Reconciling the Past, Present and Future: 
The Parameters and Practices of Land Restitution in South Africa

Ruth Hall

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Introduction

Land restitution is intended to right the wrongs of the past: to redress unjust dispossession and to heal. In post-apartheid South Africa, it is expected to help reverse racially skewed patterns of land ownership in the countryside as well as in the urban areas. As part of a wider land reform process, it must help dismantle racialized privilege in property rights. At the same time, restitution performs important symbolic work by acknowledging histories of injustice and their impacts on individuals, families and communities.

Public ceremonies around the settlement of land claims have acquired iconic status in the democratic South Africa. These have brought into the public eye images of rural communities returning to their ancestral land, dispersed urban communities returning from the periphery to the site of their demolished homes – handshakes, speeches, singing and dancing. This is part of a healing process. It is generally a happy but transitory moment that marks the culmination of the claiming process and the start of the work of reconstructing communities, livelihoods and, possibly, reconciliation.

This chapter describes the parameters of land restitution in South Africa. It reviews the legislative and institutional frameworks that have governed the process from its inception in 1995 to 2008. It also reflects on the scale and quality of the outcomes of a process that continues to be more complex than both those who designed it and those who hoped to gain from it ever anticipated.

The historical and political context

The loss of black land rights in South Africa occurred through a protracted and complex process of direct coercion and indirect pressures spanning more than three centuries. Although conflict over land predated European colonialism, the long history of dispossession was shaped by the establishment of a Dutch settlement at the Cape in 1652, followed by the movement of both British and Boer settlers into the hinterland and the series of “frontier” wars that this provoked.1 Growing competition between white farmers and mine-owners for cheap labour following the discovery of diamonds and gold in the late nineteenth century prompted measures to undermine the relatively successful and independent

1 This paper is submitted as a book chapter in the edited volume Land, Memory, Justice and Reconciliation: Perspectives on Land Restitution in South Africa, edited by Cherryl Walker, Anna Bohlin, Ruth Hall and Thembela Kepe (Ohio University Press; forthcoming).
black peasantry (Bundy 1988). Most significant was the introduction of legal restrictions on black land ownership through the Natives Land Act of 1913. This law designated land on a racial basis and prohibited black South Africans from acquiring, leasing or transacting land outside small “native reserves”, later formalized as ethnic “homelands”, which were scattered around the country.

The displacement of the indigenous population that followed exceeded that in any other colonial state in Africa. Through the twentieth century, black communities were forcibly removed from their land and independent farmers turned into tenants who, in turn, either became landless laborers or were displaced. Many communities lost land in the name of conservation when large regions were proclaimed “protected areas” and residents removed to make way for national or provincial parks. Those who were not employed by the mines, farms or factories were variously referred to as the “discarded” or “surplus” people (Desmond 1970, Platzky and Walker 1985) and, through a system of influx control, deported to the homelands. In towns and cities the Group Areas Act of 1950 etched deep divisions, segregating residential areas and prompting large-scale removals of black residents to townships on the urban periphery or in faraway homelands. The Surplus People Project, which investigated the legalized land theft underway in both urban and rural areas, estimated that between 1960 and 1983 alone about 3.5 million people were forcibly removed from their land and homes (Platzky and Walker 1985, 9-12).

By 1990, South Africa was marked by a stark racial divide between the 13 percent of land reserved for black occupation and the remainder in so-called “white” South Africa, dominated by 60 000 commercial farms that covered 70 percent of the country’s area. This divide had acquired major political and symbolic significance within the struggle for national liberation. The Freedom Charter adopted in 1955 by the African National Congress (ANC) and its allies had declared that: “The land shall be shared among those who work it” (quoted in Suttner and Cronin 1986, 263). Yet the ANC was deeply equivocal on the question of private property. While nationalization of the land and mines formed part of its political platform in exile after 1960, this remained a point of internal contention and by the late 1980s, when talks paving the way for a negotiated political transition got underway, had been abandoned.

Meanwhile, inside the country, those who had resisted removals were connected through a growing network of non-governmental organizations (NGOs) and residents’ associations in defence of their rights. Localized resistance became linked to the growing mass democratic movement, in the form of the United Democratic Front (UDF), and, through it, to the ANC in exile and its anti-apartheid supporters. One of the exigencies, then, of the transition from apartheid to democratic rule was to respond to the popular demand that those removed from their land and homes in living memory be allowed to return. As later acknowledged in the White Paper on South African Land Policy, “[f]orced removals in support of racial segregation have caused enormous suffering and hardship in South Africa and no settlement of land issues can be reached without addressing such historical injustices” (DLA 1997, 28).

However, restitution actually began under white rule. In its own pre-emptive reforms in the dying days of apartheid, the National Party and its white parliament repealed racist land laws through the Abolition of Racially Based Land Measures Act, 108 of 1991, and created an Advisory Commission on Land Allocation (ACLA). Later formalized as the Commission on Land Allocation (COLA), this structure was tasked to oversee a limited process of restitution restricted to unimproved state land (Winkler 1994, 445; Steyn 1994, 453). Very few potential claims met this criterion since most land that had been taken was either privately owned by whites or had been developed by the state. These reforms were roundly rejected by the ANC, civil society organizations and would-be claimants as wholly inadequate; treating the property rights of whites as sacrosanct would prevent any meaningful redress for those whose property rights had been so blatantly violated.

Following the unbanning of political parties in 1990, the ANC set out its demand for a specialist land court to adjudicate claims, restore land or compensate those who had been dispossessed. Its Land Manifesto of 1992 conceived of restitution as being as much about the present as about the past:
... such a claims process must be based on a just set of criteria including productive use, traditional access, claims on the basis of birthright, title deeds, tenancy and usufruct (right to benefit from use and duty to maintain), historical dispossession and need (ANC 1992, 2).

