Reflections on the South African land reform programme: characteristics, dichotomies and tensions (part 2)*

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5 *Introduction to part 2*

South Africa has grappled with land reform issues – superficially since 1991 and in-depth since 1994. Inevitably, questions arise as to whether the mechanics of intervention over time have indeed resulted in an aligned, sensible programme and whether a compelling argument can still be made to continue with land reform. In order to answer these questions, the "business of land reform" and the characteristics of the South African land reform programme also come into play. Given that the business of land reform is extremely complex in principle and requires a very particular approach in South Africa specifically, part 1 of this contribution illustrated that the land reform programme crafted and conducted here in South Africa is a rather unusual programme with particular characteristics concerning its origin, structure, mechanics and nature. In the second part of the contribution the focus shifts to the dichotomies and tensions inherent in the programme. This analysis is necessary in order to answer the question posed above, namely whether an aligned programme has indeed been crafted and whether, in light of the analysis that follows below, a compelling argument can still be made for continued land reform.

6 *Dichotomies and tensions inherent in the land reform programme*

6.1 The overarching land reform programme

In part 1 of the contribution reference was made to the conflicting aims and goals of land reform. While nation-building, reconciliation and transition to democracy were proffered as goals, livelihood enhancement, economic goals and the eradication of poverty were likewise pursued. Contrary to the underlying idea of supporting and supplementing each other, the juxtapositioning of these rather distinctive objectives contributed to polarising land reform in principle. Achieving conciliation and harmony, on the one hand, and mending historical fences and redressing injustices and hardship, on the other, did not necessarily equate to the promotion of economic development, sustainability and commercialisation. A different focus resulted in a different approach, culminating in different structures, mechanisms and tools. Accordingly, right from the outset, the land reform programme struggled with an identity crisis, intending and attempting to achieve too much and be too diverse. While the government may have expected commercial and agricultural successes, potential beneficiaries yearned for regaining what they had lost, while some other individuals or communities may have had their sights on self-sufficiency and small-scale operations only.

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Gradually, different shifts in focus and emphases embodied in policy and other documents impacted further on what land reform was perceived to be, what it was supposed to achieve and what the ultimate result would be.[122] Different ministers spearheading the process had different views and ideals, continuously changing and adapting processes and approaches.[123] The mechanics of intervention continue.[124] While good arguments can be made for adjustments when and where necessary, an uncoordinated, fragmented approach to intervention leads to uncertainty and a sense of superficiality, which only compounds the existing complexity further.

The land reform programme embodies a rights-based approach.[125] While such an approach makes a lot of sense in light of the historical background,[126] the approach is context-sensitive and is especially impacted on by structural poverty. Accordingly, to be effective, a rights-based approach to land reform has to be linked to structural changes as well. This dimension of a rights-based approach has not been attended to sufficiently. Instead, endorsing a rights-based approach but ignoring structural changes, support and monitoring clearly points to a disconnect.

The constitutional embeddedness of the land reform programme is both the cause for and the result of this tension. While the first part of the property clause protects existing rights,[127] the greater part of the property clause is aimed at reforming and transforming issues linked to property.[128] This inherent tension is hailed as both a blessing and a burden, urging courts and role players to think and act creatively. Therefore, in its nature, the South African land reform programme overall embodies paradoxes, dichotomies and tensions. This requires very particular wisdom and tenacity to bring land reform to fruition.

6.2 Specific sub-programmes

6.2.1 Access to land and redistribution

Broadening access to land and effecting redistribution were initially premised on the basis that the poorest of the poor would, for obvious reasons, qualify and benefit.[129] Yet the whole approach to redistribution, the structure thereof as well as the financial grants available all contributed to the fact that the poorest of the poor would be the least likely category to benefit in practice. That was the case for various reasons. The programme was demand-led. This meant that the government would not be the starting point: persons who were interested in benefiting had to approach government and had to indicate their needs and demands. This would have worked if the intended beneficiaries were informed of the process and had the necessary capacity and skills to access the programme. Invariably that was not the case. Furthermore, the grants were structured in such a way and the amounts linked thereto were so small that groups of persons were forced to pool resources in order

[122] Hall (n 14) 175-192.
[123] Du Plessis, Pienaar and Olivier (n 13) 608-610.
[124] Pienaar "The green paper on land reform and the mechanics of intervention" 2014 *PER* 641.
[125] See 3.1.4.b in part 1.
[126] The pre-constitutional approach essentially entailed a permit-based approach for non-whites while a rights-based approach was essentially reserved for whites. See also Van der Merwe and Pienaar (n 50) 334-380.
[127] s 25(1) and (2) regulate the deprivation and expropriation of existing rights, while s 25(3) provides the parameters for the time, manner and amount of compensation to be paid in instances of expropriation. See also Van der Walt (n 72) 16-19.
[128] s 25(4)-(9) – see Van der Walt (n 72) 21-23.
[129] *White Paper on Land Policy* (1997) 60.

to realise their redistribution endeavours.[130] This led to many difficulties, not only conceptually in constituting the group or community, but also actually in residing on and working the land in question. Although pooling resources could have benefited the poorest of the poor, the actual living and settlement arrangements effectively discouraged the most vulnerable persons to attempt redistribution in practice.

While the underlying scheme had supported small-scale or subsistence farming, the grant structure, as mentioned above, and the actual legislation operating on grassroots level, did not accommodate small-scale farming at all. The subdivision of agricultural land had to be approved under the Subdivision of Agricultural Land Act 70 of 1970 at ministerial level, resulting in delays, and, in many instances, abandonment of projects. The pre-constitutional patterns of agricultural production, including farm sizes and, to some extent, the types of crops, largely continued after the land reform programme was embarked upon.[131] Therefore, at conceptual, practical and legislative levels the redistribution programme was not aligned and, instead, exposed crucial tensions. The market-based or market-assisted approach furthermore lost sight of financial and economic realities. Land reform markets were not the same as "open markets" where land was transacted regularly. Globally, research has indicated that where land reform is concerned, some interventions in the market were required.[132] Apart from the basic approach to the programme, access to credit was limited and the willing-buyer-willing-seller principle, as applied in the South African context, resulted in time-consuming procedures, massive red tape and long delays.[133] Altogether, the various factors contributed to the fact that the most vulnerable sections of society ultimately did not benefit from the programme and that redistribution, on its own, would not contribute to the eradication of poverty and the improvement of livelihoods.

