

Creation of Land Records Prior to Formal Registration in Lesotho

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Summary

The promulgation of Land Act 1979 in Lesotho introduced the current land legislation setting the basis for title registration system. The sporadic registration where individuals apply for registration when they have some land transactions to undertake does not give a complete picture of land holdings and thus impart deficiencies to development planning especially in peri-urban areas. This paper reviews various initiatives to redress this information vacuum and the current proposals under the ongoing land reform process, suggesting that land records at various levels should be maintained even prior to formal land registration.

1. Introduction

Land Registration under the Land Act 1979 can be considered as a title registration system where the focus is on the land thus requiring unique land parcel identifier. The unique identifier is based on the national grid reference for the 1:2500 cadastral maps; and these plot numbers are also used as the actual lease number. The plot coordinates identify the sheet number for the cadastral map on which the plot falls, therefore surveying of plots is a prerequisite for registration. When the Land Act 1979 came into operation it was evident that due to lack of qualified Land Surveyors it would be impractical to have all land holdings properly surveyed and registered, it was therefore decided that only people who had to undertake some transactions in land could convert their title to leases. Leases were issued for new allocations within the urban areas.

The new allocations on the other hand could not wholly meet the requirements for new residents, which lead to the development of clandestine land market where field owners within the urban peripheries subdivided their land and sold the land for residential purposes. These 'illegal' land sales were facilitated by some chiefs who issued backdated defunct allocation certificates known as "Form Cs". The realism of land sale being illegal is re-affirmed by Justice Maqutu in his judgment of the 18th October 2003 stating " Respondents have gone so far as to say they offered to buy alternative land for applicants at Khubelu. The specific applicants are not identified. What puzzles the court is that in Lesotho land cannot be lawfully sold – but respondents claim that they associated themselves with sale of land."

The informal land market, however illegal, has resulted in a sprawl of unplanned settlements in all the peri-urban areas. Related problems emanating from this situation are summarised in the draft National Land Policy (July 2002) which stipulates "Official attempts to regulate land use and building development have met with very little success. Much of the construction that is taking place in peri urban areas is unauthorised. Rapid and uncontrolled growth and the absence of planning have created serious problems for the provision of bulk infrastructure. Valuation rolls are out of date and property rates remain uncollected. Ground rents for leases are no longer being levied... The urban population is growing at around ten percent per annum.

The vast majority move into the unserviced informal sector in the peri-urban fringe where property tenure is insecure.” The magnitude of the problem is quantified by Maseru City Council (2002) which states that “currently, as per 1999 census, the population of Maseru is about 393,154 people; and over 70% of the population live in the unplanned settlements which lack health centres, roads, clean water, high schools and many other communal facilities which go with urban development.”

The informal land sales involves subdividing agricultural land and converting it into settlements and this behaviour is no longer restricted to peri-urban areas, but it is spreading to villages within the rural areas. The problems are therefore no longer that of urban planning and service delivery, but food security is threatened as a consequence of diminishing agricultural land. The ongoing decentralisation and establishment of local authorities cannot be sustained without the financial resources that can be achieved through collection of land taxes which can only be done when there are proper land records. The paper analyses various attempts to establish land records in Lesotho linking the proposals with the reforms proposed in the Land Bill 2004 due to be tabled in Parliament.

2. Land Records Establishment

UNFIG (1999) defines Land registration as the process of recording rights in land either in the form of registration of deeds or the registration of title to land and Adjudication as the process whereby the ownership and rights in land are officially determined. Lesotho’s registration system focuses on the land with the unique identifier defined from cadastral surveying. Title registration systems is “.an authoritative record, kept in a public office, of the rights to clearly defined units of land as vested for the time being in some particular person or body, and of the limitations, if any, to which these rights are subject. With certain unavoidable exceptions known in the English system as ‘overriding interests’, all the material particulars affecting the title to the land are fully revealed merely by a perusal of the register which is maintained and warranted by the State.”(Simpson 1976). To ensure that the land records under the title registration systems are authoritative and warranted by State requires the lengthy processes of adjudication and surveying to cadastral standards, which are usually rigorous.

