

Reflections on the South African land reform programme: characteristics, dichotomies and tensions (part 1)*

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1 Introduction

Although the South African land reform programme shares some similarities with other land reform programmes embarked upon internationally,¹ it is in reality a very unusual programme. The sheer scope of the racially based approach to land reform under the previous political dispensation, the remnants of which are still prevalent today, necessitated an all-encompassing redress programme that encapsulated broadening access to land and redistribution, the upgrading of less secure rights (tenure reform) and restoring that which was taken, or restitution. To this end a particular South African land reform programme, which exhibited specific characteristics, and also impacted on the unlawful occupation of land and eviction, was sculpted.

Given that South Africa has been grappling with land reform issues cursorily since 1991 and intensively since 1994, the question may be posed as to whether the land reform programme so developed has indeed achieved the objectives it set out to achieve. In this context some consideration of what “land reform” entails, as well as the (unique) characteristics of the programme conducted here, is also called for. In this light a two-pronged question is posed, namely (a) whether the mechanics of intervention have resulted in a sensible, aligned programme that, overall, achieves the objectives and aims it set out to achieve; and (b) whether a compelling argument can still be made for continuing with land reform – in general, but also with regard to the various sub-programmes. In this process of reflection the inherent dichotomies and resulting disconnects inevitably emerge.

Reflecting on the South African land reform programme in order to address the two-pronged question posed above therefore embodies two “internal” processes. The first of these is to give some consideration to what land reform and the business of land reform entail, linked to the unique characteristics of the land reform programme overall, as well as the various sub-programmes. This process is followed by, secondly, an exposition of the emerging dichotomies and disconnects. In light of the disconnects and dichotomies the further two-pronged question is posed whether an aligned programme has indeed taken shape, so that an argument in favour of continued land reform can be advanced. Accordingly, the contribution is divided into two parts: part 1 encapsulates the business of land reform and the unique

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¹ For jurisdictions sharing comparable colonial pasts, see *eg* in general Kirby and Coleborne (eds) *Law, History, Colonialism The Reach of the Empire* (2001); Whitt *Science, Colonialism and Indigenous Peoples* (2009) 14-25.

South African characteristics, while part 2 deals with the resultant dichotomies and disconnects.

2 *Land reform and the “business of land reform”*

As no fixed definition of land reform exists, the crux of a specific land reform programme is determined by the particular aims and needs of the jurisdiction in question. While some land reform programmes are location- or continent-specific,² some other reforms are anchored in ownership-paradigms,³ or have political and time-specific origins.⁴ With regard to the latter, different generational land reform programmes may further be identified, spanning from first-⁵ to second-⁶ and more recently, to third-generation programmes.⁷

As regards the particular jurisdictional realities, it is noteworthy that in South Africa, historically, the approach to land has been consistently intertwined with control.⁸ Underlying the links between land, citizenship and labour was an official, distinct racial policy.⁹ While South Africa shares some similarities with other jurisdictions that have also emerged from a colonial past,¹⁰ as mentioned above, the sheer scope and degree of the racial dimension within which the land issue was approached makes South Africa unique. Not only were the number of racially based land measures that had been enacted overwhelming, but the impact thereof – regarding complexity and effect – was hardly comprehensible. In this light a uniquely South African-oriented land reform programme, engineered to reflect *on all of these dimensions*, had to be developed.

In this context the “usual” or traditional approach to land reform internationally, essentially comprising the redistribution of (agricultural) land,¹¹ was insufficient, and an all-encompassing land reform programme was required. Therefore, the South African approach to land reform can be defined as the initiatives, embodied in legislative, policy and other measures, constituting actions and providing for mechanisms aimed at broadening access to land and effecting redistribution, improving security of tenure and restoring land or rights in land or providing equitable redress. Overall, also embodied in this concept is the operational as well as the supportive and supplementary frameworks, including relevant strategies, papers, plans and implementing frameworks. In the South African context these initiatives also impact on unlawful occupation of land and eviction.

² *eg* similar land reform approaches in the whole of South America, see Adams “Land reform: new seeds on old ground” October 1995 *Overseas Development Institute* 5 at <http://www.odi.org.uk/resources/docs/2979.pdf> (18-06-2013).

³ *eg* substituting existing ownership paradigms by way of peasant wars and uprisings – see Bernstein “Agrarian questions of capital and labour: some theory about land reform (and a periodisation)” in Ntsebeza and Hall (eds) *The Land Question in South Africa* (2007) 27 32.

⁴ *eg* state-led developmentalism following decolonisation in Asia and Africa – Bernstein (n 3) 33.

⁵ This is where an in-depth land reform programme is being conducted for the first time nationally, on a large scale.

⁶ This is where land reform has already occurred, but is attempted anew, in a whole new format, *eg* land reform approaches following the collapse of communism in the former USSR states.

⁷ This is where land reform remains operative in principle, but the approach has been adapted to reflect urgent (modern) concerns like development and sustainability.

⁸ Van der Merwe “Land tenure in South Africa: a brief history and some reform proposals” 1989 *TSAR* 663 685.

⁹ See ch 3 in Pienaar *Land Reform* (2014).

¹⁰ See in general Kirby and Coleborne (n 1); Whitt (n 1).

¹¹ Lipton *Land Reform in Developing Countries Property Rights and Property Wrongs* (2011) 327.

While sustainability, development and economic growth has always been the underlying aims of land reform programmes generally,¹² the recent developmental paradigm has made them more pronounced.¹³ Though South Africa has essentially a first-generation land reform programme, being conducted for the first time at grand scale, it has also, since 2000¹⁴ and more markedly since 2009, linked up to developmental goals as well. In this light some “third-generation” elements also resonate within the South African land reform programme.

The “business of land reform” is in nature complex and multi-dimensional. It extends beyond property and land-law issues and also impacts on socio-economic, anthropological, developmental, environmental and sociological domains.¹⁵ While land reform requires a sound basis and foundation, flowing from legitimate points of departure, it is also a continuous process that requires monitoring, responses, adaptations and re-alignment. A particular land reform programme may thus undergo different developmental stages and may embody different phases, resulting in distinctive cycles of reform. In the South African context it is embedded in the constitution, in the property clause,¹⁶ and is informed and guided by national and, to a lesser extent, international policy frameworks, documents and guidelines.¹⁷

The business of land reform requires the concerted effort and focus of many role players, at various levels. In this regard government departments, organs of state and state institutions are involved, each empowered and tasked with particular functions and responsibilities. Non-governmental organisations functioning at grassroots level are also integrally involved in the overall success of the land reform programme.¹⁸ Private individuals, land owners, occupiers, tenants, beneficiaries and potential beneficiaries under the land reform programme are likewise affected. In this process the courts are invariably the forum where contrasting and conflicting rights and aspirations are weighed, balanced and adjudicated on. Statutory provisions are interpreted and applied, legal concepts are analysed and scrutinised, duties and responsibilities are clarified and extended and, inevitably, case-specific and constructive remedies are crafted and implemented.

Land underlies and supports much of the life on the planet, physically underpins the environment and production activities and plays a major role in jurisdictions’

¹² White Paper on Land Policy (1997) 4.

¹³ In 2009 the department of land affairs and agriculture was restructured to form the department of rural development and land reform in light of the Comprehensive Rural Development Programme, which was followed by the Rural Development and Land Reform Strategic Plan (2010-2013). See also Du Plessis, Pienaar and Olivier “Land matters and rural development: 2009 (2)” 2009 *SAPL* 588 608-610.

¹⁴ Hall “Two cycles of land policy in South Africa: tracing the contours” in Anseeuw and Alden (eds) *The Struggle over Land in Africa* (2010) 175 176-179.

¹⁵ McAuslan “Land policy: A framework for analysis and action” 1987 *J Afr L* 185 206; Hall and Cliffe “Introduction” in Hall (ed) *Another Countryside? Policy Options for Land and Agrarian Reform in South Africa* (2009) 4.

¹⁶ s 25(5)-(9).