Since 2009, in accordance with the Proactive Land Acquisition Strategy,[134] the government has been slightly more involved with redistribution, and has gradually relied more on lease and leasehold to broaden access to land. However, in principle, an overemphasis on private title as tenure form has remained, as has been mentioned above.[135] In this light a gradual, rather understated movement towards lease and leasehold within the redistribution paradigm may go a long way in addressing existing gaps and providing a more nuanced tenure paradigm. It is possible that the recent Policy Framework on State Land Lease and Disposal may provide further momentum to lease options, at least where state land is concerned. However, as this more recent approach to redistribution and broadening access to land means that title essentially remains vested in the state, the challenge highlighted in the *Land Manifesto* of 22 July 2013 is problematic: "Land redistribution programme has not yet translated into the desired strategic objective of equitable ownership."[136] The large-scale leasing of land or granting of leasehold to beneficiaries under the redistribution programme will certainly broaden access to land, but it will not address the skewed or inequitable ownership pattern. Because no ownership is transferred when lease or leasehold enters into the picture, the ownership patterns

[130] Walker "Redistributive land reform: for what and for whom?" in Ntsebeza and Hall (eds) (n 3) 132 142.

[131] Olubode-Awosola, Van Schalkwyk and Jooste "Mathematical modelling of South African land redistribution for development policy" 2008 *Journal of Policy Modelling* 841-855.

[132] Van den Brink, Thomas and Binswanger (n 28) 152 162.

[133] Lahiff (n 28) 1577 1579.

[134] PLAS.

[135] See part 1 par 3.2.2.

[136] See 119 of *Land Manifesto* (n 33).

remain altered only to the extent that land title is vested in the state. Accordingly, even in the July 2013 development, a further disconnect emerges.

6.2.2 Tenure reform

The dichotomies and tensions inherent in tenure reform essentially revolve around the following themes: (a) disjointedness of policy, mechanisms and tools; (b) continued bias towards single private ownership; and (c) a disconnect between tenure reform ideals and land administration systems. The traditional dominance of private ownership, at the pinnacle of the hierarchy of tenure forms, was challenged by the tenure reform programme. In this regard any other form of tenure, alternative to single, private ownership, could be developed and promoted, as long as secure tenure was achieved. In this light the tenure reform programme had great potential for transforming property concepts and, ultimately, society. In line with policy objectives, tenure security entailed a rights-based approach, linked to choice, aimed at the most vulnerable portions of society and supported by constitutional imperatives and values.[137]

Informing the general approach to land reform was the neo-liberal approach, strongly influenced by the World Bank and generally supported by the international community.[138] Inevitably, this approach also incorporated the market-based or market-assisted approach, mentioned above with respect to the redistribution programme.[139] The neo-liberal approach, coupled with market-based or market-assisted land reform, effectively embodied a bias towards private ownership or titling. Ultimately, the preference for single private ownership would permeate especially the redistribution and the tenure reform programmes and would ultimately also impact on how unlawful occupation would be addressed.[140]

Disjointedness is also reflected in the policy point of departure that tenure reform would include or would be based on choice. Despite stating that a variety of tenure forms would be considered, non-ownership tenure forms were reminiscent of old order or old apartheid-style tenure forms. Accordingly, any form less than ownership could continue the apartheid legacy and was therefore not favoured in practice. In this regard the underlying approach to land reform generally and the three sub-programmes are clearly not aligned. This disjointedness between ideals and objectives on the one hand and mechanisms and policies on the other has clearly impacted on what happens at ground level. These disconnects and the general continued preference for single private ownership pose serious risks for innovative tenure reform. While a real potential for drastic change continues to exist with regard to occupiers' and tenants' rights in particular, both in relation to rural and urban contexts, tenure *insecurity* has prevailed.

Despite the disjointedness identified above and the continued bias towards private ownership as preferred form of tenure, private ownership is not the bastion of private law it once was. It is especially within the context of unlawful occupation where anti-eviction measures have made great inroads into what was previously the private "fiefdom of owners".[141] In this light the balancing of rights and interests and the consideration of all relevant circumstances may prevent the granting of eviction

[137] Pienaar (n 102) 108-133. See also par 3.2.2 in part 1.
[138] Helliker "Land reform and marginalised communities in the Eastern Cape countryside of post-apartheid South Africa" in Helliker and Murisa (eds) (n 89) 43 46; Ntsebeza (n 27) 107 127.
[139] See par 2.2.1.
[140] See in general Pienaar (n 9) ch 10.
[141] Royston (n 59) 165 172.

orders in certain instances.[142] This has been particularly evident in urban contexts. Conversely, in rural areas, especially where large-scale agricultural holdings are concerned, the balancing of rights has ventured more in favour of owners, resulting in a still largely ownership-dominant environment.

Tenure reform initiatives had not been aligned with land administration systems, in particular the cadastre, survey and deeds. While some groundwork had been done and various approaches had been suggested in theory,[143] there still seems to be a disconnect between the policy ideals and legal measures on the one hand and the supporting systems, on the other. Because the cadastre and the deeds registries system remain the points of departure, registrable rights are preferred in practice. The supporting systems have thus not evolved and had not been amended in a similar transformational fashion. As long as that remains the case, registered rights will remain "more valued" than unregistered rights.

6.2.3 Restitution

Right from the outset, the restitution programme was severely shackled by inherent dichotomies and conflicting aims and objectives. The parameters of the restitution programme provided that only persons and communities who had lost their land or rights in land after 19 June 1913, *as a result of racially discriminatory laws or practices*, would be able to lodge restitution claims. Because land and property were transacted in other ways than only resulting from racially-based dispossession, this approach made sense. The dichotomy, however, lies in the fact that, while such unjust dispossessions had to be addressed specifically, persons who acquired their rights resulting from dispossessions or benefited from such dispossessions would not be affected at all. Conversely, while the *unjust dispossession* of land was attended to, the *unjust acquisition* thereof was ignored. This is directly linked to the fact that the restitution programme resulted from a negotiated process which underlined the protection of private property rights – irrespective of how such rights had been vested.[144] In this regard the *underlying reasons* which would have enabled the purchase of property at a particular point in time by a particular purchaser at a particular price would therefore be ignored for purposes of the restitution programme. Yet, that was exactly the factor that had to be considered for claimants to qualify in order to enter into the restitution programme in the first place.

