Land restitution in South Africa: is there another way to achieve land justice, redress and development?

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1. Introduction

The argument I present today is controversial, and no doubt many here will not agree with me. I will focus mainly on the 'bigger picture' of the progress and problems experienced in the process of land restitution in general from 1994 to the present, and on the questions and dilemmas it throws up. I am not familiar enough with the details of dispossession in Simon's Town and how restitution has proceeded (or not proceeded) here, to do more than make a few suggestions on the way forward in this specific context – but hope they will stimulate constructive debate.

2. The wider context

The South African dream of liberation (from poverty, oppression, exploitation, dispossession) is wearing thin, nearly three decades years after our first democratic election. Our country is clearly in the grips of a long-enduring social crisis: unemployment is over 40%, our inequality is the highest in the world (10% of population owns around 80% of all wealth), and race remains a key driver of inequality (Sulla *et al*, 2022).

Given the key role of land dispossession in the formation of the unequal, oppressive and racist order of the past, the post-apartheid land reform programme was designed to address a root cause and contribute to deep and thorough-going transformation of society. But it has not gone well to date: some would even say it has been an outright failure. It is true that are a few success stories, in all aspects of land reform, but overall most analysts conclude that it has failed to achieve the ambitious goals set out in the White Paper on South African Land Policy of 1997.

3. The argument

Today I will speak to just one of the three main sub-programmes, namely land restitution, and argue that it was a tragic mistake. I have come to his view somewhat reluctantly, and admit that until quite recently I was as convinced as the rest of the 'land sector (activists, researchers, officials) that the problems in restitution arose from poor implementation,

rather than the policy itself. There is much in this view that makes sense. Of course, more effective implementation would have made a huge difference. But I now think that the potential for a truly transformative land reform programme was undermined and diverted by the adoption of a 'self-imposed impossible task', restitution.

The two key thrusts of a radical land reform should rather have been: (i) large-scale redistribution of land, plus (ii) tenure reform to strengthen the insecure land rights of the majority. Hindsight is a wonderful thing, of course, and so precise. In practice both policy-making and implementation are always messy, imperfect, error-bound….. and thus necessarily a learning process. Learning from our mistakes, and then adjusting our course, is something we always need to do, but especially in something as complex and far-reaching as late reform. It is never too late to learn.

4. **The constitutional imperative: the 'property clause'**[1]

The 'property clause', the final section of the Constitution to be agreed in 1996, includes some controversial provisions:

1) *No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*

2) *Property may be expropriated only in terms of law of general application— (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*

3) *The amount of the compensation and the time and manner of payment must be just and equitable…..*[2]

4) *For the purposes of this section— (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land.*

Putting these thorny issues aside for now:

[1] Note that there is insufficient time to discuss this in detail in this talk.

[2](Just and equitable means) …. "reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including— (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation".

Soon after the first election of 1994 an ambitious policy of land reform began to be implemented. This included a *land redistribution* programme, aimed at broadening access to land among the country's black majority; a *land restitution* programme to restore land or provide alternative compensation to those dispossessed as a result of racially discriminatory laws and practices since 1913; and a *tenure reform* programme to secure the rights of people living under insecure arrangements on land owned by others, including the state (in communal areas and the former 'Coloured' rural reserves) and private landowners (farmworkers, farm dwellers and labour tenants).

The relevant Constitutional provisions are:

Redistribution: (5) The state must 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.

Tenure reform: (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.

Restitution: (7) A person or community dispossessed of property after 19 June 1913 as a 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 (i.e. alternative land, or cash compensation, or a combination).

The adoption of land restitution seemed to make eminent sense, given the findings of the Surplus People Project of 1983 that some 3.5 million individuals (or 700 000 households) were dispossessed through forced removals between 1960 and 1983. Efforts to resist these apartheid-era removals, often assisted by land activists and NGOs, deeply informed thinking about post-apartheid policies. (Taking into account prior processes of dispossession plus loss of land in the former reserves through 'betterment', or land use planning, it is clear that the total number of people who had lost their land through racist laws and practices was in even higher). Surely democratic South Africa needed to provide direct redress for loss on so vast a scale ….

These three land reform sub-programmes were intended to be directly complementary to one another. For example, a cut-off date was required to allow *restitution* of land to individuals and groups dispossessed in the recent past, in order to avoid triggering intractable disputes between competing groups of claimants. The date on which the Natives Land Act of 1913 was adopted (19th June 2013) was selected as the cut-off. Restitution is a rights-based sub-programme, and this means that the existence of prior rights in land must be proven before a restitution award can be made. However, much dispossession took place

prior to that date and hence a *redistribution* sub-programme was also required to address the massive inequalities in land holdings. (Land redistribution is not rights-based, however, but application-based, and the key criterion is need, not rights.)

