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"Will She Speak or Won't She? That is the Question": Comments on the Communal Land Rights Bill

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Deon Erasmus

I.	INTRODUCTION	539
II.	MAIN OBJECTIVES OF THE BILL	540
III.	THE POSITION OF AFRICAN WOMEN UNDER CUSTOMARY LAW	541
IV.	MECHANISMS EMPLOYED BY THE BILL TO PROVIDE LEGAL SECURITY OF TENURE UNDER COMMUNAL LAND TENDER SYSTEMS	542
V.	A FEW COMMENTS ON THE POSSIBLE EFFECTIVENESS OF THE BILL	543
VI.	FACTORS THAT MIGHT ADVANCE AND/OR UNDERMINE THE RIGHTS OF WOMEN	544
VII.	CONCLUSION	545

I. INTRODUCTION

On August 14, 2002, the South African Minister of Agriculture and Land Affairs, Minister Didiza, published General Notice 1423 of 2000 in the *Government Gazette*, containing the Communal Land Rights Bill (2002),¹ for comment by the general public. Comments regarding the Bill had to be submitted in writing to the Minister within sixty days of publication of this notice.²

The Bill is indeed a unique piece of draft legislation, dealing with the important and sensitive issue of land reform. It differs from other land

1. General Notice 1423 of 14 August 2002 in GG23740 [hereinafter Notice 1423].

2. An official of the Department of Land Affairs, Amanda Meyburg, confirmed that a substantial amount of public comment was received. A number of public meetings were held. The Department planned to re-submit the Bill to the Cabinet by the beginning of August and to implement it as legislation by the end of 2003.

redistribution and reform measures in that it provides for an enabling legal environment for communities, individual households, individual families, or individual persons to obtain legally secure tenure of land that they in most instances already occupy or use.³ The Bill furthermore aims to afford legal recognition for customary and other communal land tenure systems. The primary aim of the Bill, however, is to provide for the democratization of the administration of communal land.

This Article will briefly deal with the general objectives of the Bill. Thereafter, it will focus specifically on one objective of the Bill — namely, addressing the issue “that many women were made perpetual minors without rights to property and that legal mechanisms need to be developed to make it possible to assert their equal rights to property.”⁴

II. MAIN OBJECTIVES OF THE BILL

In the preamble of the Bill, it is pointed out that Section 25 (5),(6),(8), and (9) of the Constitution of South Africa requires the state to enact reasonable legislative and other measures to enable citizens to gain access to land on an equitable basis.⁵ It is furthermore the duty of the state “to provide either secure tenure of land to communities, individual households, individual families, and individual persons whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices or alternatively comparable redress and to effect land and related reforms.”⁶ The Bill furthermore takes into account “that millions of people who occupy, use, or have formal or informal access to land in communal areas . . . in the former homeland and former South African Development Trust areas, do not have secure tenure of such land.”⁷ The Bill also recognizes “the institution of traditional leadership,” as well as the role played by these traditional leaders to resist colonial dispossession of land.⁸

As pointed out in the introduction, the issue of equal rights of women to property is clearly addressed.⁹ In the preamble, it is stated that “some existing systems of land tenure rights violate fundamental human rights guaranteed in a Constitution, in particular, the equality rights of women to

3. See Notice 1423, *supra* note 1, pmb1.

4. *Id.*

5. SA CONST. § 25, available at <http://www.gov.za/constitution/1996/96cons2.htm#25> (last visited May 4, 2004).

6. Notice 1423, *supra* note 1, pmb1.

7. *Id.*

8. *Id.*

9. *Id.*

benefit from the land and to participate in all democratic decision-making processes."¹⁰ Chapter 2 sets out the objectives of the Bill. This Article will concentrate on the eighth object listed in that chapter. By the term of subsection 2(h), one objective of the Bill is to

provide . . . for the protection of the fundamental human rights contained in the Bill of Rights in the Constitution, including — (i) the right to equality, especially gender equality in respect of the ownership, allocation, use of, or access to land; (ii) the democratic right of the members of a community to choose the appropriate land tenure system, community rules and administrative structures governing their communal land; and (iii) the right to democratic participation by members of the community in the decision-making processes affecting their tenure rights.¹¹

It is therefore clear that the Bill intends to address the issue of the rights of women to communally owned property.

