

# ***Land Reform in South Africa: An Overview***

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## **INTRODUCTION: THE NEED FOR LAND REFORM**

South Africa suffered a long history of colonization, racial domination and land dispossession that resulted in the bulk of the agricultural land being owned by a white minority. Black people resisted being dispossessed but were defeated by the superior arms of the newcomers. As Lewin has written, "whatever minor causes there may have been for the many Bantu-European wars, the desire for land was the fundamental cause." [FN1] Despite the claims that South Africa was largely uninhabited at the time of the arrival of Europeans, documentary evidence shows that in fact the land was inhabited. Thus the journal of the first European to settle at the Cape, Jan van Riebeeck records incidents of confrontation with the indigenous Khoi-khoi (or Hottentots) in 1655.

Only last night it happened that about 50 of these natives wanted to put up their huts close to the banks of the moat of our fortress, and when told in a friendly manner by our men to go a little further away, they declared boldly that this was not our land but theirs and that they would place their huts wherever they chose. If we were not disposed to permit them to do that \*284 they would attack us with the aid of a large number of people from the interior and kill us. [FN2]

Documents compiled by the historians Davenport and Hunt show how the indigenous San people were almost exterminated by the advancing white farmers and how despite their resistance the other African tribes lost the land either through wars or were cajoled into giving up the land through agreements which they did not understand. [FN3] The colonial and apartheid state confined the indigenous African people to reserves consisting largely of barren land or areas with poor rainfall patterns while the more fertile land was allocated to white farmers for commercial agriculture.

Although dispossession of black people initially took place through conquest and trickery, it came to be a major policy of the state supported by an array of laws from the early days of colonization. The most systematic land dispossession by the state came into effect after 1913. The Native Land Act of 1913 [FN4] apportioned 8% of the land area of South Africa as reserves for the Africans and excluded them from the rest of the country, which was made available to the white minority population. Land available for use by Africans was increased by 5% in 1936 [FN5] bringing the total to 13% of the total area of South Africa, although much of the land remained in the ownership of the state through the South African Development Trust supposedly held in trust for the African people. Thus 80% of the population was confined to 13% of the land while less than 20% owned over 80% of the land. Black people were prohibited from buying land in areas outside the reserves. This apportionment of land remained until the end of apartheid in early 1990s and remains virtually unchanged. The main purposes of the Land Act 1913 were firstly to make more land available to white farmers. Secondly, it was to impoverish black people through dispossession and prohibition of forms of farming arrangements that permitted \*285 some self-sufficiency. This meant they became dependent on employment for survival, thus creating a pool of cheap labor for the white farms and the mines. [FN6] White farmers had repeatedly complained that black people refused to work for them as servants and laborers. Thirdly, there was of course also the purpose of enforcing

the policy of racial segregation, which had previously not been consistently enforced. Besides impoverishing black people and stunting their economic development, the successive white governments caused a lot of suffering, humiliation and abuse of the human rights of black people. The migrant system that resulted from the need of black males to migrate to the cities and white farms in order to earn a living and provide for their families, in many cases resulted in the break up of families and dislocation of social life.

The Group Areas Act of 1950, [FN7] passed soon after the National Party took over government in 1948, was used by the apartheid state to carry out forced removals of black people from land declared to be white areas and to complete the policy of racial segregation by removing "coloured" and Indian people from so-called white areas. Pockets of black farmers who had escaped the 1913 Land Act because they had title deeds to their land, were removed under the Group Areas Act in a process that was dubbed cleaning up the "black spots." The "black spots" were usually fertile land whereas the areas in the Bantustans where the people were moved to were over-crowded, over-grazed and over-cultivated. The Prevention of Illegal Squatting Act of 1951 augmented the Group Areas Act and other racially based land laws by making provision for the eviction of people who had no formal rights on land. It authorized the state and private landowners to evict people and demolish their homes without court orders. In effect, most of those evicted had initially lived on the land with the consent of the owner but once that consent was withdrawn for whatever reason, the people automatically became classified as squatters and became liable to be evicted. [FN8] Those removed were dumped in the crowded Bantustans or homelands or moved on to other vacant land until the land was needed for another purpose \*286 prompting their eviction again. It is estimated that 3.5 million people were forcibly removed under various apartheid laws between 1960 and 1983. [FN9]

The struggle for liberation from colonial and apartheid domination was partly based on the objective of regaining the land. The sentiments behind this struggle can be summarized in the statement by an old man at a community meeting:

The land, our purpose is the land, that is what we must achieve. The land is our whole lives, we plough it for food, we build our houses from the soil, we live on it and we are buried in it. When the whites took our land away from us we lost the dignity of our lives, we could no longer feed our children. We were forced to become servants, we were treated like animals. Our people have many problems, we are beaten and killed by the farmers, the wages we earn are too little to buy even a bag of mielie-meal. We must unite together to help each other and face the Boers. But in everything we do we must remember that there is only one aim and one solution and that is the land, the soil, our world. [FN10]

The Freedom Charter of 1955 set the goal of sharing the land: "Restriction on land ownership shall be ended, and all the land redivided among those who work it, to banish famine and hunger...All shall have the right to occupy land wherever they choose.." [FN11]

Liberation and democracy were ultimately not won through armed struggle but through a negotiated settlement, which necessitated compromises on the issue of land. Whereas the hopes of the black people were that after apartheid they would regain the land or that at least everyone would gain access to enough land for her or his needs, the negotiated settlement left the distribution of land largely unchanged through the constitutional guarantee of the right to \*287 property with only a limited form of restitution. Nevertheless, it was the policy of the incoming government of the African National Congress (ANC) to effect land reform that would to a significant extent ameliorate the injustices of deprivation and denial of access to land. Land reform would also

alleviate poverty, especially in the rural areas, and give some protection against eviction to those who had been forced for generations to live on land without proper rights. In the policy document, the Reconstruction and Development Programme (RDP), the ANC undertook to carry out land reform under three major strategies: restitution to restore land rights to those who were dispossessed of them under discriminatory laws, redistribution to make land more accessible to those who had previously been denied access, and tenure reform to give security of tenure to labor tenants, farm workers and other rural dwellers who lived on land without secure rights. [FN12]

## THE CONSTITUTION

The Interim Constitution of 1993, which ushered in the new democratic era in South Africa, did not contain detailed provisions for land reform. It was a compromise negotiated between the main interest groups in the negotiating process, the African National Congress and its allies, on the one hand, and the National Party government and its allies on the other. The issue of the inclusion of property rights in the Constitution was highly contested. Some in the liberation movements argued against a property clause that would guarantee the existing property rights on the ground that this would hamper efforts by the democratic government to carry out programs of land reform. It was also argued "to entrench existing property rights in the new South African Constitution was to legitimize and entrench, as a human right, the consequences of generations of apartheid and dispossession." [FN13] On the other hand, the government of the day and its supporters argued strongly for the inclusion of such a clause to ensure land would not be nationalized and transferred to the land-hungry majority without compensation to current owners. Ultimately, all parties agreed to \*288 include a property clause in the Bill of Rights. However, there were no specific provisions for a comprehensive program of land reform. The only provision was in relation to the right to restitution of land rights for persons or communities dispossessed of such rights under discriminatory laws. [FN14]

The 1996 Constitution, drafted by a democratically elected Constitutional Assembly, was more specific about land reform and more balanced in addressing the issue of property. Land matters were treated as matters of rights and included in the Bill of Rights. Section 25 of the Constitution guarantees the right of property against arbitrary deprivation but also provides for the power of the state to expropriate private property for public purposes or in the public interest subject to just and equitable compensation. Public interest is specifically defined to include "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources..." [FN15] The amount recoverable as compensation in case of expropriation, is subject to certain considerations which may have the effect of reducing it considerably below the market value but which ensure that it is just in the circumstances. Section 25(3) states: The amount, timing, and manner of payment of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors, including: (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvements of the property; and (e) the purpose of the expropriation.