Government's early vision of land reform emphasized multiple objectives: addressing dispossession and injustice; creating a more equitable distribution of land; reducing poverty and assisting economic growth; providing security of tenure; establishing sound land administration; and contributing to national reconciliation. This was clearly an ambitious, multi-pronged and wide-ranging programme, and would be very demanding of state capacity (comprising policy, law, programme design, procedures, staffing, budget, skills and training). The central importance of questions of capacity in moving from grand visions to concrete realities, were, I think, somewhat underestimated in the heady days of the 1990s.

5. Key debates

Key debates on land reform that emerged in the early 1990s continue to resonate today. To mention only a few:

(1) *Should the property rights of the white land-owning elite be protected? Does this not severely constrain redistributive land reform?* Arguments that stolen land should not be paid for by the victims of dispossession contend with the view that the property rights of all citizens, including those of the rural and urban poor, need to be afforded constitutional protection, and that the property clause as a whole enables rather than constrains land reform, including the provision that land reform is in the public interest.

(2) *Should land acquisition and transfer take place primarily though market transactions, or through state interventions such as expropriation?*

(3) *Why is the cut-off date for the lodging of land restitution claims set as June 1913, when land dispossession in South Africa dates back many centuries?* The 1913 cut-off date was chosen as a pragmatic compromise between two other alternatives (1652 and 1948), and to minimise the potential for competing claims amongst black South Africans. However, groups representing the KhoiSan have contested the legitimacy of this compromise, and government has occasionally flirted with the idea of re-opening restitution claims to allow those based on dispossession prior to 1913 (before deciding, correctly in my view, against such a move).

(4) *Is land reform on its own, without major intervention in the agricultural and rural economy, including the provision of substantial support for beneficiaries, not likely to fail?*

(5) *How important is land reform in efforts to reduce rural poverty and spatial inequality?* For some, land reform is a key thrust of post-apartheid policy since it addresses a root cause of poverty and inequality. Others assert that its role in poverty reduction is necessarily limited in an economy that is increasingly urban in character.

(6) *Should land in the former Bantustans continue to be held in systems of 'communal tenure' or not, and what roles and powers should traditional leaders have in relation to land? (This is unfinished business with a vengeance: there is no law on the books as yet that gives effect to the constitutional right to tenure security in communal area.)*

And so on, a long list, including the question of urban land reform and its contribution to reducing spatial inequality in towns and cities. Key sources providing detailed information and discussion of these issues include the High Level Panel of Parliament of 2016 chaired by former president Kgalema Motlanthe[3], and the Presidential Advisory Panel on Land Reform of 2019[4], as well as many academic publications.[5]

6. Implementation begins – but progress is extremely slow

Progress was extremely low in the first five years of land reform. The amount of land redistributed by March 1999 amounted to only 650 000 ha (or less than 1% of private farm land, as compared to the target of transferring 30% within 5 years). Only 41 land claims had been settled by March 1999. Tenure reform involved the adoption of new laws offering limited protection to farmworkers and dwellers, and rights to claim land to former labour tenants, but implementation was slow.

The *Restitution of Land Rights Act, Act 22 of 1994*, was the first law passed by the new Government of National Unity that set out to redress the legacy of apartheid rule. It affirmed the right to restitution and defined the process for lodging their claims. The Act established two institutions to drive the process: a Commission on the Restitution of Land Rights and a Land Claims Court. The timeframe for restitution was 18 years: 3 years for claims to be lodged (later extended to 31 December 1998), 5 years for the settlement of claims, and 10 years for the implementation of all court orders and settlement agreements.

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[3]https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf

[4] https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_0.pdf

[5] These include the following books: Aliber *et al* 2013; Beinart, Delius and Hay 2017; Claassens and Cousins 2008; Cousins and Walker 2015; Hall 2009; Hebinck and Cousins 2013; Hendricks *et al* 2013; Hornby *et al* 2017; Ntsebeza and Hall 2006; Walker 2008; Walker *et al* 2010; ; Wegerif *et al* 2005. See a list of references below.

The Restitution Act set out the criteria for eligibility as a person or community who was dispossessed of property after 1913, as a result of racially discriminatory laws or practices, and was not adequately compensated; or the direct descendants or deceased estates of such people. Eligibility hinges on proof that property rights existed and were lost through racially discriminatory laws and practices. Jurisprudence confirmed that restitution is not limited to those who had been private freehold owners of land, but extends to (former) non-owners, since most land held by blacks had been held under forms of customary or informal tenure.