III. THE POSITION OF AFRICAN WOMEN UNDER CUSTOMARY LAW

According to T.W. Bennett, the status of African women can be described as follows:

The status of African women is dictated by a deeply entrenched tradition of patriarchy. This well-worn term has no precise definition, but is generally understood to mean the deference due to males, or more precisely the control exercised by senior men over the property and lives over women and juniors. The empowerment of men entails a corresponding disempowerment of women, who are deprived of the capacities necessary to deal with the world at large. Legal systems that endorse patriarchy, as customary law does, deny women these powers essential to realising their autonomy. In common law terms, these are contractual and proprietary capacity and *locus standi in judicio*.¹²

10. *Id.*

11. Notice 1423, *supra* note 1, ch. 2, § 2(h).

12. T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 80 (1995).

The issue regarding the customary law versus human rights conflict is a contentious and sensitive one. This Article will not address issues surrounding customary law and its compatibility or incompatibility with a human rights culture. One can, however, agree with Bennett when he states that few people will dispute the need to change customary law in its present form.¹³ Even if women cannot immediately take action on their rights, law reform gives them long term prospects in doing so. It is my submission that this Bill is indeed one such instrument of law reform.

IV. MECHANISMS EMPLOYED BY THE BILL TO PROVIDE LEGAL SECURITY OF TENURE UNDER COMMUNAL LAND TENDER SYSTEMS

The Bill employs several mechanisms to achieve its goals. Juristic personality is bestowed on certain communities. These communities must then draw up and register community rules.¹⁴ Structured community meetings are then held to make democratic and inclusive decisions regarding communal land. Further, “[a] person or customary or communal system of land tenure may not unfairly discriminate against anyone, directly or indirectly, with regard to community rules or practice or decisions which determines . . . participation in decision-making processes and fora concerned with the ownership, allocation, occupation, use or alienation of communal land.”¹⁵ Decisions regarding land tenure rights taken at community meetings must “enjoy the support of at least a majority of members of the community who are present or represented at the meeting.”¹⁶

The community rules regulate the administration of communal land. These community rules must “be consistent with the protection of fundamental human rights” as contained in the Bill and the following principle must apply: “fair and inclusive decision-making processes, in that . . . all members are afforded a fair opportunity to participate in the decision-making processes of the community.”¹⁷ It is furthermore specifically stated that at these meetings there would be “equality of membership” and there should be “no unfair discrimination . . . on one or more of the following grounds: race, gender, sex, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief,

13. *Id.* at 83.

14. *See* Notice 1423, *supra* note 1, § 32.

15. *Id.* § 7(2).

16. *Id.* § 7(3).

17. *Id.* § 32(3).

Erasmus: "Will She Speak or Won't She? That is the Question": Comments on

culture or language."¹⁸ The section, however, goes further and states "that community rules may reflect the rules . . . as to the age at which a member may attend and vote at meetings of the community and the age at which a member may receive an allocation of land rights."¹⁹ At such meetings, prescribed democratic processes are required.²⁰ Of particular importance is that every member of the community shall have the right "to attend, speak at and participate in the voting at any general meeting."²¹ It is furthermore required that business at community meetings is conducted in an accountable and transparent fashion.²² In order to ensure the effective enforcement of the provisions of the Bill, an involved administrative system, including the appointment of land rights inquirers, are provided for.²³ Certain offences are also created.²⁴

V. A FEW COMMENTS ON THE POSSIBLE EFFECTIVENESS OF THE BILL

As indicated above, the Bill is a genuine attempt to give effect to the rights of citizens, and especially women, to communal land. The Bill employs prescribed procedural measures to promote and protect the substantive rights afforded in terms of Section 25 of the Constitution.

One major problem with a procedural cure to a substantive rights problem is that procedures may become an ineffective method of control if not strictly applied. Furthermore, procedures are often disregarded or manipulated if they are not well-known and respected by the communities to which they apply. It means little to afford the right to women to speak at and to participate in decision making at community land meetings if they do not exercise those rights in an informed manner.

In *S v. Vermaas; S v. Du Plessis*, Justice Didcott makes the following statement regarding the meaningful exercise of rights entrenched in the Constitution: "Imparting such information becomes an empty gesture and makes a mockery of the Constitution, however, if it not backed by mechanisms that are adequate for the enforcement of the right."²⁵ The greater part of communal land is located within underdeveloped and

18. *Id.* § 32(3)(b).

