

Introduction

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This collection of articles explores the conflicted terrain of land claims and land restitution in postapartheid South Africa. The volume comprises thematic overviews and detailed case studies in which the authors wrestle with the many meanings and complex outcomes of the state's official program of redress.¹ This introduction provides background reflections on major issues as well as a brief overview of the individual chapters within each of the four parts into which the collection is divided. An in-depth account of the history and scope of the program follows in chapter 1.

LAND CLAIMS IN SOUTH AFRICA

State-sponsored forced removals were among the most flagrant human rights violations of the apartheid era. Reflecting the political significance of this history, the Restitution of Land Rights Act was the first piece of “transformation” legislation passed by South Africa's newly constituted Parliament after democratic elections had ushered in the postapartheid era under President Mandela in April 1994. At the time there were high hopes that land restitution would not only redress the injustices experienced by black South Africans who had been dispossessed of land rights but also contribute to the objectives of tenure security, land redistribution, and rural development that underpinned the new democracy's wider land reform ambitions. In the event, these objectives have proven far more elusive than originally anticipated. Exploring why this has been so and what this means for assessing the program in all its variety are key aims of this book.

Now is a good time to take stock of this ambitious program of redress, reconciliation, and reconstruction.² For one thing, the full dimensions of

the official program are becoming clearer as the state pushes to meet its 2011 deadline (pushed back from earlier deadlines) for declaring finalization.³ It is now possible to undertake a far more comprehensive and informed assessment of the program's achievements than in earlier years, not only in relation to the scale of past forced population removals but also in relation to the promises of 1994 and the developmental challenges currently facing the country. For another, given that the state appears intent on finalizing the program as expeditiously as possible, it is important to reflect on what still remains to be done, not merely to settle all outstanding claims as quickly as possible—which often seems the state's overriding priority—but also to ensure that the settlements are durable.

Critics have consistently argued that restitution, as with land reform in general, has not been sufficiently prioritized by the African National Congress (ANC) government and that the state's record on postsettlement support for land-based restitution settlements is generally very poor. It is increasingly clear that restitution is best understood as a process, not a onetime event. The restoration of land as the formal settlement of a claim marks not the end of the restitution road but an early stage in an ongoing and often extremely complex process of community reconstruction. This process has proved to be challenging from a development perspective as well as socially and politically fraught. That the process has complex social, political, and developmental aspects is a major theme in this collection, cutting across urban and rural case studies (Aliber, Maluleke, Thagwana, and Manenzhe; Beyers; de Wet and Mgujulwa; Ellis; Kepe; Sato; and Wegerif).

Establishing the precise number of claims lodged with the agency entrusted with primary responsibility for processing claims, the Commission on Restitution of Land Rights (CRLR, also known as the Land Claims Commission or simply the commission) has proved a difficult research task (see Hall, chapter 1 in this volume). However, in April 2005 the acting director general of the Department of Land Affairs (DLA) reported to Parliament that the final count stood at 79,696 (DLA 2005), of which approximately 80 percent were urban claims and the balance rural. By March 2007 the commission was claiming that over 90 percent of all lodged claims—74,417—had been settled (CRLR 2007, 3). In contrast to its beleaguered status in earlier years, when claim settlements were few and far between, land restitution has come to enjoy the status of flagship in the state's larger land reform program, which also encompasses land redistribution and enhanced tenure security.

Given the deeply conflictual nature of land reform in the southern African region, as well as the inherent difficulties of any state program aimed at restorative justice many years after the original acts of dispossession, the formal achievements of the program are noteworthy. However, as Hall's overview and other chapters in this volume make clear, what counts as success is open to debate. It is clear that the official national numbers are very poor indicators of what is actually happening in projects at the local level.

