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The views expressed in the articles are those of the authors. They do not necessarily reflect the views of the Helen Suzman Foundation.

Overview and welcome

Francis Antonie is the Director of the Helen Suzman Foundation. He is a graduate of Wits, Leicester and Exeter Universities. He was awarded the Helen Suzman Chevening Fellowship by the UK Foreign Office in 1994. From 1996 to 2006 he was senior economist at Standard Bank; thereafter he was director of the Graduate School of Public Development and Management at Wits University. He is the founding managing director of Strauss & Co.

This year marks 100 years since the passing of the Natives Land Act of 1913. This Act has had profound consequences not only for individuals and communities, but it has also, in part, determined the political trajectories of modern South Africa. This edition of ***Focus*** *is devoted to the Land Question.*

The so-called 'Land Question' in South Africa is fraught with many difficulties. These include the challenge of establishing what land belongs to whom; managing land administration and land claims; promoting urban development; agricultural transformation; and securing tenure-security and genuine ownership for millions of South Africans.

The Constitution protects existing rights to land and authorises the promotion of land reform within the framework provided by Section 25. It may very well be true to say that Section 25 is characterized by a tension between protecting existing property rights and achieving justice in access to land. This tension, it could be argued, is exacerbated by land reform policies that are perceived to be failing so many South Africans.

In response, Government has indicated a need to intensify the land redistribution program (apparently moving from a 'willing buyer, willing seller' to a 'just and equitable' approach). More recently, the National Development Plan (NDP) recommends that every municipal district with commercial farmland within its borders should establish representative committees to facilitate a 20% transfer of land to black ownership, under very specific guidelines to prevent market distortions.

But there remain significant doubts as to whether land reform policies are effectively designed, or even coherent.

In this edition, various distinguished scholars and writers discuss the broader implications of land reform.

The edition opens with an article, **The Natives' Land Act: Ten historical quotes,** that presents "ten extracts from contemporaneous texts of the time, or history books written after the signing into law of the 1913 Natives' Land Act". It provides an insightful context to frame the articles that follow.

Ben Cousins' article, **Land Redistribution, Populism and Elite Capture: New Land Reform Policy Proposals under the Microscope**, argues that the rural poor and small-scale farmers are not the intended beneficiaries of government's land redistribution policies, and that existing and new policies are not properly designed. Cousins is critical of the policies that government has pursued since 1994, and what has remained of these in new land policies (the State Land Lease and Disposal Policy, the Recapitalisation and Development Programme Policy, and the Agricultural Landholding Policy Framework). Cousins argues that the real

beneficiaries of land redistribution policies are the emergent black bourgeoisie.

Gerrit Pienaar's article, **Land Tenure Security: The Need for Reliable Land Information**, looks at the land registration system and some aspects of the history of land registration and its shortcomings. He argues that a suitable land administration system is lacking, and that this results in tenure insecurity and a lack of administrative support for agricultural activities. Land administration is the "integrated processes of determining, recording and disseminating information on tenure, value and usage of land in the context of developing suitable land management and development policies." Pienaar argues that a fully computerised land registration system is a solution.

Tara Weinberg's article, **Overcoming the legacy of the Land Act**, requires a Government that is less paternalistic, more accountable to rural people, argues that the post-apartheid government has actively excluded rural people from land policy by solely considering the interests of commercial farmers and traditional leaders. This paternalistic approach has negatively affected rural people, and especially rural women. Weinberg argues that the restitution programme is being used to consolidate the power of elites. She concludes that "if government is to move towards realizing the right to tenure security, it should approach land reform with less paternalism and more accountability to rural people."

Ernest Pringle, in his article, **Land Reform and white ownership of agricultural land in South Africa**, criticises the government's targets for land reform. He argues that these have been incorrectly measured.

Pringle argues that land distribution is not as racially skewed as is supposed, if a proper measurement is applied.

Theo De Jager, in his article, **Legacy of the 1913 Natives Land Act – Taking up the challenge**, argues that farms are businesses and that agricultural and commercial investment cannot be ignored, and cannot be regarded as valueless. Small-holder farms are valuable, but they have a specific place in the value-chain. De Jager argues that "land reform must be about more than merely the transfer of land and rectifying injustices of the past", it must be about transforming the sector. Farmers should be directly involved in the transformation of the sector, and government should provide options and incentives to this effect.

Sipho Pityana, in his article **The Constitution, the Land question, Citizenship and Redress**, argues that Section 25 of the Constitution does not have to be interpreted as only supporting a 'willing buyer, willing seller' model, and that a more liberal reading is possible. He argues that limitations placed on land reform are limitations of policy choices and that these have found expression in laws passed by parliament rather than the Constitution. Pityana points out that mineral resources and capital accumulation are at the centre of our economy, more so than just agriculture. These players should also be involved in addressing the legacy of the Land Act. He poses some difficult questions to government and citizens, reminding readers that our constitutional democracy is based on "affirming the values of human dignity, equality and freedom".

Finally, **Leon Louw**, in his article, **Land Distribution Paradoxes and Dilemmas**, points out that the land question in South Africa is misconstrued because it relies on a number of problematic assumptions that are assumed to be true. He attempts to point out what he perceives to be misconceptions underlying discussion about land distribution, ownership, and proposed policy. Louw argues that "if politicians are serious about achieving a vision of racial equity and equality, they would declare all permanent holders of land to be unambiguous owners of freely tradable, mortgage able and lettable land".

We conclude this edition with three book reviews: by **Anele Mtwesi** and **Wim Louw; Kameel Premhid;** and **Anthony Egan**.

The Natives' Land Act: Ten historical quotes[1]

January 19th marked the 100th anniversary of the signing into law of the ***1913 Natives' Land*** *Act. Below are* ***ten extracts from contemporaneous*** *texts of the time, or history books written after.*

1. **The** ***1911 Census recorded a*** **"native" population of** ***4 019 006 in the Union*** **of South Africa, 67.3% of the total population of 5 973 394.**

Population of the Union of South Africa according to the 1911 Census

	Cape Province	%	Natal	%	Transvaal	%	OFS	%	Total	%
White	582 377	22.7	98 114	8.2	420 562	24.9	175 189	33.2	1 276 242	21.4
Native	1 519 939	59.3	953 398	79.8	1 219 845	72.3	325 824	61.7	4 019 006	67.3
Coloured	454 985	17.7	9 111	0.8	34 793	2.1	27 054	5.1	525 943	8.8
Asiatic	7 664	0.3	133 420	11.2	11 012	0.7	107	0.0	152 203	2.5
Total	**2 564 965**	**100**	**1 194 043**	**100**	**1 686 212**	**100**	**528 174**	**100**	**5 973 394**	**100**

LM Thompson, The Unification of South Africa 1902-1910, Oxford at the Clarendon Press, 1960

2. **The percentage of the land owned and occupied by Natives (1913-1916)**

According to the findings of the Beaumont commission established in terms of the Native Land Act farms owned by Whites constituted 74% of the total at that time, Native reserves and Native-owned farms 8.9% and Crown (i.e. state) lands 12.4%.

Overall, 48.6% of the Native population resided on Native owned farms or Native reserve land, 29.1% on farms owned by whites, 7.4% on farms owned by Whites but occupied by Natives only, 12.2% in urban areas, and 2.7% on Crown land. The principal Coloured reserves – Leliefontein, Komaggas, Steinkopf, Concordia, and Richtersveld in Namaqualand in the Cape Province, extensive but arid areas with a very small population – were included in the category of Native reserves.

Percentage of total land area in different categories

	Urban areas	Farms owned by Whites	Farms owned by Whites but occupied by Natives only	Native reserves, mission reserves, and farms owned by Natives	Crown lands occupied by Natives	Un-occupied Crown lands
Cape Province	1.3	78.1	0.1	9.3	0.1	11.2
Natal	0.9	48.4	9.5	30.4	3.2	7.5
Transvaal	1.2	61	9.1	4.4	1.6	22.5
OFS	1.4	97	0	1.5	0	0
The Union	1.2	74	2.9	8.9	0.7	12.4

Percentage of total Native population on the different categories of land

Cape Province	8	15	0.5	75.7	0.8
Natal	3.5	33.1	7.9	52	3.4
Transvaal	23.3	29.6	16.8	25.1	5.2
OFS	14	79.4	0	6.6	0
The Union	12.2	29.1	7.4	48.6	2.7

Figures derived from tables in Report of the Natives Land Commission, 1913-1916

The principal Coloured reserves – Leliefontein, Komaggas, Steinkopf, Concordia, and Richtersveld in Namaqualand in the Cape Province, extensive but arid areas with a very small population – were included in the category of Native reserves.

> *LM Thompson, The Unification of South Africa 1902-1910, Oxford at the Clarendon Press, 1960*

3. The central provision of the *Natives Land Act*

The Act defined "scheduled areas" outside of which no Native was allowed to purchase or rent land – without permission – and inside of which no non-Native was allowed to purchase or rent land – again without permission. *Section 1 of the Act* stated:

3. Except with the approval of the Governor General -

(a) A native shall not enter into any agreement/or transaction for the purchase, hire, or other acquisition from a person other than a native, of any such land or of any right thereto, interest therein, or servitude thereover: and

(b) A person other than a native shall not enter into any agreement or transaction for the purchase, hire or any other acquisition from a native of any such land or of any right thereto, interest therein, or servitude thereover.

(2) From and after the commencement of this Act, no person other than a native shall purchase, hire or in any other manner whatever acquire any land in a scheduled native area or enter into any agreement or transaction for the purchase, hire or other acquisition, direct or indirect, of any such land or of any right thereto or interest therein or servitude thereover, except with the approval of the Governor-General.

As far as one section was concerned, the Bill was going to set up a sort of pale- that there was going to be a sort of kraal in which all the natives were to be driven, and they were to be left to develop on their own lines.

4. The Cape Province, which covered about half of South Africa's land area and contained 43% of her population, was exempted from the Act (until 1936):

Section 8(2) of the *1913 Act states:*

(2) Nothing in this Act contained which imposes restrictions upon the acquisition by any person of land or rights thereto, interests therein, or servitudes thereover, shall be in force in the Province of the Cape of Good Hope, if any for so long as such person would, by such restrictions, be prevented from acquiring or holding a qualification whereunder he is or may become entitled to be registered as a voter at parliamentary elections in any electoral division in the said Province.

5. John X Merriman's warning:

In a speech on the second reading of the Bill, John X Merriman, the former Prime Minister of the Cape Colony warned:

> As far as *one section was concerned*, the Bill was going to set up a sort of pale- that there was going to be a sort of kraal in which all the natives were to be driven, and they were to be left to develop on their own lines. To allow them to go on their own lines was merely to drive them back into barbarism; their own lines meant barbarous lines; their own lines were cruel lines...

A policy more foredoomed to failure in South Africa could not be initiated. It was a policy that would keep South Africa back, perhaps for ever. What would be the effect of driving these civilized Natives back into reserves? At the present time, every civilized man – if they treated him properly – every civilized man was becoming an owner of land outside native reserve, and therefore he was an asset of strength to the country. He was a loyalist. He was not going to risk losing his property. He was on the side of the European.

All they wanted to do was to turn the Native from a tenant to a labour tenant, and then salvation would be at hand. He could not see very much difference between the two, except that one was a contented advancing man and the other a discontented man approaching very closely to the Russian serf – he was a soul.

If they drove these people back into reserves they became our bitterest enemies. Therefore, he viewed anything that tended that way with the gravest suspicion. Again, in this Bill there was not sufficient distinction between those Natives who tried to educate themselves and the ordinary raw barbarian. They were all classed under the word "Native".

In the Free State, proceeded Mr. Merriman, the people had most excellent laws from their point of view for keeping out the Natives – stringent, Draconian, and violent laws, but they were not carried out, and the Natives had flooded the country.

All they wanted to do was to turn the Native from a tenant to a labour tenant, and then salvation would be at hand. He could not see very much difference between the two, except that one was a contented advancing man and the other a discontented man approaching very closely to the Russian serf – he was a soul.

John X Merriman, MP for Victoria West, in the debate on the second reading of the Bill, House of Assembly, Hansard, May 15 1913

6. The amount of land in the "scheduled areas"

Hermann Giliomee notes:

> "The Land Act of 1913 restricted *Africans* to just over *10 million morgen*, mainly in the Cape and Natal. The Beaumont Commission, set up to find additional land, *three years* later recommended setting aside an extra *8,365,700 morgen as scheduled areas*. But it added that it was 'too late in the day to define large compact Native areas or draw bold lines of demarcation.' With few exceptions African land was 'hopelessly intermixed with lands owned and occupied by Europeans whose vested interests have to be considered.'" *The Afrikaners: Biography of a People*, Hurst, 2003

The implementation of the commission's recommendation proceeded at a glacial pace. By *1939 only 1,500,000 morgen* had been acquired by the Native Trust, and not quite a million morgen actually transferred (Hoernle, 1945).

Giliomee writes that because the Natives Land Act made "little new land available, the reserves quickly became congested and the limited opportunities for individual tenure were further restricted by the strong support for communal tenure in the traditional African system. *From 1920 the government increasingly* stressed the development of African tribal life."

7. The immediate effect of the Act:

The immediate most wrenching effect of the act was not due to the loss of title to land but rather to the enforcement of the anti-squatting provisions in the Orange Free State (the rest of the country effectively being temporarily exempted from them). The historian TRH Davenport observed:

> "...The Cape was excluded from the operation of the Act, because to interfere with African land rights in the Cape was to interfere with their qualifications for the franchise... African squatters living in Natal and the Transvaal were also spared from eviction 'until Parliament has made other provision'. But where the Orange Free State was concerned, existing legislation which restricted squatting was explicitly confirmed, and the general stipulation that existing share-cropping agreements could remain in force for the time being was incorporated in other sections of the Act, in which the Cape, Transvaal and Natal were mentioned but the OFS was not.

Many farmers in the Orange Free State proceeded to evict their squatters, rightly thinking the law required them to do so. The sudden uprooting of large numbers of Africans from Free State farms, and the migration of many of them northwards across the Vaal, to the accompaniment of widespread forced stock sales at bargain prices, were described in evidence before the Beaumont Commission and by Sol Plaatje in his memoirs."

TRH Davenport, *South Africa: A Modern History*, MacMillan Press, 1977

"The good-humoured indulgence of some Dutch and English farmers towards their native squatters, and the affectionate loyalty of some of these native squatters in return, will cause a keen observer, arriving at a South African farm, to be lost in admiration for this mutual good feeling."

8. Sol Plaatje on relations between Europeans and Natives in the OFS before and after the Act:

In Native Life in South Africa Sol Plaatje painted the relations between Dutch and European farmers and their native squatters in the Orange Free State, before the Act came into effect, in idyllic terms. He wrote:

> "The good-humoured indulgence of some Dutch and English farmers towards their native squatters, and the affectionate loyalty of some of these native squatters in return, will cause a keen observer, arriving at a South African farm, to be lost in admiration for this mutual good feeling. He will wonder as to the meaning of the fabled bugbear anent the alleged struggle between white and black, which in reality appears to exist only in the fertile brain of the politician.
>
> Thus let the new arrival go to *one of the farms* in the Bethlehem or Harrismith Districts for example, and see how willingly the Native toils in the fields; see him gathering in his crops and handing over the white farmer's share of the crop to the owner of the land; watch the farmer receiving his tribute from the native tenants, and see him deliver the first prize to the native tenant who raised the largest crop during that season; let him also see both the Natives and the landowning white farmers following to perfection the give-and-take policy of "live and let live", and he will conclude that it would be gross sacrilege to attempt to disturb such harmonious relations between these people of different races

> and colours. But with a ruthless hand the Natives' Land Act has succeeded in remorselessly destroying those happy relations."

Later in the book he describes the devastating effect of the Act on the native tenants:

> "Proceeding on our journey we next came upon a native trek and heard the same old story of prosperity on a Dutch farm: they had raised an average *800 bags of grain* each season, which, with the increase of stock and sale of wool, gave a steady income of about *150 Pounds per year* after the farmer had taken his share. There were gossipy rumours about somebody having met some *one who said that* some *one else had overheard* a conversation between the Baas and somebody else, to the effect that the Kafirs were getting too rich on his property.
>
> This much involved tale incidentally conveys the idea that the Baas was himself getting too rich on his farm. For the Native provides his own seed, his own cattle, his own labour for the ploughing, the weeding and the reaping, and after bagging his grain he calls in the landlord to receive his share, which is *fifty per cent* of the entire crop.

"Some of their cattle had perished on the journey, from poverty and lack of fodder, and the native owners ran a serious risk of imprisonment for travelling with dying stock. The experience of one of these evicted tenants is typical of the rest, and illustrates the cases of several we met in other parts of the country."

> All had gone well till the previous week when the Baas came to the native tenants with the story that a new law had been passed under which "all my oxen and cows must belong to him, and my family to work for *2 Pounds a month*, failing which he gave me *four days* to leave the farm."
>
> We passed several farm-houses along the road, where all appeared pretty tranquil as we went along, until the evening which we spent in the open country, somewhere near the boundaries of the Hoopstad and Boshof districts; here a regular circus had gathered. By a "circus" we mean the meeting of groups of families, moving to every point of the compass, and all bivouacked at this point in the open country where we were passing.
>
> It was heartrending to listen to the tales of their cruel experiences derived from the rigour of the Natives' Land Act. Some of their cattle had perished on the journey, from poverty and lack of fodder, and the native owners ran a serious risk of imprisonment for travelling with dying stock. The experience of one of these evicted tenants is typical of the rest, and illustrates the cases of several we met in other parts of the country."
>
> Sol Plaatje, *Native Life in South Africa, Before and Since the European War and the Boer Rebellion,* 1916

9. The Act restricted the purchase of land by black Africans outside of the reserves but it did not curtail it completely before 1936.

In his speech on the second reading of the Bill Minister of Native Affairs' JW Sauer denied that the Bill placed an absolute prohibition on inter-racial land purchases. He stated:

> "*Section 1 of this Bill* referred to the consent of the Governor-General having to be obtained under certain circumstances, and that implied a certain principle.

> Some people talked of provisions which would make it absolutely impossible for a European to acquire land in certain areas, and for natives to acquire land in other areas.
>
> Some people talked of provisions which would make it absolutely impossible for a European to acquire land in certain areas, and for natives to acquire land in other areas. That seemed to him to be altogether too crude, and he thought that what they should have was not prohibition, but restriction, and the whole principle underlying this Bill was not absolute prohibition but restriction."
>
> *The Minister of Native Affairs, House of Assembly, May 9 1913*

As a recent study noted permission was granted in numerous instances:

> "... the exception clause resulted in Africans buying more than *3,200 farms and lots* between *1913* and 1936. Moreover, the Land Act was not retroactive: no African owner with a title deed, to our knowledge, lost his land in*1913 because of the* Natives Land Act. Significantly, the government approved mortgages which helped Africans to buy their land.
>
> Using the exception clause in the process of gaining permission for purchasing a farm was not easy, and prospective buyers had to be prepared to conform to the rules and criteria laid down by the Native Affairs Department (NAD)....A very important criterion was the location of the land: was it in an area recommended for African residence by the Natives Land Commission or the regional committees appointed, in 1917, by the prime minister to evaluate the Natives Land Commission's report?...
>
> A geo-statistical analysis confirms the evidence that the *1913 Natives Land Act* did not prevent Africans from acquiring land outside the scheduled areasidentified by the Act. Breaking down the farms into separately transferredland units, Table

1 *shows that in 1913 there were 591 African-owned land* units in the Transvaal, of which *43.1 per cent were* outside the scheduled areas. By 1936, blacks owned *934 land units* (an increase of 58 per cent) with *63 per cent* now located outside the scheduled areas. The area of African owned land outside the Land Act areas increased by *128.8 per cent* to represent *42.1 per cent* of the land owned by Africans in 1936, as opposed to the mere *24.6 per cent* in 1913."

Harvey M. Feinberg and Andre Horn, South African Territorial Segregation: New Data on African Farm Purchases". Journal of African History, 50 (2009), Cambridge University Press.

10. In the 1920s and 1930s the view was occasionally expressed by prominent liberals that the reserve system had protected Native lands from encroachment by Europeans:

In a speech to a Conference on Native Affairs in 1923 *the liberal historian* W.M. Macmillan commented:

"The history of the last century has proved abundantly (twice over in the fate of the Griquas, first in the south of the Free State and then in Griqualand East) that open economic competitition in land is fatal to the weaker race. Given free right of entry of whites into native lands, the native will be presently be landless indeed."

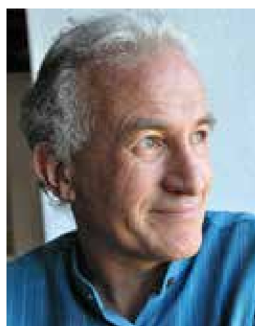
Alfred Hoernle made a similar point in 1939:

"... for the present, the Native Reserves are secured to the Natives in the sense that the Natives cannot alienate land to private European purchasers, and that Europeans can own land in the Reserves, and reside on it, only by the permission of the Government, given on the ground that the presence of such Europeans, as officials, traders, missionaries, is in the interests of the Native population. On the other hand, no Native individual or tribe may own land in an area set aside for White ownership. But, this segregation in respect of land ownership is not, of course, true territorial segregation. No doubt, it has protected, and is protecting, the remains of tribal lands from alienation, and so far it helps to preserve the integrity and cohesion of the Native peoples as a separate racial entity."

Alfred Hoernle, *South African Native Policy and the Liberal Spirit*, Witwatersrand University Press, Johannesburg, 1945.