The processes of land registration in Lesotho can be quite time consuming where an example of an application made in December 1997 and lease being collected in June 2002 (Steyn 2003) is not uncommon. It is therefore not surprising to find that there have been a number of initiatives to bypass the formal land registration system and create land records that can be used for development projects. This is done in recognition that “There is evidence that efficient use of development project funds may be greatly impaired by poor land information, especially in urban areas.” (Ting and Williamson, 1999).

2.1 Urban Sector Reorientation Project

Land Records creation projects include Urban Sector Reorientation Project 1988, which was an urban development project supported by World Bank. The land component of this project was basically upgrading of unplanned informal settlements in the peri-urban areas, specifically Maseru South, with a view to achieving the high densities, providing basic infrastructure and thus developing a basis for land taxation, that is, income for local government of Maseru City Council. This aspect was area based with intention to replicate in

other suburbs as well as other towns. The Land Records aspect recognised that it would be difficult to issue Land Act leases to all the occupants of sites in these areas since their evidence of title varied from backdated form Cs to letters of affidavit written by chiefs. The surveying of the sites was done by identification of the plot boundaries on orthophoto maps, delineating such boundaries on a plastic transparency, and issuing unique plot numbers for the sites. The owners of surveyed plots would thereafter be issued with re-validated form Cs giving them better security than their existing informal titles. The process also included an element of re-planning and providing road and services access and land taxation as an ultimate benefit for Maseru City Council. The project did not achieve its objectives, and the accesses, which had been demarcated, were abandoned, leaving the status quo of informal and unplanned settlements. Major causes for failure of the project include the fact that the proposals in the project had no legal provisions under the Land Act 1979, meaning that the legality of the processes were questionable, this issue has been redressed in the Land Bill 2004.

2.2 Government policy on informal settlements

The legality or illegality of intermediate titles in the process of upgrading informal settlements can be attributed to individual governments' will and policy to redress the informal settlements. Durand-Lasserve suggest that policies range from authoritarian to laissez-faire policies and can be viewed as falling into four major groups: The first 'authoritarian' policy would view illegally occupied land as available to the government; thus the illegal use of land is sufficient grounds for the eviction of 'irregular' occupants; The second policy would attempt to regularise illegal occupation, risking encouraging more illegal practices and might constitute 'the public powers' abdication from promoting urban law and order. The third policy would regard illegal settlements as places of marginality and social disorder, where the intervention of the public authorities could stir up severe social unrest and would therefore be avoided. The last policy would see irregular settlements as an inevitable but transitory problem that economic development and social mobility will eventually overcome, whereby a combination of laissez-faire and corrective measures is deployed (Durand-Lasserve: 1996).

Lesotho Government's policy towards the informal settlements has not been clearly defined in policy documents. The principal guidance is in clause 17 of the National Constitution (1993) which provides for "Freedom from arbitrary seizure of property (1) No property, movable or immovable, shall be taken possession of compulsorily, and no interest in or right over any such property shall be compulsorily acquired, except where the following conditions are satisfied, that is to say -....(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation."

In 1985 Government intervened in a project known as Mabote Project to formalise and replan informal settlements that were being developed in the Northeast periphery of Maseru city. This entailed collecting the form Cs from the informal settlers; re-planning the areas and re-allocating the settlers new properly planned land parcels. This intervention was successful due partly because the settlers had not yet done substantive developments when the project started and the legality of the processes were ignored.

In 1999, following a completion of a Maseru bypass road, government declared a corridor of about 300 metres on both sites on this road as a Selected Development Area (SDA) with the aim of ensuring that developments in that area are properly planned. However, as usual, the field owners continued to subdivide and illegally sell their land within this area. Government's intervention, this time, was to take the perpetrators to court for unlawful occupation of the land and where government won the cases, the properties in question were demolished. These approaches by the government reflect the variation of approaches from the laissez-faire to corrective measures if not authoritarian approach.

