Restitution of Land Rights Amendment Bill 2013

Submission by

Prof Ben Cousins

Prof Ruth Hall

Prof Moenieba Isaacs

Dr Gaynor Paradza

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PLAAS
University of the Western Cape
Private Bag X17
Bellville 7535
South Africa
Tel: 021 959 3733
Fax: 021 959 3732
Email: plaas@plaas.org.za

1. Background

1.1. This document represents a response from researchers at the Institute for Poverty, Land and Agrarian Studies to the Restitution of Land Rights Amendment Bill as published on 19 October 2013. It is a statement by the signatories below and does not purport to represent the views of the University or the Institute as a whole. All those signing have been supporters of the Restitution programme since its inception in 1994, and several have been intimately involved in its development over the years.

1.2. Our comments are made in the spirit of the original aims of the Restitution of Land Rights Act 22 of 1994: that a just resolution should be found for the situation those dispossessed of land rights through racist and apartheid legislation, and that this should be done in a way that supports the broader national aims of reconciliation and the social and economic development of our people. PLAAS's experience and role in supporting and monitoring the restitution programme are set out in the later section 10 of this submission.

2. Response to the Bill

2.1. We support a restricted re-opening of the claims lodgement process, but believes that the thinking behind this Bill is flawed. We propose that the re-opening be done in a different manner than is currently contained in the Bill. In brief, we propose that before Parliament passes this Bill, the following changes be effected:

2.1.1.	The re-opening must be restricted to one year (instead of five years);
2.1.2.	Existing claims that are not finalised must be ringfenced and prioritised for settlement (rather than being even further delayed as a result of the reopening);
2.1.3.	Successful claimants must be given developmental support on land restored to them (rather than having to apply for discretionary 'Recapitalisation' funds which are inappropriate to the rights-based claims to restitution);
2.1.4.	Claimants who have had their land restored to them must be awarded title to their land (rather than the finalisation of the restoration process being further delayed);
2.1.5.	Restitution must be granted to the people who lost land (and not to those who claim jurisdiction over their land, based on Bantustan policies).

2.2. We welcome the removal of the proposed amendments to Section 33 of the Act which appeared in the 23 May 2013 version of the Bill, which would have made land restoration contingent on the ability of claimants to use their land 'productively', a precondition for landownership which does not apply to existing landowners. This would have had the effect of racial discrimination against black landowners who were dispossessed. We opposed such provisions in our earlier submission on the 23 May 2013 version of the Bill. Removing these provisions reflects the DRDLR's willingness to take into consideration the views of stakeholders such as PLAAS.

2.3. However the Bill still contains some provisions which we believe could have negative impacts on restitution claimants. These are clearly foreseeable and therefore must be avoided. This submission outlines which aspects could harm the interests of existing and future claimants, and provides recommendations on the way forward. But in order to understand the implications of

re-opening the claims process, one needs to understand the very limited progress achieved thus far with settling rural claims, and with land restoration in particular.

3. How far along are the existing claims?

3.1. Here we provide a summary of the most relevant statistics regarding land restitution in South Africa. This data shows that the restitution programme has very far to go in addressing the existing claims, which would likely take at least another two decades to complete.

3.2. There are 9,149 outstanding claims, some of which have not begun to be processed and according to the Commission, all of these are rural claims, which typically involve large communities claiming large areas of land, often high-value farmland. These will take many years to resolve (i.e. to settle through negotiation or in the courts) and many further years to finalise (i.e. to implement the settlement agreements). It is therefore essential that these many thousands (at least hundreds of thousands and potentially over one million) of people who have been waiting for 15 years for their claims to be addressed are in no way disadvantaged as a result of the reopening of claims. Among the outstanding claims are **7,226 claims that are not yet gazetted** and a further **1,507 gazetted claims that are not yet settled.**

3.3. **There are also 20,582 claims that are 'settled' but not finalized.** Given that some of the rural claims involve between 1,000 and 10,000 households, these claims could account for several million people who are waiting for the Commission to make good on its commitments made in signed settlement agreements. Some are held back due to budget backlogs, others due to institutional capacity limitations, and others due to the unwillingness of owners to sell at prices offered by the Commission. Among the settled but not finalized claims are **8,008 claims that are partially settled and 12,594 settled claims that are not yet implemented.** In other words, settlement agreements have been signed on paper, but land has bought been acquired, nobody has resettled on their land, no houses or infrastructure has been bought, and no development process initiated.