NOTES
1 As featured on Politicsweb.co.za, 21 June, 2013

Land Redistribution, Populism and Elite Capture: New Land Reform Policy Proposals under the Microscope



Ben Cousins holds a DST/NRF Research Chair at the University of the Western Cape. He is based at the Institute for Poverty, Land and Agrarian Studies (PLAAS), which he founded in 1995. His main research interests are small-scale agriculture, trajectories of agrarian change and the politics of land and agrarian reform.

Land reform in post-apartheid South Africa is in disarray – and everyone knows it. The Minister of Rural Development and Land Reform, Gugile Nkwinti, may be incorrect in stating repeatedly that '90 percent of land reform projects have failed', but research reveals that at least half of all projects have seen little or no improvement in the lives of their beneficiaries, mostly because of poor planning and lack of effective support [1]. The extremely slow pace of land transfers against planned targets is not in doubt.

Given the powerful political symbolism of racially unequal patterns of land ownership, and amidst increasingly vociferous calls by some political figures to simply 'take back the stolen land', most South Africans probably agree that the Land Question simply *has* to be resolved, one way or another. Policies must address the long-term legacies of the large-scale land dispossession that took place both prior to and after the 1913 Natives Land Act, that includes a divided and often dysfunctional space-economy, deep-seated rural poverty and lop-sided power relations in the countryside.

But exactly what kind of land reform do we need, and what specific goals and objectives should it pursue?

Here there is much less agreement, and controversies abound over the wider purposes and significance of land reform in a rapidly urbanizing society (i.e. the *'why'* aspect). Other key aspects include *'how'* to acquire and redistribute land and *'how'* to secure land tenure rights, *'who'* should be targeted as key beneficiaries, *'where'* land reform should take place, and by *'when'*. Again, there is no consensus on how to answer these questions. A slew of recently released government policies dealing with land restitution, redistribution and tenure reform, the focus of this article, are likely to generate only further controversies.

Policy-making on land has become a somewhat *ad hoc* process in recent years. In 1997, a comprehensive and ambitious White Paper was published and charted a reasonably clear way forward. Since then, however, policies have changed track several times, and key shifts have not been located within a widely agreed vision or a clearly articulated rationale for land reform. New directions have often failed to take into account the lessons from implementation of previous policies. In 2009

the newly-elected Zuma government announced that rural development and land reform were national priorities, and in 2011 a short, 11-page Green Paper outlined some new policy thrusts, but with scant justification or discussion of past experience.

Two years later, and with a national election around the corner, it seems government does not intend to publish an expanded version of the Green Paper, or a comprehensive new White Paper. Instead, a series of short policy documents have recently been signed off by the Minister and placed on the Department's website, and it appears that no public debate or discussion of them is planned. A component that requires parliamentary approval, a far-reaching amendment to the Land Restitution Act of 1994, may be rushed through parliament before next year's election, perhaps as a vote-catching exercise. Other new laws, for example on land expropriation and traditional leadership, are also in the pipeline, but the time frames for these are unclear.

Many of these new policy shifts are highly problematic and, populist rhetoric to the contrary, are likely to result in elite capture of land reform as well as continued insecurity of tenure for the majority of rural people in communal areas, on privately owned and restored or redistributed land. That these policies have been adopted in the centenary year of the 1913 Natives Land Act, which denied or rendered insecure black people's ownership of land across most of the country, is deeply ironic.

In 1994 the initial target was to redistribute thirty percent of agricultural land, or 24.5 million hectares, by 1999, later adjusted to 2014. By 2012 around 7.5 percent (or 7.95 million hectares) had been transferred through a combination of redistribution and restitution.

This article focuses land redistribution, one of the three key sub-programmes of land reform (the others are restitution and tenure reform). It analyses the core proposals embedded within the new policy documents and assesses their underlying assumptions. It argues that capture of land reform by a small number of relatively wealthy 'emerging' black farmers is their likely consequence.

Land redistribution since 1994

Land redistribution seeks to address gross racial inequalities in land ownership inherited from the past, but also has the potential to address an underlying cause of rural poverty – lack of access to productive land, or land suitable for settlement, together with secure rights to such land. In 1994 the initial target was to redistribute thirty percent of agricultural land, or 24.5 million hectares, by 1999, later adjusted to 2014. By 2012 around 7.5 percent (or 7.95 million hectares) had been transferred through a combination of redistribution and restitution.

A combination of ideological and pragmatic considerations informed the ANC's acceptance of the protection of property rights in the new constitution of 1996, and also the adoption of a 'willing seller, willing buyer' (i.e. market-friendly) approach to the acquisition of land for redistribution. Until 2006/07 the primary mechanisms for redistribution involved grants to land reform beneficiaries for land purchase and land development, the establishment of legal entities such as communal property associations and trusts to own land, and business planning to ensure projects were 'viable'. These plans have often been very poorly aligned to the resources, needs

and desires of beneficiaries, and almost all have envisaged large-scale commercial farming ventures being established. In practice, if not in rhetoric, the option of using redistributed land for smallholder farming has not been supported. Although subdivision of large farms acquired for land reform is allowed in law, very little has taken place in practice, the default option being a curious form of 'collective farming' of single enterprises by groups of beneficiaries, an unintended consequence with predictable problems.

The State has negotiated prices with landowners and approved grants using long-winded bureaucratic procedures, while consultants have been hired to write constitutions for legal entities and develop farm business plans. Landowners unwilling to sell their farms have been able to veto land transfers in specific locations. Lack of capital and ineffective post-settlement support measures have hamstrung the ability of beneficiaries to engage in production, and in the absence of effective area-based planning, land acquisitions have lacked any spatial logic. South Africa's land reform has thus combined the least effective aspects of both state and market-driven approaches, and it is unsurprising that beneficiaries aiming to farm have struggled to achieve high levels of productivity.

The State's failures to target appropriate land for purchase and to negotiate good prices, plus the ruling party's lack of political commitment to land reform (evident in the tiny annual budget for land reform – never more than one percent of the total budget), are more likely candidates.

These problems, together with the slow pace of redistribution, have led to widespread dissatisfaction with the 'willing seller, willing buyer' approach. Some political formations have called for the property clause in the constitution to be scrapped, so that land can be expropriated more easily. However, it is not clear that this is in fact a fundamental constraint on land acquisition and transfer on a large scale. There is no evidence that inflated prices have been paid for farms acquired for redistribution (although it is true that this is the case for restitution, where the state is in effect the only buyer). The State's failures to target appropriate land for purchase and to negotiate good prices, plus the ruling party's lack of political commitment to land reform (evident in the tiny annual budget for land reform – never more than one percent of the total budget), are more likely candidates.

Government now plans to pass a new expropriation law consistent with constitutional provisions that compensation must be 'just and equitable'. It will enable valuations to take account of a range of factors other than market value, such as the current use of the property, the history of its acquisition and use, the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and the purpose of the expropriation[2]. An office of a Land Valuer-General is to be established, to oversee valuations for the purpose of rates and taxes as well as to determine compensation following expropriation. These measures might allow land to be acquired for redistribution a little more cheaply than to date, but are unlikely to greatly speed up land reform.

A Pro-active Land Acquisition Strategy (PLAS) was adopted as policy in 2006 and is currently the only available mechanism for redistribution. Here the State has purchased farms and allocated them to applicants on the basis of 3-5 year leasehold agreements, after which the lessee was to be offered an option to purchase the farm.

Funds for investment in farm infrastructure have been made available to PLAS beneficiaries for 'recapitalisation and development'.

Data on the PLAS programme are hard to come by. Between 2009 and 2012 a total of 882 238 hectares was redistributed to 10 447 beneficiaries, but it is not clear exactly how many of these were for PLAS projects. A small number of case studies suggest that PLAS beneficiaries tend to be relatively well-off and have other business interests, but often fail to pay the rent required of them. The Department's mid-term review of 2012 reports that a number of established (white) commercial farmers are acting as 'strategic partners' or 'mentors' (264 and 117 respectively) to land reform beneficiaries, and that some have been appointed in order to 'graduate smallholder farmers into commercial farmers'[3].

They cannot get re-cap funding without entering into a strategic partnership, which many beneficiaries are wary of, but without recap funding one cannot get a lease. Some say: 'you have to have a lease to be recapped – but you can only afford to pay rent if you have been recapped'.

Recent field research on PLAS farms in the Eastern Cape by Ruth Hall and Thembela Kepe indicates that some beneficiaries are caught in a 'Catch-22' situation. They have not been granted leases, and have therefore not been serviced or supported by the provincial department of agriculture. They cannot get re-cap funding without entering into a strategic partnership, which many beneficiaries are wary of, but without recap funding one cannot get a lease. Some say: 'you have to have a lease to be recapped – but you can only afford to pay rent if you have been recapped'. These experiences do not inspire confidence in the capacity of the State to administer leaseholds on land reform farms or provide appropriate support to beneficiaries trying to make those farms productive.

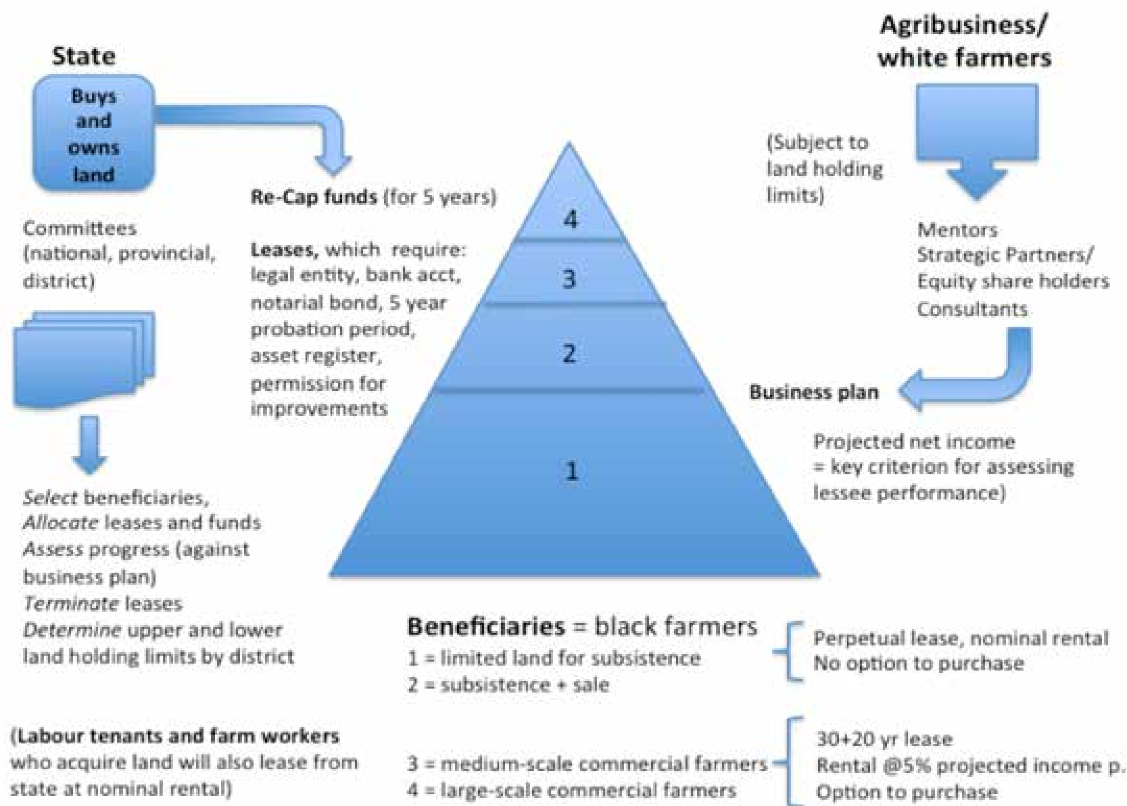
New policies

Three new policy documents effectively redefine land redistribution policy: the State Land Lease and Disposal Policy (SLDP), the Recapitalisation and Development Programme Policy (RDPP), and the Agricultural Landholding Policy Framework (ALPF) – see Figure 1 below. These build on key elements of existing policies such as PLAS and the Recapitalisation and Development Programme (RDP) and all refer to the 2011 Green Paper, and its notion of a 'four-tier land tenure system' in particular, as well as the rural economy chapter of the National Development Plan.

The *State Land Lease and Disposal policy*, the SLDP, applies to farms acquired through PLAS. It is targeted at black South Africans, and defines four categories of 'farmer' beneficiaries:

1: Households with no or very limited access to land, even for subsistence production.
2: Small-scale farmers farming for subsistence and selling part of their produce on local markets.
3: Medium-scale commercial farmers already farming commercially at a small scale and with aptitude to expand, but constrained by land and other resources.
4: Large-scale or well established commercial farmers farming at a reasonable commercial scale but disadvantaged by location, size of land and other resources or circumstances and with potential to grow.

Figure 1. New land redistribution policies, 2013



Categories 1 and 2 will be leased state land at a nominal rental of R1.00 per annum, without an option to purchase. Labour tenants and farm workers who acquire land in terms of the provisions of existing legislation on security of tenure will also lease from the state, but pay only a nominal rental.

Categories 3 and 4 will be leased state land for 30 years, with leases renewable for another 20 years, and have an option to purchase. The first five years of the initial lease will be treated as a probation period in which the performance of the lessee will be assessed, and new lessees will pay no rental in this period. For categories 3 and 4, the rental thereafter will be calculated as 5 percent of 'projected net income', as set out in an approved business plan. Leases will require beneficiaries to establish a legal entity with its own bank account in order to engage in business activities, have notarial bonds entered on their leases, provide tax clearance certificates, maintain an asset register, and seek permission to make improvements.

The *Recapitalisation and Development Policy Programme* (RDPP) replaces all previous forms of funding for land reform, including settlement support grants for those having land restored through restitution. Its rationale is that many land reform projects have been unsuccessful because of inadequate and inappropriate post-settlement support and are in 'distress', and thus in need of further injections of funds. It will also provide financial support to black farm owners who are not

land reform beneficiaries, and to producers in communal areas. Beneficiaries will be 'prioritized' in accordance with the four categories listed in the SLDP, but just what that means is unclear. Again, business or development plans written by either private sector partners or departmental officials will be used to guide decision-making. Funding will be for a maximum of five years.

Beneficiaries of the policy will have business partners recruited from the private sector to work closely with them, as mentors or 'co-managers', or within share-equity arrangements, or as part of contract-farming schemes. The definition of 'co-management' is confusing, but seems to imply some kind of joint venture for a specified period of time.

The *Agricultural Landholding Policy Framework* (ALPF) draws its inspiration from the notion in the 2011 Green Paper that one 'tier' of land tenure in South Africa will be 'freehold with limited extent'. It proposes that government designate maximum and minimum land holding sizes in every district, and take steps to bring all farms either up to the specified minimum size (a 'floor level') or below the maximum size (a 'ceiling'). The rationale is to attain higher levels of efficiency of land use and optimize 'total factor productivity'.

District land reform committees will determine landholding floors and ceilings by assessing a wide range of variables (including climate, soil, water availability, water quality, current production output, commodity-specific constraints, economies of scale, capital requirements, numbers of farm workers, distance to markets, infrastructure, technology, price margins, and relationships between different on-farm resources). Holdings in excess of the ceiling will be trimmed down through 'necessary legislative and other measures'. What this means is unclear, but the document indicates it may include purchase (possibly through giving the State the right of first refusal on land offered for sale), expropriation, or equity sharing.

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The ALPF document reviews international experience of setting land ceilings as a land reform measure, and in particular the cases of India, Egypt, Mexico, the Philippines and Taiwan. The document points out that in almost all cases the impact of land ceilings has 'not lived up to expectations', and in some cases has had almost no effect on disparities in land-holdings. The document also states that 'optimum' levels of productivity (i.e. both floor and ceiling) are 'dynamic and continuously changing upwards and downwards'. The obvious conclusions, that it will prove difficult, if not impossible, to make meaningful designations of maximum and minimum land holding sizes, and that in any case the desired impacts are likely to be negligible, are not drawn.

A broadly similar *institutional* framework for implementation is proposed in each of the three redistribution policy documents. District committees will undertake detailed assessments of applications, select individual beneficiaries, recommend the allocation of leases and recap funds, assess beneficiaries' progress against approved business or development plans, determine minimum and maximum landholding

sizes, and recommend termination of leases when performance is deemed to be poor. These committees will be composed mainly of officials from different departments and levels of government, but at district level will include a few representatives of the private sector.

For leases, a national committee will make recommendations based on the advice of district committees, and the Director-General of the Department will give final approval. In relation to recapitalisation grants, a national committee chaired by the Minister will make final decisions. In relation to landholding size, it appears that the proposed National Land Management Commission will have final authority.

Assessing the new policies

The new policies are inconsistent and unclear as to whom the beneficiaries of land redistribution will be, but close analysis reveals a strong bias in favour of 'emerging black commercial farmers'.

Who will benefit from these redistribution policies? The ALPF states that the target for land redistribution over the next six years is 8 million hectares, of which half will be allocated to what it calls 'smallholders'. Key objectives of the policy are to 'facilitate the participation of small farmers into mainstream agriculture' and 'facilitate the redistribution of land agricultural landholdings to co-operatives and family-owned landholdings'. The RDPP states that 'smallholder development and support … for agrarian transformation' is an imperative, but also that a key strategic objective is 'rekindling the class of black commercial farmers destroyed by the 1913 and 1936 Land Acts'. It also refers in several places to 'black emergent farmers'. Not one of these terms is defined.

Key objectives of the policy are to 'facilitate the participation of small farmers into mainstream agriculture' and 'facilitate the redistribution of land agricultural landholdings to co-operatives and family-owned landholdings'.

The SLDPs' four-category typology of beneficiaries is based on the sensible idea that they are not homogeneous. But small-scale farmers in categories 1 and 2, who greatly outnumber larger and commercially-oriented black farmers, will pay only nominal rentals and never have the option to purchase the land they occupy. It is not clear why not.

Farmers will be assisted to 'graduate' from one category to the next, the implicit assumption being that 'bigger is better'. People who want secure rights to well-located land for settlement and as a base for their multiple livelihood strategies, a possible route out of rural poverty, are not catered for at all. Key aspects of both the leasehold and the recapitalisation policies seem to assume that 'emerging' commercial farmers will be the main beneficiaries, as in requirements that lessees set up companies with bank accounts and enter into strategic partnerships with commercial farmers or private sector companies. Key provisions of the leasehold policy assume that there will be only one lessee per farm, and no mention is made of subdividing large farms to provide for smallholders.

The four-category farmer typology is based on the fallacy that 'farming scale' is equivalent to 'farm size'. These are not the same thing at all. Scale refers to the

relative size of the farming enterprise (which can be large-scale on a small area of land, as in intensive horticulture and livestock production, or small-scale on a large area, as in extensive livestock in an arid zone). Some smallholder farmers in South Africa are fully commercial producers on plots under one hectare in extent (for example in the Tugela Ferry irrigation scheme in KwaZulu-Natal[4]). This kind of farmer could benefit from expanded access to land and water, but there is a poor fit between their needs and requirements and these policies.

The typology that forms the basis of these new policies thus makes little sense, but it is clear that progress towards becoming a large-scale commercial farmer is what is assumed to constitute 'success'. Given government's obsession with perceptions of failure, this suggests that applicants for land who are deemed to fall within categories 3 and 4 are likely to be the main beneficiaries.

The Agricultural Landholdings Policy Framework (ALPF) lacks a sound basis in both theory and in relevant experience in other contexts.

Many beneficiaries could no doubt succeed on their own if provided with appropriate advice and start-up capital, as demonstrated in the Besters district. Yet the new policies assume that private sector partners are essential for success.

South African agriculture is highly diverse in its products, systems and scales of production, partly in response to high levels of environmental variability (both between and within large district municipalities) but also to market realities. Environmental and market conditions are dynamic and fluctuating, and as the ALPF policy document itself admits, 'optimum productivity' is a constantly moving target. Successful farmers, both large and small, are those who are able to improvise flexible and effective responses to dynamic variability. To imagine that anyone (let alone officials who have never farmed themselves) could designate landholding sizes that make economic sense in South Africa today is a dangerous fantasy. I cannot see pragmatists in the ruling party agreeing to implementation of this policy, and it may well be quietly dropped after the 2014 elections.

The experience to date of strategic partnerships and joint ventures in land reform in South Africa does not appear to have been taken into account.

Land reform beneficiaries who have been told (or chosen) to enter into strategic partnerships with businesses have had a mixed experience to date. There are some success stories, but a great many failures too. Some of the partnerships established on fruit and nut farms in Limpopo have gone bankrupt, and others continue to struggle to pay any kind of dividend to community members[5]. Small-scale farmers on irrigation schemes have had their fingers burned in poorly-managed joint ventures with tobacco and fresh produce companies. Many of the business plans drawn up by these partners have been far from appropriate, and have not provided useful instruments with which to measure the performance of beneficiaries of land reform. Partnerships and business plans are not a panacea for failure in land reform. Many beneficiaries could no doubt succeed on their own if provided with appropriate advice and start-up capital, as demonstrated in the Besters district. Yet the new policies assume that private sector partners are essential for success. The lessons of recent experience do not appear to inform these new policies.

The new policies make unrealistic assumptions about the skills and expertise of government officials in relation to agriculture.

A key weakness of land reform policy to date has been the inability of land reform officials to engage in planning to support the productive use of transferred land, or to critically assess the plans drawn up for beneficiaries by consultants. The Department has also failed for many years to effectively co-ordinate its programmes with those of provincial departments of agriculture, as well as other relevant departments such as human settlements or water affairs. Recent experience with the PLAS programme indicates that these problems have not been overcome, and that the administration of leases and recapitalisation grants continues to be beset with problems.