During the constitutional negotiations, the ANC argued that, while rights to personal property should be legally secured, an ANC-led government would not guarantee corporate property. Redressing the injustices of dispossession would of necessity confront the property rights of current owners. The National Party, bolstered by the powerful mining and financial sectors as well as the farming lobby, insisted on the constitutional protection of the property rights of owners (individual or corporate). The deadlock was resolved in late 1993, when the ANC discarded its insistence on confiscatory reform (ANC 1993). Following this compromise, the interim Constitution of 1993 confirmed the right to private property and to protection from deprivation of property (RSA 1993, Section 28). It also affirmed a right to restitution, limited to claims relating to dispossession after the promulgation of the Natives Land Act of 1913 (RSA 1993, Section 8(3)(b), Section 121). Within these parameters, the details of the restitution programme were developed by a Land Claims Working Group, established by the ANC and dominated by lawyers, in a process that was isolated from other reforms – land redistribution and agricultural deregulation – which were being framed by South African economists in partnership with the World Bank (Hall 2004).

Restitution was, then, by definition, a limited process, not a radical restructuring of property relations. The demand for restitution rested precisely on a foundation of private land ownership: to transfer ownership from current owners, including the state, to previous owners. Contrary to the vision of the Freedom Charter, the land would not be shared among those who worked it, but was to be redistributed through the market or restored, where feasible, to a limited category of those who had been unfairly dispossessed, within a certain timeframe. In this way, the constitutional compromise responded to the popular demand for redress, but divided those claiming lost rights from the wider landless population.

Even so, restitution was envisaged as the central pillar of a wider thrust to deracialize land ownership by redistributing at least 30 percent of formerly white farmland to black South Africans (DLA 1997:49). In this way, restitution became a specific programme of government, attaining a special status that set it apart from other initiatives aimed at land reform and reconciliation. Although conceived as a form of restorative justice, as the programme progressed questions emerged about whether it was possible to “turn back the clock” and re-establish scattered communities. While historical claims to land carry strong political resonance within South Africa, they do not always coincide with current needs for development and livelihoods. As a result, the restitution of land has highlighted tensions between addressing historical claims and responding to current priorities (Walker 2008). It has also brought into question the state’s ability to respond effectively to claims and to link the restitution of land to a wider programme of economic development.

The framework for restitution: legislation and institutions

The Restitution of Land Rights Act, Act 22 of 1994, was the first law passed by the new ANC-led Government of National Unity that set out to redress the legacy of apartheid rule. It affirmed the right to restitution and defined the process by which those who were deemed eligible could lodge their claims (RSA 1994, Section 10(1)). Restitution is a rights-based programme in that the dispossessed or their descendants have an enforceable right, confirmed in the Constitution, to restoration of or compensation for property that was unfairly taken (RSA 1996, Section 25(7)).

The Act established two institutions to drive the process: a Commission on the Restitution of Land Rights (CRLR) and a Land Claims Court (LCC) (RSA 1994, Chapters 2 and 3, respectively). The Commission, established in 1995, was tasked with driving the process: assisting claimants, investigating the validity of their claims and preparing these for settlement or adjudication. Post-settlement support for claimants who got back their land was, initially, the responsibility of the Department of Land Affairs (DLA). The Commission was placed under the authority of a national Chief Land Claims Commissioner, with Regional Land Claims Commissioners (RLCCs) responsible
for its work in the provinces. While initially the process was highly centralized, since 2006 RLCCs have exercised substantial authority over restitution in the provinces.

The Land Claims Court (LCC) was established in 1996 as a specialist court to approve claims, grant restitution orders and adjudicate disputes, on the basis of the investigations presented to it (LCC 2002); appeals against its judgments can be made to the Supreme Court of Appeal or, in specific circumstances, the Constitutional Court. The decision to separate this adjudicatory function from that of the Commission was influenced by the experience of land tribunals in other post-colonial or post-conflict situations, particularly Canada, Australia and New Zealand. It reflected widespread distrust of the judiciary inherited from the apartheid era, as well as the need for independent adjudication of disputes arising from other land and tenure laws that were being prepared at the time.

The timeframe for restitution set out in the 1997 White Paper was eighteen years in total. Initially three years were allowed for claims to be lodged, later extended to a final deadline of 31 December 1998 (DLA 1997: 49). Five years were envisaged for the settlement of claims and a further ten years for the implementation of all court orders and settlement agreements (DLA 1997: 49). In recent years, however, political pressure has been brought to bear to close the Commission and pass the work of finalizing outstanding claims and agreements to other state institutions.

The contested parameters of restitution

Three significant dimensions of restitution in South Africa concern who is eligible, what they should get and who is to pay.

1. The right to restitution: who is eligible?

The Restitution Act clarified the criteria for eligibility as: a person or community who was dispossessed of property after 1913, as a result of racially discriminatory laws or practices, and was not adequately compensated; or the direct descendants or deceased estates of such people (RSA 1994, Section 2(1)). These parameters remain contentious.