The judgement on the Loanika Moletsane and 42 others versus the Attorney General and Minister of Local Government characterizes the role that the courts of justice can play to moderate the undesirable elements of the government policies towards informal settlements. In this case L. Moletsane and 42 others, who were in the Maseru bypass road SDA, requested the court to interdict government from removing or demolishing their houses without compensation. In his judgement for the applicants the Judge intimated the need for proper land records saying, "Letters of allocation or form Cs and form C2 issued by chief cannot correspond with land registers – simply because some land registers did not always exist. Even those land registers that existed such as those of Upper Thamae Maseru have been found to have been fraudulently re-written. The case M Matabola V S Tsotako which ended in the Court of Appeal as S Tsotako V M Matabola C of A (CIV) No 10 of 1986 illustrate the point. In this case a form C (letter of allocation) had allegedly been issued several years before it was actually printed. Had it not been for the Government Printer dating the and numbering of years in which form Cs were issued, this fraud would not have been discovered." (Maqutu, 2004). This highlights the need to develop innovative approaches of creating land records that cannot be fraudulently copied to perpetuate informal settlements. Proper land records will instil confidence to users, which will impart tenure security; and government for its part, will not be seen as abdicating its responsibility of maintaining law and order.

3. Current proposals for land records.

There are a number of initiatives that are being envisaged to redress the lack of proper land records. The need for legal backup for the transitional stage of informal settlements into the formal leases is also recognized in the Land Bill 2004

3.1 Prevention of illegal encroachment of settlements in agricultural land

The meeting of Cabinet on Tuesday 24 September 2002 issued a directive that a formal order be issued preventing people from building on arable land with the Principal Secretary for Ministry of Local Government being responsible for follow-up. This was in recognition of the rampant encroachment of settlements into arable land within the Country's villages and urban peripheries leading to the current decline of agricultural produce and the state of famine. As previously indicated the existing land legislation prohibits this unfortunate practice that obviates sustainable land use, yet the perpetrators of these unfortunate acts are in some cases facilitated by the very protectors of the law. Government thus, directed that relevant mechanisms to stop encroachment of settlements into agricultural land be implemented.

The implementation strategy includes concerted sensitisation of affected communities to enlighten them about the provisions of the land law and planning initiatives where settlements are delimited from the agricultural land. Within the settlements boundaries, relevant experts summon their skills in villages planning techniques to create more sites for settlement and village amenities. Outside the settlements land use plans are developed in consultation with the affected communities. These initiatives will be further strengthened by the implementation of Local Government Act 1997, which is scheduled to be implemented by holding community councils' elections before April 2005. The Land Bill 2004 also provides the necessary legal framework for the initiative.

3.2 Digital Agricultural Mapping

The Ministry of Agriculture and Food Security sought technical support from the Chief Surveyor's office to undertake mapping to facilitate block farming as part of food security initiatives. The Block farming concept is the pooling together of small individual land units into a block where one crop type can be grown thus enabling economic utilization of implements and inputs. The maps ensure that the acreage for individual land can be calculated for the purpose of sharing the outputs and reestablishment of the land boundaries once the project has terminated. In addition the commercial entities willing to support such venture require the maps indicating the areas of investment.

The proposal for the Inventory of Fields utilises simplified approaches of the Land Inventory, a concept developed for recoding land parcels prior to formal registration under the land reform project (Concept note 2004). The creation of inventory of fields would involve procurement of images required for the areas of interest, training operators on identification of field boundaries and digitising them and field completion for ground truthing and associating the fields with the actual users. Ideally the relevant databases should be established in the district offices for maintenance and inclusion of other data of interest such as annual productivity from each of the fields.

In July 2004 advertisements of tenders for production of digital orthophoto mapping covering the whole country were published. Key mapping specifications included: 1:20,000 colour photography; mapping scale 1:5000; spatial accuracy of less than 1 metre; orthophoto delivered in geo-referenced tiff files clipped to 1:5000 national map index. At this stage quotations from five suppliers have been received and they are being analysed. These land records and land transactions such as sharecropping and sub-leasing will require legal backing which is contained in the Land Bill 2004, this requirement makes it imperative that the land reform process should not be allowed to stagnate.

3.3 Land Inventory Concept

The Land Inventory Concept was developed in 2000 under the Land Management and Administration component of the Agricultural Policy and Capacity Building Project (APCBP). It is a concept for acquiring and storing in a database, information about land parcels within the country. It involves acquisition of graphical and attribute data about all land parcels, but retains the inventory aspect since it does not involve adjudication and registration. However, the database can be used as a base for registration under proper legal provisions.

The concept derives its viability from three innovative approaches of the use Digital Orthophoto Maps, Digital Plane Table (DPT), and the Land Technicians.