3.4. In view of the above, it is fair to say that the restitution process is still in its early stages, with the most complex work of resolving rural community claims, negotiating settlement agreements that are acceptable to the claimants and the state, implementing these agreements still to be done. Resolving the existing claims will likely take at least a further 15 years, and probably more to implement all the settlement agreements and court orders. It is important to consider not merely the number of claims but the number of people who have been waiting and spending time, money and effort in the claims process and still have not received restitution for the unjust dispossession they and their forefathers and mothers suffered.

4. Re-opening the claims process

4.1. We address three issues relating to the proposed re-opening: (1) the need for evidence of the scale and nature of the demand, and reasons why the Minister has not used available avenues for addressing these claims; (2) existing institutional capacity and budgetary constraints and implications and requirements should the claims lodgement process be re-opened; and (3) the status of existing pending claims vis-à-vis 'new' claims and the need to ringfence the former against the latter.

Evidence of demand for re-opening & reasons why Ministerial discretion has not been used

4.2. We are aware of demands for the re-opening of the claims process, by those who are eligible under the Act but who did not lodge claims prior to the deadline of 31 December 1998. However, we are not aware of the scale of such demands, nor any evidence that the Commission or the Department has conducted any research to assess the scale.

4.3. The re-opening cannot be separated from the challenges facing the Commission in carrying out its existing mandate. Claim forms have been lost, claimants have been frustrated with delays over years and years; claimants have died waiting for restitution; and delays have contributed to complex and conflictual relationships within communities and between communities, the Commission, other state authorities, landowners, and other affected parties. The frustrations and anger expressed by claimants at consultation meetings should be heard by representatives in Parliament as an indictment of the systems and capabilities of the Commission, and a warning of the implications of a massive expansion in the restitution process.

It is important to note that the existing Act makes provision for Ministerial discretion to be used to provide alternative remedies for those whose land claims fall outside the parameters of the Act.. Section 6(2)(b) of the existing Act empowers the Commission to make recommendations to the Minister regarding 'the most appropriate form of alternative relief … for those claimants who do not qualify for the restitution of rights in land in terms of this Act' (Section 6(2)(b)). If the department is aware of claims that were unjustly excluded from the restitution process to date, could they not be addressed through this mechanism? Other mechanisms include the land redistribution programme, and housing and settlement upgrade programmes. The recognition of culturally and historically significant sites could also be accommodated through existing laws, policies and programmes. The Bill provides neither evidence or arguments on the reasons for not using these mechanisms to provide alternative remedies.

Institutional capacity and budgetary constraints and projections of requirements

4.4. Reopening the claims process means massively expanding not only the claims of the people against the state, but means massively expanding the capacity of the state to respond to the people's claims.

4.5. For this reason, Parliament should require the Commission to provide a comprehensive Strategic and Operational Plan over the coming medium term expenditure framework, demonstrating how it will be able to upscale its capabilities to the levels required.

4.6. As a ballpark estimate, if the Commission is correct that about 379,000 new claims might be lodged, this would require at least a six-fold increase in its capital and current budgets; this would be commensurate with the increase in the number of claims that is anticipated, and allow the Commission to address them at a similar rate as the claims addressed between 1998 and 2013. To avoid the new claims being processed as slowly as the existing claims have been will require much more substantial increases: to halve the amount of time it takes to process a claim would require a 12-fold increase in capacity, which could be considered the same as requiring an annual budget in the ballpark area of R36 billion per year (in 2013 Rands) over the coming few decades.