¹⁷ Cheadle, Davis and Haysom *South African Constitutional Law The Bill of Rights* (2007) 332; Dugard *International Law A South African Perspective* (2011) 347-348; Cotula “Securing land rights in Africa – trends in national and international law” in Otto and Hoekema (eds) *Fair Land Governance How to Legalise Land Rights for Rural Development* (2012) 58 76-79. See in general Chenwi *Evictions in South Africa – Relevant International and National Standards* (2008).

¹⁸ Fortuin “Struggles with activism: NGO engagements with land tenure reform in post-apartheid South Africa” 2010 *Journal of Modern African Studies* 383-411.

social and political constructs.¹⁹ McAuslan underlines that “[t]here are few more important aspects to the life of any society than land and the relations between land and human kind. Economists recognize land as being one of the three economic fundamentals of society along with labour and capital.”²⁰ In an African context a further dimension comes into play: “land is fully embodied in the very spirituality of society.”²¹ People have personal links with land, “because that is where people’s accomplishments have sprung from and where, like their ancestors, they will be buried. In this sense people own the land.”²² Conversely, “[t]he land owns men and women; they are there to take care of the land”.²³ Land is thus not only integral in making a living – both within an economic or social paradigm, but also integral in reconstructing and healing societies: “[a]ccess to land lies at the heart of social, economic and political life in most of Africa, and thus is part of the dynamics of conflict, peace-building processes and post-conflict reconstruction, particularly for conflicts involving lengthy population displacement”.²⁴

While land is central to land reform, it also has cross-connections with access to housing, water and basic services, impacts on planning and development, gives effect to cultural rights and religious beliefs, invariably embodies the right to family life and dignity and extends to the administration of land, including survey, deeds and registries.

The business of land reform is therefore intricate, time-consuming and essentially ongoing. It is within this context that the underlying idea that land reform is a temporal process that may take more than one generation to process completely and to bring to fruition comes to the fore. Given the complexities involved, as well as the objectives to be achieved, it is clear that the South African context called for a unique programme. Therefore, before the question is posed whether an argument to proceed with land reform may still be made out, as explored in more detail in the second part of the contribution, the particular characteristics of the uniquely South African land reform programme are set out below.

3 *Characteristics of the South African land reform programme*

3.1 General characteristics

In light of the reasons for embarking upon a land reform programme in the first place, coupled with the general approach to land reform overall and the structures and mechanisms incorporated into the programme, various general characteristics of the South African land reform programme can be highlighted. For this purpose four main categories may be distinguished under which further particular characteristics emerge: (a) characteristics dealing with the *origin* of the land reform programme; (b) the *scope* of the programme; (c) the *structure* and the *mechanics* thereof; and (d)

¹⁹ See generally Bruce “Simple solutions to complex problems: Land formalisation as a ‘silver bullet’” in Otto and Hoekema (eds) (n 17) 31-56; Rudman “Re-defining national sovereignty: the key to avoid constitutional reform? Reflections on the 2011 Green Paper on Land Reform” 2012 *Stell LR* 417-437; Metzger and Engerman “Some considerations of ethno-nationality (and other distinctions), property rights in land and territorial sovereignty” in Engerman and Metzger (eds) *Land Rights, Ethno-Nationality and Sovereignty in History* (2004) 7-28.

²⁰ McAuslan (n 15) 185.

²¹ AUC-ECA-AfDB Consortium *Frameworks and Guidelines on Land Policy in Africa* (2010) 8.

²² Strathern “Land: intangible or tangible property?” in Chesters (ed) *Land Rights* (2009) 13 14.

²³ Strathern (n 22) 14.

²⁴ Huggins “Shades of grey: post-conflict land policy reform in the Great Lakes Region” in Anseeuw and Alden (eds) (n 14) 37.

the *nature* of the programme. The particular characteristics of the individual sub-programmes are dealt with in more detail below.²⁵

3.1.1 The origin and roots of the land reform programme

a Land reform is a product of a peaceful transition

The South African land reform programme resulted from a peaceful transition that culminated in a negotiated compromise and settlement.²⁶ These considerations had very interesting implications for land reform generally, but in particular with respect to the approach to the redistribution and restitution programmes. Because the transition was negotiated, a variety of interests were reflected in and incorporated into the final settlement.²⁷ In this light the protection of existing rights, including private ownership and land rights, was confirmed. Correspondingly, transforming the ownership paradigm was also provided for. In this regard broadening access to land and effecting redistribution were linked to the market-based or market-assisted approach, founded on the willing-buyer-willing-seller principle.²⁸ Consumer confidence and international investment considerations, linked to the market-based approach, meant that the government would not be intrinsically involved in redistribution but would play a facilitative role only. This, linked to the neo-liberal economic approach²⁹ and statism,³⁰ limited the government's actual role in the redistribution programme, especially initially.

Likewise, the negotiated settlement entailed a limited restitution programme in scope and time. Colonial dispossessions would be excluded from the restitution programme³¹ and existing land rights would be protected.³² To this end restitution claims were lodged against the state, involving no liability for land owners.

Recent developments indicate that,³³ though the root of the land reform programme as embodying a *product of a negotiated settlement* remains unchanged, the basic tenets of the particular sub-programmes can alter and shift, especially in light of an increasingly developmental focus. In this regard the willing-buyer-willing-

²⁵ See 3.2 below.

²⁶ Roux "Land restitution and land reconciliation in South Africa" Paper presented at Transitional Justice in South Africa Conference, 3-4 Nov 2006, University of Cambridge 9.

²⁷ Ntsebeza "Land redistribution in South Africa: the property clause revisited" in Ntsebeza and Hall (eds) (n 3) 108 115 underlines that s 28 of the interim constitution was a compromise between the ANC and the NP positions.

²⁸ Van den Brink, Thomas and Binswanger "Agricultural redistribution in South Africa: towards accelerated implementation" in Ntsebeza and Hall (eds) (n 3) 152 154-155; Ntsebeza (n 27) 107-131; Marais *South Africa Pushed to the Limit* (2011) 134; Lahiff "'Willing buyer, willing seller': South Africa's failed experiment in market-led agrarian reform" 2007 *Third World Quarterly* 1577 1583-1584.

²⁹ Marais (n 28) 134.

³⁰ Helliker "Land reform and marginalised communities in the Eastern Cape countryside of post-apartheid South Africa" in Helliker and Murisa (eds) *Land Struggles and Civil Society in Southern Africa* (2011) 43 46.

³¹ S 25(7) provides that only loss of land or rights in land after 19-06-1913, the date on which the Black Land Act 27 of 1913 commenced, will be dealt with under the restitution programme.

³² S 25(1) and (2) provide, respectively, that no one may be deprived of their property or expropriated of property, except under certain conditions.

³³ The *Land Manifesto* published in celebration of Mandela's 95th birthday, published on 22 July 2013 http://www.dla.gov.za/phocodownload/1913/DRDLR_2009Manifesto_Report.pdf (28-08-2013) mentions a new development in the form of a Land Protection Bill of 2013 with an emphasis on broadening access to land for citizens (285). This may have implications for foreign land ownership, although the details of the bill are as yet unclear.

seller-principle stands to be abolished and greater involvement of government in the redistribution of land is provided for.³⁴ Re-opening the land claims process is furthermore envisaged with regard to the restitution programme.³⁵

b Land reform is embedded in the constitution

It is no coincidence that the land reform programme is located in the property clause, section 25 of the constitution. This reform-centred approach has important implications for all role players generally and for property law and land reform in particular. Van der Walt underlines that

“[p]ost-apartheid property law is required to help bring about reforms that would eradicate that [inequitable] legacy as far as possible. Property law is therefore deeply involved in the constitutional project of reversing the effects and the legacy of apartheid as a broad socio-economic and political state of affairs.”³⁶

Land reform is one critically important sector within the arena of property law that is integral to reversing the inequitable legacy and instrumental in transforming society at large. However, land reform alone is not enough to effect all of the changes that are needed. For this, systemic and institutional reforms – that have nothing to do with the transfer of land as such – are required.³⁷ Hand-in-hand, the restructuring of property law (systemic and institutional) and land reform measures and designs may bring about the changes so desperately needed.