Is it credible, then, that officials will be able to undertake the varied and technically complex tasks required of them by the new policies? Perhaps they might do so in the long run, if they receive intensive training and accumulate experience under the supervision of skilled senior staff. In the short term, the answer must be 'no'.

Does this mean that a more market-based approach to land reform, and a correspondingly smaller role for the state, is preferable? Not at all. Market forces on their own tend to privilege the better-off, and only deliberate interventions in favour of the poor will ensure we have a land reform programme that fulfils its potential to help address poverty and inequality. But this requires a capable state guided by a commitment to social justice, and one free of corruption, which exacerbates the problem of elite capture. Creating such a state is a key challenge in South Africa today.

Conclusion

Since 2009 policy documents on land reform have been replete with fine-sounding phrases on the need for 'agrarian transformation', defined as 'a rapid and fundamental change in the relations (systems and patterns of ownership and control) of land, livestock, cropping and community', and the creation of 'vibrant, equitable and sustainable rural communities'. Smallholder farmers and the rural poor are often named as key beneficiaries. This populist discourse masks the reality that the rural poor, and potentially highly productive, small-scale farmers are not really intended to be the main beneficiaries of government's land redistribution policies, which, as in other sectors such as mining, are aimed at promoting the interests of an emergent black bourgeoisie.

NOTES

1 See Fact Check Land Reform No. 4, 'Many land reform projects improve beneficiary livelihoods', Institute for Poverty, Land and Agrarian Studies, 2013 (www. plaas.org.za/plaas-publication/FC04)
2 See section 25 (3) of the constitution.
3 Department of Rural Development and Land Reform, Mid-term Review, 2012: 20.
4 Ben Cousins, 2013. "Smallholder irrigation schemes, agrarian reform and 'accumulation from above and from below' in South Africa', Journal of Agrarian Change, 13(1): 116-39.
5 Edward Lahiff, Nerhene Davis and Tshililo Manenzhe, 2011. Joint ventures in agriculture: lessons from land reform projects in South Africa. London: International Institute for Environment and Development.

Land Tenure Security: the Need for Reliable Land Information

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Registration as a Source of Land Information

Presently, the only official and reliable source of land information in South Africa is the land registration system, which is based on the land survey system. The history of land registration indicates that it is part of the process of giving publicity to the acquisition of ownership and limited real rights in respect of immovable property.

In the South African context, two diverse property regimes exist alongside one another; namely the system of individualised common law (Roman-Dutch) land ownership, which is predominantly based on civil law principles, and the system of communal land tenure, which is predominantly based on the shared use of land by communities in terms of indigenous law principles. The present registration system does not provide for the registration of communal land rights and, as a result, official information in respect of communal land tenure is currently insufficient and unreliable.

Land information by registration forms part of the general land administration system of South Africa. 'Land administration' can be described as the integrated processes of determining, recording and disseminating information on the tenure, value and usage of land in the context of developing suitable land management and development policies. A well-developed land administration system for formal and surveyed urban property and agricultural land already exists in South Africa, but the same cannot be said about informal land rights and communal land tenure in rural areas. Therefore a comprehensive and effective land administration system for all land tenure rights, based on reliable land information, should be developed to avoid a piecemeal approach to land administration and sustainable development. In this process, the development and application of good governance principles regarding land administration is necessary.

Registration of Individualised Land Rights

For registration purposes, rights in immovable property are separated into ownership as well as registered limited real rights that are registrable in a deeds registry in accordance with section 63(1) of the Deeds Registries Act 47 of 1937, and other forms of land tenure that are normally not registrable in a deeds registry. The former individualised rights are strictly enforced and protected by means of court actions, can only be transferred through registration in a deeds registry and are considered absolute in nature. The latter, on the other hand, are often considered 'weak' rights, or in most instances subservient, permit-based entitlements to occupy or use land,

and are not registrable. The reason for this is that the land in question has either not been surveyed properly, or that the individualisation of land-use rights in communal property, which is a requirement for the registration of rights in a deeds registry, is not possible.

Two recent developments of the registration system illustrate the acceptance of a more flexible attitude towards the registration of communal and fragmented use rights. Firstly, in the case of sectional titles, a registration procedure different to that of individualised and surveyed land is followed. A sectional title unit, as part of a building, is registered in the sectional title register of a specific sectional title scheme held at a deeds registry rather than in the conventional land register. What differs is that the management structure of a sectional title scheme, according to the registered management and conduct rules as applied and enforced by the body corporate of the scheme, also forms part of the sectional title register.

Secondly, the Chief Registrar of Deeds has been examining the introduction of a fully computerised land registration system (e-DRS) since 1998. It is envisaged that this development will enable conveyancers, who are linked to the central registration system by computer, to make use of paperless lodging and electronic verification of information for the transfer of real rights together with simultaneous electronic transactions, such as the cancellation of existing bonds and the registration of new bonds. A fully computerised registration system offers the possibility to incorporate different land tenure models, such as individual landownership, fragmented land tenure (e.g. sectional titles and time-sharing) and communal land tenure in different registers in the same registration system.

Communal land rights have been exercised for centuries by traditional communities in the rural areas of the former homelands. These rights are not individualised, and may not be registered at present.

Communal Property Structures in Rural Areas

Communal land rights have been exercised for centuries by traditional communities in the rural areas of the former homelands. These rights are not individualised, and may not be registered at present. It is estimated that approximately 16.5 million people, or more than 3 million households (more than a third of the total population), still live in these areas. Official land information regarding communal land tenure is almost non-existent. 'Communal land tenure' is described in terms of its inclusive nature, and ideally exhibits the following features:

- Land rights are embedded in a range of social relationships, including household and kinship networks, and various forms of community membership, often multiple and over-lapping in character;
- Land rights are inclusive rather than exclusive in character, being shared and relative, but generally secure. In a specific community, rights may be individualised (dwelling), communal (grazing, hunting and fishing) or mixed (seasonal cropping combined with grazing and other activities);
- Access to land is guaranteed by norms and values embodied in the community's land ethic. This implies that access through defined social rights is distinct from control of land by systems of authority and administration; and
- Social, political and resource-use boundaries are usually clear, but often flexible and negotiable, and sometimes the source of tension and conflict.

It has been demonstrated in several legal systems in Africa that the abolition of indigenous systems disrupts traditional rules, values and customs that have historically governed the use of land, including well-developed conflict resolution mechanisms. Replacement strategies often introduce new institutions of land administration that may not be readily accepted, causing disputes and conflict over access to land.

Legislation and Case Law

The social cohesion within communities and the attachment of communities to land have been afforded little recognition by recent legislation. One example is the Restitution of Land Rights Act 22 of 1994, which was promulgated to provide for the restitution of rights to persons or communities dispossessed of land rights as a result of the racially discriminatory laws or practices of the past. 'Community' is defined in section 1 as 'any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group'. The rights or interests in land are not limited to surveyed land, but to land in general, and are widely described as access (and not only use and occupation) to land held in common by such group. The definition of 'community' in the Restitution Act, without any reference to the status or legal personality of the community, resulted in uncertainty as to whom the land should be restored in the case of a successful land claim instituted by a group of persons. Consequently, the Communal Property Associations Act 28 of 1996 (CPA Act) was promulgated to enable communities to form juristic persons in order to acquire, hold and manage immovable property in terms of a written constitution. In the context of the Act being promulgated to facilitate the registration of communal property in the name of the group as a juristic person, it can only refer to surveyed property registrable in a deeds registry. The CPA Act mostly enjoyed a lukewarm reception because it was generally perceived to be too sophisticated for most communities. Furthermore, lawyers drafting constitutions for these communities frequently did not take community custom sufficiently into consideration. The main problem with this Act from the perspective of indigenous people was that it was based on the individualisation of land tenure for registration purposes by using Westernised corporate models. Consequently the distinctive communal spirit and responsibilities, whereby tenure security are normally ensured, were completely ignored.

The main problem with this Act from the perspective of indigenous people was that it was based on the individualisation of land tenure for registration purposes by using Westernised corporate models. Consequently the distinctive communal spirit and responsibilities, whereby tenure security are normally ensured, were completely ignored.

In order to provide for the specific needs of rural communities practising communal land tenure, the Communal Land Rights Act 11 of 2004 (hereafter CLRA) was promulgated. This Act was recently found to be unconstitutional and scrapped in its entirety by the Constitutional Court. The stated objective of the CLRA was to provide for legal security of tenure by transferring communal land to communities and to provide for the democratic administration of communal land. The administration and management of communal land were to be exercised by land rights boards and land administration committees appointed by the communities for

the benefit of the community members (sections 22(2) and 22(4)). For this purpose, the community was required to apply to the Department of Land Affairs to be incorporated as a juristic person by registering community rules as contemplated by section 20. The juristic person could, subject to the provisions of the Act and its community rules, acquire rights and incur obligations in its own name and could, in particular, acquire and dispose of immovable property and real rights therein and encumber such property by mortgage, servitude or lease.

The following objections were raised against the implementation of this Act:

- Although the Act provided for the registration of land in the name of a community, more or less the same Westernised corporate model as in the case of the CPA Act was prescribed, losing sight of the communal spirit and responsibilities of traditional communities that are essential for access to communal land and security of land tenure.
- Although security of tenure is often obtained by membership of a functional community, many communities in rural areas in South Africa are dysfunctional. Reasons for this include apartheid land measures, the dumping of thousands of unrelated people on communal land, severe overpopulation and unproductive farming practices, compelling a substantial part of the community to migrate from the communal land, or necessitating other ways of earning a livelihood.
- It was clear that the intention of the Department of Land Affairs was to use established traditional councils as land administration committees for all communities, depriving communities of their democratic right to form their own land administration committees in terms of section 22(1) of the Act. Presently, many communities fall under traditional leaders that they do not recognise, due to historical allocations in terms of the Black Authorities Act 68 of 1951.
- The Act was furthermore based on the upgrading of land tenure rights by individualising such rights for registration purposes and to use such individualised property as collateral for financial assistance. The Minister of Land Affairs had the final say in deciding to individualise land rights on a recommendation based on a land rights enquiry.

The legislation did not fully recognise the true spirit of inclusivity based on acknowledged social relationships. There is at this stage no clear policy by the Department of Land Affairs and Rural Development to fill the vacuum that has existed since the scrapping of the CLRA.

Although these legislative measures were an effort by the Department of Land Affairs to acknowledge communal land tenure and the registration of land to improve the security of tenure of communities, much of the flexibility and negotiability of communal land tenure was ignored. The legislation did not fully recognise the true spirit of inclusivity based on acknowledged social relationships. There is at this stage no clear policy by the Department of Land Affairs and Rural Development to fill the vacuum that has existed since the scrapping of the CLRA. The Draft Security of Tenure Bill of 2010 indicates briefly that security of rural land tenure will be dealt with in separate legislation, which has not been published yet.

Recent case law is much more explicit in recognising the historically based social cohesion of communities and the attributes of communities in securing land tenure.

The three *Richtersveld* cases are significant in determining what constitutes a community for the purposes of a land claim. In *Richtersveld Community v Alexkor*

Ltd[1] the Land Claims Court confirmed that there must be a group of persons who have rights to land. These rights are derived from shared rules determining access to land that the group holds in common. In analysing the evidence adduced by the Richtersveld people and corroborated by the expert evidence of an archaeologist and several anthropologists, the Land Claims Court held that the Richtersveld community fulfilled these requirements. The evidence indicated that the Richtersveld people shared the same culture, including the same language, religion, social and political structures, customs and lifestyle. One of the components of their culture was the customary rules relating to their use and occupation of land. The Constitutional Court held that the customary law interest in land is something distinct from common law ownership, and must be understood in terms of its own values and norms in terms of the customary law.[2] Although the indigenous nature of communities and communal property is not always acknowledged and fully understood by land tenure legislation, the Constitutional Court firmly established the principle that these institutions are rooted in indigenous law and should be acknowledged as such, but always subject to the spirit, purport and objects of the Bill of Rights in the Constitution. Therefore the Constitutional Court concluded that the nature of the customary law interest in land (also referred to as 'indigenous title to land')[3] is 'a right of communal ownership under indigenous law', including communal ownership of minerals and precious stones.[4] Therefore, it is a true property right with economic implications.

Therefore the Constitutional Court concluded that the nature of the customary law interest in land (also referred to as 'indigenous title to land') is 'a right of communal ownership under indigenous law', including communal ownership of minerals and precious stones.

Security by a Comprehensive Land Administration System

The failure to provide tenure security for indigenous communities can be attributed to the following factors:

- Community structures in modern-day South Africa do not provide sufficient security of tenure due to a large incidence of dysfunctional communities and a defective, and often entirely absent, administrative system to support communities.
- Legislation introduced the wrong kind of formalisation, namely Westernised corporate models too far removed from accepted customs and therefore not suitable for indigenous communities. Much of the flexibility and negotiability of communal land tenure was ignored and the legislation did not fully recognise the true spirit of inclusivity based on acknowledged social relationships.
- An additional cause of this insecurity is that land tenure rights conferred in general by legislation do not comply with the requirements of the publicity principle and are therefore uncertain until, in individual cases, such rights are confirmed by a court order, arbitration, mediation or agreement. The Richtersveld cases are examples of litigation that lasted almost a decade before the Constitutional Court decision brought finality. Legislation alone is not sufficient to obtain security of tenure, but it has to be formalised by an additional and suitable information and recording system.
- The main aim of a formalised structure should not be the individualisation of communal land tenure in the form of freehold title to be used by communities as collateral for financial support, but the security offered by information (recording and publication) of communal land rights exercised within accepted community

structures. The information system should be upgradeable in order to provide for the registration of communal title and eventually individual title if required by a community.

In the process of developing a comprehensive land administration system for both individualised and communal land rights, internationally accepted principles of good governance or best practice should be adhered to. These include predictable, open and enlightened policy-making; transparent processes; a bureaucracy imbued with a professional ethos, an executive arm of government accountable for actions; a strong civil society participating in public affairs, and all behaving under the rule of law'.[5] The following aspects are internationally recognised as requirements for a comprehensive land administration system for formal and informal, including communal, land tenure:

A paradigm shift from the exclusive protection of ownership and limited real rights to tenure security for unregistered and informal land rights has been accepted by the Constitutional Court6 as a solution to South Africa's pressing land tenure problems.

Equal protection
Policymakers in South Africa have to deal with two diverse land tenure systems. Only rights to demarcated, surveyed property can be registered, excluding a large part of the population from the protection offered by the registration system. Recent literature, legislation and case law regarding the scope of section 25 of the Constitution have changed the notion that informal and fragmented use rights, as well as communal land rights, are inferior to the individualised ownership orientation model for lack of registration. A paradigm shift from the exclusive protection of ownership and limited real rights to tenure security for unregistered and informal land rights has been accepted by the Constitutional Court[6] as a solution to South Africa's pressing land tenure problems. The solution lies in the improved protection of statutory recognised rights by an extended land information and administration system in which informal, fragmented or communal land rights are recorded and protected in accordance with the application of the publicity principle.

Land policy principles
Modern land administration has to focus mainly on recognising, controlling and mediating rights, restrictions and responsibilities over land and land-related resources, such as minerals and water. Balancing these competing tensions in land policy requires access to accurate and relevant information by way of spatial data, normally in the form of a multi-purpose cadastral system, as part of a comprehensive land information system. In this regard it is important to establish and define the roles and responsibilities of the various land-related activities such as land management, land reform, land registration, cadastre and land administration infrastructure suitable for communal land tenure.

Land tenure principles
Before a final decision on a long-term land development strategy can be made, it is necessary to examine the needs of the different individuals and population groups across all tenure relationships. Developing countries such as South Africa should consider the possibility of different tenure arrangements within one cadastral or land information system to suit the diverse needs of individuals, communities and land tenure practices in urban, agricultural and rural areas. The existing deeds registration system already provides for different forms of registration, namely individualised land rights in the case of surveyed land and urban fragmented

property holding in the case of sectional titles and time-sharing (see II above). It is possible to develop a third form to record communal land rights in the name of communities in accordance with the distinct nature of community structures and communal land tenure (see III above). The aim of such register should be to record use rights associated with communal land tenure, which will provide the necessary information (publication) for the development of a comprehensive land administration system that is lacking at this stage.

It is more cost-effective and practical to implement a computerised land information system for the purpose of land administration initially, and at a later stage for the purpose of formal registration of rights when required.

Spatial data and technical principles

Spatial data infrastructure is a key component of land administration infrastructure. Normally this is based on complicated and expensive land survey processes. It is important to extend the spatial data infrastructure, which is aimed at individualised ownership and real rights, to include flexible and layered fragmented use rights, especially in rural areas in which communal land tenure is practised. The only prerequisite is a computerised land information system within a demarcated (and not necessarily surveyed) piece of land. Communal land tenure is based on flexible use rights exercised by a range of members of a community within a specified area. The borders of these areas are often vague or flexible, and may change from time to time due to specific uses or agreements. This can only be recorded by a computerised land information system specifically developed to record communal land rights.

A combined land information and registration system?

Often, too much emphasis is placed on the formal registration of rights to improve tenure security, while a reliable land information system as the basis of an efficient and comprehensive land administration system is more important in this respect. It is more cost-effective and practical to implement a computerised land information system for the purpose of land administration initially, and at a later stage for the purpose of formal registration of rights when required. In developing an affordable as well as accessible register of communal land rights in rural areas for the purpose of a comprehensive land information system, the following principles should be followed:

- It should be a computerised register of persons, households and families, and rights exercised by them within a cadastrally defined or surveyed piece of land.
- The system must provide for complex, overlapping, fragmented use rights associated with communal land tenure by recognising secondary and more distant right-holders.
- The communal rights, even when registered, must be exercised in group context according to generally accepted rules, e.g. inheritance rules, alienation only with consent of the group and limitations imposed by the group, or the administrative system in which the rights are being exercised.
- The land information system should form a separate part of the central land registration system so that information of these rights will be accessible whenever a search is conducted in the land register.
- Information on the limitation of the rights by group members or the administrative system in which the rights are exercised must be recorded.
- There are several models of combined land information and registration systems,

mainly in operation in developing countries. A land information template is normally used to develop a conceptual model for documenting and recording communal land tenure where multi-dimensional rights exist. This is done by identifying the recordable components of communal property and providing a corresponding database template for documenting and recording all aspects of tenure associated with a given person, family or household with reference to a specific unit of land.

Conclusion

The scrapping of the CLRA will be regretted by few people, but it has left a policy vacuum in the Department of Rural Development and Land Affairs regarding rural land administration. This necessitates the development of a new rural land policy by the Department. At this stage, the lack of a suitable land policy has extremely negative consequences for people living in the previous homelands, which are still characterised by tenure insecurity and a lack of administrative support for agricultural activities. Efficient planning for housing, roads, health services, educational services and electricity and sewerage services is almost non-existent and needs to be addressed urgently.

The envisaged electronic deeds registration system offers the possibility of registering three completely different forms of land tenure, namely individual ownership, urban fragmented property schemes (sectional titles and time-sharing) and communal land rights in one registration system. This also offers the possibility of different aims for the different forms of registration. A computerised land information system linked to the present registration system will be relatively inexpensive and easy to operate. It will offer security of land tenure by the publication of the nature and extent of the use rights exercised by the members of the community on a specific piece of land. In the process of developing a land policy, implementing a comprehensive land administration system and securing the land tenure rights of all South Africans, it may be profitable to accord attention to research, literature and legal precedents in other legal systems that are considerably further down the rocky road than South Africa.

NOTES

1 2001 (3) SA 1293 (LCC) par 66–75. This aspect of the decision of the Land Claims Court was confirmed in Richtersveld Community v Alexkor Ltd 2003 (6) SA 104 (SCA) par 5 and Alexkor Ltd v The Richtersveld Community 2004 (5) SA 460 (CC) par 8.
2 Par 50.
3 CC par 57 and 62.
4 CC par 64.
5 Anon Governance: the World Bank's experience (2008) vii.
6 Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) par 16, 23 and 24.

Overcoming the Legacy of the Land Act Requires a Government That is Less Paternalistic, More Accountable to Rural People

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The 1913 Natives Land Act was one of a group of laws and policies within a long history of land dispossession of black people in South Africa. The act initially set aside only 7% of the country's land for legal occupation by black people. One of the main premises of the Land Act was that black people should not own land on an equal footing with white people. Hence only organs of state and traditional leaders were given decision-making power over land, ostensibly to protect the land. This practice obscured institutionalized racism in the language of paternalism. An attitude of paternalism is one of the continuities across the apartheid and post-apartheid policies of the state (with the caveat that the state is made of many actors and therefore not homogenous). However the logic and nature of power relations that underlie this attitude have shifted over time. Despite the post-1994 constitutional requirement that the state make secure the land tenure of people in rural areas, it has so far failed to do so. This article argues that if the government is to move towards realizing the right to tenure security, it should approach land reform with less paternalism and more accountability to rural people, giving serious consideration to the proposals they put forward.

Land laws and policies under white rule

The 1913 Land Act built upon a long history of colonial interventions that dispossessed Africans of their land as a means of domination and subordination.

These interventions sought to sideline the African farming class and to force black people into becoming mine labourers in the cities. The colonial government, in asserting European constructs of exclusive ownership, deemed indigenous systems of land rights not to constitute property rights, thereby justifying 'freeing up' vast areas of African-held land as 'Crown Land', which was then granted to white settlers. In addition, the 1927 Native Administration Act crystalized a set of rules that portrayed a distorted account of African customary law. This privileged the powers of chiefs over land in 'communal' areas, at the same time downplaying the usage, occupation and inheritance rights of ordinary people within indigenous systems of land rights.