Eligibility hinges on providing sufficient proof that property rights existed and were lost through racially discriminatory laws and practices. The jurisprudence around this has dealt with what constitutes a “community”, what measures were racially discriminatory, and which rights to property can be restored (see for instance Mostert, forthcoming). Most significant, perhaps, was the affirmation that restitution would not be limited to those who had been private freehold owners of land, but extended to (former) non-owners, since private titling had been very limited and most land held by blacks had been under forms of customary or informal tenure. “Beneficial occupiers” were recognized as de facto owners by virtue of their uncontested occupation and use of land over time. Long-term tenants were also eligible to claim, as in the high profile cases of Cremin (a rural community in the province of KwaZulu Natal) and District Six (a high-profile suburb of the city of Cape Town) (see Walker 2008 and Beyers, forthcoming, respectively). Merely restoring land to black landowners would fail to redress the suffering and loss experienced by those who, at the time of dispossession, did not have the economic or market power of ownership rights.

The major limitations on eligibility, then, are the 1913 cut-off date, and the 1998 deadline for claims to be lodged. Both have been energetically contested. The reason given by the Minister of Land Affairs for not accepting claims predating 1913 is that this would open the way to claims on land already occupied by blacks, rather than focusing on white-owned land. In response to demands at a National Land Summit in 2005, she pointed to the specter of inter-ethnic conflict among black South Africans, and with the neighbouring states of Lesotho and Swaziland, arising from claims relating to earlier disposessions (Didiza 2005). More fundamentally, this date, embedded in the Constitution, is the product of the political pacting that made the transition to democracy possible; it has usefully turned out to contain the obligations of the post-apartheid ANC government.

Because colonial intrusion and dispossession started from Cape Town, heading east and northwards during the 18th and 19th centuries, most black South Africans had lost independent access to land by
1913, and it was only in the far interior that black communities still retained independent access to large tracts of ancestral land under communal tenure. This explains why there are very few rural claims in the Western Cape and why, in contrast, large portions of Limpopo and Mpumalanga – estimated at between 50 and 70 percent of the farmland in those provinces – are subject to claims (This Day 2004). These figures suggest that restitution in these provinces could, potentially, make a substantial contribution towards the state’s target of redistributing 30 percent of commercial farmland through land reform. (See also Walker 2008, 215-6.)

However, indicative of the scale of forced removals between 1913 and 1990, it appears that the vast majority of those affected (along with their descendants) never submitted claims for restitution. The Commission’s own estimate is that the claims it received reflect just 10% of those potentially eligible (CRLR 2007d), although Walker (2008, 220) suggests that the proportion may be somewhat higher overall. Certainly, the claiming process has been uneven, with some regions and categories of claims better served than others. Some of those who missed the deadline in 1998 – because they were unaware of the process or mistrusted it – have since called on the Commission to re-open the lodgment process, but campaigns around this demand have not been sufficiently coordinated or sustained to find political traction.

The dates of 1913 and 1998 were the subject of parliamentary hearings in May 2007 where they were confirmed. Here, the Chief Commissioner, Tozi Gwanya, reiterated the government’s opposition to accepting new claims – which requires only ministerial approval rather than legal amendment. Justifying this position, he told Parliament that late claimants were only pursuing their claims with the aim of getting cash and this should not be entertained as “financial compensation has led to a lot of family disputes, fraudulent claims by wrongful claimants, abuse of the Restitution award on unproductive expenditures which do not prioritize sustainable livelihoods” (CRLR 2007d). However, more pragmatic considerations seem to explain the reluctance to open the floodgates to new claims. In 2005 the then Regional Commissioner for Gauteng and North West, Blessing Mphela, outlined these implications rather frankly:

The financial burden on South Africa will be huge… If just half of that 3,5-million [estimated eligible to claim] decided to reapply, the cost to the country would exceed the National Budget …. Would that be an intelligent way of investing in development when other areas of development, such as employment, are crying out for more funds? (cited in Groenewald 2005).

2. The content of restitution: what does it cover?

A second defining dimension of restitution concerns what is to be restored. Again, this is far from straightforward. Claimants are able to indicate their preference among having their land restored to them, obtaining alternative land or receiving financial compensation – or a combination of these. Restitution can also take a “developmental” form where, instead of cash being paid out to households, compensatory funds are earmarked for investment in infrastructure or income-generating schemes for claimant communities, as has now become the dominant form with respect to “betterment” claims. (See De Wet and Mgijulwa, forthcoming.)

According to the DLA’s White Paper, restitution is to be driven by “the just demands of claimants” and “solutions must not be forced on people” (DLA 1997, 49). However, claimants’ choices are often constrained by the realities of poverty and old age. Bureaucratic delays have also driven many who originally aimed to return to their land to accept offers of cash compensation (Bohlin and Dhupelia-Meshtrhe, forthcoming), despite the policy assertion that “wherever possible preference should be given to the restoration of land” (CRLR 2008). Many other urban claimants who have rejected offers of cash have found their rights to restitution refracted through a web of alternative and competing claims on the attention of the local authorities responsible for the redevelopment of their land (Beyers and Walker, both forthcoming).

The notion of choice is also limited by the protection of property owners’ rights and therefore the availability and cost of the property under claim. While the Constitution affirms the property rights of
both owners and the dispossessed, in practice where these come into conflict – where claimants wish to return to their land and current owners refuse to sell – current ownership has trumped historical claims. As of 2008, the government has only used its constitutionally mandated powers of expropriation in four cases, and in two of these cases the state revoked its expropriation notices to return to the negotiating table. Claimants, then, have an enforceable right to restitution, but not an enforceable right to the restoration of the original property, and whether or not claimants return is in practice contingent on the willingness of current owners to sell at the prices offered by the Commission. Lahiff (2007) has questioned whether adequate restitution is conceivable within such a consensual framework, where those who happen to be the owners of claimed property have an effective veto on land restoration.