Although the restitution program is most commonly thought of as a core element of redistributive land reform, to date the bulk of land claim settlements have been in the form of financial compensation rather than restoration of land; urban rather than rural claims have predominated (CRLR 2007, 61). This situation is set to change as the outstanding claims are processed—all of them are reportedly rural, and many involve substantial tracts of land, especially in the northeast of the country. Nevertheless, formal ownership of restored land does not necessarily give claimants unrestricted rights of access to their land, as demonstrated by restitution settlements involving high-value agricultural enterprises and prime conservation areas (Derman, Lahiff, and Sjaastad; Kepe; Robins and van der Waal, all in this volume; see also Walker 2008). Claimants have also not always taken up the opportunity to settle on or use their land in accordance with state development plans (Aliber et al. in this volume). What these outcomes mean for agrarian reform more broadly are key issues for further analysis and policy debate.

Given the preponderance of urban claims, it is striking that to date most scholarly analyses of land restitution, as well as public political commentary, have focused on rural claims and rural land issues. The particular meanings of restitution in the urban context, including the extent to which urban financial settlements have contributed to a sense of closure on the past, have received relatively little in-depth analysis thus far (Bohlin 2004), although, as this collection reveals, this state of affairs is beginning to shift. A strength of this volume is its treatment of urban and rural claims as related elements of the same program rather than as discrete categories with very different requirements, trajectories, and assessment criteria.

Urban claims have brought out particularly clearly the difficulties of restoring land rights in contexts where land use and settlement patterns have changed substantially since the dispossessions driving the claims. The many constraints inhibiting the simple act of restoring land to those who were wronged are most apparent in the urban context, although similar complexities have begun to receive more attention in the rural context, in

particular in relation to land claims on protected areas and on highly developed agricultural estates (see Kepe; Derman, Lahiff, and Sjaastad, this volume). Underestimated in the original policy framework for restitution was the likely impact of constituents who are not claimants making competing demands on land subject to restitution claims, as in Cato Manor, Durban (Walker, this volume), and, in a very different political context, District Six in Cape Town (Beyers, this volume).

In linking urban and rural land issues, the collection also highlights the complex meanings of land restitution beyond considerations of livelihoods and development. Several case studies explore the ambiguous ways in which ethnic and community identities are confirmed or reconstituted and also mobilized through the restitution process (Ellis; Robins and van der Waal; Sato; Walker). The volume also brings into focus the limitations of the official process in dealing with the symbolic dimensions of loss (Dhupelia-Mesthrie). South Africa's Truth and Reconciliation Commission (TRC) has received considerable attention internationally, but the land claims program has had a much lower profile as a program of reparations for human rights abuses and for dealing with the nonmaterial dimensions of land dispossession. Yet, given the number of beneficiaries the restitution program has reached and the significance of land for social identity, this is an issue crying out for attention. It is noteworthy that despite the undoubted political and symbolic significance of land restitution in national debate since the early 1990s, as well as the importance of land in the livelihood strategies of many of South Africa's rural poor, the policy debate on the restitution program has tended to fixate on the apparently tangible measurements of performance as represented by the total number of claims settled and hectares of land transferred. However, as the case studies in parts 2 and 3 of this volume underscore, this information opens only a small window on the significance of land restitution for claimants in postapartheid South Africa.

Another neglected dimension that this collection addresses is the extent to which South Africa's land laws have been challenged by judicial activism through the restitution program. Although there is an important tradition of legal scholarship on these issues, there has been relatively little cross-fertilization between legal research and general social science research until now, and even less public debate on the critical issues of jurisprudence and its reconfiguration of the country's land laws. Yet in recent years there have been significant developments in the area of property law as a result of judicial interpretation of key sections of the restitution legislation, not only by

the Land Claims Court (LCC) but also by the Supreme Court of Appeal and the Constitutional Court. These judgments have challenged in potentially far-reaching ways hegemonic assumptions about the authority of the model of private landownership that until now has permeated South African law and dominated the political debate (Mostert, this volume). Furthermore, although the LCC has been criticized for making the settlement process unnecessarily legalistic even in noncontested claims, it has developed a set of judgments that, according to former LCC judge Alan Dodson (this volume), increases the onus on the state to take much greater responsibility than currently displayed for developmental support for claimants who have had their land restored to them.