The 1936 Native Trusts and Land Act slightly expanded the land available to Africans in the reserves (to 13% of the country), making available certain areas of 'Trust' land alongside the existing reserves as 'resettlement areas' for those to be removed from 'white' land. African occupation of Trust land was conditional on the payment of yearly fees or rents, with the ownership of the land vesting in the South African Native Trust (SANT).

The 1936 Act also established the '6 native rule', which provided that any group of more than six black people who had cooperated to purchase land had to constitute themselves as a tribe under a chief. This was to pre-empt land buying syndicates from constituting themselves democratically. The rule embodied the prevailing colonial assumption that all blacks were tribal subjects as opposed to active citizens, able to create their own identities and choose the legal arrangements that suited them.

The apartheid period saw the onset of more extreme congestion in the land. During 1960s the government enforced the Betterment Programme under the pretext of combating congestion, poverty, soil erosion and over-stocking, and improving agricultural production. But Trust and Betterment policies had little effect on reducing poverty, congestion and landlessness in the reserves (if that ever was the intention); if anything, they accelerated the process.

> *The apartheid government believed that chiefs were the sole African decision-makers in respect of 'communal' land.*

A main feature of these laws and policies was that they prohibited black people from holding and managing land in a way that put them on an equal footing with white landowners. An example of this was the law of how a black person's property was administered when this person died. Upon the death of the person occupying Trust land, the land reverted to the Administration, which had the authority to re-allocate it. A Native Commissioner, Mr. Pike, likened government policy to customary practices of communal land tenure, arguing that the Minister of Native Affairs had replaced chiefs in the role of land 'trustee'. Implicit in Pike's statement was a paternalistic attitude that only the state could be trusted to administer and monitor African land.

Concomitant with the process of land dispossession and forced removal of black people to rural homelands was the imposition of chiefs and tribal authorities. The land laws were fundamental in this process. The apartheid government believed that chiefs were the sole African decision-makers in respect of 'communal' land. This version of power in land undermined customary practices that recognised the entitlements vesting in ordinary people and the role of groups in vetting and approving applications for land. In 1955, the Under-Secretary for Bantu Areas Mr. Young explained that under the Bantu Authorities Act, chiefs and headmen would help to administer 'Trust' (SANT) land on behalf of the government. He added that if there were no chiefs, "they could always be created". The SANT was also extensively used to buy up land adjoining the reserves that was then given to those chiefs who agreed to establish Bantu Authorities, while those who resisted Bantu Authorities were demoted or consigned to small areas.

One of the net effects of the government's land tenure system and its Betterment policies was to contribute to women's exclusion from access to land. Unwilling to recognise the reality of unequal distribution of land between blacks and whites as a problem of its own making, the state aimed

to address land scarcity and congestion by excluding women from access to land in the reserves, on the basis of a distorted version of customary law. Magistrates and Bantu Affairs Commissioners increasingly told complainants that women could not inherit or manage land in their own right because it was not 'customary' to do so. Instead they said that the head of a household, who they believed was always a man, would make decisions about land for the benefit of the family. State officials again used the language of paternalism to justify the exercise of state power over black people, and discrimination against women.

Land laws and policies post-1994

During the negotiations for a democratic South Africa in the 1990s, there was much debate about the extent to which the existing property regime should be protected, since it was skewed in favour of existing white landowners. A compromise was reached in terms of which the Constitution would protect property rights, but this would be balanced by measures intended to redress racial imbalances - specifically in the form of restitution and redistribution of land, as well as land tenure reform in the country as a whole. Sections 25(6) and (9) of the Constitution are particularly relevant (although not limited) to the 16.5 million people living in the former Bantustans. Those sections require the enactment of legislation to secure the tenure rights of people who are insecure because of past racial discrimination.

Constitution, Chapter 2 - Bill of Rights
Section 25 (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(9) Parliament must enact the legislation referred to in subsection (6)

The government has so far failed to enact laws and policies that would truly give effect to rural peoples' right to tenure security, as enshrined in the Constitution. Security of land tenure entails the legal and practical ability to defend one's ownership, occupation, use of and access to land from interference. While some protections have been put in place to give effect to Section 25(6), most of these do not cover people living in communal areas. These areas - mostly the former Bantustans - are home to an estimated 16.5 million people, of which 59% are women. Uncertainty around communal land tenure law and policy has therefore impacted disproportionately on women.

The government's failure to realise the right to tenure security is not an oversight. Under the first Minister of Land Affairs, Derek Hanekom, the strategy was to consult widely and incorporate as many of the suggestions put forward by rural people as possible. This led to the enactment of the Interim Protection of Informal Land Rights Act (IPILRA) in 1996 and development of the Land Rights Bill (LRB) in 1999. IPILRA remains a crucial law that can be used to protect people against deprivation of their informal rights to land[1], except under very exceptional circumstances. The LRB moved to create relative 'protected rights' vesting in individuals who use, occupy and have access to land. Protected rights would be secured by statute, making them enforceable immediately, even before the complex

processes entailed in enquiring into, and resolving cases of overlapping and disputed rights on a case-by-case basis was completed. But IPILRA was only intended as temporary legislation that would provide a safety net to people who did not have land titles, and Minister Thoko Didiza scrapped the LRB when she took office, on the basis that it was too complicated and costly to implement.

In the mid-1990s, the government came up with laws and policies that could have put us on the path to genuine redress for some of the legacies of the 1913 Land Act. But from 2000 onwards, many of the government's laws and policies have frustrated the move towards tenure security and have been characterised by a new form of paternalism. While paternalism in the past was underwritten by a belief system that black people were racially inferior, the current paternalistic discourse seems to be based on the notion that rural people are inferior. The similarity between the two is the assumption that poor rural people are not entitled to landownership, and cannot be trusted, and that the government 'knows what is best' for rural people. Seemingly government is more comfortable acting on 'behalf of' rural people than giving them the power to make their own decisions.

Over the last decade, power over land has been removed further and further from the hands of rural people, and placed in the hands of elites (black as well as white). This is clearly embodied in the 'willing buyer, willing seller' land redistribution policy, which the state has only recently begun to question. This policy, which pandered to white elites, made obtaining land for redistribution and restitution prohibitively expensive, and failed to take into account the structural causes of racial inequality in landholding.

The Department of Rural Development and Land Reform (DRDLR) said that chiefs would make decisions on behalf of people because it would be 'customary' for them to do – even though the historical evidence disputes this.

In addition to treading carefully with white commercial farmers, the government has put in place land policies and laws that favour traditional leaders (in the belief they can secure the rural vote).[2] This was most clearly evident in the Communal Land Rights Act (CLRA), enacted just before the general elections in 2004. Many rural people argued that the CLRA would have undermined their security of land tenure because it gave traditional councils and chiefs wide-ranging powers, including control over the occupation, use and administration of communal land.

The CLRA reinvigorated the combination of economic and political subjugation that existed under apartheid's Bantustan system. It basically wooed chiefs in an attempt to win the rural vote. It was also very convenient for mining companies who could negotiate with a single individual to acquire land, and avoid the 'messy' and complex process of negotiating with a whole community. The Department of Rural Development and Land Reform (DRDLR) said that chiefs would make decisions on behalf of people because it would be 'customary' for them to do – even though the historical evidence disputes this.

In 2010, the Constitutional Court struck down the CLRA.[3] But other laws and bills that vest power in traditional leaders remain a threat to rural peoples' security of tenure. The Traditional Leadership and Governance Framework Act (TLGFA) reinforces the boundaries of the tribal authorities established under the Bantu Authorities Act of 1951. Laws like the TLGFA and Traditional Courts Bill (TCB) marginalise women's voices, shifting the balance of power more towards male

Bantustans, 1986

Traditional Councils, 2010

household heads and traditional leaders. This context affects single women the most, particularly those without male family members, who have little status in the eyes of some traditional leaders and structures. The traditional leadership laws, like the CLRA, attempt to foreclose the ability of groups in the former homelands to constitute themselves independently of traditional authorities.

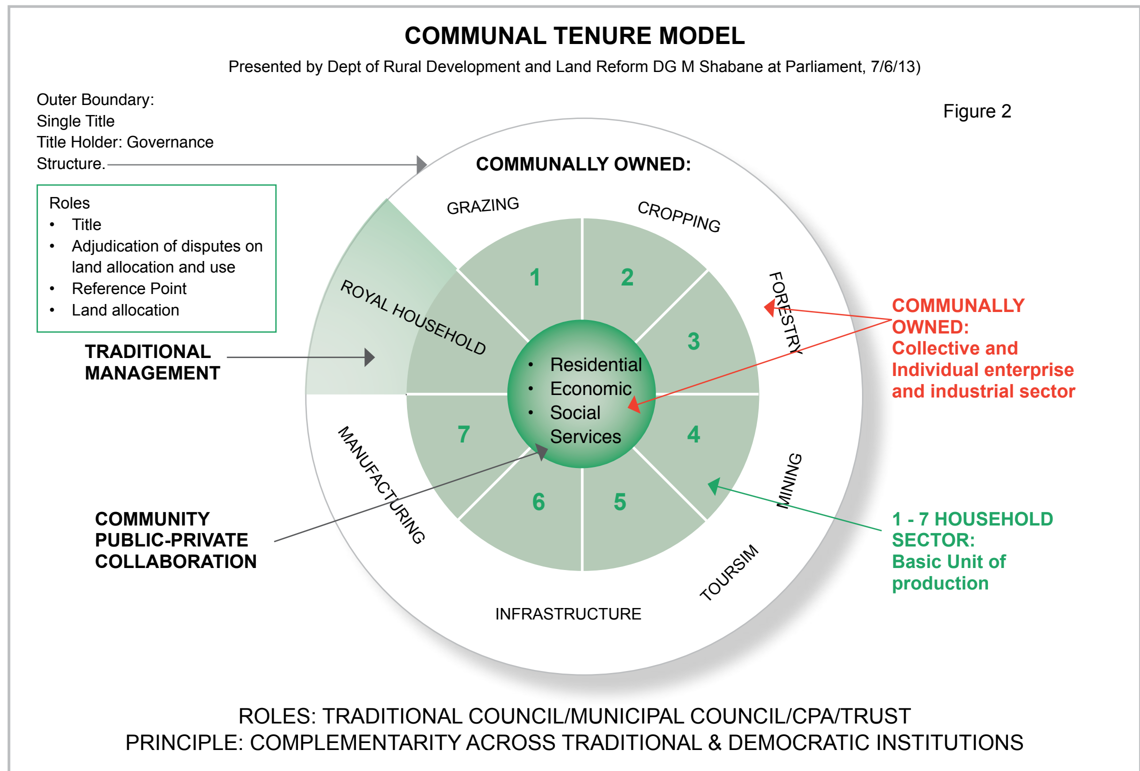
The centenary of the 1913 Land Act provided an impetus for the government to review and redraft a number of important land laws and policies. The majority of the new policies published in a cacophony in August this year, reflect almost none of the suggestions put forward during the various consultation meetings and working groups often referred to by the DRDLR. In addition the new draft laws and policies often contradict each other, take little account of past mistakes and have the potential to undermine rural peoples' security of tenure. They include policies on redistribution, communal land tenure, state land leasing and recapitalisation and development; and laws like the Spatial Planning and Land Use Management Act and the Restitution of Land Rights Amendment Bill.

In the absence of title deeds and development funds, people in Masakhane are vulnerable to invasions on their land by other stock farmers, cannot take out bank loans or invest in new agricultural schemes and cattle dipping tanks, encounter serious housing difficulties and water shortages and travel long distances to take their children to school.

The introduction of the Restitution Bill is particularly worrying in the context of the Department of Rural Development and Land Reform's attitude towards Communal Property Associations (CPAs). CPAs are landholding institutions that were established so that groups of people could come together to form a legal entity to receive title deeds to land under the restitution and redistribution programmes. The Department's de facto policy now is to discourage the formation of CPAs and freeze the transfer of title deeds to CPAs, in light of objections by some traditional leaders who believe themselves to be the rightful owners of all land in the former Bantustans. The DRDLR is currently looking at amending the CPA Act so as to make it impossible for CPAs to exist on communal land.

The Department's most recent policy on communal land tenure (the 'wagon wheel' policy, published 24 August 2013) brings back the gist of the CLRA. It shows traditional councils as the titleholders of the outer boundary of land occupied by traditional communities. If the Restitution process is reopened, but CPAs cannot hold land, most land claimed through the process will inevitably be transferred to traditional leaders or traditional councils. As soon as the government announced it planned to reopen the Restitution process, King Goodwill Zwelitini addressed a group of traditional leaders in KwaZulu-Natal and committed to helping them claim all the communal land in that province. If chiefs are to be the beneficiaries of land claims in communal areas it would severely undermine rural people's security of tenure – rendering women, in particular, even more structurally vulnerable.

This is not just a matter of prospective policy, it is already happening. Of the 887 CPAs that the Department investigated in a report in 2010, at least 34 had still not received their land titles and accompanying development funds.[4] While this list has not been released, we know CPAs still waiting include the Magokgwane, Bakubung ba Ratheo, Bakwena ba Molopyane, and Goedgevonden CPAs in North West, and the Moreipuso, Matibidi, Moletele and Setlhare CPAs in Mpumalanga.[5] In the Eastern Cape, at least three CPAs have been waiting for their land titles since 2000,



even though all the necessary forms were signed by the Minister. Despite a court order in May 2013 compelling the DRDLR to transfer the land to the Cata CPA, it has still not done so. The Masakhane and Iqayiyalethu CPAs, located south of Alice, have also waited thirteen years – and they continue to wait.

These delays have a serious impact on the lives of the people in the areas they affect. In the absence of title deeds and development funds, people in Masakhane are vulnerable to invasions on their land by other stock farmers, cannot take out bank loans or invest in new agricultural schemes and cattle dipping tanks, encounter serious housing difficulties and water shortages and travel long distances to take their children to school. Their land claim is key to their attempt to secure other natural resources – in particular, the plant Pelargonium – in light of the attempts of multinational companies and the local Imingcangathelo chieftaincy to gain control over harvesting the plant.[6]

Officials from the DRDLR have given the following reasons for the delay in the transfer of land to CPAs: that additional surveys of relevant land are required; documents are missing from files or still need to be put into electronic form; alternatively there are conflicts within 'the community'. It is not clear why it takes more than thirteen years to complete surveying or scanning of documents. In the cases of the Cata and Masakhane CPAs, there is no evidence of conflicts within the communities. The underlying reason for the non-transfer of land to CPAs emerges in an affidavit from the Cata CPA's court case:

> "The practicalities in the facilitation of the transfer of the land have been cumbersome and have now encountered fierce objections by the traditional leaders who state that the agreements transferring ownership of rural land to community based

associations undermined their authority. In various discussions with traditional leaders they are resolute in objecting to the transfer of land falling under their authority to CPA. The land in question falls under Chief Ulana and in order to get a long lasting solution it is imperative that Chiefs should accept the process."

Members of the Cata CPA have never heard of Chief Ulana. The traditional leaders they recognise have been fully supportive of the transfer of title to the CPA. It is clear that the main reason for the delay in transferring land to CPAs is that the government is committed to pandering to the demands of traditional leader organisations, such as CONTRALESA, who want exclusive ownership and control over land in the former Bantustans. At the same time, the government's attitude towards CPAs reveals a serious reversal of policy commitments that emerged during the 1990s, which supported black people's right to choose how to best to constitute themselves as groups.

Furthermore, under the new restitution process set in motion by the Restitution Amendment Bill and complemented by the Recapitalisation and Development Policy, land restoration awards will be explicitly dependent on the feasibility and cost of the land transfer and the claimants' ability to use the land 'productively'. These criteria open the way to restoration being rejected in many claims, as most poor communities claiming high-value land may struggle to prove 'productivity' (the definition of which is also unclear in government policies). These criteria, combined with the attack on CPAs, are justified in the language of paternalism. When poor, rural people object to these policies, they are told that traditional leaders and government officials are best equipped to make decisions concerning rural land use. The Restitution Amendment Bill appears to be a ploy to attract votes and not a genuine attempt to remedy the problems faced by rural people.

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An alternative vision for land reform

The government must fundamentally change its approach towards land reform if it is to honour the Constitution's principles and meet the needs of rural people - who make up nearly a third of the country's population. A key priority would be to engage constructively and transparently with the suggestions for land reform put forward by rural people.

The challenges facing rural areas are complex and difficult. But this is no excuse for pretending to consult but, in reality, ignoring inputs by rural people. Recent research shows that rural people are engaged in attempts to find positive ways to reconcile citizenship rights and indigenous precedents. An example of this is the ways in which rural women are redefining land rights in the context of living customary law. According to the stereotypes of official customary law, men were the only people entitled to inherit and manage land (although this was contested as far back as the 1930s).[7] Using evidence from surveys, parliamentary submissions and interviews at community workshops, Claassens and Mnisi-Weeks argue that single women in the Eastern Cape, Kwa-Zulu Natal and the North West have increasingly been allocated residential sites since 1994.[8] These changes have occurred as a result of local processes of struggle and negotiation around land rights led by women.

A combination of stake-holders, including NGOs and CBOs have suggested that in order to strengthen and recognise rural peoples' land rights we can build on an already existing law: the Interim Protection of Informal Land Rights Act (IPILRA). IPILRA helps to protect people whose informal rights to land are threatened, but its impact has been limited in practice because some traditional leaders believe that they own the land and this is not disputed by the DRDLR. IPILRA's enforcement has also been difficult because many DRDLR officials do not know what it is or how to work with it. In order to more effectively protect rural people against the deprivation of their land by traditional leaders and private enterprises such as mining companies, the act would need to be amended so as to:

- be made a permanent law (it is currently renewed annually).
- protect individuals within families and households from decisions being made without their consent. In this sense, women should be explicitly recognised and protected.
- allow for inquiries if there are disputes about the disposal of land.

Ultimate authority for the enforcement of IPILRA lies with the state, which is the nominal owner of the most of the land in the former Bantustans. As the nominal owner and trustee of most communal land, the state has a fiduciary duty to act in the best interests (and not on behalf) of rural people. To do so it must relinquish its decision-making and landownership power to rural people.

Conclusion

Under the name of land reform, the post-apartheid government has courted commercial farmers (with their economic clout) and traditional leaders (with their supposed ability to bring in votes) and failed to engage seriously and openly with the solutions put forward by rural constituents. As a result, rural people, and especially women, have suffered most, as they did in the past. The reason for the government's approach seems to be that it is intent on using land as a vehicle for political patronage, making the rights of rural people conditional on 'good behaviour' while reserving ownership for powerful elite partners such as traditional leaders. A deep irony is that the restitution programme, which was designed to provide redress to those who suffered forced removal and bore the brunt of the Land Act, is now being reconfigured as a means to consolidate the power of elites. A language of paternalism animates the government's attitude towards land reform, in a way that is damaging, even though it is different from the way it was applied in the past. While land reform is complex, rural people in numerous parts of the country have already played an important role in articulating some solutions. Unless the government engages with these processes respectfully and transparently, the legacy of the 1913 Land Act will not be addressed.

NOTES

1 Informal rights to land are defined broadly, and include those who use, occupy or access land in terms of: Customary laws and practices; Beneficial Occupation; Land vested in the SADT, or a so-called self-governing territory, or the governments of the former Bantustans, or any other kind of trust established by statute; Any person who is the holder of a right in land in terms of the Upgrading of Land Tenure Rights Act but who was not formally recorded as such in the register of land rights.
2 This is not a critique against the institution of traditional leadership but rather against the abuse of power by traditional leaders.
3 In 2010, the Constitutional Court heard the Tongoane case which concerned the constitutionality of CLaRA. The Court avoided the substantive issues raised by the applicants, finding the Bill unconstitutional on the technical ground that Parliament had followed an incorrect process in terms of the Constitution.
4 DRDLR, Annual Report on CPAs (2010). Note that despite a requirement that the Department publish an annual CPA report showing the state of CPAs in the country, they have only ever tabled one – the one listed from 2010.
5 Website of Land Access Movement of South Africa (LAMOSA): http://www.lamosa.org.za/
6 Morris, C. 'Failed Deeds: The Masakhane CPAs and State Negligence Under Customary Land Reform Policies', presentation at Land Divided Conference, 27 March 2013.
7 Weinberg, T. 'Contesting customary law in the Eastern Cape: gender, place and land tenure' in Acta Juridica special issue on marriage (forthcoming, 2013)
8 Claassens, A. and Mnisi-Weeks, S., 'Rural women redefining land rights in the context of living customary law' in South African Journal of Human Rights 25 (3), 2009.

Land Reform And White Ownership Of Agricultural Land In South Africa

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It has always been a fundamental assumption by the ruling party that South Africa inherited a racially highly skewed land distribution: whites owned 87 and blacks 13 percent of agricultural land.' (LARP: The Concept Document, February 2008). These ratios formed the basis of all their calculations for the amount of land required to meet their stated targets of a more equal distribution - such as 30% of agricultural land remaining in the hands of whites by 2014. It also formed the basis upon which the Constitutional Court recently ruled against Agri SA in the Minerals Case (Agri SA v. Minister for Minerals and Energy, April 2013).

