BARE LIFE IN THE BANTUSTANS (OF THE EASTERN CAPE): RE-MEMBERING THE CENTENNIAL SOUTH AFRICAN NATION-STATE

THESIS

SUMBITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY (IN HISTORY) OF THE UNIVERSITY OF FORT HARE

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Abstract

This thesis argues that 1994 did not mark a point of absolute discontinuity in the history of South Africa. More specifically, it asserts that 1994 did not signal the end of segregationism; instead of democracy leading to national integration, the Bantustans are still governed and managed differently from the rest of the country. Consequently, it is no surprise that they remain mired in pervasive, debilitating poverty fifteen years after 1994. In insisting that contemporary South Africa is old (rather than new), the thesis seeks to make a contribution to political struggles that aim to bring to an end the segregationist past-in-the-present.

The thesis is arranged in seven chapters. The first chapter considers the crisis that has engulfed South Africa historiography since 1994. It traces the roots of the crisis back to some of the fundamentals of the discipline of history, such as empiricism, neutrality and historicism. It suggests that the way to end the crisis, to re-assert the relevance of history, is for historians to re-invoke the practice of producing histories of the present, in an interested, deliberate manner.

Chapter 2 narrows down the focus of the thesis to (past and present) property. It suggests that instead of understanding the constitutional protection of property rights and installation of a restitution process as the product of a compromise between adversarial negotiators, these outcomes are more correctly understood as emanating from consensus.

The third chapter outlines the implementation of the restitution programme from 1994 to 2008. The productive value of restitution over this period is found not in what it has delivered to the claimants (supposedly the beneficiaries of the programme), but rather in its discursive effects related to citizenship in the new South Africa.

Chapter 4 considers the exclusion of dispossession that was implemented in the Bantustans from the restitution programme. It argues that this decision was not an oversight on the part of the post-1994 government. Instead it was consistent with all other key policy decisions taken in the recent period. The Bantustans have been treated differently from the rest of South Africa; they have been deliberately under-developed, fabricated as welfare zones, and subjected to arbitrary customary rule.

Whereas Chapters 2 to 4 look at the production of historical truth on the side of domination, Chapter 6 and 7 consider production on the side of resistance. Specifically, they describe and analyse the attempts of an NGO to establish the truths of betterment as dispossession, and post-1994 prejudice against the victims of betterment dispossession. They serve as case studies of third party-led processes that seek to produce truth-effects from within a prevailing truth regime.

The final chapter attempts to bring many of the threads that weave through the thesis together, by means of a critical consideration of human rights discourse. The chapter calls on intellectuals to establish truths in relation to the history of ongoing human wrongs in South Africa (as opposed to the rainbow narrative of human rights)

Finally, the thesis includes a postscript, comprising technical summaries of each of the chapters.

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Preface and acknowledgements

Some time ago, one of my siblings made a comment to me, about me, which I immediately knew was accurate. She said that whereas she has a constant need to explore and understand new issues and is easily bored after she grasps the basics of any particular subject, I tend to become occupied with a topic only once I begin understanding it. From 1989 to 1992 I read for a master's degree; I researched the twentieth century history of Keiskammahoek in the Ciskei Bantustan. In the process, not only did the people and the landscape of the Southern Amatolas make a deep impression on me and in me, I also came across the issue of betterment, which has since dominated my political and professional life. If I had not had the opportunity to spend time in Keiskammahoek, if I had not stumbled across betterment, I would not think as I do today; I would not be who I am today. I feel at home in Keiskammahoek. My sense of well-being is integrally linked to the goal of achieving redress for the millions of people in the Eastern Cape who were dispossessed through betterment.

It was also during the master's years that I first read Foucault; his work too, continues to inspire and provoke me. Shortly before his death Foucault pondered whether we should not regard our individual lives as works of art. I certainly make no claims to my life being a work of art. But I do approach my life as my work; over the past five years, my intellectual work has been integrally linked to my political and professional work. This thesis examines and reflects on my life, especially its most recent period. My life, my engagements with betterment, are part of bigger processes, involving many, many people. I cannot name all these people here, but it would be remiss of me if I did not acknowledge the following: Sakhumzi Somyo, Mcebisi Jonas, Mahlubandile Qwase, Phila Nkayi, Joe Jordan, Mfengu Makalima, Zoleka Capa, Thoko Didiza, Mtobele Mtongana, Gugile Nkwinti, Koliswa Vimbayo, Sikelela Bavuma, Vukile Njoli, Zimbini Ngungu, WZ Gcilitshana (late), Nosipho Mboso, Sanna Ngxafane, John Ncinane, BN Gcilitshana, Tozi Gwanya, Jean du Plessis, Aninka Classens, Linda Faleni, Kwandi Kondlo, Ria de Vos, Teresa Tyacke, Phumzile Matikinca, Phumeza Grootboom, Zanele Semane, Mongezi Nkota, Gail Kirchmann, Nic Matebese, Monty Roodt, Clive Plasket, Chris de Wet, Zolile Ntshona, Bertil Hogberg, Johan Dahl, Dean van Rooy, Jesse Laitinen, Maryke Savenije and Mazibuko Jara. The expression "umntu ngumntu ngabantu" really applies in the case of my life-work; the form, shape and content of this work have been determined through interactions with these and many other people.

In the process of engaging in advocacy, life-forming relationships are built. A relationship that emerged in this way which I treasure deep in my heart was one that I was privileged to have with the late Welcome Zithobile Gcilitshana. My father taught me the importance of communicating one's respect and appreciation of elderly persons to them directly, on time, before they die. I am grateful that I had such an opportunity at a Gcilitshana family day in Cata in late 2005; Welcome died in mid-2006. I dedicate this thesis to his memory, in gratitude for his having taught me the importance of humility, selflessness, service, and the joy of giving.

I have benefited from two forms of support that have made it possible for me to undertake this project. First, I acknowledge financial assistance from the National Research Foundation. Second, and more importantly, my employer the Border Rural Committee allowed me to take generous amounts of study leave, especially during 2007/8.

Some time ago, I approached Johan Dahl and Russell Grinker, asking them to provide me with peer commentary. Both consented, and have offered me insightful and relevant feedback, which I used extensively.

I have been supervised over the past five years by Gary Minkley. During this period he has passed on many, many readings to me, constantly affirmed the importance of the project, and assisted me to make the transition from writing in the style of a NGO report, to engaging in a critical intellectual manner. In 2002, I held that the 1993 Bill of Rights entailed the essence of a new regime of truth in South Africa, which offered unprecedented opportunities for constructive academic engagement. After reading the thesis, it will become apparent that I have moved some distance from my erstwhile position. This shift is the outcome of an intellectual process that has been steered and fed by Gary.

Finally, I thank my life-partner Lise for affording me the time and space that I have needed over the past five years, for consistently encouraging me to persevere with this project, and for providing me with support and love.

Acronyms

ACLA	Advisory Commission on Land Allocation
ADM	Amatole District Municipality
ANC	African National Congress
APF	Anti Privatisation Forum
BAA	Bantu Authorities Act
BAD	Bantu Affairs Department
BRC	The Border Rural Committee
CODESA	Convention for a Democratic South Africa
COSATU	The Congress of South African Trade Unions
Contralesa	Congress Of Traditional Leaders of South Africa
CRLR	Commission for the Restitution of Land Rights
DLA	The Department of Land Affairs
ECNGOC	Eastern Cape Non-Governmental Organisation Coalition
GEAR	Growth Employment and Redistribution
GRC	The Grahamstown Rural Committee
HLAO	Herschel Legal Advice Office
IDP	Integrated Development Plan
IDZ	Industrial Development Zone
ISRDP	Integrated Sustainable Rural Development Programme
LCC	Land Claims Court
LPM	Landless People's Movement
LRAD	Land for Redistribution and Agricultural Development
MDM	Mass Democratic Movement
NAD	Native Affairs Department
NCAR	National Committee Against Removals
NGO	Non Governmental Organisation
NLC	National Land Committee
NP	National Party
PEC	Provincial Executive Committee
RDP	Reconstruction and Development Programme
RLCC	Regional Land Claims Commission
SACP	South African Communist Party
SDI	Spatial Development Initiative
SPP	Surplus People Project
SSO	Standard Settlement Offer
TAC	Treatment Action Campaign
TBVC	Transkei Bophuthatswana Venda Ciskei
TLGFA	Traditional Leadership and Governance Framework Act
TRC	Truth and Reconciliation Commission
UDF	United Democratic Front
VSC	Vulamasango Singene Campaign

"South Africa is a land where history proceeds up to the present day in events of unrelieved horror, untouched by human tenderness"

Bessie Head (preface, in Plaatje S, Native Life in South Africa: Before and Since the European War and the Boer Rebellion, Ravan Press: Johannesburg, 1982 (Second Edition), xii)

Chapter 1 – Understanding the crisis in contemporary South African historiography

Introduction

The problem that I[1] grapple with at the onset of the thesis is why the South African history academy has experienced an ever-deepening crisis since the 1994 transition. There is broad consensus within the academy about the severity of crisis, but few convincing explanations for it.

In order to develop an understanding of the problem and some suggestions for ways of solving it, I scrutinize the discipline of history itself. More specifically I place the dominant variant of guild history, that I call traditional history, under the microscope. I discern the main assertions of traditional history, and utilize theoretical work to critique each of these assertions. In the course of elaborating the critiques I attempt to set down alternative, more radical, approaches, orientations and postures. This exercise is useful because it enables me to construct the epistemological and historiographic foundations on which I build the thesis.[2]

More immediately, the exercise facilitates the formulation of an explanation of the crisis in South African history that revolves around an understanding about 1994. Those who retained and assumed power in 1994 assert that the negotiators succeeded in ending the apartheid nation and ushering in a new South African nation. The South African history academy seems to have accepted this assertion and its various implications (such as the new nation has no history). Consequently, it has removed itself from the centre of contemporary society, and accepted a place in the margins. The discipline has come to represent non-interference in relation to the governance of today's political economy.

The state of contemporary South African history

There is wide-ranging consensus in the academy that the writing of South African history in the early twenty-first century is in a state of crisis.[3] The situation is so bad that Ranger

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[1] It is necessary at the onset to explain how I reference myself in this thesis. I use "I" when referring to myself as academic, as writer of this work, and I use "Westaway" / "he" when referring to myself as actor in the narrative that is discussed in the thesis. (To clarify further then, if I use "our", I am referring to the community of historians.) I do this to draw a clear distinction between myself as academic and as professional.

[2] I do introduce other aspects of theory in later chapters, when this is useful and contextual. For instance I look at recent work on property in chapter two and delve into theory on human rights discourse in some detail in the final chapter.

[3] The extent of the agreement in this regard is astonishing. For example, Bundy refers to the "crisis of contemporary South African scholarship" (Bundy, C. 'New nation, new history? Constructing the past in post-

observes that history has become "what Anthropology was in Africa in the 1950's: the discipline that dare not speak its name".[4] The sense of crisis was initially detected in the early 1990s and it has deepened ever since.[5] This concern was initially expressed specifically in relation to the brand of historiography that had dominated the South African scene from the early 1970s, generally referred to as 'radical history'. Rich was one of the first to pose the question: "Is South African radical social history becoming irrelevant?"[6] Heavy-weights like Freund and Peires entered the debate; it was soon clear that the answer to this question might be 'yes'. Freund had "a feeling that a long-term, the long-term, project of South African historiography may be reaching exhaustion", while Peires read "unmistakable signs of crisis and collapse" in South African radical history. [7]

Whereas the signs of crisis were vague and cryptic in the early 1990s, by the early 2000s they were pervasive and indisputable. Enrolments into the History Departments of most South African universities have been static or falling for over a decade.[8] (The only partial exceptions in this regard seem to be Rhodes University, the University of Cape Town and the University of the Western Cape.) This problem is exacerbated by other institutional problems facing academic history departments. Principally, they have been affected by a decline in state subsidisation.[9] This has resulted in staff shrinkage and stagnation.[10] But

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apartheid South Africa', in H. Stolten (ed), History Making and Present Day Politics: The Meaning of Collective Meaning In South Africa, Nordiska Afrikainstitutet: Uppsala, 2007,Bundy, 2007, 75), and Crais believes that "the academic practice of history has all but collapsed in South Africa" (Crais, C. The Politics of Evil: Magic, State Power and the Political Imagination in South Africa (Series: African Studies No. 103), Cambridge University Press: New York, 2002, 225). One of only a handful of dissenting voices that I am aware of is Burns, who attempts to refute "assertions that South African history research… and the development of South Africanist historiography, is dying or suffering from a terminal "post" malaise". (Burns, C. 'A useable past: The search for "history in chords"', in H. Stolten (ed), History Making and Present Day Politics: The Meaning of Collective Meaning In South Africa, Nordiska Afrikainstitutet: Uppsala, 2007, 351). Her attempt is not convincing; she seems to confuse her own enthusiasm and mini-successes, for an academy-wide engagement in effective history.

[4] T Ranger quoted in Comaroff, J. 'The End of History, Again? Pursuing the Past in the Postcolony', IDOGA Annual Distinguished Lecture on Africa, Gent (Belgium), March 29 2004, 3

[5] Maylam, P. 'Tensions Within the Practice of History', South African Historical Journal, No 33, 1995, 4; Nuttall, T. & Wright, J. 'Probing the Predicaments of Academic History in Contemporary South Africa', South African Historical Journal, No 42, 2000, 26. Bundy detected some optimism in the academy around 1992, but agreed that by 2002 it was demoralized (Bundy, 2007, 74). Stolten coincides the decline with the 1994 transition (Stolten, H. 'History in the new South Africa: An introduction', in H. Stolten (ed), History Making and Present Day Politics: The Meaning of Collective Meaning In South Africa, Nordiska Afrikainstitutet: Uppsala, 2007, 5). Dubow marks the turning point a couple of years later, in 1996 (Dubow, S. 'Thoughts on South Africa: Some preliminary ideas', in H. Stolten (ed), History Making and Present Day Politics: The Meaning of Collective Meaning In South Africa, Nordiska Afrikainstitutet: Uppsala, 2007, 51).

[6] Rich, P. 'Is South African Radical Social History Becoming Irrelevant', South African Historical Journal, No 31, 1994, 191

[7] B Freund & J Peires quoted in Maylam, 1995, 4, 5

[8] Maylam, 1995, 5; Nuttall & Wright, 2000, 27

[9] Maylam, 1995, 5

[10] Nuttall & Wright, 2000, 29

the crisis in history is not contained to the academic lecture halls of South Africa. It has spilled into schools, where fewer high school students opt for history as a matric subject than previously.[11] This is part of the "mounting evidence, in post-apartheid South Africa, that young people have scant interest in actually studying history".[12] Beyond that, even broader society is less interested in history in 2006 than it was in 1990. As early as 1994 Peires had detected "the decline of radical history's reading public".[13] Another dimension of the crisis of post-1994 history is that it has failed to change its racial profile, in line with the demographics of the country. The low numbers of black staff in history departments and the paucity of published literature written by black historians are clear indicators of this reality, which Stolten describes as "the most serious weakness of all in South African historiography".[14] For the purposes of my thesis, the key observation is that the onset of a crisis in contemporary South African historiography coincided with the transition from apartheid to parliamentary democracy.

Cobley considers the discipline of history to be a "casualty of the new order in South Africa".[15] Wright conveys the same understanding as follows: "The main effect of the advent of democracy on academic history in South Africa has been to sideline the discipline as a source of understanding the present".[16] Whereas academic history has been sidelined, there are two aspects of public history that have been prominent in the post-1994 period, these being the personal recollection and testimony associated with the Truth and Reconciliation Commission, and a variety of heritage sites, museums and monuments that are borne of a new national discourse of rainbow nationalism.[17] In the past decade, as the market for public history has grown, [18] the heritage sector has burgeoned.[19] However, for the most part, historians have adopted a condescending attitude to heritage, and retreated into the ever-narrowing confines of the academy. The

[11] Maylam, 1995, 5
[12] Comaroff, 2004, 1
[13] Peires, J. 'The Art of Writing History' in Southern African Review of Books, March/ April 1994, accessed on http://web.archive.org/web/20030510083741/www.uni-ulm.de/%7Erturrell/antho4html/Peires.htmil, on 8 December 2008. The recent upsurge in public interest in biographies of the likes of Mbeki and Ramaphosa should not be understood as a reversal of this trend. Rather, it reflects the public's craving for easy answers and identifiable scapegoats for complex societal problems. It is about instant solutions, rather than structural grappling, and looking outside rather than honest reflection on our own complicity in the so-called legacies of apartheid. In other words, the public is embroiled in Great Man politics, rather then critical collective politics.
[14] Stolten, 2007, 26
[15] Cobley, A. 'Does Social History have a Future? The Ending of Apartheid and Recent Trends in South African Historiography', Journal Of Southern African Studies, Vol 27, No 3, Sept 2001, 624
[16] J Wright quoted in Saunders, C. & Kros, C. 'Conversations with Historians', South African Historical Journal, 51 (2004), 6
[17] Cobley, 2001, 618
[18] Maylam, 1995, 11
[19] Nuttall & Wright, 2000, 35

academics' retreat has enabled tourism entrepreneurs to easily corner the heritage market. And so, there is a "growing separation of the professional reconstructions of the past from the hates and loves, fears and hopes of the non-expert members of the community or general public".[20]

The post-1994 context has certainly posed challenges to the history academy, but it is imperative to remember that the academy is populated by warm bodies with alert minds. Historians have agency. Therefore it is important to ask how historians have responded to the contemporary challenges. Despite the pressure on historians to rethink the assumptions about guild history,[21] most of them chose to close ranks in its defence, and maintained the necessity for "proper history".[22] For fear "of losing limbs to body snatchers from other disciplines",[23] they have defended history's territory and boundaries "like a reactionary comprador bourgeois class".[24] For the majority of historians it has been 'business as usual' in the post-1994 period.[25] They have taken refuge in the established safe zones of the archive and the office.[26]

Given its defensive, introverted response, it is not surprising that the history academy has been unable to "contribute to our society developing a better, more nuanced understanding of itself. We haven't moved beyond the broad brush-strokes. Generally we see ourselves through the prism of the rainbow".[27] Saunders has observed although there is now substantial literature on the South African transition – and a number of critical analyses written by the likes of Marais and Bond – historians have not contributed much to this literature.[28] A key reason for this is that we have retreated from politics and economics.[29] The extent to which historians have lost sight of and touch with contemporary South African society is reflected in Maylam's claim that "the absence of any clear-cut causes to fight for or against [in the post-1994 period] has deprived history of its edge".[30] The academy acknowledges that it has lost its political edge, "its edge in terms of

[20] Maylam, 1995, 10
[21] Cobley, 2001, 620. Some of these assumptions are discussed at length below.
[22] N Erlank quoted in Saunders and Kros, 2004, 22
[23] N Erlank quoted in ibid, 2004, 22
[24] Narismulu, P. 'Examining the undisclosed margins: postcolonial intellectuals and subaltern voices', in Cultural Studies 17 (1) 2003, 64
[25] Nuttall & Wright, 2000, 29
[26] Ibid, 2000, 29
[27] N Nieftagodien quoted in Saunders and Kros, 2004, 19
[28] Saunders, C. 'Perspectives on the Transition from Apartheid to Democracy in South Africa', in South African Historical Journal, 51 (2004), 165
[29] T Keegan quoted in Cobley, 2001, 623
[30] P Maylam quoted in ibid, 2004, 13

questioning power and authority".[31] In order to understand this response, we should take cognisance of the race, class and gender profile of the academy. The academy remains white, middle class and male, and so it is unsurprising that it has been comfortable to sit on the sidelines, in the security of its ivory tower. 1994 made life more relaxed and comfortable for white middle class males; we no longer have to show solidarity with progressive struggles. The political pressure is off; our apartheid privileges are safe.

There is no sign of what Etherington calls "a scholarly agenda of questions requiring urgent answers";[32] there is very little collaboration between historians themselves or collaboration across disciplinary borders.[33] Neither has there been any major controversy that has divided the academy, or "any significant new historiographical development[s]", over the past decade. [34] Instead, historians have opted to "escape into individualized concerns",[35] and have chosen to undertake work that is "narrow and specialized"[36] in fields such as ethnicity and cultural studies.[37] Stolten and Saunders are critical of the post-1994 turn in the academy, with the former describing the study object range as "more or less exotic", and the latter labeling it "faddish" and lamenting its lack of general significance.[38] Certainly, the reading public of these histories is minute, namely the shrinking staff complements in history departments.[39]

It is not that there are no historians who realize the importance of breaking out of the guild walls and interacting with society at large. In fact, a number have suggested ways of how this could be achieved. As early as 1994 Peires realised the need for historians to engage society. He wrote then that "[i]t is no longer enough to be a full-time historian. One must also become a political activist, or a paralegal, or an adult literacy instructor, or a development fieldworker, or even a shopkeeper. One has to acquire a purpose and function inside the community where one works. Please note that I am not talking about a cover or a pretext, but about a sincere and useful commitment that takes precedence if

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[31] N Nieftagodien quoted in ibid, 2004, 1. See also Maylam's remarks on page 5.
[32] N Etherington quoted in ibid, 2004, 5
[33] N Erlank quoted in ibid, 2004, 5
[34] Saunders, C. 'Four decades of South African academic historical writing: A personal perspective', in H. Stolten (ed), History Making and Present Day Politics: The Meaning of Collective Meaning In South Africa, Nordiska Afrikainstitutet: Uppsala, 2007, 286, 288
[35] Stolten, 2007, 41
[36] Saunders, 2007, 288
[37] Beinart, W. Twentieth Century South Africa, Oxford University Press: Oxford, 2001, v; Saunders, 2007, 288
[38] Stolten, 2007, 41; Saunders, 2007, 288
[39] Maylam, 1995, 7

necessary over academic work".[40] Similarly, a year later Maylam urged historians to operate in society, not "within a fairly closed professional circle".[41] More recently, Legassick has promoted the idea of "applied history", which at a minimum requires and involves contact and engagement with society outside the university.[42] Unfortunately, few in the academy have heeded the call for societal engagement, in any meaningful way. More fundamentally, I suggest that even if the academy had responded to it, this would not have been enough, because it is fundamentally a call for engagement on the terms of the academy, the terms of the discipline of history. There is no indication that any of the historians cited above contemplated that what may be needed is a departure from these terms, a re-thinking and questioning of the rules of the canon. In the following section I outline the basics of the discipline, critique these, and suggest ways out of the margins we now occupy.

The discipline of history

The main subject of enquiry for most of this chapter is the discipline of history, so it is necessary to start this discussion with a couple of definitions of the subject. Ismail understands history to be "a discipline that authorises the production of knowledge (truth-claims), usually (emplotted) in narrative form, about an object termed the past, in which events are caused by and/or happen to subjects. The producer of this knowledge is also conceived of as a subject, but existing in a time conceived as the present".[43] This definition is useful in that it points to a key dilemma that seems integral to the discipline, namely the relationship between the past on the one hand, and narratives about the past (written in the present) on the other. Trouillot underlines this when he notes that, "in vernacular use, history means both the facts of the matter and a narrative of those facts, both 'what happened' and 'that which is said to have happened'".[44]

Sometimes it is forgotten that the discipline – of history – itself has a history. That is to say, as Ismail points out, there was a time before history, and that time was not very long ago.

[40] Peires, 1994
[41] Maylam, 1995, 11
[42] Legassick, M. 'Reflections on practising applied history in South Africa, 1994 – 2002: From skeletons to schools', in H. Stolten (ed), History Making and Present Day Politics: The Meaning of Collective Memory in South Africa, Nordiska Afrikainstitutet: Uppsala, 2007, 130
[43] Ismail, Q. 'Once upon a time there was no past: On the consequences for postcoloniality of the French critique of history', Unpublished paper (copy accessed in BRC Resource Centre), 1999, 4
[44] Trouillot, M-R. Silencing the Past: Power and the Production of History, Beacon Press: Boston, 1995, 2

History is a relatively recent invention.[45] More specifically, the birth and growth of the discipline are closely linked to the Enlightenment Age.[46] During that period, history played an integral role in the rise of nationalism and the high noon of colonialism.[47] Whereas history played a prominent, explicit role in the political economy of the nineteenth and early twentieth centuries, by the end of the last century its role became more diffuse and somewhat down-graded.[48]

Said argues that the contemporary academic scene is characterised by specialisation and non-interference. He sees these features as directly related to the conservative political era in which we live, that he called the new age of reason.[49] This age is the result of "a counterattack by 'highly mobilised business elites' in reaction to the immediately preceding period during which national needs were thought of as fulfilled by resources allocated collectively and democratically".[50]

For Said, "[f]ields, disciplines and their discourses have taken on the status of immutable durability. Licensed members of the field, which has all the trappings of a social institution, are identifiable as belonging to a guild, and for them words like 'expert' and 'objective' have important resonance. To acquire a position of authority within the field is, however, to be involved internally in the formation of a canon, which usually turns out to be a blocking device for methodological and disciplinary self-questioning".[51] The atomised nature of the

[45] Poster, M. Cultural History and Postmodernity: Disciplinary Readings and Challenges, Columbia University Press: New York, 1997

[46] This assertion is not an attempt to deny Islamic, Roman, Greek, or other influences, rather to draw attention to the specifics of the discipline that took clear discursive shape from the late 1700s.

[47] I will substantiate and elaborate these points at some length later in this chapter.

[48] I want to emphasise that this a generalisation. As Scott correctly points out, there is still "no shortage of demand for the services of historians as providers of birth certificates and titles of ownership for politicized identities". (Scott, J. 'After History', in K. Jenkins & A. Munslow (eds), The Nature of History: Reader, Routledge: London, 2004, 263) However, Said's argument is useful in understanding macro trends that are undoubtedly evident in the twenty-first century. More specifically, I mount some of my arguments about the post-1994 crisis in South African historiography around concepts such as humane marginality, which stem from these trends.

[49] Said, E. 'Opponents, Audiences, Constituencies, and Community', in Reflections on Exile and other literary and cultural essays, Granta Books: London, 2000, 144. Said's new age of reason involves the following imperatives:

1. "The rediscovery of the self-regulating market, the wonders of free enterprise, and the classicl liberal attack on government regulation of the economy, all in the name of liberty".
2. "The reinvention of the idea of progress… and the limitation of expectation and social welfare in the quest for productivity".
3. "The attack on democracy, in the name of 'efficiency'".
4. "The remystification of science through the promotion of formalized decision methodologies, the restoration of the authority of expertise, and the renewed use of science as legitimization for social policy through deepening industry ties to universities and other 'free' institutions of policy analysis and recommendation" (Ibid, 2000, 144).

[50] Ibid, 2000, 144

[51] Ibid, 2000, 139

academy is reproduced and entrenched through the doctrine of non-interference. This doctrine has it that "the general public is best left ignorant, and the most crucial policy questions affecting human existence are best left to 'experts', specialists who talk about their speciality only, and… 'insiders', people (usually men) who are endowed with the special privilege of knowing how things really work and, more important, of being close to power".[52]

In trying to understand the relations and associations that sustain and benefit from this arrangement, Said has focused on the importance of constituency. Here the key question is: who is listening to and utilising the output of the expert, the specialist. For Said, "a constituency is principally a clientele".[53] So the person or institution who pays for the work is often the one using it. In this regard, the close linkages between science and the state is one of the defining features of Said's Age of Reason. Once a scientific expert says it, the path is cleared for the politician to propagate it towards whatever ends. In the case of humanities, the situation is less explicit, more subtle. Humanists are less marketable than scientists; few want to buy their 'soft' wares. In fact, their constituency is limited in large measure to other humanists. They occupy a marginal place; their existence is precarious. They are at the mercy of the power brokers. Said asserts that the only reason that the powerful tolerate the humanities is that these play a key role in reproducing the doctrine of non-interference. Many humanists are driven primarily by an agenda of guild self-purification. For these people, "the ethic of specialisation has become equivalent to minimising the content of their work and increasing the composite wall of guild consciousness, social authority, and exclusionary discipline around themselves".[54]

Thus, the particular ideological function of the humanities (In general and history in particular) is "to represent *non-interference* in the affairs of the everyday world… [ie] to represent humane marginality, which is also to preserve or if possible to conceal the hierarchy of powers that occupy the centre, define the social terrain, and fix the limits of use functions, fields, marginality, and so on".[55] Of course the quid-pro-quo is that the humanists leave the captains of industry and the masters of state alone to engage in reasonable excess in their own worlds. As Said sums up in devastating fashion, "non-interference for the humanist means laissez-faire: 'they' can run the country, we will

[52] Ibid, 2000, 119
[53] Ibid, 2000, 139
[54] Ibid, 2000, 139
[55] Ibid, 2000, 143

explicate Wordsworth and Schlegel".[56] The consequence of this is that "a tiny handful of large and powerful oligarchies" control information and communication flows in today's world. [57] Similarly, Trouillot notes that when historians produce work that is of interest only to fellow historians, then this opens the space for politicians, magnates or ethical leaders to produce historical assertions that inform public opinion.[58] From the above description of the post-1994 situation, it is clear that the South African history academy today is an example of a humanity that is performing the ideological function of representing humane marginality, non-interference in everyday life.

Despite the fact that the role of the discipline of history in the political economy has changed so fundamentally, some thinkers assert that its basic premises and operations have remained unchanged since its establishment over two hundred years ago. For example Ismail claims that "the discipline hasn't moved – with the exception of recognising new subjects – from the form and categories of what…I am calling the nineteenth century".[59] These historians do not deny developments and changes in historiography and historical epistemology over the past two hundred years. Rather, they argue that most of the variants of historical thinking belong to the same fundamental "type of history",[60] which has clear core propositions. For example, Jenkins and Munslow place constructionist and reconstructionist (including for instance the Annales School) variants within the same fundamental mainstream.[61] I consider the following four assertions to be core propositions of this mainstream, or what I will refer to as traditional history:

- Thorough empirical research enables a realistic recreation of the past, as it was.
- The historian needs to be detached from and neutral toward the object of her study in order to produce accurate history.
- The past exists, as a fixed, unchanging entity.
- History develops in a unified, coherent and progressive manner, resulting in a present that represents the to-date pinnacle of human development.[62]

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[56] Ibid, 2000, 144
[57] Ibid, 2000, 147
[58] Trouillot, 1995, 152
[59] Ismail, 1999, 50
[60] Jenkins, K. & Munslow, A. 'Introduction', in K. Jenkins & A. Munslow (eds), The Nature of History: Reader, Routledge: London, 2004, 1
[61] Ibid, 2004, 2, 10
[62] I have developed this list on the basis of my reading for this thesis. Some of the most important texts here are Trouillots' Silencing the Past, Jenkins' 'On Disobedient Histories', and Chakrabarty's Provincialising Europe. More specifically, Trouillot lists a fetishism of facts, an attachment to the fixity of pastness, and a rejection of conscious positioning, as three of the underlying beliefs of the guild in the United States of America (1995, 151, 152). For Jenkins, realism, empiricism, own-sakism and own-termism are some of the key characteristics of "proper, professional, academic history" (Jenkins, K. 'On Disobedient Histories', in

I now offer a critical discussion on each of these assertions, as the basis for elaborating a sustainable theoretical approach to investigating the past/present.

Assertion 1

The fundamental epistemological foundation of history is empiricism. Postmodern analysis has assisted us in understanding the inadequacies of this basis.[63] I do not intend to present this analysis in detail because it is not necessary here. Instead I will present one of the key reasons why we should resist relying on empiricism as the way to truth. Scott has identified a tension between the creation and the discovery of objects of study as the "paradox at the heart of the historian's practice".[64] She goes on to elaborate this paradox as follows:

> the reality to which the historian's interpretation refers is produced by that interpretation, yet the legitimacy of the interpretation is said to rest on its faithfulness to a reality that exists outside, or exists prior to, interpretation. History functions through an inextricable connection between reality and interpretation as separate and separable entities. The historian's inevitable dilemma consists in the need simultaneously to avow interpretation and to disavow the productive role interpretation plays in the construction of knowledge.[65]

If anything, Scott's focus here, in relation to the production of historical knowledge, is too narrow. Instead of looking solely at production during the interpretation (or narrative formulation) phase of the historical process, Trouillot considered a total of four phases, or what he called "four crucial moments".[66] He described these as "the moment of fact creation (the making of *sources*); the moment of fact assembly (the making of *archive*); the moment of fact retrieval (the making of *narratives*); and the moment of retrospective significance (the making of *history* in the final instance)".[67] I now consider the productive processes at work during each of these phases in some detail. In so doing, I join Trouillot

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Rethinking History, 7: 3 (2003), 376). Finally, it was on the basis of reading Chakrabarty that I realised the fundamental importance of historicism to the discipline (Chakrabarty, D. Provincializing Europe: Postcolonial Thought and Historical Difference, Princeton University Press: Princeton, 2000).

[63] Ismail regards the French critique of history's "categories, its epistemological assumptions and preconceptions, its unreflective reliance on (realist) narrative, its desire to make truth-claims", persuasive, to the extent that he suggests that history should be "denaturalised, deauthorised" (1999, 4).

[64] Scott, 2004, 260, 261

[65] Ibid, 2004, 261. In making this point, Scott is reiterating a key insight of Barthes, namely that historians utilize a device that he termed the "referential illusion" to foster the notion that the referent (what is being referred to) exists independently from the narrative written about it (2004, 261).

[66] Trouillot, 1995, 26

[67] Ibid, 1995, 26

in trying to move beyond attempting to sustain empiricism and facticity as the epistemological bases of history, and instead attempt the more realistic and relevant endeavour of attempting to understand "how history works".[68]

In order to understand the processes of historical production, it is useful to introduce Foucault's notion of a regime of truth. He argues that "each society has its regime of truth, its 'general politics' of truth".[69] That is, in each society there are various '*epistemes'* or discursive formations,[70] that in Said's terms are "epistemological enforcers" of what people can think, live and speak in that particular epoch.[71] Prevailing regimes of truth bear on the historical process right from its very beginning, namely the making of sources. Those who make the sources (write the manuscripts and reports, commission the research, etc) all operate within, not outside, these regimes. It is also useful to consider another basic Foucauldian concept, that being power relations, at this early stage of a consideration of historical production. In Foucault's approach, power is not possessed but rather exercised, in any unequal relation (for example between owner and worker, man and woman, white and black, teacher and pupil). Foucault describes unequal relations as relations that exist between forces of power and those of resistance. Wherever there is power, there is resistance. Therefore for him, because webs of power are pervasive and complex, so too are expressions of resistance. However, Foucault's terminology here is potentially confusing. Usefully, Sharp et al point to the origins of the word 'power'; it derives from the Latin word *potere*, meaning to be able.[72] Thus they hold that "power should not be viewed solely as an attribute of the dominant, expressed as coercion or political control, since it is also present in the ability to resist".[73] Thus instead of contrasting power and resistance, they prefer the dyad of domination/ resistance.[74] I utilise this terminology because it enables one to recognise the constructive side of resistance. A third Foucauldian insight that is instructive in this section of the thesis is that knowledge plays a vital role in the exercise of power. "There is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same

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[68] Ibid, 1995, 25
[69] Foucault, M. Power/ Knowledge: Selected Interviews and Other Writings 1972 – 1977, Prentice Hall: New York, 1980, 131
[70] Ibid, 1980,197; Foucault, M. The Order of Things: An archaeology of the human sciences, Routledge (Routledge Classics): London, 1970, xxii – xxiv
[71] Quoted in Barrett, M. The Politics of Truth: From Marx to Foucault, Polity Press: Cambridge, 1991, 127
[72] Sharp, J., Routledge, P., Philo, C. & Paddison, R. 'Entanglements of Power: Geographies of Domination/ Resistance' in J. Sharp, P. Routledge, C. Philo & R. Paddison (eds), Entanglements of Power: Geographies of Domination/ Resistance, Routledge: London and New York, 2000, 3
[73] Ibid, 2000, 3
[74] Ibid, 2000, 20

time, power relations".[75] In the light of the above comments, it should be recognized that knowledge is significant both in strategies of domination and of resistance.

Power is exercised in the making of sources, as it is exercised at other stages of the historical production process. So Trouillot is correct when he asserts that in history "power begins at the source".[76] It is the victor, the author, who leaves his mark, who inscribes his traces,[77] who writes his documents; the vanquished and the dispossessed are in no position to leave their marks, or inscribe their traces, or write their stories. It is necessary for us to understand at least two dimensions of the creative/ constructive/ productive process involved in these markings, inscriptions and writings.[78] First, the very manner in which things are conceptualised and therefore recorded (as facts, events, etc) is determined by the prevailing regime of truth. In this regard, Baucom points to the dominance of what he calls 'the actuarial type' in our understanding and recording of reality. He defines the actuarial type as that which "does not exist as *this* or *that*, but only as *such*, only in the aggregate or in the abstract".[79] Baucom argues that actuarial type originates in the speculation associated with finance capitalism.[80]

If an understanding of this first dimension of the productive process helps us to understand the types of traces left behind, then an understanding of the second dimension – that it is the powerful who author the diaries, commission the monuments, issue the decrees – helps us to explain their content.[81] Sources *always* privilege certain facts and events, certain aspects of facts and events, certain understandings of facts and events, certain experiences of facts and events, over others. So sources do not tell and describe historical truth (in the canonical definition of the term). Rather they offer at best, a few facts or interesting perspectives, and at worst, a few lies or partialities, or the bigoted tale of the victor. As Ismail emphasises, because all sources are created, none can be "considered pure or untainted".[82]

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[75] Foucault, M. Discipline and Punish: The Birth of the Prison, Penguin: London, 1979, 27
[76] Trouillot, 1995, 29
[77] Ibid, 1995, 48
[78] We should not be perturbed in realising the fundamentals of historical production. As Daston argues, we should not "regard construction as a cardinal sin, incompatible with truth and intellectual honesty". Daston, L. 'Historical Epistemology', in J. Chandler, A. Davidson & H. Harootunian (eds), Questions of Evidence: Proof, Practice and Persuasion across the Disciplines, University of Chicago Press: Chicago, 1994, 285.
[79] Baucom, I. Specters of the Atlantic: Finance capital, slavery, and the philosophy of history, 2005, Duke University Press: Durham, 216
[80] Ibid, 2005, 222
[81] Thus I disagree with Carr, who maintains that history generally sides with the losers (Carr, E. What is History?, Knopf: New York, 1962, 102).
[82] Ismail, 1999, 36

Just as production is worked and effected, so too is destruction; voice is actively generated, and so too is silence. The same powerful people who produce certain historical sources, destroy others.[83] Foucault understands the importance of silencing in the historical process; he describes silence as "an element that functions alongside the things said, with them and in relation to them within overall strategies".[84] Trouillot picks up on this insight and elaborates it further. For him, "the presences and absences embodied in sources…are neither neutral or natural. They are created. As such, they are not mere presences and absences, but mentions or silences of various kinds and degrees. By silence, I mean an active and transitive process: one 'silences' a fact or an individual as a silencer silences a gun. One engages in the practice of silencing. Mentions and silences are thus active, dialectical counterparts of which history is the synthesis".[85] The incompleteness and partiality of sources does not reflect the incapacity of some occurrences and perspectives to enter history, rather their "absence itself is constitutive of the process of historical production".[86]

Whereas sources tell us what is included, they do not tell what is excluded.[87] A consequence of an aspect of an event or an experience of an event being silenced, being excluded from the source, may be permanent exclusion from history. Trouillot reminds us that the traces, the sources "limit the range and significance of any historical narrative. This is one of many reasons why not any fiction can pass for history: the materiality of the socio-historical process (historicity 1) sets the stage for future historical narratives (historicity 2)".[88] Baucom attributes permanent exclusion, destruction or silencing to the "the constraints of politically organised sightlines of history".[89] But some things, though obscure and muffled in the sources, can be revitalised to history. In order to achieve this – in order to recover "the lost news of the news of loss" –[90] the historian needs to adopt a disposition and deploy devices not associated with guild history. Baucom urges the historian to disregard the speculation that produces the actuarial fact, and instead embrace melancholy. Melancholy comprises both "an inability to forget what cannot be

[83] As Trouillot puts it, "the census taker is always a *censor*… he who counts heads always silences facts" (1995, 51).
[84] Foucault, M. The history of sexuality: an introduction, volume 1, 1976, London, Penguin, 27
[85] Trouillot, 1995, 48
[86] Ibid, 1995, 48, 49
[87] Ibid, 1995, 48
[88] Ibid, 1995, 29
[89] Baucom, 2005, 218
[90] Ibid, 2005, 217

remembered" and "the obligation to see what has not been seen".[91] The type of truth generated by melancholy is comprised of "fictional (or fanciful)" facts, or "imaginary scenes strictly consistent with fact".[92] In order to generate these facts and imagine these scenes, we need to embrace fancy and assume a "posture of errancy" toward the world. [93] To be errant, he tells us, "is to be in transit, to be in imaginative flight across the world… to navigate the globe, to bring to light the far reaches and dim suburbs of the world system".[94]

Dening emphasises the importance of imagination for historical work attempting to unsilence the silenced. He elaborates as follows:

> We catch the contingency of silence in our imagination... Imagination is the ability to see those fine-lined and faint webs of significance. Imagination is hearing the silence because we have heard some of the sounds. Imagination is seeing the absent things because we have seen so much else. That is its dream-like quality. It is built on rearranged experience.[95]

In similar vein, Foucault implores us to "strain [our] ears, bending down toward this muttering of the world, trying to perceive the many images that have never turned into poetry, so many phantasms that have never reached the colors of wakefulness".[96] This requires "not scholarship… but rather *artistry*".[97] It is this posture, these devices that will enable us to produce new sources, ones that can lay the basis for a "romantic counterdiscourse of the modern".[98]

The archivist plays a key role in the historical production process as the assembler of historical facts. In this production, one of the most important functions that the archivist must exercise is selection, of themes, sources and so on.[99] In the process, some sources are retained and confirmed as containing relevant and reliable historical facts; other sources are dismissed and denied any further historical relevance. Some sources are selected for the consideration of historians, others are dropped. The archivist exercises considerable power.[100] In order to analyse the power that is exercised in the archive,

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[91] Ibid, 2005, 218
[92] Ibid, 2005, 216, 222
[93] Ibid, 2005, 312
[94] Ibid, 2005, 312
[95] Dening, G. 'Writing, Rewriting the Beach', in Rethinking History, 2:2 (1998), 146
[96] M Foucault, quoted in Miller, J. The passion of Michel Foucault, 1993, London: Flamingo, 107
[97] Miller, 1993, 107
[98] Baucom, 2005, 222
[99] Trouillot, 1995, 53
[100] Ibid, 1995, 53

Derrida looks at the Greek origins of the word. He points out that the word 'arkhe' refers both to commencement ("there where things commence") and commandment ("there were men and gods command").[101] The archivist exercises a violent form of power: as much as some facts commence in the archive, others are obliterated there. The archivist smashes certain histories by denying them representation in the archive.[102] The archivist, as the professional who "prepares facts for historical intelligibility",[103] commands the historian with "the force of law".[104]

By the time the historian enters the process of historical production for the first time, power has already fashioned, circumscribed and prepared the not-so-raw material in significant ways. In its arranging of the sources (as themes, etc), Trouillot has emphasised that archivists set up "both the substantive and formal elements of the narrative". Thus he describes archives as "the institutionalised sites of mediation between the sociohistorical process and the narrative about that process… [T]hey select the stories that matter".[105] The archivist does not merely set up various narrative frameworks, but also suggests which are the more or less important of the frameworks. This is achieved through the extent of the infrastructure constructed for each framework. As Trouillot points out, "[t]he bigger the material mass, the more easily it entraps us [historians]".[106] The formative work of the producers and destroyers of sources, of the assemblers and dis-assemblers of historical facts, "belie the romantic image of the professional historian as an independent artist or isolated artisan. The historian is never alone even within the most obscure corner of the archive: the encounter with the document is also an encounter with the guild".[107]

The response and attitude of historians to the archive should be informed by their analysis of it. So, it is unrealistic to expect better history "simply by an enlargement of the physical base" of the archive, because this leads straight back into the epistemological cul-de-sac

[101] Derrida, J. Archive Fever: A Freudian Impression, The University of Chicago Press: Chicago and London, 1996, 1
[102] Derrida writes that some history "never leaves its own archive" (1996, 7), but I prefer my formulation here because it recognizes the agency of the archivist. For a South African reading of Derrida's elucidation of the violence of the archive, see Rassool, C., Witz, L. & Minkley, G. 'Burying and Memorialising the Body of Truth: The TRC and National Heritage, in W. James & L. van de Vijer (eds), After the TRC: reflections on truth and reconciliation in South Africa, David Philip Publishers: Cape Town, 2000, 115 – 137. They agree that Derrida asserts that the archive denies the existence of all that the archivist excludes; this material is consigned "to oblivion" (2000, 127).
[103] Trouillot, 1995, 52
[104] Derrida, 1996, 7
[105] Trouillot, 1995, 52
[106] Ibid, 1995, 29
[107] Ibid, 1995, 53

of guild history; it is no more than "a neo-empiricist enterprise".[108] Rather, a more useful way of trying to fill the "gap in the archive", is through the assembly of a "counterarchive".[109] Whereas the archive is filled with actuarial facts, the counterarchive is made up of fanciful facts. The key is to keep the focus on creating and assembling those facts that will enable the formulation and articulation of a counterdiscourse of the modern.

Historians enter the historical process during Trouillot's third stage of historical production, namely fact retrieval (or the making of narratives), and they remain the key protagonists during its fourth and final stage, that is the determination of historical truth. I now consider some of the themes that characterise these two phases, namely interpretation, the narrative form, the importance of historiography, and the value of historical truth. Trouillot notes that occurrences "equally noted" in the archive "exhibit in the historical corpus an unequal frequency of retrieval, unequal (factual) weight, indeed unequal degrees of factualness".[110] The main reason for this is what Jenkins calls history's "interpretative flux";[111] that is, historians interpret the archive. Above I drew on Scott to highlight interpretation as an intractable dilemma for the empirical historian. Like Jenkins, I have no intention or interest in attempting to whitewash the problem "by passing it off as a sign of academic freedom thereby strengthening notions of liberal openness".[112] Instead, following Scott, I suggest that we place interpretation in the spotlight, as an alternative "object of historical enquiry" (an alternative object, that is, to the past).[113] In this enquiry, we should recognize the key role that place plays in interpretation. "Historical consciousness", Scott writes, "takes responsibility for its interpretations, for the place from which it speaks".[114] She goes on to argue that taking place seriously is a necessary condition for the production of texts that are contextually relevant.[115] This notion of place accords with Foucault's insistence that the "affirmation of knowledge as perspective" is a necessary feature of effective history.[116] He urges historians to acknowledge "their grounding in a

[108] Ibid, 1995, 49
[109] Baucom, 2005, 4
[110] Trouillot, 1995, 53
[111] Jenkins, 2003, 376
[112] Ibid, 2003, 376
[113] Scott, 2004, 263
[114] Ibid, 2004, 268
[115] The actual quote reads as follows: "taking [the historian's] place seriously is the condition that allows something to be stated that is neither legendary (or "edifying") nor atopical (lacking relevance)" (Ibid, 2004, 268).
[116] Foucault, M. 'Nietzsche, Genealogy, History', in D. Bouchard (Ed), Language, Counter-Memory, Practice: Selected Essays and Interviews, Cornell University Press: New York, 1977, 156

particular time and place, their preferences in a controversy",[117] as the basis of understanding their particular interpretations.

All history is written as narrative. In an attempt to make sense of the past, historians construct it as a story – with a beginning, middle and end. Or, in the words of Jenkins and Munslow, historicizing the past means "the turning of what seems to have happened 'before now' into something the 'before now' never actually was – an article, a film, a book, a conference paper – a history".[118] As they point out, this exercise is "as much a linguistic undertaking (and especially a narrativisation…) as it is an empirical one".[119] More specifically, the concepts that are central in historical narratives, such as an event, are created, not from the archive or out of the evidence, but out of "our language use: rhetorical constructionism".[120] That is, "the 'before now' doesn't have in it 'events' that have… the shape of narratives".[121] Feldman puts it neatly: "the historical event is not that which happens but that which is narrated".[122] More broadly, "there is *no story, no narrative, no emplotment* or argument *in* the past per se and… the past has in it no rhyme or reason".[123] The problem that exists for the empiricist historian is the now familiar one, namely that there are no reliable assessment processes that he or she can utilize; "there is nothing against which we can check out our imagined narrative orderings to see if they 'correspond', for there is literally nothing for them to correspond to".[124]

Minkley, Rassool and Witz assert that presenting "the search for the past as delving through a 'treasure trove' and finding 'lost' golden nuggets obscures the connection with the historiography".[125] Indeed, the rules of the game are such that the individual historian always succumbs to the body of work (sources, archives, narratives) that has come before. The reason that the weight of history is so heavy is that "[n]o other discipline is as insistent that…the writing of a work…require mastery of all the relevant secondary literature".[126] A historian is not permitted to write a novel history – as though there were a

[117] Ibid, 1977, 156
[118] Jenkins & Munslow, 2004, 3
[119] Ibid, 2004, 3
[120] Ibid, 2004, 12
[121] Ibid, 2004, 3
[122] Feldman, A. 'Political Terror and the Technologies of Memory: Excuse, Sacrifice, Commodification, and Actuarial Moralities', in Radical History Review, Issue 85, Winter 2003, 61
[123] Jenkins & Munslow, 2004, 12
[124] Ibid, 2004, 3
[125] Minkley, G., Rassool, C. & Witz, L., 'Thresholds, Gateways and Spectacles: Journeying through South African hidden pasts and histories in the last decade of the twentieth century', Unpublished conference paper, 1999, 17
[126] Novick, P. That Noble Dream, (1988), Cambridge University Press: Cambridge, 581

clean slate; she must acknowledge all who have come before. Just as what is written in a source and preserved in an archive is deemed to have integral value merely by virtue of being there, so too the guild ascribes value and authority to everything that it has produced. As Trouillot writes, "historians build their narratives on the shoulders of previous ones".[127] The power of historiography is considerable. I am not implying here that historians are required to agree with all narratives dealing with their areas of study. But they are required to acknowledge them, and if they disagree with them they are required to "contradict the power embedded in previous understandings".[128] In other words, previous narratives set the parameters, define the questions, prioritise the facts, draw the lines between different schools of thought, and so on. "The inability to step out of history in order to write or re-write it applies to all actors or narrators".[129] The discipline simply does not allow it.

Historians aim "to *settle*, to *solve and resolve* and thus to *control*" the past.[130] That is, they seek to produce historical truth, to close the process of historical production on a topic. In order to do this, they deploy a range of "familiar(izing) figures: the peer-respected 'original thesis', the 'interesting debate', the 'fruitful exchange of views', the 'managed controversies' and 'evidentially grounded knowledge'".[131] The aim of these strategies is to suspend critical application, to massage away uncertainty, and to replace these with scholarly satisfaction and epistemological confirmation. If however, we subject the discipline to critique, understand the productive processes at work, and seek to establish new sources and archives that disrupt the old, it should be clear that we should not aspire to close debates and suspend engagement. Rather, our intention would be to unsettle prevailing truths, to complicate simplistic versions and interpretations, to open spaces for discussion and exchange, and to promote ideas that enable the formulation of a counterdiscourse of the modern.

Assertion 2

The second assertion of guild history is that the practitioner needs to be detached from and neutral toward the object of study in order to produce accurate history. I will briefly critique this assertion and then elaborate on an alternative type of historical practice, one

[127] Trouillot, 1995, 55
[128] Ibid, 1995, 56
[129] Ibid, 1995, 140
[130] Jenkins, 2003, 373
[131] Ibid, 2003, 373

that requires proximity, involvement, interestedness. The critique of detachment and neutrality picks up on the discussion above about narrative writing and truth production, especially the section on interpretation. The purpose of the guild historian is to make truth-claims about the selected object of study.[132] Foucault points out that "traditional history" tends to select research objects that are both far away and lofty: "the noblest periods, the highest forms, the most abstract ideas, the purest individualities".[133] The primary method that is used to produce these claims is interpretation, which is the process of mediating between the object and an understanding of the object.[134] It is in relation to this process of interpretation that the guild demands the correct disposition and attitude from the historian. She is required to be disinterested, to eschew subjectivity,[135] and rather adopt the "famous 'axiological neutrality' that is… identified with scientific objectivity".[136] The academy holds that this orientation enables the historian to attain the coolness, the dispassion and the level-headness of enlightenment reason that is essential for delivering accurate interpretation and therefore reliable truth-claims. Conversely, the historian is expected to avoid ideological inclinations and interests, because these cause confusion. Her brain must be kept in cotton wool, protected from outside influences.