The role of state institutions in land reform remains a controversial subject. Alongside a fierce debate on the relative merits of the market (see Hall, this volume), lack of state capacity and its overreliance on inappropriate models of agrarian reform are frequently cited problems. These concerns are well reflected in this volume, alongside some emerging alternative perspectives on possible solutions. Although most analysts criticize the state for failing to live up to its responsibilities, a couple of chapters question the authority accorded state-led development plans and foreground the importance of claimants taking control of their own futures, whether in developing independent food production models (Wegerif) or in making their own choices at the individual or household level about how or even whether to use the land rights that have been restored to them (Aliber et al.).

A related topic concerns the powerful role of civil society organizations, including NGOs and lawyers, in not only supporting claimant organizations but also shaping restitution outcomes according to their own preferred understandings. Although in general NGOs have played a valuable role in pressuring the state on behalf of claimants and providing claimant organizations with much-needed expertise and resources (Conway and Xipu; de Wet and Mgujulwa; Ellis, all in this volume), the client/patron relationships that develop are not innocent of power relations or without ambiguity.

CHAPTER OVERVIEW

The scale of black land dispossession in South Africa historically and the variety of tenure forms and land use that were affected at different times in different parts of the country have meant that the post-1994 restitution program has had to tackle an extraordinarily wide range of issues in terms

of types of claims, levels of organization among claimants, possibilities for reconstruction, and local expectations of redress. Although it is not possible to treat the full range of issues in a single volume, the chapters in this collection achieve a wide thematic and geographical spread. They also showcase a variety of different perspectives. Although most contributors are academics, some are activists or have activist backgrounds; some were formerly located in the CRLR, the DLA, and the LCC.

The book is divided into four parts. Part 1, “Contextual, Comparative, and Legal Perspectives,” comprises three general chapters that provide a broad overview for analyzing the program. Chapter 1, by Ruth Hall, provides a history of the restitution program as it has unfolded in South Africa since 1994. Beginning with a brief historical overview of land dispossession and the struggle to enshrine a land restitution program through the constitutional negotiations of the early 1990s, this chapter sets out the main features of the constitutional compromise on property rights that made the transition to democratic government possible in 1994, and then reviews the achievements, major policy challenges, and current debates on the significance of the program. Hall highlights the tension between restituting rights and enhancing livelihoods that has characterized the program in its implementation and concludes that, both materially and symbolically, land restitution’s contribution to postapartheid reconstruction has been limited.

Chapter 2, by Derick Fay and Deborah James, provides a comparative overview of the experience of restitution as a state endeavor in South Africa and in other parts of the world. It thus helps locate the South African material within a larger literature and set of debates on the meaning, possibilities, and limitations of such an ambitious yet often circumscribed enterprise. The South African program, it emerges, carries a particularly weighty set of expectations as a result of the country’s specific history of colonial and apartheid-era dispossession by a racialized minority; nevertheless, many of the challenges facing the program are not unique, including the ambiguities of demarcating claimants within the wider society as a distinct group with special claims on the state in terms of recognition and redress.

Chapter 3, by Hanri Mostert, brings an important legal perspective to the analysis, by tracing the way in which the courts have expanded the scope of the South African restitution program to include categories of claimants that a more conventional and narrow reading of the enabling legislation might have excluded. This has implications beyond the restitution program itself, as it has expanded the scope of South African land law in ways that,

Mostert argues, have not been fully appreciated—not only by the wider public but possibly by lawmakers themselves.

Part 2, “Restitution Voices,” shifts the focus from the large scale to the small scale. Through case studies based on in-depth fieldwork and research that weave together scholarly and activist concerns, part 2 brings to the fore the local, even individual, limits and possibilities in claimant experiences of the land claims process. Although the specific contexts discussed in this part differ, it is possible to trace certain continuities across them, most notably claimants’ generally negative experience of bureaucratic inefficiency and the long delays they have faced in the processing of their claims. But although the frustrations engendered tend to undermine the symbolic value of restitution, the implications of the slow pace of restitution for the material outcomes of the program have not always been negative at project level.