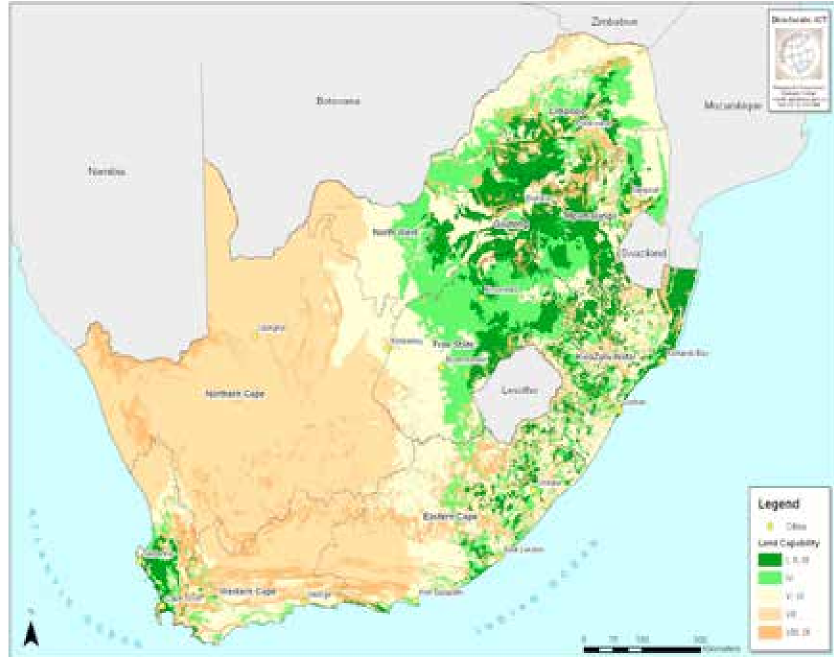
'Black' Versus 'White' Owned Land in South Africa.

The total surface area of South Africa is estimated at 122 million hectares. Prior to 1994 the homeland areas covered 16,375,435 hectares, which was the only land considered 'black-owned.' At this time, however, the biggest landowner in South Africa was indisputably the Government, which owned vast tracts of land in the so-called 'white' areas. These included all municipal land, state forests, water catchment areas, nature reserves, provincial reserves and national parks. After April 1994 all this land became black-owned by definition. It is estimated that municipal areas, including municipal reserves, commonage and townships cover approximately 3% of South Africa, while provincial reserves and national parks take up 5,9% of the total land surface. State-owned land in catchment areas, state forests and the shoreline take up another estimated 10% of the land surface. This means that in 1994 black-owned land in South Africa increased from 13% to 32% overnight. Since 1994 an additional 5,9 million hectares has been transferred by the Department of Rural Development and Land Reform to blacks (as per statistics supplied by the Department). This figure excludes land bought privately by blacks on the open market, which Agri SA estimates to be an additional 2 million hectares. It also excludes the land which could potentially have been purchased with the money paid out as compensation for land claims which have been settled to date, which the Department states is over R6 billion. This could have purchased at least 15 million hectares of land, and because these payments were made as part of the land reform process, it is logical that they should be brought into account in lieu of land transferred. This brings the overall percentage of black- owned land to over 40%.

Agricultural Land in South Africa

The vague term 'agricultural land' includes all land outside towns and cities that is not part of proclaimed national parks and nature reserves. Many nature reserves

Map 1 - Land Capability of South Africa

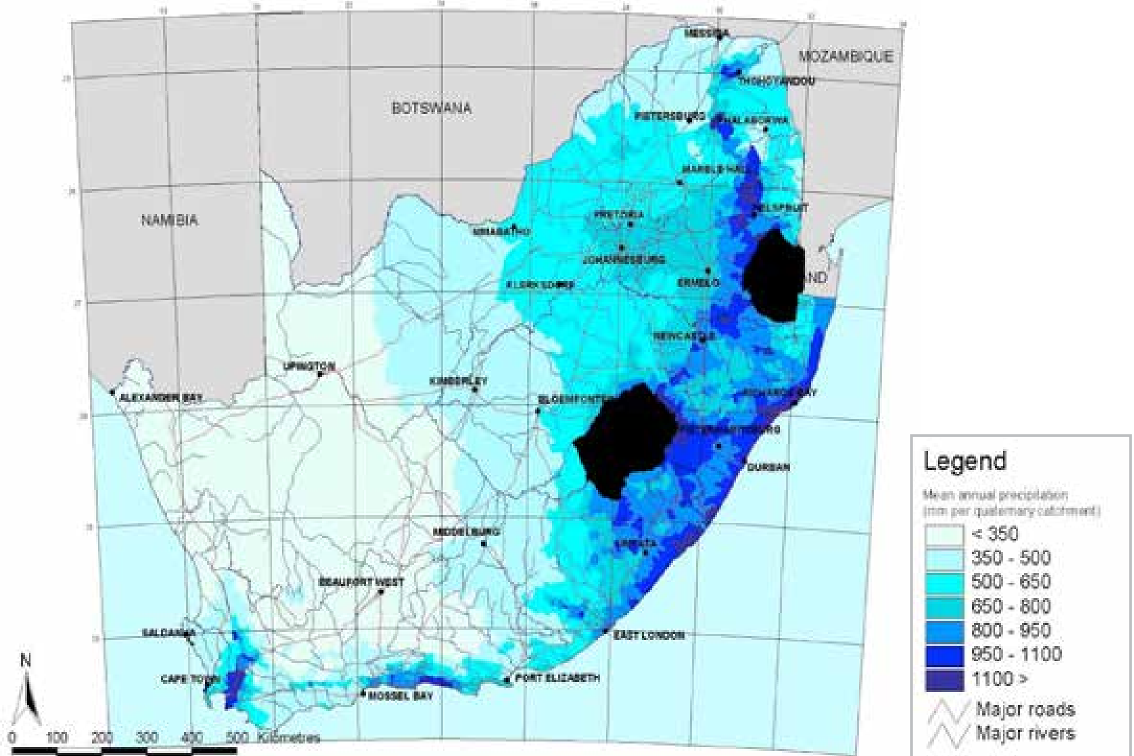


have still not been proclaimed, and so still form part of agricultural land. Within Municipal areas where zoning is applied there is also other ground which is zoned as 'agricultural land'. This term therefore applies to a variety of different uses for land, and needs to be examined more closely.

In some districts, such as Komga and Elliot in the Eastern Cape, half the farms have been purchased privately by blacks. A further one million hectares of farmland is owned by mining companies, and must also be deducted, as this land is not used for agriculture, and many of these companies (like Gencor) are either black owned or have a large percentage of black shareholders.

During the early 1970s 'white' agricultural land covered an area of 91,790,414 hectares. Homeland consolidation during the 1970's and 1980's caused this figure to drop to 89 million hectares. As we have seen, this process has been accelerated during the past two decades, with a further 5,9 million hectares transferred officially, together with an estimated further 2 million hectares transferred to black ownership through private transactions and an additional 1,5 million hectares worth of land paid out in cash for restitution claims. This figure is purely an estimate, but a very conservative one. A lot of land has been taken over by black-owned consortia and corporations, while partnership agreements with blacks with regards to farms have become quite common. In some districts, such as Komga and Elliot in the Eastern Cape, half the farms have been purchased privately by blacks. A further one million hectares of farmland is owned by mining companies, and must also be deducted, as this land is not used for agriculture, and many of these companies (like Gencor) are either black owned or have a large percentage of black shareholders. All forestry land in these areas is owned by the government or by large forestry corporations such as Sappi and Mondi, which are foreign-owned and have substantial black shareholders and partners. This must also be deducted

Map 2 - Rainfall Figures for the Republic of South Africa



from this total. This accounts for a further 1,5 million hectares. Another one million hectares must be deducted to account for the road network, of which only a minimal amount has actually been paid for by the government, and deducted from title deeds. In the past, governments simply helped themselves to the road surface areas and road reserves.From 1975 to 2000 a considerable amount of this land (at least one million hectares) was purchased by the government and added to the country`s nature reserves. This must also be deducted.

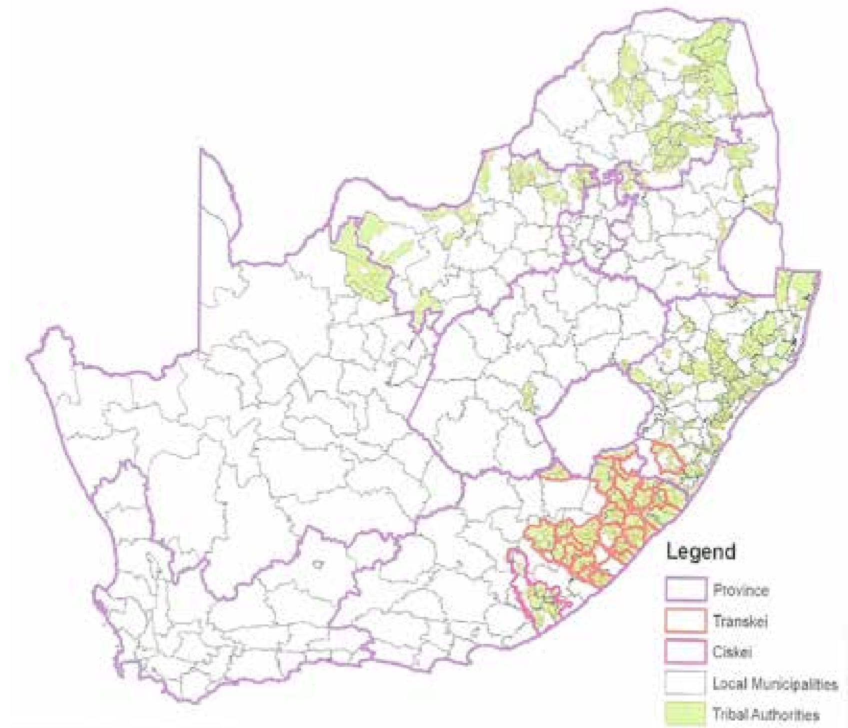
This leaves a maximum of 75 million hectares in the hands of 'white' farmers.

South Africa is a country with very low agricultural potential, as shown on Map 1 provided by the Department of Agriculture.

Only 12,6% of the country's 16 million hectares is suitable for dry land crop production, of which only 4% (4,9 million hectares) is high potential land. The remainder is suitable only for extensive livestock or game farming. When looking at the rainfall map of South Africa (Map 2) the fact that only 30% of the country receives more than 500mm of rainfall per annum is inescapable.

The remaining two thirds of the country receives less rainfall, and in global terms would be classified as semi- or true desert. True desert areas, such as the Karoo and the Kalahari, cover 55% of the country, (66 million hectares). This has resulted in a large discrepancy between the agricultural potential of these two rainfall zones, and is so reflected in their relative land values. A similar discrepancy exists between irrigated land and natural pastures, with a differential value of up to ten times greater for irrigated pastures. This is determined solely by the productive potential

Map 3 - Political Map of the Republic of South Africa showing black homeland areas in 1994.



of the respective hectares of land – a concept which is not difficult to understand. The value of natural pasturage is determined by its carrying capacity, measured in large stock units (LSU) per hectare, and reflects its agricultural potential. In the high rainfall eastern areas of the country, the average carrying capacity is 1:4, whereas in the arid western areas the average is 1:16. This means that one hectare of land in the former region can produce the same as 4 hectares in the latter, and the value of the land should therefore be 4 times higher.

In 1995 the former black homelands covered 16,375,435 hectares (see Map 3).

1,3 million hectares of this should be deducted for non-agricultural use, mainly roads, settlements and forestry. The road surface area is comparatively small – since there are very few road reserves – while the surface area for settlements is comparatively large. There is also a substantial figure of 500,000 hectares for forestry operations. This avails 15 million hectares for agricultural use. To this should be added the 5,2 million hectares transferred since 1994, the estimated land value of the restitution claims (1,5 million hectares) and the additional 2 million hectares estimated to have been purchased privately. Importantly, in order to reach a total for all 'black-owned' land in South Africa, all State-owned agricultural land should be added to this figure. This would include all State-owned forestry land, water catchment areas, military land, municipal commonages, experimental

Importantly, in order to reach a total for all 'black-owned' land in South Africa, all State-owned agricultural land should be added to this figure. This would include all State-owned forestry land, water catchment areas, military land, municipal commonages, experimental farms etc.

farms etc. The only State-owned land which should be excluded is the 7,2 million hectares which forms part of the country's proclaimed national parks and nature reserves . The current 5,9% of these are still far below the international target figure of 10%, so it is accepted that this land should not be brought into the equation. It is estimated that the remaining State-owned land would cover an area of not less than 11 million hectares, bringing the total black-owned agricultural land to 35 million hectares. This constitutes 32% of total agricultural land.

South Africa's Agricultural Potential

An analysis of where black-owned land is situated shows that not less than 80% of that land is in the high rainfall zone. Apportioning it on this basis means that the total agricultural potential of the land, measured according to its carrying capacity, is 7,44 million LSUs.

The white-owned agricultural land, on the other hand, amounts to 75 million hectares, as has been shown. The agricultural census of 1964 (probably the most detailed ever undertaken) showed that three-quarters of the total number of 101,000 commercial farms were small farms of less than 900 hectares, and covered only 23% of the total area. This meant that 77% of the area contained only one quarter of the farms, which therefore gives an accurate assessment of the number of hectares of white-owned farms falling within the low rainfall area. Apportioning it on this basis (23:77) gives a total agricultural potential of 8,06 million LSUs for white-owned farms. All white-owned irrigation farms obviously fall within the apportionment for the high-rainfall area.

In other words, when land in South Africa is measured by its true value (that is, its agricultural potential), it becomes clear that blacks already own nearly 48% of the country's agricultural potential. This figure could be considerably increased if better use was made of available water for irrigation in the well-watered eastern areas, such as the former Transkei. The fact that nearly all of the country's agricultural output is produced on mostly marginal land speaks volumes for the work that needs to be done on existing black-owned land to make it reach its true potential. This is the real challenge which Land Reform faces. It makes little sense to continue to squander our existing productive capacity by sacrificing our agricultural sector on the altar of Land Reform when the problem could be solved by making better use of existing assets.

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The Government's Targets for Land Reform

In light of the facts given, the government's 30% target makes no sense whatsoever. It is measured purely in hectares, without any regard for agricultural potential, and is based on fictitious assumptions. The LARP document of 2008 assumes that an additional 21,411 million hectares would be redistributed by 2014 to meet the 30% target of white ownership. These calculations show that not more than 22,8 million hectares of agricultural land were ever required, 9,5 million hectares of which have already been transferred. It is therefore clear that this target would be reached with the transfer of only 13,3 million additional hectares.

What is alarming about the 30% target is that it has kept shifting. Initially in 1995, the target was set at 30% of the country's land surface area. It soon became apparent that this target had already been met, once all State-owned land was taken into account. The target then changed to 30% of all 'high potential agricultural ground' (as outlined in the Agri SA BEE document of 2005). However, it also later became clear that this target had also been met. So, finally, the target was changed to its present racially based formula of 30% of white-owned agricultural land.

To date, most of the agricultural land purchased for land reform has been situated in high-rainfall arable areas. The government itself admits that 90% of these projects have failed, thereby rendering that land largely unproductive. If these trends continue, pursuing the present target of transferring an additional 13,3 million hectares of high-potential agricultural land would undoubtedly cause a crisis in the production of all agricultural goods, resulting in severe shortages of essential commodities such as food. This is because it would absorb all of the country's remaining 12 million hectares of high-potential land, which currently produces 80% of our food. This would be suicidal, on a scale matched historically only by the national suicide of the AmaXhosa in 1857. It is therefore suggested that the process be kept on hold until existing Land Reform projects can be restored to their true productive potential. Should, however, the government wish to persist in meeting this target, then it is suggested that the shortfall be purchased in the arid western half of the country. In this way, they would be able to achieve the targeted hectarage at low cost to the taxpayer, and with the least adverse impact on the country's agricultural production.

In any event, it is clear that this target is incorrectly measured. It should not be measured in hectares, but rather by agricultural potential, as measured by LSUs per hectare. Since agricultural potential per hectare is so variable across the country, it cannot be ignored in any realistic measure of a unit of agricultural land, and is inextricably linked to the value of that land. To measure land simply in hectares results in complete distortions in the assessment of any target. It should therefore be abandoned as a basis for Land Reform.

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Legacy of the 1913 Natives Land Act – Taking up the challenge

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At the marking of the centenary of the 1913 Land Act, we as an organisation have moved past trying to evaluate the merits and demerits of the particular Act. We could perhaps say today that we are a new generation of farmers, or that the Act was passed by the Union Government under British auspices 100 years ago. But we won't. We will only say that in AgriSA there is a clear mandate and commitment from all farmers' associations and 24 commodity organisations to roll up our sleeves and work towards rectifying the wrongs of the past. But that must be done in an orderly way.

Land is not a farm. A farm is much more than just land. It is developed on land but it also entails capital investment, technology and expertise. It is a business. There is no way South Africa can allow the land issue to be addressed as if the agricultural and commercial investment on the land has no value, or is of less importance to the wellbeing of our nation than the ownership of the land itself.

Land reform in SA has reduced too many farms to mere parcels of land, destroyed too many agricultural businesses in favour of subsistence farming, and moved too far away from commercial agriculture to low technology smallholder farming.

In this regard commercial farmers are highly irritated with what we perceive to be an over- romanticisation of the smallholder farmer by NGOs and populist politicians alike. There is a place for the smallholder farmer if he or she can fit into a value chain, knowing exactly where their inputs would come from and how they would market their produce. Without a clearly defined place in a value chain, smallholder farming is nothing but a poverty trap.

Farmers operate within the context of the reality of the economies of scale all over the world. Our profitability is directly linked to the advantages of scale. Large farmers are growing bigger all the time, while small farmers are dropping out of the industry. In Europe, the family farm is maintained by vast subsidies to agriculture, a luxury which South Africa cannot afford.

Some of the best agricultural land is in the communal areas. The problem is that there is little agricultural investment in those areas, no irrigation schemes, no fences, no processing plants, no value chain infrastructure. Although some of the best, most experienced black farmers make a living in those areas, they have basically no access to financing. Their lack of ownership of the land renders them without adequate collateral, and thus without access to capital to develop the land to competitive farming enterprises.

Current land reform programs are not getting us there; on the contrary, they are adding to the inequalities and polarisation of the industry.

The communal areas are not that much different from the deep rural areas elsewhere in Africa, where hundreds of South African commercial farmers have settled over the last few years. There is also no private ownership, and the commercial farmers have to farm alongside and in partnerships with local small holders in Mozambique, Congo-Brazzaville, Zambia and Tanzania. In each of these countries the commercial farmers are quick to involve agri-businesses like Afgri, Senwes, Bunge or Profert, who bring in the equipment, the inputs, the expertise and value chain assets like storage and processing facilities. They usually finance production too. These new value chains introduce local smallholders to modern technology, create the space for them to produce a marketable surplus and promote them to the commercial arena.

Land reform must be about more than merely the transfer of land and rectifying injustices of the past. It will have no meaning or sustainability if it does not entail the transformation of the sector and the development of commercial farmers along with the transfer of the land.

Current land reform programs are not getting us there; on the contrary, they are adding to the inequalities and polarisation of the industry.

The way the restitution process has been implemented has probably done more damage to commercial agriculture in South Africa than the Anglo-Boer war. It has created massive uncertainty, with thousands of farms (often whole districts or industries)

caught up in the grip of unfinished claims, and no-one – neither the current owner nor the claimants – knows who will own the farm in a year from now. So for years no further investment or development takes place on those farms.

Government's decision to re-open the lodgement of land claims was just about the worst news the industry could receive. Given the fact that government has, after 15 years, not managed to compile a complete list of claims filed in the first round, and given the disastrous administration of those claims and accompanying freeze-up of agricultural development in areas with a heavy load of claims, the re-opening makes no economic sense. There is simply no commercial success story from any restitution farm from Cape Town to Musina, and not a single land claims beneficiary is being financed by a bank.

Given government's poor track record of finalising land claims, and given the outstanding 13 000 farms gazetted under restitution claims where there has not been any engagement with the land owners over the last decade, there is little hope that this part of land reform will positively contribute to rural development or poverty alleviation. The uncertainty affects the value of farms, financing, investment and jobs where we need it most: in the poorest corners of rural South Africa.

The redistribution program has yielded much more success. In this program the beneficiaries are individuals or families who are serious about farming – not communities. Land is not transferred to the beneficiaries, though, but to the state. Beneficiaries only have relatively short term leases, and very little security of tenure. They are delivered to the state and all its administrative bungling for production financing. It is bound to lead us into a future where we will once again have two categories of farmers; white ones who are land owners, financed by the financial institutions on the open market, and black ones who are, at best, *bywoners* on leased state land, financed on an *ad-hoc* basis by the state.

There is no mention of how the debt, for which the farm serves as collateral, would be shared, or how the development and infrastructure would be shared, or how to deal with farms where hundreds of workers each have more than twenty years of service, or with enterprises on leased land.

Tenure security of farm workers and farm dwellers is a third leg of land reform, and legislation such as the 1997 Extended Security of Tenure Act has done little to accomplish what it was meant to. Rather, the oversimplified 'one size fits all' approach has had unintended consequences, such as the massive demolishing of farm accommodation, hesitance of farmers to employ workers who need accommodation on the farm and a near total freeze on the development of farm worker housing and related services. Farmers who were faced with large numbers of established farm dwellers who demanded rights and services on their land had ample time to sell their problem to the state, who passed it on to beneficiaries of the other two legs of land reform.

When, by 2012, government admitted failure in securing 'tenure and other relative rights' of farm dwellers and workers, it resorted to a radical proposal that, in line with the Freedom Charter dating from the heydays of socialist dreaming in the 1950's, land should be shared by those who work it. The Department of Rural Development and Land Reform displayed their total lack of understanding of the economics of commercial agriculture by proposing that farm workers be given a percentage of the farms on which they work, equal to the number of years they

have worked on it. There is no mention of how the debt, for which the farm serves as collateral, would be shared, or how the development and infrastructure would be shared, or how to deal with farms where hundreds of workers each have more than twenty years of service, or with enterprises on leased land.