3.3.1 Digital Orthophoto Maps

Digital Orthophoto Maps are essentially maps produced from a mosaic of orthogonally projected aerial photographs. This allows the user to identify visible details on the orthophoto map without expertise in normal map usage. The Land Inventory concepts opts for digital format to allow digitisation of visible boundaries of land parcels in a computer, thus compute the areas of each land parcel. Orthophoto is identified as ideal for this purpose by Dale who asserts “The use of aerial or satellite photography provides an alternative approach to recording property boundaries. In the case of aerial photography, as with GPS, high precision measurements can be taken allowing boundary lines to be measured to an accuracy of a centimetre or so. In order to use such techniques, the boundaries of properties must be visible from the air, either in the form of fence or hedge lines or else as markers in the ground that have been painted in such a way as to make them visible from an aircraft. Aerial surveys have the benefit of economies of scale - the more properties that are to be measured at one time the lower the unit costs; conversely if only a few boundary points are to be surveyed, the cost becomes relatively high. Aerial photography, however, facilitates the collection of other data, such as land use or the location of topographic features that may be surveyed at minimal additional cost, justifying the greater expense.” (Dale, 1999)

3.3.2 Digital Plane Table (DPT)

Digital Plane Table is based on an old mapping technique where a Plane Table, Alidade, Compass and Scale rule were used to produce a map. In Plane Tabling the map is produced in the field without the recourse to in-office computations and plotting as in other survey techniques. The Digital Plane Table facilitates production of land parcels maps in digital format in the field.

The components of the Digital Plane Table include the following:

- Three sets of Global Positioning Systems (GPS) consisting two rovers and one base station for determining the coordinates of the points of interest.
- Two Pen-computers linked to the rovers for delineating boundaries visible on the digital ortho-photo maps. These are essentially laptop PCs with onscreen writing facility.
- Penmap software which simplifies computation of coordinates of other points of interest which are not identifiable on the orthophoto maps.

3.3.3 Land Technicians

The survey of land parcels for registration purposes (cadastral surveying) is carried out by qualified licensed surveyors who are few within Lesotho, therefore if these were to be engaged to undertake data capture for the Land Inventory it would take just too long. The Land Technicians are not professional surveyors but people trained in the necessary aspects in order to use the DPT and undertake the data capture for the Land Inventory. The training of Land Technicians carried out by trained trainers takes three months of lectures, practicals and final test.

3.3.4 Implementation of land inventory concept

The proposal under the project was to undertake a feasibility study in a pilot project where there exists digital orthophoto mapping coverage. This was not carried out because, although

Land Technicians were trained, the company supplying the DPT went bankrupt and more set could not be procured. The APCBP came to an end in December 2003, there most of the proposals developed under the project will have to be implemented as part of land reform implementation. The digital mapping coverage that is likely to result from the digital agricultural mapping will provide one of the key components for the implementation of Land Inventory concept. In supporting the implementation, back in 2000 when the concept was developed, Zuelsdorf suggests “Do what is not forbidden by law” implying the legal framework for this type of land records is not essential for implementation. However the delay in implementation could mean the legal backing will be in place, as proposed under the Land Bill 2004, when the concept is finally implemented.

3.4 MCC Unplanned Settlement Upgrading

The Maseru City Council is again implementing Unplanned Settlement Upgrading project in the peripheries of Maseru. Similar to the 1988 Urban Upgrading project this phase has started in the Southwest of Maseru. The objective is “..an attempt to achieve an orderly development of the city as against the existing haphazard development that has emerged over the years.” (MCC 2002). While the stipulation of the objective does not reflect MCC’s enthusiasm about certainty of success, the community participation in this upgrading of unplanned settlements is the winning element for the implementers; failing which, the coercive or utilitarian power of MCC related to service delivery will be invoked.