Presently, a clearly reform-oriented property clause embeds the various sub-programmes of the overall land reform constituting redistribution in section 25(5), tenure reform in section 25(6) (read with section 25(9)) and restitution in section 25(7).³⁸ This has important implications for (a) the approach to and interpretation of all legislative measures that have been promulgated under section 25; (b) the responsibilities and duties of relevant role players, especially with regard to the government; (c) the choice of law source in order to enforce claims and identify causes of action; (d) the limitation of property rights; and (e) the interaction of section 25 with other fundamental rights provided for in the constitution.

Both with regard to interpreting the property clause, section 25, and its role and function within contemporary South Africa, Mogoeng CJ recently stated in *Agri South Africa v Minister for Minerals and Energy*:³⁹

“The approach to be adopted in interpreting section 25, with particular reference to expropriation, is to have regard to the special role that this section has to play in facilitating the fulfilment of our country’s nation-building and reconciliation responsibilities, by recognizing the need to open up economic opportunities to all South Africans. This section thus sits at the heart of an inevitable tension between the interests of the wealthy and the previously disadvantaged. And that tension is likely to occupy South Africa for many years to come, in the process of undertaking the difficult task of seeking to achieve the equitable distribution of land and wealth to all.”⁴⁰

³⁴ The policy framework for the acquisition and valuation of land within the land reform context was published in 2012 and a Property Valuation Bill was published for comment in May 2013 (GN 504 of 23-05-2013 in *GG* 36478).

³⁵ The Restitution of Land Rights Amendment Bill 35 of 2013 was published on 13-09-2013 in terms of which the lodgement of claims is to be re-opened with a submission date set at 31-12-2018.

³⁶ Van der Walt *Property and Constitution* (2012) 12.

³⁷ Van der Walt (n 36) 3.

³⁸ Also read with s 25(8) of the constitution.

³⁹ 2013 4 SA 1 (CC).

⁴⁰ par 60.

When approaching and interpreting land reform-related measures in particular, three further considerations come into play.⁴¹ Firstly, the values underpinning land reform generally; secondly, the interpretative approach towards legislation; and thirdly, the link between land, culture and customary law – where relevant.⁴² Particular constitutional values underpinning land reform include the commitment to orderly land reform, as underscored in *Port Elizabeth Municipality v Various Occupiers*,⁴³ *ubuntu* – in the sense that it is linked with humanness;⁴⁴ and dignity – in light of the tremendous assault on dignity during the pre-constitutional era.⁴⁵ Overall, land reform also supports the basic values of equality, dignity and freedom.

The purposive approach, also employed with regard to the constitution itself, is furthermore relevant when approaching and interpreting land reform measures in particular. This approach is linked to teleological interpretation, which is based on past experiences, but is still forward-looking. Therefore, past experience and the lessons learnt from that are also relevant when land reform measures are interpreted.⁴⁶

Though often contested,⁴⁷ the property clause, when approached and interpreted purposively, supports reform and transformation. It endorses a commitment to transforming society,⁴⁸ of which property law constructs and land reform are integral components.

c Land reform embodies different forms of justice

In the South African context land reform also embodies a sense of justice and fairness. That is due to the historical racially based approach to land whose implications are still prevalent today. Restorative justice is aimed at historical redress. This is engrained in the overall land reform programme that is aimed at redress, but is especially relevant with respect to the restitution programme. While redistributive justice also impacts on the aftermath of the racial approach to land, it is specifically linked to present inequalities and existing needs. This kind of justice also takes cognisance of what persons deserve, need or demand, on the basis of equality.⁴⁹ Accordingly, redistributive justice is more relevant in the redistribution programme where access to land is broadened and land is redistributed, to persons most in need thereof. Redistributive justice also resonates in the tenure reform programme on the basis of needs and equality, keeping in mind the disparate approach to tenure where private individual ownership was essentially preserved for a particular portion of society with lesser rights and insecure tenure for the rest.⁵⁰

⁴¹ See in general Pienaar and Brickhill “Land” in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2007) ch 48 as a whole.

⁴² See eg the approach the constitutional court followed in *Alexkor (Pty) Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) where it emphasised the importance of approaching the nature of the land right in question from the perspective of customary law, as well as the community’s history and usages.

⁴³ 2005 1 SA 217 (CC), 2004 12 BCLR 1268 (CC) par 20.

⁴⁴ (n 43) par 37.

⁴⁵ Pienaar and Brickhill (n 41) 48-5 – 48-8.

⁴⁶ See for more detail Pienaar and Brickhill (n 41) 48-5 – 48-8.

⁴⁷ Ntsebeza (n 27) 107-131.

⁴⁸ Liebenberg *Socio-Economic Rights* (2010) 97-100.

⁴⁹ Van den Brink *et al* (n 28) 152 154-155.

⁵⁰ Van der Merwe and Pienaar “Land reform in South Africa” in Jackson and Wilde (eds) *Reform of Property Law* (1997) 334-349.

Procedural justice is also embodied in the land reform programme. This is prevalent in all the land reform sub-programmes, where processes and procedures are set out.⁵¹ It also extends to the regulation of unlawful occupation of land and eviction.⁵² Putting processes and procedures in place ensures that claimants, potential beneficiaries and persons generally are offered the chance of accessing the benefits by following the required procedures and processes.

The land reform programme does not embody retributive justice. That kind of justice entails punitive justice where persons are punished in the process of transformation and reform on the basis of their participation in unfair, unlawful or discriminatory practices or on the basis of their benefiting from them.⁵³ Retributive justice was excluded due to the fact that the land reform programme was the product of negotiated settlement, which, concerning property, is also reflected in section 25(1) and (2) of the constitution.

3.1.2 The scope of the land reform programme

a Land reform relates to both the South African common law and customary law

Right from the outset it was clear that the South African common law and the customary law systems would simultaneously prevail and be impacted upon under land reform. This was important, as it indicated that *both systems* of law, embodying forms of tenure, ownership and matters linked therewith, would be eligible for scrutiny and transformation and that one system would not be swept off the table in principle.⁵⁴

While South African tenure is routinely typified as consisting of two main tenure forms, or a “dual tenure system”, as mentioned above, in reality an additional “transitional” tenure system has also developed in some areas in the country.⁵⁵ This third form of tenure is a hybrid form consisting of statutory and customary law tenure forms that developed spontaneously in response to specific needs and demands at grassroots level.⁵⁶ The complexity of the South African land control system, and correspondingly the land reform process, is compounded by the fact that more than one legal system is relevant.

b Rural contexts are emphasised in land reform

Understandably, the emphasis of the land reform programme has been on rural areas and the needs and demands within these contexts. Statistics have underlined the

⁵¹ See Pienaar (n 9) ch 7, ch 8 (tenure reform) and ch 9 in general.

⁵² See in general Pienaar (n 9) ch 10.

⁵³ Fay and James “Restoring what was ours” in Fay and James (eds) *Rights and Wrongs of Land Restitution* (2009) 6-9; Hall “Reconciling the past, present and the future” in Walker *et al* (eds) *Land, Memory, Reconstruction and Justice* (2010) 17-38.

⁵⁴ The dual focus on the South African common law and customary law also implied that less emphasis was placed on issues pertinent to the coloured community in South Africa, compared to black communities. While land reform is essentially racially neutral, as was illustrated when white persons were also successful with land claims under s 2 of the Restitution of Land Rights Act 22 of 1994, black land rights and issues are routinely emphasised more than coloured ones. That is due to the sheer scope, degree and impact of racially based measures with respect to black land rights. In practice coloured land rights had essentially been redressed by way of the measures regulating coloured rural areas (Transformation of Certain Rural Areas Act 94 of 1998) and land claims resulting mainly from group areas disposessions.

⁵⁵ Cousins, Hornby, Kingwell, Royston and Trench *Perspectives on Land Tenure Security in Rural and Urban South Africa* (2005) 26-27.