The discussion above has already pointed to the "epistemological unsustainability" of traditional history.[137] It is not necessary to repeat the remarks made there. Instead, I supplement these with some comments on the historian. The problem for traditional history is that it denies that each of us, historian and non-historian alike, has opinions and beliefs, which are forged and formed by a variety of influences. This point has been made by a number of thinkers, including Foucault. He describes it in a variety of ways. For example he refers to 'the discursive production of the subject'; alternatively he writes that the individual is "a reality fabricated by… power".[138] No matter how much one tries to protect the historian from outside influences, from power, there is no escape. We all live in this world and are therefore subject to various worldly influences. I suggest that we accept the reality of our subjecthood and subjectivity, and think about the historian from this vantage point.

[132] Ismail, 1999, 13
[133] Foucault, 1977, 155
[134] Ismail, 1999, 13
[135] Ibid, 1999, 13
[136] Bourdieu, P. 'For a Scholarship with Commitment', in Firing Back: Against the Tyranny of the Market 2, Verso: London, 2003, 18
[137] Ismail, 1999, 2
[138] Foucault, 1979, 194

Traditional historians are in pursuit of a pot of gold at the end of the rainbow. The truth claims that they seek to make, from a position of aloofness and indifference, do not hold because they result from an unrealistic endeavour, based on a fundamental misunderstanding of truth. Rather than debating endlessly, inconclusively about whether or not absolute (or even relative)[139] truth exists, it is more useful and realistic to utilise Foucault's notion of regimes of truth, as referring to prevailing, hegemonic ways of knowing. If one uses this notion, then it is straightforward to understand that

> truth isn't outside power, or lacking in power... truth isn't the reward of free spirits, the child of protracted solitude, nor the privilege of those who have succeeded in liberating themselves. Truth is a thing of this world.[140]

Because of the processes of object selection and interpretative cocooning that the historian practises, the truth-claims that she produces as a result are generally "abstractions, floating like balloons over exotic landscapes".[141] Not surprisingly, the main constituency of these historians is an increasingly narrow band of other traditional historians. Bourdieu argues that the axiological neutrality promoted by traditional historians "is in fact a scientifically unimpeachable form of *escapism*".[142] We should not confuse detachment and distance with autonomy or independence. As Gramsci points out, despite society viewing traditional intellectuals as independent of the dominant social class, they are in fact conservative allied and an essential part of maintaining the hegemony of the dominant social classes over society.[143]

Instead of being detached and distant from the object, in a bid to discover the truth about it, I propose that serious consideration be given to a different approach, one that involves the historian in contemporary political processes. More specifically, I advocate for an interventionist historian, one who is involved and participates in the object, in pursuit of societal transformation.[144] For Furedi, in order for one to classify as an intellectual in the

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[139] Many credible scholars on the left believe in relative truth. For example, Furedi asserts that "there are *absolute truths that are historically relative*" (Furedi, F. Mythical Past, Elusive Future: History and Society in an Anxious Age, Pluto Press: London, 1992, 267). Said also takes truth to be situational; he adds that it is political (see Walia, S. Edward Said and the Writing of History, Icon Books: Cambridge, 2001, 18). Closer to home, Greenstein asserts that "[t]ruth is not a one-off discovery that can retain its value irrespective of circumstances; its validity is always acquired in a given context" (Greenstein, R. 'The future of the South African past', in Journal of Southern African Studies, Vol 22, Issue 2, 1996, 9).

[140] Foucault, 1980, 131

[141] Walker, C. 'Relocating restitution' in Transformation Vol 44, 2000, 15

[142] Bourdieu, 2003, 18

[143] Burke, B. 'Antonio Gramsci, schooling and education', The encyclopaedia of informal education, 1999, accessed on http://www.infed.org/thinkers/et-gram.htm, in March 2007

[144] Ismail, 1999, 13

first place, one has to be socially engaged.[145] It is a particular type of engagement though, that I think is required. Bourdieu defines the public intellectual as "someone who engages his specific authority and the values associated with the exercise of his or her craft… in a political struggle".[146] The problem with this understanding is that it does not ask the intellectual to question the values associated with the craft. This is necessary if, like Ismail, one is interested in altering, "however modestly, one's politico-epistemological moment".[147] Said's formulation of orientation and purpose is both concise and precise. For him, the historian should be engaged in "ongoing political and social praxis". Instead of seeking the "undoing" (or uncovering of truth) associated with interpretation, we should be interested in the "doing" that comes from praxis or intervention.[148]

In order to unpack the practice of intervention, I now consider three attitudes and inclinations that seem integrally bound up in it, namely interestedness, involvement in struggle and an engagement with self. Whereas the traditional historian should remain disinterested, it is necessary for someone aspiring to radical history to be "very interested".[149] Baucom maintains that "a frank avowal of interestedness: in the subaltern, in the hauntological, in the multitudinous scenes of global injustice", is the basis from which "an alternative vision, knowledge, and politics of the global" can be developed.[150] Specifically, he argues that an interested attitude enables the witness to perceive that which is evident, whereas a disinterested attitude limits the perception of the observer to that which appears in the evidence.[151] For Baucom, there is a link between interestedness and the ability to grasp the evident, on the one hand, and melancholy and the capacity to imagine, on the other hand.

On its own, interestedness is not enough. When this is the case, the only place where historians intervene is in academic debates. Bourdieu calls this "*scholastic bias*, whose most perverse form is the propensity to a kind of "paper revolutionism" devoid of genuine target or effect".[152] Worse still, in the absence of a genuine target, campus radicalism

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[145] Furedi, F. Where have all the intellectuals gone? Confronting 21st century philistinism, (2004), Continuum: London, 35. Furedi rails against instrumentalism and advocates for intellectual autonomy (2004, 2). His understanding of autonomy reinforces the necessity for social engagement; he believes that autonomy "can best be constructed by engaging with the public's own aspiration to be taken seriously" (2004, 156).
[146] Bourdieu, 2003, 18
[147] Ismail, 1999, 13
[148] Said, 2000, 147, 148
[149] Ismail, 1999, 13
[150] Baucom, 2005, 226
[151] Ibid, 2005, 229
[152] Bourdieu, 2003, 19

mistakes “revolutions in the order of words or texts for revolutions in the order of things, verbal sparring at conferences for ‘interventions’ in the affairs of the *polis*”.[153] Interestedness needs to be supplemented with involvement in struggle. Foucault emphasizes this point clearly and specifically: “if one is interested in doing historical work that has political meaning, utility and effectiveness, then this is possible only if one has some kind of involvement with the struggles taking place in the area in question”.[154] Similarly, Gramsci holds that revolutionary possibilities depend on the extent to which the working class can foster organic intellectuals capable of nurturing a counter hegemony (an opposing common sense). He writes that "the mode of being of the new intellectual can no longer consist in eloquence … but in active participation in practical life, as constructor, organiser, ‘permanent persuader’ and not just a simple orator”.[155] This belief, of intellect emerging from action, strongly informs the thinking of Badiou. For him, the only way to experience real insight (or what he calls truth) is through reflection on action (or what he calls event).[156] Without event, there can be no truth; without involvement, there can be no revolutionary insight.

Involvement takes place in specific sectors, specific locales, at the precise points where one’s conditions of life and work (family, school, university, career) and one’s socio-economic-personal status (class, gender, race, sexual orientation) place one. This is the background to Foucault’s usage of the term “specific intellectual”. Thus, in the case of Foucault himself, “I tried to do a genealogy of psychiatry because I had had a certain amount of practical experience in psychiatric hospitals and was aware of the combats, the lines of force, tensions and points of collision which existed there. My historical work was undertaken only as a function of those conflicts”.[157] Specific intellectuals are able to contribute to transformative change because they focus on sectors in which they have first-hand, direct knowledge and involvement.[158] Thus Foucault’s work on psychiatric hospitals attempts to produce “a discourse which would be both true and strategically effective, the possibility of a historical truth which could have a political effect”.[159] I want to

[153] Ibid, 2003, 19, 20
[154] Foucault, 1980, 64
[155] A Gramsci, quoted in Burke, 1999
[156] Badiou, A. Ethics: An Essay on the Understanding of Evil, Verso: London, 2001. For a discussion on Badiou’s concept of event, see Jenkins, 2003, 378
[157] Foucault, 1980, 64
[158] Bertsch, C. ‘The Voice of Authority: Michel Foucault’s Problematisation of the Intellectual, in Bad Subjects, Issue # 52, November 2000, accessed on http://bad.eserver.org/issues/2000/52/bertsch.html, in March 2007
[159] Foucault, 1980, 64

emphasise that struggle and contestation is not necessarily rendered diffuse and fragmented if one advocates for specific focus and engagement. Bourdieu argues that we need to oppose reactionary think tanks with "the productions of critical networks that bring together 'specific intellectuals' (in Foucault's sense of the term) into a veritable *collective intellectual* capable of defining by itself the topics and ends of its reflection and action – in short, an autonomous collective intellectual".[160] Bourdieu is convinced that this collective intellectual will generate "a new internationalism", capable of tackling the pressing global issues "with truly international force".[161]

Because public involvement is integral to the historical practice that I advocate, the constituency engaged in the course of this practice is much broader than that of the traditional historian. More specifically, the constituency expands from the narrow guild to the struggle fraternity and ultimately broader society. "[W]e need to think about breaking out of the disciplinary ghettos in which as intellectuals we have been confined, to reopen the blocked social processes ceding objective representation (hence power) of the world to a small coterie of experts and their clients, to consider that the audience for literacy is not a closed circle of three thousand professional critics but the community of human beings living in society".[162]

In critiquing the method of traditional history, Chakrabarty draws specific attention to the fact that it "does not allow the investigating subject to recognize himself or herself as also the figure he or she is investigating" .[163] If the historian is directly engaged in political processes that relate directly to her work, she is personally implicated in her own study. The question is not whether she should include herself in her study, but rather how she should do this. After all, as Foucault pointed out, effective history "shortens its vision to those things nearest to it";[164] this applies not only to the object of engagement/ study but also to the subject activist/ historian. For Gramsci, the starting point for the development of an organic intellectual "is the consciousness of what one really is".[165] Foucault demands a more incisive approach. For him, the effectiveness of history can be measured through "the degree that it introduces discontinuity into our very being – as it divides our emotions,

[160] Bourdieu, 2003, 20
[161] Ibid, 2003, 23, 24
[162] Said, 2000, 147
[163] Chakrabarty, 2000, 239
[164] Foucault, 1977, 155
[165] A Gramsci, quoted in Burke, 1999

dramatizes our instincts, multiplies our body and sets it against itself".[166] The more knowledge can rid us of certain aspects of ourselves, the more our work can dissipate our identity and challenge our very being – the better.[167] This is because "knowledge is not made for understanding; it is made for cutting".[168] As Ismail correctly puts it, to intervene is "to work towards disrupting the alleged sovereignty, autonomy and agency of the subject".[169]

To close this section, I look at the academy's rejection of ideological positioning through the lens of time. That is, I place the emphasis on the fact that this rejection is an injunction to historians not "to position themselves *in the present*" (my emphasis).[170] Previously I drew on Bourdieu to argue that the guild's promotion of neutrality amounted to escapism. Furedi describes this escapism as "a desire to escape from the present and evade its challenges".[171] A secular view of society – which insists that people make their own present and their own history (even if in circumstances not of their own making) – militates against guild escapism.

In order to take responsibility for present-day implications and the consequences of the histories we write, Trouillot implores us to develop authenticity in relation to how we re-represent the past, and argues that this honesty requires that we understand our own personal politics and ideology. He dubbed this capacity "historical authenticity" and clarifies that this does not reside "in the fidelity to an alleged past but in an honesty vis-à-vis the present as it re-presents the past… Only in the present can we be true or false to the past we choose to acknowledge".[172] Similarly, Baucom held that "historical truth is be found not so much in the truth of the event (or fact) as in the truthful representation of the historian's affective response to a fact or event".[173]

If we nurture historical authenticity we place ourselves in a position where we can do justice to "the historicity of the human condition", [174] and we can realise the potential of our

[166] Foucault, 1977, 154
[167] Ibid, 1977, 162
[168] Ibid, 1977, 154
[169] Ismail, 1999, 13
[170] Trouillot, 1995, 151
[171] Furedi, 1992, 69
[172] Trouillot, 1995, 148
[173] Baucom, 2005, 284
[174] Trouillot, 1995, 151

being “fully historical”.[175] That is, if we understand our own positions clearly, then we are capable of producing history that is meaningful, relevant and defendable in the present. The historian writes in the present, just as she acts in the present. Crucially, both her writings and actions have an impact on the history of the future. Our subjective capacity to realise our own agency, to act on an understanding that the choices we make today have an impact both today and tomorrow, specifically as we reflect on, research and write history, is the essence of what it is to be fully historical. This notion puts the emphasis squarely on the challenge confronting the historian in the present. That is, in writing history, we should deliberately breach the sacrosanct guild border between past and present. More specifically, we should reject being typecast as specialists of the past, by recognising our responsibilities in the present.[176]

Assertion 3

This discussion on historical authenticity relates closely to the third assertion of traditional history, namely that the past exists, as a fixed (unchanging) and closed entity. I consider both elements of this assertion, namely the fixity of the past and its being regarded as bygone. Trouillot emphasises that the guild’s attachment to the notion of the past as a researchable object is self-serving. “Professional historians have made good use of the creation of the past as a distinct entity, a creation that paralleled the growth of their own practice. That practice, in turn, reinforced the belief that made it possible. The more historians wrote about past worlds, the more The Past became real as a separate world”.[177] Simply put, the notion of pastness is fundamental to the survival of the historical guild. Furthermore, in order for the discipline to have value and status, in order for the past to be an object capable of being studied, it has to be regarded as having fixed content. These are false assumptions and assertions.

Trouillot notes that “the past does not exist independently from the present. Indeed, the past is only past because there is a present, just as I can point to something *over there* only because I am *here*. But nothing is inherently over there or here. In that sense, the past has no content”.[178] Instead of regarding the past as a material reality, Ismail understands the past, like the present, to be “a conceptualisation, an organisation, a

[175] Ibid, 1995, 24
[176] This recommendation is based on Said’s urging that “[i]nstead of non-interference… there must be *interference*, a crossing of borders and obstacles” (Said, 2000, 145).
[177] Trouillot, 1995, 152
[178] Ismail, 1999, 15

disciplinarisation, of time".[179] He also points out that the concepts of the present and the past are clumsy, slippery and unclear. He asks us to consider: "when, after all, does the past end and the present begin? Last year? Today? Right this second?"[180] Because of its difficulty to define a clear object, Ismail taunts the academy by asking rhetorically: "can one take history seriously?"[181] Irrespective of how we deal with the taunt, we can surely agree with Furedi that because of the challenges intrinsic to historical work, "[h]istory clearly cannot have a fixed character or essence".[182]

Because the past, as an unclear object, does not have clear content, it is not surprising that key notions that stem from the assumption of 'the past as object' also flounder when scrutinized. One of the nuggets that traditional historians search for in archival treasure troves is origins. The desire to locate the origins of a historical development resides in the will to petrify the past, in the sense of setting or calcifying it. The reason for this is that traditional historians regard the origins as essential, fixed and continuous. The origins explain our glorious present. However, the Foucauldian method of genealogy (an analysis of descent) reveals

> something altogether different behind things: not a timeless and essential secret, but the secret that they have no essence or that their essence was fabricated in a piecemeal fashion from alien forms… What is found at the historical beginning of things is not the inviolable identity of their origin; it is the dissension of other things. It is disparity.[183]

Whereas traditional history builds around constants, effective history is without constants.[184] Given that the past does not exist as a fixed object, we should suspend any quest for trying to understand the present on the basis of the past, but instead realize that the present is like it is because of the actions of human beings.[185]

Traditional history – which assumes a constant past, with a fixed content – is the perfect breeding ground for nationalist narratives. As Renan puts it, "history is for the nationalist

[179] Ibid, 1999, 5
[180] Ibid, 1999, 5
[181] Ibid, 1999, 6
[182] Furedi, 1992, 265
[183] Foucault, 1977, 142
[184] Ibid, 1977, 153
[185] Furedi, 1992, 70. Furedi regarded this realisation as the basis of what he called historical thinking.

what poppies are for the opium addict".[186] The reason for this is that one aspect of the fixed content of the past that traditional historians latch onto and develop is the essence of national identity. History teaches us that national identities are distinct and constant. Even as historical development happens,[187] these identities remain essentially the same. Such representation amounts to what Furedi calls the "eternalisation of history".[188] So a purpose of traditional history is "to convey a sense of distinctiveness, to differentiate and exclude"; it is "the signifier of identity".[189] Chakrabarty defines history as "a disciplined and institutionally regulated form of collective memory".[190] Through this memory work, history plays a role in contemporary political processes, specifically nationalism. As Feldman argues, the "vernacular depiction of history and the mobilization of popular memory inform and structure political agency".[191] In sum, the "role of History is to provide the intellectual foundations of modern nationalism by helping to create a sense of national identity".[192]

It is appropriate here to reflect briefly on the linked origins of the South African nation and the South African history academy. Dubow notes that the 1870s saw both the first real emergence of a sense of 'South Africa',[193] as well as the first attempt by a critical mass of local thinkers to write South African history. In considering the key titles from the decade as a body of literature, Dubow detected "a distinctive and competing use of historical narrative and interpretation to define, survey and explain the South African predicament".[194] That predicament was 'the native problem', which was that the governing whites only constituted a small proportion of the population of the land, whereas the subjugated blacks made up the vast majority. This demographic reality set South Africa apart from other white colonial dominions such as Australia, New Zealand and Canada.[195] The solution to the problem was seen to lie with the Europeans, who historians made sure

[186] Quoted in Rowlands, R. 'Cultural Rights and Wrongs: Uses of the Concept of Property' in K. Verdery & C. Humphrey (eds), Property in Question: Value Transformation in the Global Economy, Berg: Oxford, 2004, 219
[187] See the later discussion on historicism.
[188] Furedi, 1992, 63
[189] Ibid, 1992, 63
[190] Chakrabarty, 1995, 386
[191] Feldman, 2003, 62
[192] Ibid, 1992, 63. Scholars of South Africa are part of the consensus in this regard. See for example Comaroff, JL. 'Reflections on the colonial state in South Africa and elsewhere: faction, fragments, facts and fictions', in A. Zegeye (ed), Social Identities in the New South Africa: After Apartheid Volume 1, Kwela Books and South African History Online: Cape Town, 2001, 37 – 80, and Bundy, 2007, 73 - 97. Comaroff writes that "history in its modernist form – as a chronicle of public events and heroic actions – *is* re-presentation; the authoritative self-presentation, in particular, of the nation-state" (2001, 40).
[193] Dubow, S. A Commonwealth of Knowledge: Science, Sensibility and White South Africa 1820 – 2000, Double Story: Cape Town, 2006, 123
[194] Ibid, 2006, 135
[195] Ibid, 2006, 134

to inscribe “as a permanent fixture of the African continent”.[196] The next milestone period from the perspective of nation-building/ history is the early 1900s. That period is best known for the establishment of South Africa as a nation in 1910; it is no coincidence that the South African Historical Society was established three years later,[197] in the same year as the passing of the seminal Land Act.

As historians we should recognize the complicity of the discipline in forging nations and nationalism, and the implications of this complicity. I do not need to summarise some of the most widely known events of the past two hundred years for us to accept, along with Jenkins and Munslow, that the western nation-state has been “the most effective killing machine that has ever existed on the face of the earth”.[198] With this in mind we should be cautious about the manner in we approach the topic of national identity. In this regard, Scott rejects approaches that essentialise identity and instead suggests that we “historicise identity”,[199] that “we produce histories that focus on the production of identity as a process both of homogenization and differentiation”.[200] In a more overarching frame, Chakrabarty suggests that we write history in such a way that we draw attention to the manner in which it colludes with “narratives of citizenship in assimilating to the projects of the modern state all other possibilities of human solidarity”.[201]

Traditional history holds that the past is gone. As Chakrabarty writes, the “capacity to see the past as gone and reified into an object of investigation… is the enabling condition of modern historical consciousness”.[202] Such a view is predicated on the notion of progressive time; time passes.[203] A sense of anachronism, and its offshoots – the identification of relics and legacies – is “the root of modern historical consciousness”.[204] So, for example historians may refer to the legacies of slavery in the United States, colonialism in Africa generally, or of apartheid in South Africa. A critique of the notion of

[196] Ibid, 2006, 135
[197] Ibid, 2006, 164
[198] Jenkins & Munslow, 2003, 15. I am aware of the arguments of scholars like Fanon, who exhorted Africans “to put an end to the history of colonisation – the history of pillage – and to bring into existence the history of the nation – the history of decolonisation” (Fanon, F. The Wretched of the Earth, Penguin: London, 1967, 40). However, I ascribe these views to hegemonic influence of Enlightenment thinking (Chakrabarty, 2000, 5).
[199] Scott, 2004, 266
[200] Ibid, 2004, 265
[201] Chakrabarty, D. ‘Postcoloniality and the Artifice of History’, in B. Ashcroft, G. Griffiths & H. Tiffin (eds), The post-colonial studies reader, Routledge: London, 1995, 388
[202] Chakrabarty, 2000, 243
[203] Ibid, 2000, 15
[204] Ibid, 2000, 238

legacy helps us to understand historical time in a different way from that outlined above. Trouillot has written that the "so-called legacies of past horrors… are possible only because of [the renewal of practices of domination]. And that renewal occurs only in the present".[205] In other words, the past is not gone, but rather it lives on, for the reason that it is deliberately and proactively sustained into the present. Both Chakrabarty and Baucom have elaborated this in abstract terms. Chakrabarty notes that the "the archaic comes into the modern, not as a remnant of another time but as something constitutive of the present".[206] Similarly, Baucom writes that history is both "the property the present inherits as its structuring material *and* the property (both affective and instrumental) the past holds in the present".[207]

Trouillot challenges the historian not to hide from the present in the past, but rather to deal with the past in the present. He is particularly interested in slavery and its ongoing legacy in the United States of America today. "Slavery in the US is a ghost, both the past and a living present; and the problem is how to represent that ghost, something that is and yet is not".[208] Baucom also looks at slavery; he draws a straight line from the slave trade and the slave ship to the plantation, and then on to the ghetto and shanty town of today.[209] Whereas Trouillot has problems in deciding how to represent the ghost (possibly because he does not really believe in ghosts?); Baucom has no doubts in this regard. For him, because the dead are alive and they speak, the history of slavery is indisputably a ghost story.[210]

Baucom is correct to insist that time does not pass. Rather modern time accumulates or piles up, "from an exceptional historical catastrophe".[211] In a sense then, our present started a long time ago; it is "a now that accumulates within itself the moment of loss, the long after-history of loss, and the moment of confrontation with loss".[212] Notions such as

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[205] Trouillot, 1995, 151
[206] Chakrabarty, 2000, 251
[207] Baucom, 2005, 330
[208] Trouillot, 1995, 147
[209] Baucom, 2005, 313
[210] Baucom, 2005, 323. Baucom regards the drowning of slaves aboard the *Zong* as the starting point of the modern present. The artist Turner painted a well-known work on the tragedy. The importance that Baucom attributes to the analytic usefulness of the concept of ghosts can be derived from the manner in which he concluded a 2001 paper. "When the American painter George Inness saw Turner's canvas in Boston, he dismissed it as a trivial piece of work, sniffing that 'it has as much to do with human affections and thoughts as a ghost'. To which I can only respond: exactly. That is its value". (Baucom, I. 'Specters of the Atlantic', in South Atlantic Quarterly, Vol 100, No 1, 2001, 80)
[211] Ibid, 2005, 312, 319, 320
[212] Ibid, 2005, 324, 325

our present being of the past, and a now that goes back centuries, demand that we abandon the concept of a single, progressive time, and instead contemplate "a more unruly temporality".[213] If this is the case, then Baucom suggests that "one of the greatest challenges available to us" is to learn "what it means to live nonsynchronously".[214] This requires an ability to set up a "long-durational correspondence" with distant violent moments, in order to "discover in the very brutality of what-has-been the responsibility and promise of a traverse, relational now-being".[215] Similarly, Chakrabarty implores us to write "narratives of human connections that draw sustenance from dreamed-up pasts and futures" where collectivities are defined not by modern constructs such as citizenship and tradition.[216] Instead of clinging onto the cliché that we study the past in order to understand the past, perhaps it is time that we explored the reverse discipline, which is to study the present in order to understand our histories. Perhaps it is time that we begin an imaginary, melancholic flight across the centuries, starting now, starting in the present.

Assertion 4

The fourth assertion of traditional history is somewhat at odds with the third. Whereas the latter upheld fixedness, the former – which holds that history develops in a unified and progressive manner – involves change.[217] This fourth assertion is generally referred to as historicism, which Chakrabarty defines as "the idea that to understand anything it has to be seen both as a unity and in its historical development".[218] Similarly, Foucault regards historicism as a fundamental characteristic of traditional history. For him this type of history "always encourages subjective recognitions and attributes a form of reconciliation to all the displacements of the past; a history whose perspective on all that precedes it implies the end of time, a completed development".[219] The usefulness of this definition is that draws attention to the fact that the vantage-point of historicism is a triumphant present. From this vantage point, the main purpose of the past is that it is the vehicle that has brought us to the present. Historicism therefore amounts to "progressive teleology"; "right from the start

[213] Chambers, I. 'Culture after humanism (2000), in K. Jenkins & A. Munslow (eds), The Nature of History: Reader, Routledge: London, 2004, 222
[214] Baucom, 2001, 80
[215] Ibid, 2005, 171
[216] Chakrabarty, 1995, 388
[217] Ultimately the third and fourth assertions are supplementary and synergetic because historicism's development does not occur in an unpredictable manner; instead like a train it moves along the tracks, steadily, predictably. The tracks are defined by the origins and identity that are produced through the assertion that the past is fixed and gone.
[218] Chakrabarty, 2000, 6. "Single" is often used as a synonym for "a unity". For example Chakrabarty writes that the "capacity to construct a single historical context for everything" is an "enabling condition of modern historical consciousness" (2000, 243).
[219] Foucault, 1977, 152

history had a direction and destiny in it which, fully realized, would bring it to an end".[220] In the words of Chambers, the present is enthroned by historicism as "the sole presiding, sole surviving judge of the past"[221]. Of course, those in the present who matter in this regard are not the defeated and the marginalized, but the victorious and the included.[222] Historicism breaks down precisely because it regards the present as both the pinnacle of historical development and the judge of the past. The present is explained in relation to the past, yet also taken out of time, to judge the past.[223]

Just like history's assertion that the past is fixed, provided the basis for nationalism, similarly its assertion of historicism provided the basis for colonialism and civilization.[224] Europeans in the nineteenth century viewed themselves as more advanced, as further along the path of development than the backward and primitive Africans. They could therefore justify colonialism as a way of facilitating the development of Africa and Africans, to a point where the latter could take responsibility for themselves. Until Africans reached that undefined point, Europeans would take charge of development. Historicism, Chakrabarty writes, "came to non-European peoples in the nineteenth century as somebody's way of saying 'not yet' to somebody else"; it consigned them "to an imaginary waiting room of history".[225] Therefore it is not surprising that the anti-colonial movement of the twentieth century countered the "not yet" of colonialism with an unequivocal "now".[226] Ironically, a stage-ist theory of history lives on in many post-colonial environments, with nationalist elites regurgitating the same "not yet" to the subaltern classes (often directed specifically to those in rural areas).[227] Writing about South Asia, Guha has countered this narrative with one that asserts that the peasant should not be seen as an anachronism but instead "a real contemporary of colonialism, a fundamental part of the modernity that colonial rule brought to India". [228] He goes on to argue that South Asian political modernity is characterized by "two noncommensurable logics of power, both modern"; one is the logic of civil liberties and the other is the logic of hierarchy.[229] Comaroff has developed a similar argument about the nature of power in post-1994 South Africa, where two

[220] Jenkins & Munslow, 2004, 15
[221] Chambers, 2004, 218
[222] Ibid, 2000, 219
[223] Ibid, 2000, 218
[224] Chakrabarty, 2000, 7; Ismail, 1999, 8, 50
[225] Chakrabarty, 2000, 8
[226] Ibid, 2000, 8
[227] Ibid, 2000, 9, 10
[228] R Guha quoted in Ibid, 2000, 13
[229] R Guha quoted in Ibid, 2000, 14

conflicting types of citizenship vie for dominance.[230] Perhaps these bifurcated configurations relate back to conflicting assertions of guild history, for both fixedness and teleological progression, for both tradition and development, for both custom and law. When one sees such explicit refutations to notions of historicism – when one sees first-hand a "multiple modernity in which past and present are conjoined and mutually interrogated" – [231] one has little option but to abandon the idea of a single time, and instead understand that "historical time is not integral… it is out of joint with itself".[232] These moments give one the opportunity to learn to think about time "as irreducibly not-one".[233]

Historicism deploys a number of devices to portray progressive development. The deployment of continuity is probably the most commonly used device in this regard. Continuity bridges the chasms, smoothes the rough edges, moderates the extremes, dulls the pain.[234] Therefore many radical historians exhort the usage of discontinuity to undermine historicism. For example, Scott advises that we adopt discontinuity as the "operative principle of history",[235] and Foucault promises to resist being "transported by a voiceless obstinacy toward a millennial ending", and instead to "relentlessly disrupt" the "pretended continuity" of history.[236] By deploying discontinuity, the historian is able to sever the historicist link between past and present.[237] Once severed, the past can be used to interrogate and haunt modernity; the archaic can be "a disturbing presence that proposes a new configuration of my present".[238] The present is no longer the judge of the past, but is rather now judged by the past.

Historicism is however sometimes better served by discontinuity than continuity. This is generally the case where contemporary authorities see past practices and arrangements as anathema, and want to drive a thick wedge between themselves and their predecessors. This is the case with the approach of the democratic government in South Africa to apartheid. It portrays apartheid as dead and buried; 1994 signaled a moment of

[230] Comaroff, 2001, 37 - 80
[231] Chambers, 2004, 222
[232] Chakrabarty, 2000, 16
[233] Ibid, 2000, 249
[234] Chakrabarty promotes histories that establish the "connection between violence and idealism" that lies at the heart of historicism (1995, 387). He seeks, in other words, to sharpen the contradictions, show that discontinuity and continuity occur side-by-side.
[235] Scott, 2004, 263
[236] Foucault, 1977, 154
[237] Scott, 2004, 264
[238] Chambers, 2004, 222, 223

absolute discontinuity. The forces of modernity and change, it holds, caused unbearable contradictions to mount within the machinery of apartheid, resulting in break-down, resulting in rupture. The government seeks to set up the post-1994 nation in what Paul de Man called "the true present", that is a "zero point in history – the pastless time, for example, of a *tabula rosa*, the *terra nullius*, or the blueprint".[239] In this way, government attempts to free itself from the burden of history; it does not have to systematically undo the damage of apartheid, it does not have to right the wrongs of the past, it does not have to measure its progress in inverse relation to the achievements of apartheid. It seeks "freedom from the burden of the past, from the weight of historic responsibility".[240] So it acts as it deems fit, in line with its own discretion, with authority and without account.

The radicalness of the purported break between the death of apartheid and the birth of democracy is further underlined by comments made by Wilson, contrasting the nationalism underpinning post-1994 South Africa, with that grounding the well-established democracies of Western Europe and elsewhere. Whereas these nations are naturalised by reference to their ancientness, the new South Africa is defined through an assertion of "the uniqueness of the present. The new South African identity is constructed upon a discontinuous historicity, where the past is not a past of pride, but of abuse".[241] In order to establish the credibility and legitimacy of the new state, the contrast between past and present is presented as absolute. In this narrative, 1994 is portrayed as a radical break. If the challenge for the radical historian in the face of hegemonic histories of continuity is to set up narratives of discontinuity, then conversely it is to point to continuities when the dominant narrative exclaims: "it's all different now!"

Historians and 1994

It is necessary that I make a few comments about the nature of the 1994 transition. There was considerable public hope and anticipation in South Africa in 1994; as we stood in queues and voted on 27 April, we somehow believed that the future would be different from the past, that freedom was at hand. Yet, when tomorrow dawned, it was no different from today. And when 'the next of next week' arrived,[242] it was still just like yesterday. If the tenses seem confused, it is because 1994 did not signal a moment of discontinuity, it

[239] Chakrabarty, 2000, 244
[240] Comaroff, 2004, 2
[241] Wilson, R. The politics of truth and reconciliation in South African: legitimising the post-apartheid state, Cambridge University Press: Cambridge, 2001, 16
[242] This is the literal English translation for the week after next, in isiXhosa. I use it to convey futurity.

did not mark the end of one era and the beginning of another. Our today is our yesterday, and our tomorrow will still be our yesterday. We live in the segregationist past.[243] We may not live in an apartheid state of emergency; black South Africans are not burdened anymore by the constant threat of racially-defined forced removals; they no longer have to produce identity documentation or fear arrest or expulsion from the cities; they are no longer explicitly referred to as hewers of wood and carriers of water. Yet, black rural South Africans still – in 2008 – live in extreme poverty; more people have been evicted since 1994 than those who have benefited from land reform;[244] those in the Ciskei and Transkei may now be regarded as South African citizens, with the right to vote, but they still live the life of Bantustan subjects;[245] they still depend on fire-wood for energy and the river for water. The reality is that poverty is probably worse now than it was in 1994,[246] and it is

[243] Given the extent to which I use the term segregation(ism) in this work, I should make some explanatory notes about my usage of it. I use it in two senses; both to convey the practice of governing by separating or segregating people geographically; and to refer to the period 1910- 1948. In the context of the thesis the former meaning is more important than the latter. This meaning (segregationism as a system of governance) allows one to understand apartheid as a particular expression of segregationism. Whereas formal apartheid ended in 1994, I argue that segregationism remains a predominant form of governance in South Africa today.

[244] Nkuzi and Social Surveys Africa, 'Summary of Key Findings from the National Evictions Survey', 2005, accessed on http://www.nkuzi.org.za/docs/Evictions_Summary

[245] Just as I made some footnote remarks above about my usage of the terms segregation and apartheid, I should also clarify how I use Reserves and Bantustans. Both terms refer to the areas scheduled for African occupation through the 1913 and 1936 Land Acts, but the former is associated with the segregationist era (1910 – 1948), and the latter with the apartheid era. However, I use the term Bantustans (and not Reserves) to refer to these areas in the post-1994. Technically, perhaps I should refer to them as Reserves, because I invoke the term segregationism to describe post-1994 governance. However, this term seems somewhat outdated today, and the crudeness of the word Bantustans suits my purposes in this thesis. Also, the reader should anticipate that I sometimes – in relation to the post-1994 period – refer to 'Bantustans' and other times to 'former Bantustans'. Essentially though, my position is that the end of formal apartheid in 1994 did not mean the end of segregationism and that the Bantustans still exist as discreet areas, which are differently governed from the areas that previously constituted former white South Africa.

[246] No doubt, this is a controversial line of argument to hold. I do not adopt it in a cavalier, reckless manner. I am well aware of the arguments on both sides of the debate. The debate seems to have been started with the publication of Terreblanche's History of Inequality in 2002 (Terreblanche, S. A History of Inequality in South Africa 1652 – 2002, University of Natal Press: Pietermaritzburg, 2002). This has sparked an ongoing, unresolved debate between those who argue that poverty has been reduced since 1994 and those who hold that it has deteriorated in that period. Van der Berg heads the former school of thought (his papers are available at http://stweb02.stb.sun.ac.za/economics/3.Research/2.Working Papers.php), while Meth is a leading critic of this school (at least one of Meths' papers is available on the SALRDU web-site - http://www.saldru.uct.ac.za/workingpapers.html - as Working paper number 1). Leibbrandt seems to occupy a position somewhere between the two poles; he asserts that "poverty got worse initially and has recently improved because of the impact of social grants" (personal communication). (I note my thanks to Murray here for his generosity in sharing his understanding of the debate with me and sending me the relevant literature.) It is useful to break the post-1994 period into two, ie 1994 – 2000, 2000 onwards. For the former period, the most bullish analyses suggest that "poverty had remained more or less constant, while others seemed to indicate that it had worsened" (du Toit, A. & Neves, D. 'In search of South Africa's 'second economy'', in Africanus 37 (2) 2007, 147). The debate between van der Berg and Meth has been played out in the public arena a number of times during the past few years. The most recent instance of such a skirmish was in November 2007, between the South African Institute of Race Relations, which asserted that poverty levels had doubled from 1997 – 2007, and Thabo Mbeki, who strongly refuted the assertion, countering it with statistics from a document called 'Development Indicators Mid-Term Review', published by the Presidency in June 2007, which concluded that the income of the poorest 20 per cent of the population had risen since 2002 (see www.anc.org.za/ancdocs/anctoday/2007/at45.htm). Finally, a report released by the

particularly severe and pervasive in the former Bantustan areas.[247] With reference back to the dark days of 1980s apartheid, Crais has observed that in the Bantustans today, the "state of emergency in fact continues".[248] In the former Ciskei and Transkei,[249] people are very busy implementing multiple survival techniques, but all that these yield is one plate of nqushu a day. Conversely, as the poor in the Bantustans have got poorer since 1994, the rich have got richer.[250] In 2008 South Africa is one of the most unequal societies in the world, if not the most unequal society in the world.[251] I have deliberately started my commentary on continuities across the 1994 transition with the focus on economic measures such as poverty and inequality. Because much of the thesis uses segregationism as a continuity lens, the reader may develop a sense that I privilege this lens above others, such as Scott's political lens of high modernism, the economic lens of distributional regime used by Seekings and Nattrass, or Bond's lens of global apartheid.[252] Put otherwise, the thesis may be read as one that argues that segregationism is constitutive of the post-1994 nation-state (as opposed to merely being an unintended outcome of a motor such as capitalist development). This is not my intention; my main argument is that the continuities are properly understood as an outcome or expression of a largely unchanged regime of truth, in the Foucauldian sense of the term.

Norval asserts that "apartheid will only end when its logic is broken".[253] So what is the logic of apartheid? Derrida's definition of apartheid remains one of the most useful. For him,

> by itself the word occupies the terrain like a concentration camp. Systems of partition, barbed wire, crowds of mapped out solitudes. Within the limits of the mark, the glaring harshness of the abstract essence (heid) seems to speculate in another

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South African Human Rights Commission in May 2008 found that a higher proportion of South Africans, across all race groups, live in "relative poverty" in 2008, compared to in 1997 ('SAHRC: Increase in people living in poverty', Mail & Guardian online, accessed on 22 May 2008, http://www.mg.co.za).

[247] Seekings and Nattrass argue that the basis of exclusion under apartheid shifted from race to class. Within the context of this position, they do acknowledge that the poor remain "overwhelmingly rural", and that unemployment (which they argue underpins poverty) is "especially high in the former Bantustans" (Seekings, J. & Nattrass, N. Class, Race, and Inequality in South Africa, University of KwaZulu-Natal Press: Scottsville, 2006, 337).

[248] Crais, 2002, 224

[249] These are the names of the two former Bantustans of the Eastern Cape Province.

[250] Seekings & Nattrass, 2006, 3, 4

[251] Ibid, 2006, 3

[252] Scott, JC. Seeing Like a State, Yale University Press: New Haven, 1998; Seekings & Nattrass, 2006; Bond, P. South Africa and Global Apartheid: Continental and International Policies and Politics, Discussion Paper 25, Nordic Africa Institute: Uppsala, 2004. I thank Ben Cousins for pointing out these various lenses to me at a seminar hosted by the Programme of Land and Agrarian Studies (Plaas) at the University of the Western Cape on 4 September 2008.

[253] Norval, A. 'Social Ambiguity and the Crisis of Apartheid' in E. Laclau (ed), The Making of Political Identities, Verso: London, 1994, 115

> realm of abstraction, that of confined separation. The word concentrates on separation. It institutes, declares, writes, inscribes… A system of marks, it outlines in space in order to assign residence or close off borders. It does not discern, it discriminates.[254]

As Norval distils from this definition, the essence of apartheid is "its peculiar logic of identity construction".[255] This logic was first institutionalised in 1910, and expressed in a sophisticated, totalitarian manner by the apartheid regime after 1948. Apartheid constituted identity according to racially- and to some extent spatially-defined groups; white identity was fabricated through defining the external other (in negative terms as 'non-European' or 'non-white') and setting this group apart, in its own 'homeland' or what I call Bantustan in this thesis. White was civilized; 'non-European' lacked civilisation (was barbaric). White was progressive and scientific; 'non-white' was backward. White was urban; 'non-white' was rural. And so, it was the white man's burden to promote the advancement of the 'native', along his own path, to a civilized state. Norval is thus correct when she asserts that apartheid was linked to "a certain European discourse on race – as well as to the wider domain of Western metaphysics",[256] which upholds capitalism, civilization, and cultural essentialism and evolution. These metaphysics remain firmly entrenched in South Africa's post-1994 regime of truth and systems of governance. Until we manage to destroy "the totalizing logics of modernity",[257] we will not break the logic of segregationism; we will not end the past.[258]

It is widely accepted that the ruling ANC was already dominated by the proto black middle class and other elite class interests at the time of the transition.[259] The agenda of the ANC during this period was to simultaneously neutralise the working class and foster black middle class growth and solidarity. Both aspects of this agenda were pursued by marking 1994 as a break in time, a point of discontinuity. The message broadcast to the public was that the time of protest, contestation and conflict was over.[260] Instead, the fabricated 'new South Africa', without a history, was portrayed as "an ordinary country", without political

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[254] J Derrida, quoted in ibid, 1994, 118 (from Derrida, J. 'Racism's last word', in Critical Inquiry, 1985, 292)
[255] Norval, 1994, 123
[256] Ibid, 1994, 119
[257] Ibid, 1994, 134
[258] I prefer a more general reference to segregationism here than Norval's suggestion that apartheid *itself* lives on.
[259] Nuttall & Wright, 2000, 32. Class conflict and the struggle for the soul of the ANC circa 1992 is explored at length in chapter 2, particularly as these relate to land policy and legislation.
[260] Nuttall & Wright, 2000, 32

purpose.[261] This is why Kentridge suggests that South Africa today is best understood "not as a post-apartheid society but as a post-anti-apartheid one".[262] The ANC's class project has been served by "a new discourse",[263] one that revolves around reconciliation, 'rainbow nationalism' and an 'African Renaissance'. There is little role for history in this discourse, in the project of building the new South African nation – after all it has no history, it is brand new, not borne of the apartheid nation, but rather replacing it.[264] As early as October 1994, then newly elected President Mandela exhorted South Africans to "forget the past".[265] And so it is not surprising that Stolten detects a growing "non-use" of history in the post-1994 period.[266] As the shooter silences the gun, so the politicians have deliberately (de)commissioned history.[267]

The crisis in South African historiography stems from the inability of the academy to critique, dismiss and replace the key assertions of the guild. Specifically, it seems to accept the historicist notions that a new South Africa was born in 1994, one that has no history, and that apartheid died in 1994. Similarly, it is informed by the presumption that historians should avoid taking ideological positions on their research objects, and maintain distance and coolness. As a result, the contemporary South African history academy has meekly come to represent non-interference in the real world. It is no surprise therefore that post-1994 historiography has tended towards exotic, faddish topics of research. I reject these perspectives, and the acquiescence and resignation of the academy.

I turn to art historians to locate a more challenging and relevant approach to 'apartheid time' than that which is forthcoming from historians of apartheid, who hold that the apartheid past is over. [268] In considering the work of William Kentridge, Dubow and Rosengarten draw attention to notions such as "head-on collision between past and

[261] N Alexander, quoted in Saunders, 2007, 290
[262] W Kentridge quoted in Donaldo, R. 'Post-Apartheid Fiction', The New York Times, accessed on its website (www.nytimes.com) , on 30 October 2007
[263] Nuttall & Wright, 2000, 30
[264] Ibid, 2000, 32. The anecdote about what an immigration official at the Johannesburg Airport in early 1994 told Shula Marks what she thought of her profession is worth repeating here. "Historian? Historian? You can't be an historian *now*!… I mean, in the new South Africa, we have to look to the future, not to the past" (quoted by Cobley, 2001, 617).
[265] Stolten, 2007, 42
[266] Ibid, 2007, 43
[267] See chapter 3 for an assessment of the productive work of the *Commission* for the Restitution of Land Rights and the Truth and Reconciliation *Commission*.
[268] Thelan, D. 'Challenges the Truth and Reconciliation Commission Poses to the Modern Discipline of History and Its Civics', ISER Seminar Series, University of Witwatersrand, Johannesburg, 2002, 5; Du Pisani, J. & Kim, K-S. 'Establishing the Truth about the Apartheid Past: Historians and the South African Truth and Reconciliation Commission', African Studies Quarterly, Vol 8 Issue 1, 2004, 89

present", "radical temporal discontinuity", a "past immersed in immediacy".[269] Godby has understood this collision to be "each individual's acknowledgement of his or her complicity in the violent history of South Africa".[270] Such acknowledgement rests on an appreciation that what we call legacies of the past are in fact those things that we tolerate into the present. What is needed is conceptual understanding linked to political conviction that disables any "sense of resolution" and that offers "an alternative to the very theoretic of reconciliation".[271]

Without this conceptual understanding, the kind of activism foundational in the history that I advocate, is impossible. The understanding gives rise to "a particular moral imperative", namely "to reposition the past as a present vigilance".[272] That is, our objective should be "to sustain the moment of crisis, to keep alive the 'weight… of surprise, or fright' and so to transform the past forgotten… into the possibility of a future'".[273] As the editor of the Mail & Guardian wrote at the time of the tenth anniversary of the TRC,

> [o]ur atrocious past is commemorated not so much in the archives of the TRC, or the grand spaces of Freedom Square, as in the persistence of this racial encounter [of otherness]: we are rubbed raw by history, and it is not much fun… Let [the children] dance among the ghosts of the past with their eyes wide open.[274]

In the terms of Baucom, instead of mourning the sufferings, losses and deaths of apartheid, what is needed is melancholy. Melancholy does not move on because it holds onto loss; it refuses "to introject loss", and determines, "instead, to incorporate loss, to encrypt the lost, damaged, ruined object within the secretive… mausoleumological architecture of the self".[275] Melancholy requires that we deliberately place ourselves in the situation of the dead, that we lodge the "the present (and ourselves) in the deathly afterlife of past historical situations".[276] Two characteristics of melancholy, namely its intentionality and its interest in identifying causes of contemporary problems, allow us to understand it as irreducibly political. Baucom calls this form of politics, "the politics of global

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[269] Dubow, J. & Rosengarten, R. 'History as the main complaint: William Kentridge and the making of post-apartheid South Africa', Art History, Vol 27, No 4, 2004, 673, 678
[270] Godby, W. 'Memory and history in William Kentridge's *History of the Main Complaint'*, in S. Nuttall & C. Coetzee (eds), Negotiating the past: The making of memory in South Africa, 1998, Oxford University Press: Cape Town, 109
[271] Dubow & Rosengarten, 2004, 687
[272] Ibid, 2004, 688
[273] Ibid, 2004, 688
[274] 'Dancing with ghosts', Mail & Guardian, April 28 to May 4 2006, 24
[275] Baucom, 2004, 257
[276] Ibid, 2004, 259

interestedness";[277] and elaborates on it as comprising "an alternative vision, knowledge, and politics of the global".[278]

I assert that the South Africa that was established in 1910 remains intact today; one of the most pronounced characteristics of this nation-state is segregationism.[279] The purpose and expression of segregationism has undoubtedly changed over time, but it remains, in 2008, a defining feature of the South African nation-state. The centennial anniversary of this nation is 2010 – when everyone's attention will instead be on the first African staging of the Soccer World Cup. I hold that the only way for history to regain its relevance in contemporary society is for historians to regain their ability to speak truth to power. What this means today is that we need to emphasise the continuities that spanned 1994; the key to understanding these continuities is to focus on the common regime of truth that spans the pre- and post-1994 periods. We must sharpen the contradictions between "a juridical assertion of common citizenship and the experiential reality of difference, seperateness and inequality".[280] We need to develop an understanding that we still live in the past – our "shared horrendous history" [281] – and we must nurture a determination to destroy this prolonging past. We have to fight segregationist South Africa today, in an interested, passionate manner.

Two of the fundamentals of the kind of history that I attempt to write are that it is located in the present and that it relates to and derives from involvement in contemporary political struggle. In attempting this history, I am able to draw on and learn from a long line of South African activist intellectuals, including Plaatje, Nzula, Luthuli and Turner. The writings of these giants "were all outcomes of struggles personally experienced during their years of active opposition to the class and race system in South Africa".[282] The term that is most closely associated with this type of history in South Africa is popular history. For Callinicos, two of the characteristics of popular history are that it is written "from below" (about the

[277] Ibid, 2004, 259
[278] Ibid, 2004, 226
[279] The Mail & Guardian published a series of opinion pieces in April 2008 on the topic 'Apartheid: dead or alive'. Desmond and Bond argue that apartheid lives on in post-1994 South Africa (Desmond, C. 'Apartheid: dead or alive', in Mail & Guardian, April 11 to 17 2008, 27; Bond, P. 'It's class apartheid, stupid', in Mail & Guardian, April 18 to 24 2008, 30). I explore the 1910 creation of South Africa in some detail in Chapter 4.
[280] Bundy, 2007, 79
[281] Ibid, 2007, 91
[282] Callinicos, L. 'The People's Past: Towards Transforming the Present', in Critical Arts, Vol 4, No 2, 1986, 22

experiences of ordinary people), and "for the purpose of informing and engaging the people" about whom it is written.[283] She goes on to add that

> popular history is located in the present – it seeks to examine the conditions on which contemporary dilemmas and struggles rest... It is the task of the writers of people's and workers' histories to start from the need to understand and directly *confront*, not the past for its own sake, but present-day situations and problems.[284]

In other words, popular history is activist history;[285] it involves political engagement.[286] The most significant recent expression of popular history was the History Workshop, which was established shortly after the Soweto uprising and continued into the early 1990s. Some of the particular contributions and hallmarks of the Workshop were that it "focused on the histories and experiences of marginalized communities, inaugurated the field of oral history, and sought to reach marginalized communities through audio-visual products, popular texts, educational materials and so on".[287] Through this and other work, in the 1980s history "became a major resource in the struggle for emancipation in South Africa and its production a great source of excitement and contention".[288] I am not advocating a reinvigoration of the History Workshop – its weaknesses are understood – but I am urging a resurrection of the tradition that informed its establishment.

I attempt to draw on this tradition in writing this history of segregationism in post-1994 South African. My particular interest in this thesis is the manner in which segregationism is expressed in the Bantustans (vis-à-vis former white South Africa). Within this area, I focus on property arrangements and configurations, and consider both sides of the power dyad, namely domination and resistance. On the side of domination, my first undertaking is to argue that the constitutional protection for property rights and the provisions for post-1994 land restitution are best understood as being two sides of the same coin, and that that coin – property – was jointly and co-operatively minted by the principal negotiating parties involved in the South African transition. Thereafter, I look specifically at the performance of the restitution programme over the past fifteen years, and argue that its key productive

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[283] Ibid, 1986, 21
[284] Ibid, 1986, 29
[285] Hamilton, C. 'Emerging Themes and trends, Opportunities and Challenges', Unpublished review paper delivered at a Conference of the South African History Archive (SAHA) on 'Memory, Heritage, and the Public Interest', 16, 17 November 2006, accessed at www.public-conversations.org.za on 14 September 2008, 2
[286] Callinicos, 1986, 37
[287] Hamilton, 2006, 2. For a fuller summary of the Workshop, see Bonner, P. 'New Nation, New History: The History Workshop in South Africa, 1977 – 1994', in The Journal of American History, Vol 81, No 3 (The Practice of American History: A Special Issue), Dec 1994, 977 – 985
[288] Bonner, 1994, 980

value has been in shoring up the foundational notions of citizenship and property. In chapter four, attention shifts to the place of the former Bantustans in the post-1994 nation in general and the restitution process in particular. I situate the exclusion of these areas from restitution alongside their treatment in relation to a variety of governance and development instruments, and argue that the bifurcated nature of the segregationist nation outlived the demise of formal apartheid.