What is clear is that the uncertainty around compensation is extremely concerning to investors, including the farmers themselves. Why would anyone renew an orchard or develop new land if he is not sure that he will get his money back should his number come up for land reform?

Being confronted by this kind of proposal, many farmers surprised themselves by how well they could cope with fewer labourers.

Agricultural financing was eroded further by the ANC's decision in December 2012 in Mangaung to scrap the 'willing buyer, willing seller' principle, blaming it for the poor performance of the Department of Rural Development and Land Reform. Many academic scholars, political commentators and business analysts have published their findings on the failure of an incompetent, corrupt buyer, obviating the need to scrap the particular principle. So called 'discount clauses' allowed for in Section 25 of the constitution will be calculated and deducted from market value compensation in land reform. How exactly the discount for 'the purpose of acquisition', or 'current use of the property' would be calculated, is still a mystery.

What is clear is that the uncertainty around compensation is extremely concerning to investors, including the farmers themselves. Why would anyone renew an orchard or develop new land if he is not sure that he will get his money back should his number come up for land reform? More than that, the willing buyer, willing seller principle has not been sacrificed along with investor confidence in the sector for 10% or 20% discount on market value. Government wants 40% to 50% or more!

The total value of commercial farmland in SA is estimated to be around R168 billion. It serves as collateral for agriculture's debt of around R94 billion. Paying only 50% - 60% of market value to land owners would mean that the banks and agribusinesses as bond holders are covered for their exposure, while the average farmer will be left naked!

There are a number of workable and sustainable alternatives which had been proposed on a menu-basis to government, without much success as yet:

There is the so-called 'Zuma Plan', described in the National Development Plan by the National Planning Commission and announced by President Zuma at AFASA's 2012 annual conference. It proposes that the state would pay half the price of 20% of the farms identified in each district, and the remaining farmers would pay the other half. In exchange, a farmer would get full BEE-status and be left alone to farm. For many of the largest farming enterprises this is a viable option.

AgriSA proposed that the remaining 80% of farmers in each district buy shares in the 'transferred' farms, where they act as partners/mentors until the beneficiary can buy them out as the farm makes a profit.

The NPC also proposed that farmers buy land bonds to finance land reform in the longer term.

Another proposal was that farmers can sell their farms at 60% of market value along with a long-term lease agreement with the previous owners of the land, bringing about immediate transfer and empowerment over time. The full value of the 60% plus the lease agreement would be registered at the deeds office to maintain market value. These leases would be transferrable and can be sold, inherited or set up as collateral at a bank to provide enough security for financing.

Farmers should be allowed to choose from a menu of options, thereby contributing to land reform and the transformation of the sector. Further options could be added to the list.

There is little hope that the composition and fixed personal interests of the technocrats in the Department will change. RSA does not have the capacity in the department to make land reform work. There is no economic reason why the administration of land reform and the identification, valuation and acquisition of farms could not be privatised to a reputable international auditing company or a commercial bank. It will save billions that are now lost to corruption, nepotism and ineptitude, and it would ensure private sector involvement in the transformation of the sector.

AgriSA has proven that its commodity organisations like the National Wool Growers Association, Grain-SA and Milk Producers Organisation can achieve close to a 100% success rate in promoting beneficiaries of land reform to competitive commercial farmers in the global arena. There is no alternative to a public-private-partnership when it comes to successful land reform, and yet the political and personal gains for officials in the relevant departments seem to be too limited for them to embark on such partnerships. The 2014 general elections are looming, and farmers have prepared to hold their breath, face the radical expectations which will imminently be raised to buy votes against the background of poor service delivery, knowing they will have to foot the bill the day after.

The Constitution, the Land question, Citizenship and Redress

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"As with all determination about the reach of constitutionally protected rights, the starting and ending point of the analysis must be to affirm the values of human dignity, equality and freedom. One of the provisions of the Bill of Rights that has to be interpreted with these values in mind, is section 25....The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and by private persons. Yet such rights have to be understood in the context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past."

Justice Albie Sachs in the Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

The unresolved land question lies at the heart of the social and economic relations that our country confronts today. The current generation of those who were dispossessed of their land swell the ranks of the underpaid, unemployed and poor. They are peripheral players in the economy. After all, it was the grabbing of the land of their forebears that precipitated their proletarianisation and denial of economic opportunities.

The Historical Background

Nineteen years into our freedom, we clamour for the evasive dream of equality. This year is the centenary of the Land Act 27 of 1913 which came into effect on 19 June of that year.

This legislation effectively reduced Africans' access to land. Over one-and-a-half million hectares of land was white owned and Africans rented from them. Half a million hectares was owned and occupied by Africans.

The enactment of this law was a culmination of over 3 centuries of the dispossession of Africans of their land. It all started back in 1652, when the first white settlers arrived at the Cape. In 1658, the Khoi communities were forcibly removed from their land, and were told by Jan van Riebeeck that they were no longer allowed to live west of the Salt and Liesbeek rivers.

This eviction was followed by a string of military conquests and colonial settlements, which stripped Africans of their land. Then numerous laws were passed to consolidate these colonial gains. The 1884 Native Location Act in the Cape Colony and the 1887 Squatter Laws in the Transvaal were passed.

The 1913 Land Act prohibited land purchases by Africans outside of the scheduled 'reserves', making these specified areas the only places where Africans could legally occupy land. This law also made sharecropping and 'squatting' illegal. White settlers expropriated more than 90 per cent of land under this Act.

In 1924, the Pact government came to power and decided to abolish independent African access to land, and created a uniform system of black administration throughout South Africa. In 1927, the Black Administration Act 38 of 1927 was enacted, and it became one of the methods used to effect forced removals.

The Native Trust and Land Act of 1936 expanded the total African reserve area to approximately 13% of the national land mass. The following year the Native Laws Amendment Act removed the surviving rights of Africans to acquire land in urban areas.

The implementation of the Land Acts of 1913 and 1936 respectively, gave only 8% and 13% of South Africa's territory to blacks, who at the time represented the overwhelming majority of the country's population.

The Group Areas Act 36 of 1950 allocated certain areas to specific race groups. Under this law, many black people were forcibly removed from their homes and resettled in underdeveloped and underserviced areas.

The Bantu Homelands Citizenship Act of 1970 barred Africans from being 'South African citizens', thereby forcing them to be the exclusive citizens of various tribal homelands.

Between 1960 and 1982 approximately 1 200 000 people, mainly Africans, were forcibly removed from farms, a further 600 000 through black spot and Bantustan consolidation policies, another 700 000 through urban relocation and some 900 000 under the Group Areas Act.

Should a bill of rights obstruct the government of the day when that direction is taken, should it make the urgent task of social or economic reform impossible or difficult to undertake, we shall have on our hands a crisis of the first order, endangering the bill of rights as a whole and the survival of the constitutional government itself…

The Constitutional Mandate

It should therefore surprise no one that in 1988, Judge Didcott warned thus:

> "*…a Bill of Rights cannot afford… to protect private property with such zeal that [it] entrenches privilege. A major problem which any future South African government is bound to face will be the problem of poverty, of its alleviation and the need for the country's wealth to be shared more equitably… Should a bill of rights obstruct the government of the day when that direction is taken, should it make the urgent task of social or economic reform impossible or difficult to undertake, we shall have on our hands a crisis of the first order, endangering the bill of rights as a whole and the survival of the constitutional government itself…*"

It is common cause that South Africa's land reform and redress has been excruciatingly slow. This is despite the recognition of the fact that at the heart of the prevailing poverty and inequalities in our society today is the land question. This is acknowledged by the leaders of our country as it is equally experienced by the communities who live with the legacy of that dispossession. The Green Paper on Land Reform of 2011 captures the urgency to resolve this matter thus:

"[Forcible Land removals] are not a product of just any political choice and decision, or any administrative practice, process, procedure or institution. If there could be anything positive which comes from Apartheid, it is (a) the political courage and will to make hard choices and decisions; and, (b) the bureaucratic commitment, passion and aggression in pursuit of those political choices and decisions. We are in the mess we are in today because of these two sets of qualities – political courage and will to make hard choices and decisions, and bureaucratic commitment, passion and aggression in pursuit of those political choices and decisions. We need them now to pull the country out of the mess."

We must also ask ourselves whether the warning of Judge Didcott is ringing true. It is important to recall here that the South African constitution is a product of a negotiated settlement. So, it bears the hallmarks of our history, and its legacies live in the present.

Section 25 of the constitution seeks to strike a balance between competing interests, historical injustice of dispossession and the need for redress and the importance of respect for property ownership in a post-apartheid mixed market economic dispensation.

The historical context in which the property clause came into existence should be remembered. These provisions emphasise that under the Constitution the protection of property as an individual right is not absolute but subject to societal considerations.

In the general discourse, some have read Section 25 to mean that the 'willing buyer, willing seller' model is to the determinant of the land reform and redress process. Consequently Section 25 has also come under attack as the restrictive clause in the constitution that makes land reform impossible. However, a closer reading of Section 25 in fact shows that this may be a conservative interpretation of the constitution.

The constitutional court seems to affirm these sentiments in the *Haffejee NO and Another v Ethekwini Municipality*, when it held that:

".....The interpretation of the section must promote the values that underlie an open and democratic society based on human dignity, equality and freedom......Protection for the holding of property is implicit in section 25. Section 25(1) must be construed in the context of the other provisions of section 25 and in the context of the Constitution as a whole. Sections 25(4) to (9) underline the need for the redress and transformation of the legacy of grossly unequal distribution of land in this country. The historical context in which the property clause came into existence should be remembered. These provisions emphasise that under the Constitution the protection of property as an individual right is not absolute but subject to societal considerations. The purpose of section 25 is to protect existing private property rights and to serve the public interest, mainly in the sphere of land reform but not limited thereto. Its purpose is also to strike "a proportionate balance between these two functions."

Section 25.3(e) makes explicit provision for circumstances under which expropriation can take place. Section 25.4(a) defines "public interest to include the nation's commitment to land reform and to reforms intended to bring about equitable access to all South Africa's natural resources". It further enjoins the state in Section 25. (5):

"to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis";

And in Section 25.(6) "a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent

provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress".

"A person or community dispossessed of property after 19 June 1913 as result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. (Section 25(7)).

No provision of this section may impede the state from taking legislative and other measurers to achieve land, water and related reform, in order to redress the result of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1). Parliament must enact the legislation referred to in subsection (6)".

Clearly, the difficulty that arises in relation to South Africa's post-1994 land reform does not stem from the constitution. As Hall puts it:

"While protecting rights, the constitution also explicitly empowers the state to expropriate property and that property may be expropriated in the public interest, including commitment to land reform. (Hall, 2004:6)" [1]

This approach is premised on reading of Section 25 of the Constitution as enabling government to make effective changes to advance land reform, redistribution and redress.

Apartheid Policy and Law

All three components of South Africa's land reform programme - land restitution to those disposed in 1913, redistribution of land to redress ownership resulting from 1913, and the tenure reform system to provide security of tenure to those disadvantaged by discriminatory laws and practices – are severely limited by policy choices that found expression in laws passed by parliament rather than constitution. [2]

In all three areas the tendency has been to develop policies and programmes that advantage powerful interests, including Traditional Leaders, established farmers (especially white farmers) and the markets. Over- emphasis on each of these powerful interest groups and players has resulted in land reform programme that did not translate into effective benefits for dispossessed communities and individuals.

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It is important to examine the extent to which the powers and remedies contained in the constitution may or may not be adequate. Our starting point must be to look at what we have, and test it against policy and legislative interpretation, and finally implementation.

From various attempts to develop coherent legislation and policies to address land reform, government seemed to adopt three key principles:

- Redistribution of Land to redress historic imbalances, including the support for the emergent large scale black commercial farming strata. The rationale behind this is the importance of addressing racially skewed patterns of land ownership which are the legacies of land dispossession. In addition to redress, there seemed to be an assumption that this approach would have a trickledown effect which would benefit previously disadvantaged communities and address unemployment;
- Land Restitution, which aims to compensate those dispossessed of land within a

framework determined by government and often paid out in compensation;
- Reform of the tenure system to provide security of tenure to particular communities who had been racially discriminated against, including those who live on land owned by white farmers. And the much contested communal and customary tenure system, which in essence has tended to favour those who hold or have claims of Chiefly power in rural communities in South Africa.

These distinctions, as the legislative and policy making processes have shown, are not as clear cut as portrayed. In the first place, the intersections of competing and powerful interests in South Africa have been playing themselves out against the backdrop of all these policies. In short, government on its own and with all the powers it derives from the constitution, has simply not been able to address these issues through legislative and policy frameworks. Clearly there has been a lack of appreciation of the intersection between all these different aspects of land reform and their impact on the larger canvass of land dispossession and citizenship in South Africa.

It is also evident today, as witnessed in legislation such as the Communal Land Rights Act 2010 (which was struck by the Constitutional Court on procedural grounds) that the complex tenure system that affects the majority of South Africans who live in rural areas has not been fully grasped by the law and policy making processes. CLARA 2010 was withdrawn by the Constitutional Court on procedural grounds. However, the substantive issues on different tenure systems and the hierarchies that are reinforced by this have had adverse effects on security of tenure in those areas. In particular, the over-extension of chiefly power and the extent to which traditional leaders would determine the very basis upon which people live in the areas designated as communities under the control of traditional leadership.

This gap in law has concrete and dire consequences for those who reside in the affected areas. Whatever gains may have been made by creating different levels of and forms of tenure, including remedies through the creation of Community Property Associations (CPA), which at least gave people some form of access to financial assistance for development, have been severely undermined by the failure to address this.

It is instructive that the Department of Land and Rural Development has yet to come up with a new legislative proposal to address the void created by the withdrawal of CLARA in 2010. This is despite the undertaking by the representative of the Minister in the Constitutional Court in 2010. This gap in law has concrete and dire consequences for those who reside in the affected areas. Whatever gains may have been made by creating different levels of and forms of tenure, including remedies through the creation of Community Property Associations (CPA), which at least gave people some form of access to financial assistance for development, have been severely undermined by the failure to address this.

Citizenship and Traditional Leadership

Ironically, the centenary of the Land Act occurs at a time when the majority of South Africans who live in rural communities are forced to contemplate a life without security of tenure or full citizenship, as guaranteed in the constitution. The emphasis and bias towards traditional leaders' interests and power base has resulted in the failure to provide basic rights such the right to freehold titles for people who reside in those communities.

The Traditional Courts Bill provides a good case study of how the bolstering of chiefly power actually strips people of citizenship and their right to self-determination. While it is hard to understand how a bill like this could even make it to a post-apartheid South African parliament, and pioneered by an ANC government, is not only surprising but embarrassing.

Communal Tenure is contested throughout the African continent. Its meanings are not always the same. However, there is an obligation that the South African government sought to make (as enjoined by the constitution), namely to recognise the institution of traditional leadership. So, the problem here is not the principle of recognition of traditional leadership; rather, it is with the understanding of what that recognition means.

At the heart of this, is the very understanding of 'customary law' which seems to be read and interpreted as meaning there can be no customary law without traditional leadership. Equally, there can be no community in the communal sense without traditional leadership. This must prompt the question: is this the case in reality? Is this the experience of living customary law? How close is this reading and meaning of 'customary law' to the experience of those who may choose to live according to custom?

Conclusion

Is it reasonable to conclude that part of the reluctance of the government to use a more liberal interpretation of the Section 25 has to do with established interests in agri-business? In reflecting on this we must also remember that land is not just about agriculture but also mineral resources and capital accumulation which are at the centre of South Africa's economy. What is the contribution of established farmers and capital, including mining conglomerates, in promoting a commitment to redressing the legacy of the Land Act?

Our view is that failure to use the constitution to create a just and free society does not only entrench inequality of the past - it reproduces new forms of inequality, poverty dispossession and economic marginalisation. This is seen across the South African landscape.

There is deeper ambiguity to the common vision enshrined in the constitution – the creation of a society founded on human dignity and the inalienable rights in the Bill of Rights. These are not questions to be posed to government alone. We have to ask difficult questions of government and of ourselves – to what extent are South Africans, especially those who are privileged and have resources, prepared to use that influence and power as a stabilising force in the country? To what extent are the established power centres of influence, including capital, prepared to use their agency in pursuit of common citizenship in all its meanings?

NOTES

1 Hall, Ruth. 2004. "Land Restitution in South Africa: Rights, Development and the Restrained State." Canadian Journal of African Studies; Special Issue: A Decade of Democracy in Southern Africa 1994 - 2004. Vol 38, No 3: pp 654-671.

2 Cousins, B. 2008. "Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa." In Claasens & Cousins (eds).Land, Power & Custom , University of Cape Town

Land Distribution Paradoxes and Dilemmas

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"It ain't ignorance causes so much trouble; it's folks knowing so much that ain't so." – Henry Wheeler Shaw

"The land question" is seldom a question. Typically it is a slew of dogmas and myths as tenacious as they are erroneous. Virtually every supposed fact about land in South Africa is not just wrong, but so far off the mark as to make the adoption of sound policies virtually impossible.

We all know – do we not? – that black land dispossession started precisely 100 years ago with the 1913 Natives Land Act, that blacks had 13% of the land until 1994, that land is economically important, that landless people are condemned to destitution, that current land policy is to redistribute 30% of South Africa's land to blacks, that apartheid land policy ended in 1994 when blacks were given full "upgraded" land title, that whites own most South African land, that black housing is RDP housing, that black commercial agriculture is a disastrous failure, and so on.

We also know that things changed profoundly in 1994, especially regarding "the land question". Yet, as we shall see, these axioms are all largely or completely false, and, when it comes to land, *plus ça change, plus c'est la même chose* (the more things change the more they stay the same).

In the emotional land discourse, nefarious motives and ideological agendas tend to be read into whatever corrective facts are cited. Basic facts are perceived, usually with justification, as being political, even racist, rather than informative. Point out, for instance, that land dispossession started long before 1913, or that many blacks who lost land after 1913 have been denied restitution since 1994, and you are advancing a "black" agenda. Note, on the other hand, that "settlers" acquired much land by treaty rather than coercion, or that some blacks were themselves settlers (from the North) who seized the land of truly indigenous blacks, and you are an anti-transformation racist.

Few issues are as bedevilled by the hard-wired inclination to see issues of race in black and white, in both senses of the term. A binary imperative seems to drive us into adopting one of two sides when things are seldom that simple.

Since the land debate is construed as a binary black-white matter (pun intended), it is hard to find references to land in the context of other population groups. How many well-informed South Africans are even vaguely aware of the tenure under which Coloureds and Asians lived historically or live today, or how

much land was "set aside" for their occupation? What, if any, future did apartheid envisage for them? What proportion of land do they have now, and is it included in the white or black estimates?

Is Land Really Important? Why the Heated Debate?

Why the land question generates so much passion entails its own conundrum. It is widely and erroneously presumed that land in the abstract is important and that "access to land" ameliorates poverty and inequality. The world's experience, however, suggests that land is surprisingly unimportant. There is no statistically significant correlation between the amount of land people have as a group or individually and their prosperity. If anything, there is a reverse correlation in that countries with less land (or "natural" resources generally) *per capita* are often the most prosperous such as Lichtenstein, Luxembourg, Switzerland, Hong Kong, Singapore and Mauritius.[1] "Resource-rich" countries and communities, on the other hand, including countries with lots of land *per capita* are typically so poor that economists lament the "resource curse" and the "paradox of plenty".[2]

Scholars of the determinants of prosperity, such as Robert Barro[3] and Lord Bower[4], find so little evidence of land being a significant variable that they scarcely mention it. Celebrated Peruvian economist and land activist, Hernando de Soto[5], argues compellingly that when land is not fully owned ("titled") and freely tradable, which remains true for most black South Africans 20 years after apartheid, it is "dead capital". His argument is not that land is needed for prosperity, but that for land to be a valuable resource, it must be fully owned and redistribution must be by way of voluntary transaction in freely operating land markets. Julian Simon argues equally compellingly in his seminal book, The Ultimate Resource[6], that the only "natural" resource needed for prosperity is the "ultimate" resource, namely people. He uses advanced data analysis to show that other factors, including land, are relatively inconsequential.

The "land question" here, as elsewhere, does not concern the most valuable land, which is urban rather than agricultural land. This compounds the paradox, because the world's most prosperous countries, and the most prosperous parts of countries, are often devoid of agriculture.

The "land question" here, as elsewhere, does not concern the most valuable land, which is urban rather than agricultural land. This compounds the paradox, because the world's most prosperous countries, and the most prosperous parts of countries, are often devoid of agriculture. This is almost a blessing because they are not seduced into counter-productive polices to ensure so-called "food security". Neither an individual nor a city or country has to produce a single agricultural product to have food security. Places like Monaco and Gibraltar are blessed with the world's cheapest and best food on demand because they are free to buy whatever they desire from anywhere. If food can be sourced cheaply elsewhere, why waste scarce resources producing it locally at excessive cost? That is as irrational as consumers producing their own food and clothes instead of shopping.

If land, specifically its quantity and its distribution, is empirically unimportant, what explains the enduring myth that the "land question" is pivotal? The most plausible explanation may be that it has more to do with crude Darwinian instinct than anything objectively significant in the modern technological world.

The myth is so deep that questioning why countries have departments of agriculture is unheard of, despite the fact that there is no coherent reason why agriculture, especially modern agriculture, should not fall under the same department, laws and policies as any other business sector. The most commonly advanced justification, weather, is no more than another knee-jerk myth. Countless non-agricultural enterprises are weather-prone, such as tourism, outdoor entertainment, sport, recreation and salt mining.