A second constraint is the limitation on which property is to be restored. While restitution was initially defined narrowly as pertaining to “land” rather than the more expansive “property” indicated in the Constitution, a number of landmark cases have challenged the range of property rights that can be restored. Most notable is the claim to the mineral-rich Richtersveld in the Northern Cape, in which residents successfully argued on appeal to the Constitutional Court that not only were their land rights not legally extinguished before 1913, but their rights extended to diamonds and other minerals. In this case a precedent-setting judgment ordered that these claimants were entitled to restitution not only of their rights of ownership of the land, but also to its minerals and precious stones (Constitutional Court 2003, 50-1).

A third question is whether, as the Commission claims, “compensation received at the time of removal… should be taken into account when determining redress to the claimant” (CRLR 2008). Such compensation, where it existed, was usually far from equivalent to the land lost, and generally the restitution process has not required claimants to sacrifice compensatory land on which they may have spent years, if not decades, rebuilding their lives, livelihoods and communities. A further debate has centered on what constitutes just recompense for dispossession, and whether this should be limited to property ownership or can extend to suffering and the loss of opportunities. In general, the Commission and the Court have restricted the ambit of restitution to land and housing, and only in KwaZulu-Natal have orders for compensation for suffering – *solatium* – been granted in selected cases. In any event, there is no explicit aspiration in law or policy to restore people to the condition they would have enjoyed had they not been dispossessed of their property – the *status quo ante* – although this was, at least initially, the widespread expectation among claimants.

3. **Obligations in restitution: who pays?**

A third dimension of restitution concerns who should carry the cost of restitution – those who benefited directly, those who own the land now, or society as a whole?

Unlike other post-conflict contexts where it may be relatively clear who benefited from stolen property, the long duration of dispossession in South Africa presents a problem of intergenerational claims, compounded by multiple transactions of property since the moment of dispossession. By the 1990s the owners of claimed land were more often the indirect rather than the direct beneficiaries of dispossession. In this context, the property lobby at the constitutional negotiations argued that making current owners pay for past dispossession would be arbitrary and punitive.

By confirming existing property rights and providing for expropriation with “just and equitable compensation”, the constitutional deal ensured that current property owners would not be expected to carry the cost of restitution. The political settlement confirmed that society as a whole, through the state and the fiscus, would carry the cost. Thus claims are made against the state and the Minister of Land Affairs is the respondent, on behalf of the state. By placing the state at the centre, South Africa’s restitution process has limited the evidentiary burden on claimants. Compared to tribunal-type processes in post-conflict situations elsewhere, this responsibility has been shifted to the state itself, which, in the amended Restitution Act, is conceived of as the champion of claimants. This has the advantage of buffering further conflict between owners and claimants, although the state-centric character of restitution has also meant that it is highly bureaucratized. The Commission has,
furthermore, been caught between its downward accountability to claimants to see the process through and its upward accountability to defend the state’s interests in containing the cost.

A learning curve: the first five years

1995 to 1999 was a period of gearing up and learning some difficult lessons by the state. As well as setting up its central and regional offices, the Commission had to solicit claims and set up systems to register and investigate them. By 1997, concerned that many people remained unaware of the process, the Commission extended the deadline for lodging claims and launched a “Stake your Claim” campaign with NGOs and church bodies to ensure that the public was aware of the opportunity to submit claims. This mostly took the form of television, radio and newspaper adverts, but extended to public meetings in relocation areas, door-to-door visits in some regions, a national toll-free information line, and the distribution of posters, pamphlets and claim forms (CRLR 2007d).

The work of settling claims started slowly. The challenges of establishing a new institution and the heavily legalistic framework for settling claims were among the reasons for just 41 claims being settled in the first five years. At this rate, settling claims would take a few thousand years, prompting the Minister to order a review of the whole process in 1998, just three years after its inception (du Toit et al, nd). This led to marked changes in the division of labor between the Commission and the Court, as the process for settling claims was streamlined and the role of the Commission expanded. The Restitution Act was amended to give the Commission delegated powers not only to investigate claims but also to negotiate and conclude settlement agreements with claimants (CRLR 1999:31 and RSA 1999: Section 42D). While previously all claims had to be referred to the Court for finalization, under this approach “restitution claims will be resolved via agreements between the parties, with the court only intervening to decide on legal disputes or where there is a need for interpretation of the law” (CRLR 1999, 31). Since 1999 then, an administrative process has largely replaced the judicial approach to settling claims. The Commission has also been integrated more tightly into the DLA, with Commissioners accountable to the Director-General. This has enhanced the potential to link restitution more closely to land reform as a whole, although in practice restitution has proceeded in a parallel “silo”.

Also arising from the review, the Commission’s approach to cash compensation was standardized, especially in the urban context, leading to mass offers of cash compensation that did not require the valuation of each claim. Standard Settlement Offers (SSOs) were set initially at R40 000 for a residential property, with variations for major metropolitan centres (up to R50 000) and smaller amounts (R17 500) offered to claimants who had been long-term tenants at the time of dispossession (Hall 2003,:11).

While cash compensation rapidly became the dominant form of settlement, the challenge of restoring land and ensuring its sustainable use also received greater attention. A 1998 amendment to the Act allowed for the disbursement of (limited) funds to develop land after its restoration, marking the first recognition in law that restitution should be developmental (see Dodson, forthcoming). While the Commission has resisted expansion of its responsibilities for development after land is transferred, and has a limited mandate in this regard, it has established specialized “settlement support” units in each regional office and attempted to coordinate the developmental contributions of other state agencies (Hall 2003, 18).

How far have we come?