⁵⁶ Cousins *et al* (n 55) 26-27.

great disparities between rural and urban contexts, especially with respect to levels of poverty.⁵⁷ Since 2009 rural development and land reform had been inextricably linked, not only with regard to departmental design,⁵⁸ but also with regard to development programmes that feed into land reform initiatives. While the pressing need is clear, it is a pity that the overemphasis on rural contexts has led to a neglect of the urban environment. This is especially prevalent with regard to access to land, tenure options in urban and peri-urban areas and, correspondingly, unlawful occupation.⁵⁹ Increasingly, pressure for land is being experienced in urban and peri-urban areas. Given that the promotion of rural development might stem the tide of in-migration to cities and urban areas generally, this focus has to be retained, but coupled with a concerted effort to address urban tenure and access issues urgently.

3.1.3 The structure and mechanics of the land reform programme

a Land reform is guided by various policy choices

Embarking upon the various land reform programmes is not discretionary: it is a constitutional imperative anchored in sections 25(5), (6) and (7) respectively and supported by sections 25(8) and (9) of the constitution. However, developing and crafting particular policy approaches and documents is indeed to some extent a matter of choice. In this regard the choice is informed by various factors and considerations including political views, economic, social and developmental factors and considerations.

South Africa's being both a developing country and a democracy dealing with redress – on a scale that has not been experienced before – has impacted greatly on the kind of land policy that had to be drafted. In this light some of the goals and aims that had to be achieved within this context were contradictory, which inevitably also impacted on the kind and content of policy that was finally drafted. In this regard Hall underlined that

“[a]t the heart of the [South African] programme there is tension between the objectives of “equity” and “efficiency”. The former aims to bring about social, economic and political relations, at the level of individuals, households and communities, and races, while the latter aims to improve overall output and factor productivity in agriculture.”⁶⁰

Policy documents have specific and important roles and functions; they have to be all-encompassing and multi-dimensional, direction-giving and visionary. The guidelines, principles and concepts must be of such a nature that they can be relayed, effectively, into statutory and other measures. It has to be clear when an intervention or interventions can take place, how and for which purposes. The tools and mechanisms that have to be employed in order to achieve the objectives have to be clear and functional. Because different needs and aspirations come into play, and because some aims and objectives may be conflicting, the business of policy

⁵⁷ By focusing on poverty share as well as the incidence of poverty, it is clear that households in traditional areas show the highest levels of poverty and also have the largest share of poor households in the country – almost half of all poor households in South Africa were found in traditional areas, located in rural South Africa – Statistics South Africa *Men, Women and Children Findings of the Living Conditions Survey* (2013) 21.

⁵⁸ Since 2009 the relevant department is the department of rural development and land reform.

⁵⁹ Royston “Security of urban tenure in South Africa: overview of policy and practice” in Durand-Lasserve and Royston (eds) *Holding Their Ground* (2002) 165-181.

⁶⁰ Hall (n 14) 175-192.

drafting is messy, complex and difficult to get right – both on a conceptual and a practical level.

Within the South African context a very particular kind of policy document was required; over and above the “usual” objectives that national land policies normally pursued,⁶¹ an additional *reform-oriented thrust* – with particular tools and mechanisms – was required. This has meant that, since the publication of the first national policy in 1997,⁶² the “usual” as well as the reform-oriented elements have been scrutinised and evaluated, continuously. Over time, particular key policy issues have emerged, and this has necessitated further policy-making. These key issues revolved around approaches to land, land reform and the market and the state’s role in the process, as well as beneficiary targeting, planning and design and monitoring. It was especially the market-based or market-assisted approach to land reform that impacted on the acquisition of land for land reform purposes, and has been commented on frequently.

Since 2009, when greater emphasis was placed on rural development in particular, a variety of activities have occurred, linked to land and land reform. These activities resulted in various plans, programmes and policy documents. In the tenure reform domain the Draft Tenure Security Policy was published in December 2010. The publication of the long-awaited *Green Paper on Land Reform* occurred in 2011 and a policy framework for the acquisition and valuation of land within the land reform context was published in 2012. While the policy framework of 2012 proved to be a detailed and substantiated document premised on searching for solutions and linked to particular legislative developments, the *Green Paper* was rather disappointing. Despite urgent needs for a complete, detailed and all-encompassing policy framework with motivated and grounded policy choices, that particular dimension is still lacking. While three additional policy frameworks were published in July 2013, dealing respectively with recapitalisation and development; state land lease and disposal; and agricultural landholding addressed some of the short-comings, new disconnects and tensions have ultimately emerged. Accordingly a policy framework is in the process of developing that is complex, top-heavy and difficult to administer and manage.

b Land reform is characterised by an intricate grid of legislative measures

Much legislative activity occurred within the overall arena of land reform since the first exploratory land reform programme was embarked upon pre-1994.⁶³ Viewed from an overarching perspective, different categories of legislative measures emerge. While some measures pre-date the constitutional era, most statutes flowed from the constitutional imperative. Though the Restitution of Land Rights Act 22 of 1994 is pertinent to the restitution programme in particular, most of the other legislative measures are not limited to particular sub-programmes, but extend boundaries and interact with measures in and across sub-programmes. It is quite possible therefore that one measure may have relevance for more than one sub-programme.⁶⁴

⁶¹ eg promoting the optimal utilisation of land within relevant regional, national and international contexts.

⁶² (n 12).

⁶³ An exploratory or first phase land reform programme was embarked upon under the De Klerk government after the publication of the White Paper on Land Reform in 1991. See Van der Merwe and Pienaar (n 50).

⁶⁴ eg the Extension of Security of Tenure Act 62 of 1997 (ESTA) has relevance for both the tenure reform and the redistribution programmes.

It is especially in relation to unlawful occupation and eviction that the complexity of legislative measures comes to the fore. Overall, the following categories may be distinguished: (a) one act dealing with the regulation of unlawful occupation and eviction in particular, namely the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE); (b) legislative measures that regulate land matters generally, while also impacting on eviction – including rural contexts,⁶⁵ health, safety and security,⁶⁶ danger and emergency situations;⁶⁷ (c) measures that place limitations on evictions;⁶⁸ and (d) instances where judicial oversight is required where eviction occurs.⁶⁹ Accordingly, particular measures have application to specific persons and contexts. That means that a specific legislative measure has to be employed where eviction is at stake, having implications for which forum to approach, jurisdiction, processes, procedures and remedies. In practice, it may be quite difficult to draw the necessary distinctions on the facts in order to employ the correct measure.⁷⁰

Despite the grid of measures, gaps still exist, especially from the viewpoint of the occupier who stands to be evicted. While land owners and authorities have a multitude of measures at their disposal, depending on the particular circumstances, there is *no single statute that protects occupiers against unlawful eviction from the outset*. Contrary to the motivation behind promulgating the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, this measure is only *reactive* and only becomes relevant once it has been invoked. Accordingly, where persons are evicted unlawfully, the only options for occupiers so affected to bring their circumstances to the attention of the court, are the common law remedy of the *mandament van spolie* where it is applicable; lodging an application for an interdict; or relying in principle on section 26(3) of the constitution.⁷¹ In this respect the subsidiarity principle,⁷² which is generally quite effective in the land reform sub-programmes,⁷³ is of no avail to occupiers who have been evicted unlawfully. In this regard the complexity of legislative measures has still resulted in some categories of persons falling between the cracks.

c Land reform relies on the integral involvement of courts

Land reform cannot function without the active involvement of South African courts. This is the case because the actual weighing, balancing and adjudication of

⁶⁵ *eg* ESTA and the Land Reform (Labour Tenants) Act 3 of 1996.

⁶⁶ *eg* the National Building Regulations and Building Standards Act 103 of 1977; the Trespass Act 6 of 1959 and the Domestic Violence Act 116 of 1998.

⁶⁷ *eg* the Disaster Management Act 57 of 2002.

⁶⁸ *eg* the Interim Protection of Informal Land Rights Act 31 of 1996; the Rental Housing Act 50 of 1999 and the Restitution of Land Rights Act 22 of 1994.