The dichotomy inherent in traditional leaders is also relevant within the context of the restitution programme. The dichotomy is embodied in the fact that the generation of traditional leaders appointed during the apartheid era is deemed to be illegitimate, yet their very existence was granted constitutional validity and legitimacy when the constitution commenced.[145] This dichotomy resonates in the restitution programme in two respects: (a) these are the traditional leaders who have been lodging claims on behalf of communities and have been actively involved in

[142] See generally Pienaar (n 9) ch 10; Liebenberg (n 48) 311.

[143] See especially Pienaar "The need for a comprehensive land administration system for communal property in South Africa" 2007 *THRHR* 556; "Aspects of land administration in the context of good governance" 2009 *PER* 15; and "Land information as a tool for effective land administration and development" in Mostert and Bennett (eds) *Pluralism and Development. Studies in Access to Property in Africa* (2012) 238-272. See also Mostert "Tenure security reform and electronic registration: exploring insights from English law" 2011 *PER* 85-117.

[144] Also see 3.1.1 in part 1.

[145] Von Leynseele and Hebinck "Through the prism. Local reworking of land restitution settlements in South Africa" in Fay and James (eds) (n 53) 162 179.

the restitution process, which (b) has resulted in conflicting and overlapping claims. While the lodging of claims has provided legitimacy to some formerly disputed leaders, the former displacement of some of the erstwhile leaders by the previous government has generally increased uncertainty regarding community identity, the lodging of claims and boundaries.[146] Hence the already complex and intricate situation had been compounded further.

Furthermore, conflicting expectations of what the restitution programme aimed to achieve raised critical tensions. Initially, the restitution programme was not aimed at promoting development or sustainability, as the overarching objective was that of restorative justice. While giving back what was taken away had clear political and symbolic resonance, it did not always coincide with modern needs for development and livelihoods.[147] Gradually it became clear that productive, sustainable use of land is integral to the programme's overall success. While this shift took place conceptually, the underlying support and approach to achieving the new objectives were not aligned immediately. Hence the continued disconnect. Recent developments, especially since 2009, seem to support a developmental approach more convincingly.[148] However, overall, the restitution act in its present format still does not provide a comprehensive legislative and institutional framework for addressing the demands of sustainable settlement sufficiently.[149] Even if the act is amended and the support services extended further, fieldwork that has been conducted[150] underlines the fact that these additional dimensions to restitution are experienced as foreign and intrusive. That means that additional effort has to go into making the processes understood as being absolutely integral to the restitution process, and to finally fit comfortably into the existing structures and way of life.

6.3 Unlawful occupation and eviction

The constitutional era in South Africa introduced a human rights dimension, coupled with imperatives to embark on specific land reform initiatives. Overall, the approach to land and land reform has to make sense, has to be aligned with the various relevant policies and programmes and has to interconnect where necessary. Unlawful occupation of land and how it is dealt with is therefore also impacted on or guided by the relevant land reform programmes.

As explained above, despite the point of departure in the tenure reform programme to consider and develop a variety of tenure forms, an inherent preference for single private ownership prevailed. This also had implications for how housing, informal settlement and informal settlement interventions were approached and strategies linked therewith. This has resulted, for the years 1994-2008 in theory and in practice, and beyond 2008 in practice, in the provision of single title and formal housing to beneficiaries.[151] This approach has proved to be expensive and largely unsustainable, time-consuming and invariably traumatic and impractical, because,

[146] *eg*, Claassens "Contested power and apartheid tribal boundaries: the implications if 'living customary law' for indigenous accountability mechanisms" in Mostert and Bennett (eds) (n 143) 174-209.
[147] Hall (n 53) 17 21.
[148] Du Plessis, Pienaar and Olivier (n 13) 608-610.
[149] Dodson "Unfinished business: the role of governmental institutions after restitution of land rights" in Walker et al (eds) (n 53) 273-277 283.
[150] Van Leynsteele and Hebinck (n 145) 162-183.
[151] Huchzermeyer and Karam "The continuing challenge of informal settlements: an introduction" in Huchzermeyer and Karam (eds) *Informal Settlements – A Perpetual Challenge?* (2006) 1-16.

as a rule, this approach necessitates large-scale forced relocations, demolition of existing homes and structures and subsequent reconstruction.[152]

While more recent initiatives embody a strong support for *in situ* upgrading,[153] the necessary policies and programmes to support the approach and effect the required access to land and tenure security, especially in urban areas, are largely still lacking. Tenure- and access-related measures still do not cater sufficiently for the poor, migrants and generally landless sections of the population residing in urban and peri-urban areas. It is possible that the new Spatial Planning and Land Use Management Act 16 of 2013 may have a positive impact, possibly at a conceptual level. Given the difficulties of translating these ideals into reality, however, the disconnects may continue for some time in practice.

Despite a constitutional prohibition on unlawful evictions, they continue to occur on a daily basis and are even perpetrated by the government, organs of state and state institutions.[154] In this context there seems to be a huge gap between what the constitution provides for, what legislation sets in place and what happens in practice. It is critical that these gaps are bridged as soon as possible.

Informal settlement interventions and dealing with unlawful occupation and evictions have called for social-compatible approaches, linked with tenure-related and socio-economic considerations, aimed at building vibrant and sustainable communities.[155] Such an approach underlines that housing is much more than bricks and mortar only. Yet, housing projects continue to be constructed in locations that are not ideal and that, inevitably, prolong the cycle of eviction and relocation. In this process formal housing stock is invariably lost and former beneficiaries return to informal settlement and unlawful occupation.[156]

While calls for law and order within constitutional and human rights paradigms have supplemented the usual responses to unlawful occupation,[157] the process of attending to unlawful occupation has impacted on other, equally important constitutional rights and values, including dignity and due process. While forced removals, self-help, transit camps and active control over informal settlement have been removed from the eviction paradigm, some of them have found their way back. In this regard, some of the pre-1994-mechanisms, in which human dignity was overlooked, have extended beyond the new constitutional era.[158] This cannot be allowed to continue.