Government and public opinion have largely measured the achievements of restitution quantitatively in terms of the number of claims settled, how many people have benefited, and the extent of land restored to claimants. Relatively little is known about the quality of outcomes, which remains the subject of much speculation and disagreement. In particular, not much attention has been given to the impact of restitution on the objective of social transformation, nor its contribution towards fostering national reconciliation, promoting gender equity, stimulating economic activities and contributing to
rural livelihoods. What can be reported with at least some degree of confidence are the quantitative measures.

1. Claims lodged

A total of 63 455 claim forms were reported as lodged with the Commission by the extended deadline of 31 December 1998 but it soon became apparent that the total number of claims was a shifting target (see table 1 below). Where a number of claim forms were submitted by members of one community, these were consolidated into a single claim. More commonly, group claims were split up and counted separately, for instance where the land rights had vested in individuals or households, or where claimants were divided on the outcome (eg. if some wanted to return to their land while others opted for cash). The net result is that even though no additional claims were accepted, the official total has been revised upwards on several occasions, rising to 79 696 by 2007.

Table 1: claims lodged by province

<table>
<thead>
<tr>
<th>Province</th>
<th>Total claims at Dec 1998</th>
<th>Total claims at March 2002</th>
<th>Total claims at Feb 2003</th>
<th>Total claims at June 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern Cape</td>
<td>9 615</td>
<td>9 469</td>
<td>2 213</td>
<td>5 809</td>
</tr>
<tr>
<td>Free State</td>
<td>9 615</td>
<td>2 213</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northern Cape</td>
<td>12 044</td>
<td>2 502</td>
<td>11 938</td>
<td></td>
</tr>
<tr>
<td>Western Cape</td>
<td>15 843</td>
<td>13 158</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gauteng</td>
<td>15 843</td>
<td>11 938</td>
<td>2 508</td>
<td></td>
</tr>
<tr>
<td>North West</td>
<td>15 843</td>
<td>13 158</td>
<td>11 938</td>
<td></td>
</tr>
<tr>
<td>KwaZulu-Natal</td>
<td>14 208</td>
<td>2 508</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>11 745</td>
<td>14 808</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Limpopo</td>
<td>11 745</td>
<td>14 808</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>63 455</td>
<td>68 878</td>
<td>72 975</td>
<td>79 696</td>
</tr>
</tbody>
</table>


2. Claims settled

The pace of delivery accelerated dramatically from 1999, following the introduction of SSOs for urban claims and the administrative rather than judicial approach. However, while the number of settled claims increased dramatically, the number of actual households benefiting and the amount of land being restored has risen more slowly. By the end of 2006, the Commission reported that a total of 73 433 claims were settled, involving nearly a quarter of a million households (see Table 2 below).

Table 2: Settled claims by province as at December 2006

<table>
<thead>
<tr>
<th>Province</th>
<th>Claims</th>
<th>Households</th>
<th>Hectares</th>
<th>Land Cost (in Rands)</th>
<th>Total Award (in Rands)</th>
<th>Land Cost as % of Total Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern Cape</td>
<td>16 081</td>
<td>47 742</td>
<td>72 075</td>
<td>216 811 427</td>
<td>1 218 659</td>
<td>673</td>
</tr>
<tr>
<td>Free State</td>
<td>2 582</td>
<td>4 601</td>
<td>44 464</td>
<td>9 845 559</td>
<td>109 152 504</td>
<td>9%</td>
</tr>
<tr>
<td>Gauteng</td>
<td>13 146</td>
<td>14 262</td>
<td>7 557</td>
<td>89 633 196</td>
<td>772 414 448</td>
<td>12%</td>
</tr>
<tr>
<td>KwaZulu-Natal</td>
<td>14 051</td>
<td>46 692</td>
<td>392 630</td>
<td>910 983 599</td>
<td>2 251 875</td>
<td>143</td>
</tr>
<tr>
<td>Limpopo</td>
<td>2 781</td>
<td>33 944</td>
<td>344 552</td>
<td>1 189 564</td>
<td>1 485 903</td>
<td>152</td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>2 214</td>
<td>34 475</td>
<td>175 256</td>
<td>1 406 450</td>
<td>1 743 518</td>
<td>580</td>
</tr>
<tr>
<td>Northern Cape</td>
<td>3 620</td>
<td>11 649</td>
<td>296 108</td>
<td>201 731 769</td>
<td>505 083 172</td>
<td>40%</td>
</tr>
<tr>
<td>North West</td>
<td>3 649</td>
<td>25 812</td>
<td>188 396</td>
<td>490 515 999</td>
<td>849 072 119</td>
<td>58%</td>
</tr>
</tbody>
</table>
In 2007, the Minister announced that 74,417 claims had been settled, and only 5,279 rural claims remained, implying that all urban claims were settled (Xingwana 2007). However, the shifting definitions used by the Commission in its reports makes it difficult to establish with any certainty what has been achieved and what is yet to be done. In some provinces the number of settled claims has overtaken the total claims originally reported as lodged, for instance in the Eastern Cape where the number of claims reported as settled now exceeds by 70 percent the number of claims originally submitted (CRLR 2002, CRLR 2007a). Shifts in the Commission’s reporting format, from claims-as-lodged to claims-as-settled have served – perhaps unintentionally – to exaggerate progress and disguise the scale of the task still remaining, about which relatively little is known. What is clear is that the majority of large rural claims remain unaddressed. The Commission has estimated that about one-third of unsettled claims are “complex”, involving disputes among competing claimants, disputes over the jurisdiction of traditional authorities, refusal to sell or disputes over the validity of claims from landowners, or untraceable claimants (Xingwana 2007).