The status of pending vis-à-vis 'new' claims and the need to ringfencing existing pending claims

4.7. We believe that the financial cost of re-opening the restitution programme is going to put a massive strain on the Department's ability to process the existing claims and attend to other land reform matters.

4.8. The rights of existing claimants to administrative justice requires that their claims not be jeopardised nor further delayed due to the reopening of the claims process. There are two categories of existing claimants: those whose claims are unresolved, and those whose claims are settled but implementation has not been finalised. Therefore there are two possible ways in which the ringfencing could be done, depending on the legal interpretation of the rights of the various parties to administrative justice, under the Administrative Justice Act 3 of 2000:

4.9. **Option 1: ringfence all existing claims against all later claims.** This would mean that those whose claims were lodged by the first deadline of 1998 should have their claims settled and finalised before the 'new' claims lodged between 2013 and 2018 are addressed.

4.10. **Option 2: ringfence only those existing claims which are settled against all later claims.** The disadvantage here is that this would mean that those whose claims were lodged by the first deadline of 1998 and whose claims are not yet settled (through a S42D notice or a court order) could still be affected by counter-claims by other individuals or groups on the same or overlapping land. However, it would ensure that those whose claims are settled, but not yet fully implemented and finalised, would not have their settlement agreements reversed due to later 'new' claims.

4.11. Deciding between Option 1 and Option 2 requires political consultation and sourcing of legal opinion regarding the relative rights of the various parties.

4.12. Parliament should not pass the Bill as it stands without having made a decision regarding one or the other of the options, and its incorporation in to the text of the Bill.

Recommendations:

1. Provision of evidence regarding the demand for re-opening of claims and its scale;
2. Provision of estimated timeframes for the completion of existing restitution claims;
3. Provision of a Strategic and Operational Plan to upscale the Commission's institutional capacity and budgets for the extended timeframe of the restitution programme;
4. Provision of legal opinion and political direction on ringfencing of existing claims against 'new' claims.

5. Betterment claims

5.1. Most of the estimated 379,000 potential new claims are likely to be Betterment claims.

5.2. Betterment claims will be settled through cash compensation or developmental restitution – not restoration of land. This means that the expanded restitution process would likely have much less effect on the racially skewed pattern of landownership in South Africa than the existing claims lodged prior to the end of 1998 could have, once they are resolved.

5.3. Addressing Betterment claims will mean that potentially many billions of Rands will be given to poor people in the former Bantustans, certainly something that is desirable in terms of historical redress and redistribution of wealth. However, the costs of making this transfer through the restitution process will be far higher than by transferring the same resources to the same people outside the restitution programme. Estimates of the likely cost of Betterment claims, and of the cost to the state of processing them, should inform Parliament's consideration of this Bill.

5.4. The one successful Betterment restitution claim thus far – in Cata in the Eastern Cape – shows that more than a decade after settling the claim, the implementation has barely begun, despite very substantial costs and enormous pressure on the Commission with its limited institutional capacity. In addition, providing 'developmental restitution' to the people of Cata exposed the difficulties of cooperative governance between the Commission and its regional commissioner's office, and the provincial government and district and local municipalities.

5.5. There is no restriction on government taking steps to prioritise poor rural communities for developmental support in the form of public infrastructure, income-generating projects, farming support, and other means. Doing so outside the strictures of the restitution process would possibly be preferable for all concerned, and create unequal treatment of people who were subjected to Betterment planning and those in a similar situation currently who were not. Have the potential Betterment claimants been consulted on whether they want their claims address through the restitution process or not?

6. Acquisition through Purchase and Expropriation

The Bill provides for the Minister to delegate his powers under Section 42E of the Act to his Director-General, the Chief Land Claims Commissioner, the Regional Land Claims Commissioners and 'other state officials'. This includes authority to buy land and to expropriate land, which the Minister is empowered to do in terms of the 2003 Restitution Amendment Act. This section should be read together with the Expropriation Bill published in March 2013. Clarifying the procedures involved in expropriation is indeed needed. What is not clear is the justification for the delegation, and particularly some definition is needed of the 'other state officials'.