On the side of resistance, I narrow the focus down to a critical reflection on the manner in which an Eastern Cape Non Governmental Organisation (NGO), called the Border Rural Committee (BRC),[289] has gone about advocating for the inclusion of the Bantustans into restitution. I have been Managing Director of BRC since 1997, and have thus been centrally involved in the advocacy work on which I reflect. This reflection is undertaken over chapters five and six, with the former considering attempts to secure a legal precedent, and the latter looking at an ongoing campaign to force broader redress. An important theme that runs through these chapters is that the strategies invoked by BRC are framed within the same regime of truth that drives processes of domination, or in other words despite its having made some gains, these have been achieved through simultaneously entrenching foundational hegemonic discourses about property and democracy.

The history that I wish to write is both self critical and interested (as opposed to disinterested). For the last twelve years of my life, my over-riding political and professional interest has been to advocate for compensation for people living in the former Bantustans who were dispossessed of rights through betterment from the 1950s onwards. Indirectly then, I consider myself in the thesis, not with the aim to affirm or congratulate myself, but with the aim to critique myself, to introduce discontinuity into my being. Anything else would be futile. I have a clear position in relation to the issue of restitution and betterment dispossession. I hold that betterment dispossession was excluded from restitution as part of a broader prejudicial treatment of the Bantustans in post-1994 South Africa. I have been centrally involved in campaigning for redress of this prejudice. The campaign has not yet achieved its objective and there is no guarantee that it will succeed in the future. The thesis is therefore an attempt to make an intellectual contribution to an ongoing struggle, in the present. I am deliberately trying to rise to Foucault's challenge to intellectuals that

[289] I use BRC (not the BRC) to denote the Border Rural Committee.

> [w]hat the intellectual can do is to provide instruments of analysis, and at present this is the historian's essential role. What's effectively needed is a ramified, penetrative perception of the present, one that makes it possible to locate lines of weakness, strong points, positions where the instances of power have secured and implanted themselves… In other words, a topological and geological survey of the battlefield – that is the intellectual's role.[290]

In the process of writing this history of dispossession and poverty in the Bantustans, I point to and draw on new sources, anticipate counter archives, and suggest new narratives, in the hope of contributing to the formulation of a counter narrative of our ongoing past.

Conclusion

The crisis in contemporary South African historiography derives from the prescripts of the discipline of history and it is closely related to the broader societal crisis in contemporary South Africa. The history establishment in South Africa is in a crisis because it has succumbed to the weight of the discipline. It has fallen into line with the prescriptions to be neutral and indifferent, to view the past from the perspective of a triumphant present, to accept that 1994 marked the end of apartheid and the beginning of a brand new nation. In so doing, it has turned its gaze away from the segregationist tragedy of our present – that wealthy urbanized whites are richer and more dominant than ever, and poor rural blacks are poor and more marginal than in 1994 – and has instead preferred quaint paintings on the inner walls of the ivory tower. In other words, the history academy has come to represent non-interference in governance of post-1994 South Africa.

The way out of the crisis is for historians to recover the perspectives and practices of a long line of South African historians who located themselves in the present and consistently spoke truth to power. This more radical approach demands that we see 1994 as a point of continuity, that we understand that the apartheid past persists into the present, that the South African nation will have its centennial anniversary in 2010. In order to do this, we need to create new sources, establish new archives and formulate new narratives.

[290] Foucault, 1980, 62

Chapter 2 – The common origins of the 1993 Constitution's protection of property rights and its provisions for restitution

Introduction

The focus of attention in this chapter is the period that is generally regarded as having produced our prevailing reality, namely the transition years of the early 1990s. I look at this period through a particular lens, with a particular interest, namely to understand the outcome of the negotiated settlement with regards to land. More specifically, I seek to understand the origins of the 1993 Constitution's protection of (prevailing) property rights[291] and its provisions for restitution. Moreover, I seek to shed light on what the land outcome indicates about the nature of the pre- and post-1994 South African nation.

In the chapter I explain the prevailing hegemonic narrative about the Property Clause and restitution, and then set about developing a counter narrative. The prevailing narrative asserts that the African National Congress (ANC) and National Party (NP) clashed over property during the negotiation process. It argues that the ANC opposed constitutional protection for property rights but conceded this to the NP, in the interests of national liberation. Further it maintains that the ANC won restitution, in return for its concession. This narrative is incompatible with the evidence, and irreconcilable with contemporary political realities.

I develop the counter narrative across three sections. First, I outline an alternative explanation of the Property Clause, by focusing on the class and demographic character of the ANC, the context within which the South African transition took place, and the details of the negotiations pertaining to property. The second section considers the Property Clause in the light of recent theoretical work and perspectives on property. This section not only deepens the arguments presented in the first section, it also allows me to introduce restitution into the discussion, as being an integral component of property discourse (rather than it being anathema to property). And thirdly, I put the focus on restitution. In this regard, I explain how it is rooted in the discourses of property and human rights. I argue that, like the property clause, the South African restitution programme was borne of consensus rather than discord. I close the chapter with a focus on 1913 as a key date in the restitution programme, and consider this in relation to the birth of the South African

[291] This is commonly referred to as the Property Clause.

nation in 1910, and industrial development linked to the discovery of minerals in the late nineteenth century.

Explaining the Property Clause

In 1993, negotiators involved in the Convention for a Democratic South Africa (Codesa)[292] agreed on constitutional protection for existing property rights. There was some wrangling about the wording of the provision. In fact, the resultant delays were so protracted that the property clause was one of the last sections of the constitution to be completed.[293] As Walker notes, by late 1993 "political pressure was mounting on all sides" to finalise outstanding aspects of the negotiations.[294] Even after they had reached agreement on the rest of the bill of rights, the negotiators remained at odds over the property clause.[295] "In the end, agreement on the land/ property clauses was only reached in the very final stages of the negotiations".[296] The wording that was finally agreed to for what became known as the property clause read as follows:

> **28.** (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
> (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
> (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the

[292] CODESA first met in December 1991. It reconvened in May 1992, but its deliberations were terminated by the ANC shortly after the Boipatong Massacre in June that year. After a hiatus, the ANC and NP decided that they would constitute the vanguard from then onwards. This paved the way for the establishment of the Multiparty Negotiating Forum in April 1993, which was responsible for ushering in the Interim Constitution on 18 November 1993. This provided for the inauguration of the Transitional Executive Council and the holding of the first democratic election in April 1994.
[293] The amnesty clause of the section dealing with 'truth and reconciliation' was another of the sticky points; see the following chapter.
[294] Walker, C. 'The Limits to Land Reform: Rethinking 'the Land Question'', in Journal of Southern African Studies, Vol 31, No 4, December 2005, 815
[295] Chaskelson, M. 'The Property Clause: Section 28 of the Constitution', South African Journal on Human Rights, 131, 1994, 131
[296] Walker, 2005, 815

property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.[297]

A popularly-held explanation of the property clause is that the ANC opposed constitutional protection for existing land rights, and that support for this move was restricted to conservative forces such as the National Party (NP) and the Democratic Party. This explanation holds that the ANC insisted that constitutional protection would impede and militate against the imperative of the redistribution of wealth, whereas the NP and its allies were intent on protecting privileges that whites had gained through apartheid, into the democratic era, irrespective of the wishes of an elected government.[298] In short, the two parties came "to the negotiating forum with conflicting concerns relating to the constitutional protection of property".[299] Because of this, the "protection of property rights was a hotly contested issue at the multiparty negotiations".[300] According to this explanation, it was at Codesa where the ANC abandoned its long-standing commitment to nationalisation and "accepted the principle of protection of property rights".[301] Its abandonment of nationalisation is therefore best understood as a concession;[302] it conceded the protection of existing property rights to the NP. Fuller explanations of this outcome generally run along the lines of that outlined by Weideman. She argues that the concessions were "partly the result of strong lobbying by the NP, the Freedom Front, the white commercial agriculture sector and others who would benefit from maintaining the status quo in land distribution, while the ANC negotiators paid insufficient attention to the land issue".[303] Put another way, there is broad consensus that the property clause is a compromise outcome of negotiations.[304] This view holds that the principal players entered the negotiation with conflicting, contradictory views on existing property rights. Because of their commitment to their respective positions, they deadlocked for a long time. Hence, there were protracted delays, leading to mounting pressure on the two parties to find a

[297] Republic of South Africa, Government Gazette No 15466, No 200 of 1993, Constitution of the Republic of South Africa, 1993, Cape Town, 28 January 1994, 16
[298] Chaskelson, M. 'Stumbling towards Section 28: Negotiations over the protection of property rights in the Interim Constitution', South African Journal on Human Rights, 11, 1995, 223, 224
[299] Chaskelson, 1994, 131
[300] Ibid, 1994, 131
[301] Hart, G. Disabling Globalisation: Places of Power in Post-Apartheid South Africa, University of Natal Press: Pietermaritzburg, 2002, 227
[302] Weideman, M. 'Who shaped South Africa's land reform policy?' in South African Journal of Political Studies, Vol 31, No 2, Nov 2004, 219 – 238, accessed on the 'Taylor and Francis Group web-site, 7
[303] Ibid, 2004, 7
[304] For example, Walker, 2005, 814, 815

solution. In the end, the ANC compromised on land in order to win concessions from the NP in other areas.

This hegemonic explanation suits the ruling ANC because it maintains the myth that the party is interested in rural transformation. It is the tale of the victor. In addition, another fundamental problem with this version of events is that it does not tally with important evidence in the historical record. Below, I outline some of this evidence and then posit an alternative explanation of the property clause. I start my examination of the evidence with the spotlight trained on the ANC, one of the principal actors on the negotiation stage. In order to understand some of the essential characteristics of the ANC, it is necessary to provide a summary overview of its establishment and development in the last century.

The South African Native National Congress, later known as the African National Congress (ANC), was created in the context of the formation of the Union of South Africa. Union (that is, the unification of white South Africa to solve 'the native problem') threatened to undermine the political and economic advancement of the "African proto-middle classes - doctors, lawyers, ministers, landowners and traders".[305] More specifically, the central developments that unfolded in the wake of Union, such as the consolidation of white territories and government, the ongoing dispossession of African land, and the expansion of the Natal model of segregation (at the expense of Cape liberalism), posed a direct threat to those Africans who had established economic, social or political niches for themselves during the pre-Union era. Consequently, in a rearguard action, people drawn from these proto middle classes got together in January 1912 to establish the ANC. As Head puts it, the ANC "gave voice to a new class, a black elite educated for the most part by missionaries in the British liberal tradition".[306] Therefore it is not surprising that a key objective of the ANC was to "defend and advance African civil and political rights".[307] In this regard, Pallo Jordan gave particular prominence to the land question in understanding the formation of the ANC. At a 1990 workshop in Lusaka he asserted that "the national question was based on the land question", that "dispossession of … land was the cardinal national grievance which [gave] coherence to a revolutionary strategy".[308] According to Fanon, South Africa was not exceptional in this regard. He generalises as follows: "[f]or a

[305] Dubow, S. The African National Congress, Jonathan Ball Publishers: Johannesburg, 2000, 3
[306] Head, B. 'Preface', in Plaatje, S. Native Life in South Africa: Before and Since the European War and the Boer Rebellion, Ravan Press: Johannesburg, 1982 (Second Edition), ix
[307] Dubow, 2000, 1
[308] Quoted in Dolny, H. Banking on Change, Viking: Johannesburg, 2001, 38

colonised people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity".[309] The key point here is that it was landowners, not the dispossessed or the landless, that were centrally involved in the establishment of the ANC. For example, John Dube (first president of the ANC in 1913), Albert Luthuli, Pixley Seme, HS Msimang were all well-known land-owners from the Natal area.[310] Because of its class composition, it is not surprising that the congress promoted "a form of opposition which stressed responsible citizenship and disdained popular agitation".[311] This argument is reinforced when taking cognisance of the elitist outlook of the ANC leadership in defence of the liberal Cape tradition, and in particular its limited franchise rights for property-owning blacks.[312] The cautious leadership urged the authorities for reforms that would enhance "race co-operation", warning them that inaction would produce "a fertile breeding ground for hot-headed agitators amongst us Natives".[313] The ANC's position on franchise rights both informed and emerged from its broader endorsement of and demand for a universal Bill of Rights. The ANC first articulated this call in 1923, through its adoption of the African Bill of Rights. The bill begins with the proclamation that "the Bantu inhabitants of the Union have, as human beings, the indisputable right to a place of abode in this land of their fathers".[314] Amidst the global struggle against Nazism/ fascism, the ANC adopted a more detailed Bill of Rights in 1943. This bill was arranged in the following sections: full citizenship rights and demands, land, employment and commerce, education, public health and medical services, and discriminatory education.[315] The third major statement of rights produced by the ANC was the well-known Freedom Charter.

The discovery of minerals in the late nineteenth century led to the steady industrialisation of the South African economy in the twentieth century; this process was given a fillip by war production in the 1940s. One of the consequences of capitalist development was increased urbanisation of black Africans. Not surprisingly, as South Africa became

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[309] Fanon, 1967, 34
[310] Hart, 2002, 85. In 1900 Dube et al had formed the Natal Native Congress to "press their interests – primary among which were extension of the franchise on the same terms as whites and individual land tenure".
[311] Dubow, 2000, 7
[312] Thanks to Russell Grinker for reminding me about this. For an example of the leadership's ingratiation with English civilization, see Plaatje, 1982.
[313] J Dube, quoted in Furedi, F. The Mau Mau War in Perspective, James Curry: London, 1989, 221
[314] ANC, 'The African Bill of Rights, 1923', quoted in 'The ANC and the Bill of Rights, 1923 to 1993: A Seventy Year Survey', accessed on the ANC web-site, www.anc.org.za/ancdocs/history/billorts.html, on 12 September 2008
[315] Ibid

increasingly urbanised especially from the 1940s onwards, a "distinct urban bias" became increasingly evident amongst both the black intelligentsia and the ANC.[316] Again Fanon is useful in showing that this trajectory tended to characterise most nationalist movements;

> the followers of the nationalist political parties are above all town-dwellers – shop-stewards, industrial workers, intellectuals and shopkeepers… Their way of thinking is already marked in many points by the comparatively well-to-do class, distinguished by technical advances, that they spring from. Here 'modern ideas' reign.[317]

In other words, the ANC remained a political formation that was controlled by middle class interests. In the early part of the twentieth century, these interests were predominantly rural; by the 1940s they had migrated into the cities. The rise of urban modernity meant that rural sensibilities, the apparently "shrunken", "limited", "obstinate point of view of the masses", came under pressure. [318] As Dubow writes,

> [i]n their concern to deny the apartheid government's insistence that 'natives' were naturally 'tribal' and should be confined to the rural Bantustans, the urban black intelligensia of the 1940s and 1950s was apt to treat rural Africans with a measure of condescension or disdain – an attitude curiously paralleled by revolutionary theorists and academic writers whose primary focus has been on proletarian class-formation and industrial conflict.[319]

Not surprisingly, the substance of the ANC agenda changed from the 1940s onwards. Evans asserts that the ANC "abandoned" rural issues in that decade and instead adopted "a more confrontational program centered in the urban areas".[320] Fanon memorably describes this in more general terms as the clash of modern, urban classes against "the old granite rock upon which the nation rests".[321] "The overwhelming majority of nationalist parties show a deep distrust towards the people of the rural areas… The members of the

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[316] Dubow, 2000, 47, 48. The ANC was not the only member of the congress alliance that displayed urban bias. Writing about the period 1928 – 1960 Drew notes that "South African socialists were divided between a majority giving primacy to the urban working class movement and a minority which saw the agrarian question as the backbone of any socialist revolution". This ensured "theoretical dominance of the urban bias" (Drew, A. 'The Theory and Practice of the Agrarian Question in South African Socialism, 1928-60' in H. Bernstein (ed) The Agrarian Question in South Africa, Frank Cass: London, 1996, 54).
[317] Fanon, 1967, 86
[318] Ibid, 1967, 39. Marxism generally looks to the proletariat as progressive and the peasantry as conservative, because of what it considers to be objective economic fundamentals.
[319] Dubow, 2000, 47, 48
[320] Evans, I. Bureaucracy and Race: Native Administration in South Africa, University of California Press: Berkeley, 1997, 289
[321] Fanon, 1967, 86

nationalist parties… pass the same unfavourable judgement on country districts as the settlers".[322]

From the 1940s onwards, the ANC was indisputably an urban-dominated party, but there was still a strong enough afterglow of its rural origins to ensure that the land issue featured strongly in the 1955 Freedom Charter. Arguably, its clauses on land represent the most coherent and serious statement in this regard issued by the ANC in its entire existence. Some of these read as follows:

> We, the People of South Africa, declare for all our country and the world to know… that our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality…
>
> The Land Shall be Shared Among Those Who Work It!
>
> Restrictions of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it to banish famine and land hunger;
>
> The state shall help the peasants with implements, seed, tractors and dams to save the soil and assist the tillers;
>
> Freedom of movement shall be guaranteed to all who work on the land;
>
> All shall have the right to occupy land wherever they choose;
>
> People shall not be robbed of their cattle, and forced labour and farm prisons shall be abolished.[323]

After the 1950s, the ANC paid scant attention to either the policy or organisational challenges of agrarian politics. ANC interest in the agrarian question dissipated, resulting in its becoming "a major lacuna in the South African liberation movement".[324] Over time, a "profound tension between the powerful emotive force of the 'land question,' and the relative neglect of agrarian questions in practice" grew more and more taut.[325] Bernstein

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[322] Ibid, 1967, 87

[323] Congress of the People, The Freedom Charter, Kliptown, 1955, accessed on http://www.anc.org.za/ancdocs/history/charter.html, in May 2008

[324] Hart, 2002, 42. There is broad agreement on this point. Weideman writes that "The ANC historically paid insufficient attention to rural issues" (Weideman, 2004, 13). Drew agrees: "[w]ith few notable exceptions, the political organisations forming South Africa's liberation movement have historically underestimated the theoretical and practical significance of political aspirations and social movements in the countryside" (Drew, 1996, 53). Perhaps Hart drew explicitly on Bernstein because he refers to the "strategic lacuna on the agrarian question in the programme of the South African liberation movement" in 1996 (Bernstein, H. 'South Africa's Agrarian Question: Extreme and Exceptional?', in H. Bernstein (ed) The Agrarian Question in South Africa, Frank Cass: London, 1996, 34).

[325] Hart, 2002, 226. Weideman notes that "By 1990, the African National Congress (ANC) had not produced any substantial land or agrarian reform policies" (Weideman, 2004, 5). But Walker is correct in arguing that "[t]he history of race-based land dispossession has always occupied a prominent position in the ANC's

explains the neglect of agrarian questions as part of a more general ANC problem, namely that its economic policy remained unchanged from the adoption of the Freedom Charter in 1955, until the period of transition.[326] Here it is useful to note that the ANC upheld a two-stage theory of revolution; with the immediate focus placed squarely on national liberation, many economic issues and debates were marginalised or completed ignored. Also, Bernstein notes that the socialist wing of the congress movement assumed "that capitalism would collapse with the demise of apartheid", and therefore it displayed no urgency to deliberate on economic issues. He goes on to speculate that since many cadres were educated or trained in the Soviet bloc, they "probably assumed that the capitalist farms and plantations of South Africa would be nationalised and collectivised after apartheid".[327]

In the 1970s and 80s processes based in the cities were at the centre of the struggle against apartheid. Mamdani has pointed out that the South African struggle differed from other independence struggles in Africa, where rural processes were of central importance. "The strength of urban forces and civil society-based forces in South Africa meant that unlike in most African countries, the centre of gravity of popular struggle was in the townships and not against Native Authorities in the countryside".[328] Within the struggles in South Africa's townships, the urban militants were suspicious of migrants from rural areas – "the rural in the urban" – who they regarded "as tradition-bound country bumpkins bent on damming the waters of urban township resistance"[329]. So it is not surprising that the phenomenon of urban bias continued to mark the ANC into the transition period. In December 1993, Border[330] Region ANC media officer Mcebisi Bata told rural activists "I am not going to lie by saying there is no urban bias".[331]

As can be gathered from its name, from its birth the ANC has regarded and projected itself as an umbrella organisation, capable of accommodating all people interested in national liberation. That is, the ANC has sought to accommodate a wide range of political opinions

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account of the liberation struggle, beginning with its own formation in response to the Natives Land Act of 1913" (Walker, 2005, 811).

[326] Bernstein, 1996, 34

[327] Ibid, 1996, 35

[328] Mamdani, M. Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism, David Philip: Cape Town, 1996, 29

[329] Ibid, 1996, 30

[330] This term refers to a central area of the Eastern Cape that includes East London, Stutterheim, Cathcart and Queenstown. The region has a has long history of having been constituted as a frontier or border, between coloniser and colonised, white and black, and Ciskei and Transkei.

[331] Border Rural Committee (BRC), 'NLC National Community Land Conference: BRC Border Regional Workshop', Eagles Rest, East London, 3, 4 December 1993, Unpublished BRC document catalogued in BRC Resource Centre

and view-points within its structures and processes. It was the early leaders of the movement who established the tradition that has come to be known as 'broad-church politics'. Since its establishment just after Union, the ANC has upheld inclusivity both as a principle guiding organisational life and as a tactic to shore up organisational support. In order to maintain its grip on power in this scenario, the middle classes developed a variety of skills and tactics. For example, it was during the early years of the ANC's existence that the dominant landowning class learnt the skill "to present their class interests as the general interest, and to speak on behalf of the general community".[332] Similarly, the leadership has generally been "able to absorb radical forces of opposition to white supremacy, such as militant Africanist and class-based politics, without these impulses displacing the power and authority of the moderate centre".[333] These politics have served not only to enlarge the support base of the ANC, but also to strengthen the position of the moderate centre within the organisation. Consequently, as Dubow argues, one should not be surprised about the durability and stubbornness of "long-standing liberal and social democratic orientations and traditions" within the ANC. [334] These have been fully reflected and expressed in the post-1994 policy decisions of the ANC as government.[335]

Throughout the twentieth century, the leadership of the ANC remained under the control of the moderate proto-middle classes. (Dubow highlights that only once has the ANC been led by a radical, for a brief period in the 1920s.[336]) Bernstein spells out how the context in which the transition unfolded further strengthened the position of the middle classes within the ANC during the negotiation process. In this regard he emphasises that by the 1980s, apartheid South Africa was beset with "terminal crisis".[337] As a result of many, inter-related events and developments that unfolded in the 1970s and 1980s,[338] South Africa was arguably on the brink of long-term ruin. As the military and civic stalemate became more

[332] Hart, 2002, 85
[333] Dubow, 2000, 107
[334] Ibid, 2000, 108
[335] In his comments on an earlier draft of the thesis, Grinker advised me to take cognizance of the full range of ideological influences at play within the ANC. Specifically, he cautioned me not to discard the role of Stalinism in ensuring mass support for the post-1994 leadership. In his words, "The liberals didn't do it on their own. Stalinism lent credence to otherwise conservative nationalism" (Personal correspondence).
[336] Dubow, 2000, 108
[337] Bernstein, 1996, 17
[338] For example, the rise of African trade unionism, the contestation around 'bantu education' and the 1976 uprising, shifting balance of forces in South African region, increased activity by Umkhonto weSizwe (MK, the armed wing of the ANC), the ambitious response of the PW Botha's regime, known as total strategy, the founding and growth of the United Democratic Front (UDF), the imposition of sanctions by the international community, the 1985 State of Emergency, the activities of the IFP in Natal, the increasing disaffection of big business with apartheid, and so on. See Bernstein (1996, 14 – 16) for some elaboration of these events and developments.

intractable, its consequences threatened to push the country over the precipice. Three of the key aspects of crisis highlighted by Bernstein are: economic meltdown; "widespread and increasing unemployment and poverty" that could no longer be kept out of 'white' South Africa; and "the crisis of everyday social existence in the burgeoning shack settlements and in many longer established townships, and its effects" (ie general urban insurrection).[339] There were also profound developments taking place on the global stage in the late 1980s. One of these, which had a marked influence in ANC circles, was the collapse of the Soviet Union. Bernstein refers to this as having being "a moment of profound demoralisation".[340] He also notes that in the 1980s exiled cadres in many Southern African countries observed firsthand "the crises of the various socialisms in those countries".[341] It is clear that contextual developments, both inside and outside South Africa, strengthened the position of moderate pragmatists and weakened that of left-wing ideologues.

Because of the ANC's ability to absorb and accommodate left-leaning opinions, and despite the realities sketched above, on the surface it was able to appear committed to pursuing far reaching land reform in a post-apartheid South Africa. As late as 1986, it upheld a call for nationalisation and comprehensive redistribution of land.[342] However, even by this time, there was a growing realisation within the ranks of the movement that the ANC was fairly indifferent to rural transformation in general, and to land reform in particular. When Joe Slovo used to walk in on discussions between Ruth First, Helena Dolny and others (in Mozambique) about agrarian reform in the early 1980s, he would frequently remark: "talking fertilisers again".[343] So, when Dolny moved to Zambia in 1986, she wanted "to see if I could be part of getting the ANC to take land issues more seriously, from its top echelons down to its rank and file cadres".[344] Dolny's first tactic in this regard was to attempt to establish a reading group on land issues. In her own words: "It was a dismal failure".[345] Less anecdotally and more broadly, erstwhile activist Klug reflected that "despite the assumptions and the liberation movement's general rhetoric on the 'Land

[339] Bernstein, 1996, 17, 18
[340] Ibid, 1996, 35
[341] Ibid, 1996, 35
[342] Weideman, 2004, 5
[343] Dolny, 2001, 33. Dolny notes that the "rank and file had even less interest in rural areas than Joe, if that were possible". Interestingly in this regard, she notes that many "comrades who transited through the house that … I lived in … were township youths and they would use the word 'peasant' between themselves as a term of insult when they considered someone's behaviour uncouth or their way of thinking unsophisticated" (2001,33). Just the same as the urban intelligentsia of the 1940s!
[344] Ibid, 2001, 32
[345] Ibid, 2001, 33

Question', activists … had a realistic view of the low priority rural issues had on the mainly urban-based ANC's political agenda in the late 1980s".[346] By this time, it was clear to the leadership of the ANC that the shape of a post-apartheid future land reform programme would be determined through balancing a number of complex factors. More specifically, Skweyiya highlighted the following as important at the time: protecting national food security, acknowledging the contribution of commercial agriculture to foreign exchange earnings, understanding the balance of power between various forces at the time of 'the final solution', securing the support of the international community, and assessing the availability of implementation capacity.[347]

The ANC was an important player in South Africa in the 1980s. But an explanation for "the apparent absence, or weakness, of a mass democratic politics of agrarian reform" should not revolve solely around the ANC.[348] Bernstein contrasts two different explanations for the weakness of agrarian politics. The "stereotypical and static" position is that rural civil society has lacked the capacity to formulate and struggle for popular democratic demands.[349] Key dimensions of this incapacity are described as rural people having been deprived of productive assets and the means of rural economic activity, their location in areas that militated against them struggling for improved infrastructure and services (as was the case with urban populations) and their being bound by disabling ties of personal dependence.[350] Bernstein's main complaint about this approach is that it fails to take adequate account of the fissures that run through rural communities. These were not homogenous communities that had lived together since time immemorial. Rather they were characterised by deep divisions relating to class, gender, age, and so on. He posits that these divisions should be factored into any account of the weak nature of rural resistance. Levin and Weiner work within the frame promoted by Bernstein, but they argue that the effects of class differences in rural society were mediated by those of migrancy, community and patriarchy.[351] I agree that it is unnecessary to set up the two positions summarised above (ie community versus class) in opposition to one another. The factors put forward by both positions are useful in explaining the dearth of rural resistance in South Africa in the 1980s. Even Bernstein appears ultimately to overcome this false

[346] Quoted in Walker, 2005, 811
[347] Ibid, 2005, 812
[348] Bernstein, 1996, 34
[349] Ibid, 1996, 37
[350] Ibid, 1996, 37
[351] Levin, R. & Weiner, D. 'The Politics of Land Reform in South Africa after Apartheid: Perspectives, Problems, Prospects' in The Journal of Peasant Studies, Vol 23, Numbers 2 and 3, 1996, 93 – 119

dichotomy by putting forward a pragmatic synthesis position of his own. He notes that the politics of rural civil society have generally been "introverted, both socially and spatially".[352] The limiting factors – historical dispossession, physical location, ties of dependency, class, gender and other divisions – made it difficult for rural people to organise; they militated against the formation of a rural social movement. The absence of a movement has both "puzzled activists and been lamented by them".[353] Whilst I empathise with the sentiment, activists should not be puzzled. As James writes,

> there is no easily-defined social grouping – no category of specifically 'rural' people, whether the 'landless poor' or 'small farmers' – which is in a position… to act on its own behalf in order to demand land access from the state. Regrets expressed by land activists, lawyers and analysts about the ANC's failure to attend to its landless constituents, or the failure of the landless to organise on their own behalf, are thus somewhat misguided.[354]

For my purposes, the key point is that there was no significant grouping of rural people advocating in favour of a radical programme of land reform (one built on the nationalisation of land and the confiscation of land rights acquired through colonialism and apartheid).[355]

Levin and Weiner explore the limitations of rural struggles in the 1980s in further detail. They point to two underlying factors that affected struggle in this period. First they note that the United Democratic Front (UDF)/ Mass Democratic Movement (MDM) as well as the Congress of South African Trade Unions (Cosatu) did not have much of a presence in rural areas. Instead the key organisers there were residents' associations and youth congresses. This was a limiting factor because these institutions alienated the elderly. Second they argue that rural struggle was insufficiently linked to the land question.[356] Rather it was focussed either on effecting 'regime change' or on narrower, local issues. Despite these limitations of rural struggle, Levin and Weiner nevertheless assert that the unbanning of the ANC in 1990 had a further demobilisation effect in rural areas.[357]

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[352] Bernstein, 1996, 39
[353] James, D. 'Tenure reformed: policy and practice in the case of South Africa's landless people', Paper presented at EASA conference panel "Ethnographies of Governance", Copenhagen, August 15 -18 2002, 3
[354] James, D. Gaining ground? 'Rights' and 'Property' in South African Land Reform, Routledge-Cavendish: Oxon, 2007, 254
[355] In contrast to the lack of mobilisation around the property clause, Klug notes that "the three most important areas of mobilisation and contest involved issues of gender, ethnicity and labour" (Klug, H. Constituting democracy: Law, Globalism and South Africa's Political Reconstruction, Cambridge University Press: Cambridge, 2000, 110). Mobilisation produced very clear constitutional outcomes in these sectors.
[356] Levin & Weiner, 1996, 108
[357] Ibid, 1996,101

Before delving any further into the specifics of the South African transition, there is a need to comment briefly on a further aspect of the international context in which transition unfolded. The 1980s and 1990s witnessed the rise to hegemony of human rights discourse, as a central component of so-called third way politics.[358] Amongst other things, this discourse holds that a country's economic success is dependent on appropriate governance arrangements being in place.[359] The end of the cold war added considerable impetus to this discursive phenomenon. The rise of human rights discourse had numerous consequences, including a shift to constitutionalism across the world and the southern African region (eg Namibia). By the early 1990s, international development aid focused on promoting the rule of law and constitutionalism.[360] Klug is so sure of the importance of global discursive influences that he argues that "the vast majority of the world's constitutions reflect the appropriation of a heterogeneous range of constitutional principles from the prevalent international political culture".[361] From the mid-1980s, the ANC began shifting from its support for parliamentary sovereignty to constitutionalism. An early sign of a shift was the 1985 ANC decision to set up a legal department, under the leadership of Zola Skweyiya.[362] Tellingly a year later, it shored up and sharpened its legal focus through establishing a constitutional office in the President's office.[363] These decisions yielded fairly quick results; in 1988 the ANC published proposed guidelines for a democratic constitution, including those dealing with a bill of rights.[364] The key point for my purposes is that the ANC had already taken decisive steps towards an embrace of constitutionalism by the late 1980s. For Klug, this shift is (at least partially) attributable to the international discursive context. It is equally true that the ANC's turn to constitutionalism was founded on its well established and frequently articulated belief in foregrounding the issue of human rights. Perhaps the most interesting development in the ANC's approach to human rights in the 1980s is that it shifted from prioritising the (group) rights of the African people, to an emphasis of individual rights. This was partially in response to the NP's promotion of minority groups rights.[365]

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[358] This politics advances technical solutions in place of mass-based organization. Again, I acknowledge Grinker's commentary here.
[359] Klug, 2000, 66, 67
[360] In the mid-1990s, donors readily supported BRC's work in the area of the democratisation of local government structures and processes.
[361] Klug, 2000, 67
[362] Ibid, 2000, 77
[363] Ibid, 2000, 77
[364] Ibid, 2000, 109. The ANC's justification at the time for its support for a constitutional bill of rights, as a strategic manoeuvre to allay the fears of the white minority, is neither here nor there.
[365] Ibid, 2000, 77

Dolny made a renewed effort to put rural issues onto the ANC's agenda in 1990; she organised a workshop in Lusaka in early February.[366] The workshop took place as scheduled, but was overshadowed by FW de Klerk's famous speech on 2 February, which unbanned the ANC and announced the imminent release of Mandela, amongst other things. The workshop was opened by Pallo Jordan (a senior ANC leader). After re-asserting the basic thinking underpinning the theory of two-stage revolution, he wondered whether land dispossession was still "the cardinal national grievance" which could "give coherence to a revolutionary strategy".[367] The reason that he considered it necessary to pose this question was that "the land question has not in recent years been a rallying call to mass struggles… the profile of the land question and the rural areas as sites of struggle has declined since the 1960s".[368] In answering his own question, he downplayed the impact of the changes in the global and national contexts, conceding only that the "accents in which we speak today may have altered slightly in view of recent developments". Rather unconvincingly, he stuck to the 1985 position of the ANC, which asserted "the significance of the rural areas for a strategy of people's war".[369]

Jordan's comments were neither realistic nor informed. Already in 1988, the ANC had announced "its intention constitutionally to protect property".[370] Klug probably downplays the ANC's intentions and agenda when he asserts that its 1988 Draft Bill of Rights "only protected… limited rights to personal property".[371] Despite its endorsement of the constitutional protection of property rights at this early stage, the ANC came under further pressure to adopt an even more moderate land reform agenda. For example, the South African Law Commission attacked the ANC's bill as providing, "in a manner which hardly disguises the aim, for nationalisation of private property without objectively testable norms for compensation".[372]

Within a few months of the February workshop, there was confirmation that the ANC would not assert radical proposals on land reform in the negotiation process. By then, Weideman

[366] Dolny, 2001, 34
[367] P Jordan quoted in Ibid, 2001, 38. Interestingly, Drew traces the origins of the two-stage theory in socialist circles to the Native Republic Thesis, which was adopted by the Comintern in the late 1920s. It read: "the national question in South Africa, which is based upon the agrarian question lies at the foundation of the revolution in South Africa" (1996, 60).
[368] P Jordan quoted in Dolny, 2001, 38
[369] P Jordan quoted in Ibid, 2001, 38
[370] Klug, 2000, 125
[371] Ibid, 2000, 126
[372] Quoted in ibid, 2000, 126

notes, internal congress discussion became nuanced and cautious; all of a sudden the comrades were considering issues such as "regulated land markets, the re-emergence of sharecropping as a solution to landlessness, the development of a black commercial agricultural sector and safety nets for the rural poor".[373] Quoting Dolny, Weideman argues that it was in October 1990 that the ANC "really explored" the limitations of nationalising land "for the first time".[374] This is not to say that the left within the ANC conceded defeat immediately and quietly withdrew. Dolny recalls that activists outnumbered bourgeois intellectuals in the self-same October workshop, and maintained their call for the nationalisation of land. As at many times in its history, in the early 1990s the "ANC needed to do some fancy footwork to satisfy the diverse interests in its broad alliance". [375]

By 1990, the ANC had set up a Land Commission (complete with Regional Commissions) to formulate its policy positions. Although the Commission was only in place for a couple of years (before being subsumed into the ANC's department of economic planning at the end of 1992), this was a crucial time for the formulation of ANC positions.[376] In fact, Weideman asserts that the ANC's "real policy work around land issues" started in 1991.[377] At this crucial time, it was conservative view-points – for example that property rights should be constitutionally enshrined – which held the day. A discussion document drawn up in March 1991, entitled 'ANC position on the land question', read as follows:

> Some people think that the answer to the land problem is to nationalise the land. But it is not the easy solution that we used to think it was. In Mozambique the government nationalised the land but the people did not have tools, seeds, and skills to use it properly. In the Soviet Union, land which was state-owned and has been farmed collectively is being redistributed to individuals because people have won their popular demand for land to till as their own… Some people say that if land is nationalised the banks will be in crisis and foreign investors will be scared off. They may take their money out of the county. We might also be faced with international sanctions.[378]

[373] Weideman, 2004, 6
[374] Ibid, 2004, 6
[375] Dolny, 2001, 50. Later, the Land Commission caused a stir by proposing a wealth tax to fund the payment of compensation to people/ institutions expropriated for purposes of land reform (Klug, 2000, 127).
[376] In June 1991 the commission prepared guidelines for the development of a land policy, and a month later the ANC adopted a Land Manifesto at its National Conference (Klug, 2000, 127).
[377] Weideman, 2004, 6
[378] African National Congress (ANC), 'ANC position on the land question', March 1991, Unpublished discussion document for the ANC National Conference June 1991, catalogued in BRC Resource Centre

Conservative views were adequately strong and pervasive within the organisation by mid-1991 that a senior ANC leader expressed "dismissive impatience" with those who questioned "the political need to accept constitutional protection for property rights".[379]

In the wake of the collapse of the Soviet Union, the burgeoning human rights discourse quickly emerged as hegemonic on the world stage.[380] As Klug argues, "the left- and right-wing libertarian revolt against government interference" that characterised the 1990s, may "be traced to shifts in international political culture related to the discrediting of state socialism. This development produced a greater emphasis on property rights, particularly private property rights, in both international and national discourse on fundamental rights".[381] Similarly, Wilson asserts that by the mid-1980s human rights discourse was regarded "as a universal panacea to authoritarianism".[382] There is little doubt that human rights discourse increasingly influenced and informed ANC policy discussions from the mid-1980s onwards, across a range of topics, including land and property. Significantly, the discourse smoothed the way for a broader acceptance of the need to protect property rights through adequate legal and other mechanisms. Albie Sachs' input to a conference on property rights hosted by the Community Law Centre of the University of the Western Cape in 1993, illustrates this very clearly. [383] The framework within which he situates his exposition of property is one of human rights, which he contrasts with that of power. "In a power framework, property represents exclusivity and inequality. In a human rights context, however, property is something to which all can aspire equally, which deserves equal respect, independently of quantity or value".[384] For Sachs and the ANC, the key was to construct a system of property rights that would have legitimacy for all South Africans.[385] Sachs was unambiguous in asserting that such a system would involve "constitutional rights, legislation, appropriate institutional mechanisms, and so on".[386] More specifically, he acknowledged that one of the "key dimensions" that would have to be addressed in "a comprehensive system of just and secure rights in land" was "appropriate

[379] Walker, 2005, 812
[380] For more on this phenomenon, see the next chapter.
[381] Klug, 2000, 63
[382] Wilson, 2001, xv
[383] Sachs was influential in formulating ANC positions during the negotiation process (see Klug, 2000, 129).
[384] Sachs, A. 'Property as a human right', Chapter 12, in Land, Property Rights and the New Constitution, Community Law Centre (University of the Western Cape): Cape Town, 1993, 141
[385] Ibid, 1993, 141
[386] Ibid, 1993, 142

acknowledgement of existing title and of the intimate relationship that many owners have to the land".[387]

James seems to draw on this kind of evidence in postulating that the ANC's support for property rights should be understood as a predictable reaction to apartheid. In the apartheid scheme, denial of land rights had "been central in denying the entitlements of the citizen", therefore provision and protection of land rights were considered to be "an important part of the planning that underlay South Africa's transition from an apartheid to a constitutional state".[388] Or put another way, she says that land rights can be regarded as "an idiom for the citizenship once denied to South Africa's black majority".[389] Indeed, by the time the ANC entered the negotiating chamber, it was already supportive of or at least open to constitutional protection of existing property rights. Therefore, the property clause should not be understood as a product of compromise, but rather one of consensus.

There was undeniably a bloc within the ANC – closely linked to the non-governmental (NGO) sector – that did oppose constitutional protection for existing property rights.[390] However, this group was up against a much more powerful grouping within the ANC, comprising amongst others the urban bloc (which favoured an extension of freehold title into the townships) and the powerful exiles (who were convinced by the international consensus that property was fundamental to economic and political development). Apart from the fact that the views of this grouping were aligned with white interests, they were also supported by a number of powerful forces such as the World Bank.[391] In 1993 the World Bank funded a major research programme in South Africa, which recommended that land reform be implemented within a market-based paradigm in which property rights were secure. Not surprisingly, the rural lobby did not prevail - within the broad church that was and is the ANC - in its opposition to a property clause.

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[387] Ibid, 1993, 144. Other factors that he mentioned that served to reinforce his support for acknowledgement of existing tile included maintaining food supply, and "avoiding further bloodshed over the land" (1993,144).
[388] James, 2007, 11
[389] Ibid, 2007, 10
[390] It can be noted that future Minister Hanekom was part of this lobby. As noted by Lodge, Hanekom had a close relationship with the National Land Committee (Lodge, T. Politics in South Africa: From Mandela to Mbeki, Indiana University Press: Bloomington and Indianapolis, 2002, 79). This lobby used various strategies such as mobilisation to advance its cause. The most notable instance of such action was mass protest against the constitutional protection of property rights at the World Trade Centre in Johannesburg in September 1993 (Levin & Weiner, 1996, 108).
[391] Lodge 2002, 73. As much as it is necessary to take note of international interests and discourses, Klug takes the argument too far by suggesting that this was the main reason that the ANC dropped nationalisation (2000, 136). The weakness with this argument is that it denies the geo-class composition of the movement.

A further factor that accounts for the receptiveness of the ANC to protecting property through legal mechanisms is the respect of the congress movement for liberal legalism. From the time of high-profile political trials such as the Treason and Rivonia Trials onwards, liberal lawyers have been held in high esteem within the congress movement. Moreover, some of the most powerful leaders of the ANC at the time, such as Mandela and Tambo, were trained lawyers. James thus strikes a particular chord when she asserts that "the connection between land and citizenship was also fashioned at the point where law and society intersect".[392] Her reference is not the trials of the 1960s, nor the educational credentials of congress leadership, rather it is that amidst the tyranny and lawlessness of apartheid in the 1980s "a liberal social and legal culture" remained intact.

> While an increasingly coercive regime was enforcing a racial order in which African customary law, territorial segregation and the denial of property ownership were tools of subjugation, human rights lawyers and the NGOs with which they worked hand-in-glove were using liberal visions of the law, intersecting with ideas on African customary rights, to subvert this. It was through the interactions between such lawyers and their dispossessed African clients, in the years leading to South Africa's transition, that the connections between land ownership and citizenship were partly forged.[393]

Klug takes issue with this view, dismissing the claim that broad-based faith in the judiciary was based "on the past, or the perceived legitimacy of the South African legal system". [394] Instead, he holds that this faith derived from the open-endedness of constitutionalism. For victims of apartheid, constitutionalism promised protection against injustice and oppression, and for the old ruling elite, it offered restraint from arbitrary redistribution. Grinker suggests that the rise of liberal constitutionalism should be placed in the context of ANC weakness and the collapse of the Eastern Bloc. Specifically, he points out that the ANC and even the unions (to some extent) were materially dependent on foreign donors, and thus susceptible to outside influence. These factors gave NGOs and liberals within the ANC "disproportionate influence" in the negotiations process.[395]

The ANC that entered the negotiation process was dominated by the bourgeois forces within its ranks.[396] As Bernstein writes, "the circumstances of the transition, and the course

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[392] James, 2007, 12
[393] Ibid, 2007, 12
[394] Klug, 2000, 181
[395] Grinker, personal communication
[396] Levin & Weiner, 1996, 97. Grinker maintains that many radicals were prevented from returning from exile until negotiation processes were already underway (personal communication).

of negotiations, enlarged the political space and influence of the statist tendencies in the ANC and the aspirant petty-bourgeois and bourgeois elements of its heterogeneous (inevitably) class alliance". [397] The assertion that bourgeois and statist tendencies dominated the ANC at this time is borne out by considering both the negotiating stance of the non-statutory block in the early 1990s and "the extreme caution, indeed conservatism, of the economic and social policies of the GNU".[398] Because of this, it is not surprising that an overall outcome of the negotiations was elite pacting,[399] or perhaps more accurately, elite cooption.[400] The latter term recognises that the relation between the statutory and non-statutory forces was not equal; it was a power relation with the former dominant. Nevertheless, the outcome of the exchange was that elites from both sides of the political spectrum emerged as the dominant players and secured deals that had the effect of preserving the economic fundamentals forged in the eras of segregation and apartheid, through the transition into post-1994 South Africa. If one takes land for example, the continuities from National Party land reform to ANC land reform are much stronger and more significant, than the discontinuities. As Weideman writes, the National Party "laid significant groundwork for subsequent land reform policy. This includes… a commitment to the upgrading of tenure rights, adherence to free-market policies, agricultural market liberalisation and the introduction of a partial grant for land acquisition".[401]

Before moving on, I should emphasise that I do not mean to advance trite or superficial arguments about the transition. I take note of the views of scholars like Klug who assert that its history "demonstrates that the process of negotiations was accompanied by unprecedented levels of violence and political mobilisation, belying the notion of a simple consensus. Rather it indicates a constant struggle for political advantage and the fragmentation of power which required political accommodation under the threat of mutual destruction".[402] Arguably though, the violence and mobilisation were motored not by the

[397] Bernstein, 1996, 35
[398] Ibid, 1996, 35
[399] Levin & Weiner, 1996, 94. Ironically, at the time of writing, in mid 2008 Levin was the Director-General in the National Department of Public Administration, of the South African government. Also, I argue that Levin and Weiner's perception of elite-pacting should have deterred them from claiming that the ANC position on land rights circa 1992/3 was contradictory in that it "was progressive with regard to redistribution targets", yet enshrined existing property rights (1996, 108). I maintain that Levin and Weiner over-estimate the ANC's progressiveness in relation to redistribution policy. Subsequent policy developments, specifically the adoption of what can be described as a tokenist subsidy-based approach to redistribution, which has proved ineffectual in actually redistributing land, indicate that the ANC's apparent progressiveness in 1993/4 was little more than a parroting of World Bank targets, without any conception of how they would actually be met.
[400] Grinker, personal communication
[401] Weideman, 2004, 8
[402] Klug, 2000, 70

negotiations as much as the momentum that had built up through political processes in the 1980s. Klug's argument is not compatible with the overwhelming evidence of more convergence between the negotiating parties (certainly on the property clause) than conflict.

In order to complete my revision of the explanation for the property clause, I am left with one outstanding issue, namely why the wording of the property clause was one of the last sections of the constitution to be finalised. Instead of arguing that delays were caused by the doggedness of the contest, I maintain that they resulted from the incompetence and indifference of the negotiators in relation to land issues. An anonymous participant in the negotiation process told Weideman that there "is a perception that land reform was a high profile issue at Codesa, but the ANC negotiators were not really interested in land reform".[403] Chaskelson provides more information in this regard. His general thesis is that "the drafting and negotiating processes at the World Trade Centre were much more haphazard than is generally imagined".[404] One of the primary reasons for this is that none of the members of the 'Ad Hoc Committee on Fundamental Rights', which was responsible for drafting the property clause (amongst other clauses in the Bill of Rights) had legal expertise in matters pertaining to land and property.[405] As a result of this incompetence, the committee spent considerable time dealing with peripheral land issues;[406] there were no fundamental, serious contests unfolding behind those closed doors. Not only were the negotiators easily side-tracked, they also floundered at the points of convergence. For example, despite the fact that they agreed that the state should be afforded leeway in exercising expropriation, they opted for the restrictive term 'public purpose' instead of the more enabling term 'public interest', in the expropriation clause.[407] The delays in finalising the property clause were an imbroglio; Chaskelson calls the process a "comedy of errors".[408] Klug seems to concur with Chaskalson's view that "the final outcome… was as much a result of serendipity, legal ignorance and the particular quirks and concerns of the individual negotiators, as the logical product of an informed or even interest-based political debate and compromise".[409]

[403] Ibid, 2004, 7
[404] Chaskelson, 1995, 223
[405] Ibid, 1995, 229, 230. Walker agrees that the property clause was "clumsily drafted", but she insists on characterising it as "compromise" (Walker, 2005, 815).
[406] Chaskelson, 1995, 230
[407] Klug, 2000, 133
[408] Chaskelson, 1995, 237
[409] Klug, 2000, 133

When the ANC was confronted by progressive forces on its decision to uphold the property clause in the constitution, shortly after the finalisation of the said negotiations, it chose to assume the pose of a defeated warrior. For example, Border ANC media officer, Mcebisi Bata, had the following to say to land activists in the Eastern Cape on 4 December 1993: "Regarding the property clause, the ANC was defeated. This is still a struggle and we will have to fight it".[410] Similarly in March 1994, in a meeting between Mandela and black rural constituencies, Mandela apparently asserted that the ANC had "made a mistake in not consulting affected communities and relevant service organisations". [411] He gave his audience the impression that the property clause would be reviewed once the ANC came into power.

> Dr Mandela… went on to give us a lesson in inclusive processes and in the politics of negotiations. He indicated to us that although the constitution is not perfect the strides that were made in the political transition are significant and that because of some of these interim compromises an election is going to be held. On what is going to be done about the [compromise] clauses Dr Mandela… referred us to the RDP which states (through our lobbying) that any legislation which hampers Land Reform should be reviewed… [W]e can assume that the 'balancing act' is responsible for [the property clause, and that this clause falls] into the category of legislation which is going to be reviewed.[412]

Nevertheless, the property clause was not substantively altered after the ANC came into power, neither was it challenged (let alone removed) after the ANC achieved a two-thirds majority in the National Assembly in 2004.[413] My reading of the evidence suggests that it was convenient for the ANC to articulate a radical rhetoric in its direct exchanges with progressive forces, long after it abandoned the notion of pursuing a radical programme of land reform.

When opening a conference on land redistribution options in October 1993, its Secretary General Ramaphosa referred honestly to the ANC's neglect of land issues.

> The land question appears so difficult, so laden with emotion, so ridden with layers of competing interests, that we always wait for a more convenient moment to deal with it. Now is never the time. There are always seemingly good reasons for

[410] BRC, 1993
[411] N Mandela quoted in Pearce, B. 'Report on meetings as a follow up to the Community Land Conference with ANC, NP, TEC, IEC', March 1994, Internal NLC document catalogued in BRC Resource Centre
[412] Ibid, 1994
[413] This is the parliamentary majority required to effect constitutional amendments.

> avoiding the land question; we do not want to rock the constitutional boat; we must give priority to putting new government structures in place; we must first get the economy going.[414]

Fourteen years later, commenting on country-wide consultation processes in the run-up to an ANC policy conference in mid-2007, NEC member Moleketi acknowledged that "the most frequently mentioned criticism… was the absence of a coherent vision for development in the rural areas".[415] The ANC was not interested in effecting rural transformation in 1993, and it remained indifferent by mid-2007. It will take a real shift of class, demographic and other forces to change this.

An overview of some recent theoretical work on property[416]

In order to further deepen our understanding of the origins and purpose of the South African Property Clause, I will now outline some recent theoretical propositions on property. With the collapse of the Soviet Union, the emergence of intellectual property as a key factor of production in contemporary capitalism, and other developments, there has been renewed international attention on property studies, in the last twenty years. A key notion in this literature is consideration of property as a "native concept".[417] This notion suggests that property is basic, central and foundational to a host of other important issues and topics that have defined the nature of lived reality for the past few centuries. As Verdery and Humphrey put it, "From early political thought onward… some sort of property concept was central to thinking about a whole nexus of themes: civil government, forms of economy, gender, morality, individuality/ personhood, work, entitlement, conquest".[418] Written in Foucauldian terms, one would say that the notion of property has been at the centre of the regimes of truth in force since the eighteenth century.[419] Property is

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[414] Ramaphosa, C. 'Opening address by the Secretary General of the African National Congress', at Land Redistribution Options Conference, hosted by the Land and Agriculture Policy Centre (LAPC), October 1993, copy held in BRC resource centre, 2

[415] Moleketi, J. 'ANC 'ladders' to give the poor a rung to climb', in Sunday Times (Business Times), June 17 2007, 8

[416] The overview focuses on a 2004 publication edited by Verdery and Humphrey (K. Verdery & C. Humphrey (eds), Property in Question: Value Transformation in the Global Economy, Berg: Oxford, 2004). References to thinkers such as Locke and Proudhon are included because of their featuring in this work.