Part 2 begins in chapter 4 with Uma Dhupelia-Mesthrie’s deeply personalized account of the experience of former residents of Black River, Cape Town. Having first interviewed some respondents in the mid-1990s when they were just embarking on the land claims process, she is able to compare claimant hopes and concerns at the outset with their accounts of what has transpired since then. Unable to return to their former homes in what is today a well-developed, middle-class suburb, these claimants have opted for financial compensation. The chapter describes how they have deployed humor in the face of an often opaque officialdom and also how they have attempted to come to terms with the unsatisfactory nature of the compensation they have received. For some the cash awards were so small once the money had been divided among all family members that they signaled the failure of restitution, not its success. Yet for others the process of acknowledgment represented by the financial settlement did bring a measure of closure on the past.

Chapter 5, Marc Wegerif’s account of a group of claimants from Mahlahlalani, in rural Limpopo, provides a striking contrast with that of Black River. Here, rather than endlessly waiting for the state bureaucracy to deliver a formal settlement, a group of subsistence farmers decided unilaterally to return to their former land and started producing crops on it, despite their claims still being under negotiation and their presence on the land regarded by officialdom as technically illegal. Wegerif highlights the productive and cooperative nature of this “illegal” production, which has been facilitated by an informal but efficient “production leadership” that contrasts sharply with the often conflict-ridden “political leadership” that the

state has engaged as the proper representatives of claimants in the formal restitution process. For Wegerif the implications are clear: claimants should not rely on a fickle and misguided bureaucracy to regain their land but take control themselves of their land and livelihood needs.

The third chapter in this section, chapter 6, in which Anna Bohlin compares restitution in the two Western Cape urban communities of Kalk Bay and Knysna, echoes themes raised in Dhupelia-Mesthrie's chapter. Initially most claimants were committed to returning to their former land (in both cases situated in what are today classified as prime residential areas), but long waiting periods and frustrating encounters with the CRLR gradually eroded their belief that their land would be restored to them. This finally drove the majority to abandon hopes of land restoration and opt for financial compensation. In both places, then, the passage of time has undermined claimant cohesion, commitment, and sense of closure.

Chapter 7, by Angela Conway and Tim Xipu, the final chapter in part 2, provides a contrasting experience. It describes how claimants from the tiny community of Covie, on the southern Cape coast, assisted by an NGO, were able to use the long waiting period involved in the processing of their claim to their advantage. In this case they strategically delayed the transfer of land until they had ensured that various external parties had formally committed to concrete measures of support in the postsettlement phase. This account provides a useful corrective to the view that speed should necessarily be an overriding concern in the processing of claims. It also endorses the importance of securing developmental support in tandem with, rather than after, the negotiations to restore the land, and highlights the role of NGOs in supporting claimants around long-term goals.

Part 3, "Restituting Community," explores the many challenges involved in reconstituting communities through the restitution program. Although there are thematic continuities with part 2, the case studies in this part bring to the fore the contested nature of "development" among members of claimant communities as well as between claimants and outside groupings, including local authorities and other parties with an interest in the development of the claimed land. These chapters also examine the multilayered ways in which land claims can serve as a platform for the assertion of reformulated group identities that, although generally invoking the past, are firmly rooted in present-day struggles over power and resources.

Chapter 8, by Christiaan Beyers, focuses on the protracted battles around the redevelopment of Cape Town's District Six—one of the most enduring

symbols of the ravages of apartheid. It examines the very different interests driving local government on the one hand and claimant representatives on the other in the redevelopment phase, once the formal parameters of a settlement framework that recognized the legitimacy of restitution claims had been negotiated. His discussion highlights the seemingly intractable nature of the conflicts that have dogged the process. Claimants fear that the City of Cape Town's call for broad stakeholder involvement and for commercial and housing development on "surplus" District Six land could weaken their own control over the land and the direction its redevelopment should take. Speaking in the name of community, the Beneficiary Trust has instead insisted on a claimant-centered approach, but it faces ongoing challenges from the city—on whose resources and legal authority it is dependent—as well as other potentially powerful actors in the battle over prime urban real estate.