Recommendations:

1. Address the ambiguities in the Bill in relation to delegation of powers and acquisition of land for restitution.

7. Appointment of Judges to the Land Claims Court

7.1. The Bill proposes various changes to the Land Claims Court (LCC), including that there must be five judges and a Judge President, and that these must be judges of the High Court. This is a reversal of the existing provisions which allow any person considered to have relevant experience to sit on the LCC, jettisoning the idea that adjudication of land claims must draw on a range of contextual knowledge, and not only technical interpretation of the law. There have been widespread criticisms that this 'pro-poor court' has produced 'anti-poor outcomes' and one result of this is that trust in the Court has been eroded, as evidenced in the current campaign by the National Union of Metalworkers of South Africa (NUMSA) and Food and Allied Workers Union (FAWU) which explicitly calls into question the role of the Court. The current proposals are likely to further separate this specialist Court from relevant contextual expertise. This is not advisable, and no motivation for this is provided in the memorandum to the Bill.

7.2. The other proposals on the Court flow from this. It is proposed that the judges will sit on both the High Court and the Land Claims Court; this dual appointment means that, unlike the Labour Court, they will not specialise entirely in land law but work on a range of different kinds of cases. The whole idea of having a Land Claims Court – drawing on experiences with land tribunals in Canada, New Zealand and elsewhere – arose from the need for a specialist court. Why is the Land Claims Court not to be specialist? The likely reason is that, with most claims being settled through negotiation, under the administrative process provided in Section 42D, the work of the Court is somewhat erratic. Since all judges of the Land Claims Court will also be High Court judges, the Bill proposes that all the sections of the Act dealing with their employment and remuneration are to be deleted.

7.3. Acting judges are to be appointed by the Minister of Justice (not the President, as is currently the case), which could help to address problems of vacancies, and this can be for an unspecified duration. This is probably a good idea.

7.4. While several of the provisions seem to address problems with vacancies in the Land Claims Court – a positive move – at the same time, there must be provisions to support both the independence and specialisation of the court, and also to enable a range of dispute resolution options, including mediation and arbitration. More thought is needed on how the two institutions – the Commission and the Court – can work more closely and effectively together.

Recommendations:

- 1. Rethink the provisions in the Bill on the composition of the Land Claims Court
- 2. Further consideration needs to be given to how the Commission and the Land Claims Court can co-ordinate their efforts to greater effect.

8. Administrative justice

8.1 Community members have often raised concerns about the restitution claims process, and in particular in relation to lack of feedback and engagement after the submission of their claims. This connects to issues of administrative justice as community members are expected to wait for long periods of time without receiving any indication on the progress of their claim. Moreover, community members have also voiced the need for an internal appeals mechanism that would allow

communities to be informed on missing documentation or additional supporting information that would be needed to process their claims rather than claims being rejected and communities being forced to utilise the Land Claims Court which can extend the process of finalising their claims. Furthermore, administrative justice is better served when community members have access to officials to assist with additional information to conclude claims.

Recommendations:

- 1. Provide clear guidelines for claimants on how to engage with the claims process and include mechanisms for feedback to claimants within the process
- 2. Provide an appeals system within the restitution claims process to allow communities to bolster their claims should the need arise

9. Relevant issues not addressed by the Bill

9.1. There are some matters that have not been raised in this bill that are materially important in order to understand its full implications. These include funding for restitution via the new Recapitalisation and Development Programme policy, restitution for pre-1913 land claims by Khoi-San people and others, and the status of Communal Property Associations in land reform policy. The section below outlines the considerations that PLAAS wishes to bring to the attention of Parliament, which are not directly addressed in the Restitution Amendment Bill but will shape its implementation in practice.