At the same time, the property clause includes specific provisions on land reform, which impose obligations on the state to bring about greater access to land. These provisions embody three

different aspects of enhancing access to land: restitution, redistribution and tenure reform as originally conceptualized in the RDP. In what follows, an attempt is made to summarize the \*289 Constitutional and statutory provisions of these strategies as well as their implementation.

## RESTITUTION

### The Legal Provisions

The Constitution provides that persons or communities who were dispossessed of property after 19 June 1913 [the date of the coming into effect of the notorious Native Land Act of 1913] as a result of past racially discriminatory laws or practices are entitled in terms of an Act of Parliament to restoration of that property or to equitable redress. [FN16]

The Act of Parliament giving effect to the constitutional provision is the Restitution of Land Rights Act. [FN17] The Act entitles a person or a community dispossessed of rights in land or a descendant of a person or a deceased estate of a person dispossessed of rights in land, after 19 June 1913, as a result of racially discriminatory laws or practices, to claim restoration of those rights or equitable relief such as alternative land or compensation. [FN18] The scope of restitution and its potential for transforming the distribution of land ownership in South Africa is limited because of its 1913 cut off date which excludes many potential claimants who were dispossessed of land before 1913. The cut-off date was a compromise agreed to by those who negotiated the new dispensation on the basis that leaving the right to restitution open-ended would have entailed many problems. As stated in the White paper on Land Policy: "In South Africa, ancestral land claims could create a number of problems and legal-political complexities that would be difficult to unravel." [FN19] This conclusion was reached based on various grounds. Firstly, since most historical claims are based on membership of a tribal kingdom or chiefdom "the entertainment of such claims would serve to awaken and/or prolong ethnic and racial politics." Secondly, it would be difficult to determine the eligible claimants as members of ethnic communities or chiefdoms and their descendants had increased more than eight times and were scattered. Thirdly, large parts of South Africa could be subject \*290 of overlapping and competing claims where pieces of land had been occupied in succession by different groups, for example, the San, Khoi, Xhosa, Mfengu, Trekkers and British. [FN20] It is doubtful that the white minority, represented by the National Party government would have agreed to an open-ended restitution claims process knowing that virtually the whole of the South African land surface could be the subject of restitution claims. Nevertheless, many black South Africans are to-date unhappy about the cut-off date, [FN21] although it is difficult to imagine how the process would have worked without the cut-off date.

In the interest of certainty for existing landowners, a deadline of 31 December 1998 was also imposed by the Act for the lodgment of claims. This also has excluded some potential claimants who did not get to know that they had a right to restitution in good time [FN22] or being under the patronage of the land owners as labor tenants or farm workers, were afraid to lodge their claims. The Commission for Restitution of Land Rights (CRLR) has acknowledged the problem but has rejected calls for the reopening of the lodging of claims. It has stated: It appears that there are many people who did not lodge their claims probably because they did not believe that this restitution promise would be met. Now that they see that claims are being settled, they are putting pressure on the Commission to re-open the lodgment process. The Commission is unable to do so, since it is bound by the Act. [FN23]

The Commission gives examples of areas where calls for reopening have been made: District Six

in the Western Cape (Cape Town), rural betterment claims in the Eastern Cape (former Transkei & Ciskei) and urban claims in Uitenhage and Kirkwood.

#### \*291 Progress in Implementation

According to the White Paper, the government had set itself targets for the finalization of restitution as follows: "a three year period for the lodgment of claims, from 1 May 1995; a five year period for the Commission and the Court to finalize all claims; and a ten year period for the implementation of all court orders." [FN24] The program is now in its ninth year and should therefore be completed by next year (2005). However, the process has not moved at the pace envisaged. The validation of claims, that is, the investigation to determine whether a claim is prima facie valid in terms of the criteria set by section 2 of the Act, has been completed but the verification process-confirming the identities of claimants, the size and value of the land involved etc. is still going on and the settlement of claims is far from being completed. However, the rate of settlement of claims has greatly increased over the years. Whereas in the four years between 1996 and 1999 only 41 claims had been settled, benefitting 3,508 households, in the following four years 36, 645 claims were settled (about half of the total number of claims) benefitting 80, 153 households. [FN25] According to the latest statistics issued by the Land Claims Commission, as of February 2004, 48 663 or 61% of all claims have been settled, benefitting 117 326 households. [FN26] This is a considerable achievement given the challenges that the Commission has been facing. Nevertheless, it is unlikely that the target of completing the process including implementation of settlement awards by 2005 can be attained. President Mbeki in 2002 called on the Commission to complete the process of settling all claims by 2005. This does not mean implementation of wards must be completed by that time. However, even the reaching of settlement agreements or obtaining court orders in respect of all the claims may not be achieved by the target date. [FN27]

The Commission faces a number of challenges that may make the achievement of the 2005 target impossible. First it lacks the capacity in its various offices to handle all the stages of processing claims, especially verification, valuation of claims and calculation of compensation to be paid either to claimants or to owners of land under claim. Secondly, there are problems with obtaining the necessary evidence, documentary or otherwise to \*292 go ahead with a claim that is prima-facie valid. Many of the land rights in rural areas were never registered or surveyed. Some claimants do not have identity documents, marriage or death certificates which can assist with proof of entitlement to restitution. Thirdly, many current owners of land are reluctant to give up the land or are outright hostile to restitution. Some landowners' organizations have been waging a campaign urging their members not to cooperate in the restitution process. The Transvaal Agricultural Union, for instance, has set up a Restitution Resistance Fund intended to raise money to pay off claimants so they withdraw their claims or settle for less valuable land elsewhere. Where farmers have agreed to negotiate for the purchase of the land for restitution, they have pitched the prices of the land out of the reach of the state, sometimes up to 10 times or more the market value. [FN28] The state has the power under the Constitution to expropriate the land subject to payment of "just and equitable" compensation. However, in the interest of reconciliation and national unity as well as the desire to portray South Africa as an investor-friendly country that protects private property, the government has from the start been reluctant to resort to expropriation. It has preferred to negotiate and follow the principle of "willing buyer willing seller." Given the unreasonableness of some farmers, however, there is no reason why the government should not go for expropriation. This would not only accelerate the rate of settling claims but would act as an incentive to land owners to take the state more seriously and encourage them to demand reasonable prices. An amendment

to the Restitution of Land Rights Act [FN29] has been passed giving the Minister the power to expropriate land for restitution without having to get a court order. Previously, the Act provided for expropriation of land for restitution where the Land Claims Court had ordered the state to expropriate land for the purpose. Although nothing stopped the state expropriating in terms of section 25(2) of the Constitution, the Amendment Act makes the matter much clearer. The Amendment should indeed allow the acquisition of land to proceed much faster where the landowner is refusing to negotiate. There is still scope for landowners to frustrate the process by challenging the amount offered as compensation in the Land Claims Court. However, since the expropriation \*293 becomes effective at the time of a valid expropriation order by the Minister, the Amendment still takes the process forward. What remains is to see whether the state is serious about expropriation and has the political will to proceed or whether it is only a threat to get the landowners talking. What is necessary is a few expropriations to send a clear message to white farmers that government is serious. Before the "fast-track" land acquisition in Zimbabwe got out of hand, this kind of strategy had worked in getting farmers talking and negotiating seriously with the state.

