**15 August 2021**

The Legal Resources Centre is a public interest law firm that is committed to a fully democratic society based on the principle of substantive equality. We seek to ensure that the principles, rights and responsibilities in the South African Constitution are respected, promoted, protected and fulfilled. We make these submissions based on our experience of representing poor and landless people since 1979.

**WOMEN’S RIGHT TO SECURITY OF TENURE**

The LRC litigated several cases[[1]](#footnote-1) challenging discriminatory laws that denied women in customary and civil marriages the right to an equitable share of marital property and security of tenure. These cases secured a community of property regime for black women, strengthening their right to security of tenure and financial freedom by ensuring that a husband and his wife/wives equally share the right of ownership and other rights to family and house property in marriage. Under articles 2(2) and 3 of the Covenant, States parties have the obligation to guarantee equal enjoyment of Covenant rights by all without discrimination. States parties are required to eliminate all forms of discrimination, formal, substantive, direct, indirect, and multiple, and take appropriate measures to ensure substantive equality. The LRC supports the CESCR’S recognition that women are particularly at risk of discrimination in securing access to and control over land tenure.

We further note that such discrimination is often intersectional, with black women in particular experiencing discrimination arising from gender, race, locality, marital status, education, poverty, or traditions and culture. This impacts on their security of tenure, access to, use of and control over land, their rights to marital property, inheritance, and exclusion from decision-making processes, including in the context of communal forms of land tenure. The LRC suggests that the General Comment specifically recognise the intersectional discrimination that black women living in rural areas experience in relation to land.

The legacy of differential access to opportunities leaves marriage as one tool to escape family poverty and acquire security. Parties enter and dissolve marriages blindsided by gender neutral matrimonial laws that amount to indirect race, gender, age and sex discrimination. Unpaid domestic labour contributions during marriage should be recognised and protected legally. The marriage-based nature of land rights is deeply embedded in customary law. However, an increase in numbers of single women headed households have been documented in South Africa. Independent rights to land provide women with access to economic and social resources needed for basic survival and with fallback positions in cases of domestic violence or marital breakdown. Whilst the role of women as housewife and family care person is entrenched, it is often not codified because legislation is gender neutral. Arguably, this expectation of the woman as a housewife is so strong that it constitutes a duty of work for women. Women who would like to deviate from the role of housewife or family care person have very little recourse. The result of this gender inequality is that women in the majority of marriages have a subordinate economic position in comparison to men creating a lack of bargaining power. Legislating against gender neutral laws and practices which include devaluing women’s labour at home is necessary and proactive in fulfilling the legislative obligation to substantive equality for women.

The barriers to implementation of legal frameworks that are in place include capacity, budget and political will. It is suggested that the General Comment makes specific provision for state parties to respect the role of the judiciary in interpreting legislation and holding government accountable. It is also suggested that state parties be encouraged to respect and promote the role of civil society organisations that often represents the interests of vulnerable people in relation to land and create free and fair conditions for them to do their work.

**Participation, Transparency and Consultation**

The LRC supports the Committee’s identification that consultation and consent are key principles of the Covenant. The ability to give or withhold consent to any land-related project is a powerful tool for communities in not only protecting their customary land rights, but in defending their right to participate in development decisions that affect them. Free, prior and informed consent (FPIC) should act as a mechanism for the promotion, implementation and monitoring of the human rights of affected communities.

FPIC refers both to a *substantive right* under international-, regional - and indigenous customary law, as well as a *process* designed to ensure satisfactory development outcomes. It imposes both procedural requirements to protect against arbitrariness and substantive requirements to ensure balanced outcomes among unequal stakeholders. To realise this right, the affected community’s decision whether to allow development that will affect their rights, should be made free from any obligation, duty, force or coercion. Secondly, the community has the right to make the development choice prior to any similar decisions made by government, finance institutions or investors. In the words of the African Commission on Human and Peoples’ Rights, the community’s right to FPIC is not realised if they are presented with a project as a *fait accompli*. Thirdly, the community must be able to make an informed decision. That means that they should be provided sufficient information to understand the nature and scope of the project, including its projected environmental, social, cultural and economic impacts. Finally, consent means that the community’s decision may be to reject the proposed development. Consent is not mere consultation. The community can say no.

Because the right to say no places the community in a position to negotiate, it is also a process. FPIC is not designed only to stop undesirable projects, but also to provide communities with better bargaining positions when they do consider allowing proposed developments on their land or resources. FPIC should not be relegated to a risk-management exercise. Rather, FPIC should be the basis upon which the relationship between the affected community and the company is built.