[152] See generally Pienaar (n 9) ch 10.

[153] "Breaking new ground" was announced by the minister of housing on 2-09-2004. See for more detail regarding recent developments linked to the "Breaking new ground" approach Presentation to the Portfolio Committee on Human Settlements 20 February 2013, http://www.spii.org.za/agentfiles/434/file/Research/Review/20of%20Right%20to%20Housing.pdf (28-07-2013). See also Van Wyk *Planning Law* (2012) 484-485.

[154] *eg Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA); *City of Tshwane Metropolitan Municipality v Mamelodi Hostel Residents Association* 2011 JDR 1654 (SCA); 2012 JOL 28434 (SCA); *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC). See also Boggenpoel and Pienaar (n 71) 998-1021.

[155] McLean "Housing" in Woolman and Bischop (eds) (n 41) 55-21.

[156] Huchzermeyer "From 'contravention of laws' to 'lack of rights': redefining the problem of informal settlements in South Africa" 2004 *Habitat International* 334 337.

[157] Liebenberg (n 48) 315.

[158] Boggenpoel and Pienaar (n 71).

7 *Reflections*

In light of the dichotomies and tensions inherent in the overall land reform programme and in the particular sub-programmes, coupled with the disconnects and the concomitant problems and difficulties involved in the business of land reform generally, two questions arise. Firstly, whether the mechanics of intervention have resulted in an overall, sensible, aligned programme achieving the objectives and aims it set out to achieve; and, secondly, whether a compelling argument can still be made to continue with land reform overall, but also with regard to the various sub-programmes.

7.1 A sensible, aligned land reform programme?

South Africa has never before dealt with land issues in such detail, on such an all-encompassing scale and with so much pressure directed at achieving diverse, sometimes conflicting, aims. It goes way beyond the traditional redistribution of land only and also encompasses efforts to broaden access to land, tenure reform, restoration and redress and matters linked to unlawful occupation and eviction. Being a temporal process, it was approached in stages: an exploratory programme followed by an in-depth all-encompassing programme.[159] It is grounded in the constitution and is informed by and guided by relevant sound policy frameworks.

Guiding and informing the initial general approach to land was a neo-liberal approach, linked to market-based or market-assisted land reform. Directly impacting on land reform was the fact that South Africa underwent a peaceful transition and concluded a negotiated settlement.[160] Land reform furthermore required consideration at two distinctive levels: at (a) a conceptual and philosophical level; and at (b) a practical, detailed level that dealt with processes, procedures and requirements. Being multi-dimensional, aimed at conflicting and contrasting objectives and embodying inherent dichotomies and tensions, the business of land reform posed major challenges – for various role players, at different levels.

Land reform was approached incrementally. This in itself is neither an indication that the overall process was unplanned nor is it an inherent sign of incompetence or haphazardness. An incremental or phased approach overall, or within the individual sub-programmes, is equally valid, provided that it is structured, co-ordinated and aligned. Inevitably, an integrated, holistic approach to land reform is required.

Since the publication of the first national land policy in 1997, the "usual" land-related and reform-oriented elements have been scrutinised and evaluated, continuously. Over time, particular key policy issues have emerged, urging further policy-making. These key issues revolved around approaches towards land, land reform and the market (especially the acquisition of land) and the state's role in the process, as well as beneficiary targeting, planning and design and monitoring. It was thus expected that these and other burning issues would be dealt with at some point in a (further) all-encompassing policy drafting process. 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. Recently, particular developments occurred within the policy context: the publication of the long-awaited green paper on land reform in 2011 and a policy framework for the acquisition and valuation of land

[159] See generally Pienaar (n 9) ch 4.
[160] See 3.1.4.b in part 1.

within the land reform context, 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. Since the 2011 green paper on land reform, other initiatives have also been embarked upon, including the publication of three further policy frameworks in the course of 2013, dealing respectively with recapitalisation and development; state land lease and disposal; and agricultural landholdings. While some form of alignment may emerge, a closer look at the latest policy frameworks has identified further disconnects and gaps. Apart from the fact that the policy frameworks overall contain massive rhetoric and are somewhat repetitive, an overly complex, regulated framework has emerged.[161] In the light of remaining uncertainties, including the format of envisaged developments and the time frameworks involved, how the recent process has been approached has underlined the urgent need for greater dissemination of information and concomitant consultation.

All of the above interventions were embarked upon in the absence of a land register or land audit that could provide the necessary foundational information and statistics. Although a land audit had been completed in the course of 2013,[162] it was subsequently contested,[163] leading to calls for a renewed foundational basis for land reform. A holistic approach is still lacking, as vast areas of the country have been excluded from almost all of the most recent interventions. The situation at ground level in communal areas, comprising large portions of the country and impacting on millions of South Africans, remained virtually unchanged, despite massive legislative and other activity in this area. This is especially disconcerting given the emphasis placed on rural development in particular.

Invariably, the cause and effect and conduct and response have not been considered carefully either. When one provision impacts on another issue, the overall effect has to be re-assessed and re-addressed. Bodies and institutions to be established have to fit into the existing structures, while existing structures have to be readjusted where necessary. Roles and functions have to be aligned accordingly. As the programme has unfolded, ideas and concepts have not been embedded in a framework that facilitates aligned implementation sufficiently. The latest policy developments, resembling a "third cycle" in policy making, envisage a multitude of new bodies and institutions without the necessary alignment. Generally, proposed systems and structures seem overly complex and top-heavy, with manifold levels and bodies involved, thereby compounding the bureaucracy factor markedly. These initiatives will require enormous human and financial resource investment.