Fourthly, there is the problem of financing the program. Although the state has already spent over three billion rand on restitution, the Commission requires more billions to pay for land, provide compensation but also to pay for the consultants that assist the commission in validating the claims and carrying out the valuations of claims and the land. Given the other priorities of the state such as education, health and housing, the treasury is hard-pressed to provide the money. [FN30] Nevertheless, the budget for restitution, has been substantially increased since 2003 and the government seems determined to complete the process.

#### How Effective Will Restitution be as a Contribution to the Correction of the Inequitable Distribution of Land in South Africa?

At the end of the restitution process when all the 79,694 [FN31] claims have been settled, a large proportion of the agricultural land in South Africa will still be in the hands of a few thousand white farmers and cannot be depended on either to bring about equity in the distribution of land or to alleviate the overcrowding in the rural areas and the urban townships. As of 29 February 2004, with 61% of the claims settled, 810 292 hectares have been transferred to an estimated 616429 beneficiaries. [FN32] This is a significant achievement in \*294 processing of the claims, especially since 2000. A number of communities, which were brutally moved under apartheid, have been able to return to their ancestral lands. However, even double the amount of land so far restored would still be about 1.6 million hectares, which is only 2% of the land held by white commercial farmers. [FN33] The majority of claims settled so far (about 88%) are urban claims involving small plots of land. About 35% of these have been settled with the restoration of land while about 60% were awarded financial compensation and the balance alternative remedy. [FN34] Thus, not much land has changed hands in the urban areas. As far as rural areas are concerned, most of the rural claims involving thousands of hectares and representing thousands of claimants are still to be settled. [FN35] Although the statistics show that about 46% of the rural claims settled have been settled with restoration of land, [FN36] it is not clear how much land remains under claim. It is regrettable that more rural claims have been

settled with monetary compensation than with land as the rural poor are in need of more productive land to alleviate poverty. As has been argued, "The tendency towards cash rather than 'developmental' settlement of claims (land, housing or commonage) limits the contribution of restitution to the broader objectives of transforming patterns of land ownership and building the livelihoods of poor rural people." [FN37] Compensation has in most cases been by way of standard settlement offers of between R40,000 and R50,000 in urban areas although in rural areas offers are based on the actual value of the land dispossessed. It is not clear whether monetary compensation is in all cases the preference of claimants who are compensated or whether it is a result of pressure from the state. Compensation avoids valuations and is therefore cheaper and faster thus enabling the state to deliver on restitution. However, when the state offers compensation it must be accepted or otherwise the claimant must pursue \*295 the claim through the Land Claims Court. The latter option requires the assistance of lawyers and is therefore expensive and not attractive to poor claimants. The Commission has argued that many people, especially in the urban areas have, due to poverty, insisted on monetary compensation rather than land. [FN38]

The CRLR is probably right in saying that in restitution, the South African government has taken a bold step in healing the wounds of the past and that [unlike Zimbabwe] this has been done in an orderly way under the rule of law. [FN39] However, because of poverty, lack of modern technical and managerial skills as well as lack of follow-up support by the state some of the communities that have received land back have not been able to utilize it all or efficiently. This detracts from one of the major policy objectives: tying land restitution to development and the improvement of the lives of the beneficiaries of restitution. In any case, despite the considerable success with restitution the grossly inequitable distribution of ownership of land can only be substantially transformed through redistribution, which we discuss below.

## **REDISTRIBUTION**

### Constitutional Framework for Redistribution

Redistribution refers to the acquisition of land by the state for purposes of distribution to those who have no land or who have inadequate access to land. This is provided for in S25(5) of the Constitution, which states: "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

This provision imposes a positive obligation on the state to enhance accessibility to land. It creates a socio-economic right for those in need of land to call on the state to act and make land accessible. This is confirmed by the decision of the Constitutional Court in *Government of the Republic of South Africa v Grootboom and others* where in talking about the right to

housing, it \*296 stated: "The rights need to be considered in the context of the cluster of socioeconomic rights enshrined in the Constitution. They entrench the right of access to land, to adequate housing and healthcare, food, water and social security." [FN40] [Emphasis added].

Thus, although the Constitution does not expressly state access to land as a right, the Constitutional Court has interpreted it as such. The Court further states: "The state must also foster conditions that enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done." [FN41] The court emphasized that the Constitution obliges the state to give effect to socio-economic rights and that in appropriate circumstances the courts must enforce these rights. [FN42]

The state's obligation to foster access to land is, however, not absolute. First, the state is only required to take "reasonable legislative and other measures" and secondly, it is only obliged to act "within its available resources" to foster conditions that enable citizens to gain access to land. [FN43] The Constitutional Court has indicated that the executive and legislature have discretion to determine from among a range of possible measures what option(s) should be adopted. However, to be reasonable, a program must be capable of facilitating the realization of the right. [FN44] The policies and programs must be reasonable in their conception as well as their implementation. [FN45] Most importantly, the measures must take into account the social, economic and historical context. [FN46] They must not leave out those most in need. "If the measures, though statistically significant fail to respond to the needs of those most desperate, they may not pass the test." [FN47]

\*297 As far as "available resources" are concerned, it is recognized that the state does not have unlimited resources to satisfy all the legitimate needs of its citizens. Therefore, the fulfillment of the obligations under the Constitution is subject to availability of resources in the context of the other obligations of the state. [FN48] The determination of how much money should be allocated to land reform is regarded as a matter for the executive and the legislature. The Constitution Court has made it clear that courts should be slow to interfere in such decisions unless there is a clear need to do so to protect constitutional rights. [FN49]

## Enabling Legislation

There is no comprehensive law providing for mechanisms for redistribution of land in order to eliminate land hunger and achieve an equitable distribution of land in accordance with section 25(5) of the Constitution. There is a pre-1994 law [FN50] which was not meant to bring about large scale redistribution but was rather intended by the last apartheid government to alleviate the more glaring needs for land, especially for housing in overcrowded African townships and hopefully thereby to avoid radical changes to the distribution of land by a future black government. This law was amended



in 1998 [FN51] to broaden its scope, but remains limited. The Act empowers the Minister to designate state or private land for acquisition, development and transfer of land for settlement or for small-scale agricultural purposes to benefit the poor. The Minister has power to expropriate land for redistribution subject to compensating the owner. [FN52]

\*298 There are other laws which primarily deal with other aspects of land reform but only deal with acquisition of land by specific types of persons in given circumstances. Thus, the Land Reform (Labour Tenants) Act provides for a labour tenant who qualifies as such under the Act to apply for acquisition of the land on which he/she resides or on which he/she was residing before he/she was evicted. [FN53] The state would provide the means to purchase such land for the tenant from the current owner. However, this particular mechanism for redistribution was only intended to be operative for five years from 1996. The deadline expired in March 2001, after a year's extension. According to the Department of Land Affairs (DLA), 21,000 applications had been received by the deadline. 19,000 were considered valid, 2000 were rejected as invalid and about 5000 had received land by mid-2003. [FN54]

Another law that may be used for redistribution for a dedicated class of persons is the Extension of Security of Tenure Act (ESTA), [FN55] discussed later under tenure reform, which is primarily aimed at providing security of tenure to occupiers living on other people's land in rural areas. This Act is aimed at protecting mainly current and former farm workers and their families living on commercial farms from unfair evictions. In addition, section 4 of the Act provides that such occupiers may apply to the Department of Land Affairs for the acquisition of the land on which they are residing or other land off the farm which is provided by the owner of the land on which they reside or by another person. [FN56] There is no reliable information as to how effectively this form of redistribution mechanism has been used. According to DLA information, 9,227 hectares have been transferred to 1,699 households of farm workers or former farm workers. [FN57] The Development Facilitation Act [FN58] is equally limited in its scope and effect on redistribution. This Act is largely aimed at accelerating development of land for settlement by bypassing cumbersome sub-division, planning and building regulations that are ordinarily required in the development of a township. Again it empowers the Minister to designate land for development and provides mechanisms for approval of development plans by special tribunals etcetera. However, although the developed areas are ultimately \*299 allocated to individual owners, this law cannot be said to have a serious impact on making land available to those who need it.