Land Myths – Almost Every Supposed "Fact" Is Wrong

A typical example of land mythology is a quote from Collins and Burns: *A History of Sub-Saharan Africa*, 2007[7].

> "The Natives Land Act of 1913 was the first major piece of segregation legislation passed by the Union Parliament, and remained a cornerstone of Apartheid until the 1990s when it was replaced by the current policy of land restitution. The act decreed that only certain areas of the country could be owned by natives. These areas totalled only 13% of the entire land mass of the Union."[8]

Land dispossession and segregation was not new. Far from being the start of land dispossession and discrimination, the 1913 Land Act was essentially a consolidation and continuation of much that preceded it.

In so few seemingly accurate words there are as many errors as assertions. It was not the first "major piece of segregation legislation", it did not remain "the cornerstone of Apartheid", it was not "replaced" in the 1990s, it did not decree that certain areas "could be owned by natives", and the areas did not total "13%". It is hard to imagine anything so axiomatically correct being so absolutely wrong.

It was one of the first – though not the first – pieces of "segregation legislation" in the "Union Parliament" for no more complicated reason than that it was new. It inherited, presided over and retained many racist laws from the pre-union governments, and had already passed such racist laws as the "colour bar" Mines and Works Regulations Act, 1912.

Land dispossession and segregation was not new. Far from being the start of land dispossession and discrimination, the 1913 Land Act was essentially a consolidation and continuation of much that preceded it. Paradoxically, it was regarded by some blacks, most prominently Jonathan Jabavu[9], as an improvement in that it provided for previously denied private ownership and the addition of substantially more "black" land. Far from things having changed fundamentally, the promises of equal ownership rights and "equitable" redistribution have not been met to this day.

Many whites opposed the Act because they thought improved land rights for blacks (albeit in black "reservations") would deprive whites of black labour, especially farm labour, and revenue from black tenant farmers.

13% Equals Zero

The 13% mantra was an understatement because it did not include such "black" land as homeland consolidation land, but it was also a gross overstatement because blacks never owned whatever the percentage might have been. What they owned was zero.

Given the tenacity of the mantra that might be hard to grasp, but it is true. It

cannot be over-emphasised that **blacks did not own any of the iconic 13%**. All the land in question was owned by the government in one of its many incarnations.

Paradoxically, what land blacks did own, which was of much greater significance, especially during apartheid's twilight years, was and remains defined as "white" because it was in historically "white South Africa". It included "black spots" and land in burgeoning "townships[10]", "locations"[11], "settlements"[12] and "grey areas"[13].

In other words, blacks owned none of the notorious 13%. What they did own was an unknown percentage of land defined then and now as "white".

If the 13% or whatever the truth might have been is "black" because blacks occupied it, then all black occupied land should likewise be "black". By that definition blacks always "had" much more than 13%, but "owned" much less. However one looks at it, "13%" is a refrain devoid of substance.

The Illusive 30% – Good Policies from Bad Data?

Does "black" include coloureds, Asians and other population groups? Does it include all blacks or only blacks of South African decent? Does 30% refer to land by area or what really matters, land by value?

If basic information that informs the land discourse is flawed there is little prospect of addressing the "land question" properly. Consider the implications of the twin myths that (a) what the government is doing is redistributing land to blacks, and (b) that the policy is "failing" because the official target of blacks owning 30% of the land is not being met due to the 'willing buyer, willing seller' policy.

These propositions are riddled with conundrums, the most basic of which is that, for practical purposes, no land is being redistributed to blacks. It is being acquired by the government and blacks are occupying it under amorphous forms of title and tenure seldom constituting full unambiguous freely tradable and lettable ownership, called "full title".

In other words, even if all white land were to be "redistributed" blacks would own none of it; it would belong to the government (*de facto or de jure*). Far from the "cornerstone" of apartheid land policy – blacks living on government controlled land – having been "replaced" it will have been exacerbated.

It gets worse. It has until recently been unclear to what the 30% refers. Is it 30% of all land or only "white" farm land? Is it 30% of land owned by whites individually or does it include corporate land, which is a substantial proportion of "white" land? Does "black" mean blacks in their own name, or does it include black participation in land-owning entities such as companies, institutions and the government? Does "black" include coloureds, Asians and other population groups? Does it include all blacks or only blacks of South African decent? Does 30% refer to land by area or what really matters, land by value? Would the target be reached if 30% is desert and semi-desert land? Does it matter that were blacks to have 30% of high-value land, demographic proportionality would be exceeded by value? Does "redistribution" include market redistribution? Does it include, for instance, land bought privately by blacks, or is it only land redistributed by government? Does it include land rented, occupied and utilised by blacks, or only owned land? If owned land, which kinds of "ownership"?

Much of the terminology associated with the "land question" is anomalous. Land "redistribution" implies that land was initially "distributed". Land and housing in free markets is, like wealth, incomes, skills and other endowments, not "distributed". Virgin land may be distributed by a chief or government. RDP housing may have distributed. But once acquired, land is traded, developed, let, mortgaged and so on, but never "distributed". It should be clear that what the government wants to do is buy or take land and improvements from someone who acquired it legitimately and give or sell it to a favoured beneficiary. It is in this role not a "redistributor" but an agent. One of the lessons that can be learned from this realisation is that the best people to implement its policy may be estate agents. Unlike disincentivised bureaucrats, they would not fail and, if they did, they would not blame their failure on a supposed absence of "willing sellers".

The Meaning of Meaningless Data

Glib propositions that blacks should have a specified percentage are close to meaningless without elementary issues being clarified.

Depending on how these questions are answered, blacks might already "have" over 50% or less than 5%. Take just one unspecified variable: government land. Is it in the "black" 30%, the "white" 70%, neither or both in proportion to demographic ratios? The question of how much land by area, value or type is owned by the government, let alone how or whether to classify the government racially, is a conundrum wrapped in a paradox bedevilled by myths.

Despite such incontestable facts, a recent land audit by the Surveyor-General says that the government (as opposed to blacks) owns 14% of the land by area. The audit has been widely cited as factual and has been "approved" by the Cabinet despite being manifestly nonsensical.

If we start with the modest assumption that blacks "have" (as opposed to "own") the former bantustans, they have at least the much vaunted (but erroneous) 13%. They also have whatever "consolidation land" was "incorporated" but never transferred in deeds registries to homeland governments. If we assume that such land pushes not-white land up to, say, 20%, what must be added to meet the 30% target is another 10%.

How far we have progressed towards or exceeded the 10% outside the former bantustans is almost impossible to establish. If realistic definitions of "black" ownership are used, it is extremely probable that the 30% target has been exceeded. If not, it is a devastating admission of failure by the post-apartheid government to adopt economic policies conducive to black self-empowerment.

Despite such incontestable facts, a recent land audit by the Surveyor-General says that the government (as opposed to blacks) owns 14% of the land by area. The audit has been widely cited as factual and has been "approved" by the Cabinet[15] despite being manifestly nonsensical. Since it has not been released, its methodology is as much a mystery as its conclusions are a myth.

Shades of Grey in Black and White

More fundamentally, the proposition that blacks under apartheid had 13% (or whatever low percentage) of the land and that all other land was "white" defines everything outside a bantustan as "white", including all blacks, companies,

institutions and the government. If the apartheid regime was "white" because whites controlled it, presumably the new government is "black", or at least white only in proportion to the country's demography, which makes it around 5% white. Since all 200 plus parastatals, including such massive entities as the IDC and the PIC that were "white", are now not white, further adjustments are required.

Almost everything that purports to provide facts compounds confusion. In support of their ideological vision, Cherryl Walker and Alex Dubb,[16] dispute the white-right proposition that all government land should be considered "black". They, like almost everyone, incorrectly define non-bantustan land under apartheid as "white", yet say correctly that little or no government land should now be considered "black". Why the inconsistency? They cite with approval Land Reform Minister Gugile Nkwinti's view that 87% of South Africa's 122,081 hectares is white-owned and that 67% is "white commercial" farmland.

To what the 30% refers had never been defined until Minister Nkwinti volunteered clear definitions. The goal, he said, is to redistribute to blacks (by which he means the government) 30% of the 82 million hectares (i.e. 24.5 million hectares) "presumed to be in the hands of white commercial farmers" by next year.

By his classification, all agricultural land outside former bantustans is "white". In other words, blacks, coloureds and Asians who buy farms are "presumed" white. Maybe so few buy farms as to be inconsequential. If so, it suggests that very few people other than whites want to be farmers, so why is apartheid-style resettlement of blacks onto 30% of "white" farms of such overwhelming gravitas? Of the 79 000 land claims lodged so far, only 6 000 claimants wanted land.[17] This suggests that intended beneficiaries are not victims of the myth around land being an empowerment magic wand.

It is not that blacks cannot afford farms. Vivian Atud's research[18] shows substantial black advancement in every other area of economic life where they account for substantial and growing proportions, mostly over 50%, of new share purchases, companies, bank accounts, insurance policies, houses, credit cards,

credit agreements, mortgages, vehicles, apparel and the like. What is needed if we are to become a modern economy is fewer people, blacks especially, on "the land" and more people urbanising as residential tenants or owners. Urbanisation is one of the defining features of progress and as such should be supported rather than countermanded by blind faith land ideology.

According to the Minister, 6.7 million hectares has been transferred by the government, as opposed to the market, to blacks, although who precisely owns (in the full sense of the word) "redistributed" land is unknown; maybe unknowable. He says that 90% of blacks who get farms from the government fail and he laments the propensity of black farmers who get redistributed farms (presumably with tradable title) to sell them back to whites.[19]

"When government needs to procure land in the public interest, it is perfectly empowered to do so by the Constitution, to identify such land and make an offer."

"Often, we say 30% by 2014, without specifying what we're talking about. That's really [what is causing] the confusion around this," Nkwinti said.[20] Here we have one of the few objectively true and unambiguously clear statements about land.

Quite how amorphous the policy has been was explained by former Deputy President, Kgalema Motlanthe. *Times Live* reported him as saying that the percentage attached to the government's plan to redistribute land to black South Africans was "a mythical figure".[21] So mythical, in fact, that the target of 30% redistribution by 2014 "was still a government goal" despite being "impossible to implement".

"I think", he told the Parliamentary Press gallery "there are difficulties in just scanning the land surface and saying this percentage is in the hands of white South Africans and therefore still needs to be distributed to other South African nationalities."

Accordingly, as reported, "it was not possible to tell which part of the country needed to be distributed to satisfy land hunger. Where do you start? [Do you] drive across the Karoo and say nobody seems to be occupying this land, so we'll get people

to come and reside here or do you go to the gems of this country, the most beautiful panoramic areas and say these people are deserving to enjoy this space?" he asked.

Motlanthe suggested that the government "first identify the purpose for which land was needed, and then procure the piece of land."

He was also mystified by the "furore surrounding the willing buyer, willing seller model."

"When government needs to procure land in the public interest, it is perfectly empowered to do so by the Constitution, to identify such land and make an offer."

Where prices were "inflated by land owners", the government could expropriate and "the aggrieved party will then go to court, and the court of law then places itself at the boots of the willing seller, willing buyer [model] to make a determination." He did not, so it was reported, "understand how it had become a stumbling block."

How much land does the government own? How much can it Redistribute?

In one of its typically informative analyses the South African Institute of Race Relations (SAIRR) debunks the 13% myth.[22] Although this is one of the more accurate analyses there has been, it repeats some of the myths, such as the supposed 13% being black-owned. As noted above, most of what people have in mind belongs to the government, much of it held and administered by chiefs "in trust". The SAIRR asserts that of the "total surface area of 122 million hectares … 31 million hectares or 25% … was in the hands of the State."

Superfluous state land of most significance is urban land. That is where blacks can and should get land. Agricultural land, on the other hand, can at best be farmed viably, sustainably and commercially by no more than a few thousand blacks.

This 25% figure has been floating around for decades as the informed guess of experts. It is probably a conservative minimum. It excludes some land that is de facto state land, such as urban "reserved" land. Reserved land is probably the most valuable state land there is. It is seldom considered because it remains registered in the name of private property developers when they have land "proclaimed", some of which happened over 100 years ago.

The 25% estimate first appeared in an official estimate in the 1996 Land Policy Green Paper. It added an estimate that seems never to have been mentioned again, that much of that land is "superfluous" (unutilised and underutilised) and therefore easily redistributed without the need to acquire white land. This raises myth by omission. By far the easiest, cheapest and least conflict-provoking way to bring about land transformation is for the government to redistribute land loot it inherited from the apartheid regime.

The Gutto Report[23] is a classic example of the kind of nonsense that parades as fact. Its estimate, at one point, of the government owning no more than 20% of the land (by area) is based on the absurd fact that "land owned by municipal authorities are (sic) not yet included under 'state land' but is still listed under 'private land'".

It lists only two government departments, the provinces, traditional land and "Coloured Rural" as state land. Everything else is called "private" and everything "private" is in the Report as elsewhere presumed "white". That includes, by

implication, other government departments, parastatals, municipalities, and entities not normally considered "private" such as not-for-profit organisations (missions, churches, conservation trusts, etc).

About 30% of farms are in "corporate" ownership. What is the race of "corporations"? Without bothering to check, everyone happily assumes that 100% are 100% "white". This is no trivial matter since, according to the Gutto Report, nearly 80% of farms by value and over a third by area are "corporate" owned.

Later in the Report where the definition of the government is slightly extended, the percentage of state land (by area) creeps up to the more plausible 25%.

What is meant by "white" and "black" ownership? Does it mean only land registered in the Deeds Registry in the name of a white or black individual? If not, would land cease to be racially classified if registered in the name of a company, cooperative, trust or partnership? How are all population groups classified?

Superfluous state land of most significance is urban land. That is where blacks can and should get land. Agricultural land, on the other hand, can at best be farmed viably, sustainably and commercially by no more than a few thousand blacks. Why then is there so much pro-redistribution fervour amongst blacks who will never get any redistributed land, on one hand, and so much anti-redistribution angst amongst whites who will not lose land, on the other? There does not seem to be any rational basis for so much heat and so little light.

How Many Black Beneficiaries?

There are fewer than 40,000 white commercial farmers. If we make the charitable assumption that everything defined in law as a "farm" is "white" and "commercial" (as opposed to land used for recreational, conservation, tourism and other purposes), if the government redistributes 30% of these farms to blacks, if land is in fact transferred to blacks (as opposed to simply nationalised and occupied by black wards of the state), if every white farmer is replaced by two black farmers, if these black farmers are successful, and if they never sell to white farmers (thereby mangling manicured numbers), there will be about 25,000 black beneficiaries. That is below 1% of black South Africans.

Consider another estimate, the number of blacks who already have other forms of land in "white" areas and traditional areas (residential and arable allotments, and kraals). Many have land in both urban and tribal areas. No one knows how many pieces of land are involved. No systematic effort has been made to produce a reliable estimate. Most of this land is not separately registered in deeds registries. Much is documented in local government and traditional authority registers. The established consensus is that most of those records are hopelessly incomplete.

Informed estimates suggest that the number is between five and ten million pieces of land[24]. Urban land tends to be more valuable by area than rural land, which means that land already held by blacks is worth many-fold more than all agricultural land in the country.

This means that redistribution by government of land it already has and is already occupied by blacks would constitute by far a bigger land reform by value and by numbers of beneficiaries than Julius Malema dreams of in his wildest fantasies. At the stroke of the statutory pen South Africa could, at virtually no cost, become a nation of land owners.

But why is it not done? Why is this not what demonstrators and rioters demand? Why is it not the primary promise of any political party that wants votes? And why do most black South Africans still live under apartheid tenure despite repeal of the 1913 Land Act?

How to Make an Accurate Assessment of Land Ownership

An absolute precondition for making an accurate assessment of land ownership in South Africa is to start with coherent definitions. What is meant by "white" and "black" ownership? Does it mean only land registered in the Deeds Registry in the name of a white or black individual? If not, would land cease to be racially classified if registered in the name of a company, cooperative, trust or partnership? How are all population groups classified? What is meant by "private" and "state" ownership?

Once there are coherent definitions, they could be used to make statistically valid estimates. Those estimates should be more concerned about land value and the nature of land than crude land area.

A static analysis and one that ignores market redistribution should be replaced by one that is inclusive and estimates dynamic change along the lines of Vivian Atud's proposed Transformation Index.[25]

One of the few rigorous analyses was the 1997 White Paper on Land Reform Policy.[26] It repeated most of the erroneous axioms, but did at least produce sensible policy proposals. Perhaps because it is long and dense, it has been largely ignored. It proposed *inter alia* "legally enforceable rights to land", a "unitary non-racial system", eliminating "second class systems of tenure developed exclusively for black people", and constitutionally consistent "basic human rights and equality".

Amongst the RDP housing myths is the notion that stupid destitute sellers will become indigent vagrants if they sell or let prematurely. Firstly, for every seller there is a buyer. Buyers demonstrate both the ability to save and invest, and to maintain a home, including paying rates and taxes.

One of the few ways to make reasonable estimates of who owns what land is surprisingly straightforward, yet seldom if ever used, namely to establish from local government records who, if anyone pays land rates and taxes. Land that is not taxed can safely be presumed to belong to government or a non-profit organisation, such as a club or religious mission. Land that is rated has, in most cases, a readily classifiable identity.

Why the Pre-emptive Period?

People living in RDP houses and as tenants in pre-transition apartheid housing, live as they did under apartheid – under a kind of house arrest. A virtually universal assumption prevails to the effect that people who get RDP houses should not be allowed to sell or let them immediately, that they should personally occupy them for a prescribed period. The existing statutory period is an arbitrary eight years. The Department is considering reducing the period to five years and the Democratic Alliance suggests two years.

The interesting question is why they want any period at all. Is it based on logic or emotion? It is hard to believe that someone sitting in an air conditioned office about to drive home in a luxury 4x4 to a mansion in the leafy suburbs knows better

Housing audits find that up to 90% and seldom below 50% of RDP houses are illegally occupied. All pre-emption achieves is to decimate the benefit of being a beneficiary.

than someone with detailed knowledge of their unique personal circumstances what is best for them. Amongst the RDP housing myths is the notion that stupid destitute sellers will become indigent vagrants if they sell or let prematurely. Firstly, for every seller there is a buyer. Buyers demonstrate both the ability to save and invest, and to maintain a home, including paying rates and taxes.

Secondly, sellers will get far less for their house than they would were it freely tradable. Since they may not give buyers lawful title, and since buyers live under a permanent sword of Damocles whereby they will be evicted without compensation if caught, “black market” prices tend to start at around one tenth of what free market prices would be, and then rise as the statutory period approaches. This means that the value of houses to beneficiaries and the country as a whole is destroyed.

Thirdly, no one knows why beneficiaries sell. They have a kaleidoscope of complex motives almost all of which people who bother to acquaint themselves with the unique circumstances of each case will agree, are rational.

Fourthly, the reality is that people do not accept pre-emptive house arrest. Housing audits find that up to 90% and seldom below 50% of RDP houses are illegally occupied. All pre-emption achieves is to decimate the benefit of being a beneficiary.

Fifthly, there is no rational period other than zero. Everything between a minute and a century is a matter of degree not principle.

Millions of black South Africans suffer loss of wealth and dignity, and live in fear of being caught, for what appears to be a whimsical psychological desire not to have injured feelings when giving what someone else pays for, to someone they do not know.

Conclusion

The racist and discriminatory legacy of the 1913 Land Act is alive and well despite being nominally "replaced" in the new South Africa. The Land Act centenary is a time for bold reflection on how to end the long shadow it casts over the land. If politicians are serious about achieving a vision of racial equity and equality, they should pass a new Land Act that declares all permanent holders of land to be unambiguous owners of freely tradable, mortgageable and lettable land. By doing so they will divert attention from the myopic obsession, sometimes fuelled by envy and retribution, with what happens to a few "white" farms to the substantial empowerment and emancipation of millions of victims of apartheid. They will have converted an estimated one trillion rands worth of dead capital into dynamic capital.