[417] For example, Verdery, K. & Humphrey, C. 'Introduction', in K. Verdery & C. Humphrey (eds), Property in Question: Value Transformation in the Global Economy, Berg: Oxford, 2004, 1

[418] Ibid, 2004, 3. Writing about South Africa in the 21st century, World Bank economist van der Brink is almost parrot-like in trundling out the line. "[T]he promise of broad-based ownership of land is not so much about cheap politics, but about democracy, economic growth and higher living standards for all" (Van der Brink, R. 'Putting land reform on the right track, not fast track', Sunday Times (Business Times), November 26 2006, 6).

[419] In fact, the notion of a 'property regime' is sometimes used. For Verdery and Humphrey, it is a particularly useful expression to draw attention to "the political and institutional frameworks that are often 'disappeared' in discussions of property" (Verdery & Humphrey, 2004, 20).

entrenched in multiple matrices that have constituted the very fabric of our lives. It fosters what Blomley calls deeply-engrained "forms of subjectivity"; it "shapes our beliefs as to what is natural, possible and desirable".[420]

The Blomley quote infers that property discourse performs various functions in society; it is invoked to produce certain effects.[421] Here I focus on the productive effects of the discourse in relation to the economy, democracy and citizenship. Property is a foundation stone of fundamental economic theory, because it constitutes the method by which access to scarce resources is controlled and legitimised. That is, property assigns rights to particular objects (eg a parcel of land), to specific persons relative to other people. This allocation gives the holders of the rights the incentive to use their respective objects productively and efficiently.[422] Through this work, property enables the creation of markets in respect of these objects. The market, in turn, reinforces the incentivising effect of property. Rose summarises the argument by highlighting identification and internalising, as two key roles of property. That is, property "identifies who has what", and thereby it "encourages labour and investment".[423] In relation to its identifying role, Blomley argues that property now operates quite differently from how it did during the feudal era.[424] Whereas in feudal land law, property was "premised on social relations", the contemporary capitalist modern is individualised to an extent and in such a way that it "militates against such forms of social relationality".[425] In this regard, I take note of Mostert's appraisal that South Africa's "legal system has always been biased towards westernised forms of ownership and land title, in particular a civil-law, hierarchical conception of ownership".[426] Blomley's contrast between feudal and capitalist property resonates with comments from Verdery and Humphrey, who note that in today's world property discourse is "associated with processes of individualisation, commodification, the narrowing of 'property' to mean

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[420] Blomley, N. 'Who owns the land? Restitution and the geographies of property', Presented at a Conference called 'Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa', Houw Hoek (Western Cape), 13 – 15 September 2006, 1

[421] Verdery and Humphrey are also interested in the work that property does. "Rather than looking for a better definition of [property], we ask how this concept works, who uses it, for what purposes, and with what effects" (Verdery & Humphrey, 2004, 2).

[422] Ibid, 2004, 3

[423] Rose, C. 'Economic Claims and the Challenge of New Property', in K. Verdery & C. Humphrey (eds), Property in Question: Value Transformation in the Global Economy, Berg: Oxford, 2004, 276

[424] Verdery and Humphrey recognise that property is a "is a protean idea that changes with the times" (Verdery & Humphrey, 2004, 1). This does not contradict with their assertion that it is a 'native concept'. Instead it allows for a historical approach to property.

[425] Blomley, 2006, 1, 3

[426] Mostert, H. 'Beyond Richtersveld', Presented at a Conference called 'Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa', Houw Hoek (Western Cape), 13 – 15 September 2006, 8

ownership".[427] So, property – as a native concept – remains a fundamental concept for "capitalist economic circuits".[428] More specifically, the increased legitimacy of 'private property' is closely associated with the contemporary phase of neoliberal capitalism.[429]

Another key and consistent aspect of the economic work of property is that it performs "processes of appropriation".[430] Hart and Sitas argue that it is more useful to understand dispossession implicit in the practice of property "as an ongoing process", rather than as an occurrence that is necessary en route to industrial capitalism.[431] There are many examples, in different periods of history, to demonstrate this effect of property discourse. Colonisation was based on arguments pertaining to property, which related to land and plough agriculture, amongst other things.[432] In the contemporary period, Kamerie-Mbote highlights various "new forms of dispossession".[433] These include global trade rules and standards of environmental management, the emergence of technologies that undermine traditional livelihood strategies such as seed saving, and "biopiracy" (the seizure and unauthorised commercialisation of local traditional resources and knowledge, without benefit to the local peoples concerned).[434] Similarly Verdery and Humphrey refer to the recent sudden increase in intellectual property claims as a modern instance of "enclosing the commons", alternatively as a "massive intellectual land grab".[435] That is, these practices result in the expansion of individual and corporate domains, at the expense of a shrinking, reconfigured public terrain. This insight - that seizure, violence and dispossession are integral to and essential components of property - helps Blomley to understand that "[p]roperty is unsettled, despite appearances".[436] These appearances, the straight survey lines, the uncontestable cadastral information, the austere title deeds, feign to place property in the realm of the objective, where it is described as a set of facts and figures. But appearances can be deceptive; in this case they mask "unmapped layers of dispossession and prior entitlement, and webs of human and ecological connection and

[427] Verdery & Humphrey, 2004, 11
[428] Ibid, 2004, 2
[429] Ibid, 2004, 18. This phase of capitalism has undoubtedly been buoyed and influenced by the collapse of socialism.
[430] Ibid, 2004, 11
[431] Hart, G. & Sitas, A. 'Beyond the urban-rural divide: linking land, labour and livelihoods' in Transformation, Vol 56, 2004, 35
[432] Verdery & Humphrey, 2004, 4
[433] Kameri-Mbote, P. 'Righting Wrongs: Confronting Dispossession in Post-colonial Contexts', Presented at a Conference called 'Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa', Houw Hoek (Western Cape), 13 – 15 September 2006, 15
[434] Ibid, 2006, 15 - 17
[435] Verdery & Humphey, 2004, 10
[436] Blomley, 2006, 4

distance".[437] This is the broad backdrop to global struggles about property. As Gelder and Jacobs put it, "[o]ne's place is always already another's place and the issue of possession is never complete, never entirely settled".[438] The dispossessed draw attention to the history of possession, that it always involves dispossession. Of course, Proudhon long ago asserted that property is theft. This insight also points to the rather nuanced and unstable relationship between property and restitution, which I will discuss further later in the chapter.

The concept of property has also underpinned the theory and practice of civil government for the past few centuries. More specifically, numerous philosophers and political scientists have stressed the relation between property and liberal democracy.[439] Rose notes that the assertion that property promotes political independence is "one very old argument for property".[440] John Locke theorised that property sets up a specific relation between states and their citizen-subjects.[441] Indeed, "Locke is a critical source of the native theory linking property, prosperity, and democratic practice".[442] The property-owning subject can reliably be expected to act and behave in a responsible manner because of the relative freedom and autonomy that he or she enjoys. Blomley notes that in its contemporary guise, property is defined in strictly "territorial terms, with clearly marked lines between a valued inside and an apparently threatening outside".[443] (This is why it is necessary to erect good fences if one wants good neighbours.) This model presents itself as one that promotes and enables freedom and autonomy, from the will of others, to engage in voluntary market transactions.[444]

Verdery and Humphrey argue that Western property "emphasises 'rights' or entitlements and sees the subjects of property relations as inherently *rights-bearing*; hence the prevailing language of 'property rights'".[445] This discourse is closely linked to the discourse of citizenship. The citizen of a modern nation-state is deemed to be the bearer and exerciser of a myriad of rights, including property rights. That is, rights are available to every citizen, male and female; modern democracy promises a universality of basic rights.

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[437] Ibid, 2006, 4
[438] Quoted in ibid, 2004, 4
[439] Verdery & Humphey, 2004, 3
[440] Rose, 2004, 275
[441] Verdery & Humphrey, 2004, 3
[442] Ibid, 2004, 4
[443] Blomley, 2006, 1
[444] Ibid, 2006, 2
[445] Verdery & Humphrey, 2004, 5

The emphasis on property rights was brought into sharp relief by Maine's dictum at the turn of the last century that "property is a bundle of rights".[446] For Verdery, an emphasis on the rights of property "veils the exercise of power underlying their creation and is itself an element of the power of the property concept".[447] A key element of that power seems to involve the risks, debts and responsibilities of property – which Verdery calls its "darker face".[448] Here we come up against the productive capacity of property; privatisation creates "new *kinds of persons"*, who are required to "be economically responsible persons bearing not just rights but risks and debts".[449]

Another aspect of the property-citizenship axis that should be scrutinised is the assertion that property rights are available to all citizens. An assessment of past and prevailing ownership configurations does not tally with the assumption and assertion of the universality of property rights. Instead, as noted above, readiness or the ability to receive and then bear rights, assumes certain kinds of people and subjects.[450] For example, despite the attempts of the likes of de Soto to make us believe otherwise, property rights are generally beyond the reach of the poor. Nevertheless, the myth of the universality of property persists and it is capable of performing important outcomes. For example, the myth has been important in fostering indigenous land claims.[451]

It is apparent from the above outline of recent theory on property – covering topics such as its identifying role, its inherent tendency to dispossess, its unsettled nature, the myth of universality – that it has an ambiguous and uneasy relationship with restitution. On the one hand, there is no doubt that contemporary property discourse focuses on the here and now. So Blomley is correct when he asserts that property encourages "a certain kind of selfhood that militates against restitution".[452] Yet, on the other hand, the mythologies that are integral to the discourse force some concessions, some measures to include and to assimilate. That is, for property, restitution is a necessary evil. Blomley notes in those

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[446] Alexander, C. 'Value, Relations, and Changing Bodies: Privatisation and Property Rights in Kazakhstan', in K. Verdery & C. Humphrey (eds), Property in Question: Value Transformation in the Global Economy, Berg: Oxford, 2004, 251 – 273

[447] Verdery, K. The Obligations of Ownership: Restoring Rights to Land in Postsocialist Transylvania, in K. Verdery & C. Humphrey (eds), Property in Question: Value Transformation in the Global Economy, Berg: Oxford, 2004, 139 – 159. In the final chapter I present arguments that human wrongs are integral to human rights, so perhaps Verdery's understanding of rights is inadequately critical.

[448] Ibid, 2004, 139

[449] Ibid, 2004, 140

[450] Verdery & Humphrey, 2004, 6

[451] Ibid, 2004, 5

[452] Blomley, 2006, 5

instances when the claims of the dispossessed "are acknowledged at all", these "tend to be bounded and zoned".[453] Writing about restitution in Africa, Kameri-Mbote argues that individual, corporate and institutional property rights (as opposed to communal and informal rights) are typically very strong, and that "[d]eference to private property rights has resulted in reluctance to deal with the injustices accompanying the acquisition of property rights".[454] It is the prevailing balance of forces then, that explains the bounded nature of claims. Blomley elaborates that claims will only be accepted "insofar as they can be discerned and validated according to the terms of the dominant societies".[455]

This process has been explored in detail by Povinelli, in relation to aboriginal claims in Australia. For her, a useful starting point is Marx's understanding that the extension of social abstraction (i.e. law) into indigenous life is an essential characteristic of liberal capitalism.[456] She uses this to explore at least four dimensions of such an extension in the Australian context. That is, she notes that: it enables outsiders and external institutions to adjudicate indigenous claims;[457] it replaces the dynamism and complexity of indigenous social life with a narrow set of supposedly indigenous rules; it paves the way for the installation of "an entire liberal regime of social relations" into indigenous life; [458] and it both diverts public attention away from fundamental contemporary challenges and absolves the state of responsibility for past dispossession.[459] Here I elaborate the first dimension in more detail. The legal framework for aboriginal land claims presented native Australians with "the multicultural proposition", namely "you be yourself for me", or alternatively "you be yourself in such a way that I can recognise you without being undone".[460] That is, they were required to submit claims such that they could be assessed by the state, which masqueraded as a neutral, objective referee. This has the effect of turning "the truth of the local outside itself".[461] More broadly, it enabled the state to enter and manage the realm of "cultural difference".[462]

[453] Ibid, 2006, 5
[454] Kameri-Mbote, 2006, 14
[455] Blomley, 2006, 5
[456] Povinelli, E. 'At Home in the Violence of Recognition', in K. Verdery & C. Humphrey (eds), Property in Question: Value Transformation in the Global Economy, Berg: Oxford, 2004, 193
[457] Ibid, 2004, 193
[458] Ibid, 2004, 188
[459] Ibid, 2004, 203
[460] Ibid, 2004, 195
[461] Ibid, 2004, 195
[462] Ibid, 2004, 194

So, it is argued that one of the key functions of restitution is to whitewash the original process of dispossession. As Verdery and Humphrey write, "[w]hen 'compensation' means redress… it implies a moment of *consent*, which must be elicited – and that is part of what the notion of compensating does: it makes a taking seem consensual".[463] In other words, restitution sanitizes property; it restores the faith and belief of the public in property. This discursive effect of restitution helps to cement the argument put forward here that it should be understood as a component of the knowledge regime of property and not as something outside, which poses a challenge to this regime. Kameri-Mbote sums this up succinctly when declaring that "[r]estitution is about getting people to identify with… forms of property management and to feel that their interests are taken care of through guaranteed access to resources and sharing of benefits even if they are not the owners or controllers of the resources".[464]

Although property is usually the dominant force, the outcome of the engagement between property and restitution is not pre-determined. Blomley is quite correct to assert that restitution can entail "creative forms of re-imagination, and the constitution of new forms of citizenship and engagement with others, mediated by property".[465] This is where my research interest lies, to explore the extent to which practitioners and intellectuals have collaborated around restitution in South Africa to push the boundaries of such re-imaginations; to enable new forms of citizenship. In so doing, I am well aware that the "forms of subjectivity that property fosters are deeply engrained and materially embedded, and not easily cast off in some collective act of re-imagination".[466]

The birth of South Africa's restitution programme

In the above discussion on the evolution of the constitutional protection of property rights, I tried to avoid introducing the parallel debate taking place at the time, namely that relating to the restitution of land rights dispossession during the implementation of segregation and apartheid. I narrowed the focus deliberately, in a bid to clarify and sharpen the arguments. But this choice means that a qualification is required here, right at the outset of this discussion on restitution. I acknowledge that negotiations about the restitution of dispossessed land rights influenced those on the protection of existing property rights and vice versa. In fact, one of my key propositions is that both these aspects should be

[463] Verdery and Humphrey, 2004, 13
[464] Kameri-Mbote, 2006, 18
[465] Blomley, 2006, 1
[466] Ibid, 2006, 7

understood as containable within the discursive regime of property, as outlined above. The reason that this regime accommodated, no, rather called for or required restitution in the South African context, was that the efficacy of its myth of universality was under severe strain. After centuries of wars of dispossession and decades of forced removals, the belief of many black South Africans in the notion of property rights was tenuous. This context is appreciated in arguments formulated by James. Harking to Mamdani's citizenship/ subjecthood dichotomy, and drawing on the recent work of Wilson and Enslin, James argues that the restoration of people's citizenship was a key concern of influential thinkers within the constitution-making process.[467] And significantly, she claims that they saw the restoration of denied and dispossessed land rights as a necessary and fundamental step towards restoring citizenship.

> 'From the outset' land reform was seen as crucial in restoring citizenship because of its earlier centrality in the denial of citizenship. In planners' constitutionalist vision for the new South Africa, citizenship has been explicitly linked to the project of overcoming the past. The drafters of the new constitution saw land as central in defining the rights that had formerly been denied, and its restoration as a means to restore those rights and with them the sovereignty and full citizenship of the African population.[468]

James takes her argument further by referring to the constitutional outcome as a programme of "entrenching and restoring … property rights".[469] Note that 'entrenching' sits side-by-side with 'restoring'; from the perspective of the prevailing property regime these two components of the programme are mutually reinforcing.

This insight and approach is at odds with the majority view. That is, those who see the constitutional entrenchment of property rights as a product of compromise, hold that what the ANC gained in return from the NP was restitution. Thus, Hart for example asserts that the "concrete commitment wrested through the negotiation process was to restitution of land expropriated since 1913".[470] Similarly, Walker puts the ANC and NP at opposite and opposing ends of the negotiation table. The Constitution, she asserts "was a synthesis of two competing political imperatives – atonement for the forced removals of the past that

[467] James notes (2002, 7) that human rights lawyers were prevalent in developing this line of thought.
[468] James, 2002, 7
[469] Ibid, 2002, 15
[470] Hart, 2002, 227

had… come to be emblematic of the evils of that regime, and compromise with the ruling class on property rights, for economic and political stability".[471]

There are three key dimensions of the argument about post-1994 restitution that I develop below. First, I show that restitution was one of the only dimensions of the rural land reform programme that emerged that was anchored in popular organisation. This is why "negotiating the shape of a restitution programme to address [the legacy of land dispossession and population relocation] dominated the land reform debate of the early 1990s".[472] Second, I suggest that restitution, like the protection of property rights, was borne of consensus rather than contest. Third, I outline how constitutionalism and human rights discourse informed the manner in which the restitution programme was conceptualised and established.

During the period of 'grand apartheid' (c1970 – c1990), spatial segregation was implemented and enforced with purpose and without mercy. The apartheid state sought to forcibly remove African individuals, households and communities from areas designated to be part of 'white South Africa'. More specifically, it sought to expel individuals from white cities (section 10 removals) and households from white suburbs (group areas removals), and to uproot communities from white corridors (black spot removals). Furthermore, the apartheid regime used various tactics (eg Bantustan consolidation) to rob thousands of black South Africans of their citizenship. Not surprisingly, many of those under attack resisted, some successfully, other unsuccessfully.

It was because rural communities were so vulnerable to forced removal or incorporation into a Bantustan, because dispossession was happening on a huge scale without most communities being able to resist the apartheid state or even communicate their plight to the outside world, that progressive academics in various universities around the country embarked on a research project aimed at telling the stories and enumerating the land-plight of black rural South Africans. The Surplus People Research Project (SPRP) originated in the eye of the storm of forced removals, in the late 1970s. This project produced an authoritative and comprehensive account and analysis of forced removal in South Africa. (Given the argument of this thesis that there is an urgent need for relevant,

[471] Walker, C. 'Relocating restitution' in Transformation, Vol 44, 2000, 8
[472] Walker, C. "We Are Consoled': Reconstructing Cremin', South African Historical Journal, No 51, 2004, 212

effective public engagement by the post-apartheid history academy, I note that the intervention of the SPRP academics was both relevant and effective.)

A number of land rights organisations emerged out of the Surplus People Research Project. Included amongst these were the Cape Town based Surplus People Project (SPP) and the Grahamstown Rural Committee (GRC), which evolved into BRC in the early 1990s. Naute provides an outline of the establishment of the Grahamstown Rural Committee. He notes that the 'Grahamstown Group' of the SPP team met in Grahamstown on 4 September 1982, to establish a committee "with the broad aims of monitoring and giving up-to-date information on communities in the Eastern Cape who have been or may be resettled; serving these communities with information or any support possible…; and co-ordinating the work of concerned organisations and individuals to these ends".[473] Some of the academics who played a leading role in the organisation in the 1980s included Monty Roodt, Andrew Donaldson, Jeff Peires, Marion Lacey and Andre Roux.[474]

A major focus of the land rights organisations in the 1980s was to assist communities under threat of removal to resist the apartheid state. Thus it is not surprising that, at the end of 1984, they set up a national network called the National Committee Against Removals (NCAR). (This later evolved into the National Land Committee (NLC).) Neither is it surprising that these organisations built up close links with the ANC both inside and outside the country. This is illustrated very clearly in the case of GRC, where staff such as Mike Kenyon, Nic Matabese, Sue Lund and Glen Thomas were all ANC members, and played important roles in ANC policy processes at provincial and national levels.[475] Consequently, they were well positioned to make an impact on emerging ANC policy on land reform.

By 1990 apartheid was in its dying days, and the threat of forced removal that had hung over many rural and urban communities in the mid-1980s had lifted. However, the NCAR /NLC affiliates had established strong links with many communities that had been removed during the 1970s and 1980s, and they had direct knowledge of countless more. Thus they

[473] Minutes of inaugural meeting of the Grahamstown Rural Committee, 4 September 1982, quoted in Naute, W. The Implications of Freedom: The changing role of land sector NGOs in a transforming South Africa, Lit Verlag: Munster, 2004, 19

[474] In 2002, I undertook research into the first decade of GRC life, as part of the preparation for the organisation's 20th year anniversary celebrations. Roodt and Donaldson attended the main event on 15 June 2002, and were recognised for their respective contributions to the organisation.

[475] Personal communication. All four of these people went on to take up senior positions in the Department of Land Affairs in the post-1994 period.

shifted their focus from resistance against forced removals to advocacy for restitution. The emergence of the NGOs gave rural communities a mechanism to mobilise on a scale that had not previously been possible. The NGOs provided resources for those who had been dispossessed through apartheid policies, to come together, organise together and act together. As Hall notes, "the impetus for a programme of land restitution originally came from rural communities that had lost their land within living memory and had the support of a network of solidarity groups and non-governmental organisations around the country".[476] In the early 1990s the NGOs co-ordinated a successful campaign, under the slogan 'Back to the Land'. It is important to note that not all categories of victims of forced removal were represented in the 'Back to the Land' campaign. For example, those removed through the implementation of betterment in the Bantustans were not included. The two categories that featured prominently in the campaign were 'Black spot' communities (for example Riemvasmaak) and those dispossessed through the cancellation of provisos in title deeds (for example Elandskloof). Not surprisingly, these groupings enjoyed "the highest priority" in the public debate on restitution in the transition period.[477] In fact, the former grouping dominated to the extent that little over a year before the Restitution of Land Rights Act was signed into law, plans were afoot that it would "provide an expedited 'fast-track' procedure for restoration of land lost through black spot removals".[478]

James makes fascinating and important comments about the manner in which victims of black spot removals articulated their struggle for reclamation. Noting that they were frequently from missionary backgrounds,[479] she asserts that their narratives stressed the following points, amongst others: "their inviolable right to the land they had bought, the exclusivity of their property and the strength of internal community ties".[480] Sometimes, in order to emphasise the validity of their claims and modernity of their outlook, they eschewed "the customary ways of their 'heathen' counterparts in the homelands".[481] This tallied with the hierarchy of civilisations that was already ensconced within the ANC, namely urban modernity at the top and rural tradition at the bottom. The key point here is

[476] Hall, R. 'Land Restitution in South Africa: Rights, Development, and the Restrained State' in Canadian Journal of African Studies, Volume 38 Number 3, 2004, 656
[477] NLC, 1993, 74
[478] Claasens, A. (on behalf of the 'Land Claims Working Group'), 'Land Restoration and a Land Claims Court', presented at Land Redistribution Options Conference, hosted by the Land and Agriculture Policy Centre (LAPC), October 1993, copy held in BRC resource centre, 4
[479] For example, the Mgwali community outside Stutterheim in the Eastern Cape developed around a Presbyterian Church mission set up in the nineteenth century.
[480] James, 2007, 12
[481] Ibid, 2007, 12

that, other than traditional authorities, the only rural black grouping organised during the transition period was victims of certain forced removals implemented during the era of grand apartheid. This is one reason that explains the emphasis on restitution in the negotiation process. According to Walker, "[t]he energy emanating from local struggles for land restoration… guaranteed the primacy of the restitution agenda above other land issues beyond 1994".[482] I would not go that far, but the relatively high level and large scale of community organisation is a reason that restitution was given pride of place in the land reform agenda.

The NGOs' advocacy arsenal was not limited to community organising and mobilising; they also employed various legal tactics. In the early 1990s, various prominent NGO members and lawyers formed a 'Land Claims Working Group'. This group did considerable conceptual and legal work on a future restitution programme. Before April 1994, it had developed a draft restitution bill.[483]

By the time the ANC entered the negotiation process, restitution was at the top of its rather short list of land issues. The 1992 'Ready to Govern' policy statement read as follows: "Priority will be given to victims of forced removal who, wherever possible, should get land back taken from them by the apartheid state".[484] When lead negotiator Ramaphosa opened a policy conference in October 1993, he reasserted this position, proclaiming that it "is the ANC's view that the legacy of forced removals and dispossession must be addressed as a fundamental point of departure to any future land policy for our country".[485] The manner in which the ANC gave expression to this commitment was by valuing the contribution of the NGO Working Group. As Walker points out, the group "enjoyed close links with members of the ANC's Land Commission and constitutional negotiating team".[486] Other commentators[487] have made the point that some of the key policy makers involved in the constitutional and legislative processes were drawn directly from the NGO sector.[488]

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[482] Walker, 2005, 813
[483] Ibid, 2005, 813
[484] Quoted in Claasens, 1993, 1
[485] Ramaphosa, C. 'Opening address by the Secretary General of the African National Congress', at Land Redistribution Options Conference, hosted by the Land and Agriculture Policy Centre (LAPC), October 1993, copy held in BRC resource centre, 2
[486] Walker, 2005, 813
[487] For example James, 2007, and Naute, 2001
[488] Particular mention in this regard should be made of Anninka Claasens. In the 1980s she worked for the Transvaal Rural Action Committee (TRAC), which was one of the founder members of the NCAR, and in the

Whereas ANC support for land restitution is hardly surprising, there is an argument to be made that the National Party was more open to such a process than is widely believed. In her exposition of the continuities between the land reform programme implemented by the de Klerk's apartheid regime and that implemented by Mandela's democratic government, Weideman points to restitution as one example.[489] She refers to the pre-1994 Advisory Commission on Land Allocation (ACLA) as the "precursor" to the post-1994 Commission for the Restitution of Land Rights (CRLR).[490] This line of argument rankles with the architects of post-1994 land reform policy in general, and restitution policy in particular. Without doubt, one can point to significant differences between the programmes. Also, one can assume that the intention of the Nats in offering its limited restitution programme was to scupper an anticipated post-democracy attempt at thorough restitution. Nevertheless, one cannot wish away the strands of continuity between pre- and post-1994 restitution. Here I draw attention to three relevant facts about the ACLA process. First, because the apartheid government only had de jure authority in white South Africa, the process did not cover the TBVC 'states' (ie the Bantustans). Second, the NGOs did facilitate the lodging of ACLA claims despite initial reservations about engaging with an apartheid process. More specifically, 68 claims were lodged through the 'Back to the Land' campaign.[491] Third, a total of about 1300 claims had been lodged with ACLA by 1993; the majority of these related to urban group areas and rural black spot removals.[492]

By 1993, Walker argues, "the NP had accepted that land restitution need not constitute a fundamental challenge to the sanctity of private property – indeed it could even uphold that".[493] It seems that the National Party negotiators understood that their central demand for the constitutional protection of existing property rights meant that restitution, far from being anathema, was actually a necessary part of the package. They probably recognised that a consequence of protection for then-existing property rights would be recognition that obviously unjust dispossession of previously held property rights constituted unfair state practice, and that the victims of such processes should be accorded restitution.

1990s she played a key role in the drafting of the Restitution of Land Rights Act. At the time, Minister Hanekom frequently highlighted the role played by Claasens in this regard.

[489] For other examples that she cites, see footnote 400 above

[490] Weideman, 2004, 4

[491] National Land Committee (NLC), 1993, 6

[492] Ibid, 1993, 1

[493] Walker, 2005, 813

The key to understanding why the two antagonists found each other so easily on the restitution issue is the hegemonic influence of human rights discourse (as it was in relation to the property clause). Above, I outlined part of (ANC heavyweight) Sachs' elucidation of his human rights approach to property. Not surprisingly, in its quest to deliver a "legitimate system of property rights", it took account of the "consequences of apartheid dispossession". That is, the approach advanced an argument that if property is to be "regarded as a human right then it is something that both the possessed and the dispossessed claim".[494] In his proposed "comprehensive system of just and secure rights", he gave top priority to "the need to rectify the injustice of the past".[495]

Sachs' approach was congruous with the specific restitution proposals that had been formulated by the working group. Informed largely by its experiences of the 1980s, which led it to believe that rights need to be enforceable in court,[496] the NGO group had developed restitution proposals that revolved around law and legalities.[497] That is, it emphasised the need for the restitution process to be conducted in terms of clear, comprehensive legislation, and it placed the primary institutional authority in an independent Land Claims Court. Mindful of some of the usual weakness of judicial processes, the group urged that the court process should be "speedy, accessible and effective".[498] A Land Claims Commission was proposed to champion the cause of the claimants in preparing their respective cases for court. As Walker confirms, the working group was "responsible for designing the basic institutional arrangements for restitution, including a bifurcated structure consisting of both a Land Claims Court and a Commission".[499]The role of the new state was limited to acting as respondent in restitution cases, and settling the financial bill.[500] Because the state would be directly involved in legal battles, pitted against the claimants, it was argued that the Commission (like the Court) should be an independent body. It was hoped that the commission would have a co-operative relationship with the Department of Land Affairs, but the group stressed that

[494] Sachs, 1993, 141. In other words, he bought into the discursive assertion of the universality of property.
[495] Ibid, 1993, 144
[496] Walker, 2005, 814
[497] I should emphasise that legal NGOs such as the Legal Resources Centre were well represented on the group. It was dominated more by activist lawyers than by activist organisers. Weideman notes that the "participation of legal-based NGOs contributed to the legalistic nature of the Restitution Programme" (2004, 8).
[498] Claasens, 1993, 1
[499] Walker, 2005, 814
[500] One of the reasons that the 1994 transition is referred to as a miracle is that there was seemless continuity from the old to the new. Given that the South Africa state agreed to honour and service the debt of the apartheid regime, it was logical that it should agree to take full and direct responsibility for the injustices of that regime in relation to land dispossession.

the former should not be accountable to the latter. All these suggestions seemed objective and logical at the time, but their underlying rationale revolved around a deep suspicion of an untransformed bureaucracy and a determination to insulate the imminent restitution process from the old order. Because of the considerable influence of the group on the ANC Land Commission, its proposals were taken up in their entirety.[501]

The ANC position played right into the hands of the NP. Walker notes that by the early 1990s, the NP "had fervently adopted the idea of an independent Land Claims Court", as a bulwark against what it feared might … be a rampantly socialist ANC government".[502] Walker has understood National Party thinking accurately here; it realised that the transformation of the executive and legislative arms of a democratic government would be achieved more quickly and more comprehensively than that of its judicial arm. Hence the best institutional safeguard against a far-reaching restitution programme would be to situate authority in an independent Land Claims Court. Undoubtedly, the NP's considerable experience of the ways and means of government placed it in a good position to make the judgement. The ANC by contrast, was more an underground movement than a modern-day political party, and had no experience of the realities of government. This accounts for the manner in which it formulated the institutional framework of restitution. There is an indication that the ANC negotiation team had a re-think in this regard very late in the process. Walker quotes Claassens as follows:

> Suddenly we all shifted sides. We had wanted the process to be court-driven because we were so used to people being weak that they needed the law to defend them. And suddenly [the NP] were scared about anything that was going to be politically motivated and they made it conditional, the whole restitution/ property court deal, that it must be a court-driven process… We heard that [the ANC negotiators] had agreed to those terms and we were hoping… that it could be re-negotiated because by then we were all convinced; we had seen that it was going to backfire. The irony is just extraordinary. It became apparent that, actually, the people who were arguing for more rights were the people who were going to be in government and the rights were going to be against the government, and suddenly

[501] Claasens, 1993, 1; Ramaphosa, 1993, 2
[502] Walker, 2005, 814. It should also be noted that the NP's allies such as the South African Agricultural Union and Urban Foundation were also insistent that there should be "a credible and binding juridical process to deal with legitimate land claims" (NLC, 1993, 60).

> the Nats were saying: Ja. … And you got this shifting of positions to do with the fact that people just weren't used to where the power was going to fall.[503]

But it was too little, too late. And so the parties agreed to a constitutional framework that dealt with land issues in three sections. I have already dealt with Section 28 (the Property Clause) above. The sections that dealt with restitution were Section 8(3)(b)[504] and Sections 121, 122 and 123. Section 8(3)(b) can be regarded as the 'Restitution Clause'. It read as follows:

> Every person or community dispossessed of rights in land before the commencement of this Constitution under any law inconsistent with subsection (2) ['no discrimination on the basis of race, colour, etc'] had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.[505]

Sections 121, 122 and 123 laid out the institutional frameworks, as described above.

There is disagreement amongst commentators about how to characterise the Bill of Rights. Wilson argues that it entrenched classic individual rights and largely disregarded socio-economic and welfare rights.[506] Fullard and Rosseau argue the opposite, referring to the variety of commissions established to address human rights issues as "a fleet of institutions of redress and transformation".[507] They claim that this battery of organs of change reflected "the exuberant ethos of social justice and restitution that [was] as much enshrined in the Constitution as [were] individual property rights".[508] This view is not adequately critical because it denies the fundamentally elitist character and outcome of the negotiations.[509] In this regard, Wilson's explanation of why human rights discourse informed the Constitution so strongly, is useful. He holds that human rights discourse triumphed in South Africa circa 1993, not for any noble or progressive reason, but because it developed into the language "of pragmatic compromise, seemingly able to incorporate

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[503] Walker, 2005, 814
[504] Section 8 spelled out the Equality Clause. One of the 'storm-in-a-tea-cup' debates that took place in the constitutional negotiations was whether or not restitution should be dealt with under the Property Clause or as part of the Equality Clause.
[505] Republic of South Africa, Government Gazette No 15466, No 200 of 1993, Constitution of the Republic of South Africa, 1993, Cape Town, 28 January 1994, 10
[506] Wilson, 2001, 6
[507] Fullard, M. & Rousseau, N. 'An imperfect past: The Truth and Reconciliation Commission in transition', in The State of the Nation 2003 – 2004, 2005, Free download from www.hsrcpress.ac.za, 81
[508] Ibid, 2005, 81
[509] Wilson, 2001, xvi

any moral or ideological position".[510] It is the slipperiness and flexibility of the discourse that explains the National Party's preparedness to drop its insistence on the protection of group rights, and settle for the elevation individual rights, coupled with their being shrouded in all manner of liberal checks and balances.[511] Not coincidently, this was the first choice of the business elite, which advocated strongly for a liberal political economy.

The constitutional framework for restitution was in place by the end of 1993. For the following six months the focus shifted to the challenge of formulating draft legislation. Here I will not dwell further on the institutional mechanisms, but it is necessary to outline the key components of the paradigmatic framework that was set into law. Basically, the legislation makes provision for those who were dispossessed of land rights after 1913 because of racially discriminatory law or practice, without receiving adequate compensation. Below I comment on three of these details, namely racial discrimination as the bedrock, the notion of land 'rights', and the 1913 cut-off date.

The restitution process was not designed to address all forms of dispossession, but rather only those effected through racially discriminatory law or practice. Thus expropriation of land necessary for a developmental intervention such as the building of a school did not fall inside the framework.[512] But dispossession originating in any form of racism was understood to fall inside the framework. The act defines racially discriminatory laws as "laws made by any sphere or government and subordinate legislation".[513] This broad definition would include dispossessions that were carried out because of racist by-laws or proclamations for example. Similarly, the act defines racially discriminatory practices to mean "racially discriminatory practices, acts or omissions, direct or indirect, by – a) any department of state or administration in the national, provincial or local sphere of government; b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation".[514] In other words, as long as a dispossession was effected through an action of the state that was racially discriminatory, it would fall within the framework.

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[510] Ibid, 2001, 5
[511] Wilson, 2001, 6
[512] This was confirmed through the finding of the Land Claims Court in the Slamdien case. In this instance, a coloured family was removed for purposes of building a school for the utilisation of the coloured community residing in that group area. The court ruled that the establishment of the school was essentially a developmental action.
[513] Republic Of South Africa, Restitution of Land Rights Act (No 22 of 1994), Government Printers: Pretoria, 25 November 1994, Definitions
[514] Ibid

The policy makers adopted a framework that attempted to accommodate the full range of losses that occurred because of racially discriminating law or practice. The manner in which they ensured an inclusive framework was to accommodate all those who had been dispossessed of any right in land. The act defines "a right in land" as "any right in land whether registered or unregistered, and may include the interest of a labour tenant, a sharecropper, a customary law interest, the interests of a beneficiary under a trust arrangement and the beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question".[515] Therefore it is accurate to say that the act covers the dispossession of any land right that occurred because of state racism in South Africa after 1913.

In February 1994, the NLC and its affiliates organised a Community Land Conference in Bloemfontein. It was the culmination of a mobilisation and consultation process conceptualised by the network and implemented by the affiliate organisations in the provinces. Over 750 people representing 356 communities were brought together to draft and adopt a rural charter.[516] This was one of the largest national gatherings of rural black people ever assembled in South Africa, in the pre-elections era.[517] One of the most controversial demands made in the charter was that the cut-off date for the restitution programme should be 1652. The NLC distanced itself from this position.[518] The fear of the NLC as well as other lobbyists inside and outside the ANC was that the restitution programme could lead to conflicts between various indigenous groupings that had fought one another over land after the era of colonisation commenced.[519] After much debate, the policy makers – after May 1994, under the leadership of the first ANC Minister of Land Affairs, Derek Hanekom – opted for a finite, limited restitution programme that would address post-1913 land dispossession. 19 June 1913 was chosen as the cut-off date because that was the date on which the Land Act was promulgated. For purposes of

[515] Ibid
[516] National Land Committee (NLC), 'Press statement from the community land conference: Rural communities challenge ANC, NP, TEC and IEC to take up land issues', 10 March 1994, Unpublished press statement, catalogued in BRC resource centre
[517] Levin & Weiner, 1996, 110
[518] 'Rural people unite around land rights', in Afra News, Jan/Feb 1994, accessed on http://disa.ukzn.ac.za in June 2008
[519] I worked for Surplus People Project in Cape Town from October 1993 to December 1996. I personally attended the Community Land Conference, and as a researcher I was fairly close to the policy discussions taking place within the NLC at the time.

restitution then, the promulgation of the Land Act is taken to symbolise the birth of formal segregation in South Africa.

The restitution programme institutionalised by the democratic government was founded on a general interpretation, or what Walker calls a "master narrative", of South African history.[520] She lists "key elements of this story" as follows:

- as a result of the colonial wars of dispossession and the land policies of successive white supremacist governments, 87 per cent of the land came to be owned by 15 per cent of the population – by whites;
- before that time, once upon a time, people lived in peace and harmony with their neighbours, with nature, with the ancestors;
- under apartheid some 3.5 million people were forcibly removed from their homes and dumped in relocation camps, closer settlements and apartheid townships;
- these relocation areas were deliberately located on the periphery, away from centres of power and wealth;
- people suffered enormously in the removals – families and communities were destroyed, lives were lost, economic potential squandered; compensation received by those removed was minimal or non-existent;
- all this was done in order to maintain white supremacy and/or advance capital accumulation in the hands of a white ruling class.[521]

Walker argues that this master narrative is effective as "political fable", but that it is "increasingly problematic" as the basis for government's restitution programme.[522] One of the reasons for its limitations in this regard is that "it presents forced removals as a story on its own, instead of an important chapter in a much larger story of dispossession".[523] She presents two of the other chapter headings as pre-1913 dispossession, and dispossession effected through private actions.[524] In my mind, restitution is all about political fable because fable is often the basis of fabrication. The negotiators had no interest in uncovering the larger story of dispossession; instead all that they required was very select chapters. I do not think that Walker is right in arguing that the master narrative is increasingly problematic as the basis for restitution; on the contrary it is formative of the

[520] Walker, 2000, 1
[521] Ibid, 2000, 2
[522] Ibid, 2000, 7
[523] Ibid, 2000, 7
[524] Ibid, 2000, 8

myth of the new South Africa. In order to explain why this is the case, I explain why it was impossible at the time for either of the two missing chapters to have featured in the book.

The 1913 Land Act was passed three years after the Union of South Africa in 1910. Union was significant in that it consolidated the Cape, Free State, Transvaal and Natal into one white nation, under one system of government. It was the birth of a new nation, South Africa. South African history begins in 1910; this is when our ongoing modernity, our present, began. As mentioned in chapter one, the raison d'être of the South African nation was to seek a solution to the native question. The essence of the South African way is structured, systematic segregation along racial lines. The first indication of the comprehensiveness that segregationism in South Africa would come to entail was the Land Act, which instituted the policy of physically separating defined race groups in terms of a philosophy of white supremacy. The Land Act is not conceivable outside the project of Union. It is for this reason that there is an argument to be made that the restitution programme is locked into South Africa as a particular nationalist fabrication, one founded on segregation. By selecting 1913 as the cut-off date, the message that the restitution programme broadcasts is that the new South African government will make good only on the transgressions of the old South African government; it will not make good on the transgressions of a variety of pre-South African institutions – more specifically, it will not make good on colonial transgressions. Restated, it will not correct or reverse colonial conquest, and it will not restitute colonial dispossession, which was a prerequisite for Union. By disregarding the dispossession instrumental in and fundamental to the birth of Union, the restitution programme prohibits the undoing of the segregationist South African nation. The most that restitution can do is to reform the segregationist nation. The restitution programme establishes continuity between the 1994 nation-state and the 1910 nation-state.

Given the transition context, it is inconceivable that the restitution programme would have sought to tell the story of property's innate propensity to dispossess. Its mission was to support, not to short-circuit, capitalist development. The dispossession that pre-dated 1913, the centuries of colonial dispossession that followed from 1652, laid the groundwork for the establishment of modern capitalism in South Africa. Colonial dispossession was sanctioned because of its formative work in this regard. Restitution was only able to assist those Africans who had managed to acquire or hold onto property rights despite or, in

some cases, because of the workings of colonialism.[525] That is, it was the descendants of the proto middle classes who had formed the ANC in 1912 who stood to benefit, not the descendants of Maqoma, Cetshwayo and others who had succumbed to the military might of the colonial invaders in earlier centuries. In a sense, the restitution process promised to integrate black proto-capitalists into the national economy from which they had been expelled in 1913. It promised to complete the process of uniting all the interests of capital. But it offered nothing to the descendants of those millions who were already landless, dispossessed and poor in 1913.

It is the limited nature of the South African restitution programme that has led some critics to dismiss it as "narrow, even Thatcherite".[526] In terms of this position, the

> existence of the programme has created an artificial hierarchy of rights and divided different groups of landless people… At the same time, the programme has created an arbitrary ladder of legitimacy to the demands of landless people, and provided an escape route for a government that is not committed to comprehensive needs-based land redistribution as this would disrupt the existing grid of property rights and compromise the country's standing in the eyes of domestic and international elites.[527]

In the words of one of the leading spokespersons of this group, restitution is "part of an effort to distract from the lack of real land reform in the country".[528]

I have argued that restitution is fully implicated in property discourse, and that the South African restitution programme emerged as part of the reformist national-capitalist agenda of 1993. Despite this, it would be mistake to hold that there is no potential to engage with the restitution framework in a critical, disruptive manner. Foucault's general comment about discourses is informative here:

> Discourses are not once and for all subservient to power or raised up against it, any more than silences are. We must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling-block, a point of resistance and a starting point for an

[525] Here one can note communities associated with mission stations and those who were rewarded in the form of land donation for collaborating with the British military.
[526] James, 2002, 15
[527] Hargreaves, S. & Eveleth, A. 'The land restitution programme: Advancing real reform or delaying it?' in Development Update, Vol 4 No 2 (Piecemeal Reforms and Calls for Action), 2003, 92
[528] A Mngxitama, quoted in Hall, R. 'Land and agrarian reform in South Africa: A status report 2004', Programme for Land and Agrarian Studies Research report no 20, Plaas: Cape Town, 2004, 23

> opposing strategy. Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it.[529]

It would be foolhardy to suggest that a critical engagement with restitution, alone, could undermine prevailing power relations. It seems clear that the only conceivable way that restitution could have developed into a hindrance, a stumbling block to property, to neo-liberal capitalism, is if it was integrated into a broader, more comprehensive opposing strategy.[530]

The potential of restitution as a point of resistance lies in the fact that it established a direct relation between the value of that which was dispossessed and the value of that which should be returned. The state, as the respondent in restitution claims, did not have discretion in this regard. Restitution is not about providing a predetermined, pegged subsidy or a government hand-out; instead it is a process that promises to deliver a reasonable measure of justice. It holds redistributive potential, in the context of a generally reformist transition programme. Yes, considerable dispossession pre-dated 1913, but segregation and apartheid confiscated significant property rights from Africans, with significant value. In this regard, Bernstein has contrasted restitution in South Africa, with that in Australia, Canada and the USA, where the descendants of 'first nation' peoples are now "a tiny minority". In these countries, "any success in pressing such restitution claims – for all their symbolic and political significance to those making them – is likely to have only minimal effects on prevailing systems of property rights and the economy (including its distributions of wealth and power)".[531]

In South Africa, restitution had the potential to unlock significant state resources for successful claimants. Du Toit and the team that he headed to review the restitution programme in 1998 understood this clearly. In their report they wrote that restitution "has huge potential to address past injustices, and to deliver significant land and other resources to impoverished and landless communities. It is not bound by the limits of

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[529] Foucault, 1976, 100, 101

[530] I acknowledge Grinker for drawing my attention to the notion of transitional demands, that is a set of demands that together constitute a challenge to existing power relations, but that separately amount to very little. On its own, restitution cannot achieve transformation (personal communication).

[531] Bernstein, H. 'Report to final plenary on issues of livelihood', Presented at a September 2006 conference on 'Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa', Houwhoek (outside Cape Town), South Africa, downloaded from the Plaas web-site on 30 January 2007

programmes constrained by the size of household grants". [532] Similarly, Bernstein understands that South Africa restitution "is associated with notions of redistribution of an asset that can make a significant difference to the livelihood prospects of those able to (re)gain access to land of sufficient size, good quality, and favourable location (including infrastructure and social services)".[533] Finally in this regard, Hall points to the exceptionalism of restitution: it is, she says, "a radical idea that is, in some respects, contrary to the fundamentals of national economic policy in that its success requires some degree of interference with property markets and the vested interests of landowners, the transfer of significant assets to the poor, and the provision of public support in order to support livelihoods".[534]

Full responsibility for lodging claims and partial responsibility for making the cases and formulating the particular restitution narratives, was placed in the hands of potential claimants themselves. Agency in this regard does not rest with the policy makers, legislators or bureaucrats, but with dispossessed communities and individuals and those institutions set up to support them. Civil society was placed at the centre of restitution. This opened the way for historians and other intellectuals to take the opportunity to contribute to the formulation of counter-narratives that would both unlock significant state resources for beneficiaries, and set up hindrances to the exercise of prevailing power relations.

Conclusion

Instead of the 1993 negotiations being characterised by differences and dissensus, they were marked by a confluence of interest and consensus. Elites from both sides of the political divide agreed that capitalism would be retained as the country's economic system, in a de-racialised form. In the case of land, this meant both protecting existing (white) rights and restoring previous-held (black) rights. As noted by former Minister of Land Affairs Didiza, in early 2000: "Looking back we can certainly be proud of the prudence of our constitution makers, who had the wisdom to provide for the restitution of land rights of all dispossessed persons or communities, as a result of racially discriminatory laws or

[532] Du Toit, A., Makhari, P., Garner, H. & Roberts, A. 'Ministerial Review of Restitution Programme', unpublished DLA document accessed in BRC Resource Centre, 1998, 8
[533] Bernstein, 2006
[534] Hall, R. Rural Restitution (Evaluating land and agrarian reform in South Africa series; no 2), Plaas: Cape Town, 2003, 34

practices, on the one hand, while guaranteeing the protection of property rights, enjoyed exclusively by only a few White people over decades, on the other hand". [535]

Instead of 1994 being a point of discontinuity between apartheid and democracy, it is better understood as providing a bridge from apartheid segregation to a more modern, class- and demography-based, type of segregation. 1994 was a point of continuity. It obviously involved some changes, but these were insufficient to bring about transformation or the birth of a new nation or new regime of truth. Instead they allowed the continued existence of the segregationist nation that was born in 1910, albeit in a modern guise.

Restitution was a measure instituted to promote economic continuity, to restore people's confidence in private property. Despite this, the outcomes of restitution were not pre-determined in 1993. By placing the focus on the dispossession of land rights, and placing some agency in the hands of the dispossessed themselves, there was potential that restitution could have undermined the functioning of property in the new South Africa. Restitution had the potential to unsettle property and by extension capitalism, through an emphasis on the violence and exclusions integral to it, through remembering and (re)-imaging pasts that were more social, more human than the present, and by mobilising a politics of grievance. In the following chapter, I turn attention to the actual manner in which restitution was implemented in the post-1994 period, and the effects and outcomes that this implementation produced. In particular, I gauge whether or not the left has managed to realise the potential for resistance that is integral to the restitution process.

[535] Commission on Restitution of Land Rights, Annual Report (April 1999 – March 2000), Government printers: Pretoria, 2000, 2

Chapter 3 – Restitution, truth and reconciliation: the commissioning of a new nation

Introduction

The purpose of this chapter is to provide insight into the outcomes of power relations in the early post-1994 period, in the arena of restitution. It does not attempt to assess the dynamics or details of the clash between the forces of domination and those of resistance in this regard. Such an exercise would require a dissertation on its own. My interest in looking at the outcomes is to try to formulate an understanding of the balance of forces in post-1994 period. I have argued earlier that the outcome of restitution was not a forgone conclusion when its basics were negotiated in 1993. So here I check and assess what has actually transpired between then and now. In undertaking this exercise, I follow a conventional chronological approach; I narrate my understanding of the manner in which restitution unfolded from 1994 to 2008.

In order to sharpen the analysis of restitution-in-practise and its effects, the chapter thereafter provides an overview of the TRC process that unfolded in the late 1990s. This is warranted because restitution, and truth and reconciliation, shared two key characteristics, namely both were driven by commissions, and both were based on essentially historical investigations. In considering the TRC, through an interesting set of commentaries, I find many observations and suggestions directly relevant to the consideration of restitution. Crucially, the exercise helps in my bid to develop a fairly comprehensive view of the regime of truth of the new South Africa and its effects in contemporary society. Because restitution and the TRC process were based on historical investigations and assertions, it is appropriate to assess the role played by historians in these exercises. I consider this issue in the final section of the chapter.

The early years of restitution

All the restitution-related agreements reached in the 1993 negotiations were captured in the Restitution of Land Rights Act, which was the first piece of legislation to be passed by the democratic parliament. The act was promulgated into law on 2 December 1994. In 1995 the Land Claims Court was established under the leadership of Judge Fikile Bam, and the Commission for the Restitution of Land Rights (CRLR) was set up, with Joe Seremane appointed as the Chief Land Claims Commissioner. In addition, five Regional Land Claims Commissions were established, each under a Regional Land Claims Commissioner. By the end of 1995 therefore, the institutional machinery was in place, and

expectations in the land reform community were high that the country was about to benefit from an efficient and far-reaching restitution programme.

From virtually the onset of the restitution process, most of the focus (both inside and outside government) was placed on the settling rather than the lodging of claims. As soon as 1996, the main issue that dominated discussion within restitution institutions, and in civil society and the media was that none of the claims that had been lodged had yet been settled. This focus was sustained throughout the last years of the 1990s.[536] There was considerable fanfare around the settling of the Elandskloof claim on 16 December 1996. However, this event did not mark the beginning of a settling spree, and therefore by early 1997 attention again reverted to the inability of institutional machinery to deliver settled claims. The first comprehensive review of restitution was carried out in that year, by the University of Manchester's Institute for Development Policy and Management. Erasmus was responsible for the section of the review dealing with the administration of claims. Referring to "the present painfully slow rate of delivery", he wrote that by "1 August 1997... over 16,000 restitution claims had been lodged with the relevant Regional Commissions, of which only five settlements had been referred to Court and only one – Elandskloof – had been ratified by the Court and implemented".[537]

The emphasis on settling claims was dominant, but neither appropriate nor particularly useful. As du Toit noted in 1999, "we have been somewhat ill served by the approaches of the media, which have tended to focus almost exclusively on the slow pace of processing".[538] Instead of focusing on claim settlement, the emphasis in the early years should have been placed on lodgement, because the right to restitution in South Africa was not automatic; it had to be claimed. Potential claimants were given a fixed period, until 30 June 1998 (later extended by six months to 31 December), in which to lodge their claims. In other words, the first task of the commission was to elicit as many claims as possible before the cut-off date. Yet curiously, there was little official, media or non-governmental interest in this issue. NGOs were surprisingly passive in mobilising the

[536] Mesthrie, U. 'The Truth and Reconciliation Commission and the Commission on the Restitution of Land Rights: Some Comparative Thoughts', Unpublished paper presented to Conference on the Truth and Reconciliation Commission, History Workshop, University of the Witwatersrand, 11 – 14 June 1999, 16
[537] Brown, M., Erasmus, J., Kingwill, R., Murray, C. & Roodt, M. Land Restitution in South Africa: An Independent Evaluation, Institute for Development Policy and Management (University of Manchester) Paper Series, Paper No 51, Copy accessed in BRC Resource Centre, 1997, 3
[538] Du Toit, A. 'The End of Restitution: Getting real about Land Claims', Paper presented for the Land and Agrarian Reform Conference, Pretoria, July 1999, 3

lodgement of claims. The reaction of BRC to the restitution programme illustrates this clearly.