FPIC as a right of customary landowners have now been recognised by the South African courts[[2]](#footnote-2) even beyond the application of UNDRIP. This is a crucial recognition that UNDRIP has a complicated place in the African context and the continued insistence on a narrow application of the FPIC principle to communities who claim indigeneity in terms of UNDRIP, is leading to the dispossession of millions of African customary land owners. The General Comment should explicitly provide that FPIC is applicable to indigenous and other customary communities.

States should recognize the various power struggles in communities and require a separate consultative process among communities. The process of seeking consent, where applicable, must follow the decision-making process of the customary law of the community concerned. The committee must encourage States to adopt laws which require the consultation process, and the fulfilment of FPIC principles where applicable, to be satisfied and resolved before any activities, actions or transfers of land take place.

We suggest the following additions to the text:

* states must ensure that communities are given adequate time to study and understand the information so that communities engage in the decision-making process from a well-informed position;
* states should encourage parties involved in the consultation and FPIC processes to view the process as a building of a mutually respectful and beneficial relationship and that the development needs and interests of the community residing on the land should be regarded paramount;
* states must recognise that, when interpreting the right to FPIC, that this includes the right to refuse or decline any proposals made in the decision-making process. This would grant the community bargaining power in negotiations and adequately protect their interests in the land;
* states should ensure that women are adequately represented in consulting forums and in decision-making processes.

**Land Administration**

In order to address the egregious consequences of the legacies of colonialism on the tenure security of people living in communal areas it is necessary to 'construct a new system … based on a clear understanding of how existing property relations have developed, and why those relations do not satisfy people’s needs'. This requires that the government understand the flaws and benefits of the current systems in place – often inherited from colonial times - and develop a system (in consultation with the affected peoples) that will allow for protection of their rights and sustainable use of the land.[[3]](#footnote-3) Across the African continent, the colonial systems’ distorted understanding of communal tenure fed into the states’ distorted views of communal tenure which was then codified in colonial legislation. These interpretations of communal tenure and customary law has been challenged. Professor Okoth-Ogendo describes communal tenure practices in markedly different terms: he rejects the notion that communal tenure is necessarily 'communal' in nature- with 'collective' ownership vesting in a whole group and decisions made by the community. Instead, he argues that social relations create 'reciprocal rights and obligations that bind together, and vest power in community members over land'.[[4]](#footnote-4)

The challenge is in properly adjudicating and recording such rights. A land administration system that acknowledges the customs and reality on the ground should be preferred. That does not mean translating customary land rights into title deeds based on common law ownership. Sharing resources and maintaining relationships are fundamental to customary communal tenures. It is suggested that the General Comment specifically encourage states to develop appropriate systems of recordal of customary and other communal rights that reject colonial distortions and aim to record these rights within their own context.

**PROMOTION AND PROTECTION OF SMALL-SCALE AGRICULTURE**

It is challenging to achieve food security without access to land and security of tenure. To boost productivity and produce enough food to feed the world’s poor, both small-scale and large-scale agriculture are necessary. Access to land and security of tenure will ensure increased subsistence production and that has the potential to improve the food security of poor households in both rural and urban areas. It is important that member states ensure that there is access to land so that people living in low-income households can realise their right to food. Paragraph 28 of the General Comment can be amended to highlight the relationship between tenure and food security: “States parties should put in place laws and policies […] paying particular attention to tenants, peasants and other small-scale food producers whose vulnerable tenure may threaten their household food security” (addition underlined).

The LRC further recommends that the state parties’ duty to protect small-scale agriculture be extended to small-scale fishers. According to the Food and Agriculture Organization of the United Nations, small-scale fisheries play a significant role in food security and poverty alleviation; fish itself also contributes to the nutritional aspect of food security. State parties should enact affirmative protection for vulnerable groups such as women, small farmers and fishers to achieve food in an equitable manner. The GC can explicitly mention small-scale fishers when discussing state party duties: the text in paragraph 36 can be amended to read “That implies that States have a duty to […] small-scale farmers and fishers who depend on access to land and fisheries for their livelihoods” (additions underlined).

**CORRUPTION**

Corruption in land administration hinders economic growth and thus ultimately denies people access to land and livelihood. Transparency and the provision of information are crucial in addressing corruption in land administration. In this regard, the land sector has two advantages: first, the use of land is generally visible on the ground – it cannot be made to disappear in the same way as medicines or textbooks; second, victims of land corruption are frequently a specific set of people who live on or lay claim to the land in question unlike the losers from corrupt land deals who are typically not just a large group of taxpayers or voters, such as in the case of corruption in government procurement or the embezzlement of national budgets.