Apart from the gaps in the policy dimension of land reform, shortcomings in existing legislation, problems in its approach and interpretation as well as its implementation and enforcement also exist. The complex grid of legislative measures and the enforcement thereof pose particular challenges to all role players

[161] See Pienaar "Land reform" 2013 *JQR*.

[162] Announced on 21-02-2013 – Speech of the minister of rural development and land reform "Building vibrant, equitable communities and sustainable rural communities". http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=34328&tid=98998 (24-08-2013).

[163] Parliamentary Monitoring Group (7-06-2013) indicates that a renewed audit will start in July 2013 and will be completed by the end of 2014. See also Anon "State not sure if it owns 8,360,527ha of land – Gugile Nkwinti" http://www.politicsweb.co.za/view/politicsweb/en/page71654?oid=389911&sn=Detail&pid=71654, (7-06-2013); Sapa "TAU SA calls for 'credible' land audit" http://www.timeslive.co.za/politics/2013/07/18/tau-sa-calls-for-credible-land-audit; Administrator "TAU SA demands land audit before land claims reopening" http://www.tlu.co.za/index.php/en/5-03-2012/latest-news/355-tau-sa-demands-land-audit-before-land-cloaims-reopening.html (18-07-2013).

involved. Tenure insecurity has prevailed, especially in rural areas where large commercial land holdings are prevalent and in urban and peri-urban areas.[164] As the 2010 initiatives embodied in the draft Tenure Security Policy and concomitant draft Tenure Security Bill were overturned in the latest offering, the Extension of Security of Tenure Amendment Bill, published on 17 October 2013, it is thus quite possible that uncertainty concerning tenure security in agricultural areas in particular could continue for some time yet.[165]

With respect to urban and peri-urban areas, a clear tension between broadening access to land, improving tenure security and approaching unlawful occupation intervention has been identified. In this regard, the existing disconnects between different pieces of legislation have been pointed out, the gaps between existing legislative measures have been highlighted and the disconnect between land reform programmes and land administration systems has also been identified.[166]

In this light the only conclusion that can be reached is that the existing land reform programme has inherent structural, administrative, policy and legislative shortcomings. It functions within budgetary constraints, has conceptual and philosophical limitations and grapples with an identity crisis. Overall, unlawful evictions continue, gender inequalities prevail and the need for land increases daily. Increased pressures on food security, livelihood enhancement and productivity have elevated the need for development and sustainability. The question emerges whether, in light of the conclusion reached here and the factors mentioned in this context, a compelling argument in favour of land reform can still be made.

7.2 A compelling argument for continued land reform?

7.2.1 The redistribution programme

Apart from the practical, economical and philosophical reasons for a continued land redistribution programme, albeit in an adapted or readjusted format, the point of departure remains that the state has an obligation to take the necessary steps to broaden access to land for citizens on an equitable basis. This obligation is constitutionally based and is not a political choice.[167] The government has entrenched its commitment to land reform constitutionally and is therefore enjoined to continue with it.

Although research on the benefits and advantages of redistribution has thus far not been uniform, some specific benefits can be highlighted here. Apart from broadening access to land, benefits of redistribution also include other gains, not easily quantifiable, but still very real – for example, an enhanced sense of justice, self-esteem, security, dignity and self-respect.[168] Apart from these elements, which are almost impossible to measure, it is clear that (a) acquisition of land has improved – vastly in some instances – the socio-economic conditions of beneficiaries; (b) land reform beneficiaries are on the whole much better off on average than their counterparts in communal areas where the land-basis is different; and (c) many

[164] Pienaar (n 102)108-133.
[165] See Pienaar (n 161).
[166] See par 6.2.1 above.
[167] s 25(5) of the constitution.
[168] Chitange and Ntsebeza "Land reform and rural livelihood in South Africa: does access to land matter?" 2012 *Review of Agrarian Studies* 87-111.

beneficiaries have been able to improve their livelihood with minimal or no support from the government.[169]

Because South Africa is no longer a primarily agrarian society, and as the non-agrarian economy is failing to absorb the unemployed and new work seekers, the potential importance of land for the poor and marginalised increases.[170] Although redistributing land to the marginalised will not automatically enhance incomes, improve livelihoods or guarantee social stability,[171] it will certainly contribute to these ideals. Despite still grappling with enormous problems and despite the dismal record of redistribution generally, a compelling argument to continue redistribution can still be made, albeit in a different, improved format. As Kepe explains:

> "Land carries a powerful symbolic charge for many black South Africans not only because of their recent memories of racialised dispossession of their land, but also because inequalities in land ownership 'stand for' and evoke the broader inequalities that post-apartheid policies have yet to undo."[172]

Symbolism is not enough. Equity is good for growth.[173] While it is integral to agricultural and rural development, a more equitable distribution of land and resources would also benefit non-agricultural and non-rural growth. It is also in this context that broadening access to land is critical.

It is furthermore crucial that broadening or "opening up" of land is also connected to the opening up of labour, markets and credit, and that access to support and extension services is likewise broadened. A new wave of leasing land or awarding land on the basis of leasehold has both advantages and disadvantages. While access to land is broadened, coupled with support and linked with more effective monitoring, ultimately benefiting beneficiaries more, title remains vested in the state. This means that the patterns of land ownership will not change dramatically.

7.2.2 Tenure reform

The tenure reform programme has great potential to change ownership patterns and, ultimately, to transform society. The promotion of secure tenure is linked to increased investment in land and property, and leads to innovation and enhanced livelihood security.[174] De-linking tenure from race – though important – was thus but *one* of the dimensions of tenure reform.

Tenure reform is also linked to clarity and certainty – especially in the South African context, where diverse, sometimes unregistered, informal and overlapping rights prevail.[175] Accordingly, it is important, especially from a property law perspective, to define, delineate and demarcate rights and interests and their consequences. Developing a form of tenure that would suit the particular needs and

[169] This is the case concerning a case study involving eight municipalities in the Chris Hani district municipality, which incorporates large parts of the former Ciskei and Transkei national states – see the whole of Chitange and Ntsebeza (n 168).

[170] Walker (n 130) 134.

[171] Walker (n 130) 134-135.

[172] Kepe, Hall and Cousins "Land" in Shepherd and Robins (eds) *New South African Keywords* (2008) 145.