As noted above, BRC (like other affiliates of the NCAR/ NLC) had been born out of the struggle against forced removal. It had forged close relations both with communities that had been removed, and those that had successfully resisted removals; it had marched side-by-side with the dispossessed in the 'Back to the Land Campaign' and picketed with the landless against the Property Clause. Certainly, one would have expected BRC to attempt to play an effective role in the Eastern Cape Province in facilitating the lodgement of restitution claims. This was likely at the time of the country's first democratic election, when the organisation resolved "to assist community groups in making land claims".[539] However, less than a year later, in January 1995, the organisation changed its position on the issue in deciding "to limit [its] role".[540] Consequently, BRC only undertook "minimal" restitution work in 1995 and 1996. External evaluators appointed to assess the organisation in the second half of 1996 were at a loss to explain its u-turn on restitution. The main reason that staff cited in 1996 for the organisation's decision was that the dispossession of most of the communities that the organisation worked with at the time, did not neatly and obviously meet the legislative criteria.[541] However, senior Regional Land Claims Commissioner (RLCC) employee at the time, Harold Winkler, pointed out that the apparent limits of the restitution programme in its initial phase related to organisational weakness and inexperience, more than to the legislation itself.[542] He noted that if the Commission had been presented with well substantiated cases, it would have had no option but to endorse them. In the light of this, he regretted the fact that the NLC and its affiliates demonstrated "a dwindling interest" in engaging proactively with restitution processes.[543]

In the ministerial review of restitution carried out in 1998, Du Toit et al provided a useful corrective to the misconception that delivery in the first phase of restitution amounted to the settling of claims. "The emphasis in implementation has been on getting lodged claims finalised as quickly as possible. It is interesting to note, for instance, that concern around slow delivery has focussed around the fact that so few lodged claims have been finalised,

[539] Cole, J. & Nyoni, P. 'Evaluation Report on the Border Rural Committee (BRC) for the period 1994 – 1996', September 1996, Unpublished BRC document, accessed in BRC Resource Centre, 15
[540] Ibid, 1996, 19
[541] Ibid, 1996, 23
[542] Ibid, 1996, 23
[543] Ibid, 1996, 23

and not that out of all the 3.5 million people estimated to have been dispossessed, only a fraction have lodged. What is disregarded, in other words, is that lodgement itself should be seen as a kind of 'delivery'".[544] But this was written with only one month left of the extended lodgement period, before the cut-off date of 31 December. The real crisis of delivery in the first few years of the restitution programme (1995 – 1997) was that so few claims generally and so few rural claims specifically, were lodged. In the Eastern Cape/ Free State for example, of the 3891 claims lodged by early 1998, only 624 of these were registered as rural claims.[545]

In 1998 there was acknowledgement that an inadequate number of claims had been lodged and thus it was decided both to extend the lodgement period by six months and to embark on an information campaign (named 'Stake your claim') throughout the year. To some extent, these strategies bore fruit because by 31 December the total number of lodged claims across the country had risen to approximately 63500, from only about 25000 six months earlier.

The little chance existing in 1995 that the restitution programme would amount to anything significant in relation to the prevailing property regime in South Africa had dissipated by the end of 1998. Whereas at least three and a half million people had been dispossessed, only sixty-odd thousand claims were lodged (many of them by individual claimants). [546] In 1995 the restitution programme had had the potential to deal with the legacy of dispossession suffered by three and a half million victims, but from 1998 this possibility had been reduced to executing a measure of justice in relation to sixty-odd thousand claims. Below I suggest some of the factors that contributed to the outcome.

It is necessary to take note of broad contextual developments in South African politics in the immediate aftermath of democratisation. Probably the most significant development in the mid-1990s was the infamously 'un-negotiable' decision of the South African government to adopt a conservative macro-economic policy, known as the Growth, Employment and Redistribution (GEAR) programme. The hallmarks of this programme were an embrace of the market, the withdrawal and shrinkage of the state, and a decision

[544] du Toit et al, 1998, 11
[545] Tyacke, T. 'Information Campaign Research', unpublished BRC document in BRC archive, 1998, 9
[546] Hall, R. Rural Restitution, Evaluating land and agrarian reform in South Africa series, no 2, Programme for Land and Agarian Studies, University of the Western Cape: Cape Town, 2003, 1. Drawing on the Surplus People Project research, Hall asserts that this number of South Africans was dispossessed between 1960 and 1983. Clearly therefore, the number dispossessed from 1913 to 1994 is considerably higher.

not to incur debt to promote development. As Hall puts it, GEAR has produced a "restrained state";[547] effectively government chose to limit its own ability to effect socio-economic change. For example, whereas the apartheid government had spent over R5bn on agriculture in 1988, by 2001 this figure had dropped to R2.5bn.[548] GEAR had a constraining impact on many government programmes, including restitution. More specifically, budget limitations may have narrowed down the visions and expectations of restitution. The scope of restitution after the adoption of GEAR was narrower than it had been before its adoption. This may have had an impact on the manner in which the protagonists conceptualised and implemented processes aimed at encouraging the lodgement of claims.

In retrospect, it was unfortunate that the policy makers decided that the risks of entrusting a claims-based process to an established bureaucracy were greater than giving it to a brand new institution. Having observed the early years of the commission (in both the Western Cape and Eastern Cape) from close quarters, it is clear to me that the compulsion of setting up a new organisation wore heavily on the minds and shoulders of the newly appointed commissioners. The need to secure office space, procure furniture, equipment and recruit staff, and so on, meant that they were necessarily distracted from the key initial task, namely to solicit claims. Mesthrie refers to some alarming facts about the difficulties that the Commission had in gearing up. For example, it took over a year for the Regional Commissioner in the Western Cape, Mgoqi, to recruit a communication officer. The plight of the Commissioner in the North-West was worse; after her first year she had not yet secured permanent office space.[549] In the context of the adoption of GEAR, the commissioners had to think seriously about how to manage all aspects of restitution within a very small budget. I should be specific and to the point here: in 1996/7 the CRLR was allocated a paltry budget of R14m, and in 1997/8 this figure declined to a mere R10m.[550] Clearly, government did not prioritize the restitution process in its lodgement phase.

Concern about budgetary constraints was not confined to the commission. The minutes of a BRC meeting of programme staff in July 1995 read as follows: "there is a problem with the land claims process because restitution is being defined too widely by communities. There are big questions about whether there is enough of a budget for the settlement of

[547] Hall, 2004, 661
[548] Ibid, 2004, 665
[549] Mesthrie, 1999, 16
[550] Ibid, 1999, 17

claims processes".[551] This is an insightful quote in that it reveals the 'hand-brake' effect of BRC staff on potential claimants in the mid-1990s. To an extent, this was an expression and implication of the political culture of the organisation. BRC had been closely aligned with the ANC in the late 1980s; it remained closely aligned with the ANC in the early- and mid-1990s. It was caught up in the euphoria of April 1994 in that it was keen to see the Mandela government prosper. Many commentators have pointed to high turn-over of staff as a factor accounting for the indecision that gripped NGOs after the elections. Naute notes that seven BRC employees left the organisation at this time.[552] Without doubt, the departure/ redeployment of key BRC staff weakened the political intelligence of the organisation. In 1995, it was still able to articulate that pressure needed to be brought to ensure that 'the new government that emerges at local, regional and national levels is responsive to local needs… [that] reconstruction should… provide an incentive for local initiative and participation".[553] A year later, as the quote at the top of this paragraph indicates, the organisation was anxious to limit public participation (more specifically with regard to lodging of claims). However, this is not to say that NGO concern with budget limitations was a specifically post-election phenomenon. In 1993 the NLC had worried about "commit[ting] the country's limited resources to a spate of claims and expenditures".[554]

Perhaps the most important comment in relation to the paucity of lodged claims is that it is hardly surprising. In the previous chapter I pointed to the (class and geographic) character of campaigns such as 'Back to the Land', and took note that the interests of groupings that influenced pre-1994 restitution advocacy processes (especially the 'Black spot' communities) similarly dominated the public debate on restitution in the transition period. Further, I drew attention to the fact that the majority of claims lodged with ACLA related to urban group areas and rural black spot removals. So, it would have been surprising if groupings other than the proto middle classes had managed to organise to lodge claims *en masse*. It would have been particularly amazing if the poor rural masses had lodged claims. Certainly this grouping had no serious backers or champions that they could draw on. The NGOs were not in touch with the rural under-belly circa 1994. There is literature that argues that the key role of NGOs is to mitigate the harshest effects of capitalism.[555]

[551] Quoted in Cole and Nyoni, 1996, 23
[552] Naute, 2004, 38
[553] Quoted in Cole and Nyoni, 1996, 15
[554] National Land Committee (NLC), 1993, 73
[555] Helliker, K. 'Bridging the Gap', Unpublished document prepared for the Africa Groups of Sweden (South Africa Office), accessed in BRC Resource Centre, 2008

They exist to smooth the way for capital. If this is the case, then the role of NGOs in restitution would not be to undermine capitalist property regimes, but merely to facilitate their deracialisation, in a measured, sustainable manner. As I have argued in Chapter 2, the classes best equipped to bear the yoke of property are the proto middle classes, not the poor.

Structural overhaul

In 1997 and 1998, policy attention centred on the inability of the established institutional machinery to settle claims. The 1997 review referred to above identified institutional and structural weaknesses as the key reasons for failure. It singled out the relationship between the commission and the department as the most important structural problem.[556] One of the key underlying issues in this regard was the rather split personality of the Department of Land Affairs (DLA) in the restitution process. On the one hand it was the respondent (on behalf of government), but on the other hand it was required to assist with claim preparation. It was both paymaster and facilitator.[557] This led to tension between it and the commission, which carried the bulk of responsibility as far as claim preparation and administration were concerned. At the time, analysts and commentators looked primarily to the court to speed up delivery.[558] In 1997 the act was amended to give claimants the option of pursuing the restitution of their land rights by going directly to court.

This amendment did not lead to any sudden improvements. The main reason for this was that the court failed to respond to the demands of the situation. Instead, it stuck to its ways, unable to adapt. Those ways, of old-orderliness, legal meticulousness and putting form above content, were clearly evident in the very first judgement of the Land Claims Court, namely the Macleantown case in the Eastern Cape, in 1996. The run-up to that case had been protracted out-of-court processes, including negotiations between the claimants, the white rate-payers in the small town, the Amatola District Council[559] (which had jurisdiction over the hamlet), and the Eastern Cape RLCC. The negotiations had been fraught and contested, but they did yield a draft settlement agreement. As Brown et al put it, the Macleantown proposal represented the “ethos of restitution”.[560] The parties asked the court to ratify the agreement; the court refused. On the face of it, the reasons given by

[556] Brown et al, 1997, 3
[557] Ibid, 1997, 22
[558] Ibid, 1997, 27 - 28
[559] Subsequently renamed as the Amathole District Municipality (ADM)
[560] Brown et al, 1997, 19

the court for turning down the application seem valid; it argued that there were too many gaps in the papers. Amongst other things, the following information/ documentation were missing: a list of individual claimants and an explanation of the details of the land tenure system and dispossession of rights, proper cadastral description of the land, resolutions mandating the signatories of the settlement agreement to act on behalf of the respective parties, and proof of the municipality's power to transfer the land in question.[561] However, as Roux argues, in placing "technical correctness" above "the need to help the Commission in the performance of its duties", the court was effectively constructing a particular relationship with the commission, namely that "of hierophant and acolyte, with the Court initiating the Commission into the sacred mysteries of the law".[562]

The Macleantown decision was not an unfortunate aberration; instead it was a sign of things to come. One of the next landmark decisions made by the Court was taken in relation to the Slamdien case in the Western Cape, where 'coloured' people had been removed to enable the establishment of a school for 'coloureds'. The court rejected the application, arguing that that "there must be a link between dispossession of land under the Restitution Act, and the discriminatory practice that caused such a dispossession, and that this link had to relate both to the exercise of land rights and to the achievement of the purposes of racial zoning or spatial racial segregation".[563] The Slamdien judgement was also a clear indication that the responsible institutions would not allow restitution to undermine or critique forms of development that were not superficially or explicitly linked to racial prejudice, however much they were integral and structurally entwined with apartheid. Like the production of historical truth, the production of legal truth occurs by admitting certain voices and facts, and silencing others;[564] the Land Claims Court silenced the voices that testified to the fact that (apartheid) development *per se* involved dispossession. Roux explains the court predilection and tendency to make conservative decisions as deriving from "the dominant professional legal culture in SA".[565] This culture persisted into

[561] Roux, T. 'Pro-poor court, anti-poor outcomes: explaining the performance of the Land Claims Court', in South African Journal of Human Rights, Vol 20, 2004, 519
[562] Ibid, 2004, 537
[563] Mostert, H. 'Beyond Richtersveld', Unpublished paper presented at a September 2006 conference on 'Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa', 14. This ruling was used to inform decisions in other cases such as Richtersveld, and only abandoned through intervention by the Appeal Court in the early 2000's (Ibid, 2006, 15).
[564] Castillejo-Cuellar quotes Conley and O'Barr as follows: "The law selects among these voices, silencing some and transforming others to conform to legal categories and conventions. Most voices are silenced; those that do survive do so in a barely recognizable form" (Castillejo-Cuellar, A. 'Knowledge, Experience, and South Africa's Scenarios of Forgiveness', in Radical History Review, Issue 97, Winter 2007, 11).
[565] Roux, 2004, 536

the twenty-first century, with its judgements remaining conservative. For example, it passed down very narrow rulings on matters such as discrimination and rights in the important Richtersveld case. These rulings were subsequently overturned in the Supreme Court of Appeal.[566] Mostert has a different take on the character and the role of legal institutions in the restitution process. She credits "judicial activism" for what she perceives as a "broadening of the focus of the restitution programme" and argues that "the parameters of restitution have been and are continually being challenged on a level more forceful than policy can hope to be; the judicial level".[567] This view is inadequately critical and cannot account for the Land Claims Court rulings made in the cases cited here.

Because the legislative amendment did not have positive ramifications as far as the settling of claims was concerned, the minister was placed under increasing pressure to institute an official evaluation of the restitution programme. In April 1998, Minister Hanekom announced that he had appointed a team to be co-ordinated by Andries du Toit to review the restitution process, with the aim of making recommendations to improve delivery. The team adopted a 'systems approach', that is it sought to consider "the entire ensemble of institutions, laws, discourses and practices" involved in the restitution programme. [568] Before summarising the key findings, recommendations and outcomes of the review, it is noteworthy that it was carried out in a context of institutional and personal conflict and mistrust. DLA management had certain misgivings about the team's methodology, but a more dramatic and paranoid opposition came from the commission generally, and Chief Land Claims Commissioner Seremane specifically. This was reflected through his attack on the integrity and objectivity of the team in parliament on 18 September. The suspicion emanated from perceptions that the review process was master-minded by the DLA to produce predetermined findings that would marginalize and weaken the commission, and that the co-ordinator of the team was close to DLA management.[569]

The ministerial review team identified five key dimensions of the restitution crisis, namely slow delivery, unplan-ability, perceived lack of integration of restitution into broader land reform and development programmes of government, breakdown of trust between

[566] Ibid, 2004, 524
[567] Mostert, 2006, 18, 19
[568] du Toit et al, 1998, 2
[569] Ibid, 1998, 6

implementers, and high levels of frustration with the institutional machinery.[570] The team identified six underlying causes of the restitution crisis, namely pressure for quick delivery, the scale and nature of demand, the legal and institutional framework, leadership weakness, lack of policy, and absence of effective business process.[571] The analysis, although generally summary in nature, focused on the final four of the identified causes. The section dealing with the legal and institutional framework showed how tensions between two different paradigmatic approaches to restitution, namely a moral-legal one (with strong political undertones) and a legal-administrative paradigm (neutral), were not adequately resolved within the framework.[572] The commission, with a strong political character, was given responsibility for technical tasks that it did not have the capacity or the inclination to deliver. “The real irony of the legal framework … was that it set up an institutional apparatus which was fundamentally out of sync with the real demands of the process”.[573] Further, the team also picked up on some of the structural problems identified by Erasmus a year earlier.

The review unpacked various layers of the leadership problem, ranging from disparities in capacity between DLA and the CRLR, to racial tensions.[574] One of the key issues identified was a complete breakdown in the relationship between the Regional Commissioners and the Chief Land Claims Commissioner.[575] (This undermined the potential to develop an effective business process.) The confused roles of the three institutions set up to deliver restitution compounded the leadership problem. In this regard, Du Toit refers to the commission as the “champion” of the claimants, to DLA as increasingly taking on certain commission functions, and to the court as the “headmaster”.[576] In short, leadership was disparate and generally weak, and roles were confusing and blurred. These leadership difficulties translated into a lack of policy on key issues. Confusion about how to calculate the monetary value of claims was particularly debilitating for those required to effect restitution.

The final underlying cause of the restitution crisis identified by the review team, namely the absence of effective business practice, was a consequence or at least a reflection of other

[570] Ibid, 1998, 10
[571] Ibid, 1998, 10
[572] Ibid, 1998, 12
[573] Ibid, 1998, 15
[574] Ibid, 1998, 18, 19
[575] Ibid, 1998, 20
[576] Ibid, 1998, 24 25

causes. Because of the inappropriate legal and institutional framework, the leadership weaknesses, confused roles and absence of policy, the evaluators found it hardly surprising that "there has been very little effort to develop a coherent, nationally consistent restitution process. Instead there have been a number of partial attempts to solve the puzzles of process design… The result has been something of a patchwork".[577]

After the analysis, the review team went on to develop options to remedy the ills. Interestingly, all the options were developed with the view to improve the administrative (not legal) functioning of the restitution process. For the team, the key to restitution lay in sorting out the relationship between the commission and DLA, and then enhancing the ability of government to settle claims administratively. The following four options were fleshed out in some detail:

1. complete abolition of the commission;
2. absorption of commissioners, with their present role, into the DLA;
3. expansion of commissioners' role and integration into the DLA; and
4. expansion of commissioners' role and complete separation from the DLA.

For each of these options, the team presented their respective features, implications, advantages and disadvantages. The final decision was referred to Minister Hanekom.[578]

The minister did not take long to arrive at a decision. On 5 November he issued a press statement that summed up his key policy choices, as follows:

> To eliminate problems arising out of duplication of functions, different interpretations of roles, unclear lines of accountability and confused policy, [the review team has recommended] that all the functions and activities of restitution will be vested in one body, namely the Commission. The Commission in turn should be integrated into the Department of Land Affairs, becoming accountable to the Director General, through the Chief Land Claims Commissioner…. The restitution programme has suffered in a number of ways from the emphasis on a judicial process and the requirement that each and every case has to be ratified by the Land Claims Court. To this end it is recommended that there be a shift in emphasis to a more administrative process which would allow for the mass processing of claims…. On the key issues of principle and overall direction, I have taken the decision, to

[577] Ibid, 1998, 27
[578] Ibid, 1998, 53 - 59

> support the recommendation…that the role of the CRLC will be expanded and that it will be integrated into the DLA.[579]

The most striking and important conclusion of this overview of the eighteen month period of restitution crisis review and reworking (mid 1997 – end 1998) is that the focal point had shifted decisively from the court to the commission. In 1997 it was agreed that the way forward was to facilitate easier access to the Land Claims Court (LCC), whereas in 1998 it was decided to change the character of restitution. Instead of being a legal process, it would henceforth be dealt with administratively. Shortly thereafter, parliament approved various amendments in line with Hanekom's decisions. Consequently, the "LCC, which was originally conceived as the main institution through which restitution claims would be adjudicated, has been virtually legislated out of the restitution process".[580] Here Mostert concurs with Roux, agreeing that the restitution process is now essentially "administrative rather than adjudicatory".[581] Because of the Court's inability to adapt to the demands of the restitution process and amend its role accordingly (from headmaster to facilitator), it effectively positioned itself as counter-productive to the objects of government. Instead of being part of the solution to speeding up the process, the Court remained integral to the problem of stringing it out, slowing it down.

The structural changes brought about a new phase of the restitution programme, known as the administrative approach. In this phase the Commission plays the dominant role in validating claims in relation to the criteria set out in law and negotiating settlements.[582] These changes were accompanied by the installation of new leadership for the restitution programme. The contract of Chief Land Claims Commissioner Seremane was not renewed when it lapsed, and by March 1999 he had been replaced by Wallace Mgoqi. Also, when newly-elected President Thabo Mbeki announced his first cabinet in mid-1999, he chose not to re-appoint Derrick Hanekom as Minister of Land Affairs. Instead, Mbeki appointed Thoko Didiza in this portfolio.

<u>The headlong rush</u>

From mid-1999 it was evident that there was a determination amongst policy makers to

[579] Ibid, 1998, 96 - 97
[580] Roux, 2004, 521. He quantifies this by noting on page 516 that the LCC handled only approximately seven cases per year in the early twenty-first century.
[581] Mostert, 2006, 6
[582] Mostert, 2006, 6

speed up the resolution of claims. The first key development in this regard came in 2000 with DLA's adoption of the Standard Settlement Offer (SSO) as a mechanism to resolve claims. There are two key characteristics of the SSO, namely that it sets a standard offer for all claimants in South Africa, in relation to two categories, namely former owners and former tenants,[583] and that this offer is paid out in cash. Hall credits this innovation, together with the shift to the administrative approach for having "enabled the Commission to speed up the settlement of claims dramatically".[584] The acceleration was achieved for a number of reasons, some technical, others practical. On the technical side, the SSO meant that the commission could circumvent a number of time-consuming tasks involved in the conventional approach to resolving a claim, such as establishing the extent of dispossession and determining the monetary value of the claim (through the fraught process of valuation).[585] This was a significant change because it undermined one of the key principles of the initial restitution concept, namely that there should be a direct relation between what claimants were dispossessed of and what should be returned to them. That is, the adoption of the SSO weakened the rights-based core of the restitution programme, and strengthened the arbitrary hand of the government. Claimants' right to restitution was undermined; the government's power to dispense with restitution claims was enhanced. As Kondlo has written, "if a claimant opts for the SSO, in essence he [or she] forfeits his or her claimant locus standi as defined by the Restitution Act".[586] At the time of the shift from the legalistic approach to the administrative approach, a primary architect of this change, Andries du Toit predicted that "the carrot of a quick deal" (as an alternative to "a long-drawn out Court process") would compound the already existing problem of the weakness of the claimants within the programme.[587] The reason for this, du Toit argued, was that the administrative approach involves avoiding "the rights issues that are the basis of the

[583] In 2000, these amounts were set at R40 000 per owner in most urban areas and R17 500 per long-term tenant (Hall, 2004, 657). It seems that the policy makers did not have rural areas in mind when they thought about the SSO. Nevertheless, influenced by the policy discussions at the time, BRC invoked a version of the SSO in its proposed resolution of the Cata claim (see chapter 5).
[584] Hall, 2004, 657
[585] Hall writes that "the major benefit" of the SSO was "savings on valuations" (2003, 10); in other words, she recognises that it allows the by-passing of the task of determining the monetary value of claims, but she has not, to my knowledge, commented about its impact on research requirements.
[586] Kondlo, K. 'Restitution, Reconciliation and the Reconstruction of Memory of the Past: South Africa's Truth and Reconciliation Commission and the Commission on Restitution of Land Rights', Unpublished Paper Presented to the workshop on 'History, Truth and Reconciliation: Memory matters in Africa', Basel University, Switzerland, 14 October 2002, unpublished document accessed in BRC Resource Centre, 9
[587] Du Toit, 1999, 15

Restitution programme".[588] This avoidance of rights was compounded by the adoption of the SSO.

The acceleration of the processing of restitution claims was given a further fillip in 2002 when President Mbeki announced December 2005 as the deadline for the finalisation of all restitution claims.[589] The significance of this move lies in an appreciation of the fact that the Presidency emerged as the dominant institution of state during the Mbeki era (much more so than during Mandela's tenure). When circa 2002 President Mbeki spoke, government officials took careful note of the implications, and attempted to act accordingly. In this instance, the land reform community in general and the Commission specifically realised, for the first time, that government wanted the restitution programme to be concluded within the shortest possible timeframes. Despite the fact that the Commission failed to meet this deadline, which was then extended to March 2008,[590] there is no doubt that the announcement contributed to generating momentum in the acceleration process. An indirect consequence of the imposition of deadlines for the completion of the existing restitution programme has been the steely resolve of government not to consider calls made by a variety of voices to embark on a second phase of the programme. In the Eastern Cape, disgruntled people from towns such as Uitenhage and Queenstown have called for a re-opening of a claiming window; they have been joined by many others around the country, as well as some civil society groups. In fact, the Land Summit organised by the Minister of Land Affairs in July 2005, resolved that government should consider another round of land claiming.[591] But government has not been receptive to these calls; rather it has dismissed them abruptly and with increased irritation. The point here is that its response has confirmed the message that restitution is a temporary government programme, with a short life expectancy.

These various changes and interventions paid handsome dividends for government. After the first five years of restitution, only 41 claims had been settled.[592] By 2003, this figure

[588] Ibid, 1999, 16
[589] Hall, 2004, 667
[590] Not all claims had been settled by this date. Although government has not set a revised deadline, Hall argues that budget revisions imply that the new target date is 2012 (Hall, R. 'Land Budget Update', in Umhlaba Wethu, No 5, June 2008, accessed on the Plaas web-site at www.plaas.org.za, 3).
[591] Gutto, S. 'Recommendations from Commission on Theme Two: Land Restitution: Balancing Rights of the Dispossessed and Economic Development', accessed from DLA web-site (http://land.pwv.gov.za/Land-summit/) on 31 July 2008
[592] Hall, 2004, 658

had skyrocketed to 46 727, and by early 2007, it had settled 74 417 claims or 93% of the total revised figure of 79 696 claims that had been lodged.[593]

Non-delivery and delivery

In the light of these quite astonishing figures,[594] it is important to try to understand what government has achieved through this accelerated programme. Perhaps the best way to arrive at useful insights in this regard is to first clarify what government has not achieved. In a general sense, the starting point is to recognise that it has not delivered a project of significant proportions from a resources' perspective. I mentioned GEAR previously, in relation to the manner in which the restitution programme initially took shape; the key point here is that the champions of restitution, unsurprisingly, have not been able to wrest it free from the constricting grip of government's self-imposed structural adjustment programme. Hence Hall is correct to assert that "the most significant limits to land restitution today are the result of the state's commitment to shrinking the role of government and imposing its neo-liberal macroeconomic policies".[595] This context has meant that it is all but impossible for the Commission to lose the Cinderella tag that it took on early in its existence.[596]

Although the changes instituted in 1998 do amount to some sort of watershed moment for the restitution programme, there were notable continuities that easily traversed the divide into the Mbeki era. Principally, the commission continued to pursue a minimalist programme after 1999. I have shown how the number of claims lodged paled in comparison with the number of post-1913 dispossessions effected by the segregation and apartheid regimes, and I have taken note of the constricting judgements handed down by the Court in its early years. Here I posit that the imperative to complete the restitution programme within tight timeframes militated against an approach that maximised the advantages to claimants in settlement agreements. For example, the Commission has been reluctant to compensate claimants for the full extent of property rights that were dispossessed, preferring to invoke notions such as direct losses to limit the bill of restitution,[597] and it was unwilling to investigate all instances of dispossession that occurred within areas under claim, opting rather to restrict the investigation to

[593] Hall, 2004a, 13; Hartley, W. 'Land claims will again miss deadline', Business Day, 21 May 2007, 2
[594] I note Hall's point that "there are such major problems with data reported by the CRLR that this information is questionable" (2003, 26). Nevertheless, it is undisputable that the acceleration in the resolution of claims has been exponential.
[595] Hall, R. 'Land Restitution in South Africa: Rights, Development, and the Restrained State' in Canadian Journal of African Studies, Volume 38 Number 3, 2004, 667, 668
[596] This tag was given to the Commission by none other than its head, Joe Seremane (Mesthrie,1999, 15).
[597] This is discussed at some length in chapter 5.

dispossessions suffered by those explicitly reflected on the claim form.[598] So the process of paring down the restitution programme started almost immediately after legislation had been enacted, and it looks likely to continue until its looming termination.

I do not mean to imply that the Commission deliberately set out to emasculate the restitution programme. Rather, a more likely argument is that its interpretative conservativism was a product of its poor institutional state. The marginalisation of the commission was not limited to poor resource allocations; it also translated into a lack of decision-making power (delegated authority).[599] Not surprisingly therefore, it has continued to be bogged down by poor management. Writing about the late 1990s, Mesthrie noted that "criticisms that the commission has lacked proper managerial strategy are valid… [it has] performed unsatisfactorily in all phases of its work".[600] The problem of poor management of the Commission has persisted in the post-1999 era.[601] With regard to human resources, some of the key dimensions of the problem have been discontinuity in management,[602] high staff turnover, and a general paucity of staff.[603] Also, there is some anecdotal evidence that the management of the commission has engaged with external service providers in an unprofessional, counter-productive manner. For example, Legassick reported "adversarial relations" with the Western Cape Land Claims Commission; he went as far as accusing it of obstructing its own projects.[604]

In the light of its persistent institutional weaknesses, it is not surprising that the Commission failed to improve its work practices in the early years of the twenty first century. It is difficult to identify any aspect or phase of the claim resolution process that the Commission has performed competently; conversely, it is easy to identify weaknesses right across the programme, starting from stage one, namely the management of data.

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[598] From my own experience, the two examples that loom large in this regard are Mbems (outside King Williams Town) and North End (in East London). The former is discussed at length in Minkley G and Westaway A, 'Restitution in South Africa: Rights versus might', unpublished manuscript prepared for the American Anthropological Conference held in Washington DC (USA), 2005. In the latter case, the RLCC signed a settlement agreement that included approximately 500 claimants, but excluded over three times that figure, including many former tenants.
[599] Hall, 2004, 661
[600] Mesthrie, 1999, 23
[601] Minkley and I have written on post-2000 management difficulties experienced by the Eastern Cape Land Claims Commission in 'Restitution in South Africa: Rights versus might'.
[602] Legassick, M. 'Reflections on practising applied history in South Africa, 1994 – 2002: From skeletons to schools', in H. Stolten (ed), History Making and Present Day Politics: The Meaning of Collective Memory in South Africa, Nordiska Afrikainstitutet: Uppsala, 2007, 140, fn 15
[603] Hall, 2004, 661
[604] Legassick, 2007, 140 footnote 15. I know from personal involvement in both at programme (eg validation) and project (eg Mbems) levels that it was extremely difficult for BRC to maintain professional working relations with the Eastern Cape Land Claims Commission in the period c2002 – c 2005.

Many commentators have identified the poor national data-base as a factor that both impedes planning and casts doubt over the veracity of its public media releases.[605] This problem is rooted in poor administrative systems and practice. Kondlo reported that the losing of claimant files resulted in claimants invading the office of the Western Cape Land Claims Commission both before and after the signing of the settlement agreement pertaining to the District Six case in 2000.[606] Evidently, this problem persisted in the Cape Town office beyond that date. When Legassick attempted to research the so-called 'Western Cape African tenants' case in 2002, he found that almost half of the files of the over 1000 claimants that his team had interviewed could not be found. That is, in his words, "since these people had made claims [a mere five years earlier] the Commission had mislaid nearly half of their files".[607] This kind of administrative incompetence must surely be responsible for some of the data incongruities that have spluttered out of the Commission since its establishment in 1995.

Methodological inconsistency has dogged the restitution process from the onset, to date. That is, as Hall puts it, there is "a degree of variation in how the RLCCs use the Restitution Act to settle claims".[608] The different provinces have approached many of the technical processes involved in settlement (for example how to determine the monetary valuation of claims, and how to obtain the necessary mandates or authorities from all direct descendants of dispossessed persons who are deceased) in different ways.[609] In fact, even within the same province, different officials have conflicting views and approaches to these processes.[610]

Similarly, there have been ongoing, serious limitations to the manner in which the Commission has gone about researching restitution cases.[611] In this regard, it seems that there have been two underlying reasons for the persistence of the problems, namely

[605] For example Mesthrie, 1999, 17, and Hall, 2004a, 17
[606] Kondlo, 2002, 8
[607] Legassick, 2007, 138
[608] Hall, 2003, 12
[609] Ibid, 2003, 6, 12 - 14
[610] BRC had direct experience of intra-office inconsistency. In attempting to facilitate the resolution of the Keiskammahoek claims, BRC took direction from the Eastern Cape Land Claims Commission. In late 2001, BRC was party to an open disagreement between a senior official (Ms Mbete) and the then provincial Commissioner (Mr Gwanya), about how to proceed with claimant verification. In the end, the official's view prevailed, and BRC was required to formulate family trees for 1704 claimants and seek powers of attorney from all direct descendants, giving the designated family member the authority to receive money on behalf of the family. This task was never completed, but the RLCC settled the claim nevertheless, in June 2002, and paid out financial compensation to all 1704 designated recipients, regardless of whether or not all/ any of their descendants had granted the supposedly necessary powers of attorney.
[611] Mesthrie (1999, 22) identified this to be a problem from the beginning of the programme in 1995.

management weakness and mounting political pressure to 'deliver'. The former has been fundamental: it has precluded an ability to identify those pieces of information that are required (by law), in order to settle or dismiss a claim, and it has militated against the adoption of minimum research standards. As Kondlo concluded after reflecting on the debacle that unfolded in the District Six case between 1998 and 2000, the "problems which frustrated the project were of an institutional nature… research into [this] case was disjointed".[612] The latter reason has made it difficult for the Commission to work systematically to improve its research method. Instead, research has been "conditioned by political pressures and urgencies of the powers that be", which has resulted in its being reduced to "patch-work designed for immediate consumption"[613]. It seems that Legassick's insider perspective in this regard is very similar to Kondlo's; after his various experiences of research in the Northern and Western Capes, he was despondent and exhausted. "My mind felt drained of energy. I referred to the production of sausages as in a sausage factory".[614]

In this context, it is hardly surprising that the Commission turned to outsourcing, as a possible panacea for its ills. In the early 2000s it embarked on drives that it termed validation and verification, with financial assistance from the Belgian government. The former aimed to check which of the lodged claims satisfied the criteria stipulated in the legislation, and the latter aimed to clarify who the legitimate claimants are in cases deemed to be valid.[615] It did not have adequate confidence in its own human resources, so the Commission looked to outside service providers to undertake these core tasks. At the risk of stating the obvious, I should note here that the private sector is/ was interested in the restitution process only insofar as it can/ could make money out of it. The Commission could, possibly, have obtained value for money out of the process if it had defined clear terms of reference for the consultants and managed them accordingly. However, it failed in this regard.[616] Instead, the management weaknesses and inconsistencies outlined above permeated both the validation and verification processes, resulting in uneven outputs and outcomes. Thus as Hall commented, "[e]ven after validation, it is neither possible to say

[612] Kondlo, 2002, 8
[613] Ibid, 2002, 7, 8
[614] Legassick, 2007, 140
[615] Hall, 2004a, 18
[616] BRC was part of the consortium appointed to validate claims in the Chris Hani and Ukahlamba Districts of the Eastern Cape Province.

how much land has been claimed, nor to establish the number of people involved in the claims".[617]

Because of the political conservatism and institutional limitations of the commission, it is does not come as a surprise that the restitution process – despite the fact that it has almost run its course – has not delivered significant resources to verified claimants. That is to say, restitution has not yielded much land, money or development resources to successful claimants. At the end of March 2008, about 94% of logged claims had been settled. These claims had only facilitated the transfer of under 2% of agricultural land (at a cost of R7.7 bn) and the (promised) payment of R4.8 bn in financial compensation. The total value of all settled claims was a mere R15.3 bn.[618]

One of the reasons that restitution has failed to unsettle property systems and relations in the country is the authorities' reluctance to utilise available mechanisms to expropriate land. As Hall has noted, "the Constitution provides for expropriation on various grounds, including the achievement of restitution".[619] Yet the government has been reluctant to employ this provision. Up to 2004, it had invoked expropriation in only two restitution cases, namely Farmerfield and Boomplaats.[620] In 2003, the legislature granted the Minister of Land Affairs power to expropriate land for purposes of restitution without a court order, through the Restitution of Land Rights Amendment Act 48 of 2003. However, the main reason for government's tardiness in expropriating land is not constitutional or legal weakness, rather it is political compromise and expediency. [621] The overall policy framework that guides land reform is 'willing buyer, willing seller', which is an approach that privileges the private market over public interference. This approach militates against the usage of expropriation. As a consequence, the restitution programme has redistributed relatively little land. For a claimant from Fort Beaufort, the experience of restitution was not dissimilar to the experience of apartheid dispossession: "it seems that we are being robbed of our land the second time around".[622]

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[617] Hall, 2003, 5
[618] Commission on Restitution of Land Rights (CRLR), Annual Report 2007/08, Government printers: Pretoria, 2008, 57. For point of reference, it should be noted that BRC research into the value of land rights dispossessed in Ciskei and Transkei (Eastern Cape Bantustans) through the implementation of betterment from the 1940s to the 1970s approximates R12bn (BRC, DLA and Tralso, 'Betterment Dispossession: Consolidated Quantum Document', Unpublished document, 1997, accessed in BRC Resource Centre). The figure is not far below the total cost of the national restitution programme to date.
[619] Hall, 2004, 660
[620] Hall, 2003, 9 and Hall, 2004a, 20
[621] Hall, 2004, 661
[622] Quoted in Kondlo, 2002, 3

Just as restitution is not delivering land, neither is it delivering development. On the contrary, there is widespread consensus that "far from transforming the livelihoods of dispossessed rural communities", it is "resulting in enterprise failure, land degradation and deep disillusionment amongst its intended beneficiaries".[623] These problems were detected fairly early, in cases such as Riemvasmaak, Elandskloof and Doornkop,[624] but government has failed to address them in the post-1999 period. Commentators have put forward various reasons to explain the failure of restitution to advance development. Noting that the "implementation of settlement agreements takes years, even in a 'best-case scenario'",[625] Hall argues that confusion about institutional responsibility for this phase of the restitution process has stifled progress. More specifically, there has been no consensus within the Commission about its role in the post-settlement period.[626] Some provinces have set up post-settlement units, others have not.[627] In the absence of decisive leadership from the CRLR, perhaps one would have expected either the provincial or local spheres of government to assume this mantle, but this has not materialised.[628] In an attempt to improve the situation the CRLR entered into a trilateral agreement with the National Development Agency and the Land Bank in 2002. However, there is not yet any sign that either institution will make any meaningful contribution to post-settlement development process in the near future; certainly, nothing has been forthcoming to date.[629] Consequences of the lack of management of the post-settlement phase have included malfunctioning of community legal entities, lack of agricultural production and inadequate access to infrastructure and services.[630]

The manner in which the processing and settlement of restitution claims has been structured, has not empowered the claimants. Rather restitution processes are heavily bureaucratic and unduly technical. Beyers refers to this as the "depoliticisation" of restitution.[631] That is, "politics is effectively excised by legal and planning processes

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[623] Zille, P. 'Free-riders drag down the horse', in Business Day, 4 July 2007
[624] For example see du Toit, 1999, 7
[625] Hall, 2003, 14
[626] Ibid, 2003, 18
[627] One of the provinces that has established a unit is the Eastern Cape. Based on my experience, this unit has been unable to effectively promote, co-ordinate or implement development in restitution cases.
[628] Hall, 2003, 33
[629] Hall, 2004a, 19. Both the NDA and Land Bank have been dragged down by seemingly endless internal conflicts and other difficulties in recent years.
[630] Hall, 2003, 18
[631] Beyers, C. 'Land Restitution's 'Rights Communities': The District Six case', in Journal of Southern African Studies, Vol 33, No 2, 2007, 279

carried out by experts purportedly working on behalf of 'the people' or 'the community' but which, in the end, define the latter in ways that tend to circumscribe meaningful participation".[632] As du Toit puts it, "one of the most troubling aspects of the Restitution programme has been the marginalisation and weakness within this process of the claimants themselves".[633] If the Commission were an effective, efficient institution, then the technicist route could arguably have brought some benefits. But, as explained above, this has not been the case; on the contrary, the Commission has failed to put the most basic of institutional building blocks in place. Bohlin does not take umbrage with the pitiful state of the commission because she holds that it has enabled claimants "to invent their own ways of engaging with and organising the claim process".[634] The claimants that she engaged with in the Kalk Bay claim may have dealt with this situation constructively and imaginatively, but even in this exceptional case their inventiveness was of little consequence. The point is that the commission's conservativism, confusion and incapacitation generally results in the claimants being left in a helpless situation, effectively excluded from the process that they entered, with no recourse.[635]

Having clarified what restitution has not achieved, I now turn attention to the question of more interest, namely what is the productive value, the effective work, of restitution. Hall provides useful clues to this question when she postulates that restitution is "an icon of the new South Africa", that it is "an important political symbol".[636] However, side-by-side with this, she maintains that restitution has material value, that its role is to undo "some of the legacies of dispossession and the social upheaval it entailed".[637] Here of course she stumbles because, as established above, restitution has not delivered significant land or development to apartheid's victims. Hall anticipated that restitution was going to provide "redress for injustices in the past at both a symbolic and material level", and because it has failed with regard to the latter, she concludes that restitution "lacks real political support".[638] This is not very useful, because it cannot be reconciled with the important fact that restitution has increasingly dominated the land reform agenda of the government in

[632] Ibid, 2007, 279
[633] du Toit, 1999, 15
[634] Bohlin, A. 'Claiming land and making memory: Engaging with the past in land restitution', in Stolten H (ed), History Making and Present Day Politics: The Meaning of Collective Memory in South Africa, Nordiska Afrikainstitutet: Uppsala, 2007, 124
[635] The closest that Bohlin gets to this reality is a recognition that the commission's lack of capacity has often resulted in the exclusion of "under-resourced rural communities" (2007, 126).
[636] Hall, 2003, 32, 34
[637] Ibid, 2003, 32; 2004a, 12
[638] Ibid, 2003, 32, 34

the post-1999 period. In order to understand the reasons for this, I linger in the realm of the symbolic, or rather, the discursive. I noted in the previous chapter that constitution makers regarded the restitution of dispossessed land rights as a necessary step towards restoring the citizenship of the South African masses. In this regard, Beyers has re-iterated the point made by James and others that restitution provided some of "the many previously excluded from meaningful citizenship" an opportunity "to stake a concrete claim to citizenship".[639] In other words, restitution was conceptualised as a programme that would contribute to the making of new country, one in which citizenship was available to all the colours of the rainbow.

The actions of claiming citizenship, of lodging a claim, of testifying about dispossession, of signing a settlement agreement, are not tantamount to realising citizenship, but they can play the role of reinforcing, deepening the citizenship experience of already-citizens. Although du Toit's commentary concerned the initial period of restitution (ie 1995 – 1998), his analysis is possibly even more relevant in 2008 than it was in 2000. He writes that the restitution process

> is distinguished by the way in which stories of injustice and violation told by claimants can enlist the identification of many of those who did not suffer those specific hurts (and even of those who were beneficiaries of Apartheid!) The neighbourhoods and communities that were destroyed are often described in idealised, romantic and evocative terms, and the ways in which these accounts emphasise the racial harmony, the spontaneous generosity, and the vibrancy of these communities often work to make them a function of the metaphors of the unified non-racial society we are thought to be aiming for today – powerful evocations of the way we would like to be – the way we wish we were. And… land claimants' stories of how these idealised communities were destroyed often seem to speak for all of us, and the injustice they suffered seems to become a symbol or a metaphor for all the injustices caused by Apartheid. The project of undoing that injustice, in turn, is also linked to transcendent and romantic narratives of return and homecoming through which [all of us] can imagine… to be redeemed.[640]

The key phrases in this extended quote are "enlist the identification of many" and "speak for all of us". Restitution work relates more to 'all of us' (insiders, or already-citizens) than

[639] Beyers, 2007, 285
[640] Du Toit, 1999, 10, 11

to ‘all of them’ (outsiders, or would-be-citizens), its supposed beneficiaries. It allows already-citizens access to a precolonial past of harmony, generosity, vibrancy, ubuntu; it enables them to regret a shared apartheid past of injustice, violation, destruction, suffering (without having to do or sacrifice anything), and it promises hope for a united future of return, homecoming and redemption. This is the discourse of the new South Africa. The value of restitution lies not in having unlocked material resources for the dispossessed, but in having enlisted identification, in consolidating the experience of already-citizens, in contributing to project ‘new South Africa’. The target group is hardly the beneficiaries – they are incidental – rather it is the citizenry of the new nation. The media through which this public is targeted are primarily television and print.[641] Ever since the first restitution ceremonies (at Elandkloof) in December 1996, there has been a steady supply of these events pumped onto our television screens and described in our newspapers, to remind us all that apartheid atrocities are behind us, to make us believe that a precolonial bliss is again within reach, and to convince us that this government is delivering land reform, that transformation is taking place in our lifetimes. The slogans of restitution are precise, to the point, and (against the backdrop of the television images) fully believable: ‘fulfilling the promise of the constitution’, ‘giving land back to the people’.

Whereas du Toit managed to see this clearly in 1999, Bohlin fails to understand it in 2007. For her, “the land claim process was subjected to [little] of the pressure associated with nation-building, namely the requirement of reconciliation, forgiveness, and ‘leaving the past behind’”.[642] Guided by this misguided notion – borne of an apparently positive experience in a single restitution case (Kalk Bay) - she incorrectly maintains that restitution is concerned with “structural and comparably low-key injustices experienced by ordinary South Africans” and therefore holds that it “encourages local communities to face injustices in the present and to actively trace and address their roots in the past”.[643] In other words, she believes that restitution is an open-ended process rather than a choreographed event.[644] She does go on to qualify this assertion, through recognition of “the contractual nature” of the programme. [645] That is, restitution claims are settled or ended through the signing of agreements. After the signing of these settlement agreements, the claimants forgo their right to further restitution for the dispossessed rights

[641] This public, after all, is rich and literate.
[642] Bohlin, 2007, 115
[643] Ibid, 2007, 119, 125
[644] Ibid, 2007, 119
[645] Ibid, 2007, 125

in question. Bohlin wonders whether this "does not contribute to the impression that such injustices can be redressed by a one-off deal, and indeed, whether compensation 'cancels' them out. There is a risk that land restitution, rather than achieving a form of closure that insists on the continued significance of the past in the present, becomes another way of closing off the past".[646] Of course, this is more than a risk; it is fundamental to the essence of the restitution process, and a useful reference point in understanding how it contributes to the overall building of the new nation.

The narrative of the new South Africa is compelling and popular, partially because of the strength of the dominant themes and myths underlying the narrative.[647] Two of these are the myths "of a unitary, organic and harmonious *community*",[648] and of exile and return.[649] The former is integral to the master historical narrative underlying the restitution programme, and the latter is conveyed compellingly by the television images of settlement agreement ceremonies. But neither assertion stands up to critical scrutiny. As far as the former is concerned, it is now broadly understood that all communities are stratified and divided, and as Du Toit points out, land claimants are united "not by any shared sense of present day community but by a painful, traumatic and divisive past… In some cases, the enterprise of building a present-day sense of community proceeds… through competing claims to sole ownership of [a] past, lost authenticity".[650] Similarly, whilst myths of exile and return will always resonate and appeal broadly, it is dangerous and naïve to assume that restoration of an idyllic past is within reach.[651]

Du Toit argues that the above-mentioned assertions are "rooted in a meta-narrative of South African history which owes its most essential intellectual debts to a form of South African liberalism which is… downright condescending and patronising toward the very people it is supposed to help".[652] The concept of community is associated and linked with a particular understanding and version of communal tenure, one characterised by general malaise, stagnation and dysfunction. Du Toit hones in on this when asserting that restitution discourse holds "an ideological view of community which supposes that rural/ African people are different from other property owners". From this vantage point,

[646] Ibid, 2007, 125, 126
[647] Du Toit, 1999, 11
[648] Ibid, 1999, 12. See also: Everingham, M. & Jannecke, C. 'Land Restitution and Democratic Citizenship in South Africa' in Journal of Southern African Studies, Vol 32, No 3, 2006, 560; and Bohlin, 2007, 127
[649] Du Toit, 1999, 12; Bohlin, 2007, 123
[650] Du Toit, 1999, 12
[651] Bohlin, 2007, 127
[652] Du Toit, 1999, 11, 12

communal ownership is naturally equated with “a second-class kind of owning”.[653] This explains why the land reform fraternity accepts, so readily it seems, the complete, uniform dysfunction of Communal Property Associations and Trusts – set up through the restitution and other land reform processes – across the country.

It is clear from this analysis that the disruptive potential of restitution has not, in general terms, been realised to date. On the contrary, the manner in which micro restitution narratives have been assembled and the truths that they have produced, have tended to consolidate prevailing power relations, hegemonic discourses and the underlying meta-narrative. Bohlin writes in general terms that “expressions of ‘official culture’... represent reality in ideal, abstract terms in order to minimise social contradictions and divisions while seeking legitimacy for official, nationalistic projects”.[654] Restitution provides a perfect illustration for the workings of this dynamic.

At the risk of being repetitive, I close this sub-section by briefly summarising the exercise of restitution, in relation to Trouillot’s four stages of historical production. To date, the making of sources has largely occurred with very little input from the dispossessed themselves and their descendants; instead, new sources have been produced by profit-seeking consultants on their laptop computers, or indifferent officials seeking to limit the bother factor. The restitution archives have been thrown together in the offices of the Regional Land Claims Commissions, in a chaotic, unprofessional and haphazard way. Officials from the same offices, generally inadequately skilled and poorly managed, are the drafters of case-by-case narratives of dispossession. Their over-riding objective in this regard has been to meet minimal technical requirements to enable claim resolution. They have had no interest in formulating narratives that aim to end the past in the present. These narratives are the technical stories of the officials, not the tragic lived realities and experiences of the dispossessed. So, it is no surprise that the ultimate truths of restitution – which are repeated at each settlement agreement ceremony – have reinforced hegemonic notions of the South African nation, development modalities and racial categories and concepts. Put another way, the restitution process has not contributed to the formulation of a counter-discourse of the modern. Finally, for all intents and purposes, the restitution process ends with the signing of settlement agreements; little

[653] D James, quoted in Everingham & Jannecke, 2006, 560
[654] Bohlin, 2007, 127

implementation of agreements takes place, and that which does, does not transform the situations of the poor.