3. Amount and cost of land

By 2007, the Commission reported that 1.5 million hectares of land had been restored through restitution – about a third of the land transferred through all aspects of land reform (CRLR 2007a). However, much of this land was merely earmarked, not yet transferred, and in some cases did not involve physical restoration to claimants, as in protected areas. So the reported scale and cost of restored land refer to a mix of achievements to date and future commitments. They also differ widely across the provinces. Until recently, most restored land has been in the more arid parts of the country, particularly the Northern Cape where several large restitution claims have predominated, including that of the Khomani San (Ellis, forthcoming). However, since 2005 a focus on rural claims in the north has led to the settlement of claims on large tracts of valuable commercial farmland in Limpopo and Mpumalanga.

By the end of 2007, R4.5 billion (approximately 450 million US dollars) had been spent on or earmarked for buying land, and slightly less, nearly R3.8 billion (about 380 million US dollars) on compensating claimants in cash. The proportion of restitution budgets spent on land differs widely across the provinces. Where most claims are urban, as in Gauteng and the Western Cape, the bulk of restitution spending has been on cash compensation and grants. Conversely, provinces that have spent proportionately more on land are those, like Limpopo and Mpumalanga, where large rural claims have been tackled – but where, for this reason, fewer claims in total have been settled. This inverse relation between the amount of land restored to claimants and the number of settled claims has posed a quandary for regional commissioners: with the political pressure to finalize claims mounting, their attention has understandably tended to focus on settling urban claims with cash, rather than tackling rural claims, where years of negotiation may be needed for a single claim to be settled.

4. Rural claims lodged and settled

Rural claims account for less than 30 percent of all claims, but most entail groups of hundreds if not thousands of people, while urban claims are generally smaller, centered on individuals or extended families. For this reason, rural areas – where an estimated 90 percent of claimants live and where the bulk of the land is to be restored – are widely considered to be the “backbone” of restitution. Provinces with predominantly rural claims are Mpumalanga, Limpopo and the Northern Cape; the others are predominantly urban, with over 90 percent of the claims in the Free State and Western Cape being urban.

The cumulative statistics on settled claims that the Commission publishes each year are not disaggregated to show how claims have been settled (land, cash or other), and where they are (rural or urban).
However, based on the database maintained by the Commission, and kindly made available for the purposes of this chapter, it has been possible to unpack some of the numbers. According to this data, as of March 2006, a total of 4,221 rural claims had been settled – about a quarter of the total. Of these, 867 involved land ownership being restored. Because of multiple claims by members of claimant communities, these represent 233 projects nationally (see Table 3 below).

### Table 3: settled rural claims involving land restoration as at 31 March 2006

<table>
<thead>
<tr>
<th>Rural projects involving land</th>
<th>Rural claims settled</th>
<th>Households</th>
<th>Beneficiaries</th>
<th>Hectares</th>
<th>Land Cost (in Rands)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern Cape</td>
<td>23</td>
<td>162</td>
<td>17,347</td>
<td>72,871</td>
<td>67,248</td>
</tr>
<tr>
<td>Free State</td>
<td>6</td>
<td>7</td>
<td>1,655</td>
<td>8,121</td>
<td>44,094</td>
</tr>
<tr>
<td>Gauteng</td>
<td>3</td>
<td>0</td>
<td>2,028</td>
<td>12,168</td>
<td>3,444</td>
</tr>
<tr>
<td>KwaZulu-Natal</td>
<td>56</td>
<td>90</td>
<td>15,781</td>
<td>94,692</td>
<td>325,959</td>
</tr>
<tr>
<td>Limpopo</td>
<td>52</td>
<td>181</td>
<td>22,179</td>
<td>96,129</td>
<td>178,329</td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>37</td>
<td>205</td>
<td>26,676</td>
<td>139,489</td>
<td>88,748</td>
</tr>
<tr>
<td>North West</td>
<td>41</td>
<td>64</td>
<td>12,630</td>
<td>68,796</td>
<td>86,781</td>
</tr>
<tr>
<td>Northern Cape</td>
<td>13</td>
<td>14</td>
<td>5,969</td>
<td>33,434</td>
<td>246,679</td>
</tr>
<tr>
<td>Western Cape</td>
<td>2</td>
<td>144</td>
<td>1,280</td>
<td>14,909</td>
<td>5,246</td>
</tr>
<tr>
<td>Total</td>
<td>233</td>
<td>867</td>
<td>105,545</td>
<td>540,609</td>
<td>1,046,528</td>
</tr>
</tbody>
</table>

Source: CRLR 2007b

5. **Funding restitution**

Contrary to expectations, money to buy back land has *not* proven to be the main impediment to speeding up restitution. From 2005 the budget allocation from central government has grown sharply, but the Commission’s inability to spend this budget – including under-expenditure of about R1 billion (100 million US dollars) in 2006/07 – led to a reduced allocation at precisely the time that it was gearing up to finalize claims and requesting more funds from National Treasury. Under-spending is in large part the product of institutional weaknesses in the Commission: while the capital funds for buying land, paying out grants and compensating claimants have risen sharply, the proportion of the budget dedicated to staffing has shrunk over time. Added to this has been a reluctance to expand the Commission in the face of its impending closure.

Figure 1. Restitution Budget Allocation 1995 - 2008
Assessment

Restitution in South Africa has been both hailed as a great success and devastatingly critiqued as overly conservative, highly bureaucratic and painfully slow. Among its achievements thus far are the mass settlement of urban claims with cash payouts, alongside a handful of significant attempts to rebuild urban spaces. Progress towards unraveling the complex geography, politics and economics of rural claims has been much more modest. This section presents a brief review of these high and low points of restitution, with their complexities and contradictions.