⁶⁹ *eg* s 66(1)(a) and 67 of the Magistrates' Courts Act 32 of 1944 and Rule 31(5) of the Uniform Rules of Court may impact on eviction with regard to sales in execution in pursuit of satisfying debts or foreclosure concerning mortgage bonds.

⁷⁰ Eviction applications are invariably lodged under PIE that ought to be processed under the ESTA and *vice versa*.

⁷¹ See in this regard Boggenpoel and Pienaar "The continued relevance of the *mandament van spolie*: recent developments relating to dispossession and eviction" 2013 *De Jure* 998-1021.

⁷² The principle was developed by way of constitutional court judgments and is dealt with in detail by Van der Walt *Constitutional Property Law* (2011) 66-68. Essentially it entails that the person who avers that a constitutional right was infringed may not principally rely on the constitution itself, but has to refer to the particular legislation that was enacted to protect the right in question.

⁷³ This means that, *eg*, where land claims and restitution are concerned, the claims have to be lodged under the statute that was specifically promulgated to give effect to s 25(7) (restitution) and should not be lodged under s 25(7) itself.

rights, interests, claims and demands occur here, in this forum, at different levels. While the land claims court is intrinsically involved in land reform issues and has exclusive jurisdiction with regard to labour tenant issues and matters peculiar to restitution claims, other courts, also at a lower level, are also involved in matters linked to land reform. In this regard magistrates' courts are routinely the first forum to be approached when the Extension of Security of Tenure Act 62 of 1997 (ESTA) issues are dealt with. Acting in supervisory capacity, the land claims court reviews all eviction orders handed down by these courts,⁷⁴ building on an ever-increasing body of case law comprising guidelines and directives. The land claims court has also been instrumental in providing guidelines concerning the legal requirements for lodging claims, granting costs orders against the state, the employment of framework agreements effecting restitution and adjudicating on the non-restoration of land. More recently, interesting developments have occurred with regard to the consideration of section 33 factors in determining whether actual restoration should take place or equitable compensation ought to be ordered instead.⁷⁵ In line with its duties and responsibilities, the court has contributed greatly to interpreting and applying the various legislative measures pertinent to its jurisdictional domain, in particular the Restitution of Land Rights Act 22 of 1994. In future this court will be called upon much more for guidance concerning just and equitable compensation and issues linked with expropriation.

Courts are also integral in giving form and format to rights enshrined in the bill of rights, especially with respect to access to housing, impacting on unlawful occupation and eviction. Gradually the boundaries outlining the duties and responsibilities of the government in general, but also its different spheres and organs of state have been delineated. This has been the case with regard to both state and private land, including instances where eviction applications were initiated by the state in relation to private land.⁷⁶ Interesting and important developments occurred in this context. Being a multi-dimensional, context-sensitive issue, judicial officials (judges) have expressed their frustration with the task at hand.⁷⁷ While courts have been called upon to craft case-specific and effective court orders, judicial officials have also been alerted to their duties to apply the law and operate within its confines and have been forewarned not to enforce their own views and ideas.⁷⁸ Toeing the line so as not to overstep the separation of powers is also part-and-parcel of this kind of legal adjudication. Inevitably, determining whether the granting of an eviction order would be just and equitable, and linking that decision to a future date for eviction to take place, is a difficult, complex process that requires the consideration of all circumstances within a context of humanity and dignity.

⁷⁴ Under the automatic review procedure provided for in s 19(3) of ESTA.

⁷⁵ *eg see The Baphiring Community v Tshwaranani Projects* CC 2014 1 SA 330 (SCA).

⁷⁶ See Wilson "Planning for inclusion in South Africa: the state's duty to prevent homelessness and the potential of 'meaningful engagement'" *Urban Forum* (7-06-2011).

⁷⁷ See *eg Willis J in Johannesburg Housing Corporation (Pty) Ltd v The Unlawful Occupiers of the Newtown Urban Village* 2013 1 All SA 192 (GSJ) par 14: "The reason is that any judge whose *unhappy lot* it is to decide such applications, needs to know the issues in respect of which he or she needs, in an alerted watch, to be prepared" (own emphasis). Willis J also handed down the judgment in *Emfuleni Local Municipality v Builders Advancement Services* CC 28-04-2010 (GSJ) (unreported) [but see 2010 4 SA 133 (GSJ) – ed] where he underlined the difficulties judges are faced with and the risk of overstepping boundaries which may blur divisions between different arms of government.

⁷⁸ *Dada v Unlawful Occupiers of Portion 41 of the Farm Rooikop* 2009 2 SA 492 (W).

3.1.4 The nature of the land reform programme

a Land reform is a temporal process.

In South Africa land reform was approached in two phases. The first phase, which was initiated under the De Klerk government in 1991, was an exploratory land reform programme only.⁷⁹ Though it was grounded in a solid policy foundation constituting the *White Paper on Land Reform*, it was not complete and not in-depth enough. However incomplete or insufficient the initial land reform steps had been, the need for such an intervention at that stage already was undeniable. This was clear from the intricate, complex and diverse land control system that prevailed in 1991, consisting of four main categories of land, namely (a) coloured rural areas; (b) rural areas generally comprising traditional black areas; (c) urban areas for black occupation; and (d) the rest of South Africa.⁸⁰ Within each category different tenure forms prevailed, depending on whether the land was South African Development Trust land, located within the national states or self-governing territories or whether the land was within so-called “white” South Africa, but designated for black or non-black occupation. Generally speaking, more secure tenure prevailed in white South Africa, with notable exceptions pertaining to land that had been designated for and occupied by blacks within white South Africa.

The first phase of land reform removed the racial element from all land-related measures and prohibited further discrimination on the basis of colour, race, age and religion.⁸¹ It was grounded in a sound, though limited policy embodied in the 1991 *White Paper on Land Reform* and coincided with the promulgation of measures dealing with (a) tenure issues by way of the Upgrading of Land Tenure Rights Act 112 of 1991; (b) restitution by establishing the commission on allocation of land in 1991; and (c) agricultural and urban settlement, thereby embodying some elements of redistribution under the Provision of Land and Assistance Act 126 of 1993. Apart from addressing these particular issues that had to be dealt with on an urgent basis, the exploratory measures also guided the physical reunification of South Africa⁸² and provided for matters connected therewith.

Though necessary and undeniably important, the exploratory land reform measures were neither all-encompassing, nor visionary. Conversely, the material provisions aimed at tenure reform, redistribution and restitution were intrinsically restricted and short-sighted. The latter defect particularly embodied a lack of synergy with other connected and related issues that impacted on land generally. It furthermore lacked a constitutional foundation that was clearly needed to prevent anything slightly resembling apartheid from ever happening again.

Shortcomings in the first phase of land reform demanded and resulted in a second phase, or the all-encompassing land reform programme. Though categorically a second phase as a whole can be identified clearly, the commencement thereof did not occur overnight. Instead, gradually, first on the basis of the interim constitution and thereafter embedded in the final constitution, an all-encompassing land reform programme unfolded. In this regard, particular constitutional and policy dimensions emerged. Being all-encompassing by no means implied from the outset that the

⁷⁹ See in general Pienaar (n 9) ch 4.

⁸⁰ Van der Merwe and Pienaar (n 50) 334-349.

⁸¹ Under s 99 of the Abolition of Racially Based Land Measures Act 108 of 1991.