Historical truth and reconciliation in post-apartheid South Africa

Ndebele has observed that unlike in France, in South Africa the "Bastille was not stormed".[655] Instead of a seizure of power, there was an uneasy truce followed by prickly negotiations, which resulted in a complex sharing of power between elite groupings. As explained in Chapter 2, the negotiations and their outcomes were strongly influenced by various factors including human rights discourse (HRD). The TRC is well understood in this context, as a product of HRD-infused negotiations.[656] The transitional reality in South Africa was characterised by a particular set of challenges. For example, the new state had to be seen to deal with past perpetrators as part of a bid to emasculate or at least deter remaining vestiges of terror; it needed to bring erstwhile social enemies together; and it had to transform the state without undermining its authority or capacity.[657] In 1994, South Africa was typically transitional; the state was "not yet powerful but in need of power", its populations required harmonisation, past and future required "recalibration, each by themselves, and each in relationship to the other".[658] Herwitz has argued that a "transitional" form of justice is useful in managing such situations.[659] Over the past couple of decades, truth commissions "have taken on a transnational validity as one of the main mechanisms for announcing a new democratic order".[660] For Herwitz, Wilson, Fullard et al and others, the TRC was established in order to administer transitional justice in a transitional South Africa. Dubow and Rosengarten put it succinctly: the TRC was "the key transitional statutory body created to promote a post-authoritarian constitutionalist political order".[661] More specifically, the TRC was needed to "promote the new constitutionalist political order and the reformulation of justice in human rights talk as restorative justice",[662]

[655] Dubow & Rosengarten, 2004, 679
[656] Bundy, C. 'The Beast of the Past: History and the TRC', in W. James & L. van de Vijer (eds), After the TRC: reflections on truth and reconciliation in South Africa, David Philip Publishers: Cape Town, 2000, 12; Fullard, M. & Rousseau, N. 'An imperfect past: The Truth and Reconciliation Commission in transition', in The State of the Nation 2003 – 2004, 2004, Free download from www.hsrcpress.ac.za, 79
[657] Herwitz, D. 'The Future of the past in South Africa: On the Legacy of the TRC', Social Research, Vol 72, No 3, 2005, 539, 540
[658] Ibid, 2005, 539
[659] Ibid, 2005, 539
[660] Wilson, 2001, xviii
[661] Dubow & Rosengarten, 2004, 679
[662] Wilson, 2001, 13

"to lay an ethical foundation on which to establish [a] liberal constitutional polit[y]",[663] and "to save the law from the filth into which it had fallen".[664]

Human rights discourse is pliable and elastic. The extent of its pliability is shown by the manner in which the negotiators dealt with the contested issue of amnesty for apartheid operatives. At the end of CODESA in November 1993, when all other issues (including the Property Clause) had been resolved, the parties were still divided on amnesty. The National Party pushed for blanket amnesty for those instrumental in the implementation of apartheid;[665] in fact as Gibson has noted, it made this "a nonnegotiable centrepiece" of its demands.[666] By contrast, the ANC initially demanded that crimes against humanity committed in the name of apartheid should be punished. In order to break the deadlock, CODESA referred the issue to a two-person technical committee comprising Maharaj and vd Merwe. Their brief was to write a post-script to the Interim Constitution that would make provision for amnesty.[667] Messers Maharaj and vd Merwe emerged from the chambers with "a compromise formulation", sometimes referred to as 'qualified amnesty'.[668] The agreement was that amnesty would be granted in exchange for full disclosure of the truth of what had happened.[669] Clearly, this agreement favoured the interests of NP over the demands of the ANC. Thus Gibson is correct to assert that the "creation of the TRC, with the power to grant amnesty, was the price that the liberation forces had to pay to secure a peaceful transition to majority rule".[670] Put another way, the perceived need for, or value of forgiveness and reconciliation held sway over "the sterner stuff of retribution".[671] The post-script to the Interim Constitution insisted that there was "a need for ubuntu but not for victimisation".[672] Once the decision to provide for qualified amnesty had been made, those entrusted with implementing it defended it strongly. Most famously, Tutu declared that it was in keeping with African values and principles. "Retributive justice is largely Western",

[663] Grandin, G. & Klubock, TM. 'Editors' Introduction', in Radical History Review, Issue 97, Winter 2007, 2
[664] Gearey, 2004, 48
[665] Herwitz, 2005, 541
[666] Gibson, JL. Overcoming apartheid: Can truth reconcile a divided nation?, 2004, HSRC Press: Cape Town, 9
[667] Wilson, 2001, 8
[668] Gibson, 2004, 241
[669] Ibid, 2004, 241
[670] Ibid, 2004, 9
[671] Ibid, 2004, 241
[672] Quoted in Wilson, 2001, 8

he said. “The African understanding is far more restorative – not so much to punish as to redress or restore a balance that has been knocked askew”.[673]

The TRC implemented the restorative model in a dramatic, public manner in the mid- to late-1990s. It was characterised by confession and truth-telling, pain and emotion, and forgiveness and reconciliation. This dramatic production, more than any other in the 1990s,[674] signified the reconciliation of the Mandela presidency. The extensive television coverage of its proceedings enabled the TRC to invoke what Gearey calls “a universal of suffering”.[675] The TRC process enabled all South Africans to empathise with the victims.

Wilson has noted that South Africa adopted a restorative justice model (predicated on forgiveness) at the same time that the world was dealing with crimes against humanity in an increasingly punitive manner. This can be illustrated with reference to the establishment of the International Crimes Court at The Hague and the prosecutions of perpetrators of human rights violations by the UN war crimes tribunal in relation to the former Yugoslavia and Rwanda.[676] In this context, it was not surprising that the Azanian People’s Organisation (Azapo) and others (including Amnesty International) challenged the constitutionality of the TRC Act, arguing that the South African legislation could not be accommodated within international law and convention, which forbade the granting of amnesty for crimes against humanity. But the South African Constitutional Court disagreed, and found in favour of government.[677]

There are parallels between the government’s decision not to punish the perpetrators of apartheid, and its reluctance to invoke expropriation for land reform purposes. The tendency of the South African government not to utilise expropriation in pursuit of restitution (and promote financial compensation instead) can also be seen as an expression of the forgiveness model. Importantly, the model effectively privileges the interests of the powerful (landed) over those of the weak (dispossessed). As Mesthrie has written, “[j]ust as the TRC has privileged reconciliation over justice, restitution goes along

[673] D Tutu quoted in Wilson, 2001, 11
[674] The other moment that signified post-apartheid reconciliation was when President Mandela donned the Springbok rugby jersey before the kick-off of the historic World Cup Final in 1995. In South Africa rugby has been dominated by whites and on that day, the Ellis Park Stadium in Johannesburg was cram-packed with conservative rugby-loving whites. Significantly, both this moment and the TRC theatre were characterised by blacks extending the olive branch to whites, and not vice versa.
[675] Gearey, 2004, 57
[676] Wilson, 2001, xvi
[677] Gibson, 2004, 9

the same path. For rural communities justice means the restoration of the land and there is little appreciation for the finesse of the legal process. Pursuing the long path of negotiation between claimants, current owners of property and the DLA can mean justice delayed and possibly justice denied".[678] A further comparative remark concerns the respective origins of the TRC and CRLR. Both the truth and reconciliation, and restitution processes have their genesis in demands asserted by the National Party, for amnesty and the protection of existing property rights, respectively. Paradoxically therefore, two of the processes generally attributed to the 'left', popularly thought to be a testament to the strength of the ANC and its non-statutory partners in the negotiations, the prize of victory, turn out to be nothing more than the price of the negotiated settlement, by-products of the demands of white interests.

The mandate of the commission

Having contextualised the TRC in terms of the real politic of 1993/4, I now turn attention to outlining and discussing its purpose and mandate. The TRC legislation stipulated that the goal of the Commission "shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past".[679] One of the key ways in which the Commission was expected to arrive at its goal was to undertake an investigation that would establish "as complete a picture as possible of the causes, nature and extent of the gross violations of human rights, which were committed during the period…including antecedents, circumstances, factors and context of such violations".[680] The period referred to 1960 to 1993 (later extended to May 1994), and the enabling legislation required that this picture be put together "both by examining individual cases and by producing aggregated data showing local and national patterns of violence and violations".[681] In considering the above framework, it is clear that a lot hinged on the definition of 'gross human rights violations'. The Act defined these as: "a) the killing, abduction, torture, or severe ill-treatment of any person; or b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a)".[682] Wilson describes the terms of reference outline above, the mandate of the TRC, as "the widest remit of any truth commission to date".[683]

[678] Mesthrie, 1999, 258
[679] Gibson, 2004, 10
[680] Gibson, 2004, 10
[681] Posel, D. & Simpson, G. 'The power of truth: South Africa's Truth and Reconciliation Commission', in D. Posel & G. Simpson (eds), Commissioning the past: understanding South Africa's Truth and Reconcilation Commission, Witwatersrand University Press: Johannesburg, 2002, 3
[682] Quoted in Wilson, 2001, 34
[683] Ibid, 2001, 34

In the light of comments made above about the significance of 1913 in the restitution process, it is appropriate for me to comment briefly about the importance of 1960 in the TRC process. Why 1960? Why not 1948 (the formal inauguration of apartheid as government policy), for example? The event from 1960 that stands out in popular history is the Sharpeville massacre.[684] In fact, this is the first well-known instance of a large-scale, explicitly gross, headline-grabbing human rights violation in apartheid South Africa. However, there is little doubt that the origins of Sharpeville lie in the twelve years preceding it, following on from the electoral victory of the National Party in the whites-only election of 1948. (Of course, one should go beyond this by pointing out that the significance of 1948 is sometimes exaggerated in historical overviews. My position on this issue that there is considerable continuity between colonialism, segregation and apartheid.) During the 1950s for example, the white legislature passed the following pieces of fundamental apartheid legislation: the Population Registration Act, the Group Areas Act, the Suppression of Communism Act, the Reservation of Separate Amenities Act, the Public Safety Act, the Bantu Education Act, the Bantu Authorities Act, the Prevention of Illegal Squatting Act, and so on. The legislative decision that the TRC focus on the period after 1960 reflects the intention of law-makers that it restrict its focus to gross human rights violations, to violations that were not run-of-the-mill apartheid violations, rather than to consider the intrinsic violence of apartheid.

In the previous chapter, I discussed the fact that the CRLR dealt with the dispossession of land rights in the period commencing shortly after South Africa became a 'Union' in 1910; here I note that the TRC was mandated to deal with gross human rights violations in the period commencing one year before South Africa withdrew from the Commonwealth and became a Republic in 1961. In other words, in both instances the policy makers defined 'separatist/ apartheid modernity' in relation to significant constitutional moments in the making of South Africa. This may just be coincidental, but it may also speak to the nation-building role of commissions in post-apartheid South Africa. An effect of defining periods in relation to unionisation and republicanisation may be to dismiss pre-union and pre-republic South Africa as primitive and immaterial. That is to say, those dispossessions that happened before Union and human rights violations that happened before South Africa became a Republic respectively, are not worthy of consideration because they were

[684] I also note that the ANC adopted armed struggle as a strategy of resistance in 1960.

effected by government entities regarded as pre-modern. The decision to set 1960 down in the TRC legislation draws a direct line between the constitutional 'progress' made in 1961 and 1994, just as the decision to set 1913 down in the restitution legislation draws a line between 1910 and 1994.

I now turn attention to how the TRC interpreted its mandate and make some remarks in this regard. The TRC decided that it would only consider human rights violations that were illegal within the apartheid framework. The past was to be judged not in terms of international norms and standards but rather "in terms of itself".[685] That is, the TRC failed to make a distinction "between what is legal and what is legitimate, between law and right".[686] Practically speaking, the commission chose to include only "cases that exceeded the wide latitude of abuse permitted by apartheid laws".[687] According to Mamdani, this forces us "to ask whether the TRC had come to share the legal fetishism so characteristic of the apartheid regime, in that it considered as a gross violation only that which was a gross violation under the laws of apartheid!"[688] A consequence of the TRC decision is that the "the everyday, mundane bureaucratic enforcement of apartheid" was bypassed and overlooked.[689] More specifically, the TRC decision meant that it did not consider "socio-economic violations related to discriminatory legislation (such as forced removals and pass laws) and non-political violations (such as the torture and killing of criminal suspects)". Quite clearly therefore, this decision laid down "the parameters of truth-seeking" in a narrow way.[690] Bennun holds that violence was necessary for apartheid, that it "made use of violence to sustain itself".[691] Mamdani argues more precisely, asserting that "the violence of apartheid was aimed less at individuals than at entire communities, and entire populations groups… The point of torture, terror, death… was to dispossess people of means of livelihood".[692] This tallies with Das' characterisation of apartheid as a "social distribution of pain and suffering".[693] Yet for the TRC, violence and gross human rights

[685] Wilson, 2001, 34
[686] Mamdani, M. 'The Truth According to the TRC', in I. Amadiume & A. An-na'im (eds) The Politics of Memory: Truth, Healing and Social Justice, Zed: London, 2000, 181
[687] Wilson, 2001, 34
[688] Mamdani, 2000, 181 (see also Mamdani, M. 'A finished Truth', in W. James & L. van de Vijer (eds), After the TRC: reflections on truth and reconciliation in South Africa, David Philip Publishers: Cape Town, 2000b, 58 – 61)
[689] Wilson, 2001, 34
[690] Pigou, P., 'False promises and wasted opportunities? Inside South Africa's Truth and Reconciliation Commission', in D. Posel &G. Simpson (eds), Commissioning the past: understanding South Africa's Truth and Reconcilation Commission, Witwatersrand University Press: Johannesburg, 2002, 43
[691] M Bennun quoted in Wilson, 2001, 53
[692] Mamdani, 2000, 179
[693] Quoted in Castillejo-Cuellar, A. 'Knowledge, Experience, and South Africa's Scenarios of Forgiveness', in Radical History Review, Issue 97, Winter 2007, 32

violations were regarded as an expression of excessive apartheid (rather than being understood as integral to essential apartheid). For Mamdani, this approach or "version of truth obscured what was distinctive about apartheid".[694] Grandin et al argue that truth commissions' "primary mode of evading a confrontation with the structural socioeconomic and ideological conflicts that created the conditions for political violence has been to focus on verifiable and documented cases of human rights violations".[695] Castillejo-Cuellar reminds us that the TRC "was simultaneously a technology that rendered visible certain forms of violence while obliterating others".[696] The voice recognition devices deployed by TRC technology featured a "discursive abyss" that ruled out all testimony not "framed by a technical language of human rights violations".[697] Chipkin's basic understanding that by "casting the effects of apartheid in terms of human rights, the founding legislation prefigured a judgement in these terms", is useful in helping us understand the origins and effects of TRC technology.[698]

Apart from the fact that the TRC's interpretation of gross human rights violations meant an avoidance of structural analysis, it also resulted in particular understandings of victims, perpetrators and beneficiaries, and their relations with one another. A narrow definition of violations translates into a narrow definition of victims of apartheid. That is, because it excludes the everyday enforcement of apartheid, it excludes the everyday victims of that enforcement, those "whose lives were mutilated in the day-to-day web of regulations that was apartheid".[699] Obviously, this meant that the vast majority of ordinary South Africans who had suffered under apartheid were not deemed to be victims in terms of the TRC process.[700] Instead, only those who suffered gross human rights violations, that is political activists who were killed, abducted, tortured, or severely ill-treated were defined as the 'victims of apartheid'.

The TRC interpretation of its mandate meant that most of white society was exonerated from responsibility for human rights violations. It narrowed down the definition of perpetrators. For example, it absolved the ordinary white voter who had returned the racist government to power, decade after decade; it exonerated the foot-soldiers and pen

[694] M Mamdani quoted in Pigou, 2002, 43
[695] Grandin et al, 2007, 6
[696] Castillejo-Cuellar, 2007, 12
[697] Ibid, 2007, 37
[698] Chipkin, I. 'Somewhere over the rainbow', in Sunday Times, 26 November 2006, 29
[699] Quoted in Wilson, 2001, 35
[700] Hook, D. & Harris, B. 'Discourses of Order and their Disruption: The Texts of the South African Truth & Reconciliation Commission', South African Journal of Psychology, 2000, 30 (1), 17

pushers of apartheid; it even cleared the likes of FW de Klerk. Grandin and Klubock have pointed, in general terms, to another effect of defining violations narrowly. They argue that truth commissions tend to "disaggregate the collective nature of social justice struggles". In that way, they reproduce "the logic of a repression that was intended to break down networks of political solidarity".[701] They take this further, drawing on Taylor, to hold that commissions reconfigure people who were "actors in highly political dramas where they had represented clashing world views and collective strategies for implementing them", "as innocent or transgressing individuals with individual rights and obligations".[702] The TRC's understanding of its mandate also led to a blurring of the "link between perpetrator and beneficiary".[703] So frequently, contemporary South African society overlooks the fundamental truth that whites, as a group, benefited from apartheid. This truth was obscured by the commission in its search for perpetrators, the "bad apples", according to former General Magnus Malan.[704] As Pigou emphasises, this "allowed most whites to distance themselves from the violations addressed by the Commission".[705] A comparison with the CRLR is in order here. In restitution cases, the respondent is the South African government; the whites who benefited from apartheid dispossession are secondary roleplayers. An understanding of today's heavily racialised property market, highly capitalised agricultural sector and racially divided cities, towns and rural areas are not fundamental (or even of minor importance!) to the restitution process.

For the purposes of this thesis, another interesting dimension of Mamdani's commentary on the TRC is what he says about the relationship between human rights violations and forced removals. In his general disdain for the commission's move to pare down its definition of the former, he lambastes it for having excluded the latter from its mandate. "Imagine that a truth commission had been commissioned in the Soviet Union after Stalin, and this commission had said nothing about the Gulag. What credibility would it have? The South African equivalent of the Gulag was called forced removals".[706] It would surely have made sense to coordinate the efforts of the TRC and CRLR in relation to forced removals. There is no doubt that some removals were more brutal than others. In some there were certainly gross human violations (as defined by the legislation), and the TRC research into

[701] Grandin et al, 2007, 2
[702] Ibid, 2007, 4
[703] Mamdani, 2000, 179
[704] M Malan quoted in Feldman, A. 'Political Terror and the Technologies of Memory: Excuse, Sacrifice, Commodification, and Actuarial Moralities', in Radical History Review, Issue 85 (winter 2003), 69
[705] Pigou, 2002, 43
[706] Mamdani, 2000, 180

these abuses could have underpinned arguments for supplementary restitution compensation for pain and suffering. If this had happened, there may possibly have been greater realisation of the potential to deal more comprehensively with the substance of forced removals.[707] At least one researcher in the TRC, Kondlo, "openly moved for" such a link. [708] But this did not happen, in his view because of the pressure to finalise claims, particularly in cases regarded as politically significant.[709] I should remark that Mamdani does not refer at all to the restitution process. Needless to say, the latter has suffered from the absence of luminaries like Mamdani, and would have benefitted significantly from their engagement.

The underlying plot of the TRC report (conveying its complete picture of the past) is essentially "a moral narrative about the fact of moral wrongdoing across the political spectrum, spawned by the overriding evil of the apartheid system".[710] The narrative does not include an "in-depth understanding of the social conditions (racism, class inequality, gender hierarchy, poverty) of wrongdoing". Such analysis "is bypassed in favour of the moral category of 'evil' which resolves the problem of meaning: Why did people commit gross human rights violations? Because of the evil system of apartheid. End of story".[711] The TRC helped the people of South Africa to come to a united analysis that apartheid was bad, was evil, was a mistake that should be avoided in the future.[712] "Never again", President Mandela assured all South Africans, "never again". Grandin and Klubock point out that the TRC was no exception in this regard: truth commissions the world over generally present history "not as a conflict of interests and ideas within a context of unequal power, but as a parable of illiberal intolerance, distilling a nation's recently ideological feverish past into a useful moral, one that portrays terror as an inversion of a democratic society, a nightmarish alternative of what lies ahead if it does not abide by constitutional rules".[713] As Castillejo-Cuellar points out, there was a distinct "historic-teleological" dynamic at play in the formulation of the TRC report;[714] testimonies and

[707] I have shown above that the LCC and CRLR both adopted narrow interpretations of the legislation (more specifically the notion of 'racially-discriminatory dispossession of land rights').
[708] Kondlo, 2002, 7
[709] Ibid, 2002, 7
[710] D Posel, quoted in Wilson, 2001, 54
[711] Wilson, 2001, 54
[712] Gibson, 2004, 6
[713] Grandin et al, 2007, 2
[714] Castillejo-Cuellar, 2007, 32

events were used "as an authoritative device to highlight and substantiate some of the commission's main arguments regarding restoration and reconciliation".[715]

The TRC's narrative of the period 1960 – 1994 assumed and propagated that apartheid ended in 1994. Gearey asserts that the TRC viewed the apartheid past as "a pile of corpses".[716] The TRC set out to bury these corpses. The purpose of the TRC-orchestrated funeral was not to retrieve the trauma of apartheid, but "be free of its fixations"; it was not to linger in the past, but rather to "relegate history to the past";[717] it was not to open a new chapter of history, it was to close the chapter, indeed the book; it was not to begin a process of recollection, testimony and discussion, rather to commission memory,[718] and to codify the apartheid past.[719] Tutu was explicit in this regard; he told South Africans to "shut the door on the past".[720]The TRC process was not only about burying the dead; its most far-reaching and important purpose was to re-orient the mourners away from the past, towards the future. That is, the reason that they had to deal with the dead properly, definitively, ultimately, was so that they could move forward assertively, unburdened and encumbered by the dead. As Tutu put it, we must "take care that the past is properly dealt with for the sake of the future".[721]

In the funeral presided over by the TRC, the death of the nation and its re-birth were inextricably linked; without death, there could not have been re-birth. As Hook and Harris put it the project of establishing a new South Africa needed the "TRC's retrospective critique on the past" because this differentiated "the 'here and now' from the 'there and then'".[722] The TRC declared "the final fatality of apartheid and a rebirth at the threshold of a new nation out of 'exquisite cruelty'".[723] Sitas accords the TRC all the pathos and drama of a state funeral: "It was to be the grand, sorrowful performance and ritual of a society re-making itself. It was to be one of the most compromised, yet significant pieces of nation-building ever imagined".[724] As Dubow and Rosengarten point out "the incantation of a

[715] Ibid, 2007, 36
[716] Gearey, 2004, 57
[717] Dubow & Rosengarten, 2004, 680
[718] Ibid, 2004, 681
[719] Wilson, R. 'The Sizwe Will Not Go Away: The Truth and Reconciliation Commission, Human Rights and Nation-Building in South Africa', African Studies, Vol 55, Number 2, 1996 17
[720] D Tutu quoted in Bundy, 2000, 15
[721] D Tutu quoted in Gearey, 2004, 58
[722] Hook & Harris, 2000, 16
[723] Minkley et al, 2000, 13
[724] A Sitas quoted in Bundy C 'New nation, new history? Constructing the past in post-apartheid South Africa', in Stolten H (ed), History Making and Present Day Politics: The Meaning of Collective Memory in South Africa, Nordiska Afrikainstitutet: Uppsala, 2007, 81

'New South Africa' is instantiated… in the portentous language of birth and death, beginning and ending that attends the 'progressive' rhetoric of a new bureaucratic rationality"; the TRC is all about "moving beyond and living on" .[725] Albie Sachs puts it precisely when he describes the TRC as "the birth of a nation".[726]

The TRC produced fundamental truths – the death of the evil system of apartheid, the birth of a democratic rainbow nation – that served the imperative of nation-building effectively. It was an event –"a short, sharp hammer blow"[727] – that changed the nation, through the production of truth about its past and present. For Lever and James, the TRC-provided "memories of the unjust" and "values of the just" constitute "the foundations of the moral character of the new South Africa".[728]

Amnesty and reparations

I now comment further on the key TRC couplet of amnesty and reparations. Because of the agreement about qualified amnesty for perpetrators, it is no surprise that the institutional mechanism set up to implement the amnesty agreement was powerful. In early 1996 President Mandela appointed five people onto the Amnesty Committee, two of whom were judges. The committee was authorised to make decisions that were binding, on both the broader TRC and government,[729] and subject to review only by a court of law.[730] The process that the committee was required to follow to reach these decisions had to meet rigorous standards. As Wilson has asserted, "the South African amnesty process had the most stringent legal requirements of any recent amnesty".[731] But that the balance of forces was stacked in favour of the perpetrators, so the requirements did not result in balance between disclosure and amnesty.[732]

The amnesty hearings and rulings may have been only one component of the greater truth and reconciliation process, but they were its dominant component. Much of the discourse and practice of the TRC is well understood looked at through a legal lens. After all, the

[725] Dubow & Rosengarten, 2004, 687, 681
[726] A Sachs quoted in Wilson, 2001, 13
[727] Quoted in Posel, 2002, 152
[728] Lever, J. & James, W. 'The Second Republic', in W. James L. van de Vijer (eds), After the TRC: reflections on truth and reconciliation in South Africa, David Philip Publishers: Cape Town, 2000, 200
[729] Mamdani, 2000, 176
[730] Simpson, G. '"Tell no Lies, Claim no Easy Victories': A Brief Evaluation of South Africa's Truth and Reconciliation Commission', in D. Posel & G. Simpson (eds), Commissioning the past: understanding South Africa's Truth and Reconcilation Commission, Witwatersrand University Press: Johannesburg, 2002, 242
[731] Wilson, 2001, 23
[732] Gearey, 2004, 46

TRC carried out a significant amount of quasi legal work, which culminated in the granting of amnesty to about 850 gross human rights violators.[733] Wilson traces the dramatic rise of the "legalistic forensic paradigm" to about a year after the TRC began its work.[734] Key characteristics of this paradigm were rigor,[735] "facticity and impartiality".[736] Posel and Simpson emphasise the seriousness with which the TRC approached its work. "Any obvious traces of bias or distortion, any signs of a desultory or timid engagement with the task at hand, would scupper such a project from the start".[737] The legal paradigm became so hegemonic that there was no longer any room for the popular narrative truths that had thrived during the initial period. As Wilson writes, the "rise of the forensic model transformed everything from the statement form to the controlled vocabulary of data coding".[738]

The methodology (thoroughness, balance, impartiality) enabled the TRC "to pass informed, objective judgements on the past".[739] Without producing such an account, it would not have been possible for the TRC "to create a moment through which history can be judged".[740] No less of an expert on the matter than Judge Goldstone has noted that, "[f]undamental to all forms of justice is official acknowledgement of what happened".[741] In order to arrive at official acknowledgement, there needs to a judgement, a verdict, based on meticulous evidence and balanced reasoning. Posel acknowledges that the status of the TRC's written report is established "as the official, impartial, disengaged verdict on the past",[742] or what Mamdani calls "institutionally produced truth". [743] The TRC wrote the ultimate truth of the high noon of apartheid; it created "'the global truth' of an abusive period".[744] It ended the need of the South African public for further historical enquiry, or for further pronouncements on the past. The state has endorsed the TRC's history of the period 1960 – 1994 to be its definitive and final history. To all intents and purposes, the TRC settled the matter of the past; it closed the debate; officially-speaking, there are no

[733] Gibson, 2004, 1
[734] Wilson, 2001, 37
[735] Posel & Simpson, 2002, 2
[736] Wilson, 2001, 37
[737] Posel & Simpson, 2002, 2
[738] Wilson, 2001, 38
[739] Posel & Simpson, 2002, 2
[740] Gearey, 2004, 56
[741] Posel, 2002, 147
[742] Ibid, 2002, 156
[743] Mamdani, 2000, 177
[744] Wilson, 1996, 17

more “lingering questions and controversies about South Africa’s troubled history” [745]. For Dubow and Rosengarten, the TRC process ‘commissioned memory’, “to take the place of history”[746]. Wilson’s general commentary about commissions is relevant to South Africa’s TRC; they “play a vital role in fixing memory”[747]. A verdict passed by a credible court of law cannot be over-turned, except on appeal to a higher court. In the matter of ‘the people’ versus ‘the apartheid past’, there is no court higher than the TRC. The final judgement in the matter has successfully been handed down. Fullard and Rousseau accuse Mamdani of a “one dimensional and instrumentalist reading” of the TRC.[748] I think that they miss the point, which is not to argue that the TRC was bound to have produced the history that it did, but rather that its history undeniably yields effects that effectively serve the project of the new South Africa.

There is an abundance of evidence (anecdotal and substantive) that South Africa has succeeded in making a smooth transition across 1994. For this simple reason, Gibson has a point in his assessment that the TRC succeeded in its mandate of promoting unity and reconciliation, and that “democracy in South Africa has been well served by the efforts of the TRC”.[749] Certainly, the TRC has been internationally acclaimed as successful.[750] Amongst other things, Gibson asserts that the TRC has fostered belief in human rights and enhanced the legitimacy of democratic institutions.[751] Or, as Dubow and Rosengarten put it, the TRC effectively promoted a “phantasm of progressivism” that has had an impact on South African consciousness and political life.[752] Acclaimed novelist Krog cherishes the TRC as the mid-wife of a new era in South Africa. She treasures it for having “kept alive the idea of a common humanity. Painstakingly it has chiselled a way beyond racism and made space for all of our voices. For all of its failures, it carries a flame of hope that makes me proud to be from here, of here”.[753] On a more specific level, I should emphasise that

[745] Posel & Simpson, 2002, 13. The only exceptions in this regard pertain to those individuals (perpetrators) who defied the TRC. If the recent charging of Vlok and van der Merwe is anything to go by, then it seems that the National Prosecuting Authority (NPA) will attempt to force those who defied the TRC to answer questions in court.
[746] Dubow & Rosengarten, 2004, 681
[747] Wilson, 2001, 16
[748] Fullard et al, 2004, 81
[749] Gibson, 2004, 2, 23
[750] Fullard et al, 2004, 78, 82
[751] Gibson, 2004, 17. See also Fullard et al, 2004, 97
[752] Dubow and Rosengarten, 2004, 684
[753] Quoted in Unterhalter, E. ‘Truth rather than justice? Historical narratives, gender, and public education in South Africa’ in H. Stolten (ed), History Making and Present Day Politics: The Meaning of Collective Memory in South Africa, Nordiska Afrikainstitutet: Uppsala, 2007, 105

government has granted what is effectively a general amnesty to apartheid operatives in the wake of the TRC; this is reconciliation and forgiveness, new-South-African style.[754]

The insights from the TRC literature help to sharpen and focus one's understandings of the productive value of the restitution process. As du Toit has written, it is instructive to compare restitution with the TRC because both established a "hold on the public imagination. For, as in the case of the TRC, the land claims process is distinguished by the way in which stories of injustice and violation told by claimants can enlist the identification of many of those who did not suffer those specific hurts (and even of those who were beneficiaries of Apartheid!)"[755] Again, it is useful to emphasise the role of television in propagating these stories. The key way that TV actuality items enlist the citizens of the new South Africa, from all classes and races, is to sustain and propagate myths with universal appeal. As du Toit puts it, "like the accounts of love and courage, defiance and injury, hope and loss generated through the TRC process, land claimants' stories of how these idealised communities were destroyed often seem to speak for all of us, and the injustice they suffered seems to become a symbol or a metaphor for all the injustices caused by Apartheid".[756] Crucially, this effect is achieved through an event rather than a convoluted process. The testimony is told, the tears are wept, the verdict is handed down, the agreement is signed, the beast is slaughtered, the community returns. Both the TRC and restitution were/are 'truth by event', customised for TV, easily delivered to the populace; they were/are 'fast truth', digestible in bite-size pieces. And they contribute(d) to the subjectification of citizens of the new South Africa.

Wilson notes that amnesty not only protected perpetrators from prosecution, it also "extinguished citizens' constitutional right to sue for civil damages in compensation from the perpetrator and state".[757] In other words, the amnesty provisions indemnified the state itself.[758] Both at the level of logic and in terms of the victims' expectation, the quid-pro-quo of amnesty in South Africa should have been state reparations. The reason for this is clear: if neither the perpetrators nor the state pay the price for amnesty, then the victims cannot claim any form of justice. "Notionally, the constitutionality of the Commission's amnesty provisions rested on the idea that the state would provide reparation to survivors

[754] Fullard et al, 2004, 93
[755] Du Toit, 1999, 10, 11
[756] Ibid, 1999, 11
[757] Wilson, 2001, 24
[758] Ibid, 2001, 24

in lieu of the compensation that they could otherwise have been entitled to claim from perpetrators, but which the granting of amnesty denied them".[759]

Whereas overall logic and moral considerations pointed to the need for a comprehensive programme of reparations, there were a number of complicating factors at play. Most importantly, unlike the Amnesty Committee, the Reparation and Rehabilitation Committee did not have the power to make decisions. Instead, it could only make recommendations, to be considered by government.[760] Government delayed taking and implementing a decision about reparations. Finally, in his March 2001 budget speech, Finance Minister Manuel announced that government had set aside R800m for reparations,[761] providing for a once-off payment of R30 000 to victims.[762] (R30 000 approximated both the value of a housing subsidy and the value of financial compensation in a medium-size restitution claim, at the time.) This decision was part of what Grandin and Klubock call the "hollowing out" of the truth commission process in South Africa.[763] The contrast between government's focus, seriousness and efficiency in dealing with amnesty, on the one hand, and its clumsiness, laxness and arbitrariness when it came to reparations, on the other, is stark. It is evidence that the post-apartheid government was more concerned with a smooth transition to democracy in order to build a rainbow nation, than engaging with apartheid in a substantial manner and with the transformation of an apartheid society.

As alluded to above, there are apparent parallels between the respective manners in which the reparation and restitution processes have been formulated, managed and executed. Here I highlight three. First, they both emerged as shadows of compromise creations, namely amnesty and the protection of existing property rights. That is, the reason for a reparation process was that there was an amnesty process, and the reason for restitution was the protection of apartheid property rights. The power brokers squabbled over and resolved amnesty and property protection, and reparations and restitution (respectively) followed, as an object produces a shadow. Second, both processes lacked political support (in the sense of political leaders using them to effect the redistribution of resources), which resulted in weak institutional underpinnings. Neither the

[759] Simpson, 2002, 242
[760] Ibid, 2002, 242
[761] Matshoba, M. 'Nothing but the Truth: The Ordeal of Duma Khumalo', in D. Posel & G. Simpson (eds), Commissioning the past: understanding South Africa's Truth and Reconcilation Commission, Witwatersrand University Press: Johannesburg, 2002, 139
[762] Villa-Vicencio, C. 'Our past is still with us', Sunday Times, 23 April 2006, 19
[763] Grandin et al, 2007, 5

Reparation and Rehabilitation Committee nor the Land Claims Court and thereafter the Commission for the Restitution of Land Rights, had an adequate resource allocation or authority to enable it to take and implement far-reaching decisions. Instead, they were reduced to beggars at the table; they had to be content with the crumbs that were brushed aside. Third, the reparation and restitution processes were both circumscribed by arbitrariness. In each case, the arbitrariness was deliberately designed to marginalise and render insignificant. Reparations were pegged at R30 000 per victim; the SSO was fixed at R40 000 per urban owner and lower in other cases. There can be little doubt that these projects have more value to the citizens of the country than to those regarded as their direct beneficiaries.

Historians

Silences are not an omission or a mistake; rather they are deliberate and intended. In the late 1990s, French thinker Derrida caused a minor stir in South Africa when he referred to forgetting as being integral to the TRC process. Harris applied this thinking further by suggesting various types or layers of this forgetting in government's response to the TRC's recommendations.[764] Further, he postulates that there was a deeper and more fundamental level of forgetting at work, aimed at enabling the state to get "back to business as usual as quickly as possible".[765] Whilst Harris (V) is appropriately critical of government, he is silent about the layers of forgetting and silencing that were integral to the TRC itself. Above I have argued that the commission and its report drove a deep wedge, created an impassable chasm between past and present. In the view of Hook and Harris (B) this "signals the limits of their political efficacy in terms of criticising and opposing *ongoing* relations of racialised power".[766] The post-apartheid regime of truth prevailed to the extent that it presented the apartheid era "as more distinct, as more separable from the present, than in fact it actually is".[767] Whilst this outcome is "politically operative" in the post-1994 nation, Hook and Harris point out that the "the discursive order of the 'new' South Africa appears in some ways, to support certain of the material arrangements of the 'old'".[768] As Bundy suggests, the TRC version of history effectively

[764] Harris, V. 'The Truth And Reconciliation Commission: An Exercise In Forgetting?', Statement by the Director of the South African History Archive, 21 September 2002, http://www.wits.ac.za/saha/reports_trc.doc (accessed July 2006)
[765] Ibid. Similarly, as Bohlin has illustrated (2007, 117), the way that the restitution process has functioned, has made it easy for whites, even those directly implicated in specific cases of forced removal, to forget what happened and their involvement in these events.
[766] Hook & Harris, 2000, 16
[767] Ibid, 2000, 16
[768] Ibid, 2000, 16, 19

condones a polity in which ordinary citizens are poor, illiterate and disempowered.[769] The truth-effects of the TRC – like those of the CRLR – work in favour of the beneficiaries of apartheid, and against its victims. It is therefore definitely necessary to think "outside the historicist logic of epochal closure and coherent re-beginnings".[770] What has been needed from historians from the late 1990s onwards, more than anything, are histories of post-1994, present-day segregationist South Africa.

Given the importance of the TRC and restitution processes with regard to the generation of historical truths, I now turn attention to trying to understand the near absence of historians from these processes.[771] According to Wilson, a main lesson that emerges from the TRC experience is that future truth commissions around the world should "learn from the inability of the South African TRC to incorporate and integrate historians".[772] In the mind of Wilson, South African historians were deliberately excluded from the process because "they could not produce the kind of history amenable to the preferred model of nation-building".[773] Instead the '"civic nation-builders" of the new South Africa relied on lawyers and statisticians "to supply their opium".[774] For Wilson and others, a consequence of the marginalisational of historians was the failure of the TRC to produce "a coherent socio-political history of apartheid".[775] Many of the key characteristics of guild history – adequate concern given to context,[776] "the complexities of social causation",[777] "analysis of causation",[778] "a central narrative",[779] "a progressively structured exposition of an argument"[780] – were consequently either absent from or under-developed in the TRC Report. As Comaroff puts it, the legal/ therapeutic nature of the TRC, meant that it would lack "analytic evaluation – the sort that is the stock in trade of History as a scholarly discipline".[781] Thus, from the perspective of the professional historian, the TRC Report

[769] Bundy, 2000, 20
[770] Dubow & Rosengarten, 2004, 684
[771] While the majority of high profile historians remained distant from the TRC process, some historians (eg Nicky Rousseau, Madeleine Fullard, Janet Cherry) worked in the TRC's research department. Importantly, though, these historians found themselves in an institutional research setting that prioritized fact based and positivist research processes, and shunned critical engagement. This minimised the possibilities of a critical research process within the TRC.
[772] Wilson, 2001, 60
[773] Ibid, 2001, 60
[774] Ibid, 2001, 61
[775] Ibid, 2001, xix
[776] Du Pisani & Kim, 2004, 88; Wilson, 2001, 53
[777] Posel, 2002, 166
[778] Du Pisani & Kim, 2004, 88
[779] Wilson, 2001, 53
[780] Ibid, 2001, 52
[781] Comaroff, 2004, 3

does not amount to an "authoritative perspective on the past";[782] rather it contains merely an "oversimplification of the past".[783] Nieftagodien elaborates as follows: "As a history project it didn't critically engage the underlying processes that contributed to apartheid and to change. It worked within the easy binaries of good and evil; victim and perpetrator, which foreclosed on any real enquiry into historical processes, including the complexities of causality and effect. Individuals and organisations, even narratives were pigeonholed as either good or bad. It lacked the kind of complexity proper history can and does provide".[784]

For many professional historians, not all is lost. They hold that, over time, members of the academy will engage in thorough investigation; they will embed context into the debate, and will institute the academic contestedness required to produce the kind of nuanced analysis that befits the discipline.[785] Posel implores historians to view the TRC as "a beginning rather than the end of an encounter with history, one which has no necessary deadline or schedule".[786] For her, the TRC was not an event, rather it was but one stage in an historical process; its key value is that it produced an archive that will be used for future research. In accordance with the guild prescription for even-handedness and objectivity, Du Pisani and Kim remind future historians in this regard that the TRC archives "represent only one voice among many".[787]

I hold a different view from that of Wilson. Academic historians were not marginalised by the TRC process. The reason that they were virtually absent is that they did not join the process.[788] Saunders pleads that "some would have participated had they been asked to do so", forgetting that no-one asks them to research the specialised, faddish issues that they choose to take up.[789] Their heads were held then – as they are held now – in the vice-grip that is guild history; they did not perceive the importance of what was happening around them at the time, the moment of transition. Ironically, as a consequence, they

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[782] Wilson, 2001, 52
[783] Du Pisani & Kim, 2004, 88
[784] N Nieftagodien Quoted Saunders & Kros, 2004, 1,2
[785] Du Pisani & Kim, 2004, 88; Posel, 2002, 166
[786] Posel, D. 'The TRC Report: What Kind of History? What Kind of Truth?' in D. Posel & G. Simpson (eds), Commissioning the past: understanding South Africa's Truth and Reconcilation Commission, Witwatersrand University Press: Johannesburg, 2002, 153
[787] Ibid, 2004, 88
[788] According to Saunders, a sole historian played a "leading role" in the TRC, and "a few young researchers" contributed to its report writing exercise (Saunders, C. 'Historians and the South African Truth Commission', in History Compass, Vol 2, 2004a, 3).
[789] Ibid, 2004a, 1

overlooked the importance of historical process in fashioning contemporary realities. The TRC legislation required a complete picture of the past; that this was not interpreted by historians as a clear signal that they should contribute to the process indicates the extent to which their gaze was introverted already by 1996. History is implicated in contemporary power relations; it has a symbiotic relationship with the present, not with an unknown future. As Gearey explains, the TRC was staged as an event (not an inconclusive process).[790] As such it was necessary for the TRC to produce compelling, ultimate popular history, and this is what it did. Histories on the period 1960 – 1994 will be produced in the future, but none will replace the TRC report, either officially or in the public mind. The opportunity to produce effective history in this area has, for the moment at least, passed.

In the early stages of the transitional period, there were some indications that the academy would engage meaningfully with the restitution process. As early as mid-1995, shortly after the promulgation of the Restitution of Land Rights Act, Maylam ventured that research into land claims was an "obvious area… where historians could play an important role". [791] If the academy needed a direct invitation to participate, it received this in 1998, when a senior delegation from the Research and Policy Unit of the Commission for Restitution of Land Rights visited the heads of the History Departments of the top universities in South Africa. The delegation's mission was to enlist the support of these institutions in the huge challenge that confronted the commission, namely to investigate and resolve thousands of land claims.[792] Despite this, historians have been conspicuous in the restitution process only by their absence. Van Eeden comments that the "role that South African historians have played to date in enquiring, monitoring, researching and writing about the process of land reform and land tenure in South Africa is limited".[793] Similarly, Bohlin observes that "surprisingly little academic work has examined how the CRLR has generated new forms of memory and history".[794] The overall point is that academic involvement in the restitution process has been negligible. Compared with the amount and type of research that the restitution process called for or required, together the academic projects that have been undertaken do not amount to a significant body of work. Most of these projects have

[790] Gearey, 2004, 46
[791] Maylam, 1995, 11
[792] Personal communication with Justin Erasmus, previously researcher in the Commission for the Restitution of Land Rights. I hosted Justin during his Eastern Cape leg of the 1998 trip.
[793] Van Eeden, ES. 'The Role of History with regard to Evidence in Land Claims as officially Proposed: A Case Study on the Farm Deelkraal IQ142, North West Province', in South African Historical Journal, Vol 57, 2007, 180
[794] Bohlin, 2007, 114

related to restitution cases in the Western Cape.[795] Closer to home, I am only aware of a couple of useful contributions to the restitution effort in the central and eastern portions of the Eastern Cape Province. Curiously, Bohlin accords the little academic work undertaken greater importance than it justifies.[796]

My interest and concern is not limited to the amount of academic work on restitution; it also relates to the type of this work. Not only has there been a paucity of work in general, but the type of work undertaken has been variable. This stems from the fact that the overall stance and approach of historians to restitution varies considerably. Most approach the issue in a disinterested and objective manner; they view restitution cases and claimants from the outside, and keep them at arm's length. Within this category of academics, some appear cynical and reactionary, some indifferent, and others sympathetic and progressive. For example, Van Eeden uses history to undermine a community restitution claim to the Deelkraal farm;[797] Grundlingh insists that professional mediation is necessary to validate the historical assertions of a claimant community outside Stellenbosch (without any indication that he is interested in providing this mediation);[798] whilst Walker is undoubtedly sympathetic to restitution claimants as a grouping. Despite their differences, these academics share a common purpose, namely to assert academic arguments in academic publications. Their interest in life in Deelkraal, the unnamed community outside Stellenbosch or Cremin is secondary, and their involvement negligible.

There are few historians who operate from the inside, who locate themselves inside claimants' struggles for restitution, and whose work is a function of these struggles.[799] For the handful of exceptional historians, what is at stake is more than just a publication opportunity; it is a chance to produce truth that could trigger the transformation of the lives of victims of forced removals or at least ensure the release of state resources to these

[795] Ibid, 2007, 114, 117; Mesthrie, U. 'Land Restitution in Cape Town: Public Displays and Private Meanings, in Kronos, No 25, 1998/9, 245
[796] She writes that "these professionally researched histories…often involve innovative and multi-layered methodologies" and that they have "found their way into the news media, academic theses, journals and museums" (Bohlin, 2007, 119).
[797] Van Eeden, 2007, 199
[798] Saunders & Kros, 2004, 21, 22
[799] The few academics who meet this description possibly include Mesthrie, Legassick and Delius (Bohlin, 2007, 114, 117; Delius, P. & Schirmer, S. 'Betterment as Discrimination: Racial Prejudice, Discrimination and Apartheid in Soil Conservation Policies Applied to Rural Residents with a Special Focus on the Mkonde Community in the Transkei', unpublished document accessed in BRC Resource Centre, 2000). I qualify the inclusion of Delius with a note that besides writing this paper, which was commissioned by the Legal Resources Centre, his involvement in the Mkonde claim was negligible. Broadbridge, Boge and Bantom should possibly be added to the list of activist restitution historians but I have not been able to access their work, so I cannot make an informed judgement in this regard (See Mesthrie, 1998/9, 245).

people. Perhaps some people may dismiss activist research into restitution claims as instrumentalist, but for me the fact that it has the potential to effect a redistribution of public resources enhances (rather than detracts from) its value.

To date, historians have spurned the responsibility to consolidate existing sources and archive of land dispossession (that which existed despite apartheid) and to create and fashion new sources and archives in this regard. Such archives would be the basis on which to formulate counter narratives and histories of dispossession in South Africa. As it is, the history academy sits by and watches an almost-complete restitution programme that is hardly worth the name.

Conclusion

The CRLR and TRC played important roles in formulating and building the new South Africa. The manner in which they generated knowledge and produced truths consolidated the power relations that prevailed in the 1993 constitutional negotiations. By rescuing property, saving the law and promoting a culture of human rights, the CRLR and TRC enabled the elite victors of Codesa to facilitate a smooth transition from apartheid to constitutional democracy. By smooth, I mean that the socio-economic structure of apartheid South Africa remains intact today. That is, restitution has been delivered, truth has been told, and reconciliation achieved, without there having been a redistribution of resources or transformation of economy or society.

The historical truth produced by the CRLR and the TRC drove a wedge between an apartheid past and a democratic present. In so doing, it silenced the voices and obliterated the ongoing experiences of the mass of South Africans – black, poor, rural – who continue to live the life of subjects, not citizens. In this period of transition, which is probably now nearing its end, what is urgently needed are critical histories of the present. Yet disappointingly but not surprisingly, South African historians have, generally speaking, been conspicuous in restitution and TRC processes only by their absence. Instead they have thrown stones from inside their glass houses, complaining about lack of analysis, insisting on the importance of professional mediation, and so on. They have sought to buy time, thinking that proper history can only follow, well after the intensity of contemporary politics has subsided. Here they have fundamentally miscalculated and misunderstood the nature and character of the South African transition. The history that counts (in relation to the CRLR and the TRC) is that which was written over the period 1998 – 2008, not that

which will be written in future. The indifference of historians to the above-mentioned processes stems from their inability or reluctance to engage in the production of effective history.

Chapter 4 – The exclusion of betterment dispossession from restitution: an expression of segregation policy in post-1994 South Africa

Introduction

In the previous chapters, I have tried to elucidate contemporary power configurations in South Africa, through formulating general analyses of recent historical developments such as the institutionalisation of a property clause and the restitution process. In this chapter my interest shifts from the general to the specific. Here I look specifically at the impact of restitution on the former Bantustans. Because the main type of apartheid dispossession that affected these areas was betterment, I focus on the relation between restitution and betterment dispossession. Despite the significance of betterment to grand apartheid, the vast extent of its implementation, its dispossessing effects and devastating consequences, post-1994 policy makers decided to exclude it from the parameters of restitution. The main purpose of the chapter then, is to try to make sense of this decision. Was it a mistake, in the sense of government having neglected, overlooked or misunderstood it? Was it deliberate, in the sense that it was consistent with other related policy choices made by government at the time? In order to answer these questions, the chapter considers the decision-making process, context and actors in detail. Particular attention is placed on civil society in this regard, through a case study of how BRC positioned itself in relation to betterment and restitution in the mid-1990s. Thereafter, the chapter isolates four other policy issues that also have a major bearing on the former Bantustans, namely socio-economic planning, rural development, local governance, and land tenure. The pattern that emerges through the ensuing analysis necessitates that I follow this up with a brief genealogy of contemporary South African segregationism, which is characterised by distinguishing the former Bantustans from the rest of South Africa.

The basics of betterment

Betterment was the flagship rural development programme of the segregationist and apartheid governments. Infused as it was with science, these governments conceptualised and fashioned it as a rational, meticulous intervention to be implemented at village level. Betterment plans were formulated and implemented in the former Reserves/ Bantustans and other so-called black areas from the 1930s onwards. Under betterment, designated areas were divided into distinct land use zones, for example, for residential, arable and grazing usage. The land use categories were rigid; as a result residents were forced to move into the demarcated residential areas, and to farm in the designated arable and

grazing areas. As de Wet sums up, the "basic paradigm of dividing land up into separate arable, residential and grazing areas shaped the *planning* of individual Betterment areas in a fairly uniform sense. In addition, the South African administration had the organisational and… the military capacity to ensure that the basic plan was actually *implemented* as intended, that is with broadly uniform spatial changes".[800] However, one should qualify this generalisation with acknowledgement that betterment took quite different forms in different parts of the country, and according to different tenure regimes. For example in Lebowa, Trust areas were set up to absorb large numbers of people flushed out of white areas of one description or another. In Ciskei and Transkei by contrast, spatial reorganisation did not generally involve a change of locality boundaries and cannot therefore be explicitly linked to the objective of making room for outsiders.[801] (This does not detract from the facts that previously white-owned farms bought by the South African Bantu Trust were organised in such a manner that they could absorb people evicted from farms and cities, and that other areas, eg Elukhanyweni, were explicitly set aside and planned for victims of black spots removals, eg Tsitsikamma). Similarly, in communal areas in the Eastern Cape, betterment rearranged all land within affected localities, whereas in quitrent and freehold areas the spatial changes were restricted to commonage areas.[802]

Different scholars have suggested different reasons why the segregationist and apartheid governments implemented betterment.[803] There is no need for me to re-cover this ground; rather, I emphasise that betterment was of central importance to the policy and practise of separate development. From a rural perspective, one can distinguish three phases of social engineering in twentieth century South Africa: foundational (c1910 – c1940), betterment (c1940 – c1970),[804] and grand apartheid (c1970 – c1986). During the first phase, the Union government laid down the legal and administrative infrastructure upon

[800] De Wet, C. Moving Together, Drifting Apart: Betterment Planning and Villagisation in a South African Homeland, Witwatersrand University Press: Johannesburg, 1995, 199
[801] Ibid, 1995, 199
[802] Westaway, A. 'The formulation of modern power configurations in the Keiskammahoek district of the Ciskei from c.1948 to the present', MA dissertation, Rhodes University, 1993, chps 3 and 4
[803] For a discussion on the origins of betterment discourse, see Westaway, 1993, chp 1. This chapter contrasts materialist explanations developed by the likes of Hirson and Hendricks, with Beinart's environmental explanation (Hirson, B. 'Rural revolt in South Africa: 1937 – 1951', in The societies of southern Africa in the nineteenth and twentieth centuries, Vol 8, collected seminar papers No 22, University of London, 1977, 115 – 131; Hendricks, F. The pillars of apartheid: Land tenure, rural planning and the chieftaincy, Almqvist and Wiksell International: Stockholm, 1990; Beinart, W. 'Soil erosion, conservation and ideas about evelopment: a southern African exploration, 1900 – 1960', in Journal of Southern African Studies, Vol 11, No 1, 1984, 52 – 83).
[804] In my limited understanding, there was a similar process to betterment underway in the urban areas of the country during this period (Evans, 1997). He identified the "planned native location" as a "key apartheid institution in the 1950s" (1997, 266).

which apartheid was constructed. This included legislative developments such as the passing of the 1913 and 1936 Land Acts, and administrative initiatives such as the establishment of the Native Affairs Department (NAD), which would develop into a "state within a state" by the 1950s.[805] During this time most remaining opportunities for African capital accumulation were destroyed.