[173] Van den Brink, Thomas and Binswanger (n 28) 158.

[174] Adams, Cousins and Manana (n 83) 10. This does not mean that only private, individual title embodies these benefits.

[175] Pienaar (n 102); Cousins "Characterising 'communal' tenure: nested systems and flexible boundaries" in Claassens and Cousins (eds) *Land, Power and Custom Controversies Generated by South Africa's Communal Land Rights Act* (2008) 109-137.

demands best, in light of the overarching transformative paradigm, is after all one of the main objectives of the new constitutional era.[176] This may also result in changing approaches to and concepts of property and ownership, and adjusting particular hierarchical structures accordingly. Secure tenure is furthermore instrumental to progress and development, it enhances elements of citizenship, community and a sense of belonging and it assists in the balance of power relations and social inequity.[177] It has implications for state authority and says something about political sovereignty and state building. Tenure and its reform are thus important in discussions about political structures and society.[178] It is instrumental in better resource management and conservation[179] and is also of symbolic relevance.[180] Economic development, especially in the former national states and self-governing territories, is largely dependent on secure tenure.[181] Having secure tenure may furthermore prevent suffering and social instability.[182]

While tenure security is in many respects an end in itself, it is also a means to an end. In this regard it acts as an enabling agent for the exercise of other fundamental rights like the right to family life, religion and cultural beliefs, and is linked to dignity and equality.[183]

The preferred rights-based approach in South Africa remains context-sensitive, which results in vulnerability due to, *inter alia*, structural poverty.[184] In this light a more holistic approach to tenure reform, linked to structural change and coupled with monitoring and support, is necessary. While this is true with respect to tenure reform generally, it is particularly pertinent with respect to tenure reform on communal land. In this regard gender-related and everyday experiences at grassroots level also resonate in the rights-based approach.[185] Accordingly, structural changes, which would support a rights-based approach, have to take cognisance of engrained communal land and customary law approaches and practices in order to be really effective.

In reality, a preference for individual private ownership has continued beyond the constitutional divide. While this bias towards individual title as a *preferred form of tenure* has had important implications for redistribution structures and unlawful occupation intervention approaches, as an apex form of tenure ownership underwent important changes. In the context of inner city and urban eviction in particular a human rights paradigm has evolved that has seriously challenged the dominance of

[176] Van der Walt (n 72) 521.

[177] Boone "Property and constitutional order: land tenure reform and the future of the African state" 2007 *African Affairs* 557 560-561.

[178] Boone (n 177) 560-561.

[179] Adams, Cousins and Manana (n 83) 9.

[180] This is not limited to persons of a particular cultural background only. Kepe, Hall and Cousins (n 172) 144 show that this is the case for both blacks and whites, though different symbolic value is attached, respectively. For white South Africans, particularly farmers and large land holders, land underpins their identity and symbolises wealth and security in an era where they no longer yield political power. On the other hand, for black South Africans, land is symbolic of the losses they suffered generally and is therefore integral to their struggle and fight for freedom. In this regard land is important as a physical asset, but it also extends beyond its physicality: it has political, economic and spiritual meaning as well – 147.

[181] See in general Adams, Cousins and Manana (n 83) 9.

[182] Adams, Cousins and Manana (n 83) 9.

[183] Pienaar and Brickhill (n 41) 48-31-34.

[184] Cousins and Hall "Rights without illusions: the potential and limits of rights-based approaches to securing land tenure in rural South Africa" *Working Paper* (May 2011) 18 PLAAS 6-8.

[185] Cousins and Hall (n 184) 6-8.

ownership and the hierarchical private law paradigm.[186] Despite having resulted in a "new paradigm" for evictions, serious challenges remain. In this context the rule of law and the role of the courts remain critical.

The benefits of tenure security, coupled with the need for *broad spectrum tenure options* not limited to single title only, underline the imperative for continued tenure reform.

7.2.3 Restitution

Land is both material and symbolic, a factor of production and a site of belonging and identity.[187] Therefore restoring what was lost would require more than only the restoration of land or rights in land. The aim of the restitution programme was thus not only to restore land and provide other remedies to people dispossessed, but also to ensure that the process would support reconciliation and that special emphasis would be placed on fairness and justice for individuals, communities and the country as a whole.[188]

The restitution programme embodies two kinds of justice: "procedural justice" and "restorative justice".[189] Procedural justice is provided for in the format set out in the Restitution of Land Rights Act 22 of 1994. This way the dispossessed were given a voice and a procedure to follow which could, finally, result in restorative justice. In an African context, where much emphasis is placed on balance, harmonisation and reconciliation,[190] the need for restorative and redistributive justice is even greater. By restoring land and property where it was possible to do so and by providing equitable compensation where actual and specific restoration were not possible, harmonisation and balance were pursued and justice was infused into South African society.[191]

While the balancing and harmonisation process, coined in legal terms, is not perfect and has limitations, it has proved to be extremely valuable. It has contributed greatly to better understanding of the past, and getting to grips with what certain sections of the population had to sacrifice and what they endured. The meaning of land generally and specifically to particular individuals and communities has also come to the fore.[192] By restoring land and rights in land, dignity has been restored and a sense of community, belonging and identity has been achieved. By not restoring land and land rights but awarding monetary compensation instead, some real benefits still accrued, even if they were only symbolic.[193] By restoring land and rights in land the skewed land ownership pattern had been adjusted, albeit only slightly.

Envisaged amendments to the existing act with respect to reopening the process of lodging of claims and extending the period for submission to 31 December 2018 may cause confusion and lead to uncertainty. This is the case not only with regard to land owners who have had no claims lodged against their land and who

[186] Liebenberg (n 48) 314-315.
[187] Fay and James "Giving land back or righting wrongs? Comparative issues in the study of land restitution" in Walker, Bohlin, Hall and Kepe (n 53) 41-61.
[188] Hall (n 53) 17.
[189] See also Gibson *Overcoming Historical Injustices: Land Reconciliation in South Africa* (2008) 20-23.
[190] Bennett *Customary Law in South Africa* (2004) 20-23; Claassens (n 146) 174-209.
[191] Fay and James (n 187) 41.
[192] Kepe, Hall and Cousins (n 172) 145.
[193] Fay and James (n 187) 41-61.

have thought, relieved, that the process has been completed, but also with respect to claimants who have already lodged claims or whose claims had already been resolved. With regard to the latter, conflicting and overlapping claims may be a real possibility. Re-opening the process furthermore impacts directly on the matter of procedural justice. While persons who do not lodge claims have the opportunity to do so again, those who have toed the line and managed to act within the time and other constraints, as required in law, may be resentful about the additional opportunity awarded certain claimants.