⁸² Before 27-04-1994 South Africa consisted of four national states (Transkei, Bophuthatswana, Ciskei and Venda); six self-governing territories (Qwa-Qwa, Gazankulu, Lebowa, KwaNdebele, Kwa-Zulu and KaNgwane) and four provinces: the Transvaal, Free State, Cape and Natal.

programme so employed was final and cast in stone. On the contrary, the second phase of land reform in South Africa is still ongoing and requires continuous adaptations when and where necessary, underlining that essentially land reform is a temporal process that is most likely to last for more than a generation.

b Land reform embodies a rights-based approach

As explained, land reform is embedded in section 25 of the constitution. This is already an indication of its rights-based approach. It is particularly rights-based with regard to the tenure reform and restitution programmes. A rights-based approach was specifically followed in contrast to the inequitable and insecure permits-based approach that formed the basis for tenure development in the pre-constitutional era. It was furthermore useful as rights are traditionally more effective in defending interferences and challenges because of their potential to influence debates and policy.⁸³ While this approach is understandable it is not without its difficulties and limitations. Because structural poverty tends to weaken substantive rights, a rights-based approach is only as effective as the context or environment within which it functions. In this light a rights-based approach cannot function in isolation but requires structural changes as well, linked to monitoring and support. Being context-sensitive, a rights-based approach therefore requires constant vigilance from all role players involved.

c Land reform is also linked to the exercise of other basic human rights

While land rights are central to land reform, they are also linked to the exercise of other fundamental rights. Benefiting from the land reform programme, be it by way of the redistribution, tenure reform or restitution programmes, may in practice enable the exercise of a right to religion or cultural beliefs⁸⁴ or the right to family life.⁸⁵ It is also connected to the right to dignity, the right not to be evicted arbitrarily and the right to legal representation.⁸⁶ In the majority of cases land reform is the main goal or objective, but in some other instances, depending on the facts and circumstances, land reform is thus also a means to another end. In this regard case law developments have been instrumental in scrutinising these issues, in forging the necessary links and delineating the scopes of each.

d The land reform programme is complex

Because land reform is so multi-dimensional and involves various arms of government, government departments, organs of state, state institutions, as well as private individuals, non-government organisations and a multitude of other role players, it is extremely complex to plan, implement, regulate and monitor. The aims and goals of land reform are often conflicting and contradictory: achieving equity and restoration is not necessarily equal to commercial success, development and sustainability. Inherently, different tensions exist. While beneficiaries only want what was theirs to be restored to them, government (increasingly) and the general

⁸³ Adams, Cousins and Manana "Land tenure and economic development in rural South Africa: constraints and opportunities" *Working Paper 125* (Dec 1999) Project of Land and Agrarian Studies situated at UWC (PLAAS) 17.

⁸⁴ *Nhlabathi v Fick* 2003 7 BCLR 806 (LCC).

⁸⁵ *Hattingh v Juta* 2013 3 SA 275 (CC).

⁸⁶ *Nkuzi Development Association v Government of RSA* 2002 2 SA 733 (LCC).

public demand success and a return on the investment. The multitude of legislative measures, the variety of role players, the conflicting aims, goals, needs and demands all contribute to establishing a complex field of which law is only *one* component. In this regard social and economic issues have to be coined in legal terms, phrases and constructs, increasingly resulting in the need to develop new and appropriate legal remedies and solutions for lingering social problems.

The land reform programme overall is furthermore complex because, to some extent, it is always in a state of flux. It is forever being changed, adapted, amended and adjusted. Because further developments are still in the pipeline, the exact scope of which is as yet unclear,⁸⁷ land reform is also characterised by uncertainty, leading to misunderstandings, misconceptions and, ultimately, fear of the unknown.

3.2 Characteristics of sub-programmes

3.2.1 Access to land and redistribution

Broadening access to land and enabling and effecting redistribution are provided for under section 25(5) of the constitution. Though redistributive justice underlies the redistribution programme, economic and political undercurrents also inform, to some extent, the general approach to land and markets and the government's role in this regard. While redistribution of agricultural land traditionally forms the crux of land reform programmes globally,⁸⁸ the South African redistribution programme is relevant in both urban and rural contexts in that access to land has to be addressed holistically. Accordingly, the South African redistribution programme is broader than redistribution programmes generally and requires a more encompassing approach.

In this light the South African redistribution programme is more open-ended, compared to restitution. Aspects that have to be dealt with in particular in this programme are the identification of beneficiaries, the kind of benefit involved as well as the processes that unlock the benefits, details regarding the financial structures and tools and the relevant qualifying criteria. While fairness is the underlying value supporting broadening access to land, it is also intrinsically linked to livelihoods, to survival and to eradicating poverty.⁸⁹ At least, these were the considerations that informed the initial policy and corresponding measures in support of redistribution.

Particular characteristics of the South African redistribution programme include that it is market-based or market-assisted and that it has been demand-led for the greater part of the programme. In this regard government has a facilitative role to play by providing financial support where necessary, acquiring land on the basis of the willing-buyer-willing-seller principle and waiting for potential beneficiaries to approach government and indicate their needs and demands.

The programme is also characterised by shifts in focus and cycles of redistribution, both with regard to aims and goals on the one hand and the relevant tools and mechanics on the other. Basic fairness in broadening access to land was gradually superseded by demands for sustainable development; and livelihood enhancement

⁸⁷ See generally the *Land Manifesto* (n 33).

⁸⁸ Van den Brink *et al* (n 28) 152-201.

⁸⁹ Murisa and Helliker "Contemporary rural realities in Southern Africa" in Helliker and Murisa (eds) *Land Struggles in Civil Society in Southern Africa* (2011) 1-2 underline that access to land is critical where great reliance is placed on agriculture and economic growth. See also Van den Brink *et al* (n 28) 154-155.

was overshadowed by the promotion of successful commercial farming. While the period 1994-2000 generally supported basic fairness and poverty alleviation, different surges in policy-making and corresponding aims and goals became noticeable after 2000.⁹⁰ Increasingly, redistribution became caught up between different paradigms: justice and reparation on the one hand and development and commercial success on the other.⁹¹ Whereas initial redistribution endeavours centred on the poorest of the poor, a gradual shift occurred in favour of more resourced and more competent beneficiaries, with the aim of enabling commercial farming with greater emphasis on efficiency.⁹² Shifts in focus also occurred with respect to the tools and mechanics employed to achieve redistribution goals. From 2009 a gradual shift towards pro-active acquisition of land occurred, coupled with a subtle preference for lease and leasehold. By government acquiring land under the proactive land acquisition strategy,⁹³ the land redistribution programme had become somewhat less demand-led since 2009. In this regard two new policy frameworks, published in July 2013, further envisage greater emphasis on lease where state land is concerned and the regulation of agricultural landholdings generally. The latter aims to regulate the size of land holdings which would ultimately require increasing or decreasing the size of existing landholdings, resulting in different categories of farmers and landholdings.⁹⁴ While these new policy developments may provide new impetus for broadening access to land, the resultant structure is overly complex and may ultimately prove too cumbersome and too top-heavy to administer.

To date, the South African redistribution programme has not been very successful as a poverty-alleviation scheme, mainly because of the demand-led approach, the manner in which the grant system was structured and the kind of beneficiaries that eventually end up receiving the land.⁹⁵

The programme has also been characterised by ongoing debates concerning general approaches to markets,⁹⁶ the role of the government in the redistribution process, the size of land holdings and the subdivision (or not) of farmland. In this regard recent developments occurred in the form of the publication of the valuation framework policy in 2012, a Property Valuation Bill in May 2013⁹⁷ and a policy framework dealing with agricultural landholdings in July 2013, mentioned above. These developments essentially embody a movement away from the willing-buyer-willing-seller principle towards more involvement by the state, in the form of the office of the valuer-general, concerning acquisition of land in the public interest, where the state is involved. The need for this approach is reflected by the urgency to acquire sufficient land at the right size, in the right location and at the right price for land reform purposes generally, including for redistribution. With regard to expropriation generally, which would also impact on the redistribution programme

⁹⁰ Hall (n 14) 175-192.

⁹¹ The different paradigms ought not automatically to result in a preference of the one above the other, but the mix in paradigms and corresponding goals clearly have implications for project design and implementation – see also Marais (n 28) 218.

⁹² Van den Brink *et al* (n 28) 154.

⁹³ Proactive Land Acquisition Strategy (PLAS).

⁹⁴ Agricultural Landholding Policy Framework.

⁹⁵ Zimmerman “Barriers to participation of the poor in South Africa’s land redistribution” 2000 *World Development* 1439 1450-1455.

⁹⁶ *eg* whether the market should be regulated in principle or whether the market ought to be accessible to all persons. The degree of government involvement in this process is furthermore relevant.