It has been argued that there is a need for a comprehensive and effective land redistribution law enacted after wide consultation, providing for rights of potential beneficiaries and specifying responsibilities of the state through its local, provincial and national organs in order to effectively accomplish the purpose of section 25(5) of the Constitution. [FN59]

## Redistribution Policy and Targets

In the Reconstruction and Development Programme (RDP), the ANC set itself the target of transferring 30% of all agricultural land within five years.

[FN60] The document informed the drafting of the White Paper on South African Land Policy [FN61] which committed the government to land reform, including land redistribution. According to the White Paper, the purpose of land redistribution is: "to provide the poor with access to land for residential and productive uses, in order to improve their income and quality of life. The programme aims to assist the poor, labour tenants, farm workers, women, as well as emergent farmers." [FN62]

As earlier indicated, the state has pursued a market-oriented land reform policy. Although the Constitution permits expropriation of land for public purposes or in the public interest, including land, the White Paper states: "Redistributive land reform will be largely based on willing-buyer willing-seller arrangements." [FN63] It is further said: "Expropriation will be used as an instrument of last resort where urgent land needs cannot be met, for various reasons, through voluntary market transactions." [FN64] So far, the state has not once used its power to expropriate land although it has often complained that land owners are unwilling to avail land for redistribution or that exorbitant prices make land too expensive to acquire. [FN65]

\*300 In June 2001 the period over which the targeted 30% of agricultural land was to be completed was extended to 15 years." [FN66] This was an acknowledgement of the very slow pace at which redistribution had been going. It has been estimated that to achieve the 30% target, the state would have to redistribute 1.64 million hectares per annum, assuming the total amount of land in the commercial farming sector to be just over 82 million hectares. [FN67] Yet less than one million hectares was distributed between 1994 and 2000. [FN68] Although land delivery has accelerated with the current Land Redistribution for Agricultural Development, it is unlikely that 24.7 million hectares will be distributed in 15 years.

According to the Department of Land Affairs' Medium Term Strategic Plan for 2003-2007, a total of 867,641 hectares will be redistributed during the four years from 2003/04. This is an average of 216 910 hectares per annum or 13% of the 1.6 million required to achieve the 30% in 15 years. However, the DLA projections may be more realistic given the budget allocated to the department. The budget for the different redistribution programs is to grow by 15% from 2003/04 to 2004/05 and by 20% from 2004/05 to 2005/06, that is, from R195 882,000 in 2003/04 to R270 773,000 in 2005/06. [FN69] Whether the Department will in fact spend this money and redistribute the land remains to be seen. [FN70] The projections are in line with the current rate of redistribution. According to the Minister of Land and Agriculture, 185,609 hectares were transferred under the various redistribution programs from 1 April 2002 to 31 \*301 March 2003, involving 438 farms. [FN71] This is just 10,273 hectares less than the figure projected for 2003/04. This calls into

question whether the demand-led approach can achieve the 30% target even in 20 years.

There are a number of redistributive mechanisms that are used: the Settlement/Land Acquisition Grant (SLAG); farm equity schemes; municipal commonage grants and more recently the Land Redistribution for Agricultural Development programme (LRAD). The LRAD is the most significant of these programs.

#### Settlement/Land Acquisition Grant (SLAG)

SLAG was the main mechanism for land redistribution until 1999. Although it has not been abandoned, it has been overtaken by LRAD as the main vehicle of redistribution. Under SLAG, the state provided a standard subsidy of R16 000 [about US\$2,300] per household to be used for "acquisition of land, related on-farm capital items, enhancing tenure rights..." [FN72] This subsidy is supposed to cover the needs of the poor for a modest dwelling and/or a productive land ownership opportunity. Obviously the amount is very small even for the very poor to be able to purchase land with it and construct a dwelling. It is expected that a number of poor households pool their subsidies, and if possible access a top-up loan in order to purchase agricultural land, which they can then jointly own and run as a farm or have it sub-divided as individual family farms.

#### Farm Equity

Farm workers or former farm workers may apply for the R16, 000 per household grant to finance or part finance the purchase of equity shares in farms. [FN73] A few workers have benefitted from the scheme. However, there is no reliable data as to how successful this scheme has been. There are claims that white farmers in financial problems have persuaded their workers to get the \*302 grants and buy shares in the farms thus giving the farms a lifeline without the workers benefitting much from it. [FN74]

#### Commonage

The national government provides funds to municipalities to purchase land to be used by poor communities living in or around rural towns for grazing or as small garden areas to supplement their incomes and improve food security. [FN75] Whereas municipal commonages existed before 1994, they were only accessible to the white residents of the towns in accordance with the discriminatory policies of the state. In the 1950s, municipalities started leasing out the commonage land to commercial farmers. [FN76] The post 1994 policy was to ensure that commonage was used for the benefit of the poor in urban and periurban areas. However, not much land has been made available in this way except in the two provinces of Northern Cape and the Free State.

Although commonage accounts for 31% of all land made available under redistribution up to end of 2002, 74% of this was only in one district, Namaqualand in the Northern Cape. [FN77] In any case, indications are that use of commonage for redistributive purposes is being de-emphasized on the basis that it has not been very effective in improving the lives of the poor. [FN78]

#### Land Redistribution for Agricultural Development Programme (LRAD)

LRAD is currently the dominant redistribution mechanism. In a policy statement in February 2000, the new Minister of Land and Agriculture expressed dissatisfaction with the nature and application of SLAG. The new programme, LRAD, was drafted in 2000 and launched in August 2001. The major aspect of the programme is that grants are subject to an own contribution from the applicant. The minimum contribution is R5000, which qualifies an applicant to get the minimum grant of R20, 000. A contribution of R400,000 would qualify \*303 an applicant to access the maximum R100,000. [FN79] The lower scale grants are supposed to be used to provide a food-safety-net for the very poor -- in other words, to engage in subsistence agriculture. However, the higher the grant the more it is expected of the beneficiary to produce for the market. At the higher end of the scale, the objective is to promote emerging black commercial farmers and to use "land redistribution as a mechanism to facilitate long-term structural change in agriculture." [FN80] LRAD has been criticized in that emphasis appears to have shifted from the poor and marginalized to emerging commercial farmers as the primary beneficiaries of redistribution programs. This criticism is borne out by figures from the state. In April 2003, the Minister of Agriculture and Land Affairs announced that in the year between 1st April 2002 and 30 March 2003, 185,609ha had been transferred under LRAD with 8,139ha going to "previously disadvantaged beneficiaries, including labour tenants." [FN81] This is only about 4.4% of land transferred.

Besides the apparent state bias in favor of commercial farming it is likely that the own contribution requirement will discourage potential beneficiaries among the poor, to apply for land grants. Although, the LRAD document stipulates that contribution may be made in cash or in kind or in labor, this may not be very helpful. The poor are the ones unlikely to have farming implements or large animals to pledge as contribution and their labour is spent in various survival activities. It is true that contribution is an incentive for potential beneficiaries to take working the land seriously but it would seem like punishing the very poor to demand R5000 before they can have access to land for their very survival. For those in desperate need of land, the right of access to land in section 25(5) as interpreted in Grootboom is not likely to be realized under LRAD. This is not to suggest that potential black farmers with the capacity and commitment to engage in medium to large scale commercial farming should not be assisted to purchase farms. It will serve the purpose of reconciliation for land to be equitably distributed and wealth creation from agriculture to be shared among the different racial groups of South Africans. Unlike Zimbabwe, there is no evidence of corruption

and cronyism in land allocation. However, the primary purpose of land reform should revert to \*304 alleviating poverty and to ensuring a dignified existence for the majority of the citizens.

