

## Land Restitution and the 1913 cut-off date a red herring?

On Monday the 31<sup>st</sup> of May, the Ad Hoc Committee reviewing section 25 of the Constitution requested additional time as it was not in the position to make recommendations to the National Assembly. The committee was originally tasked to look into the compensation element of expropriation and to make 'explicit' what some have argued is 'implicit' in the Constitution, namely that nil compensation could be paid in extreme circumstances. The debates have, however, drifted a bit wider, with some political parties calling for more drastic changes, including state custodianship of land and removing the 1913 'cut-off' date for land restitution claims. The committee could not deliver its report on time since no agreement could be reached on these critical issues.

Much has been written on expropriation and compensation, but this article focuses on the 1913 cut-off date for land restitution. To recap, s25 (7) allows for a person or community who was dispossessed of their land without compensation after 1913 to claim the land back. 1913 was chosen as the threshold because it was the date when the infamous Native Land Act came into operation. Calls to scrap the 1913 date have been made several times in the past. From a theoretical point of view, one can understand the argument: The Native Land Act may have entrenched and formalized land dispossession, but it had been taking place for centuries before that.

From a practical point of view, one has to ask whether simply removing the 1913 date in the Constitution will make any real difference? Land restitution is a 'rights-based form of land reform. It links a specific beneficiary (including whole communities) to a specific piece of land. It is aimed at social justice and healing the divisions created by a historical event. In this sense, it is a vital part of the reconciliation process and is perhaps the most direct symbol of social justice. Unfortunately, when the costs of the verification process are factored into it, restitution is also the most inefficient programme in the land reform quiver.

The Restitution of Land Rights Act prescribes a bureaucratic and expensive process precisely because claims have to be proved before the land can be returned. Once a claim was submitted, the Restitution Commission must notify the current owner, conduct an investigation to determine if it is valid, collect evidence and mediate between the claimant and owner. If the owner disputes the claim, a court process must follow before negotiations can commence to obtain the property in question. The Act is well designed to make sure that the right piece of land is returned to the right owners. Unfortunately, this comes at a great cost as funds that could be used to acquire land is used to investigate and prove claims. When purely looking at rand spent to hectares acquired, land restitution will always be less efficient than the land redistribution programme.

The bureaucratic process also places a huge burden on the Restitution Commission and raises expectations that may be difficult to fulfil. When one considers all the hoops that a claimant and the commission must jump through before land can be acquired, it is a small wonder that successful claimants wait decades to have their land returned. Let us look at the facts: from 1998 to date, just over 80 000 claims have been settled, and the commission aims to settle an additional 8 447 claims that were submitted before 1998. Only once these claims have finally been settled will the commission be able to start working on the 140 000 claims

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that were submitted in 2014 when the window for new claims was opened. If the criteria are changed to allow pre-1913 claims, then the number is likely to climb exponentially.

Communities in large areas of the Western, Eastern and Northern Cape are not currently eligible for restitution as dispossession by colonial authorities largely occurred prior to 1913. There is no doubt that their decedents have a legitimate claim for redress, but is restitution the best vehicle to do so? Will it not just add an unrealistic administrative burden on a commission that is already struggling to keep its head above water? Is it the best means to achieve the end? A targeted redistribution approach that seeks to prioritize communities excluded by the 1913 qualification to restitution would surely be cheaper and quicker. Restitution certainly has its place in our legal system, but when looking at the best way to accelerate land reform, one has to weigh up the accuracy of the restitution process versus the expediency of redistribution. I hope that the members represented on the Ad Hoc Committee consider these realities as they continue to deliberate on the land reform matter in the coming days.