NOTES

1 Economic Freedom Network, Annual Economic Freedom of the World Index, www.freetheworld.com. Leon Louw, Habits of Highly Effective Countries, Law Review Project, Johannesburg.
2 http://en.wikipedia.org/wiki/Resource_curse; http://www.investopedia.com/terms/r/resource-curse.asp
3 http://en.wikipedia.org/wiki/Robert_Barro
4 http://en.wikipedia.org/wiki/Peter_Thomas_Bauer
5 De Soto, Hernando, The Mystery of Capital, Basic Books, 2003.
6 Princeton University Press, 1996.
7 Cambridge University Press, 2007.
8 http://en.wikipedia.org/wiki/Natives_Land_Act,_1913
9 http://en.wikipedia.org/wiki/John_Tengo_Jabavu
10 "Townships" are in law proclaimed urban residential areas regardless of race. However, the term is more commonly used to refer to historically and predominantly "black" areas. Their "white" counterparts are commonly called "suburbs". Despite being called "townships" most such "black" areas are not lawfully proclaimed as such; they are defined by less formal layout plans instead of Surveyor-General diagrams.
11 "Locations" were the common name for "black" residential areas alongside "white" towns and cities. The term tends today to refer to older formal and lawful "black" urban areas, especially smaller country towns where Afrikaans is the dominant vernacular.
12 "Settlements" were and are "informal" and "semi-formal" places where blacks settled technically as unlawful squatters, sometime by way of "land "invasions". Most "settlements" become recognised in fact if not in law as permanent unplanned black-occupied areas.
13 "Grey areas" were rapidly expanding "white group areas" into which blacks were relocating in large numbers unlawfully, such as Hillbrow, Berea, Yeoville and Lombardy in Johannesburg.
14 http://www.dla.gov.za/news-room/newspaper-clippings/file/1795.
15 http://www.iol.co.za/news/politics/state-owns-14-of-sa-land-audit-1.1574347#.UjeO_sZkOfs.
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17 http://m.news24.com/fin24/Economy/Farm-output-trumps-transfer-targets-20130813
18 http://www.freemarketfoundation.com/issues/black-economic-empowerment-and-job-creation
19 http://www.dailymail.co.uk/news/article-2032588/Black-farmers-South-Africa-cash-selling-land-given-government--whites-originally-owned-farms.html
20 http://www.fin24.com/Economy/Nkwinti-spells-out-land-reform-target-20120301-2
21 http://www.timeslive.co.za/politics/2012/08/30/30-land-distribution-aim-a-myth-motlanthe
22 http://www.sairr.org.za/sairr-today-1/research-and-policy-brief-land-ownership-and-land-reform-in-south-africa-27th-february-2012
23 Report and Recommendations by the Panel of Experts on the development of policy regarding Land Ownership by Foreigners in South Africa, 2007.
24 Author interviews with recognised experts such as the Chief Registrar of Deeds, the head of organised conveyancers, the President of CONTRALESA, and academic specialists.
25 Ms Atud, an academic economist, has made considerable progress towards generating an as yet unpublished "Transformation Index". Her index is the first systematic and comprehensive measure of black advancement. Unlike "empowerment indices", which tend to be confined to government-induced "empowerment", her index includes all forms of transformation, including market-driven black advancement, i.e. what blacks do for themselves.
26 http://www.polity.org.za/polity/govdocs/white_papers/landwp.html

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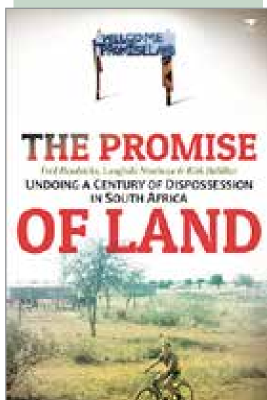

THE PROMISE OF LAND: UNDOING A CENTURY OF DISPOSSESSION IN SOUTH AFRICA
Edited by Fred Hendricks, Lungisile Ntsbeza and Kirk Helliker
ISBN: 978-1-4314-0816-0
Publisher: Jacana Media

BOOK REVIEW

The Promise of Land: Undoing a Century of Dispossession in South Africa edited by Fred Hendricks, Lungisile Ntsbeza and Kirk Helliker

"The promise of land" argues that land redistribution in South Africa has failed. The book opens with and closes with outrage, arguing that the plight of the landless should be heard more loudly. A collection of essays is used to widen the context of the land-question: There is a clear attempt to differentiate types of land, i.e. "white" commercial rural areas, former reserves, and urban areas, and to show how these types of land interrelate; Rural development, smallholder agriculture and food security are discussed; Land policy in Zimbabwe, India, and the Netherlands are included to provide a comparative perspective. But, ultimately, the book takes a narrow view of what needs to happen in South Africa: immediate restorative justice.

The opening argument (constituted by Fred Hendricks, Lungisile Ntsbeza and Kirk Helliker's arguments), states a simple and accurate premise: land dispossession is wrong. It was wrong during colonialism, and during Apartheid. The result of land dispossession was racialised inequality across a number of areas, but, more immediately, in the distribution of-, access to-, and ownership of land.

According to the authors, very little has changed. The book rejects government's land reform attempts as "inappropriate and inadequate". They argue that a strong bias exists to preserve the current situation – a bias that perpetuates and entrenches the legacy of colonialism and apartheid, and even reproduces it.

Government's failure to meet their own targets with regard to land reform underlies the book's view that "a fundamental change in approach is necessary". The argument holds that this change must take the form of 'social movement politics' – social movements that have the potential to ignite "latent tensions", and to bring about change. These social movements are, according to the book, exemplified by the Marikana miners and the Western Cape farmworker strikes that took place last year.

The land question in South Africa is fraught with many difficulties. These difficulties include the challenge of establishing what land belongs to whom, land administration, urban development, and agricultural transformation. Moreover, the Constitution protects existing rights to land and authorises the promotion of land reform within the framework of Section 25. The interpretation of Section 25 is characterized by a tension between protecting existing property rights, and achieving justice in access to land.

Our Constitution, in the view of the authors, is an obstacle to achieving restorative justice – if it does not go hand-in-hand with the proper political and moral will. Social movement politics, from this perspective, can be seen as a way to force radical action. On one reading, the book is a curious mix of 'analysis', and moral prescription. The analysis seems to play out within a bigger narrative of radical and just redistribution, driven by 'the people'. This type of reasoning portrays the rights of 'the people' as paramount. But does it not do so at the cost of disregarding those of the individual? Is this not a dangerous view?

'The promise of land' does well to confront the reader with the urgency of land reform, and the injustice of dispossession. But the challenge in the new South Africa – and this is not properly acknowledged in the text – is to address the wrongs of the past within a framework that includes all citizens, and protects the rights of all citizens. When the suggestion is made that Zimbabwe's fast-track land reform policy was a good thing, one cannot help but raise an eyebrow. The book makes a comparison between Zimbabwe and South African, 19 years into democracy, in the context of massive unemployment and failure of market-based land reform and argues that South Africa finds itself in the same position Zimbabwe was in, 20 years after liberation. The authors, in drawing this comparison, blatantly disregard the political factors underlying the Zimbabwe land grabs, the abolishment of the rule of law, and human rights violations – factors that cannot be reconciled with the founding values of the South African Constitution.

But the challenge in the new South Africa – and this is not properly acknowledged in the text – is to address the wrongs of the past within a framework that includes all citizens, and protects the rights of all citizens.

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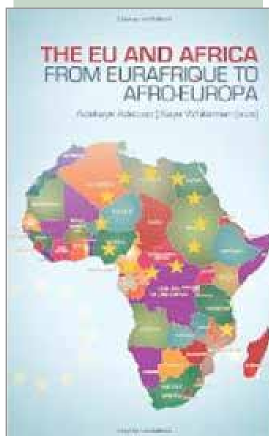

THE EU AND AFRICA: FROM EURAFRIQUE TO AFRO-EUROPA
Edited by Adekeya Adebajo and Kaye Whiteman
ISBN 2013: 978-1-86814-575-1
Publisher: C Hurst & Co Publishers Ltd (3 Aug 2012)

BOOK REVIEW

The EU and Africa: From Eurafrique to Afro-Europa edited by Adekeya Adebajo and Kaye Whiteman

While the title of this work may have benefitted from a little more attention from the publishers, one should not make the mistake of discounting this work's value and relevance, based on the title alone, in the discourse of historical and modern (continental) relations between the 'new' and 'old' worlds. The editors, Adebajo and Whiteman, do a thorough job of marshalling some of the world's foremost experts' thoughts on areas as diverse as identity and security into an easily readable, though nuanced, book.

Whereas this subject has been canvassed by many other authors, writing alone or in concert, the distinguishing feature of this book, apart from the fact that it emanates from an African think-tank in an otherwise European-dominated area of scholarship, is that it seamlessly brings together people of diverse backgrounds and beliefs in a way that allows individual authors enough freedom to express their opinions while allowing the book to escape being schizophrenic, as is often the case with compilations of this nature. Rather, Adebajo and Whiteman, both experts in African affairs themselves, have done a superb editorial job of allowing individual authors the freedom to express themselves while maintaining a balance of opinion that results in the reader benefitting from a cogent exposition on EU-African affairs over time.

The book itself is the product of the Centre for Conflict Resolution's (CCR) specifically organised research and policy seminars to consider relations between the two continents. The CCR, based in Cape Town, and headed up by Adebajo, is an African flagship organisation which is able to undertake research and make policy proposals in a way that not many other African entities are able to do so. Institutional biases, whether intended or not, tend to dominate the narrative, rightfully or wrongfully, around particular subjects. Accordingly, subliminal prejudices and beliefs, no matter how learned or enlightened the author, can particularise the way in which certain subjects are considered. This book does an excellent job of providing balanced and critical comment: it is not simply an inward-looking African exercise in self-aggrandisement as a response to Europhilia, it is a serious piece of scholarship.

Divided into 6 parts, this book is an ambitious attempt to explain a historical relationship that spans several centuries. It covers, broadly; history, the political economy, trade and development, security and governance, bilateral relations, migration and identity. While the book itself runs to 500 odd pages, its length is justified, both by the complexity of the subject matter it attempts to deal with and the consequent need for incisive, if long, commentary that explains it. This book cannot be described as being "gripping," or "riveting" nor by any of the other labels blithely applied to books in reviews, especially those reviews conducted in the popular press, but such is to be expected: it is a study done in assiduous detail.

In an age where communication is limited to 140 characters per tweet, and where long-form journalism is itself a rarity, lengthy essays of this kind do not lend themselves to being picked up and pursued by the everyday reader. The everyday reader that does, therefore, deserves to be elevated to being considered as more than "everyday." Accordingly, this book is not meant for the everyday reader, but rather the reader who seeks to deepen, challenge and further his/her understanding of Africa and Europe and the ties that bind. It is the mastery of the detail that it provides which sets this book apart. It is not inconceivable, therefore, that this book could be prescribed as essential reading for those reading history, politics, economics, international relations, security studies at university. Some of the policymakers who have responsibilities in these areas should consider it essential reading too. Indeed any reader of this review, who has an interest in those disciplines, within an African/European context, would benefit from reading this book.

They argue that this relationship must be reformed so that there is greater equity in the future. What is interesting is that they readily concede that this is not only in Africa's benefit, as it will go some way to break Africa's dependence on the West, thus making it better able to empower itself, but, in time, has become a geopolitical necessity for Europeans themselves.

The transition in this relationship, postulated in the subtitle ("From Eurafrique to Afro-Europa"), is one that is not immediately clear based on the title alone. In the introduction, Whiteman goes some way to explain what this means.

The intelligent linguistic device used to symbolise that transition, "Eura" for "Europe" being predominant and primary to "Afrique," the French word for Africa in "Eurafrique," then changing to "Afro" for Africa and "Europa" for "Europe" with, seemingly, more equality between the two terms, rather than one dominating or colouring our understanding of the other, is a theme that is returned to by most, if not all authors. The authors and editors, rightfully, argue that the previous characterisation of Europe's relationship with Africa was an exploitative and self-enriching relationship, to Africa's detriment. They argue that this relationship must be reformed so that there is greater equity in the future. What is interesting is that they readily concede that this is not only in Africa's benefit, as it will go some way to break Africa's dependence on the West, thus making it better able to empower itself, but, in time, has become a geopolitical necessity for Europeans themselves. With the United States's continued, even if diminished, economic dominance to the West, and India and China's emergence as rival power bases to the East, European countries finds themselves individually too weak to rival either of these nations, but collectively more able to act in the continent's individual nations' best interests when they do so as a trade and political bloc. Thus, reform should not be viewed as caving to the demands of Africans, but rather as a strategic necessity to ensure that Europe's benefits continue.

The book does discuss in great detail the EU model. The lessons that it thus allows AU policymakers to glean, without the pain of experience, is something that cannot be understated. The Eurozone crisis, the rise of nationalism in response to it, the arbitration of justice and questions of sovereignty, are issues that, as the AU moves for greater continental and regional integration, must be considered. Comparatively, the EU is a much stronger institution (it has had a few decades head start and did not have to deal with the nasty effects of colonialism). But if it manages to just limp on from crisis to crisis, can it serve as a model for the AU?

However, not all of the books prognostications are bad. In fact, it is the opposite. In allowing the AU to look to its northern neighbours and learn the lessons they have to offer, some of the more calamitous mistakes that the EU has made, can be avoided. Further, this historical and holistic approach offers key insights into the mutual benefits that both Africa and Europe stand to gain from a continued strategic relationship. While the book does not offer a sufficient explanation as to why this is the case, but rather seems to accept it fait accompli, it is clear that the historical ties and financial interests which exist is enough of an incentive for it to continue. Leveraging off Europe's need to remain relevant to and, in some respects, dominant of world affairs, is something that international relations and foreign policy is made of. Why, however, Europe is the best strategic partner for Africa, in the opinion of authors and the editors, is perhaps a chapter that would have been a good starting point, as the foundation for the exposition which would follow. This question, especially if answered from both perspectives, would have enhanced the books attempt to settle any ambiguities or ambivalence in each continent's policy towards the other.

What may have previously been an exploitative relationship, has by chance or design, morphed into one that is predicated on mutual interest. When policy makers realise this, as well as the people of both continents, Europeans will, hopefully, no longer feel that they are being exploited and, likewise, Africans will no longer feel entitled. Rather, this relationship must be fully cognisant of the past while not allowing it to determine current and future relations, for a preoccupation with settling old scores may render it impossible to govern for today and tomorrow. This is not to say, at all, that an ahistorical approach must be taken which allows Europeans to abdicate their responsibility for Africa's present problems. Rather, it is an approach which accepts European responsibility and African accountability as well: not all problems, or at least their manifestations, can be blamed on the past.

Academic books of this nature can often be banished to the annals of history without a further thought. This book, however, is one that the authors and editors should genuinely seek to keep alive by updating it periodically to reflect the dynamic and ever-changing relationship they seek to examine.

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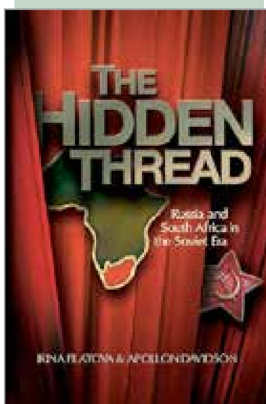

THE HIDDEN THREAD: RUSSIA AND SOUTH AFRICA IN THE SOVIET ERA
By Irina Filatova & Apollon Davidson; Johannesburg & Cape Town
ISBN 978-1-86842-499-3
Publisher: JONATHAN BALL PUBLISHERS

BOOK REVIEW

The Hidden Thread: Russia and South Africa in the Soviet Era by Irina Filatova & Apollon Davidson

I suspect that many South Africans' fascination with Russia, pre- and post-Soviet era as well as the Soviet Union, lies with a sense that our countries' histories contain so many parallels: minority elites and peasant masses; pockets of high technology industrialisation combined with an agrarian economy; lurches back and forth between democracy and authoritarianism, punctuated by revolutionary uprisings and mass protest. Indeed, in both countries one sees, too, tense engagements with liberal constitutionalism and the rule of law, faced off against populist nationalisms.

Given, too, the general lack of South African scholars familiarity with the Russian language, it's also not too surprising that few works of comparative history or of Russian-South African relations have been written. Those that have come from South Africa have been mainly polemical works, relics of the Cold War warning against (mostly, it seems, imagined) Soviet imperial designs on the country.

Thankfully, this new book by two leading Russian historians of South Africa, both professors for many years in the country, sets out to clarify Russian-South African foreign relations. Drawing on original and published sources from both countries, what we have is the most comprehensive and balanced account to date on the subject. In addition Filatova and Davidson are also lively and engaging writers, making this book enjoyable as much as informative reading.

Though their narrative focuses on the era of the Soviet Union (1917-1989/91), unsurprising given that this dovetails neatly with the apartheid era in South Africa, they begin by describing the first Russian encounters with Dutch and British rule at the Cape, diplomatic and trade ties with the Boer Republics – including strong Russian moral support for the Boers during the Anglo-Boer War. Such support included Russian volunteers serving in the Boer forces.

Interestingly, too, Russians were seen by Pondo chiefs in the Eastern Cape as potential allies in their struggle against colonial incorporation. Letters were written to the Tsar, who was perceived to be black, asking for assistance. It did not come, though in the 20th century the Soviet Union provided considerable educational support and military training to the descendants of these earlier African nationalists.

The 1917 Bolshevik Revolution's impact was also quite varied. While some South Africans served in the Allied war effort against the Red Army, the mainly white South African Left – then a mishmash of trade unions and socialist groups – was inspired to form the Communist Party of South Africa in 1921 and became part of Comintern. Even the National Party was not left unaffected – no less than future Prime Minister J B M Hertzog proudly endorsed the Russian Revolution and declared that the goals of Afrikaner Nationalism were identical with Bolshevism.

A relatively small but significant level of trade occurred between South Africa and the Soviet Union until at least the 1950s – and perhaps even afterwards.1 South African mining companies were also engaging in trade agreements with the USSR over production and sale of key minerals – to the economic benefit of both parties.

Official South African-Soviet relations took a strongly Cold War turn from 1950 onwards. This was played out most dramatically during South Africa's war in Angola and Namibia during the 1970s and 1980s. Soviet military advised and supported the MPLA government of Angola in their war with South Africa and the UNITA guerrilla movement.

On a political level, the Soviet Union through Comintern's 'Native Republic' policy directed the Communist Party towards strong identification with African nationalism. This decision divided the CPSA and led to expulsions of dissident members. The Party itself, the only non-racial political movement in South Africa for decades, played a key role in cementing the alliance of the African National Congress with its supporters among minorities and the labour movement; it would also, in the early 1960s, be central to the formation and leadership of the ANC's armed wing, Umkhonto we Sizwe. In turn, the Soviet Union assisted MK in military training – though some within felt that the training was all too often overly focused on conventional, as opposed to guerrilla, warfare.

During World War II, with the USSR part of the Allied war against Nazism, the Soviet Union enjoyed a temporary resurgence in popularity through the Friends of the Soviet Union. Set up by the CPSA it included (for the duration of the War at least) the patronage of figures like Prime Minister Jan Smuts, his deputy Jan Hofmeyr and Anglican Bishop Lavis. After the war it continued, mainly led by Communists, and helped set up the South African Peace Council, the local wing of the Prague-based World Peace Council.2 It died out by the end of the 1950s, as National Party discourse rapidly adopted Cold War rhetoric to serve the apartheid agenda.

Official South African-Soviet relations took a strongly Cold War turn from 1950 onwards. This was played out most dramatically during South Africa's war in Angola and Namibia during the 1970s and 1980s. Soviet military advised and supported the MPLA government of Angola in their war with South Africa and the UNITA guerrilla movement. Though Soviet military aid in the 'frontline states' and support for the ANC and SWAPO was significant, the authors do not dwell overmuch on it, seeing it as part of a much wider and more subtle Soviet foreign policy3.

Similarly South Africa was also a sideshow in global espionage activities. Among Soviet agents captured during the period the most important was navy commodore Dieter Gerhardt – who was later part of a multinational spy swop organised by the United States. South African intelligence, it should be noted, worked closely with American, British and West German secret services throughout the Cold War. The extent of South African involvement in the Cold War has yet to be examined

historically (if indeed the sources remain!) – what Davidson and Filatova offer are tantalising glimpses that cry for further research.

As both apartheid and Soviet communism slid into decline in the late 1980s, the authors reveal the extent to which both sides were reconsidering their rivals. South African scholars, many with intelligence and foreign affairs backgrounds, began considering renewed diplomatic relations with the USSR. In Russia, their counterparts began to reconsider how they might contribute to peace in South Africa. Some even went so far as to suggest a less inflexible attitude to white South Africa – a few even started to learn Afrikaans.

In the new era, say the authors, relations between the new South Africa and new Russia have normalised. A brief Russian romance with South Africa has cooled, and morphed into the hard-nosed diplomacy and trade issues that South Africa's entry to the Brics Group has generated. Indeed peace has even seen the collapse through economic rationalisation of the two major Russian Studies departments at South African universities (UNISA and Witwatersrand).

What this all too brief outline of The Hidden Thread has, I hope, shown is the complexity of the Soviet-South African relationship in the 20th century. Interspersed with the grand narratives of politics and economics, apartheid and Marxism-Leninism, the authors present short accounts of ordinary Russians in South Africa, and South Africans' experiences in the Soviet Union. Naturally not all areas are covered in the detail one might hope for – I for one feel that there is considerable need for more on the exile experience of South Africans in Russia, on early South African experiences in Lenin's and Stalin's USSR in particular. Similarly, it would be interesting to examine the influence of Russian literature on its South African counterparts: to what degree do authors like Gordimer, Brink and Coetzee, for example, consciously echo that historically-informed, spiritually tormented melancholia that one finds in the great Russian writers of the last few centuries?

But of course one cannot demand everything of one book, not least one that delivers so much as it is. The result of meticulous research. Irina Filatova and Apollon Davidson have produced for us a dense, rich narrative, intellectual filling, thick and tasty as borscht soup at its best. Thoroughly engaging, and truly entertaining as history at its best should be, this book will be the standard text on Soviet-South African relations for years to come.

NOTES

1 I recall that the first watch I owned (in the mid-1970s) was made in Russia. I heard later, though I have never been able to verify it, that many of the boots worn by South African Defence Force infantrymen during the 1970s and 1980s were of Soviet provenance.

2 Here I notice one of the few 'errors' in the book. Though the FSU and Peace Council were chaired by a non-Party member, the Reverend Douglas Thompson, he was not, as the authors say, a 'protestant dean' (p 192) but a Methodist minister. The term 'dean' is associated with Anglicanism, and the authors are almost certainly conflating Thompson with the British Anglican 'Red Dean' of Canterbury, the Reverend Hewlett Johnson, who was in many ways Thompson's more famous British counterpart. Johnson, it should be noted, was author of a bestselling apologia for Stalinism, The Socialist Sixth of the World (London: Victor Gollancz 1939), which was a standard introductory textbook for young South African Communists.

3 A more detailed account of this aspect of Soviet-South African relations can be found in the fairly polemical but comprehensive work of their fellow Russian 'Africanist', Vladimir Shubin. See: Shubin, ANC: A View from Moscow 2nd edition (Johannesburg: Jacana Media 2008); The Hot 'Cold War': The USSR in Southern Africa (Pietermaritzburg: UKZN Press, 2008).

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