⁹⁷ GN 504 of 23-05-2013 in *GG* 36478.

as a way in which to acquire sufficient land, the Draft Expropriation Bill of 2013⁹⁸ was furthermore announced. In this regard the ongoing debates concerning the role of the government and the importance of acquisition of sufficient land for redistribution purposes have continued and have led to interesting and important recent developments. Further developments also seem to be in the pipeline,⁹⁹ although the exact scope and status of the developments are as yet unclear.

3.2.2 Tenure reform

Tenure reform is notoriously complex and technical and poses particular challenges to the land reform process overall. Firstly, the intricate grid of diverse forms of tenure based on race resulted in a multitude of fragmented rights and interests that were time- and location-specific.¹⁰⁰ In number and nature existing tenure forms prior to the reform programme therefore already posed particular challenges. Secondly, various tenure systems are relevant, including the South African common law (or Western-style) forms of tenure, communal or customary law tenure forms and transitional forms, mentioned above.¹⁰¹ Thirdly, the already complex situation was compounded by the fact that tenure forms prevalent in the national states and self-governing territories and certain black spots in so-called “white” South Africa were as a rule insecure, personal in nature and permit-based. Fourthly, tenure reform is difficult to evaluate and to monitor in practice. Finally, tenure reform is extremely context-sensitive. This means that tenure is impacted on and determined by prevailing social, economic, cultural and relational factors. This means that, although tenure may have been secured formally, it may be quite insecure and ineffective in reality.

Under the *White Paper on Land Policy* of 1997 the tenure reform programme was (a) guided by a rights-based approach as opposed to a permits-based approach; (b) based on choice; and (c) in line with constitutional imperatives.¹⁰² A rights-based approach was decided on in light of the historical approach to reserve real rights and secure property rights for whites while granting permit-based or personal rights to non-whites. As mentioned above, a rights-based approach is understandable, but is not without its limitations.¹⁰³ Despite being identified as a driving factor, choice in the tenure reform programme has not always prevailed, for many reasons. That was the case because of the manner in which grants were structured, which forced many beneficiaries to pool resources together and effectively removed choice from the equation. Had the Communal Land Rights Act 11 of 2004 not been found to be unconstitutional, communities falling within the ambit of the act would have been forced to undergo the process provided for under the act, again effectively negating choice. Furthermore, in reality a clear bias in favour of single title existed. Accordingly, while a broad spectrum of tenure options stood to be developed, informed by choice, the reality indicated otherwise.

⁹⁸ See the discussion of Van der Walt “Constitutional property law” 2013:1 *JQR*.

⁹⁹ See *Land Manifesto* (n 33). Some of the developments mentioned in the *Manifesto* concerning redistribution and access to land include the Land Protection Bill, which seeks to regulate access to land for citizens only. This may entail that some limitations could be placed on landholding of non-citizens, possibly similar to the Policy Framework for Agricultural Landholding. The contents of the act are as yet unclear.

¹⁰⁰ See Van der Merwe and Pienaar (n 50) 334-349.

¹⁰¹ See 3.1.2.a above.

¹⁰² Pienaar “Tenure security: overview and challenges” 2011 *Speculum Iuris* 108-133.

¹⁰³ Roth “Securing rights and finding solutions: contradiction and pathways to tenure reform in South Africa” in Roth, Sibanda, Nxasana and Yates (eds) *National Land Conference Finding Solutions, Securing Rights* (2004) 392-393.

The tenure reform programme is furthermore characterised by the fact that large portions of South Africa remain under trusteeship of the state,¹⁰⁴ that gender is still a critical determining factor in tenure security in practice and that the tenure reform programme has led to important unintended consequences. Three particular phenomena have resulted with respect to the last: firstly, that tenure rights are being “out-contracted”;¹⁰⁵ secondly, the further exacerbation of the housing shortage generally, but in particular in rural agricultural areas; and, thirdly, the rise of brokering and consultation enterprises assisting beneficiaries.¹⁰⁶

While insecure tenure, especially in agricultural areas, has remained contentious, urban and peri-urban areas have generally been neglected in tenure reform initiatives. The transformation thrust of the new Spatial Planning and Land Use Management Act 16 of 2013 and its implications for urban and peri-urban areas may provide much-needed relief when it is fully operational. However, the transitional provisions,¹⁰⁷ coupled with the task of reducing transformative ideals,¹⁰⁸ also those connected to tenure, to implementable frameworks, may pose serious challenges for some time yet. An emphasis on rural areas generally has not, however, benefited communal tenure, as this crucial element is still in limbo despite having been grappled with for almost two decades.

The tenure reform programme has also been characterised by a general disconnect between tenure reform initiatives and corresponding land administration systems, including survey and land registration systems. Again, some developments are envisaged within the general scope of tenure reform, though the exact details and the status of the developments remain somewhat unclear presently.¹⁰⁹

3.2.3 Restitution

The restitution programme is characterised by the fact that it had to be dealt with at two levels conceptually: at an overarching philosophical, theoretical level and on a basic, practical level. While the overarching level involved aims and a philosophical stance, the practical level had to give body to actual requirements and procedures. In this light, the restitution programme is characterised by being limited in scope and time, being based on restorative justice conducted within the rule of law and endorsing the sanctity of property rights.

The limited scope of the programme entailed that not all land dispossessions would be redressed and that land loss during the colonial era, before the Black Land

¹⁰⁴ While much land in communal areas is under trusteeship of the state, some portions of land occupied and owned by traditional communities are in fact registered in the names of the communities involved. During the briefing of the portfolio committee on rural development and land reform on 27-02-2013 (http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/1gl_gwB7m7KnFOnXYfkqWw9tC5Y2D3UytfTnjML5MiE/mtime:1362130996/files/docs/130227survey.pdf) (14-07-2013) it was pointed out that some portions of land owned by traditional authorities in the Eastern Cape and registered in the deeds office were included in the data for privately owned land. The land owned by the Royal Bafokeng has also been included in the database on privately owned land.

¹⁰⁵ *eg* occupiers under ESTA are often persuaded to settle for cash in return for vacating homes. To that end survival and livelihood issues trump land rights in practice.

¹⁰⁶ James “The return of the broker: consensus, hierarchy and choice in South African land reform” 2011 *Journal of the Royal Anthropological Institute* 318 334.

¹⁰⁷ s 60. All development applications lodged under the Development Facilitation Act 67 of 1995 have to be completed under that act.

¹⁰⁸ s 3.

¹⁰⁹ See generally *Land Manifesto* (n 33). *Eg* the Communal Property Associations Amendment Bill of 2013 of which the contents are as yet unclear.

Act commenced on 19 June 1913, would be excluded. It was furthermore confined due to the fact that all land claims had to be lodged between the period 1 May 1995 to 31 December 1998.¹¹⁰ Coupled with these underlying time frames was the idea that the restitution process would be completed within five to ten years.¹¹¹ The recent publication of the Restitution of Land Rights Amendment Bill 35 of 2013 announced re-opening the land claims process by substituting the lodgement date with 31 December 2018.¹¹² While the time frames have been adjusted recently, the restitution programme remains a limited programme in that it had been structured in a manner so as not to overhaul the whole property law system and property law relations.

Similar to the tenure reform programme, the restitution programme supports a rights-based approach. Under section 25(7) of the constitution, persons and communities who have lost their land and rights in land have a constitutional right to lodge claims. Government has to adhere to this right, it is enforceable by the parties involved and it embodies either restoration or equitable redress. While a right to restoration exists, it is not unqualified and is linked to meeting the requirements set out in section 2 of the Restitution of Land Rights Act 22 of 1994. Restoration also includes equitable compensation.