The major limitations on eligibility are the 1913 cut-off date, and (until the 2014 Amendment Act) the 1998 deadline for claims to be lodged. The reason given government for not accepting claims predating 1913 was that this would open the way to claims on land already occupied by blacks, rather than focusing on white-owned land. There are very few rural claims in the Western Cape and why, in contrast, large portions of Limpopo and Mpumalanga – estimated by some at between 50 and 70 percent of the farmland in those provinces – are subject to claims.

It appears that the vast majority of those affected by forced removals (along with their descendants) have never submitted claims for restitution. The Commission estimates that claims received reflect 10% of those potentially eligible, although others (e.g. Walker 2008) suggests that the proportion is higher.

By the official cut-off date of December 1998, a total of 63 455 land restitution claims had been lodged. Further investigations revealed that some claims needed to be split, and the official total was then revised upwards, rising to 79 696 by 2007 – and currently to around 83 000. Around 88% of claims were from individuals or families in urban areas; in contrast, most rural claims were group-based and thus involved a great many more people than urban claims. Only 41 land claims had been settled by March 1999; after a new 'administrative' approach was adopted, the pace quickened and 12 314 claims had been resolved by June 2001. However, the Land Claims Commission found it challenging to provide effective post-settlement support for beneficiaries, and criticism of this aspect has continued ever since.

Under the Mbeki presidency, land restitution speeded up dramatically. Government reported that by 2009 the land restitution programme had settled 75 787 claims, the great majority being urban claims resolved through cash pay-outs via 'standard settlement offers' of R40 000. Around 1.5 million people were reported as benefitting from restitution, and 2.64 million hectares as restored. However, there is a difference between 'settled' as opposed to 'finalised' claims. And many restitution projects were found to be unsustainable, and most saw few improvements in the life of successful claimants.

In the Zuma period, restitution was extremely troubled, and settlement of claims slowed to a crawl. In addition, the adoption of the Restitution of Land Rights Amendment Act of 2014, in the period leading up to a national election, opened up the possibility of lodging new land claims for a period of five years (until 2019). This affected thousands of existing claims that had not been settled, as well as another 20,000 that are settled but not yet implemented. This led to fears that existing claims could be side-lined by new claims. In addition, government wanted to open up claims to traditional leaders, a longstanding problem that . A further 163 000 claims were lodged by 2016, when the Amendment Act was struck down by the Constitutional Court (it was estimated that around 400,000 new claims would be lodged by 2019). But most of these claims were probably as a result of 'betterment' removals, and most were for cash compensation.

Since 2018, restitution has been de-emphasized by government and has proceeded slowly, averaging 340 settled and 504 finalised claims per year. In 2016 it was estimated that at this rate it will take between 35 and 43 years to finalise all 'old order' claims, a further 140 years to finalise the already lodged 'new order' claims, and if a further 240 000 claims are lodged, around 700 years to complete the programme. No wonder that the Department's recent annual reports barely mention restitution.

Restitution in South Africa has been both hailed as a great success by government ministers and officials, and criticized as overly conservative, highly bureaucratic and painfully slow by many researchers and activists. Some see a significant achievements in the settlement of most urban claims with cash pay-outs, alongside a handful of significant attempts to rebuild urban spaces (e.g. in Port Elizabeth). Progress towards addressing the legacies of dispossession in rural areas has, however, been much more modest.

There has been overwhelming pressure on urban claimants to accept standardised cash pay-outs that bear no relation to the value of what was lost, or its current market value. The result is that restitution has made few inroads into the geography of apartheid that continues to shape our cities. Cash compensation has sometimes been derided as "cheque book" restitution, a quick-fix solution to deep and intractable grievances. Although the vast bulk of claims have been settled this way, relatively little attention has been given to what this money has meant in people's lives, how it has been spent, and the degree to which cash compensation is experienced as restitution.

Once-off windfalls are often divided among large extended families and are generally too small to bring about lasting change in their lives. They are most often used to pay off debt and meet immediate expenses like school fees and consumer items. Research suggests that a significant proportion of those whose claims are settled in this way may *not* consider that justice has been done.

7. What has gone wrong, and why?

Impacts of restitution to date

A host of reviews, research reports, articles and books over the past 25 years report decidedly mixed results. In relation to rural cases, the impacts include limited material benefits from restitution in the majority of cases, the collapse of many of large-scale projects premised on partnerships with private sector partners, high levels of conflict amongst groups of claimants, the departure of many from the restored or new land, unhappiness about inappropriate and unworkable business plans (most drawn by former white farmers now earning their living as consultants) being imposed on beneficiaries by government, anger at elite capture, and feelings of betrayal.