Despite the fact that the state has not achieved its ambitious target set in 1994, there is clearly progress in land redistribution and it has come about in an orderly manner. According to a recent study, 1.4 million hectares were transferred to approximately 130, 000 beneficiaries between 1994 and 2002. [FN82] This is only 1.7% and a long way from the 30% target but it is, nonetheless, progress.

## **TENURE REFORM**

Tenure reform is intended to provide secure tenure for those living for a long time on land owned by others without secure rights. The targeted persons include farm workers, former farm workers, sharecroppers, as well as labour tenants. The policy also aims at protecting people living on communal land without secure rights. As section 25 (6) of the Constitution puts it: "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress." Because of the segregation and apartheid policies that denied black people access to land, many migrated to the cities or to commercial farms in search of employment. They never acquired ownership or other secure rights on land and stayed on land on the basis of a government permit or permission to occupy or with the consent of the landowner. This meant that such permission or consent was liable to be withdrawn at any time with the consequence that the occupier became a squatter. As discussed above, the notorious Prevention of Illegal Squatting Act 52 of 1951 was frequently used to evict such occupiers and move them to the crowded black homelands. In the communal land areas (mainly the former homelands), occupiers hold land under customary law, which does not permit individual ownership as understood in the western type common law. Instead, they have use rights under customary law, which though traditionally secure, can be arbitrarily taken away by corrupt chiefs. With the new democratic dispensation, it was necessary to improve security of tenure for all vulnerable occupiers of land. It is in this context that constitutional provision \*305 was made requiring the state to pass an Act of Parliament providing for security of tenure to those with insecure use of land.

Parliament did not pass one piece of legislation providing for security of tenure but rather a number of laws addressing the needs of different categories of landholders. The major ones are the Land Reform (Labour Tenants) Act 3 of 1996, which protects labour tenants, and the Extension of Security of Tenure Act 62 of 1997 [ESTA], which protects other occupiers of rural land with consent of owners. A less significant law is the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILR) that was enacted as a temporary measure to provide protection for de facto occupation, particularly in the

former homelands, pending the introduction of comprehensive legislation that would provide permanent rights. The IPIPR, however, is still in operation as the state has failed to finalize the enactment of the Communal Land Rights Bill. [FN83]

### The Land Reform (Labour Tenants) Act (LTA)

A person entitled to the protection and benefit of LTA must be a person who, as of 2 June 1995, lived on a farm, had a right to use land for grazing or cropping and in consideration thereof provided labor to the owner of the land and whose parent or grandparent had a similar arrangement on a farm. [FN84] The Act provides that such labour tenant may not be evicted except in terms of an order of the Land Claims Court and only for refusing or failing to provide labour or for committing a material breach of the agreement with the owner that is not practically possible to remedy. [FN85] A tenant who is 65 years of age or above or who as a result of disability is unable to work may not be evicted for failing to provide labour. A labor tenant need not provide labor to the owner personally but may nominate a representative to perform the labor. In practice it is the wives and children of labor tenants who fulfill the labor obligations of the labor tenant.

\*306 Although the Act is an important law that attempts to balance the interests of landowners and those who have worked the land for years or even generations, some landowners have resisted it. They argue that the presence of labor tenants with long-term security on the land has devalued their properties. Intimidation and illegal evictions are still continuing. The Act is also limited in its scope in that it covers only a tenant whose parent or grandparent is or was in a labor tenancy arrangement on a farm. Thus persons who have provided labour on a farm in exchange for the right to reside and use land but whose parents or grandparents never had such an arrangement do not qualify for protection under the Act. The generational requirement was introduced precisely to limit the number of claimants by benefitting those whose extended families have served longest but as has been observed in a number of cases, the generational requirement has resulted in unfairness for some otherwise deserving tenants. [FN86] Another problem is that, probably because of poor government communication, a number of qualifying labour tenants never applied in time for ownership of the land on which they live.

### Extension of Security of Tenure Act (ESTA)

ESTA applies to rural occupiers. An occupier is defined as a person who occupies land with the consent of the owner or person in charge. The consent may be express or implied. Besides farm workers, former farm workers and their families, the Act covers labor tenants [FN87] and persons who have a labor tenancy agreement but do not qualify for protection under the LTA because they do not fulfill one of the conditions such as the generational requirement. Similar to the LTA, ESTA is intended to provide security of tenure to

occupiers. An occupier may only be evicted by an order of court for serious misconduct or a serious breach of the agreement between him or her and the owner. An owner can no longer rely on a simple assertion of ownership and the concomitant right to regain possession. He has to show a justifiable ground, in terms of the Act, for the termination of the agreement before he can seek an eviction order. He must also show compliance with the procedures set out by the Act. [FN88]

\*307 An attempt is made to balance the interests of owners and those of occupiers who have been forced by historical factors, especially racial discrimination, to live on other people's land. Besides spelling out the right to security of tenure to reside and use the land, ESTA requires that before an application for eviction can be considered by a court, the applicant must have given notice of not less than two months to the occupier, the provincial Department of Land Affairs and the municipality in whose areas of jurisdiction the land is located. The purpose of the notice is not only to give the occupier an opportunity to prepare his/her case but allow the Department of Land Affairs to attempt mediation and for the municipality to consider possible alternative accommodation if the eviction is granted and the evictees have no where else to go.

The Act lists a number of rights as mutual rights between owners and occupiers. These rights mirror a number of rights listed in the Constitution, including: dignity, freedom of association, freedom of movement, privacy, religion etc, which were frequently denied workers on farms. There is a right to family life, ensuring that occupiers are allowed to live with members of their families in accordance with their culture, which was often denied to them. There is also a right to visit family graves on the land even for non-occupiers. Recently, ESTA was emended to give occupiers the right to bury deceased members of their families on the farm on which they live, if there is an established practice of occupiers burying family members on the farm. [FN89] There is also a right to bury a long-term occupier [i.e., one who has lived on the land for over 10 years and is 60 years old] who was living on the land at the time of his/her death, even if there is no established practice. [FN90]

Commercial farmers vehemently opposed the passing of the Act and many continue to defy it by evicting occupiers illegally or intimidating occupiers into leaving the farms. [See the South African Human Rights Commission report on farm violence, 2003.] They claim that ESTA violates their Constitutional right to property. [FN91] They also argue that security of tenure of occupiers makes prospective buyers of farms reluctant to buy and this depresses prices. On the other hand, occupiers and some civil society organizations have \*308 argued that the protection given by ESTA is inadequate if not illusory since arbitrary evictions continue and abuse of occupiers' rights to security of the person and to dignity as well as other rights continues. Although ESTA requires a court hearing an eviction application to call for a social impact report indicating the availability of alternative accommodation and the impact the eviction is likely to have on the evictees, there is no obligation on

either the private landowner or the state to actually provide alternative land on which evicted persons can be resettled. Further, most applications are brought in the magistrates court. Many magistrates have not embraced transformation and invariably grant eviction orders without much concern for the statutory protection, [FN92] especially in undefended proceedings where default judgment is given. Although this problem is mitigated by the automatic review of eviction orders by the Land Claims Court sometimes the setting aside of the order comes too late when the evicted occupier has given up and left and cannot be traced.