The restitution programme is furthermore characterised by shifts in focus. Apart from restoring land and rights in land, other objectives also included the ideal of furthering conciliation and nation-building. These noble objectives were increasingly being trumped and tested by other considerations as time passed, including the promotion of good governance,¹¹³ keeping costs down, and protecting the rights of owners while at the same time promoting and controlling development.¹¹⁴ A clear shift has occurred with regard to the latter: since 2009 development had been integral in the department's approach to land reform in general.¹¹⁵ In this regard rural development was especially emphasised, with a particular aim, namely achieving social cohesion and development through the programmes it was implementing. While the emphasis on development and sustainability makes a lot of sense and is indeed necessary in the light of land being such a scarce and valuable resource, it is important to keep in mind that the restitution programme was never embarked upon with the aim of furthering development *per se*. In this regard the restitution programme is characterised by contradictory and conflicting aims and goals.¹¹⁶ The manner in which restitution was initially approached did not provide for development goals and measures and was thus not planned and structured to support those particular aims. The dismal performance of restitution projects, which has also characterised the restitution programme, has to be seen in this light as well. An emphasis on development and sustainability has also resonated in the recent

¹¹⁰ The initial date for the submission of claims was 31-05-1995 which was extended to 31-12-1998.

¹¹¹ Walker *Landmarked* (2008) 9.

¹¹² Draft Amendment Bill was published for comment on 23-05-2013 in *GG* 36477, followed by the Restitution of Land Rights Amendment Bill 35 of 2013, published on 13-09-2013.

¹¹³ See especially Pienaar "Aspects of land administration in the context of good governance" 2009 *PER* 168; Pienaar "Restitutionary road: reflecting on good governance and the role of the land claims court" 2011 *PER* 170-194.

¹¹⁴ Hall (n 53) 37.

¹¹⁵ Under the Comprehensive Rural Development Programme.

¹¹⁶ Hall explains that restoring land and identity and promoting reconciliation sat especially uncomfortably with wealth creation and strengthening rural economy – "Land restitution in South Africa: rights, development and the restrained state" 2004 *Canadian Journal of African Studies* 664.

recapitalisation and development policy framework and the policy framework on state land lease and disposal that provide for the lease of land acquired by the state for restitution purposes.

Restitution claims involving groups and communities have furthermore been characterised by extreme difficulties, including the initial constitution of the claimant communities, the actual lodging of the claim and dealing with post-settlement issues following a successful restitution claim.

The restitution programme is legislation-based and is particularly characterised by a large amount of government involvement. That is the case because all land claims are lodged against the state, court orders have to be implemented by the state and monetary and financial burdens are carried by the state. Being mainly an administrative process, with only the most complex and difficult claims being referred to the land claims court, the state is furthermore involved by way of the commission on the restitution of land rights. The minister is also instrumental in the finalisation of land claims by way of the various section 42D-framework agreements, and the department is generally tasked with providing post-settlement assistance and support. It is particularly with respect to the restitution programme that the issue of the government's objectivity and neutrality is often raised: in this context the government is both the spearheading institution and a party.

The restitution programme is increasingly being characterised by complex, overlapping and time-consuming land claims and intricacies linked to compensation. The approach to compensation where expropriation is concerned as well as financial compensation instead of specific restoration are critical issues that the land claims court will increasingly be confronted with.

3.2.4 Unlawful occupation and eviction

Unlawful occupation of land in South Africa was previously characterised by a high-handed, draconic approach involving the conventional response in the form of eviction.¹¹⁷ In this regard the regulation of unlawful occupation was much more than a planning tool only. The pre-constitutional approach embodied a "contravention paradigm" in terms of which private ownership and property rights were enforced, usually with little regard for the underlying reasons for unlawful occupation and the circumstances of the occupiers concerned. In this paradigm unlawful occupation of land was criminalised and vigorously prosecuted, invariably leading to a cycle of eviction and resettlement.

While the links between access to land and access to housing, shelter and tenure security are clear, thereby also involving other land reform concepts and considerations, the gaps between and the disconnects in this area have remained. Underlying policy and ideas have not yet been fully translated into legislative measures and practices at grassroots level do not always correspond with the legal and policy frameworks. Therefore, unlawful occupation and eviction are still characterised by a somewhat disjointed approach.

Post-1994 a constitutional dimension was also added to unlawful occupation and eviction. In this regard the approach was inverted: unlawful occupation would not be criminalised in future. Instead, *unlawful eviction* would be criminalised and prosecuted. Linked to this was the constitutional imperative that no person could be

¹¹⁷ Pienaar "'Unlawful occupier' in perspective: history, legislation and case law" in Mostert and De Waal (eds) *Essays in Honour of CG van der Merwe* (2011) 309-330 312; Liebenberg (n 48) 342.

evicted or have his or her home demolished without a court order and that it could only be handed down once all the relevant circumstances had been considered.¹¹⁸ In future, eviction would be regulated and monitored strictly, on the basis of humanity, resulting in a complex grid of measures regulating, impacting on and placing limitations on eviction. While the contravention paradigm has been replaced by a human rights paradigm,¹¹⁹ this area of law is still characterised by complexity: particular statutory measures have particular scopes and applications, with further implications for which court (or forum) to approach, jurisdictional issues, processes and requirements. Interestingly, despite a human rights paradigm and the influence of the constitution overall, the pre-1994 conventional response, which embodied forced eviction and relocation, basically remains intact. While provision was made in theory for upgrading *in situ* or for the consideration of options other than eviction and relocation, cycles of eviction and relocation have effectively continued after 1994. It is only quite recently that *in situ* upgrading has been considered seriously as an alternative to eviction.

The complexity factor is compounded by the number and variety of role players involved in regulating unlawful occupation and eviction. In this regard case law has gradually delineated and expanded the duties and responsibilities of the government generally, but in particular with regard to local government.¹²⁰ This area of law is furthermore characterised by the various conflicting rights, aspirations, needs and values that emerge where ownership, housing and shelter are at stake. Invariably these considerations are played out in a legal forum where they are weighed, balanced and adjudicated on. Added to the conundrum are the underlying socio-economic and personal circumstances, linked to legal issues and the overarching objective of finding the just and equitable solution for each individual case. In this process courts are enjoined to act proactively and craft case-specific solutions. In this light it is thus quite possible that owners may be called upon to sacrifice some of their entitlements, albeit only for a limited period of time. Accordingly, it is fair to state that this area of law has been characterised by some innovative solutions and a generally much more hands-on approach,¹²¹ which has resonated in structural interdicts and engagement and report orders, which are not all equally effective or successful in practice.

4 Preliminary conclusion

Specific factors and considerations required a South African land reform programme that would promote broadening access to land and redistribution, enable tenure reform, provide for restitution of land and rights in land and deal effectively with unlawful occupation of land. To that end a uniquely South African programme was crafted with very particular characteristics linked to its origin, structure, mechanics and design. In this light the sub-programmes each developed their own characteristics, some of which changed and evolved as time passed. Reflecting on the peculiar circumstances that led to the programme, as well as its aims and objectives and, ultimately, the characteristics of the overall as well as the individual sub-programmes, the question emerges whether the interventions have indeed

¹¹⁸ s 26(3) of the constitution.

¹¹⁹ Liebenberg (n 48) 311-312.

¹²⁰ *eg Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 1 SA 470 (W) and *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA).

¹²¹ See generally Pienaar (n 9) ch 10.

resulted in a sensible, aligned programme. In considering that question in part 2 of the contribution the possibility of disconnects, dichotomies and disjointedness is investigated in particular.

[to be concluded]

ON APPOINTABLE LAWYERS AS JUDGES

“Just as under the Civil Law there was no liability for advice not given fraudulently (D 50 17 47), so also in the customs of the present age a judge who gave a wrong judgment through want of skill is not held liable. And this also appears clearly from the fact that very inexpert persons seek judicial office with not the least fear that they might make a great many causes their own by giving wrong judgments through want of skill. And it would certainly be most iniquitous and judges would fare badly, especially lesser judges, if in so difficult a science as that of the law and its practice, and amid so great a variety of opinions and such a multitude of cases that brook no delay, where frequently no adequate time is allowed for deliberation, they were subjected to risk in each single case in which anything perchance escaped them as a result of lack of knowledge or want of skill” *ad Inst 4 5pr* Groenewegen van der Made *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia Vicinisque Regionibus* (1649) (transl Beinart).