19. Notice 1423, *supra* note 1, § 32(3)(b).

20. *Id.* § 32(3)(c).

21. *Id.*

22. *Id.*; *see also id.* § 32(3)(e).

23. *See id.* ch. 9.

24. *See* Notice 1423, *supra* note 1, §§ 63-64.

25. 1995 (7) BCLR 851, 860 B-C (CC), *available at* <http://www.saflii.org/za/cases/ZACC/1995/5.html> (last visited May 4, 2004).

remote (and at times inaccessible) areas of our country, where poverty and low levels of education are ever present. "Policing" the fair implementation of the provisions of the Bill will be very difficult indeed.

VI. FACTORS THAT MIGHT ADVANCE AND/OR UNDERMINE THE RIGHTS OF WOMEN

The following are factors that might advance and/or undermine the rights of women the Bill seeks to protect:

6.1 POSITIVE IMPACTING FACTORS

1. Knowledge of the rights afforded by the Bill: As indicated above, women will only be able to assert their rights if they are aware of these rights.
2. The Human Rights Commission: The main aim of this commission is to "promote respect for human rights and a culture of human rights."²⁶ Through educational campaigns, rural women can be informed of their rights to land.
3. The Commission on Gender Equality: This commission can likewise promote the rights of rural women, as it must "promote respect for gender equality and the protection, development and attainment of gender equality."²⁷
4. Fostering a general human rights culture: Only when a general human rights culture exists in South Africa will everyone be able to assert their rights.
5. Paradigm shift: An entire paradigm shift is called for. Women should function and be valued as equals by all in society.

6.2 NEGATIVE IMPACTING FACTORS

1. Poverty and HIV/AIDS: Poor and sick women will be prepared to be slaves of unjust practices, just to survive.
2. The stereotyping of women: As long as women are stereotyped as second class citizens, they will not be able to meaningfully assert their rights.
3. Customary law principles entrenching unequal treatment of women: These principles need to be revisited and revised where applicable.

26. SA CONST. § 184.

27. *Id.* § 187.

Erasmus: "Will She Speak or Won't She? That is the Question": Comments on

4. **Patriarchy:** As long as women are regarded as minors, they will not be equals of their male counterparts.
5. **A lack of knowledge of rights and poor education:** People who are ignorant of their rights will not make efforts to enforce these rights.
6. **General gender discrimination:** As long as general gender discrimination against women prevail, women will not enjoy equal human rights.
7. **The lack of funding to police provisions of the Bill:** Substantial funds will have to be made available to police the provisions of the Bill.
8. **Remoteness of rural areas:** Many of South Africa's rural areas are very remote and difficult to access by road. This fact will contribute towards poor enforcement of the provisions of the Bill.
9. **Women not being taken seriously:** Only when women are seriously regarded as equals will true gender equality prevail.

VII. CONCLUSION

The Bill is indeed a step in the right direction. The machinery created by the Bill aims to protect, among others, the right of women to communal land. It is submitted that the general human rights culture envisaged by the Constitution should be expanded. A sad article in the *Mail and Guardian* clearly illustrates the plight of women. The following lines illustrate the point:

A battered woman walks painfully to a tribal court to lay charges against her husband. He had beaten her for years and she has finally gathered the courage to do something about it. But when she arrives at the court she is turned away. It is a family affair and she must solve the problem with her husband. Within months she is dead. The woman's death has so outraged women in Ga-Mothapo village, near Pietersburg in Northern Province, that they decided it was time to overhaul the way tribal courts work. In most of the province's rural villages, women are not allowed to appear in the tribal courts. If they want to lodge a complaint, they need to find a male representative.²⁸

In order for women to fully and meaningfully exercise their rights, an entire paradigm shift is necessary. The words of Nussbaum are apt to end this Article: "Women in much of the world lose out by being women."

28. *Women Look for a Voice in the Tribal Courts*, MAIL & GUARDIAN, Oct. 3, 2000.

Their human powers of choice and sociability are frequently thwarted by societies in which they must live as servants of the ends of others, and in which their sociability is deformed by fear and hierarchy.”²⁹

29. MARTHA C. NUSSBAUM, WOMAN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 298 (2000).