It must be acknowledged that ESTA is an important step in controlling the damage caused by apartheid. Ultimately, however, what is needed is for those whose only home is on other people's land to get land of their own on which they can live peacefully and derive a living without the fear of eviction hanging over their heads. S4 of ESTA empowers the Minister of Agriculture and Land Affairs to grant subsidies to enable occupiers, former occupiers and other persons who need long term security of tenure to acquire rights in the land they currently occupy or other land. However, the section does not create a right to land and indications are that the Department of Land Affairs has not exploited this avenue of redistribution.

#### Security of Tenure on Communal Land

People living on communal land in the former homelands have no security of tenure on the land. They have use rights based on customary law or derived from state permissions to occupy. Under colonial and apartheid laws they were not permitted to acquire rights that were legally secure. The rights \*309 were mostly informal and not registrable, compared to the land rights of those living in "white areas." Section 25 (6) of the Constitution now requires that an Act of Parliament be passed to provide such persons or communities with tenure that is legally secure. The Communal Land Rights Bill, [FN93] currently before Parliament, is intended to fulfill that obligation. Among its objectives, the Bill seeks to:

- (a) legally recognize the African traditional system of communally held land;
- (b) legally secure land tenure rights of communities and people (including women, the disabled and the youth within the tenure system of their choice);
- (c) provide for the transfer and registration of communal land and rights in and to that land;
- (d) create a uniform national registration system for all tenure rights whether held individually or communally; [FN94]

The main thrust of the Bill is to improve security of tenure of landholders giving communities on communal land the right to acquire title to the land as a group or as individuals. A community can register as a juristic person with perpetual succession irrespective of the changing membership of the community and thereafter acquire land and have it registered in its name. With ownership comes the power to deal with the land as owner and includes the power to



encumber by mortgage or to dispose of the land. All land must in future be registered either in the name of a person or a community. The Bill provides that land currently registered in the name of a traditional leader or a trust or other legal entity must be registered in the name of the community on whose behalf such land is held or in whose interest it was registered. An individual member of the community may apply to opt out of community ownership and get freehold title to his or her piece of land. The community, through its governing structures, may accept or reject such application. Significantly, the Bill gives women an equal right of access to land. This is in line with the constitutional imperative of gender equality and a reversal of the customary law position whereby only males have a right to be allocated land although it is the women who till the land.

\*310 The Bill has been controversial. It is in its ninth year and its tenth draft. The final version as amended by the Agriculture and Land Affairs Portfolio Committee is still heavily criticized by NGOs, academics and community based organizations (CBOs). [FN95]

Land in the African society was traditionally a community resource, which could not be sold and therefore was available as a sort of social security for members of the community. When a person retired from employment due to old age or injury, he was assured that if he went back to his community he would have access to land and a livelihood. However, critics of the Bill argue that with the introduction of the "foreign" form of tenure- individual ownership-land will be a commodity that can be sold. If individual title-holders sell the land to satisfy other needs, they will deprive other members of their immediate and extended families of a source of livelihood and thus increase rather than reduce poverty among poor communities. However, proponents of the Bill argue that communal access is not secure and individuals cannot use the land as security for loans for development. They argue that if individual tenure is good for white people it should be good for black people as well.

Another criticism is that the Bill leaves the control of land in the hands of traditional leaders and their apartheid era councils, which are conservative, patriarchal institutions that should not be in control of such an important resource in a democratic South Africa. In the past, corrupt chiefs have been known to abuse their power by depriving people under them of access to land and giving the land to their friends or relatives or selling the land for personal gain. The Bill requires that a community must establish a land administration committee to allocate land and otherwise control dealings with the communal land. The original idea of setting up committees was to avoid the abuse of power by traditional leaders by democratizing the administration of land. Thus the Bill provides that "members of a land administration committee must be persons not holding any traditional leadership position and must be elected by the community." It further requires that at least one third of the members must be women. However, the Bill then virtually negates this democratic provision by stating: "If a community has a recognized traditional council, the powers of the land administration committee of such community may be exercised and performed by such council."

This provision was included in the Bill due to pressure from traditional leaders who saw the Bill as undermining their authority and control over the people in their areas. Nearly every communal area \*311 community has a traditional leader and a traditional council. Members of these councils are appointed by the traditional leader. Although the new Traditional Leadership and Governance Framework Act (TLGFA) [FN96] now provides that traditional councils must have an elected element, this is still not satisfactory. The TLGFA provides that a traditional council should consist of traditional leaders and members of the community appointed by the senior traditional leader concerned and elected members of the community who must comprise 40% of the council. This means that traditional leaders and their councilors form a majority on councils and will continue to control decisions on land matters under the new law. The intended democratization of land administration will thus be frustrated. [FN97] Land boards appointed by the Minister are supposed to keep a watch over the activities of land administration committees but this may not be a sufficient safeguard. The retention of unelected structures is not justifiable in a democratic South Africa especially with regard to land administration, which has been the cause of so much suffering and poverty.

## **CONCLUSION**

South Africa's land reform programme is to be applauded in its attempt to ameliorate the wrongs of the past and its intentions to bring about a more equitable distribution of land. Restitution is proceeding fairly smoothly and should be completed in 2 years or so. Although it has brought justice to some, it can never fully compensate the suffering caused through dispossession. It can only be a step towards healing and reconciliation. As far as overall distribution of land is concerned it is still grossly unequal and will be so for a very long time. Nearly 10 years after the end of the apartheid state and only about 2% of the land transferred, there is need for acceleration of implementation of the redistribution programme. The state may have to modify the market-based willing-buyer willing-seller approach to a more interventionist supply-led strategy in order to make a real advance towards its goal of poverty alleviation and equitable distribution of resources. The Restitution of Land Rights Amendment Act 2003 is a step in the right direction in giving the Minister more powers of expropriation without a court order. However, this power needs to be extended to redistribution as well. Regarding tenure reform the state is failing to protect farm dwellers against evictions or to provide those evicted with alternative land and tenure security does not exist for many. The justice system, including police, prosecutors and the judiciary needs to be transformed before \*312 the right to security can be realized for those whom the Constitution and the law seek to protect. The Communal Land Bill once passed should improve the security of tenure of rural people living on communal land. However, if the administration of land remains under the control of traditional leaders and their appointed councilors the improvement will be marginal. The committees should be fully democratized. Nevertheless, South Africa is on the whole moving in the right direction with regard to land reform.

[FN1]. Vice-President, Supreme Court of Rwanda, formerly Associate Professor of Law, University of the Western Cape, Cape Town, South Africa. LLB (honors), Makerere University, Uganda; LLM, Yale Law School, USA; and, D. Phil., Oxford, England.

[FN1]. J. LEWIN, *The Native in South Africa*, Witwatersrand University Press, Johannesburg. Quoted in LETSOALO "Land 'Reforms' -- State initiatives" in Michael DE KLERK, ed: *A Harvest of Discontent: The Land Question in South Africa*, 1944. 99-111 at 100.

[FN2]. THOM, H.B., ed., *Journal of Jan van Riebeeck*, entry of 10 Feb 1655 quoted in T.R.H. DAVENPORT and K.S. HUNT, *The Right to the Land Document No. 17*. David Philip, Cape Town, 1974.

[FN3]. DAVENPORT and HUNT *ibid.* Documents 20 and 21. Documents 34, 35 36 and 37 show how the Kings of the Zulu, Shaka and Dingane supposedly gave grants or ceded much of the east coast -- estimated at 20, 000 square miles (Port Natal and its hinterland including mineral rights) to four different people- F.G. Farewell, John Saunders King, Captain Allen Gardiner and Piet Retief at different times between 1824 and 1838 for nothing more than "as a reward for his kind attention to me in my illness" or "for his attention to my mother in her last illness."