Chapter 9, by Steven Robins and Kees van der Waal, reviews one of the best-known restitution cases involving a major conservation area, that of the Makuleke claim in the north of Kruger National Park. The authors discuss the ways in which the outcome of this case appears to embody the official objectives of reconciliation, nation-building, and economic development. The Makuleke's decision to maintain their land for conservation, as well as their apparent success in reconciling traditional and democratic governance institutions, positions them as a model tribe according to the authors. They argue that this claim's iconic status can be attributed to the Makuleke leadership's strategic deployment and creative assimilation of various development discourses. Here, notwithstanding the significant external resources that went into the settlement, claimant agency seems to have triumphed. However, lurking beneath the surface is a significant battle for authority involving traditional authority structures within and beyond the Makuleke, which threatens the progress made thus far.

Chapter 10, by William Ellis, explores another prominent claim on a conservation area, that of the ≠Khomani San on the Kgalagadi Transfrontier Park between South Africa and Botswana. This chapter focuses on the manner in which different groups of claimants deployed claims to an "authentic San identity," both before and after the land claim settlement, to try to maximize potential benefits for themselves. Ellis argues that the tensions and synergies among claimants have revolved around different interpretations of San identity, whereby San "authenticity" is required to gain membership in the claimant group and also used strategically to strengthen the legitimacy of the claim before external arbiters and brokers.

The following discussion of Chatha in the Eastern Cape in chapter 11, by Chris de Wet and Eric Mgujulwa, addresses one of the very few cases whereby people who were resettled through apartheid-era “betterment planning” in the bantustans, or former “native reserves,” were compensated under the restitution program. “Betterment” refers to a land use management policy that involved the spatial reorganization of villages and consequent resettlement of people on a very large scale. At first CRLR officials argued that betterment claims could not be entertained under the restitution legislation. In the Chatha case, however, claimants were assisted by a local NGO to press their claim successfully, again highlighting the significance of external support networks for claimants. As in the ≠Khomani San and Makuleke cases, major challenges in the postsettlement phase were local politics centering on the legitimacy of governance structures and contestations over the content and control of the restitution award that was finally won from the state.

Chapter 12, by Chizuko Sato, the final chapter in part 3, explores the dynamics of land struggles and associated community politics in Roosboom, a previously black-owned farm in KwaZulu-Natal. Sato details how Roosboom claimants were prominent in the struggle for land restitution during the constitutional negotiations, leading to a settlement that predated the 1994 Restitution of Land Rights Act. However, like many other cases discussed in this book, the challenges of reconstituting a community that historically comprised both landowners and tenants, in addition to the lack of consensus on redevelopment priorities among claimants, make it very difficult to offer a simple verdict of success. Sato addresses the fraught relationship between former landowners and their tenants and the tensions surrounding who is a rightful beneficiary—a particularly thorny issue when restitution signifies not only reconnection with the land but also new, albeit often temporary, livelihoods through state development projects.

The chapters in part 4, “Restitution Policy,” span urban and rural geographies and interrogate the competing mandates that postapartheid land restitution has had to confront on various fronts: to transform landscapes scarred by spatial apartheid and address deep inequities while protecting the environment, maintaining agricultural production, and acknowledging demands for economic development and social inclusion from more constituencies than claimants alone. A common thread running through these chapters is concern with the meaning of “development.”

In chapter 13, a detailed case study of the Mkambati land claim on a protected area along the Wild Coast of the Eastern Cape, Thembela Kepe

explores the tension between two constitutional imperatives: the first is to restore land to the dispossessed, and the second is to promote biodiversity conservation. He argues that the comanagement agreements entered into by claimant communities and conservation authorities have seen the reconfiguring, not the abandonment, of former exclusionary practices that privilege hegemonic conservation discourses over the land rights and livelihood activities of the poor. This forms the basis of a critique of the comanagement model in both its conception and its implementation in this claim.