From the late 1930s until the early 1970s, the main change that occurred in those parts of rural South Africa reserved for African people was betterment. Betterment was not conceptualised with grand apartheid (c1970 – c1990) in mind, but its effects certainly suited that project. More specifically, the spatial workings of betterment both rendered the Bantustans easier to govern and made it possible for them to absorb thousands of surplus people. Betterment enabled the Bantustans to "contain and discipline the reserve army of African labour"; Evans describes this as their "chief function" during the era of apartheid.[806] Significantly, some senior apartheid officials were cognisant of the fact that bettered villages were easier to control than scattered locations; at the 1950 conference of Chief Native Commissioners, there was recognition that "rehabilitation measures had… improved the department's control over Africans' movements in the reserves".[807] The disciplinary work performed by spatial reorganisation was supplemented by a variety of other instruments, including improved documentary controls,[808] the setting up of a complex of labour bureaux,[809] and what Mamdani has called "decentralised despotism".[810]

The importance of betterment in relation to the apartheid project is underscored by the fact that it caused the removal and dispossession of millions of South Africans. The most authoritative text on forced removals in South Africa is the Surplus People Project volumes published in 1983. According to these volumes, "betterment has forcibly removed more people in more places with greater social consequences and provoking more resistance than any other category of forced removal in South Africa".[811] The volumes do not specify

[805] Ashforth, A. The politics of official discourse in twentieth century South Africa, Clarendon Press: Oxford, 1990, 43
[806] Evans, 1997, 245
[807] Ibid, 1997, 258
[808] Posel described the apartheid bureaucracy's penchant for documenting facts and figures as its "mania for measurement" (quoted in Dubow, S. A Commonwealth of Knowledge: Science, Sensibility and White South Africa 1820 – 2000, Double Story: Cape Town, 2006, 267).
[809] Evans, 1997, 258; Mamdani, 1996, 192
[810] See below for a discussion on the establishment of Bantu Authorities in the 1950s, and the links between this development and betterment.
[811] Surplus People Project (SPP), Forced Removals in South Africa: The Eastern Cape, Citadel Press: Cape Town, 1983b, 110

the number of people dispossessed because of betterment, but they give do note that over one million people in the single province of Natal were affected.[812] Recent policy work undertaken in the Eastern Cape provides clarity about numbers affected in that province. In 2004, a task team set up by former Minister of Land Affairs Thoko Didiza, estimated that 320 000 households from Ciskei and Transkei had been affected by betterment.[813] Upon receiving this report, then Director-General in the Department of Land Affairs Glen Thomas reportedly asked for additional empirical research to be undertaken to verify the 'quantum' of affected people. In 2006, BRC and the Transkei Land Service Organisation (Tralso) were appointed to carry out this work; they revise the estimate of affected households downwards to 190 000, but argue that this "probably represents a minimum possible number"[814]. Even if one takes a low estimate of 200 000 households in the Eastern Cape, and uses a conservative average of 6 people per household (at the time), one arrives at a conclusion that approximately 1 200 000 people in the province were dispossessed through the implementation of betterment. If one puts the estimates for Natal and the Eastern Cape together, then de Wet's "minimal estimate" of 3 000 000 looks too low. [815]

In the light of the analysis of the history discipline in the first chapter, it is appropriate for me to make a couple of remarks on the betterment archive. Most of the sources that comprise the archive were drafted by officials responsible for its implementation (that is, the then victors). Its contents do not surprise. The voice that predominates is that of the Native Commissioner; he speaks the language of science, rationality and regulation. The information laid out in the sources is predominantly of the actuarial type. That is, the betterment archive discusses village people only in the aggregate.[816] 36 people gave their consent to the implementation of betterment; the average arable land holding is 1.6 hectares; the total number of dwellings is 146; and so on. The same people who assert their own voices silence the voices of others. Betterment sources broadcast the official voice (the voices of the Native Commissioner and scientific experts) and they mute the voice of the dispossessed. They tell the story of an experiment in scientific development,

[812] Surplus People Project (SPP), Forced Removals in South Africa: General Overview, Citadel Press: Cape Town, 1983a, 5
[813] Commission on Restitution of Land Rights, 'Memorandum: Lodgement of betterment restitution claims in the Eastern Cape', Unpublished document, 2004, 5
[814] BRC, Tralso & DLA, 'Betterment Dispossession: Consolidated Quantum Document', February 2007, Unpublished research commissioned by the Commission on the Restitution of Land Rights, BRC archive, 32
[815] De Wet, 1995, 28 (fn 24), 235
[816] The only specific individuals discussed are candidates for headmanship. The Native/ Bantu Commissioners' sole over-riding interest in these processes was to ensure that the most compliant candidate was appointed.

not the story of how people's lives were turned upside down and diminished as a result. The only interest that this archive has in the people who were subject to betterment is their role in enabling legal compliance.[817] When the colonial and apartheid authorities met with some opposition, the archive does not manifest any interest in the reasons for it or its validity. Instead, it is conveyed only as an irritation, a temporary setback. Typically, the authorities responded through mechanisms such as effecting a change of headman, or they simply moved on to another village. The voice of the bettered people – those dispossessed of the land and robbed of their ways of living – was silenced by the authorities and archivists alike. Local knowledges of betterment dispossession were completely subjugated. The Native Commissioners went beyond suppressing the voices of the dispossessed in their silencing effort; they ordered the removal of the dwellings that the people were forced to vacate in the process of villagisation.[818] That is, they sought to leave no traces of betterment dispossession in the (written and physical) sources.

Following Baucom, there is therefore a need for historians to assemble a counterarchive, comprising documents that describe the link between betterment and apartheid, the process of dispossession, people's experiences of dispossession, the consequences of dispossession, and so on. There are two initial tasks required in pursuit of a counterarchive, namely imagination (borne of melancholy) and the production of new sources through collecting oral testimony. Imagination is a prerequisite if we are to meet our obligation to see that which the Native Commissioner did not want us to see. And so, I ask you to join me in imagining how the villagers experienced the day of betterment dispossession: hastily harvesting any ripe produce off the arable lands; carrying the roofs of the houses that had to be abandoned; transporting all the possessions to the new residential area; trying to solicit the co-operation of the children; dealing with the emotion and trauma of having to leave home; clambering for a new site in the demarcated area; managing the movement of kraal-ed livestock to the new site; realising just how small 50 X 50 is; coming to terms with having new neighbours, living too close for comfort and privacy; trying to keep dry and keep the children dry on that first rainy night. The scene may be imagined, but it is certainly consistent with fact. The counterarchive should be filled with the voices of villagers who experienced betterment and its consequences. Time is of

[817] In places such as Ciskei where a modicum of consultation was required by law, community meetings were called to achieve the necessary approval. Elsewhere, I have drawn attention to the farcical nature of these engagements. Westaway, 1993, 62 -67

[818] Plasket, C. 'Notice of Motion in the Land Claims Court of South Africa - In the matter between: the community of the village of Chatha (Applicant) and the Minister of Land Affairs (Respondent)', Unpublished legal papers in BRC Archive, 18 December 1998, Annexure 6, 5

the essence in this regard, as more and more survivors of betterment grow old and confront death.[819]

Notwithstanding gender, age, class and other stratifications that ran through rural societies at the time,[820] betterment was a direct assault on communities' livelihood strategies and their social and political practices.[821] With regard to the latter, it is necessary to note that the planning and implementation of betterment coincided with the passing and implementation of the Bantu Authorities Act (BAA), which devolved "greater local powers onto fully-fledged indirect rule authorities in the tribal areas".[822] Mamdani is correct to regard the act as a significant milestone in a process of re-working the governance of the rural areas. As Crais has noted, whereas the destruction of chieftaincy was a central strategy of colonial intervention in the nineteenth century, the reversal - its resurrection - was the preferred governance strategy in the twentieth century. "The elevation of chiefs to the center of rule completed a process of retribalization that had been initiated in the 1920s".[823] The BAA set up an elaborate hierarchical structure of governance, comprising Tribal, Regional and Territorial Authorities.[824] The authorities were led by chiefs and populated by headmen.[825] In its haste to get the system up and running, the number of chiefs recognized in the Transkei by the apartheid government more than doubled between 1955 (when the council of chiefs, called the Bunga, accepted the Bantu Authorities Act) and 1963.[826]

Key characteristics of indirect rule included the reconstitution of tribal leadership and customary law, and market restriction. "For the subject population of natives, indirect rule signified a mediated – decentralised – despotism".[827] Significantly, custom allocated both executive and judicial authority to the institution of Native Authorities.[828] It thus "came to be

[819] The efforts of BRC to produce new sources are laid out in chapters 5 and 6.
[820] See Mager, A. Gender and the making of a South African Bantustan: a social history of the Ciskei 1945 – 1959, Heinemann: Portsmouth, 1999
[821] There is a growing archive of oral testimony on people's experiences of betterment. For example, see de Wet, 1995, 87 – 95, and Westaway, 1993, 131, 132. More recently, BRC has implemented a 'speak-out' process in hundreds of villages in the Ciskei and Transkei; see Chapter 6.
[822] Mamdani, 1996, 191
[823] Crais, 2002, 151
[824] Also District Authorities in the former Transkei (see Evans, 1997, 251)
[825] Crais, 2002, 150
[826] Evans, 1997, 252
[827] Mamdani, 1996, 17
[828] Dubow has drawn attention to the role of volkekunde in providing "practical guidance for the implementation of the Bantustan policy of tribally based social engineering", especially in "the elaboration of 'Bantu' education and 'Bantu' law" (Dubow, 2006, 266, 267).

the language of force, masking the uncustomary power of Native Authorities".[829] Mamdani notes that the Native Authorities were not left to their own devices by the colonial state; on the contrary they were supervised by "white officials deployed from a racial pinnacle at the centre".[830] The apartheid government vested considerable powers in Native Authorities pertaining to a wide range of issues, including the implementation of betterment. This may not have been clarified before the Bunga accepted the BAA in 1955, but soon thereafter it "became clear that Tribal Authorities would be entrusted with stabilization and rehabilitation measures".[831] Also, the land allocation functions of the authorities were made contingent on their ability to persuade their subjects to accept the Trust. That is, after 1956, headmen were prohibited from allotting new sites in unplanned areas.[832] In these ways, the Tribal Authorities system became closely related to betterment; this relation has been described in various ways, including fusion and intersection.[833] This was part of an overall strategy of placing the authorities "on the front line of the state's new policies".[834]

Betterment "threatened [peoples'] already precarious existence as rural landholders".[835] That is, it dispossessed them of arable land, replaced flexible land use practices with rigid demarcations that undermined sustainable practices, and in some cases culled their livestock. Because betterment attacked people's most basic economic, social and political ways, they did not support it. Govan Mbeki sums up betterment and communities' response to it in these powerful words:

> Those who were being pushed off the land were bitterly resentful. They forfeited the right to graze stock and had to abandon the one form of security to which they clung – the occupation of an arable plot with the right to share the common pasturage.[836]

In many cases, affected communities opposition to betterment found expression in various forms of resistance. Because betterment amounted to a fundamental attack on people living in the Reserves/ Bantustans, from 1940 to 1965 resistance "became more an attribute of life than an exceptional event".[837] There are two points here: resistance was widespread and it was varied. With regard to the former point, Drew draws attention to

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[829] Mamdani, 1996, 22
[830] Ibid, 1996, 287
[831] Evans, 1997, 255
[832] Crais, 2002, 156
[833] Evans, 1997, 244; Crais, 2002, 156
[834] Crais, 2002, 156
[835] Switzer, L. Power and Resistance in an African Society: The Ciskei Xhosa and the Making of South Africa, University of Natal Press: Pietermaritzburg, 1993, 303
[836] Mbeki, G. South Africa: The Peasants' Revolt, Baltimore: Penguin Books, 1964, 95
[837] Mamdani, 1996, 192

"virtually continuous upheaval in South Africa's reserves" in the 1940s and 1950s.[838] Similarly, Bernstein describes these decades as having been characterised by "widespread and overt rural political agitation".[839] The struggles in places such as Zoutpansberg, Witzieshoek, Zeerust, Sekhukhuneland, Thembuland and Pondoland, are now well known examples of rural resistance against betterment.[840] According to the literature, these instances of rural resistance shared a number of common characteristics, two of which were that there was involvement of urban-based migrants and that resistance to betterment was fused with resistance to tribal authorities.[841] The former point is interesting because it points to the nature of the South African economy at the time. According to Drew, "because of the convergence of economic exploitation and political oppression, the South African countryside at that period was the base of the national democratic struggle".[842] But, the 1940s and 1950s also saw significant industrial development in the cities. The unionisation of African labour started in this period. So, as "urban-based migrants organized in response to a threat to their rural base, they brought home the lessons of resistance learned in urban South Africa in the 1940s and 1950s".[843] For example, some of the leaders of the Pondoland revolt participated in urban protests such as the 1952 Defiance Campaign.[844] Thus Bantu Affairs Department (BAD) officials and tribal authorities frequently attributed local resistance to "the propaganda of 'young men who were away in the cities', who were interested in 'politics rather than land'".[845] In the light of this, Evans has described the "state-supported system of migrant labour" as "the single most important conduit that diminished the spatial chasm between town and village and facilitated the transmission of ideas between the two poles".[846] For Crais, this vibrant transmission contradicts the understanding that rural resistance against betterment was "backward-looking".[847]

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[838] Drew, 1996, 75
[839] Bernstein, 1996, 33
[840] See for example, Yawitch, J. Betterment: the myth of Homeland Agriculture, South African Institute of Race Relations: Johannesburg, 1981; Delius, P. 'Migrants, comrades and rural revolt: Sekhukhuneland 1950 – 1987', in Transformation, Vol 13, 1990, 2 – 26
[841] Mamdani, 192, 195; de Wet, 1995, 51. In Cata, resistance against betterment included burning down of the houses of the headman and two of his councillors (de Wet, 1995, 94).
[842] Drew, 1996, 79
[843] Mamdani, 1996, 192
[844] Crais, 2002, 188
[845] Mager, A. ''Things of the Trust': gender, rehabilitation and the South African Native Trust in the Ciskei, 1945 – 1957', Paper presented at a conference on 'Women and gender in Southern Africa', 1991, 10; see also de Wet, 1995, 96
[846] Evans, 1997, 266
[847] Crais, 2002, 190. Because of the trajectory of the South African economy, this period was the last time that political activity focused on rural areas. (Bernstein, 1996, 33, and Hart, 2002, 42) By the late 1960s and early 1970s, activity had clearly shifted to urban issues and struggles.

From the 1950s, resistance against betterment became more widespread than it had been earlier. This was not only because the apartheid regime implemented it with more rigor and force than the segregationist government had done, but also because this coincided with other key interventions imposed during that decade by the regime in rural areas, principally labour bureaux and associated controls, and the Bantu Authorities Act. In other words, the 1950s saw people in the Bantustans being bombarded on all sides, and so they resisted on multiple fronts, often simultaneously. As Crais puts it, "[w]hen people condemned the Bantu Authorities system they at once condemned taxes, the passes, and the state's new betterment and rehabilitation policies".[848] Evans describes how the fusing together of rural grievances caused them to "burst forth across the twenty-six districts in the Transkei".[849] The apartheid decision to extend passes to women in the rural areas resulted in women playing a "central role" in rural resistance.[850] Alongside the well-known examples of resistance mentioned above, there were many lesser- and un-known instances of communities resisting betterment. Mager writes that the resistance of the women and men of Ngwabeni in Peddie in the Ciskei was "typical of countless others engaged in intense… struggles against the state's betterment and rehabilitation schemes".[851] Similarly, after describing local protest in the Makgoba locality in Mount Currie/ Matatiele, Crais writes that "[a]cross the entire expanse of the Eastern Cape officials encountered similar examples of protracted, often violent resistance against the state's betterment policies".[852] Although the resistance was widespread, it was not coordinated. Instead it was local in nature (reflecting the fact that betterment plans were drawn up and implemented at the scale of a locality, not a larger entity such as a cluster of localities or a magisterial district). The apartheid state, with all its capacity, confronted the rural masses, community-by-community. And thus they responded, community-by-community. From an overall perspective therefore, the resistance was "uneven, incomplete and partial".[853] The apartheid impositions were "interpreted and dealt with in the context of local histories and local dynamics. Generalized resistance to the new order in the reserves was thus not instantaneous".[854] But, because of the significant scale of the state's implementation effort and therefore the incidence of resistance, "by the end of the decade the ability of officials to confine opposition to local geographies was coming to an end".[855]

[848] Crais, 2002, 163
[849] Evans, 1997, 252
[850] Ibid, 1997, 258
[851] Mager, 1991, 1
[852] Crais, 2002, 160 - 162
[853] Mager, 1991, 21
[854] Evans, 1997, 263
[855] Ibid, 1997, 263

In some instances, “the organizations that grew out of peasant society” began learning from one another through mechanisms such as learning visits; in these cases, organizational capacity grew and there was increased coherence of struggle. (This is certainly apparent in the Pondoland Revolt.)[856] But, generally speaking, the reason that “various clans or districts simultaneously came up with identical grievances”,[857] was that the apartheid state launched a common multi-pronged assault on many communities simultaneously.

Given that there was widespread resistance, predictably there was considerable variety in the tactics of resistance. In earlier research, I summarise some of the forms of resistance against betterment in the district of Keiskammahoek as follows: “fence cutting and legal resistance in Gwili-Gwili; letters of millenarian protest, and aggression toward government employees in Mbems; and stubborn refusal to accept betterment rationality, and deception of [Native Commissioner] Leppan in Wolf River”.[858] In order to be able to recognise in/action as resistance, it is useful to utilise Foucault’s relational understanding of resistance. For him, “where there is power, there is resistance… Resistances are the odd term in relations of power; they are inscribed in the latter as an irreducible opposite”[859]. A benefit of this dialectical/ Newtonian approach is that it enables one to see a broad range of responses to domination, as resistance, that one may otherwise gloss over or dismiss as irrelevant. Put another way, it assists one to reveal struggles and resistances that would otherwise remain hidden.[860] A danger with a Foucauldian approach is that it can devalue the notion of resistance. More specifically, if all action undertaken in the face of domination is deemed to be resistance, irrespective of the intention behind it or its effectiveness, then the basic meaning of resistance is undermined. For example, I think that it is trite to regard compliance or acquiescence as an expression of resistance. Foucault provides a useful qualification to his own generalisation; he clarifies that “as soon as there is a power relation, there is a *possibility* of resistance. We can never be ensnared by power: we can always modify its grip in determinate conditions and according to a precise strategy”.[861]

[856] Ibid, 1997, 266; Crais, 2002, 187
[857] Chairperson of the Commission of Enquiry into the Pondoland Revolt, quoted in Crais, 2002, 207
[858] Westaway, 1993, 107
[859] Foucault, 1976, 95, 96
[860] Bundy, C. & Beinart, W. Hidden struggles in rural South Africa, Ravan Press: Johannesburg, 1987
[861] Foucault, M. ‘Power and sex’, in Telos, no 32, 1977a, 160 (my emphasis)

As much as there was variety in the ways in which communities resisted betterment, it is also necessary to emphasise that these actions were, generally speaking, "parochial".[862] One reason that resistance was parochial was the indifference of the ANC to betterment. In Chapter 2, I explained the general ambivalence towards and distrust of 'the rural' that emerged in the ANC from the 1940s. This had a bearing on the manner in which the organisation approached betterment. Mager contrasts the oppositional stance of the All Africa Convention (AAC), which called upon "all the African people to fight against this iniquitous scheme", and the conservative approach of the ANC, which through the Imvo "warned against 'Mau-Mau tactics', and urged that Africans 'be schooled in the proper way to use the weapon of boycott' rather than going beyond the bounds of the law and committing violent crimes".[863] Although the emergence of the Youth League from the 1940s did result in increased ANC attention on and engagement with rural issues,[864] its focus remained squarely placed on urban struggles such as the 1952 Defiance campaign. Evans notes that "the ANC intervened only sporadically in the Transkei – and only in the late 1950s at that".[865] It did not play "any role" in the formation or functioning of organisations such as the Congo in Pondoland.[866] A consequence of this is that the countless localised rural struggles were not co-ordinated or brought together under a coherent political programme.

Foucault makes some interesting, suggestive comments about the usage of the term 'struggle' in relation to resistance. More specifically, he questions whether or not it is appropriate for "certain political discourse" to make frequent use of "the language of relations of force". The opinion that he offers is that

> the affirmation, pure and simple, of a 'struggle' can't act as the beginning and the end of all explanations in the analysis of power-relations. This theme of struggle only really becomes operative if one establishes concretely – in each particular case – who is engaged in struggle, what the struggle is about, and how, where, by what means and according to what rationality it evolves.[867]

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[862] Mager, 1991, 1
[863] Ibid, 1991, 10, 15. The latter comments were made in relation to resistance in Peddie specifically, but I regard them as illustrative of the ANC's general approach toward betterment. See also Crais, 2002, 188
[864] Ibid, 1991, 10, 20
[865] Evans, 1997, 266
[866] Crais, 2002, 188. Bizarrely, the Minister of Bantu Administration and Development asserted in Parliament in 1960, without any evidence, that the Pondoland revolt "was the work of Communists who had landed on the Transkeian coast from Russian submarines" (Evans, 1997, 263).
[867] Foucault, 1980, 164

This is useful because it allows one to distinguish between a large number of parochial resistances (eg against betterment) on the one hand, and a coherent, organised, co-ordinated resistance (eg 'the struggle against apartheid') on the other hand.

Despite the condition of widespread rural protest in the 1950s, the only high-profile leader who lobbied the ANC to accord more prominence to rural struggle and to bring this into the centre of its national strategic analysis, was Govan Mbeki. He waged this campaign consistently, patiently from the 1940 onwards. Finally, in the wake of the Pondo Revolt in 1960, he thought that progress had been made.

> The Pondo movement succeeded by example in accomplishing what discussion had failed to do in a generation – convincing the leadership of the importance of the peasants in the reserves to the entire national struggle. The leaders realized at last that a struggle based on the reserves had a much greater capacity to absorb the shocks of government repression and was therefore capable of being sustained for a much longer time than a struggle based on the urban locations.[868]

However, there is little evidence to suggest that Mbeki was correct in this regard. Hart's explanation for Mbeki's inability to convince the ANC to give more attention to the rural was that his "insistent focus on everyday material conditions and practices was… at odds with the liberation movement's two-stage theory of revolution".[869]

Fanon provides an interesting reference point in trying to understand ANC indifference to the struggle against betterment. He observes that there is a typical response of nationalist parties to peasant uprisings.

> They offer them no objective; they simply hope that this new movement will go on indefinitely and that the bombardments will not put an end to it. Thus we see that even when such an occasion arises, the nationalist parties make no use at all of the opportunity which is offered to them to integrate the people of the countryside, to educate them politically and to raise the level of the struggle. The old attitude of mistrust towards the countryside is criminally evident.[870]

In this respect the ANC was no different from nationalist organisations in the struggle for independence from colonialism, operating elsewhere on the continent. Indeed as Crais

[868] Mbeki, 1964, 130, 131
[869] Hart, 2002, 226. In terms of this theory, the 'two stages' of revolution are the national democratic and socialist revolutions. It was held that initial priority should be given to national liberation (political freedom), and that economic freedom (socialist revolution) would follow later.
[870] Fanon, 1967, 92, 93

shows, in the case of the Pondoland revolt, the ANC only made an appearance in the area after the police had quelled the resistance by the beginning of 1961, trying (rather opportunistically) to "appropriate" any vestiges of rural resistance in the area.[871]

Despite the significance of betterment, as a segregationist intervention that had a debilitating effect on millions of rural lives, the ANC retained a distant, cool approach to the issue, remaining at arm's length from the thousands of instances of popular resistance against it. In so doing, it sought to erase the political discourse of the rural – with its potential for spontaneity, longevity, unpredictability, uncontrollability – in favour of a nationalist formulation of the land issue.[872]

Betterment slips off the restitution agenda

The Surplus People Project (SPP) was a seminal exercise of action-research in the early 1980s. Its influence on the activist groupings that emerged as a direct result of the research project was fundamental, and the SPP volumes that were published were the key reference resources available during the policy making process that took place in the 1990s. The volumes are nevertheless ambiguous in their approach to betterment and they fail to include it in their coverage of dispossession. As far as the former issue is concerned, the authors swing between two positions, namely a neutral one that portrays betterment as a fairly benign relocation policy,[873] and a critical one that recognises betterment as forced removal.[874] The apparent lack of consistency across the volumes is probably best explained by the fact that different people were responsible for authoring different sections.[875] Significantly, the authors did not deem betterment to be an adequately important form of forced removal to warrant attention. In selecting areas for attention, they purported to having used the following criteria: accessibility (geographic and political), incidence of relocation and amount of existing knowledge of removals in the area.[876] The authors refer explicitly to the final two criteria in deciding to focus their research on rural removal: "Priority was given to developments in the rural areas rather than in the urban

[871] Crais, 2002, 206, 207
[872] Thanks to Minkley for pointing this out in supervisory comment.
[873] For example, see the definition as well as the insinuation that dispossession was limited to former white South Africa (SPP, 1983a, xvi, 2).
[874] Ibid, 1983b, 115, 116
[875] The author of volume 2 seems to have had relatively good insight into betterment. S/he writes that betterment is "as nightmarish as a Kafka novel. To most of the people concerned it represents a totally inexplicable, oppressive bit of intervention by officialdom which disrupted their life and left them materially poorer" (Ibid, 1983b, 110).
[876] Ibid, 1983a, xx, 4

areas since very little of what has been happening in the countryside has been documented in any detailed and systematic way and because this is where the majority of the removals have occurred".[877] Yet, they ignore betterment. The conclusion that may have been drawn in the minds of many activists in the 1980s and 1990s was that betterment did not amount to forced removal.

Given this background, it is not surprising that victims of betterment removals were overlooked by NLC affiliates in campaigns such as 'Back to the Land' which advocated for restitution. In 1993, the NLC commissioned wide-ranging research aimed at influencing the shape of a future land reform programme. The paper that made proposals dealing with the legacy of dispossession was called 'An approach to dealing with land claims in SA'.[878] Whereas the approach of the SPP volumes to betterment was ambiguous, that adopted in 'An approach' was conservative. It claimed that the intention of betterment regulations such as Proclamation 31 of 1939 was "aimed purely at soil protection and the agricultural upliftment of these areas".[879] Further, it asserted that in most cases bettered land was "being used again on a communal basis, as in the past", by second and third generations.[880] These assertions – together with the technical reason that the Advisory Commission on Land Allocation (ACLA) did not have jurisdiction to deal with claims outside former white South Africa – were understood to account for the fact that no betterment claims had been submitted to either the Department of Regional and Land Affairs or ACLA.[881] The document went on to propose a bi-furcated way of dealing with different claims. On the one hand, it suggested a juridical process to restore rights dispossessed through racially-based action and to award compensation in cases where the apartheid state under-compensated victims of forced removals. It proposed that cases such as black spot removals and the cancellation of provisos should be dealt with through this juridical process.[882] On the other hand, it proposed an administrative process to dispense affirmative action to people who had "claims for hardship, such as pain and suffering, inconvenience and damage to human dignity, and the deprival of development and commercial opportunities".[883] It argued that such claims may have arisen outside of

[877] Ibid, 1983a, 4
[878] National Land Committee (NLC), 'An approach to dealing with land claims in SA', Unpublished paper, November 1993, copy in BRC resource centre
[879] Ibid, 1993, 19
[880] Ibid, 1993, 22
[881] Ibid, 1993, 22
[882] Ibid, 1993, 75
[883] Ibid, 1993, 73

land-related processes, for example in the enforcement of influx and labour controls.[884] Predictably, it proposed that the legacy of betterment be dealt with through such an administrative process.[885]

The alternative view, namely that betterment dispossession should fall within the ambit of the legal process, was held by a small grouping of people that included Claasens.[886] This grouping controlled the legislation drafting process, and it ensured that the Restitution of Land Rights Act was deliberately crafted as 'enabling legislation' so that it could potentially accommodate various forms of racially based dispossession, including that which occurred through the implementation of betterment plans. However, by the time that Green Paper on Land Reform was published by the Department of Land Affairs in February 1996, betterment had been excluded from the realm of restitution. Betterment was covered under a sub-section of the document that described and commented on

> people who fall outside the scope of the Restitution Act, either because they did not have a 'right in land' as defined in the Act, because they were not dispossessed as a result of racially discriminatory laws and policies, or because they were dispossessed prior to 19 June, 1913.[887]

More specifically, the policy paper asserts that the

> claims of those dispossessed under 'betterment' policies, which involved forced removal and loss of land rights for millions of inhabitants of the former Bantustans, should be addressed through tenure security programmes, land administration reform and land redistribution support programmes.[888]

The window of hope that had been opened for victims of betterment dispossession, ever so briefly, by the manner in which the legislation had been drafted, was abruptly shut by the narrow strictures of the Green Paper. What the drafters of the legislation had sought to enable, the policy crafters quickly managed to disable.

In retrospect, this policy outcome was no surprise, because the process was dominated by essentially three interest groups, namely ANC-linked political appointees, newly appointed civil servants with NGO backgrounds, and established apartheid-era bureaucrats.[889] The

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[884] Ibid, 1993, 73
[885] Ibid, 1993, 75
[886] Claasens, 1993, 3
[887] Department of Land Affairs (Republic of South Africa), Our Land: Green Paper on South African Land Policy, Government Printers: Pretoria, 1 February 1996, 37
[888] Ibid, 1996, 37
[889] In practice, there was considerable overlap between the second and third interest groups.

first two groups shared a common discursive understanding of struggle and resistance, which militated against the recognition of betterment as dispossession. (The educated, politicised holders of title, who stood their ground, in the face of the bulldozers, were the recognised resisters, not the militant, uneducated masses in the communal areas who cut the fences and assaulted the rangers.) Further, all three groups shared a number of assumptions and biases (such as a belief in private, individual title as being superior to forms of tenure)[890] which led them to focus on the land reform challenges in former white South Africa and to ignore or overlook those specific to the former Bantustans. There was no champion of the 'betterment issue' included in the DLA drafting team of the Green Paper.

The betterment issue was not promoted from inside the policy formulation process, and neither was it pushed by any of the lobby or interest groups on the outside. The only coherent lobby group that directly represented a constituency from the former Bantustans was traditional leadership, and its primary interest was to protect and consolidate its own power through gaining control of local governance (including land administration). So it did not advocate for the inclusion of betterment dispossession within the restitution framework. The other two groupings that one may have expected to play a progressive lobby role were the NLC and ANC. It has been explained above that because the (generally NLC-aligned) civil society organisations concentrated on communities threatened with removal in the 1980s, they had very little focus on and therefore understanding of the Bantustan areas. (In fact, James has noted that their indifference towards the former Bantustans continued into the twenty-first century.)[891] Similarly, the analysis of the ANC presented above, pertaining to its geographic and class biases, meant that it had little understanding of, never mind interest in, addressing the legacy of betterment dispossession. Then President Tambo acknowledged in 1987: "We have not done and are not doing sufficient political work among the millions of our people who have been condemned to the Bantustans".[892] For Ntsebeza, the ANC's work and capacity in the rural areas has been

[890] Reflecting about the biases and discourses of bureaucrats in the department at the time, erstwhile RLCC employee Tony Harding said: "They had a bias towards title and private property, so they easily understood claims in which people had actually owned property beforehand, but not the ones … involving former labour tenants and rental tenants who had been removed from the land". (Quoted in James, 2002, 13) Therefore, one can reasonably surmise that they would not have regarded the rights held by people living in Bantustans in the pre-betterment era to have been substantial or real (in the technical meaning of the term).
[891] James, 2002, 17
[892] Quoted in Ntsebeza, L. Democracy Compromised: Chiefs and the Politics of Land in South Africa, HSRC: Cape Town, 2006, 260

"exceptionally weak".[893] Again Fanon's generalised commentary of post-independence nationalist parties pertains to post-1994 ANC. "For all practical purposes, the interior ranks with the unknown. Paradoxically, the national government in its dealings with the country people as a whole is reminiscent of certain features of the former colonial power".[894]

Finally, it is worth noting that the academic community failed in the mid-1990s to provide an analysis that drew attention to the dispossession of land rights that had been integral to the implementation of betterment. None of the academics interested in betterment considered it in relation to the criteria laid out in the Restitution of Land Rights Act. Therefore, they were unable to make coherent comments about the place of betterment dispossession in relation to restitution. Take for example, the comments of the time of one of the foremost scholars of resettlement, Chris de Wet.

> It seems that the initial emphasis [of land reform in South Africa] will fall on the restitution of land to people who lost their land as a result of race-related land laws, going back to the 1913 Land Act. The categories of land loss with prior claim to restitution would appear to be cases where people were actually turned off the land they occupied; these include, for example, rural 'Black spot' removals, homeland consolidation removals, ex-labour tenants on farms, and urban removals related to, *inter alia*, the Group Areas Act. … Betterment schemes are … somewhat different from the other kinds of land loss outlined above. While people in Betterment villages may have lost arable land to the scheme, they lost it in the sense that land-use patterns were re-arranged within existing village boundaries, rather than losing it outright in the sense of having to move off the land they occupied. Betterment schemes would thus seem to rate somewhat lower down on the list of claimants for land restitution.[895]

Later, in 1998 de Wet likened betterment to "moving around the deck-chairs on the Titanic".[896] In other words, with or without betterment, the Bantustan villages were doomed to go down. De Wet was not the only academic to accept that betterment fell outside the parameters of the restitution process. Radical thinkers, Levin and Weiner, in pondering the conditions necessary for structural reform of the agrarian economy, wrote as follows in 1996: "Current thinking within the NLC favours a shift away from restitution issues towards

[893] Ibid, 2006, 259
[894] Fanon, 1967, 94
[895] De Wet, 1995, 216, 217
[896] De Wet, C. 'Affidavit', 4 in Plasket C, 'Notice of Motion in the Land Claims Court of South Africa - In the matter between: the community of the village of Chatha (Applicant) and the Minister of Land Affairs (Respondent)', Unpublished legal papers, 18 December 1998

land access and redistribution. This would be welcome and would take NGOs into the Bantustans".[897] The implication is clear: in the view of Levin and Weiner, restitution neither applies nor is of any import in the Bantustans.

In summary, the betterment issue slipped quietly, easily off the agenda because it had no champions, not within the department and the policy-making process, nor outside of it (neither in civil society or academia). Therefore, when government had to make its position on betterment and restitution explicit, betterment was excluded from restitution. In the minds of the drafters of the Green Paper, this was not a difficult, nor a big decision to make.

Different Regional Land Claims Commissions appear to have responded differently to the position taken in the Green Paper (and repeated in the White paper a year later).[898] Most of the provinces appear to have ignored it.[899] In the Eastern Cape however, Commissioner Mayende was forthright in his support for the Green Paper position. At a meeting held on 22 October 1996 between the commission and provincial NGOs, the following was recorded under the agenda item 'Problems associated with applying the Act on claims in the former Transkei and Ciskei':

> The Restitution Act is there for a specific purpose. There are laws that cannot be used in some situations, and the Restitution Act cannot be used in dealing with cases in the Bantustans. The Act addresses itself to laws that were designed to put people in the Bantustans, and not about when they were there. There are many cases in the Bantustans where the Act has proved to be a hindrance, because to the Commission those are deserving restitution claims. However, presently Commissioners are referring them to the Minister with recommendations that they be treated under other Land Reform programmes.[900]

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[897] Levin & Weiner, 1996, 111

[898] Regional differences occurred because of what Erasmus refers to as regional "interpretative latitude" and the "high level of autonomy" (Brown et al, 1997, 16). In a nutshell, each of the Regional Land Claims Commissions operated relatively independently, and arrived at their respective decisions in a rather whimsical and arbitrary manner.

[899] In 2002, a BRC employee embarked on a roadshow to Limpopo, Mpumulanga and North-West in a bid to galvanise support for the Vulamasango Singene Campaign (see Chapter 6 below). In the course of this trip, she did not come across any evidence that the commissions in these provinces had acted on the policy prejudice. Later in the year, the then Minister of Land Affairs. Thoko Didiza, was adamant that the Eastern Cape was the only province that had actively implemented the Green Paper policy position.

[900] Regional Land Claims Commission (EC/FS), 'Minutes of the Regional Land Claims Commission (EC/FS) meeting with Regional Non-Governmental Organisations (NGOs), 22 October 1996', unpublished document accessed in BRC Resource Centre, 4

What is surprising is not the position taken by the Eastern Cape, because this was consistent with the dominant discursive framework, but rather that it was apparently the only province that explicitly took this position. This situation is probably more attributable to the general disorganisation of the commission at the time and the marginalisation of the betterment issue (it was so irrelevant that no-one thought much or spoke much about it), than it is to anything resembling the promotion or articulation of an alternative policy position in other provinces.

In the Eastern Cape, the implementation of the Green Paper position took various forms. Principally, it meant that communities that had been dispossessed through the implementation of betterment were discouraged or dissuaded from lodging claims.[901] It also resulted in the speedy rejection of some of the few betterment claims that had been submitted (for example the claims lodged by the Keiskammahoek Freeholders' Association and the Mkhonde community).[902] Testimony from the Mkhonde community suggests that the primary reason that the Eastern Cape Commission regarded betterment as falling outside the parameters of the legislation was in line with the Green and White Paper policy statement. According to the Mkhonde community, the Commissioner wrote that "although it was accepted that dispossession undoubtedly took place, it did not occur under the circumstances envisaged by section 2 of the Restitution of Land Rights Act, namely that the dispossession must have been as a result of past racially discriminatory laws or practices".[903] As a consequence of the prejudice against people in Ciskei and Transkei, by the time that the deadline for the lodgement of restitution claims (31 December 1998) had passed, only a small percentage of claims pertaining to betterment dispossession in the Eastern Cape had been submitted.[904] Effectively, therefore betterment dispossession had been shut out of the restitution process.

Given that I have made reference to redistribution and tenure reform in developing the argument, a few further background comments about these programmes are required. During the mid-1990s policy formulation process, land reform was conceptualized as a

[901] Government Task Team on betterment, 'Memorandum to the Minister of Land Affairs and Agriculture, Unpublished document, 2007, 1
[902] Government Task Team on Betterment, 2007, 1
[903] Giannandrea, H. 'Towards a definition of betterment in South African restitution law', in University of Toronto Faculty of Law Review, Vol 63 No 2, 2005, fn 60 (167 – 168)
[904] In 2002, BRC estimated that 5% of betterment claims had been lodged, but this now appears to have been an exaggerated estimate (Eastern Cape Provincial Council of Churches and BRC, 'Press Statement: Reopen lodgement process for victims of betterment dispossession', 16 June 2002, Unpublished document in BRC Resource Centre). In 2007, a government convened task team was less optimistic, asserting that

'three-legged pot'. Each leg was meant to address a distinct legacy of colonialism and apartheid. The purpose of restitution was meant to address the legacy of post-1913 land dispossession; redistribution was envisaged to address the legacy of landlessness and inequality (the infamous '87/13' imbalance); and tenure reform was meant to address the legacy of insecure land rights (in those instances where black people had managed to retain access to land despite apartheid). The substance of the three legs or programmes was put in place sequentially. In the period 1993 – 1995 attention was given to restitution, thereafter, from 1995 – c2000 the focus shifted to redistribution, and in the period c2000 – 2005 there was a convoluted policy process pertaining to tenure reform.[905] The detail of restitution policy has been outlined above, and will not be repeated here. The basic redistribution framework constructed in the mid-1990s revolved around the notion of 'wiling buyer/ willing seller'. That is, government decided that redistribution of land would be effected through market operations, and that it would not intervene directly into the market as a buyer of land. Instead it would offer eligible people a grant, hoping that this would enable them to enter the market as buyers. Initially, in 1996, the level of grant support made available in this manner was equivalent to housing support made available to urban people (ie R15 000 per beneficiary). As far as tenure reform was concerned, all that was clear in the mid-1990s was a general commitment to a 'rights-based' approach (ie one where all rights in a particular area would be recognized and accommodated). Because government was unclear about how to give effect to this commitment, it decided to implement a number a 'tenure test cases' around the country. The purpose of these was to implement a set of broad principles in practice, and in that way to develop detailed procedures and regulations that could later be given legislative effect. Of the three land reform programmes in South Africa, the lion's share of the annual budgets during the period 1994 - 2007 was allocated to restitution.[906] The decision to exclude betterment dispossession from restitution, has effectively meant that the Bantustan areas have been bypassed by land reform. (It is notable here that the adoption of the Land Redistribution for Agricultural Development (LRAD) Policy in 2000, as the primary mechanism to achieve

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under 1% of affected communities in the Ciskei and Transkei lodged claims (Government Task Team on betterment, 2007, 1).

[905] This is not to say that there was no restitution policy work after 1995, or no policy work in tenure reform before 2000. On the contrary, above I outlined the restitution review that took place in 1998 and the policy changes that follow. Similarly, I note here that the Extension of Security of Tenure Act (ESTA), that regulates land rights on commercial farms, was passed in 1997. However, I think that schema holds at a general level, and is useful in enabling the reader to get a sense of where policy processes where in the mid-1990s.

[906] Hall, 2008, 4

redistribution, effectively excluded the Bantustans from redistribution as well. Of the 349 LRAD projects in the province in 2007, only 3 were located in the former Transkei.)[907]

BRC and betterment in the mid-1990s

The purpose of the section above is not to cast aspersions on government officials, ANC politicians or academics, but rather to elucidate the post-1994 regime of truth. Thus it is useful to place the focus, for a moment, on how BRC positioned itself (as an activist civil society organisation) in relation to betterment. This is useful not only to gauge the extent to which the truth regime was hegemonic, but also because BRC is a key player in the processes of generating historical truths that are discussed in the following two chapters.

Betterment was on the organisation's radar around 1994. BRC took part in at least two major research processes in the early 1990s (one sponsored by World Bank and the other by the Land and Agriculture Policy Centre (LAPC)). Amongst other things, BRC contributed betterment-related research material to both these processes.[908] Various members of the BRC research team at the time, including William Beinart, Rosalie Kingwill and Luvuyo Wotshela, had a sound knowledge of betterment. However, the organisation was not able to harness the intellectual capacity of its Research Unit to develop a programmatic or strategic response to the legacy of betterment in the former Ciskei or Transkei. Two possible reasons for this may have been BRC's January 1995 decision to limit its interest in restitution, and that the Research Unit was not properly integrated into the rest of the organisation at the time. It seems to have been an external evaluation process undertaken in mid-1996 that stirred the organisation into more focused thinking about betterment.[909] The evaluators presented the betterment issue as a prime reason that BRC should re-enter the terrain of restitution. There was internal focus on betterment from shortly after the evaluation. In September 1996, BRC staff commenced a strategic planning process for the period 1997 to 1999. Betterment and its place in the land reform programme were actively debated in the meeting. Calling betterment a "critical" issue, the minutes reflect the following discussion and decision:

> The plenary discussion identified that cases arising from communities in relation to betterment planning did not necessarily fall easily into the Restitution process, and might be better dealt with under Redistribution and Tenure reform. There was

[907] BRC was subcontracted to conduct the Eastern Cape research for a national review of the LRAD programme in 2007.
[908] I was involved in this 1993 Bank-sponsored research process, as a contract employee of BRC.
[909] Cole et al, 1996, 24, 53

> however, some feeling that these (sic) were in fact communities who had been negatively impacted upon by betterment, which in itself was a discriminatory practice, and therefore should have some claim of redress. The meeting decided that a specific objective of the land reform arena should be to plan and identify an appropriate and workable approach to Betterment Cases.[910]

Indeed, the objective was captured in the organisation's plan, as follows, "Appropriate policy and processes in place to deal with betterment cases".[911]

In October 1996 the RLCC emphatically told BRC and other NGOs in the province that it did not regard betterment claims as falling within the restitution process. In mid-November this interpretation was formally brought to the attention of all BRC staff. At a 'content meeting' held on 20 November the Land Rights Unit informed the meeting that the RLCC's "[m]ain contention is that people who lost land through betterment schemes did not lose it through a discriminatory act".[912] It seems from the unedited notes of the meeting that the staff did not take umbrage at the commission's position; instead they acquiesced through jettisoning the approach that had been developed through the strategic planning process. The notes read as follows:

> Betterment is not viewed as a straightforward restitution case, tenure is involved. BRC is in a position to do a betterment test case of its own. We would be able to have a great impact on policy and legislation. A fresh strategy is required. A lobbying strategy is required – aimed at NLC and government to put betterment on the agenda.[913]

In a bid to formulate this strategy, BRC convened a staff seminar on betterment on 26 November. In order to prepare staff for the discussion, Wotshela produced a seminar paper entitled 'A retrospective view of betterment and its effects on land policy'. The document sought both to explain "the process and effects of the application of the betterment programme", and to consider where betterment cases fitted into the framework of land reform as defined by the South African government. Specifically it aimed to explore some of the "potential complexities in addressing betterment cases by means of the 1994

[910] BRC, Strategic Planning Meeting: "Vision for 2000", Morgan Bay, 16 – 20 September 1996, 12
[911] Ibid, 1996, Appendix 2: Arena Based Plans, 1
[912] BRC, 'Unedited notes from the Content Meeting held on Wednesday, 20 November 1996', Unpublished document accessed in BRC Resource Centre, 1996b, 5
[913] Ibid, 1996b, 5,6

Restitution Act".[914] Wotshela was concerned about what he considered to be two problems that stood in the way of "unravelling the betterment cases by means of the restitution process". First he questioned "the scope and the relevance of the 1994 Restitution Act on betterment cases". This point is not argued strongly or clearly in the paper. The only reason that he provided for his concern in this regard was the assertion that the "betterment programme as a whole cannot be strictly defined generally as an orthodox form of forced removal".[915] Strangely, he concluded his brief discussion about the compliance of betterment dispossession with the legislative criteria as follows:

> "Whether the betterment cases had/have pure characteristics of being direct results of discriminatory legislation, they cannot be generally examined as restitution cases as opposed to the general land reform programme (sic) and simultaneously it would be painstaking to examine the complicated betterment process on an individual case basis. Some betterment cases in the form of commonage claims have been submitted to the LCC and there has been no significant progress so far. These cases are likely to be handed over to the upcoming tenure reform programme or addressed with (sic) the broader land reform programme".[916]

It seems that Wotshela was more concerned with the spatial legacy of betterment (ie consolidated villages) than with the question of whether or not betterment dispossession complies with the Restitution of Land Rights Act. Clearly, he held that restitution would not be able to address this legacy. He allowed this belief to inform a conclusion that betterment does not neatly fall within the parameters of restitution. The second problem mentioned by Wotshela is that the commission did not have "the capacity and the capability … to deal with the betterment and other related cases".[917] Although this section of the paper also lacks coherence, the argument appears to be that because the commission was unable to handle the processing of so-called orthodox removals, it would be unrealistic to expect it to be able to handle unorthodox removals.

There is no available record of the discussions that transpired on 26 November. However, all indications point to the likelihood that it firmed up the thinking that had first emerged a month earlier, namely that an appropriate approach to betterment could be forged through a tenure test case. The most important indicator in this regard is the minutes of the first

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[914] All quotes in this paragraph are drawn from the abstract of: Wotshela L, 'A retrospective view of betterment and its effects on land policy (Draft unedited and incomplete)', BRC internal seminar, Unpublished document accessed in BRC Resource Centre, 1996, 1.
[915] Ibid, 1996, 13
[916] Ibid, 1996, 13
[917] Ibid, 1996, 13

quarterly content meeting of 1997, held in early February. These indicate that the betterment quandary had been assigned to the research unit (which, by that time, had developed a particular interest in tenure reform).[918] There were two initial objectives that the research unit set for itself. First, it aimed to identify a betterment community, and second to investigate the land rights issues at stake. From the onset, the research unit struggled to meet the identification challenge. By the end of April, the unit had still not selected a site.

BRC's strategic framework for the period 1997 – 1999 was laid out in a document entitled 'Strategic Direction', which was finalised in June 1997. Under a section dealing with restitution, the analytical and operational thinking that the organisation had undertaken over the preceding twelve months was summarised as follows: "One significant gap in DLA land reform policy is a coherent approach to communities that suffered betterment removals. There is reluctance on the part of the department and the commission to accommodate these within restitution. Given the fact that hundreds of thousands of people in the province suffered from betterment, we will commit resources to developing proposals regarding an appropriate approach to addressing the legacy of betterment. It would be presumptuous to assume that this approach will locate betterment cases in the restitution programme, the priority is for DLA to adopt a coherent and progressive approach to this significant cluster of land reform cases".[919]

The six monthly report for the period January to June confirms that BRC had decided to tackle betterment by means of a tenure test case. However, the research unit had not identified a betterment community appropriate for the test case by June. Therefore, BRC decided to approach the Keiskammahoek Transitional Representative Council to assist in the identification process. Also, the report indicates that the "work will proceed once we have recruited an employee for the purpose".[920] However during the period that followed, the organisation neither recruited the envisaged employee nor selected a test case site, and by early 1998 BRC had shifted betterment out of its tenure programme.

[918] BRC, Minutes: First Quarterly Content Meeting of 1997, Gonubie Hotel, 3 – 5 February 1997, unpublished document accessed in BRC Resource Centre, 1997
[919] BRC, 'Strategic Direction, 1997- 1999', unpublished document accessed in BRC Resource Centre, 1997a, 9
[920] BRC, 'Six-monthly Report January – June 1997', unpublished document accessed in BRC Resource Centre, 1997b, 10

This case material has served three purposes. First, it has demonstrated the extent to which the land reform discourse outlined above was hegemonic during the mid-1990s. There were very few alternative perspectives (on the betterment issue) available or that could be drawn upon by organisations outside government. BRC was no exception in this regard. Second, it has sought to establish a portrait of BRC that I hope will linger throughout the thesis: BRC was and is an ordinary non-governmental organisation. BRC was not an organisation that operated above its context; it was not unencumbered by its history nor unhampered by resource constraints, and neither is it such an organisation today. BRC did not have any extra-ordinary insight or perspective on betterment; on the contrary, it initially struggled to recognise its importance and thereafter battled to find a way to deal with its effects. Third, the case material provides some background information on BRC that serves as a contextual bridge to the next chapter.

Policy approach to Bantustan denizens in the post-1994 period

Restitution was not the only government programme worked over, in the early years of democracy, by an emerging hegemonic post-1994 discourse of rights, rationality, progress, modernity and development. Four other areas that warrant brief commentary are economic planning, rural development, local governance and another of the 'legs' of land reform, namely tenure reform. In all these cases, the application of the prevailing regime of truth in the period 1994 – 2008 has resulted in people living in the former Bantustans being understood to be different from and being treated differently from people living in former white South Africa.

From shortly after democratization, the South African government began producing a spate of planning requirements and regulations.[921] These arrangements have been institutionalized in all three spheres of post 1994 government, namely national, provincial and local. The turn to planning has, more than anything else that we have seen since 1994, reflected a determination in government to achieve the rational allocation of public resources. This determination was shaped by the rapid abandonment of mass mobilization by the elected government, in favour of centralized and technicist governance. Put in simple terms, government decided that it was best placed and fully mandated to make developmental choices on behalf of the South African public. There is a broad recognition in society that these choices are not easy because the development backlog caused by

[921] Instruments such as Land Development Objectives (LDOs), Integrated Development Plans (IDPs) and Growth and Development Strategies (GDSs) have been introduced in the last decade.

apartheid is considerable. The resources at the disposal of the South African government are finite, therefore the decisions regarding their deployment are complicated. The fact that the South African transition has supported the capitalist trajectory of economic development in the country and that the elected government adopted a conservative macro-economic policy (in the form of GEAR), has meant that the space for manoeuvre in this regard has been narrow.