The implementation involves registered Land Surveyors producing detailed maps of areas of settlements, MCC Planners proposing roads based on the details maps, and the Surveyors demarcating the land parcels per the new plans at the same time surveying the resultant sites to cadastral standards, so that the owners can ultimately be issued with leases. Problems experienced with this approach included the fact that by the time the MCC Planners complete the upgrading proposals for Surveyors to set-out, the situation on the ground has changed because the people continue to develop new structures. A remedial approach to this problem has been to instruct the Land Surveyors to do the planning of roads, guided by MCC planning standards, in their areas of work. This aspect of planning has to be done in consultation with the communities since in most cases it involves reducing the sizes of land parcels in order to provide road accesses

The affected communities bear the cost of land surveying. Initially the Land Surveyors were requested to submit proposals, but it was found out that some Surveyors had priced themselves too to perform the required work. After consultation with the Land Surveyors’ Association it was agreed that a price tag of M650- (approx. US\$ 100-) be paid for each land parcel. Payments by individual landowners are made to the Chairman of the Association who will distribute it to Surveyors according to their areas of work. The Surveyors find that there are individuals who are reluctant to participate in the project and there are others who are interested but they cannot afford the survey fees.

To encourage participation of people in these upgrading initiatives MCC has joined hands with Water and Sewerage Authority (WASA) whereby under the Maseru Peri Urban Water Supply project, funded by BADEA, WASA will not provide water connections for those people who do not participate in the upgrading project. This reflects a change of heart from

WASA¹ who initially had a business approach that they are in the business of selling water regardless of whether the client has formal or informal title. The change resulted when one of their main pipes was dug out by an informal settler who was building a toilet in his plot and felt that WASA had no right to have a pipe in his land.

The main predicament for all these noble initiatives is the lack of institutional capacity in the formal registration system; as pointed out earlier it takes from one to five years to acquire a Land Act lease. Currently, applications for leases pertaining to these initiatives by MCC have not been lodged with the Department of Lands, Surveys and Physical Planning (LSPP). This means when they finally come to LSPP, the system will not be able to handle such an influx of applications. From the land surveying perspective also, there needs to be some discussions to accommodate bulk surveys as opposed to individual plot surveys where the Chief Surveyors Directions indicates that for every plot fix there needs to be an independent check. Such discussion would drastically reduce the examination load.

4. Land Bill proposals

The realism of missing pieces in the jigsaw parcel of creating functioning land records is summarised in the following stipulation: “The "big picture" needs to acknowledge what global drivers of change exist, understand the current issues in land administration and then begin to substantiate a way forward to facilitate the legal, technical and institutional changes that are necessary in land administration to properly support the sustainable development objectives.” (Grant and Williamson, 1999) The following paragraphs highlight key elements of the Land Bill 2004 which are relevant for the creation of land records, however the question of institutional capacity is yet to be addressed in the strategy for implementation of the new land laws.

4.1 Principles of Land Bill

The Land Bill 2004 addresses the following four key principles:

4.1.1 Land occupied by citizens and others is held on a lease which derives its legitimacy and legality from the Constitution; this introduces the three types of leases administered at different levels of local government structures and central government

4.1.2 Land management is devolved from the centre to elected local authorities operating in a transparent and participatory manner. This will facilitate land allocation and management by local authorities established under the Local Government Act 1997. This will entail institutional changes which will require extra resources allocation for implementation.

4.1.3 Introduction of transparent and consistent regulation of the land market. The recognition here is that there exist an informal land market which should be formalized in order to control and protect the contracting parties.

4.1.4 Establishment of an efficient, economical and equitable systems of dispute settlement. The proposal here is to introduce specialised courts to address land issues, this is in recognition of a number of pending land cases and development proposals held up due to court cases. In addition the mediation and arbitration processes are formalized.

4.2 Types of leases

4.2.1 Primary leases replace the former allocations of land under the Land Act 1979 which in turn were meant to replace the customary law land tenure system provided for by the Laws

¹ Information from verbal interview of MCC project team

of Lerotholi. The nature and incidents of primary leases on the other hand are clearly spelt out in the Bill: in essence they derive their legality and legitimacy from the Constitution which vests the power to allocate land and make grants of land in the King “in trust for the Basotho Nation” while providing that the manner and form of the exercise of this power shall be exercised in accordance with the Constitution and “any other law” that is the Land Bill. The foundational or general law which applies to primary leases, that is the law behind the Land Bill is the customary law. The term ‘primary’ is given to this lease as it is and will remain for some time to come the primary form or land holding in Lesotho

4.2.2 Demarcated leases will be the type of leases which citizens may obtain through a process of adjudication of customary law interests in land held for a primary lease.. The specific interests which different people have in land held for a primary lease will be fairly fluid and unwritten and the boundaries of the leased land will likewise be ‘unwritten’ and fluid. Citizens who wish to move towards greater clarity and specificity in relation to their rights in land may via a process of the adjudication of rights in land obtain a demarcated lease which is registrable in a local register, and which clearly spells out the boundaries of the land and what rights and subject to what limitations the holder of a demarcated lease has. These leases will be fully marketable and available to be pledged as security for a loan. It will be possible for holders of demarcated leases to move from customary law to Roman-Dutch law as the foundational law of the lease.