Wisdom, patience and concerted effort will guide the resolution of complex and overlapping land claims. In the context that clear guidelines are required with regard to what "just and equitable" compensation entails and whether actual restoration would be viable and preferable, a compelling argument may still be made for continued restitution. In this regard sufficient post-settlement planning and support, forming an integral part of the overall restitution process, is imperative.

While critical matters still have to be dealt with concerning land claims that have been lodged in accordance with the 31 December 1998-deadline, re-opening the claims process adds a whole new dimension to the restitution programme and may, ultimately, pose risks for its stability.

7.3 Land reform and the property law paradigm

James indicates that the rates of inequality have increased in South Africa since the advent of democracy.[194] While it is true that land reform has a major role to play in addressing these inequities, including inequities in ownership, it is important to consider the impact of land reform on the property law paradigm in general.

Despite propagating a broad spectrum of tenurial forms, preference for single title or Western-style ownership has essentially remained in place. There are many reasons for this: because title or full ownership was largely preserved for a small portion of the South African society, it has become sought after and prized. Being available for everyone, in principle, furthermore confirms equality and embodies a drastic movement away from apartheid-style, less secure, permit-based rights and interests. Traditionally, private ownership has also been linked to security, sustainability and progress.[195] In this light a preference for (single) Western-style ownership as form of tenure has endured. However, recent literature recognises that appropriate forms of land tenure are those that "mesh" best with the other cogs in the local economic and social machinery to produce security and development, and that tenure other than full private ownership works well in some contexts.[196] Accordingly, while inequities in ownership may be addressed by redistribution initiatives, it is unlikely that the redistribution endeavours alone will change the patterns of ownership dramatically. In this light tenurial reforms, not limited to full private ownership alone, are critical.

While a preference for private ownership has remained regarding its role and use as form of tenure, ownership itself has indeed undergone some changes and adaptations. It is especially in the context of eviction that the private law ownership paradigm has been altered by a new human rights paradigm. In this light a balancing of rights and interests may result in ownership being trumped, depending on the particular facts and considerations in each case. This is the case if eviction

[194] James (n 106) 318-338.
[195] Boone (n 177) 560-561.
[196] Bruce (n 19) 31 33.

applications are lodged formally and adjudicated on in formal court contexts. In instances where unlawful evictions prevail, as still often happens in present-day South Africa,[197] built-in protections and mechanisms aimed at enabling the balancing act are wholly ignored. Accordingly, urgent legislative amendment and other initiatives are required to exclude such avoidance in principle.

Adapting approaches to ownership, land and property has implications for administration and support systems. Adaptations therefore need to coincide with corresponding adjustments to survey, deeds and registries systems.

Some consideration as to what the property law framework will look like once land reform has progressed is also called for. Reilly makes the point that the big difference between the South African land reform programme and Australia's response to land issues is that, after completion of the process of restitution and acknowledging native title, native title would be recognised as a separate legal system, whereas the restitution of land and property rights in South Africa would largely result in "black" land titles being absorbed into the broader land title paradigm.[198] To some extent this is true. While customary law land rights will continue to operate, perhaps separately from ownership in the Roman-Dutch (or Western-style common law) context, restitution of land and land rights would mean that land title has largely been homogenised: former (initial) customary land ownership that had been dispossessed after 1913 would then be replaced by ownership in the Western-style format – either individual title or a common title, but essentially a private law, property law concept. Inevitably, vast tracks of land that were originally owned under customary law land title would then have been transferred into Western-style ownership. Only in the communal land areas, broadly located within the traditional areas of South Africa, would customary law land title continue, insofar as it had not been impacted on by way of other legislative measures and land reform developments.

Ultimately, land reform has contributed greatly and will continue to contribute in underlining and developing the inter-relationship of property and land rights on the one hand and the links with other socio-economic and political rights on the other.

8 *Summative conclusion*

It would not have been possible to venture into a new constitutional democracy and to endeavour reconciliation and nation-building without embarking upon an all-encompassing land reform programme. For South Africans of all races the path of reconciliation had to involve addressing history – in general, but in particular with regard to the history of dispossession. In this light the land reform programme has a historical foundation. But it is much more than that. It is essentially forward-looking, bringing the past into the present, and, ultimately, into the future.[199] In that regard development and sustainability go hand-in-hand with redress and reconciliation.

In this light a compelling argument can still be made for a continued land reform programme that is conceptualised and implemented optimally and successfully. In order to achieve this, the existing gaps and short-comings have to be addressed holistically. Dichotomies and tensions have to be considered and dealt with and tensions have to be identified and the necessary bridges built. Existing legislation and policies have to be aligned, conceptually and in practice. Mechanisms and

[197] See in general Nkuzi Development *National Nkuzi Development Evictions Survey* (2005).
[198] Reilly "Land rights for disenfranchised and dispossessed peoples in Australia and South Africa: a legislative comparison" 2001 *Queensland Law Journal* 23 39.
[199] Fay and James (n 187) 1-24.

tools have to be developed and structured in line with the overarching aims and objectives. Shifts in focus have to be grounded and motivated and thereafter reflected and carried through in all the dimensions involved, from policy perspectives right through to legislation to implementation and, finally, monitoring. Greater synergy between the various departments of rural development and land reform, agriculture, forestry and fisheries, and housing is furthermore called for. Reconsidering and re-evaluating the programme, its approaches, tools and mechanisms have to take place continuously, but in line with considered and weighed concepts and policies, subject to constitutional imperatives. Integrated, co-ordinated efforts with built-in monitoring and support are imperative.