The varied array of claims

Land handover ceremonies have become prominent events for celebrating the achievements of post-apartheid South Africa. Highlights have included the restoration of land to rural communities such as the Khomani San in the Northern Cape (see Ellis, forthcoming), Elandskloof in the Western Cape, and Makhoba in the Eastern Cape. Redress has also seen rural claimants entering co-management agreements around forests and nature reserves, as at Makuleke in Limpopo (see Robins and van der Waal, forthcoming) and Mkambati and Dwesa-Cwebe on the Wild Coast (see Kepe, forthcoming); here, rather than returning to live on their land, claimants have become partners with government agencies to conserve the biodiversity of these environments. Also among the achievements is the settlement of large numbers of urban claims. These include a few highly complex cases of urban land restoration and redevelopment, such as the Port Elizabeth Land and Community Restoration Association (PELCRA) process in the Eastern Cape, Alexandra in Gauteng, Cato Manor in Durban (see Walker, forthcoming) and District Six in Cape Town (see Beyers, forthcoming).

Putting a price on restitution

Restitution cases involving the restoration and redevelopment of urban residential land are prominent precisely because they are exceptional. Less visible to scrutiny are the great majority of urban claims that have been settled with cash. The great success story of restitution thus far has undoubtedly been the relatively rapid settlement of urban claims with cash compensation. There has been overwhelming pressure on urban claimants to accept standard cash payouts that bear no relation to the value of what
was lost, or its current market value. The result is that restitution has made few inroads into the tenacious geography of apartheid that continues to shape our cities.

Cash compensation has been derided as “cheque-book” restitution, a quick fix solution to deep and intractable grievances, yet although the vast bulk of claims have been settled this way (CRLR 2008), remarkably little attention has been given to what this money has meant to people’s lives, how it has been spent, and the degree to which cash compensation is experienced as restitution. This once-off windfall is often divided among large extended families and is generally too small to bring about lasting change in their lives; it is most often used to pay off debt and meet immediate expenses like school fees and consumer items (Bohlin 2004). As a result, available research suggests that those whose claims are settled in this way may not consider that justice has been done. As Bohlin (forthcoming) points out, it remains to be seen whether claimants themselves, or the next generation, may re-assert their claims in the future.

Restitution and reparation

Another limitation is the disconnect between restitution and wider processes of reparation. This can be seen in the separation of restitution from the work of the Truth and Reconciliation Commission which was also established in 1995, with a mandate to deal with gross human rights violations of the apartheid era. In the process, a profound question has been elided: whether those who benefited from dispossession – the white (and corporate) owners who obtained land cheaply from government, and may have developed it with public subsidies and cheap labour – have any role in the restitution process. As Dhupelia-Mesthrie (forthcoming) points out, this means South Africa’s restitution programme has missed the mark of reconciliation: in the restitution process there are no beneficiaries of dispossession, only victims.

Competing claims and reconstituting tradition

Restitution in the rural areas has opened up a layered world of overlapping land claims and raised fundamental questions about whose claims assume primacy. Many rural communities were forcibly removed more than once, often from land designated “white” to the reserves and then again into ethnically defined homelands. In these areas dispossession also took the form of reduced access to land and forced changes in land use, while people remained in situ. Those living in communal areas were compromised and their livelihoods disrupted both by “betterment” planning – a form of enforced villagization – and by the dumping of “surplus” people into the homelands, which led to overcrowding and widespread conversion of grazing and arable land into residential plots. Competing claims pose the challenge of unraveling these pasts. Traditional leaders have also used the restitution process to reassert or extend their jurisdiction, in some instances reigniting long-standing disputes over the status of various chiefs and headmen as a result of apartheid-era manipulation of the institution of traditional leadership (Ntsebeza 2006, Robins and van der Waal, forthcoming).

New disposessions

In practice, restitution is also complicated by the sometimes arbitrary distinctions between those who have claimed and those who have not. Most fundamentally, perhaps, it has privileged the claims of those who were dispossessed over the rights of those who managed to remain on land designated “white”. This is most evident in the case of commercial farms, from which an estimated 1.5 million blacks were evicted between 1963 and 1980 alone (Platzky and Walker 1985). These evictees can now claim restitution (and upgrading to ownership) of their former tenure rights. Paradoxically, however, those who remained on these farms cannot claim, and the claims by former farm workers and labour tenants who were evicted during the twentieth century are being addressed at a time when present-day evictions from farms seem to be gathering pace (Wegerif et al 2005). So while restitution has affirmed rights for some, it has created division between claimants and those who are currently threatened with dispossession. In so doing, it has created opposing interests among claimants and farm workers who may lose their jobs and homes when claims are settled. It is not surprising, therefore, that, while restitution represents redress and closure for some, it is opening up old wounds and exacerbating feelings of marginality for others.
Reconstituting community

The outcomes of rural restitution have been shaped by the difficulties of reconstituting communities, as properties are restored in private ownership to communal property associations (CPAs) or Trusts. These entities often consist of large groups of people living in different places, with varied resources, assets, skills, and interests in the land they once owned. This has inevitably produced complex and often conflictual group dynamics centering on how the land is to be used, who can settle there and on what terms, how labour and capital will be mobilized for production, and how income will be either reinvested or distributed. Transactability of rights to restored property is crucial if successful claimants are to have real choice as to whether they wish to invest in improving their livelihoods where they are rather than returning to their restored land. Yet the community ownership model has prevented individual community members from liquidating their assets or directly deriving rents from the restored property that they do not use (Aliber et al., forthcoming).