A Hierarchy of Rights

9.2. A draft restitution policy document of March 2013 (not presented to Parliament) specifies that claimants will not necessarily be given ownership of the land they lost. Up until now, and based on the Kranspoort judgement of 2001, people who lost property rights ('beneficial occupation') are to have these rights restored in the form of private ownership, regardless of whether they lost customary rights, private title, or forms of tenancy. This means that the Land Claims Court said that there must be no discrimination regarding the type of tenure rights lost. Now, a possible hierarchy of rights is being proposed, with the suggestion in the policy (but not in this Bill) that those who were not private landowners at the time of dispossession will get 'use rights' rather than ownership. This suggests that the class hierarchies of the past will be resurrected: the syndicates of middle-class blacks who bought land around the turn of the last century should get ownership, while the descendants of those who had already been dispossessed, and were sharecroppers or labour tenants or had other relationships to the land they held, should now get 'use rights' rather than ownership. Is it the aim that the restitution process should revive these inequalities?

The Khoi-San and pre-1913 Claims

9.3. The Bill does not address pre-1913 claims at all, though the memorandum to it says that a separate process is underway to look into this. In political pronouncements, this has been linked specifically to the demands of Khoi-San people, but there can likely be no justification for an ethnically-selective re-opening. There seems no clear middle ground: either the process of claims prior to 1913 (starting from which date?) is a blanket reopening to all people, or it is not.

Opening up the whole restitution process to pre-1913 claims would require constitutional amendment to Section 25(7).

9.4. However, there is no legal constraint on (a) Ministerial discretion to address pre-1913 claims by referring these to the redistribution process, through which the land in question could be acquired and transferred to descendants of the Khoi-San community who lost land before 1913, or (b) the Commission working with other state institutions to erect monuments, renaming, acquire and maintain heritage sites and create other symbolic forms of restitution. Why have these opportunities not been used? The Minister could do so, now, without any legal amendment.

9.5. It appears that there is a mix of claims to territory, claims to land, claims to sovereignty, and claims to traditional authority that are combined in the claims of the Khoi-San. How much of the push is for land through a claims process – as opposed to land through a redistribution process? Are the demands of the Khoi-San communities for land or for traditional authority?

Communal Property Associations

Communal Property Associations (CPAs) and Trusts are legal entities for the holding of land in common, and since 1994 most of the land awarded to successful restitution claimants whose claims are group-based has been transferred to such entities. Trusts, however, do not provide sufficient accountability of trustees to group members and CPAs are now generally preferred. CPAs allow successful claimants from communal areas to hold land collectively without submitting themselves to the authority of traditional leaders, should they so choose. They also allow traditional leaders to play a constructive role on the executive committees elected by CPA members, should that be desired.

Recent policy pronouncements by the Minister[1] and senior officials indicate that government intends to discourage the establishment of CPAs on land that is seen by traditional leaders as being under their jurisdiction. This could include much land claimed for restitution purposes. This opens the way for traditional leaders to claim large areas of land when the period for the lodgement of claims is extended.

There are indications that government is already preparing itself for tradition al leader claims. In over 30 cases CPAS have been formed for taking transfer of restitution land but are still waiting such transfer, and in one case, in Cata, where the CPA has been awaiting transfer since 2000, this is in defiance of a court order. According to a senior official of the department, this is because of the objections of traditional leaders.

Recommendations

1. The Bill should include a re-affirmation of the rights of land claimants to choose the basis on which they own land and exercise their land rights following restoration or the award of alternative land.

[1] Minister Gugile Nkwinti stated at the opening of the 'Land Divided' conference at UCT in March 2013 that in his view a communal area within a communal area is 'wrong' and should be discouraged.

2. The Department should fulfill its legal obligations to CPAs to which land has been awarded, and provide effective support to and oversight of all existing CPAs and Trusts holding land on behalf of successful claimant communities.