4.2.3 Registrable and qualified lease is the existing lease of the Land Act 1979. It is called ‘registrable’ as it has to be registered in the Deeds Registry. It is granted of land that has been surveyed in accordance with the long-standing principles of surveying. The difference to the existing lease is the introduction of the qualified lease. A qualified lease is a registrable lease but without all the full paraphernalia of final registration. The purposes of a qualified title are to enable land to be alienated in advance of survey; and to enable title to be issued in advance of survey (McAuslan, 2003)

4.3 Land dispute resolution

The Bill introduces Local Land Courts, District Land Courts and the National Land Court for resolution of disputes on land issues. These will be part of the existing Courts systems with special personnel nominated to specialise with land related issues. Similar arrangements have been introduced for Labour Courts. In addition alternative dispute resolution systems is introduced to provide mediation and reconciliation service. This consists Local Mediation Panels in the ten districts and the Mediator at the Central level.

4.4 Introduction of land market

The bill introduces the land market providing for transparent and consistent regulation of the land market. From the natural resources perspective the introduction of Land Market is perceived as catalyst to bring about the mindset change where land can be treated as an economic resource not a free commodity which does not deserve utmost care and protection. Conversely some schools of thought see introduction of Land Market as introduction of social polarisation where land will move from the poor, orphans and disadvantaged groups to the rich and the elites; leading to poverty and social turmoil. The Bill provide for Land Market Board to ensure that land dealings do not expose the disadvantaged groups to unscrupulous land sharks; and those heads of families who would sell the land disregarding the interests of the heirs to the land. The land disposition will therefore have considerations of community interest, future generations, orphans and other disadvantaged groups. Other

land transactions such as sub-leasing of agricultural land, sharecropping and others are also catered for and formalised to ensure protection of the contracting parties.

4.5 Decentralised land management

Another fundamental issue is to ensure that land management is devolved from the centre to elected local authorities operating in a transparent and participatory manner. This recognises the provisions of the Local Government Act 1996 where the land management function is devolved to the local level. The Community councils will therefore be responsible for allocation of land, issuing primary leases and control of land dispositions within their jurisdictions. The Councils will establish standing land affairs committees (SLAC) as sub-committees to oversee the land management issues. At the District level there will be established a District Land Team of technical officers to support the SLACs within the district. The District Council will be responsible for reviewing applications in relation to demarcated and registrable leases and dispositions thereof. The Urban and Municipal Councils will be responsible for determining applications for registrable leases.

5. Conclusions

The Land Bill 2004 introduces innovations that will go a long way to address the recognition and formalising of informal settlements in the urban peripherals. The ongoing proposals by MCC would be accommodated well under the new law, since rather than attempting to issue applicants with registered leases, the qualified leases would suffice. In addition most of the related records would not necessarily have to be at LSPP but the local authority would keep and maintain such records. The Digital Agricultural Mapping, if it is implemented, will assist the establishment of the graphic records of land parcels, however rudimentary they may be. Formalising of the land market would at the same time imply there are no illegal settlers since the land transactions would be properly controlled. This will facilitate densification of settlements to warrant service provision, because the people would be allowed to subdivide their large land parcels and dispose off the resultant sites.

The major concern will be about the ability to implement the new law. The ability would include the necessary institutional capacity at all levels; the government's will to let go of the ideal environment and let all the informal settlers be formalised as legal, especially when there are many pending cases against some of them and the risk that the settlers whose properties were demolished will sue and seek compensation. The tenure security would be questionable; there may not be doubt between individual transacting on a piece of land, but the financiers would require some state warranting to some of these basis leases which are not registered at the Deeds Registry before issuing a bond on such property. Finally the traditional authorities have no legal role in the new law, which could result in animosities and sabotage from the chiefs; some schools of thought perceive them as being responsible for the dismal failure of the Land Act 1979, which they saw as taking away their birth right of land allocation.

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