Rights and development

Perhaps the most significant shortcoming has been the degree to which restitution has enabled those acquiring land to improve their livelihoods. Rights to land do not necessarily lead to development. The only major review of the program’s developmental impact to date has found that the vast majority of projects (179) were dysfunctional in that little if any production was being pursued, income from production was minimal, and only one project had achieved its developmental goals (CASE 2006). Restitution has shown up the wider contradictions of land and agricultural policy. Poor communities are expected to emulate existing production systems in a capital-intensive farming sector, as a collective, and to compete with the established commercial farming class and increasingly powerful and oligopolistic agribusiness sector (Hall 2004). While the thrust of agricultural policy has been to withdraw state interventions, restitution has seen the state re-entering land markets. Nowhere is this tension between the rights-based restitution programme and its economic policy context more evident than in community claims in rural areas, where high-value agricultural land is claimed by large, sometimes amorphous and heterogeneous groups of people (see Aliber et al., forthcoming). Unlike the self-selecting would-be farmers who apply for land through redistribution, restitution offers little scope for the state to decide which people are to benefit – and which land to target. While the discretionary market-based redistribution programme allows the state to by-pass these disconcerting questions, restitution shows up starkly some foundational contradictions of land reform more generally.

Strategic partnerships

The poor track record of production on restored farms has prompted grave concerns, including in the top echelons of government, that extending existing approaches to the large rural claims that have not yet been settled will result in massive declines in production, sever the linkages to up- and downstream industries serving agriculture, and lead to job losses in both primary and secondary agriculture. These concerns have combined with the complaints of landowners and investors about the uncertainty created by outstanding restitution claims where high-value farming and mining land is at stake. In response, the Commission has put mounting pressure on claimants to agree, as one of their settlement conditions, to lease out their newly restored land via joint venture agreements with strategic partners – and, thereby, not to live on or use their land directly. Derman et al. (forthcoming) draw attention to the (uncritical) way in which strategic partnerships have been embraced as the dominant model for the settlement of large community claims in the context of high-value commercial farming enterprises, and the degree to which these involve established companies sharing risk with poor rural communities who have little control over the farming and business decisions. The concentration of claims on commercial farmland in the north-east regions of the country seems likely to be resolved through the extension of the strategic partner model, or other joint ventures, as described elsewhere in this collection. (See in particular Kepe and Derman et al.) This is most marked where primary production is strongly linked through vertical integration into agroprocessing, for instance in the forestry and sugar sectors where major milling companies have extended up and down the value-chain into input supply, milling, packaging and transport. The undoubted priority being placed on continuity in production raises the question of whether restitution is being pursued in a way that maximizes its role
in transforming unequal social relations and production systems in the countryside or involves as little change as possible beyond transferring private title.

**Wrapping up redress: towards the deadline**

Because of slow progress in land reform more generally, the Commission’s apparent success in settling claims meant that the state came to see restitution as its flagship programme. It attracted major budget increases from 2003 and drew the attention of the President who, in 2002, set a deadline for the finalization of all restitution claims and the closure of the Commission by 2005, later extended to 2008. In 2008 this deadline was pushed back further, to 2011, signaling the recognition that resolving claims will likely continue for some years to come. What this sense of urgency makes clear, however, is that the ANC government is anxious to limit further obligations in the future, finish off the frustrating unplannability of restitution, and move on to invest in a programme of transformation that is more amenable to state visions of rational investment in “development”:

Restitution is a priority in South Africa. We must finish it off. It’s a matter of right. It’s not a matter of pure economic development like you have in land reform as such…. It must be finished off so that we can go into systematic land reform, scientific land reform, to a far greater extent than we are capable of at the moment (Deputy Minister of Agriculture and Land Affairs, cited in Keet 2005).

**Conclusion**

Restitution in South Africa constitutes a major programme of redress. In comparison with other countries, the process has been fairly rapid, with a substantial proportion of claims being settled in the first 14 years of democracy. The cost has been substantial, but it is striking that public debate has focused on how to expedite the process and ensure lasting developmental benefits and has *not*, generally, called into question the merits or cost of the programme. However, the available evidence suggests that the expectations of what can be achieved and the significance of restoring ownership of land on its own, have been greatly over-estimated.

As restitution turned from a political commitment to implementation, the process became massively depoliticized. Apart from periodic media reports on the handover of land, the institutions, procedures and actual bureaucratic practices that have shaped restitution have been beyond public scrutiny. The programme has turned out to be immensely more complex and messy than anticipated by those – mostly lawyers – who designed it. As the attention of the ruling party turned from liberation to governance, restitution articulated with, and became circumscribed by, other priorities – keeping costs down, protecting the rights of owners, ensuring investor confidence, promoting and controlling development. And as the scale of claims became apparent, government’s interest has been to fast-track the process, limit future obligations and get the work of restitution “off the table”. Restitution is a process at odds with two simultaneous processes of change: restructuring in the commercial farming sector, which is ever more hostile to poor people returning to their land and attempting to compete; and the attempts to revision history and engage in a public processes around reconciliation. Restitution has been limited on both counts – the material and the symbolic.

In the process, the opportunity to use restitution to bring about both far-reaching economic transformation and reconciliation among the perpetrators, victims and beneficiaries of the massive process of property theft that underpinned apartheid may have been missed.

**References**


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1 “Boer”(literally, farmer) refers to the descendants of the first Dutch settlers.

2 The figures for land cost and total award have been rounded to the nearest rand.

3 Author’s calculations.

4 These figures are based on a currency exchange rate of R10 to the US dollar.

5 Author’s calculations.

6 Author’s calculations.