Of course, there are some success stories as well, including the Ravele land claim in the Levubu Valley in Limpopo, a large sugar cane operation in KwaZulu-Natal, individual claimants who unofficially subdivide large tracts of arable land and farm as market-oriented smallholders or livestock producers, and some urban redevelopment projects in the Eastern Cape and elsewhere.

For a minority of claimants, including some in urban areas who were paid compensation, restitution has indeed succeeded in 'laying the ghosts of the past'. These remind us that the potential impacts of restitution on the symbolic level and in relation to identity and 'belonging', should never be underestimated – they are important, if often insufficient.

To provide a flavour of the continuing unhappiness of many people on the ground, take a look at the testimonies who spoke to the High Level Panel of Parliament in 2016. For example:

'Today I stand here before you and all I can account for is an eye-sore of ruins .. I can account for stretches of land that lie unattended and unproductive, I can also account for hundreds of poverty-stricken and underdeveloped beneficiaries of the failed restitution process. The millions of land is non-existent in the minds of many beneficiaries like me' (Mr K Dingiswayo at the North West hearing).

Why has the restitution of land been so ineffective?

(1) Procedures

Given its basis in 'rights', a key issue in restitution is the validation of claims. This requires rigorous procedures, to research claims and validate them or not, approve of lists of

beneficiaries, separate or amalgamate claims, form communal property institutions (i.e. Communal Property Associations or trusts); commission 'business plans' from consultants; undertake dispute resolution; monitor and evaluate progress; and so on. This has become a a bureaucratic nightmare. Not sufficiently recognised has been the problem of multiple and overlapping claims and the conflict this generates.

A key piece of the jigsaw puzzle has gone 'missing in action' for the most part: appropriate and effective post-settlement support, especially in rural contexts. Where some support has been provided, it has usually been premised on preserving the 'single farm' character of previous systems of land use – usually not suited to the needs and capabilities of beneficiaries. No officially ratified subdivisions have taken place on farms acquired through either restitution or redistribution in 29 years of land reform - but of course, beneficiaries subdivide all the time, in practice.

(2) Capacity

Inadequate state capacity is a key constraint identified in the literature, in relation to skills (e.g. research); support staff (e.g. record keeping: many claims and other documents have simply been lost); management and leadership; support for the establishment and operation of communal property institutions (CPIs); and of course budget – which has always been inadequate to the task. Capacity is also an issue at community level (e.g. in relation to the skills required to manage a large-scale commercial farm).

Attempts to simplify the process, such as through amalgamating several claims into single, 'omnibus' claims, have often had highly negative consequences and enhanced rather than reduce conflicts among claimants.

Corruption in restitution has been evident from the early 2000s and grown over the years, some examples being the Fred Daniels case in Mpumalanga and the Mala Mala game reserve claim. Former land owners like white farmers have been amongst the beneficiaries of corruption.

(3) Inadequate understandings of context and complexity

Stereotypes have not been a useful guide in the complex terrain of post-apartheid land reform: communities are never homogeneous, and are even less so after decades of social change; social differentiation along lines of race, ethnicity, gender and class is an unavoidable reality but has been poorly recognized; large-scale commercial farming models are inappropriate for even experienced and productive smallholder farmers; the position of farmworkers or labour tenants in restitution has never received enough attention; and the fact that many 'communities' would not be able to reach agreement on restoration or

alternative land or cash compensation was not sufficiently acknowledged. In urban contexts, the potential for developmental transformation of urban landscapes through land restitution has not been widely supported (i.e. very few restitution initiatives have attempted to use land claims to redesign and develop neighbourhoods at scale).

(4) Politics and power

At national level, the dynamics of ruling party politics began to seriously skew the process of restitution from around 2009. The new minister was in favour of traditional leaders (chiefs) being key beneficiaries, instead of rights-holding claimants, and encouraged 'tribal claims'. In 2014, the Amendment Act (to open up claims for a further 5 years) was poorly thought through and can perhaps be interpreted as an election stunt - with disastrous consequences. Many in the land sector saw this as the death knell of restitution.

At local level, poorly supported and overseen communal property institution have often been captured by elites, be they tribal or business-oriented or both. This hollows out our aspirations to a robust democracy - and thus mirrors state capture in its wider impacts.