Land reform in South African has already contributed, to some extent, to transforming South African society, landholding patterns and approaches to ownership concepts and paradigms. While some of the benefits are tangible and quantifiable, other benefits have more symbolic relevance, contributing to identity and a sense of well-being and community. But it has great potential to do much more: it can transform the country and society at large.

Presently, enormous challenges are being faced. But land reform is not a lost cause: it is a gradually unfolding process that is not achieved overnight. It requires constant commitment, unfailing vigilance and continued focused effort. It embodies a nation-wide endeavour which requires a national effort to shed the historical shackles and take land reform into the future.

SAMEVATTNG

REFLEKSIES OP DIE SUID-AFRIKAANSE GRONDHERVORMINGSPROGRAM: EIENSKAPPE, SPANNING EN DISKONNEKSIES

Die oormaat en impak van rasgebaseerde grondmaatreëls, waarvan die nagevolge steeds merkbaar is, het nie net 'n herverdeling van grond en grondregte genoodsaak – soos wat gewoonlik internasionaal die geval is nie – maar het ook vereis dat die opgradering van swak regte (grondbeheerhervorming) en die herstel van grond en regte in grond (restitusie) dringend aangespreek moes word. In dié proses moes onregmatige okkupasie van grond en uitsetting ook aandag geniet. Hoewel die Suid-Afrikaanse grondhervormingsprogram enkele ooreenkomste met ander grondhervormingsprogramme toon, is dit dus in wese 'n taamlik unieke program.

Suid-Afrika gee sedert 1991 oorsigtelik aan grondkwessies aandag en bedryf sedert 1994 'n indringende grondhervormingsprogram. Onvermydelik ontstaan die vrae of (a) die ingrypings oor die jare inderdaad tot 'n sinvolle, belynde grondhervormingsprogram aanleiding gegee het; en (b) of daar steeds 'n argument uitgemaak kan word dat grondhervorming moet voortgaan. Om hierdie vrae te beantwoord, word twee "interne" refleksies benodig. Eerstens moet aandag geskenk word aan die begrip "grondhervorming", gekoppel aan die uitsonderlike eienskappe van die oorhoofse grondhervormingsprogram en sub-programme, soos dit ter plaatse bedryf word. By nadere ondersoek is dit duidelik dat tweespalt en spanning inherent aan die program is. Vervolgens, gegewe die gapings, spanning en diskonneksies word die vraag ondersoek of daar steeds met grondhervorming voortgegaan behoort te word. Om reg aan beide refleksies te geskied, word die bydrae in twee afdelings onderverdeel. In deel 1 word die konsep van grondhervorming uitgelig, gekoppel aan die eienskappe van die Suid-Afrikaanse grondhervormingsprogram wat wentel om die oorsprong, struktuur, meganismes en aard daarvan. In deel 2 word die tweespalt, spanning en diskonneksies uitgelig waarna die vraag ondersoek word of grondhervorming nog sin het. Hoewel die uitdaging besonder groot is, kan daar steeds 'n argument uitgemaak word dat grondhervorming moet voortgaan, mits dit bedryf word in 'n aangepaste formaat, waardeur die gapings en diskonneksies pertinent aangespreek word.

In deel 1 van die bydrae is die fokus geplaas op die begrip "grondhervorming" in die Suid-Afrikaanse konteks en die uitsonderlike eienskappe wat die program uniek maak. Ten aansien van die oorsprong van die Suid-Afrikaanse grondhervormingsprogram, sowel as die strukture, meganismes en die aard daarvan is bevind dat dit 'n omvattende program is wat toegang tot grond en herverdeling, opgradering van grondbesitregte (grondbeheerhervorming) en restitusie omvat. Die proses van grondhervorming het ook 'n uitwerking op onregmatige okkupasie van grond en uitsetting.

In die lig van bogenoemde uitsonderlike eienskappe ondersoek deel 2 van die bydrae die tweespalt en spannings inherent aan die grondhervormingsprogram. Die analise toon aan dat die oorhoofse program in beginsel teenstrydige oogmerke najaag wat inherente verwarring veroorsaak. Dié verwarring slaan negatief neer op die meganismes en strukture wat daargestel is om grondhervorming te bedryf. Die sub-programme word eweneens deur diskonneksies en spannings gekenmerk. So het die herverdelingsprogram weens die manier waarop dit ontwerp is nie aan die armstes van die armes toegang tot grond bewerkstellig nie, het die grondbeheerhervormingsprogram in wese die klem op privaat, enkel eiendomsreg behou en het die restitusieprogram nie tot versoening en volhoubare ontwikkeling gelei nie. Die analise toon verder aan dat die wetgewing wat gepromulgeer is nie met onderliggende beleide belyn is nie en dat die implementering, interpretasie en afdwing van wetgewing problematies is. In wese is daar gapings en diskonneksies tussen beleide en relevante wetgewing, tussen wetgewende bepalings onderling en tussen die verskillende sub-grondhervormingsprogramme. In hierdie konteks is dit deurslaggewend om te onthou dat grondhervorming in artikel 25 van die grondwet gefundeer is. Daar kan gevolglik nie net daarvan afstand gedoen word nie. Die staat, in alle fasette, kan nie grondhervorming versaak nie. Ten spyte van die geweldige uitdagings kan daar steeds ’n argument ten gunste van grondhervorming uitgemaak word. Maar om met grondhervorming te slaag en werklik ’n verskil te maak, is dit noodsaaklik dat die inherente spannings en die bestaande gapings en diskonneksies, soos in deel 2 uiteengesit, dringend aangespreek moet word.

ARBITRARY DEPRIVATION IS UNCONSTITUTIONAL INTERFERENCE

“Interference significant enough to have a legally relevant impact on the rights of the affected party amounts to deprivation. Forfeiture involves state conduct by which property is lost to the state, without the consent of the owner and without just compensation … deprivation of property is arbitrary when the law does not provide sufficient reason for the particular regulatory deprivation in question, or when it is procedurally unfair … Thus s 89(5)*(c)* results in arbitrary deprivation of property in breach of s 25(1) of the Constitution” Van der Westhuizen J in *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) 21D-23D.