These two features mean that transmitting information from local people on the ground to anti-corruption actors is particularly useful in addressing corruption in the sector, both in providing data on land use as well as telling the stories of those dispossessed. Indeed, transparency on its own is unlikely to be effective against corruption. It is therefore important to ensure information processes are integrated within the accountability mechanisms that exist within a country.

In support of The Global Land Tool Network, states should aim to establish a continuum of land rights, rather than just focus on individual land titling; improve and develop pro poor land management as well as land tenure tools; unblock existing initiatives; assist in strengthening existing land networks; improve global coordination on land; assist in the development of gendered tools which are affordable and useful to affected people; and improve the general dissemination of knowledge about how to implement security of tenure.

**SPATIAL JUSTICE**

In South Africa, as in many parts of the world, most residential settlement patterns remain segregated along race and class lines. This spatial injustice has meant that the majority of poor and working-class families (who are predominantly People of Colour) have been excluded from accessing housing in well-located areas and are confined to housing projects on or beyond the urban edge. In 2015 South Africa implemented the Spatial Planning Land Use Management Act 16 of 2013 (SPLUMA), a legislative framework that seeks to address past inequality and provide effective spatial planning and a land use system that promotes social and economic inclusion for previously disadvantaged and previously racially discriminated South Africans. One of the objects of SPLUMA is to provide a uniform system of spatial planning within South Africa, which ensures that social and economic inclusion is prioritized.

The State’s constitutional obligations was recently affirmed in the in the case of Western Cape High Court decision in *Adonisi v Minister for Transport and Public Works and others.[[5]](#footnote-5)“[I]t is fair to say that the statutory and policy framework which finds its origins in the Constitution and the legislation mandated thereunder, renders it necessary for [the state] to redress the legacy of spatial apartheid as a matter of constitutional injunction. The constitutional and statutory obligations of ... government to provide access to land and housing on a progressive basis, encompass the need to urgently address apartheid’s shameful and divisive legacy of spatial injustice and manifest inequality.”[[6]](#footnote-6)*

South Africa’s three largest municipalities; The City of Cape Town, City of Johannesburg and the eThekwini Municipality (Durban) have made some progress in addressing spatial justice, however, more needs to be done to achieve spatial integration. Notwithstanding the principles contained in SPLUMA, without appropriate policy, local governments lack appropriate criteria and mechanisms to guide their implementation of inclusionary housing in private developments. Private developments are often located in ‘well developed’ suburbs and/or close to the City’s economic hubs. Inclusionary housing policies will aid in creating integrated neighbourhoods. We recommend that inclusionary housing guidelines be required by the General Comments. The necessary end goal of spatial planning is to make land close to economic hubs more equitable and accessible to all, especially to historically marginalized groups.

1. B*he and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC); *Gumede (born Shange) v President of the Republic of South Africa and Others* (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); *Ramuhovhi and Others v President of the Republic of South Africa and Others* (CCT194/16) [2017] ZACC 41; 2018 (2) BCLR 217 (CC); *Sithole and Another v Sithole and Another* (CCT 23/20) [2021] ZACC 7; 2021 (6) BCLR 597 (CC) (14 April 2021). [↑](#footnote-ref-1)
2. *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP); *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* (CCT265/17) [2018] ZACC 41; 2019 (1) BCLR 53 (CC). [↑](#footnote-ref-2)
3. *Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others* (Case No. 12745/2018P) (11 June 2021) available at <https://landportal.org/sites/landportal.org/files/2021/06/ITB-Judgment-11-June-2021.pdf>. In this case, the Court upheld that Zulu communities living on land held in trust on their behalf by the Zulu monarchy are the true and ultimate owners of the land and that the conversion of those land rights into leases infringed upon their rights to property held in terms of customary law. Notably, the decisions of the Trust and Board had a gendered impact as they disproportionately infringed on the land rights of women. When implementing their leasehold model, the trust dispossessed many women of their ownership rights. [↑](#footnote-ref-3)
4. See Clark, Michael and Nolundi Luwaya. *Communal Land Tenure 1994-2017: Commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an Initiative of the Parliament of South Africa* Land and Accountability Research Centre, 2017. [↑](#footnote-ref-4)
5. *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* (7908/2017; 12327/2017) [2020] ZAWCHC 87 (31 August 2020). [↑](#footnote-ref-5)
6. Adonisi and Others, par 94. [↑](#footnote-ref-6)