In chapter 14 Cheryl Walker provides an account of the struggles surrounding the redevelopment of the suburb of Cato Manor, Durban. Here, as in District Six, the imperatives of land restitution have clashed with other demands for redevelopment and social inclusion, in this case by the residents of informal settlements that proliferated in the early 1990s on the land under claim. However, unlike in District Six, Cato Manor claimants never enjoyed a significant degree of local political legitimacy, and here the promise of restitution was ultimately compromised by the “default” presumptions of urban planners that favored low-cost housing for nonclaimants as the most pressing priority for the area. Drawing on this case study, Walker argues that the restitution framework was inadequate to handle both the volume and the particular political and developmental challenges posed by the deluge of urban claims that engulfed the CRLR at its outset, and that this has had major implications for how the program has unfolded overall.

Chapter 15, by Alan Dodson, a former judge of the Land Claims Court, reflects on the mandates that were given to the LCC and the CRLR respectively and how the developmental responsibilities of the restitution program could be better served through future institutional and legislative changes. In reviewing various LCC judgments relating to the restoration of land, he criticizes the view of the court as insufficiently pro-poor. He questions what is required to give restitution meaning through the implementation of settlement agreements, as well as where responsibility for achieving this should lie. He concludes that legislative change is needed to allocate specific responsibilities to a reconceptualized CRLR (or similar body) that will actively support claimants’ use of restored land, in order to realize the program’s underlying goal of supporting sustainable, dignified, and humane lives.

Chapter 16, by Michael Aliber, Themba Maluleke, Mpfariseni Thagwana, and Tshililo Manenzhe, offers a somewhat different slant on development. It highlights the tensions between restitution and rural development. The authors describe how, far from realizing the ANC’s early vision of transforming

what it regarded as the inefficient and environmentally destructive practices of white commercial farming in favor of smallholders, the restitution program came to regard the commercial farming sector as the model that rural restitution projects should emulate. Through an examination of four sets of claims in Limpopo province, the authors argue that the national debate on appropriate farming models echoes disputes at the project level. These generally divide claimants who favor settling on the land and possibly undertaking small-scale farming from those who prefer the land to be given over to unified commercial production. The important question is how to address the real-life heterogeneity that characterizes claimants and their interests in land-based settlements.

In response to the ostensible failures described by Aliber, Maluleke, Thagwana, and Manenzhe and fearful of what will happen when prime commercial farmland is restored to poor communities, the state is now proposing—even insisting on—deals between land claimants and commercial operators to ensure continuity in production. The emergence of the “strategic partnerships” model is described by Bill Derman, Edward Lahiff, and Espen Sjaastad in chapter 17, the final chapter, which looks at the early application of strategic partnerships in the lush, fruit-growing Levubu valley in Limpopo province. The authors interrogate how these partnerships were envisaged in terms of who makes the key decisions, who carries the risk, who gets the jobs, and, most fundamentally, how claimant communities (who are not allowed to live on or use their land themselves) may benefit from these deals, if at all. Although this experiment is still in its early stages, this chapter raises important concerns and provides a useful baseline from which to evaluate such deals and develop alternative, more claimant-centric models for restitution in the future.

The postapartheid state, driven by the desire to claim tangible results for land reform and yet also limit its responsibilities for land claims, has signaled its intention to wrap up the restitution program as speedily as possible. What the chapters in this volume collectively make clear is that the issues of community reconstruction and land redevelopment elude easy resolution in the unstable context of contemporary South Africa. The challenges of redress stubbornly extend beyond the parameters that the state has attempted to fix.

NOTES

1. The collection is based on a selection of papers from an interdisciplinary conference held outside Cape Town, South Africa, in September 2006 that was cohosted by the Programme on Land and Agrarian Studies (PLAAS) at the University of the Western Cape, the Department of Sociology and Social Anthropology at the University of Stellenbosch, and the Human Sciences Research Council. The conference brought together researchers from South Africa and abroad, government officials, and representatives from NGOs and some claimant communities. The support of the Ford Foundation toward the conference and publication of this book is gratefully acknowledged.

2. Final updates to chapters were made in mid 2009.

3. In 2005 the ANC government set 2008 as its deadline for the finalization of the program. In early 2008 the date was shifted to 2011. In early 2010 government plans projected (rather more realistically) that the settlement of claims would extend to 2020.

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