My own analysis: 'idealistic and impractical'

South Africa's restitution programme is unique – never before has land reform attempted to change patterns of land ownership on such a large scale through a focus on the past, rather than a desired future. Australia and Canada? Much smaller in scale, and not aimed at social transformation. Germany after re-unification? Cash compensation only. Eastern Europe after the fall of communism? Limited, messy and incomplete….

The most successful land reform programmes in history have focused on possible futures rather than the past – for example, in Mexico, Bolivia, the Philippines, China, Japan, South Korea and Taiwan. Often they have been driven by popular energies from below, sometimes in alliance with (new) governments. In 2016 I wrote: "Restitution is complex, cumbersome, conflict-ridden, expensive, consumes scarce capacity and yields few sustainable benefits. The past has been a poor guide to land reform in the present."[6]

This leaves us with a very real dilemma. What to do? How to negotiate our way out of this cul-de-sac in a way that does not involve a second round of denying the rights of the victims of dispossession?

The bottom line: rights-based restitution can contribute relatively little to resolving the wider social-economic-and-political crisis we find ourselves in. But land reform, if it sets its

[6] Cousins, B., 2016. 'Land reform in South Africa is failing. Can it be saved?' *Transformation* 92: 135-157.

sights on root and branch transformation in the interests of the majority of the population, can do so.

Is there, then, another way to achieve land justice, redress and development? What might an alternative approach to the unresolved 'Land Question' that continues to haunt our society look like?

There is, in my view. it involves shifting the focus from the past to the present and possible and feasible futures. The key thrusts of land reform should be on:

(a) securing the land rights of all citizens through tenure reform, including the strengthening of democratic practices within social tenures such as 'customary' property regimes and in informal settlements;

(b) 'development through redistribution', as a key component of large-scale urban and rural restructuring. This should aim to open up livelihood and employment opportunities, for younger generations in particular, and to re-integrate the spatial divides and geographies created through policies of segregation and apartheid.

(What about the claimants of the right to restitution? "Given that relatively few claimants desire to be producers on the land, it may be wise to seek closure on restitution through the payment of compensation through standard settlement offers, as for most urban land claims" (Cousins 2016). I would now add: If there are land restitution claimants who genuinely want to re-occupy their land, and who can contribute in meaningful ways to such restructuring, then consideration should be given to bringing them to the front of the queue.

Are there any examples of transformative redistribution we can learn from, in South Africa today? Yes, a few, although they are exceptions, not the rule. Two examples:

(a) Ravele community in the Levubu valley in in Limpopo province. From a failing 'strategic partnership' with a private sector company to a community-run commercial farming venture producing subtropical fruit and nuts for export markets[7]
(b) Livestock farmers in the KwaZulu-Natal Midlands producing cattle and goats for both formal and informal markets.[8]

8. What would this mean in Simon's Town?

[7] Manenzhe, T. 2016.

[8] Alcock R., M. Geraci and B. Cousins, 2020.

As I said in my introduction, I do not have all that much local knowledge, but here are some suggestions on what an alternative approach to land redress and transformation in this context might look like:

1. Organize an association of land claimants, the urban poor, the emerging black/brown middle class and their progressive allies to advocate for the building of a diverse, vibrant and multi-class community in Simon's Town and across the South Peninsula;
2. Move from a purely individual, 'right-based' focus to the social context and collective action, without embracing naïve notions of 'community';
3. Identify public land and state holdings that could be sites of urban renewal and community regeneration, and engage with the Navy and the Minister of Defence on their potential contributions;
4. Build strategic partnerships with the City of Cape Town, the private sector and donors and create an investment portfolio for companies seeking to enhance their ESG profiles; explore practical lessons from successful projects of this kind;
5. Engage the City of Cape Town in relation to its land use and development policies, and propose that criteria for approval of projects should include contributions to social and environmental equity;
6. Ensure that these partnerships work in the interests of low-income citizens not existing elites through designing appropriate governance structures and processes; consider including direct representation of beneficiaries on these structures;
7. Give due emphasis to environmental and conservation concerns as integral to the notion of 'sustainable development'; these could include urban waste management and alien clearance projects;
8. Give special emphasis to projects which create employment opportunities for black/brown youth, working closely with the Jobs Fund and programmes that promote youth employment;
9. Consider the potential of heritage and historical sites and programmes to generate employment in the local tourist industry;
10. Build a compelling vision of an inclusive, equitable and sustainable Cape Town that can draw wide support across the political spectrum.

9. Conclusion

Pie in the sky? Maybe …. but maybe not, if the political will is there and the arguments are backed by numbers (of rands, yes, but also of people) ….. the key is organisation and mobilisation, energy and a clear-sighted focus on both desirable AND feasible aims and objectives.

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