[FN4]. Native Land Act 36 of 19 June 1913.

[FN5]. Native Development and Trust Land Act 1936.

[FN6]. As Bundy puts it: "What the 1913 Act attempted to do was to legislate out of existence the more independent forms of tenure and to perpetuate instead the most dependent. Its intention was to outlaw cash paying tenants, and in the Orange Free State to forbid sharecropping agreements. The Act was intended to reduce cash-paying tenants and sharecroppers to the status of labor-tenants or wage-laborers." C. BUNDY, "Land, Law and Power: Forced Removals in Historical Context," in C. MURRAY, and C. O'REGAN, *No Place to Rest: Forced Removals and the Law in South Africa*, Cape Town, Oxford University Press, 1990, 1-12 at 6.

[FN7]. Group Areas Act No. 41 of 1950; replaced by the Group Areas Act No. 36 of 1966.

[FN8]. For a detailed account of the use of the Act see Catherine O'REGAN, "The Prevention of Illegal Squatting Act" in MURRAY and O'REGAN supra fn. 6, 162-179.

[FN9]. PLATZKY and C. WALKER, 1985. The Surplus People: Forced removals in South Africa. Johannesburg, Raven Press at 10. At 141-142, the authors list 18 major laws dealing with black land rights and powers of relocation.

[FN10]. Attributed to Petros Nkosi at an Eastern Transvaal meeting. Quoted in Aninka CLAASENS: "For Whites only -- Ownership in South Africa" in Michael DE KLERK: A Harvest of Discontent: The Land Question in South Africa. Idasa 1991 43-61 at 50.

[FN11]. The full text of the "Freedom Charter" can be found as appendix 1 in N. STEYTLER, ed., The Freedom Charter and Beyond: Founding Principles for a Democratic South African Legal Order. Wyvern Publications, Cape Town, 1991.

[FN12]. AFRICAN NATIONAL CONGRESS, Reconstruction and Development Programme, 1994 2.4.

[FN13]. G. BUDLENDER, "The Constitutional Protection of Property Rights" in BUDLENDER, et al, eds., Juta's New Land Law Juta, Cape Town, 2000 at 1-3. See also on this issue: Andre VAN DER WALT, "Property Rights, Land rights and Environmental Rights in D.H. VAN WYK, et al., 1994, Rights and Constitutionalism in the New South Africa 455+ at 479 and M. CHASKALSON, "The Property Clause: Section 28 of the Constitution" 1998 SAJHR 131-39.

[FN14]. Constitution of the Republic of South Africa Act 200 of 1993, sections 8(3)(b) and 121.

[FN15]. Ibid. Section 25(4).

[FN16]. Ibid. Section 25(7). Equitable redress is defined in the Restitution of Land Rights Act 1994 as a right in alternative state land or the payment of compensation.

[FN17]. Restitution of Land Rights Act 22 of 1994.

[FN18]. Ibid. Section 2.

[FN19]. DEPARTMENT OF LAND AFFAIRS, 1997, White Paper on South African Land Policy par 4.14.2.

[FN20]. Ibid.

[FN21]. This has been made clear during discussions with students at the University of the Western Cape in my Land Law class.

[FN22]. Ruth Hall of the Programme for Land and Agrarian Studies (PLAAS) at the University of the Western Cape, argues in a recent research report that "many potential claimants have been excluded because they missed the deadline in 1998, most because they were unaware that they had the right to claim." R. HALL, 2003, "Rural Restitution." No. 2 of Evaluating Land and Agrarian Reform in South Africa: An occasional paper series at 4.

[FN23]. T. GWANYA, (Chief Land Rights Commissioner). "Land Restitution in South Africa: our achievements and challenges." 2003. Dated 20/5/03. Available at <http://land.pwv.gov.za/restitution>, accessed on 4/4/04.

[FN24]. DLA 1997 supra fn. 19 par 4.13.

[FN25]. GWANYA 2003 supra fn. 23.

[FN26]. Commission on Restitution of Land Rights (CRLR). "Settled Restitution Claims: Cumulative Statistics as of 29 February 2004," 2004 available at <http://land.pwv.gov.za/restitution/statistics/March/>.

[FN27]. In this respect see Hall 2003 supra fn. 22.

[FN28]. According to the Chief Restitution Commissioner, the average price has been between R1000 to R4000 per hectare, which is already expensive. However, in the case of the Tenbosch farms in Mpumalanga, the owner demanded R23000 per hectare and R45000 per hectare for the other. Thus one farm of 150,000 hectares would cost R1.2 billion, much more than the restitution budget for the year. See Gwanya, supra fn. 23.

[FN29]. Restitution of Land Rights Amendment Act No 48 of 2003. Government Gazette Vol. 464 No. 25972 of 4 February 2004.

[FN30]. According to the CRLR, although the allocation for restitution was substantially increased in 2003-2004 from R391million to R800 million, the Commission required R1.2 billion to finalize the claims prioritized for that year and a similar amount was required for the following year. GWANYA 2003 supra fn. 23.

[FN31]. CRLR 2003: Annual Report April 2002-March 2003. The number of claims reported has increased from the 68,878 previously reported as it was discovered during the validation exercise that some claim forms included more than one plot of land or different land rights.

[FN32]. CRLR 2004, "Cumulative Statistics as at 29 February 2004" available at <http://land.pwv.gov.za/restitution>. Accessed 12/04/04. The statistics show that as of 29 February, 48,463 claims had been settled. Recent research, however, has disputed the accuracy of CRLR statistics. See HALL 2003 supra fn. 22 at 27-29.

[FN33]. According to the Department of Land Affairs Annual Report 2001-2002 commercial farms consisted of 82 million hectares in 2000.

[FN34]. CRLR 2004 "Cumulative Statistics on Settled Claims 1995-29 February 2004." A CRLR Table shows that at 29 February, a total of 42,490 urban claims were settled. 14,677 with land restoration, 25,336 with monetary compensation and 2,477 with alternative remedy. <http://land.pwv.gov.za/restitution>. Accessed 12/04/04.

[FN35]. CRLR 2003: Annual Report April 2002-March 2003 p. 5. The Annual Report states that although rural claims constitute only 20% of all claims, they affect the largest numbers of the rural poor and they involve the largest tracts of land. It gives the example of one claim in Kwazulu-Natal involving 43,000 hectares and more than 1000 households.

[FN36]. CRLR 2004 supra fn. 34. It is stated here that of the 5973 rural claims settled, 2743 have involved restoration, 3225 monetary compensation and 5 alternative remedy.

[FN37]. HALL 2003 supra fn. 22 at 11.

[FN38]. The Commission claims that it encourages claimants to opt for land but adds: "Most urban claimants have demanded that it is their right to choose financial compensation, which enables them to resolve many survival problems, which they are facing." GWANYA 2003 supra fn. 23 at 6.

[FN39]. Ibid. 8.

[FN40]. The Government of the Republic of South Africa and others v Grootboom and others 2000(11) BCLR 1169(CC) paragraph 19. In footnote 15, J. YACOOB, reproduces section 25(5) as providing for the social economic right of access to land.

[FN41]. Ibid. par 93.

[FN42]. Ibid. par 94.

[FN43]. The interpretation of these phrases is discussed in more detail in LAHIFF and RUGEGE, "A critical assessment of land redistribution policy in the light of the Grootboom judgment," 2002. Law, Democracy and Development vol 6(1) 2002 279 at 286-291.

[FN44]. Grootboom supra fn. 40 par 41.

[FN45]. Ibid. par 42.

[FN46]. Ibid. par 43.

[FN47]. Ibid. par 44.

