The Ngcolosi traditional community is based in KwaZulu-Natal and in 1983 members of the community were displaced from their land to make way for the development of the Inanda Dam. It had initially been agreed that the South African Government would compensate the KwaZulu government for the land used. However, with the dissolution of the KwaZulu government and the advent of South Africa's constitutional democracy, some of the land was transferred in terms of section 20 of ULTRA.

Land was identified for the compensation of the members of the Ngcolosi traditional community that had been displaced by the dam. 250 ha of agricultural land was transferred to 'the Ngcolosi tribe under Chief Bhekisisa Felix Bhengu' in terms of section 20 of ULTRA and over seventy two thousand hectares of land was earmarked for development but remained vested in the Department. The land that was still in the

[16] Id.
[17] 41 of 2003.

hands of the Department was eventually developed, however, there were not enough houses for the families that had been displaced. It was at this point that the community members investigated the possibility of expanding onto the agricultural land that had been vested in Chief Bhengu in terms of section 20 of ULTRA. It was then discovered that certain transactions relating to parts of this land had taken place without consultation with or the consent of the people that hold rights over the land.

Conclusion

The amendments made to remedy the issues highlighted in *Rahube* are important, necessary, and welcome. However, a number of concerns related to capacity to fulfil obligations imposed by intended laws, clarity of applicable processes aimed at protecting constitutional rights, and the accessibility of institutions aimed at giving effect to rights were raised in our submission. These must be settled now to ensure that the violation of rights does not continue.

Access to communal land is via social norms and networks where local powers may play an integral role in conflict resolution and land rights regulation. However traditional leaders and authorities are not outright owners of the land nor do they hold ultimate decision-making power regarding communal land – these vest in the land rights holders themselves. The Dinabakubo example demonstrates the way in which this is often misinterpreted in practice. As individual rights holders, community members are having difficulty in holding their chief to account because at their core title deeds – particularly when vested in an entire traditional community – cannot accommodate the nuance and flexibility inherent in customary tenure systems. Rights held in terms of these tenure systems are instead weakened and distorted by attempts to articulate them in the form of an overarching 'tribal' title deed. **Instead of benefiting from the conversion of land rights made possible by ULTRA, people from Dinabakubo have lost their ability to use and access the land. This cannot be an acceptable outcome for legislation that purports to provide tenure security and reform.**

It is important for the Portfolio Committee to expand the process of amending ULTRA to proactively engage with sections 19 and 20. This in-depth process will allow you, as the PC, to determine how appropriately these sections fit into ULTRA. If they are deemed inappropriate in the context of the state's intended tenure reform framework, then they must be removed from ULTRA using this amendment process. Rural citizens living on land under the jurisdiction of traditional institutions must have their rights to land appropriately protected by laws dealing specifically with them. They cannot afford to have to wait for further expensive and time consuming litigation for these glaring potential rights violations to be remedied.

Nokwanda Sihlali is a Research Officer at the Land and Accountability Research Centre at the University of Cape Town.