Recapitalisation Funding

9.6. Experience to date of the recapitalisation of failing land redistribution projects allows for an assessment of how recapitalisation might work in the restitution context. PLAAS has carried out exploratory research regarding the practice of recapitalisation. Of particular concern is the way public funds channelled through recapitalisation have sometimes ended up supporting agribusiness and consultants (strategic partners) to the detriment of land redistribution beneficiaries. Community members are sometimes used by agribusiness and strategic partners to register projects and access government funding which supported their own farming operations, with community members seemingly unclear on their role as beneficiaries, how much they were to benefit and/or receiving few benefits, whilst the majority of shares/profits are retained by agribusiness or strategic partners. Moreover agribusiness and strategic partners are sometimes very reluctant to provide details on project details, such as profit sharing arrangements, the role of beneficiaries, who the project beneficiaries are and so on; this is even though their operations are funded by public money.

9.7. Consequently, making recapitalisation and development grants the sole mechanism for providing financial support for restitution projects raises a number of concerns. These include questions of transparency and accountability, private sector enrichment through public sector money and unfair profit sharing and/or allocation of shares for restitution claimants. Moreover, recapitalisation was conceptualised to be a policy vehicle for failed or failing land redistribution projects yet now it is being positioned as the only funding model for financial support for the whole land reform programme. This should not be the case.

Recommendations:

- Provide diverse funding streams for different land uses for settled land claims
- Introduce measures to limit the diversion of public funds to support established agribusiness

9.8. Lack of adequate consultation

There are communities and groups of people who are going to be directly affected by the Restitution Amendment Bill must be consulted. The provincial hearings conducted, and several workshops prior to that, addressed rural people in general, and not specifically those claimants who are waiting for their claims to be resolved. They are the parties with most to lose from this new Bill, if the ringfencing proposed above is not introduced prior to Parliament passing the Bill.

9.9. Conclusion

PLAAS supports the reopening of lodgement provided that the serious dynamics around systemic, rights, funding and consultation issues are adequately dealt with. Moreover, there is a need to ensure that the legislative and policy changes (such as the Recapitalisation policy) that are being developed and introduced are actually reflected in the form of a White Paper that reflects an overarching and clear policy vision. Currently, the lack of a White Paper means that new bills and policies lack cohesion and leading to policy disjuncture.

In the absence of any formally adopted policy, several laws including this Bill are under consideration and even being considered in Parliament. The White Paper of South African Land Policy of 1997 has long since been discarded, and instead government is doing bits and pieces of decision-making on the hoof. After the National Land Summit of 2005 promised an overhauled policy, including an alternative to the 'willing buyer, willing seller' approach to acquiring land, nothing happened for several years running. In 2011, two and a half years into the Zuma administration, a Green Paper on Land Reform was published, which provided no direction on core policy questions, but did propose to create several new institutions. And still there is no new White Paper which can provide a policy framework. In its absence, major changes are underway, with no transparency as to the direction being pursued.

Without clarity on how land reform can help to reduce poverty, stimulate rural economies, or contribute to the National Development Plan, Parliament is expected to debate an Expropriation Bill, a Land Tenure Security Bill, a Spatial Planning and Land Use Management Bill, a Communal Land Tenure Policy, a Communal Property Associations Amendment Bill, an Infrastructure Development Bill and a Land Valuation Bill. If the land claims process is reopened it will likely mean delays in processing existing claims. It will almost certainly extend the lifetime of the restitution process by several decades.

Recommendations

1. Outstanding claims should be ring fenced
2. Overlapping and conflicting claims create impetus for an administrative system that deals with this challenge and its potential impact on outstanding claims
3. Introduction of estimate timeframes for the completion of restitution claims
4. Introduction of provisions in the bill of measures to facilitate the implementation of the Restitution Amendment Bill in reaction to existing implementation challenges that have hampered the conclusion of restitution claims
5. Diverse funding streams for different land use for settled land claims
6. A clear guideline of the restitution claim process and the points for feedback to claimants within the process to make continuous engagement with claimants an integral part of it
7. Appeals system within the restitution claims process to allow communities to bolster their claims should the need arise
8. Clarity on the status of CPAs and an outline of how DRDLR aims to allow for community management of settled land
9. Development of a White Paper as advocated by the Parliamentary Ad Hoc Committee on the Legacy of the 1913 land Act; to drive DRDLR's policy changes