[FN48]. Grootboom supra par 41. This limitation is consistent with Article 2 of the International Covenant on Economic, Social and Cultural Rights which states: "Each State Party to the present Covenant undertakes to take steps, individually and through international cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means..."

[FN49]. See for instance: *Soobramoney v Minister of Health (Kwa Zulu-Natal)* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) par 29 and *Minister of Health and others v Treatment Action Campaign and others* 2002 (5) SA 751 (CC); 2002 (10) BCLR 1033 (CC) par 37-38.

[FN50]. Provision of Land and Assistance Act 126 1993.

[FN51]. Amended by the Provision of Certain Land for Settlement (Amendment Act) 26 of 1998.

[FN52]. *Ibid.*, section 12.

[FN53]. Land Reform (Labour Tenants Act) 3 of 1996. Section 16.

[FN54]. R. HALL, Evaluating land and agrarian reform in South Africa An occasional paper series No 3 Tenure Reform, 2003. 25 p.

[FN55]. Extension of Security of Tenure Act. 62 of 1997.

[FN56]. *Ibid.*, section 4.

[FN57]. R. HALL, 2003 *supra* fn. 54. Hall, however, observes that these figures do not distinguish between land transferred under section 4 of ESTA and land transferred under other redistribution mechanisms.

[FN58]. Development Facilitation Act 67 of 1995.

[FN59]. See LAHIFF and RUGEGE 2002 *supra* fn. 43 302-303.

[FN60]. AFRICAN NATIONAL CONGRESS. Reconstruction and Development Programme (RDP): A Policy Framework, Johannesburg, 1994.

[FN61]. DEPARTMENT OF LAND AFFAIRS. White Paper on south African Land Policy, 1997.

[FN62]. *Ibid.* par 4.3.



[FN63]. Ibid.

[FN64]. Ibid. par 4.4.

[FN65]. See For instance, Minister of Agriculture and Land Affairs' speech to Parliament in February 2000 entitled "Strategic Directions for Land Issues and Policy."

[FN66]. DEPARTMENT OF LAND AFFAIRS, "Minister Didiza to launch LRAD sub-programme in Nkomazi, Mpumalanga," Media Release 13 August. Pretoria.

[FN67]. According to Department of Land Affairs figures in 2000. Annual Report Department of Land Affairs 2000-2001.

[FN68]. Business Day 9 October 2000 quoting Minister of Lands and Agriculture.

[FN69]. DEPARTMENT OF LAND AFFAIRS, "Taking Land Delivery to Greater Heights: Department of Land Affairs Medium Term Strategic and Operational Plan 2003-2007," 17.

[FN70]. In the period 1995/96 to 1998/99 the Department underspent its budget by a total of R1.4 billion, spending less than half its allocated budget for the period: Streek: "Land Minister under spends by R1.4 billion Mail & Guardian 26 May. However, it must be pointed out that more recently, the Department has been spending its allocation. According to the Director-General, by December 2002 that financial year's budget was 94% spent. Department of Land Affairs Media Briefing 2002, 03/12/2002. <http://land.pwv.gov.za>. Accessed 05/08/2003. In 2003 the DLA spent 99% of its budget. "Report by the Director General to the Agriculture and Land Affairs Portfolio Committee 4 Feb 2004. Summary by the Parliamentary Monitoring Group: <http://land.pwv.gov.za>.

[FN71]. Land Affairs Budget vote 2003/2004: speech by Minister Thoko Didiza on 01/04/2003. Available at <http://land.pwv.gov.za>, accessed on 05/08/2003.

[FN72]. White Paper on South African Land Policy, supra. Box 4.3.

[FN73]. Ibid. Box 4.4.

[FN74]. Information from a law student whose family was involved in such a scheme in the Western Cape.

[FN75]. White Paper on South African Land Policy, *supra*. 28.

[FN76]. ANDERSON and PIENAAR, "Municipal Commonage" Policy Brief No. 6 PLAAS University of the Western Cape, 2004.

[FN77]. Ibid. quoting figures from DLA.

[FN78]. Ibid.

[FN79]. Ministry of Agriculture and Land Affairs, Land Redistribution for Agricultural Development: a sub-program of the Land Redistribution program, Pretoria, June 2001.

[FN80]. Department of Land Affairs: Policy statement by the Minister of Agriculture and Land Affairs on "Strategic Directions on Land Issues." Pretoria, February 2000, 13.

[FN81]. MINISTRY OF AGRICULTURE AND LAND AFFAIRS, "Land Affairs Budget Vote 2003-2004, Budget Speech by Minister Thoko Didiza 01/04/2003, National Council of Provinces. Available at <http://land.pwv.gov.za>. Accessed 8/8/2003.

[FN82]. JACOBS, P., LAHIFF, E. and HALL, R. Evaluating land and agrarian reform in South Africa: An occasional paper series. No.1 Land Redistribution, Table 2. PLAAS, University of the Western Cape, 2003.

[FN83]. There have been several drafts of the bill. The current version is the Communal Land Rights Bill 2003' which has been before Parliament since late 2003.

[FN84]. In *Ngcobo v Salimba, Ngcobo v Van Rensburg* [1999] 2 All SA 491 (A) it was held that all the three requirements must be met before a person can be classified as a labor tenant.

[FN85]. A material breach would be, for instance, assault, threats to the owner or other members of the farm community, unreasonably denying the owner access to the land occupied etc. See *Van Zuydam v Zulu* [1999] 2 All SA 100 (LCC).

[FN86]. See *Klopper v Mkhize and others* 1998 (1) SA 406 (N); *Tselentis Mining (Pty) Ltd v Ndlalose and others* 1998 (1) SA 411 (N) and *Ngcobo v Salimba; Ngcobo v Van Rensburg supra* fn. 84.

[FN87]. The Land Affairs General Amendment Act 51 of 2001 amended ESTA by deleting the exclusion of labor tenants from the definition of occupier.

[FN88]. ESTA ss6-10.

[FN89]. Land Affairs General Amendment Act 51 of 2001 amends ESTA by inserting ss6 (2) (dA).

[FN90]. *Ibid.* inserting new S.6 (5).

[FN91]. For instance applicant in *Nhlabathi v Fick* [2003] 2 All SA 323 (LCC) argued that the right to bury in S6(2) dA was unconstitutional. However, the court found that the deprivation was justifiable in a democratic society based on S 36 of the Constitution.

[FN92]. Even some judges have expressed their dislike for land reform legislation. In *Joubert v Van Rensburg* [2002] All SA 473 (W) the judge stated that ESTA was unconstitutional in that it violated the right to property although the issue had not been raised in the pleadings or argued before the court. Both the Supreme Court of Appeal [*Mkangeli v Joubert* [2002] 2 All SA473 (A)] and the Constitutional Court [*Mkangeli v Joubert* [2001] (4) BCLR 316 (CC)] subsequently disapproved of the statement and the political stance of the judge in *Joubert v Van Rensburg*.

[FN93]. Republic of South Africa: Communal Land Rights Bill [B 67B-2003]. Available at <http://www.pmg.org.za>. Accessed 20/02/04.

[FN94]. REPUBLIC OF SOUTH AFRICA, "Memorandum on objects of the Communal Land Rights Bill, 2004" attached to the Bill as cited in fn. 93 supra.

[FN95]. For a summary of these criticisms see IRIN "New land law 'flawed'."  
Available at [http://www.news24/South\\_Africa/Politics/0,,2-7-12\\_1443736,00.html](http://www.news24/South_Africa/Politics/0,,2-7-12_1443736,00.html).

[FN96]. Traditional Leadership and Governance Act 41 of 2003.

[FN97]. See IRIN 2003 supra fn. 93