

Press Statement on the Constitutional Court judgment on the Communal Land Rights Act

by

*The Law, Race and Gender Unit at the University of Cape Town
(www.lrg.uct.ac.za)*

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Today the Constitutional Court declared the Communal Land Rights Act (CLRA) unconstitutional in its entirety. We welcome this judgment as a fundamental victory for the rural communities who challenged the Act. They have persevered with their objections since the CLRA was enacted in 2004 and despite the odds being stacked against them. These communities were opposed by local “official” traditional leaders, who stood to profit from the now repealed Act, two government departments, Parliament, and the National House of Traditional Leaders. At issue in the litigation was the process that Parliament used to force the Act through during the build-up to the 2004 elections and the denial of tenure security to at least 17 million very poor South Africans.

A central concern of the applicant communities was what happens to tenure security when traditional councils are given control over the land occupied by people living in the former “homelands”. Chief Justice Ngcobo, writing on behalf of a unanimous court, describes the pivotal role played by laws such as the Bantu Authorities Act in “relentlessly” dispossessing African people of their land and undermining their tenure security. The judgment explains that the tribal authorities created by the Bantu Authorities Act have now been transformed into “traditional councils” by the Traditional Leadership and Governance Framework Act of 2003. The Communal Land Rights Act gave these traditional councils wide-ranging powers, including control over the occupation, use and administration of communal land. In other words, apartheid-created tribal authorities are given a new lease on life with additional powers over land, service delivery and development in a democratic society. This is a contradiction that has significant implications for democracy, equality and citizenship rights in rural areas.

The Court did not rule on the issue of tenure security. Chief Justice Ngcobo decided that because the court had declared CLRA invalid in its entirety, it was unnecessary to consider whether its provisions were consistent with the Constitution. Moreover, shortly before the case was argued in March 2010 the Minister of Rural Development and Land Reform, Mr Gugile Nkwinti, informed the court that the Department of Rural Development intended to amend or repeal the law in any event, as it was inconsistent with current government policy. During the hearing itself the Minister’s counsel informed the court of the government’s intention to entirely repeal and replace the Act.

This extraordinary about-turn by government should be claimed as an important victory for the many rural communities who made submissions to

Parliament, opposing the Communal Land Rights Bill in November 2003. Scant attention was paid to their pleas at that time, resulting in a further long delay in the measures to secure tenure rights required by the 1996 Constitution. Today's judgment stresses the need for urgency and diligence in enacting the legislation contemplated by sections 25(6) and (9) of the Constitution.

There is an intrinsic connection between who is consulted when legislation is drafted and whom it benefits. When the Bill was being considered in 2003 rural people were not consulted about the last minute changes that empowered traditional councils to administer and control their land. The procedural issue decided by the Constitutional Court in this judgment means that in future Parliament will have to effectively involve the provinces in deliberations on legislation that has an impact on customary law. Today's judgment quotes the court's prior judgment in *Doctors for Life* and reiterates that: "Our Constitution manifestly contemplated public participation in the legislative and other processes of the National Council of Provinces, including those of its committees".

Rural communities and civil society organisations concerned with democracy, rights and equality in rural areas should take the judgment as a direct call to prepare for the process of drafting new legislation to replace the CLRA. We call on rural communities and organizations to mobilise to ensure that replacement legislation is based on a proper consultative process. It is only through the participation of those directly affected that parliament can take into account the views and experiences of rural communities. The legislative process must make it possible for ordinary rural people, in particular women, to be heard, and not privilege traditional leaders as is the case with the Traditional Courts Bill that is currently before parliament. To give effect to the constitutional imperatives of tenure security and participation, we call on parliament to take pro-active steps to ensure that this time around the rural people whose land rights and tenure security is at issue are properly consulted and can engage effectively with the legislative process.

ENDS

FOR COMMENTS, Contact:

Mazibuko Jara – 083-6510271

Sindiso Mnisi – 021- 8136209

Aninka Claassens - 084-5102333

Dee Smythe – 073-3812821

Senior Researchers: Law, Race and Gender Research Unit, Faculty of Law, University of Cape Town