Since 1999, there are two concepts that have come to dominate the manner in which government has gone about determining development priorities and plans. First, the Mbeki government promoted a perspective that South Africa comprises two economies, a formal first-world economy, and an informal third-world economy. The strategy of government to promote development (and tackle poverty) over the period 1999 – 2008 has been to support the growth of the first economy, "in the right direction, at the right pace", and to build linkages between the first economy, and the "structurally disconnected" second economy.[922] In other words, the first economy is seen to hold the solutions for the essential problem, which is the second economy. The space, more than any other, that is home to the second economy is the Bantustan. Over the past couple of years, a number of critical scholars have rebutted the Mbeki assertion. These include Bond, Legassick, Frye and Helliker.[923] I will not outline the detail of their collective critique and antithesis. Suffice it to say that I agree with their overall point that "capitalism thrives on uneven development and social marginalization".[924]

The second foundational concept that has informed government decisions is the so-called spatial perspective. This notion posits that 'the map' presents planners with their most useful tool, that it is best to consider and analyse available statistics spatially (in relation to defined/ demarcated geographic entities). Similarly, the decisions taken on the basis of such analysis are conceptualised and described in spatial terms. For example, municipalities rely on spatial concepts such as nodes and zones to determine resource flows. In the Eastern Cape, provincial government and many municipalities have adopted a three-level, triangulated model of public investment. The large, dull base of the triangle is

[922] T Mbeki, quoted in Bond, P. 'Introduction: Two economies – or one system of super exploitation', Africanus: Journal of Development Studies, Volume 37, No 2, 2007, 1
[923] Volume 37, No 2 (2007) of Africanus: Journal of Development Studies, seeks to transcend the two economies thesis. Some of the articles published in this volume include: Bond, P. 'Introduction: Two economies – or one system of super exploitation', 1 – 21; Legassick, M. 'Flaws in South Africa's 'first' economy', 114 – 144; du Toit, A. & Neves, D. 'In search of South Africa's 'second economy'', 145 – 174; and Frye, I. 'The 'second economy' as intellectual sleight of hand', 175 – 190
[924] Helliker, 2008, 80

referred to as “addressing basic needs”; this is about meeting basic constitutional rights throughout the province. At the apex of the triangle, government targets “focus areas”; this is about strategic investment, where returns are maximized.[925] The spatial coherence and logic of municipal and provincial plans are fine-tuned through the formulation of Spatial Development Frameworks. The Eastern Cape Province and its constituent municipalities have been demarcated anew, into strategic and unstrategic areas. Similarly, national government has become obsessed with a spatial perspective, driven aggressively by the Presidency. This has resulted in huge investments being channeled to Spatial Development Initiatives (SDIs) and Industrial Development Zones (IDZs). Investment-type public resources are directed to these areas; whereas the large swathes of land falling outside are at the receiving end of only welfare-type resources. Ironically, government tries to obfuscate the capitalist essence of the spatial perspective by claiming that it focuses “on people not places”. When one scratches just under the surface, the actual imperative of the spatial perspective emerges, and ultimately prevails: “In localities with low development potential, government spending, beyond basic services, should focus on providing social transfers, human resource development and labour market intelligence to enable people to become more mobile and migrate, if they choose to, to localities that are more likely to provide sustainable employment or other economic opportunities”.[926]

In relation to the arguments presented here, the most important consequence of the hegemonic economic planning paradigm is that it promoted the further development of (strategic) urban areas, and continued underdevelopment of (unstrategic) rural areas. The reason for this is that there is “a prevalent attitude in the public and private sectors... that rural areas are inherently and uniformly unviable in economic terms. Seen in this perspective, rural areas need basic infrastructure, and their denizens need welfare support and basic survivalist skills – development as charity... No more ambitious economic goal is

[925] Amathole District Municipality, ‘Keiskammahoek Villages Restitution Project: Integrated Development Plan (Final Draft Report)’, October 2007,Unpublished municipal document accessed in BRC Resource Centre, 72

[926] Chris Hani Municipality, ‘Draft Integrated Development Plan, 2008 – 9’, Unpublished municipal document, accessed in BRC Resource Centre, 2008, 48. It is noted that there is currently significant contestation within the ANC about the spatial perspective. There is clear evidence that it was rubbished in the Polokwane conference in December 2007. Whereas the discussion document prepared to inform resolution drafting promoted it strongly (ANC, ‘Economic transformation: for a national democratic society’, www.anc.org.za/ancdocs/policy/2007/discussion/contents, accessed in May 2007, 2007, 17), the actual resolutions place the emphasis on the need for a ‘developmental state’ to address basic needs, as the priority issue. The influence of the two economy paradigm on the resolutions is negligible. For summary commentary of the ANC’s resolutions on land and agrarian reform, see Jara, M. ‘Polokwane land resolution creates space for struggle’, Umhlaba Wethu 5, Plaas (UWC): Cape Town, June 2008, 5. Jara points out that the contest is far from over.

regarded as feasible".[927] This reality was acknowledged by then cabinet member Moleketi in an ANC meeting in the Eastern Cape in April 2007; he recognized what he called 'the rural periphery complex', which he understood to have resulted from urban- biased policy.[928] Whereas Moleketi exercised political acumen in this meeting, by ensuring that he came across as ambiguous and apologetic, others who share the view that the future lies in industrial, capital-intensive urban development present the argument unashamedly, arrogantly even. For example, economist Kantor asserts that "we should reinforce the economic strengths of the urban areas rather than try to compensate for the weakness in the rural areas".[929] The key point for my purposes is that this spatial-economic model has tended to reinforce the geography of apartheid. Generally speaking, post-1994 strategic investment has happened in and around cities of former white South Africa, whilst the former Bantustans have been type-caste as non-strategic and therefore forced to survive on welfare expenditure.[930] As Walker notes, "[t]hroughout the first decade of democracy, the former Bantustans have remained essentially welfare, not economic, zones".[931]

The elected government has not developed or implemented a rural development strategy since 1994. This fact is closely related to the economic planning policy decisions outlined above. There has long been acknowledgement at the level of debate, that the problem of poverty in the former Bantustans is more than an economic one, that the very term 'poverty' describes a multi-facetted, complex condition of general deficit.[932] In the run-up to the first democratic elections, there were indications that a post-1994 government would attempt to implement an integrated programme of rural development. The ANC's election manifesto, for example, promised to introduce a rural development programme that would seek to eradicate poverty. "Central in the development programme will be job-creation through industrial development and opportunities for small business, alongside land reform. We will focus on provision of water, clinics, schools, toilet facilities, electricity,

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[927] Everatt, D. 'The politics of poverty', in Bangladesh e-Journal of Sociology, Vol 2 No 1, 2005, 12
[928] I was a participant in discussions at the said meeting.
[929] M Kantor quoted in Centre for Development and Enterprise (CDE), Voices from a new democracy: South Africans reflect on ten years in a democratic country and the challenges of the next decade, CDE: Johannesburg, 2004, 34
[930] I acknowledge that some SDIs do occur in former Bantustan areas (eg the Wild Coast SDI in the former Transkei). However, these are exceptional. Furthermore, despite there having been significant resource injections into these areas, little economic progress has been made. I suspect that decision-makers required some coverage of rural areas for the appearance of 'balance', but these have failed because the SDI model is innately linked to industrial development.
[931] Walker, 2005, 820
[932] Generally speaking, if one lives in a former Bantustan, not only is one unemployed and poor, one is also sick, uneducated, un-connected (communication and transport), living in an unserviced area (eg no piped water), in informal housing, and so on.

telephones and roads".[933] However, this commitment dissipated shortly after 1994. In the immediate aftermath of the elections, an RDP office was established (under the 'Minister without Portfolio, Jay Naidoo) to take on the mantle of government co-ordination. Amongst other things, it attempted to fashion a programme of integrated rural development. However, it struggled to mobilize adequate support from relevant line ministries and failed to overcome the insularity (turf protection) of their respective bureaucracies. In 1996, the RDP office and ministry were unceremoniously abolished, before having made substantive progress in relation to rural policy. Thereafter, the Department of Land Affairs attempted to pick up the challenge, but to no avail. After the inauguration of Thabo Mbeki as President in 1999, the Presidency rapidly consolidated its spheres of influence. One area that it took charge of was rural development policy. In 2000, Mbeki launched the Integrated Sustainable Rural Development Strategy (ISRDS), which was later called the Integrated Sustainable Rural Development Programme (ISRDP). However, this strategy/ programme has only amounted to an attempt to co-ordinate the activities and projects of various government departments, in selected districts.[934] Ordinarily speaking, programmes are fashioned around objectives, which are achieved through funded projects. In the case of the ISRDP, objectives are vague, project-interventions difficult to distinguish from government-as-usual work, and the programme has no budget. This set of issues rubbishes its claim to being a programme.[935] Moreover it has failed even to achieve its minimal co-ordination intension.[936] The main reason for this failure is that there is a fundamental fault-line that runs through government's approach to rural areas. On the one hand, the ISRDP purports to pursue integrated and sustainable rural development, but on the other hand, the spatial perspective demands that the focal ISRDP nodes be regarded as areas where government investment should be reduced to the bare minimum, to welfare.[937] Thus, the ISRDP ends up having nothing to co-ordinate. As senior ANC MP Ben Turok puts it, "there is no obvious vision for rural development [in communal areas] and, as a result, underdevelopment is the rule, extension services are poor... yet [these

[933] ANC, '1994 Election Manifesto', accessed on ANC web-site (www.anc.org.za/ancdocs/policy/manifesto), in October 2007
[934] BRC, Right-Based Rural Development: A New Approach to Poverty Eradication, BRC: East London, 2004, 12; Everatt, 2005, 12
[935] Umhlaba Rural Services, 'Mid-term Review of the Integrated Sustainable Development Programme', November 2007, Unpublished document accessed in BRC Resource Centre, 15
[936] Umhlaba, 2007, 17. See also ANC, 'ANC 52nd National Conference 2007 – Resolutions', Accessed on ANC web-site (www.anc.org.za/ancdocs/history/conf/conference54/resolutions-f.html), on 8 August 2008, 2007a
[937] Umhlaba, 2007, 15

areas] do have productive potential".[938] Seen in this light, it is incorrect to think about the absence of a substantial rural development strategy or programme as being a failure of government policy; it is better understood as a natural consequence of the primacy of the two economy thesis and spatial development perspective.[939]

Two important consequences of the absence of a substantial rural development policy have been the realisation of the self-fulfilling prophesy of the Bantustans as pathetic welfare zones, and the entrenchment of what Cronin calls "two-faced" government.[940] Because of government's refusal to invest economic resources in the former Bantustans, because of their deliberate under-development of these areas, the millions of people that live there have become increasingly dependent on welfare transfers. Ironically, government uses this dependency to argue against the further expansion of the welfare system, asserting that grants cause people to sit "around the corners of streets" rather than engage in economic activity. "If we are not careful we will create a situation where people depend solely on free gifts and do not take advantage of the opportunities created".[941] The COSATU view on the dependency syndrome is more honest and useful. It asserts that it is best understood as a phenomenon that was created by apartheid and is being perpetuated by the approaches taken by the ANC government since 1994.[942] Simply put, the simultaneous underdevelopment of an area, and expansion of a welfare system into that area, exacerbates its inhabitants' dependency on welfare. The governance dimension of Mbeki's first-world economy (in the service of capital) has been well-resourced, whereas the institutional underpinnings of the third-world economy (softening the blow for the poor) have been "woefully under-resourced".[943] That is, the duality of policy – Gau-train for the first-world, Expanded Public Works Programme for the third-

[938] Turok, B. 'Public service 'not equipped for developmental role', in Sunday Times Business Times, 4 November 2007, 10
[939] As was the case with the two economies thesis and spatial development perspective, the Mbeki government's approach to rural development came under attack at Polokwane in December 2007. Two of the resolutions adopted were to "ensure an integrated approach to land reform and rural development" and to accelerate "the roll-out of rural infrastructure... ensuring in particular that former Bantustan areas are properly provisioned with an infrastructural basis for growing economic and social development... the ANC reaffirms our objective of realising universal access to free basic water, electricity and sanitation before the centenary of the ANC and recognises that the bulk of this challenge is in rural South Africa" (ANC, 2007a).
[940] Cronin, J. 'The dangers of two-faced development', in Mail & Guardian, June 1 to 7 2007, 27
[941] Moleketi, J. 'ANC 'ladders' to give poor a rung to climb', in Business Times Sunday Times, 17 June 2007, 8. Moleketi claims in the article that the quote text emanated from a "Limpopo delegate", but it is clear he, along with other senior members of Mbeki's cabinet, shares this view.
[942] COSATU spokesperson P Craven, quoted in 'Towards an economic policy that works for all', Sunday Times Business Times, September 16 2007, 8
[943] Cronin, 2007, 27

world [944]– is reflected in the duality of government. Cronin observes that this duality is clearly expressed in the Ministry of Land and Agriculture, with the former component closely resembling the erstwhile Native Affairs Department (except it should be noted that the NAD was far more focused and effective in its pursuit of policy than the current Department of Land Affairs), and the latter serving the interests of white-dominated commercial agriculture. “That way, we end up with an aspirant first-world developmental state that frees the market, while a third-world ‘caring’ state does its best to ameliorate the very underdevelopment the market constantly reproduces”.[945]

Traditional leaders (represented by the Congress of Traditional Leaders of South Africa, or Contralesa) were the only organised lobby grouping from the former Bantustans in the 1990s. Consequently, the issue of governance arrangements in these areas featured prominently in policy debates during that decade. Neither is the eventual outcome of this policy process – the entrenchment of traditional authorities in the Bantustan areas - unexpected. However, it is useful to remind ourselves that shortly before 1994, there were some indications that the ANC seemed to hold a modernist position that entailed scrapping traditional leadership as a vestige of indirect colonial rule and apartheid. In 1985, for example, UDF leader Lekota declared the chieftaincy to be a “dying institution”.[946] In fact, ANC policy at that time toward traditional authorities was contested; in the 1980s, Govan Mbeki led the call to scrap the authorities, whilst Nelson Mandela preferred to hold out the olive branch to them and bring them into the congress movement.[947] This contest accounts for the fact that ANC policy on traditional authorities was in fact “highly ambiguous and ambivalent”,[948] despite modernist appearances. Through the negotiation process in the early 1990s and in the run-up to the 1994 election, the Mandela position strengthened, and the Mbeki position weakened.[949] The two main reasons for this were the perceptions, in the context of the bloody conflict that was then ravaging KwaZulu-Natal, of the importance of Inkatha to the political settlement, and of widespread support for traditional authorities in the Bantustan areas throughout the country.[950] As a result, the ANC gave some ground to the chiefs. That is, the Constitution recognized traditional authorities as legitimate

[944] Frye, 2007, 188. Gau-train is a multi-billion, capital intensive project that is constructing a commuter train service between Johannesburg and Pretoria. The Expanded Public Works Programme consists of a hodge-podge of small projects that create unskilled, temporary, low paying jobs.
[945] Cronin, 2007, 27
[946] Ntsebeza, 2006, 261
[947] Ibid, 2006, 259, 260
[948] Ibid, 2006, 258
[949] Ibid, 2006, 266
[950] Ibid, 2006, 258, 265

institutions of governance, although it did not spell out their roles.[951] As a general explanation of this outcome, Mamdani argues that, in a bid to "defuse an intertribal collision", the ANC "settled for an intertribal alliance" which included "those in the Native Authority who were willing to join it in an electoral alliance... The promise of that alliance was a federated civic power. Its price was unreformed customary power in the reserves".[952] Mamdani probably exaggerates the tribal dimension of the political contest, but he is correct to assert that the ANC did court traditional leaders both in its efforts to stabilise the transition period and to consolidate its own power. Ntsebeza also utilizes the notion of alliances, but he places the emphasis in this regard on elite politics. For him, institutional recognition of traditional leadership "was part of the highly political arena of choosing and consolidating alliances between elites".[953] This explanation is useful because it takes cognisance of the fact that co-option politics were the order of the day at the time, and that the ANC was far removed from the rural masses in the Bantustans. On the back of the constitutional concession, traditional authorities were (and are still) represented at national level and in six of the provinces by the Houses of Traditional Leaders. In addition, prominent traditional leaders such as Holomisa and Nonkanyana became ANC Members of Parliament, and as Ntsebeza has observed, they have used their positions there as an opportunity "to advance the interests of their constituency".[954] In fact Contralesa, generally speaking, has maintained the pressure that it brought to bear on the ANC in the negotiation process, throughout the post-1994 period.[955]

Although the Traditional Authorities made and secured some ground in the mid-1990s, the terrain remained contested. The progressive bloc remained a factor for the remainder of the decade. To illustrate its influence, the RDP White Paper asserted that "[p]erhaps the most crucial [challenge in rural areas] is the establishment of credible and effective Local Government… Without this, implementation of development programmes will be seriously hindered".[956] After 1994, the two camps within the ANC remained pitted against one another and waged "a fierce battle" over the power of traditional leaders for the next decade.[957] Only in 2004 was it clear that the conservative forces had defeated the more progressive interests. The 2004 Traditional Leadership and Governance Framework Act

[951] Ibid, 2006, 274
[952] Mamdani, 1996, 293, 294
[953] Ntsebeza, 2006, 295
[954] Ibid, 2006, 289
[955] Ibid, 2006, 268
[956] Quoted by Crais, 2002, 223
[957] Walker, 2005, 820

(TLGFA) stipulated that traditional councils must be established in former Bantustan areas to operate alongside elected municipalities. Significantly, the TLGFA endorsed Tribal Authorities established through the 1951 legislation "as a foundation" for establishing Traditional Councils.[958] The majority of members of these councils are unelected, drawn from traditional authorities and those appointed by them.[959] Beall, Mkhize and Vawda are correct in their assertion that the TLGFA "significantly entrenches the authority of traditional leaders, and means… that legislation introduced in the 21st century will give perpetual life to a system of 'indirect rule' dating back to the colonial era and ossified under apartheid".[960] Or, as Crais has put it, the ANC government has renewed "a tradition of rule" that began with conquest and continued in the twentieth century during the eras of segregation and apartheid.[961] The Eastern Cape government (headed until July 2008 by a traditionalist, Nosimo Balindlela) is attempting to give effect to the policy decision through both restoring a number of chieftaincies and re-instating the institution of headmanship.[962] Commentators have suggested similar reasons for the 2004 outcome as that which occurred in 1994. Beall et al point out that the ANC government has made all major legislative and policy concessions to traditional leaders in close proximity to elections held since 1994.[963] They argue that the reason for this is "the recognition by the ANC of the electoral influence of chieftaincy".[964] It is unclear how much electoral influence the chieftaincy has actually had, but it certainly seems that the ANC leadership regarded its influence as having been considerable.[965]

The contents of a Traditional Courts Bill tabled for consideration in Parliament in May 2008 is further evidence of the extent to which traditional authorities have emerged as powerful during the era of Mbeki's presidency. The Bill has been formulated to address some of the issues previously regulated by the now repealed infamous Black Administration Act of 1927, especially the exercise of customary justice in the former Bantustans. The continuities are stark with regard to the composition of traditional courts, their geographic

[958] Ntsebeza, 2006, 14
[959] Ibid, 2006, 14
[960] Beall, J., Mkhize, S. & Vawda, S. 'Emergent Democracy and 'Resurgent' Tradition: Institutions, Chieftaincy and Transition in KwaZulu-Natal', Journal of Southern African Studies, Vol 31, no 4, Dec 2005, 763. I would not have used the word "perpetual", but in general the point is well made.
[961] Crais, 2002, 227
[962] Opportunistically, in a pre-emptive move that effectively silenced any would-be critics, the Mandela chieftaincy was restored in April 2007, in the first such move.
[963] For example, Ntsebeza explains how traditional authorities successfully lobbied for an amendment to the Municipal Structures Act, in the run-up to the second municipal elections, which increased their representation on local government structures from 10 to 20% (2006, 282).
[964] Beall et al, 2005, 763, 764
[965] Ntsebeza, 2006, 256

jurisdiction, and their juridical powers. With regard to the latter issue, the Bill accords traditional courts the powers to extract forced labour from offenders and to strip them of customary rights to land and water. Further, it gives the rulings of traditional courts the same authority as these of magistrate's courts.[966] If the bill is passed, it will fuse executive and judicial power into the hands of unelected traditional leaders. It is exactly this fusion of power that characterised customary colonial power, as described by Mamdani. "The administrative justice and the administrative coercion that were the sum and substance of [the chief's] authority lay behind a regime of extra-economic coercion, a regime that breathed life into a whole range of compulsions: forced labour, forced crops, forced sales, forced contributions, and forced removals".[967]

Whilst there is considerable agreement between analysts about the reasons for the triumph of segregationist tradition in post-1994 South Africa, there does not seem to be consensus about its fundamental meaning and implications. For Ntsebeza, the matter is black and white. Democracy is good, traditional leadership is bad; the two are contradictory. In this instance bad has defeated good. Crais holds that the state did what it had to do "to produce the political consent to ensure that its policies and programmes will not be 'seriously hindered'".[968] I do not find either of these perspectives useful. Ntsebeza's perspective militates against a critical understanding of the nature of democracy in the post-1994 state; this brand of democracy is highly centralized and accountability works upwards to the party and the president, and not downwards to the populace. Similarly, Crais seems too optimistic about the policies and programmes of the democratic government. As I argued above, there is no indication that the government would like to see integrated development in the former Bantustans. Walker's perspective is different; for her the triumph of tradition amounts to "a decision by the state to shed the burden of responsibility for these marginal areas".[969] This is more in keeping with my overall analysis that 1994 did not mark a fundamental moment of discontinuity as far as the former Bantustan areas of the country are concerned. Just as the apartheid state set up and nurtured the system of indirect rule through the institution of Bantu Authorities, the post-1994 state has retained this institution as a mechanism to achieve cheap stability in what it regards as the welfare zone of the country. The official recognition and remuneration of traditional authorities has institutionalised interests that drive a fundamentally

[966] Joubert, P. 'Back to the Dark Days', in Mail & Guardian 16 to 22 May 2008, 3
[967] Mamdani, 1996, 23
[968] Crais, 2002, 224
[969] Walker, 2005, 820

conservative, anti-developmental agenda. Government policy in this regard entrenches a basic regime of accumulation that depends on keeping the Bantustans backwards and involuted. The traditional authorities duly oblige, by actively maintaining inertia.[970] A consequence of this policy preference is that the district and local municipalities in the former Bantustans in the Eastern Cape are in a parlous state. An indicator of the seriousness of the problem is that not a single municipality operating in these areas received an unqualified audit report in 2008.[971] The problem goes way beyond financial capability and controls, and affects all aspects of service delivery (incl water, sanitation and local economic development). Recent reports (such as Municipal IQ's Productivity Index and a Rapid Assessment Survey commissioned by the Office of the Premier in the Eastern Cape Province)[972] confirm that the municipalities in the province, especially those based in the former homelands, are in a parlous state and rank amongst the very worst performing in the entire country.

With the adoption of LRAD in 1999 as the key mechanism to deliver redistribution, it was clear that the only one of the three land reform programmes that government intended to implement in the former Bantustans was tenure reform. Tenure reform policy-making has unfolded in a convoluted, confusing manner after 1994. In the aftermath of elections, the agreed-upon underlying approach was 'rights-based'.[973] Implications of this principle included recognition of all existing (formal and informal) land rights, and accommodation of these in an inclusive package. However, the policy makers did not know how they would go about actually delivering rights-based reform. In a bid to develop a tool-kit in this regard, the Department initiated a number of so-called test cases. BRC undertook one of these projects, at Mgwali outside Stutterheim. The test cases did not supply any easy answers, but the policy team proceeded nevertheless to craft draft legislation to give effect to rights-based tenure reform. The most important feature of the Land Rights Bill of 1999 was that it entailed the creation of statutory rights in land.[974]

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[970] I acknowledge the insight of Oupa Lehulere in helping me to develop this point.
[971] Nombembe, T. 'Municipalities – Eastern Cape 2006-07 Audit Outcomes (23 May 2008)', accessed on the web-site of the South African Auditor-General (see www.agsa.co.za/Portals/1/EC_presentation.ppt) on 15 August 2008
[972] Municipal IQ, '2008 Municipal Productivity Index', accessed on http://www.municipaliq.co.za, in Novemmber 2008 (Copy in BRC Resource Centre); The Fort Hare Institute of Social and Economic Research (FHISER) and Development Research Africa, Rapid Eastern Cape Provincial Assessment of Service Delivery and Socio-Economic Survey, FHISER: East London, 2006
[973] Cousins, B. 'More Than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy', in Journal of Agrarian Change, Vol 7 No 3, July 2007, 284
[974] Ibid, 2007, 285

The replacement of Hanekom by Didiza as Minister of Land Affairs meant the end of the road for this phase of policy making. Didiza regarded the bill as inappropriate and expensive, so she started the process afresh, with a new team of specialists. The process was given a shot in the arm when the ANC Congress in 2002 prioritised the need for the Minister to give effect to the constitutional requirement to enact legislation to either secure tenure or provide comparable redress to those whose land tenure was/ is insecure because of segregation/ apartheid.[975] Within a year, the Communal Land Rights Bill was being debated in parliament, and it was passed into law in 2004. Hallmarks of the Communal Land Rights Act (CLRA) include the following: it provides for the transfer of land ownership to communities and the issuing of secondary rights, called Deeds of Communal Land Rights, to individuals; it requires the constitution of land administration bodies in communal areas and allows traditional councils established in terms of the TLGFA to serve as land administration bodies; and it gives the Minister authority to determine community boundaries.[976] Cousins and Ntsebeza have made important analytic remarks about the CLRA. Cousins notes that it involves important shifts of power, "away from individuals and households towards the group and its authority structures, on the one hand, and towards the Minister… on the other".[977] More specifically, he argues that it undermines the tenure rights of many women (eg divorcees, unmarried adult sisters).[978] Ntsebeza puts the focus on the fact that the CLRA restored control of land allocation to traditional authorities. For him land allocation is the "linkage between chieftaincy and the land question: control of land allocation processes has been 'central' to the survival of traditional authorities".[979] In the light of this analysis, the reaction from the principal stakeholders to the CLRA has not been surprising. Traditional authorities welcomed it,[980] whereas four affected rural groupings mounted a constitutional court challenge to it in April 2006.[981]

For a long time, the ANC has publicly regretted its supposed neglect of rural areas. Echoing this, commentators and analysts have pointed to the failure of the post-1994 government to deal coherently with rural issues. The weakness of these kinds of assertions is that they cannot account for the coherence of post-1994 policy decisions

[975] Constitutional Assembly of the Republic of South Africa, 'Constitution of the Republic of South Africa 1996', Clause 25 (6), 11
[976] Cousins, 2007, 287 - 289
[977] Ibid, 2007, 290
[978] Ibid, 2007, 291
[979] Ntsebeza, 2006, 295
[980] Ibid, 2006, 288
[981] Cousins, 2007, 290

pertaining to the former Bantustans. The two economies paradigm, the spatial development perspective, the preference of custom to democracy in the former Bantustans, tenure reform policy – all these are informed by the same set of beliefs and principles, which is the same set of beliefs and principles that resulted in the exclusion of betterment dispossession from the restitution programme.

Segregation and the South African nation

My final task in the chapter is to establish the genealogy of contemporary South African segregationism, which is characterised by the distinguishing of the former Reserves/ Bantustans from the rest of South Africa. Because the Reserves/ Bantustans were products of segregation policy, it is worthwhile to revisit the period in which this policy was developed and crystallized, namely the first decade of the last century, those interesting years between the South African War and Union.

South Africa is not only a recent nation-state, it is also a recent idea. The term was only used with frequency after South Africa achieved responsible government in the 1870s, and it had no constitutional meaning before Union. As Dubow has written, "[p]rior to its becoming a political entity in 1910, 'South Africa' was little more than a figurative expression".[982] The South African War of 1899 – 1902 allowed a consolidation of white interests, especially between agrarian and industrial elites, that was necessary for unification. Again Dubow is useful: "A war that was at once fought *over* possession of the country's riches, *by* what were to become South Africans, *in* what was to become South Africa, has surely to be understood as a war *for* South Africa, not only in the immediate sense of acquisition and control, but also in the forward-looking sense of making a new nation-state – in effect a 'white man's country'".[983] In the build-up to Union and during the first years of the new country, white South Africa remained divided. In this context, South Africanism was developed as the ideology that enabled whites to overcome their differences.[984] South Africanism came to signify a broad form of patriotism to which both English- and Afrikaans-speakers could subscribe.[985] This patriotism involved belief in scientific and technical progress rather than adherence to a civilizing set of morals and norms.[986] South Africanism was not only about the bringing together of Britons and Boers;

[982] Dubow, 2006, 122
[983] Ibid, 2006, 158
[984] Ibid, 2006, 158, 200
[985] Ibid, 2006, 162
[986] Ibid, 2006, 165, 178

it was a two-pronged population ploy, the second part of which was the separation/ segregation of blacks and whites.[987]

From the turn of the century, science increasingly became the lens through which policy makers considered the key issue of the day, namely the native question.[988] The native question related to two inter-linked challenges faced by white power, namely how to secure an adequate supply of cheap labour to the mining industry and how to govern the majority black population.[989] The answer to the question was forged in a concept of land reservation, first articulated at the 1903 Inter-Colonial Customs Conference in Bloemfontein, as follows: "the reservation by the State of land for the exclusive use and benefit of natives involves special obligations on their part to the State".[990] This principle underpinned deliberations in the South African Native Affairs Commission (SANAC), which was set up to address the issue definitively. The SANAC Report elaborated the reservation concept through developing an argument about the relationship between territory and citizenship.[991] The argument rested heavily on a particular understanding of customary tenure, namely that rights to indigenously-held land were vested not in the indigenous peoples (either individually or collectively), but rather in the person of the chief.[992] Crais goes on to explain that the assertion underlying reservation was that customary land rights (vested in chiefs) were regarded as personal rights that their chief holders could exchange, in the same way as "any ordinary object of possession".[993] With this foundation in place, the Commission developed its argument on the rights of 'natives' to reserved lands as follows:

> the 'Natives' have 'distinct rights' to the reserved lands because they were the 'ancestral lands held by their forefathers';
> occupation of this land was 'traditionally' under conditions of 'communal tenure', which amounted to a form of group ownership with the 'Tribal Chief' administering the lands in 'trust' for the people;

[987] Ibid, 2006, 177
[988] Ibid, 2006, 175. A science that was especially important in this regard was social anthropology, which Dubow describes as "the first example of modern social science in South Africa" (177). Scott's general analysis of the prominence of science in the era of high-modernist planning and intervention is applicable to South Africa, and contributes to an understanding of 1994 as a point of continuity (Scott, 1998). Both betterment and Mbeki-era Spatial Development Initiatives are correctly understood as expressions of high-modernism.
[989] Ashforth, 1990, 23; Evans, 1997, 13
[990] Ashforth, 1990, 27
[991] Ibid, 1990, 35
[992] Cousins, 2007, 297
[993] Crais, 2002, 152

through ‘peaceful annexation’, the ‘Chiefs’ transferred their sovereign rights to the Crown;
these chiefly rights stemmed from the ownership of the land and were thus embodied in a ‘system’ known as tribalism;
thus, the Crown, upon annexation, collected the full swag of rights and obligations previously possessed by the ‘Chief’ as sovereign.[994]

The SANAC report amounted to a sophisticated recommendation for the implementation of a system of segregation, founded on the practice of land reservation.[995] By positing a particular relationship between territory and citizenship, the report fashioned what Ashforth calls the “structure of legitimacy” that was characteristic of the twentieth century South African state.[996] One of the implications of SANAC’s segregationist vision was that it provided a justification for the eventual disenfranchisement of Africans who qualified for the vote;[997] this was necessary for labour control over the long-term.[998] Disenfranchisement was consistent with the commission’s overall notion of tribal society, as one comprising “subjects equally subordinated”, rather than rights-bearing citizens.[999]

1910 is the year in which South Africa was forged, as a Union. Not coincidently, that was also the year in which the Department of Native Affairs was created.[1000] Three years later, Union’s parliament passed the Land Act, which formally ushered in segregation as the fundamental national policy.[1001] These developments – Union, Native Affairs, segregation – are best understood as constituting the birth of the South African nation, which I refer to ‘1910’. My contention here is that the 1910 nation is still largely intact today; despite the changes that took place in 1994, many characteristics of the 1910 nation remain in place today. Amongst other things, the Reserves/ Bantustans are still spaces set aside for the exclusive residence of subordinate subjects.

The period between 1910 and 1948 saw the consolidation of South Africanism as described above, namely white unity, and the separation of black from white. Seekings

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[994] Ashforth, 1990, 36, 37
[995] Ibid, 1990, 47, 53. I think that SANAC Report is properly regarded as the watershed with regard to the beginnings of South African segregationism, rather than the Glen Grey Act, as asserted by Crais (2002, 20).
[996] Ashforth, 1990, 35
[997] This was finally achieved in 1936/7.
[998] Ashforth, 1990, 43
[999] Ibid, 1990, 44
[1000] Crais, 2002, 25
[1001] The Land Act was a key measure to address the labour challenge. Others included intervention in agricultural markets in favour of white producers and the imposition of taxes on Africans (Seekings et al, 2006, 75).

and Nattrass have highlighted that the segregationist state constructed the "key components of [its] distributional regime", namely pro-poor white policies, from the mid-1920s to mid-1930s.[1002] By then Boers and Britons were relatively united. For the remainder of the period, the emphasis was focused solely on the "greatest issue of the period – racial segregation".[1003] The issue was tackled in terms of an "enabling ethos stressing national efficiency, technical expertise, and scientific training and management".[1004] It was a productive period as far as rendering African society governable was concerned. In the twenty years after 1920, the Union government passed more laws relating to Africans than the total number passed during the previous one hundred years of colonial rule. Between Union and Republican Independence (1961), the government appointed forty-two commissions to investigate native affairs.[1005]

On the basis of the above elaboration of the origins and essence of South Africa, I now turn attention to developing an abstract understanding of the colonial state and then consider the transition from colonialism to independence. The key to understanding the nature of colonial power, Mamdani holds, is to analyse the techniques of power used to govern native subjects. He thinks that an emphasis on the marginalization or exclusion of subjects from civil society does not assist in understanding the colonial state.[1006] To say that rural areas were excluded from the realm of direct rule in the cities, does not help us understand how the system actually worked. In Mamdani's understanding, the colonial state was

> Janus-faced, bifurcated. It contained a duality: two forms of power under a single hegemonic authority. Urban power spoke the language of civil society and rights, rural power of community and culture. Civil power claimed to protect rights, customary power pledged to enforce tradition. The former was organised on the principle of differentiation to check the concentration of power, the latter around the principle of fusion to ensure a unitary authority.[1007]

[1002] Seekings et al, 2006, 76
[1003] Dubow, 2006, 211, 206
[1004] Ibid, 2006, 203
[1005] Crais, 2002, 8
[1006] Mamdani, 1996, 15. Similarly, du Toit and Neves argue that the Mbeki's two economy thesis, which emphasizes disconnection and exclusion, has limited value. Instead they posit an approach that sees the South African economy as "unitary and heterogenous". One's ability to participate in the economy "is linked to one's social positioning in the complex networks that constitute" town and countryside. Therefore, the solution does not lie in integrating two economies, but in implementing "measures that can ameliorate existing power imbalances and reduce inequality" (du Toit et al, 2007, 145, 167, 171)
[1007] Mamdani, 1996, 18

Thus for Mamdani, the apartheid state which implemented decentralised despotism in rural areas and centralised despotism in cities is the proto-type colonial state, rather than being exceptional.[1008]

Just as colonial states in Africa had a typical form, so too was there a sameness in the processes of transition to independence. In essence, the basic, bifurcated structure of state remained intact, because the transition process was more about deracialisation than democratisation. For Mamdani, democratisation entails "a dismantling of the mode of rule organised on the basis of fused power, administrative justice, and extra-economic coercion, all legitimised as the customary",[1009] but this has not happened in African decolonisation. The consequence of this failure is that civil society remains an urban phenomenon; in the rural areas, "unreformed Native Authorities… contaminate civil society".[1010] When Mamdani wrote 'Citizen and Subject' in the mid-1990s, it was too early for him to make predictions about whether or not the structures of indirect rule in the reserves would be left intact. He emphasised that if they were to be left intact, it would mean that "deracialisation without democratization will have been a uniquely African outcome".[1011] I have shown above that large portions of the segregation/ apartheid system of governance in rural areas have not only been left intact, but actually reinforced.

If segregationism was forged as the answer to the native question (of how to govern the majority population in a scenario of minority rule, and how to ensure an adequate supply of cheap labour to meet the needs of capital), and since I am asserting that segregationism remains significant today, after 1994, then it is necessary to understand the role that it plays in contemporary South Africa. In this regard, it is obvious that economic and political changes in the country have made the native question obsolete. Above I have discussed the key political changes, and the concomitant developments in governance strategy; I will not repeat this discussion here. Suffice it to say that the post-1994 government has installed a bi-furcated governance arrangement in the country, civil democracy for former white South Africa, and customary tradition for the Bantustans. It has learnt from the colonial and apartheid governments about the benefits of decentralised despotism. The

[1008] He argued that South Africa is exceptional only from the perspective of the labour question, as opposed to the more relevant perspective of the native question (Ibid, 1996, 23, 28).
[1009] Ibid, 1996, 296
[1010] Ibid, 1996, 293, 21. In similar vein, on page 297, he writes that as "long as the rural is not reformed, the perversion of civil society is inevitable". I disagree with Mamdani's apparent belief in civil society, but the point about different strategies of governance in urban compared to rural areas is relatively well made nevertheless.
[1011] Ibid, 1996, 32

economic changes require more detailed commentary. The economic situation in the period from 1994 onwards, differs markedly from that which prevailed in 1910. Most crucially, whereas the key imperative then was to ensure labour supply, today the challenge is to manage labour surplus. From the 1960s onwards, the increasingly capitalised South African economy has shed jobs, leading to increases in unemployment, underemployment and economic inactivity. In the light of this underlying, fundamental change in the structure and trajectory of South African capitalism, there is a need to consider the growing class of unemployed and not economically active people.[1012] According to the likes of Adam, and Seekings and Nattrass, a key feature of unemployment in South Africa in the recent period is that it is "often very long term".[1013] In 1993 "not only had most unemployed people been without work for a long time, but most reported that they had *never* worked".[1014] Adam refers to these people as "permanently marginalised outsiders".[1015] Because of the permanence of this condition of unemployment (linked to the lack of capital), Seekings and Nattrass deploy the term "discrete underclass" to distinguish this group from the working class.[1016] They argue that in 1994, "South Africa had a clear underclass of unemployed people in that economic and social conditions had created an especially disadvantaged class".[1017] The distinguishing of an underclass is not incompatible with recognising that there are a multitude of family and other relations between the underclass and the proletariat. However, it is important to recognise that the value and significance of remittances being paid from urban into rural areas has declined in the post-1994 period.[1018] The reality is that levels of employment and economic activity are markedly higher in former white South Africa than in the former Bantustans. Whilst there are pockets of the underclass in former white South Africa, it is ubiquitous in the former Bantustans. Ironically, whereas the Bantustans were initially created to assist with the supply of cheap labour, from the 1970s onwards (up to the present) they are most valuable as places – or rather non-places, social voids, or disaffected zones, in the terms of Baudrillard – to contain surplus labour, the underclass.[1019]

[1012] The South African government makes a distinction between these two groups. In terms of this distinction, the unemployed actively seek work, whereas the not economically active have given up hope of finding a job. The left criticizes the distinction as a false way of suppressing unemployment figures.
[1013] Seekings et al, 2006, 277; see also Adam, H. 'Transition to democracy: South Africa and eastern Europe', in Telos, No 85, 1990, 33 - 55
[1014] Seekings et al, 2006, 277
[1015] Adam, 1990, 47
[1016] Seekings et al, 2006, 271
[1017] Ibid, 2006, 273
[1018] Ibid, 2006, 338, 339; Border Rural Committee, The Cata Story, BRC: East London, 2007, 23
[1019] Baudrillard, J. The mirror of production, Telos Press: St Louis, 1975, 133

Baucom argues that the legal basis of bifurcation is a world-wide phenomenon called the state of exception. This refers to legal power to suspend the law, "a power within the law to operate without the law", or, Agamben puts it, the "power of decision over life".[1020] Its universality derives from the fact that it is "the first principle of sovereignty".[1021] This power enables governments to divide their territories into "normal and exceptional juridical terrains",[1022] without fear of condemnation or reprisal from the international community. These terrains are not empty landscapes; they are populated, and their populations are divided accordingly, in terms of what Agamben describes as "the two different codes of membership and inclusion", or what Badiou terms representation and presentation.[1023] "[M]embership always exceeds inclusion and those members of a polity who find themselves present before the law but not included or represented by it, find themselves living in a permanent state of exception".[1024] These people live what Agamben calls "bare life", and what Patterson refers to as "social death".[1025] Agamben has identified the (concentration) camp as "the pure space of exception";[1026] that is, its inhabitants are "stripped of every political status and wholly reduced to bare life".[1027] They are rendered exposed to a direct, unrelenting, unmediated confrontation with forces of domination in the camp. Before the birth of the camp, the state of exception only occurred as a temporary suspension of the rule of law to overt dangerous situations. The emergence of the camp – as a "permanent spatial arrangement" – indicates the rise of the state of exception as governance, as rule.[1028] It is for this reason that Agamben refers to the camp as "the hidden matrix and nomos of the political space in which we are still living".[1029] If this is the case, then we urgently need to expose and confront our predicament. Towards this end, Benjamin implores historians to arrive at an appropriate concept of history, one that

[1020] See Ranciere, J. 'Who is the subject of the Rights of Man?', The South Atlantic Quarterly 103: 2/3, 2004, Duke University Press, 300
[1021] Baucom, 2005, 185, 186
[1022] Ibid, 2005, 186
[1023] Ibid, 2005, 186
[1024] Ibid, 2005, 187, 188
[1025] Ibid, 2005, 189. During discussions following my presentation of this chapter to a seminar hosted by the Programme of Land and Agrarian Studies (Plaas) at the University of the Western Cape on 4 September 2008, Andries du Toit took issue with my usage of Agamben's notion of bare life to understand dynamics and realities in the Bantustans, insisting that these are the outcome of competing and overlying politics. I take the point and accept that the conceptual framework that I deploy sometimes lacks nuance and sophistication. But I hold that this weakness is more than compensated for by the strength of the insights and truths derived from the framework, and its relevance to contemporary political struggle. Sometimes it is more useful to draw attention to specific aspects of the picture than trying to describe the whole picture, in general terms.
[1026] Agamben, G. Homo Sacer: Soveriegn Power and Bare Life, Stanford University Press: Stanford, 1998, 134
[1027] Ibid, 1998, 171
[1028] Ibid, 1998, 168, 169
[1029] Ibid, 1998, 166

challenges life in the camp.[1030] Such a concept of history would necessarily trace the origins of our ignominious present in the past, resist official proclamations of new dawns, and aspire for the realisation of "the real state of exception", that is life outside the camp.[1031]

The Reserve/ Bantustan is one of "occidental modernity's classical spaces of exception" and its inhabitants an example of people who live outside normal legal parameters.[1032] For the Bantustan subject, social death or bare life is not temporary or exceptional, it is the permanent norm. I have argued in this chapter that the underlying structure of the Bantustan system was retained in the post-1994 period. Whereas the Bantustans were reincorporated into the borders of the South African nation, they are still deliberately under-developed, fabricated as welfare zones, and subjected to arbitrary customary rule. For the Bantustan subject, 1994 meant that she was no longer regarded as an "extradomestic alien", but instead became a domestic denizen. In other words, it meant that she changed from one form of "haunting opposite (and double) of the citizen" to another.[1033]

Conclusion

In this chapter, I have sought to write a history of the present-day Bantustan. Betterment slipped off the restitution agenda in 1996, not because of government oversight or inadvertent error. It was not an exceptional policy development that went against the grain of building a coherent framework for a unitary South Africa. Rather it was one of the first clearest indications that the segregationist character of the nation would remain firmly ensconced in the post-1994 period. If one looks at relevant policy developments since the 1996 White Paper on Land Reform, including the emergence of planning frameworks that perpetuate apartheid space, the paring down of rural development to welfare, the bolstering of the position and power of apartheid-era traditional authorities, and the decision to invest land rights in these authorities, then it is reasonable to conclude that government's decision to exclude betterment dispossession from restitution was considered and deliberate, and part of a larger policy to manage the former Bantustans

[1030] Benjamin, W. 'Theses on the Philosophy of History' in H. Zohn (ed), Illuminations, New York: Schocken Books, 1968, 257
[1031] Ibid, 1968, 257
[1032] Baucom, 2005, 188
[1033] Ibid, 2005, 190

differently from former white South Africa (with regard to both governance and economic modeling).

The arguments presented in this chapter suggest that some changes should be made to Walker's grand narrative of government restitution, as outlined in chapter 2. The basics of this re-worked version are as follows:

- The colonial and apartheid governments dispossessed African people and communities of land within the boundaries of the old South Africa (the 87%).
- Dispossessed people were dumped in the Reserve/ Bantustan areas (the 13%), which had earlier been selected and demarcated as such because they were the least fertile and productive areas of the land mass of South Africa.
- The dispossessed people lived on this pitiful land with no rights, and they were functionally urbanised because they were dependent on income streams from the prosperous urban centres.
- Restitution has been put in place to return to people what was taken from them in the land of plenty, in other words in the 87%.
- The 13% had no (land or other) economic value then, and has no potential now.

To live in a Bantustan today, is not dissimilar to having lived in a Bantustan in the 1970s and 1980s. As I have shown in this chapter, if you live in a Bantustan, you are deemed by the state to exist outside the country which is governed in terms of rights, democracy, and development.[1034] Instead, you are subjected to custom, autocracy and welfare. Put another way, I have drawn attention to and explained various consequences of bifurcated power configurations in the former Bantustans, including their political marginalization, their economic fabrication into dead zones and their creation as places of custom, to be governed by tradition.

From the perspective of someone living in Ciskei or Transkei, the new South Africa is not new; in fact, the only South Africa that exists is the one that was born in 1910, went through puberty from 1961, and entered adulthood on 27 April 1994. Those who live in the

[1034] It is not my intention to imply that things in former white South Africa are hunky-dory. There are certainly a plethora of problems in around South African cities that have not been effectively addressed in the post-apartheid period. However, this should not detract from the bifurcated nature of governance in South Africa after 1994, which has continued along the much the same lines as had been developed from the birth of the nation in 1910, onwards.

13% of the country previously reserved for black occupation are not citizens of South Africa, certainly not then, and still not now.

Chapter 5 – The production of truth on the side of resistance: the value and limitations of the Cata case[1035]

Introduction

In 1998, BRC took a decision to advocate for the inclusion of betterment dispossession into the restitution programme of the South African government. In order to implement this decision, the organisation had to generate counter-narratives to those propagated in government policy. Put another way, it required that BRC produce historical truth on the side of resistance, about betterment as dispossession. The overall strategy employed by BRC in its quest to broaden the parameters of restitution was to bring a betterment case to the Land Claims Court. The case that it selected was Cata. It is necessary to stress at the onset that the chapter does not tell the story of the Cata community, as told by the Cata people. Instead, it tells the story, the narrative (about Cata) that was produced by BRC. My interest and my aspiration therefore do not lie in pursing any kind of ultimate or popular historical truth about the implementation of betterment in Cata. Rather, my ambition is to place the lens on BRC and understand the process that it went through to produce narrative that came to be regarded by government as valid. In order to do this, I look both at the internal context in BRC circa 1998 and the external context within which BRC operated. With regard to the latter, I am particularly interested in understanding the dynamic between forces of domination and those of resistance, which in turn relates to the detail of the regime of truth within which this dynamic unfolded. The chapter shows how BRC both influenced and was influenced by this regime. Specifically, it argues that its productive advances echoed the regime's penchant for individual property rights and actuarial capitalism, whilst its reversals mirror the regime's bifurcated approach to communal property, traditional governance and cultural authenticity.

BRC sets its sights

BRC's attempt to access compensation for betterment dispossession through tenure reform (as outlined in chapter four) was short-lived. For various reasons the organization shifted betterment into restitution in early 1998. Its initial optimism relating to the tenure reform policy formulation process had already subsided by the end of 1997.[1036] Instead there was a growing understanding within BRC that it would take a long time before

[1035] 'Cata' is my preferred spelling of the name of the village. In documents quoted in the chapters, other spellings are used; these have not been changed.

[1036] BRC, 'Six-monthly report: January to June 1998', Unpublished document in BRC resource centre, 1998, 9

comprehensive legislation would be put in place, and that it was unlikely that the legislation would bring substantial benefits to people living in former Bantustans.[1037] Also, a couple of human resource changes within the organisation had a negative impact on the effectiveness and status of the tenure programme within the organisation.[1038] By the end of 1997 there was a sense within BRC that significant benefits lay hidden within the Restitution of Land Rights Act; this sense was informed by early successes in the revived Macleantown restitution case.[1039] It is also notable here that from the beginning of 1998

[1037] This perception was reinforced by BRC's rather frustrating experience in piloting a tenure test case in Mgwali. In line with government's rights-based framework, BRC commenced the process at Mgwali by conducting a rights-enquiry. The research was undertaken in 1997. It identified four different so-called interest groups at Mgwali, namely holders of quitrent title, tenants living on church-owned land, holders of Permission To Occupy (PTO) Certificates to land that had previously been part of the commonage but had more recently been demarcated for residential purposes, and landless people. It took BRC considerable time to finalise its recommendations on how to accommodate the needs and claims of all interest groups, within a coherent framework. The recommendations that BRC finally made to the Department of Land Affairs, in late 1998, were as follows:

- The quitrenters' restitution claim to the commonage was valid and should be settled through developmental and financial compensation.
- Quitrent titles should be upgraded to freehold titles.
- The state should acquire the church-owned land (preferably through donation). The rights of the tenants should then be upgraded to freehold.
- The rights of the holders of PTO certificates should be similarly upgraded.
- The needs of the landless should be addressed through the redistribution programme.

Pretoria referred the recommendations back to the Provincial Land Reform Office (PLRO). After some months, the office decided that it would only take decisions within the bounds of existing legislation (in other words that it would not use the kind of discretion normally associated with a piloting process). It indicated that the only legislation in place in terms of which a land rights award could be made was the Restitution of Land Rights Act. It therefore referred the quitrenters' claim back to the restitution programme. Because BRC held that the legacy of dispossession had to be addressed before moving on to tenure reform, this decision effectively meant the end of the test case. Nothing had been tested. Nothing had been achieved.

[1038] First, the resignation of Siyabulela Manona in March 1997 left the tenure programme without a champion. Second, a restructuring exercise undertaken in mid-1997 seems to have had a negative impact on the programme. At the end of June, the Research Unit was abolished, with its staff absorbed into the Land Rights Unit. In the period 1996 to mid-1997 tenure had become a key focus of the Research Unit; its abolition meant that tenure no longer had a protected place in the organisation. Instead it had to compete with the restitution, redistribution and land administration programmes in the Land Rights Unit.

[1039] BRC's intervention in Macleantown revolved around its establishment of a project steering committee (PSC), in early 1998. It involved the following institutions in this co-ordination and management structure: the Macleantown Residents' Association, the Amatole District Municipality (then called Amatola District Council), the East London Transitional Representative Council, the Regional Land Claims Commission and the Department of Land Affairs. The committee met frequently during 1998 and was perceived to bring many benefits to the project, including "communication, co-ordination, accountability and transparency" (BRC, 'Community Participation in Eastern Cape Land Reform Projects', Unpublished document accessed in BRC Resource Centre, 1998a, 9). Furthermore, the process improvements seemed to be matched by the reaching of milestones en route to the settlement of the claim. More specifically, the beneficiary list was finalised, research was undertaken to determine losses incurred and hardship suffered by the dispossessed, and the relevant government department (including the Department of Housing and Local Government) began discussing their respective planning and service provision responsibilities in relation to the land development process (Ibid, 1998a, 9, 10). BRC regarded the work as successful; one of its reports read as follows: "The Macleantown PSC remained a very effective institutional vehicle to move the restitution and development process forward". (BRC, 'Six-monthly report: July to December 1998', Unpublished report accessed in BRC Resource Centre, 1998b, 17) BRC's intervention was also publicly lauded. The 1998/9 Annual Report of the Commission on Restitution of Land Rights reads as follows: "The Macleantown claim has the potential to provide a model for future claims with similar circumstances. The Border Rural Committee, an affiliate of the National Land Committee, took the initiative to set up a steering committee

the restitution programme was the best resourced in the organisation, certainly with regard to human resources.[1040] So, in early 1998 BRC decided that restitution was the most appropriate programme of land reform to address betterment dispossession.

Before outlining the manner in which BRC sought to insert betterment into restitution, I need to draw attention to broader developments within the organisation. More specifically, I consider general problems pertaining to the organisation's ability to engage communities in the mid-1990s, and weaknesses in its technical proficiency. In chapters three and four, I outlined some of the difficulties (eg staff turnover) experienced by BRC in the mid-1990s. One of the criticisms of BRC made by external evaluators in 1996 was that it had placed inadequate emphasis on advocacy work after 1994.[1041] The report asserted that this weakness was closely related to BRC's distant and unsystematic relations with communities and their leadership formations.

> How far BRC has gone to organise and mobilise the rural and landless to develop their own voice and, collectively pressure for change, apart from its earlier role in the NLC Community Land Conference, is not clear…. [I]t is not readily evident from BRC's social surveys, research studies and, organisational reports, to what extent people have been organised or, are beginning to articulate their own views and interests. This is, perhaps, why one member of the evaluation team found himself reaching the following conclusion: *There are no reports of committee formations with names of leaders and expressions of their own views… There are no individual identities of some of the poor, landless and marginalized, only total aggregates or delineations by age, sex, and other attributes. I think this is where BRC fails to distinguish between their clients as subjects of studies or, recipients of material resources, on the one hand, and as people active in their own struggles with their own ideas, dreams, demands and a voice on the other*. [1042]

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which includes stakeholders – the Amatola District Council, in conjunction with DLA and the Department of Local Government and Housing, which will be responsible for the provision of bulk infrastructure and housing for the resettled claimants" (Commission on the Restitution of Land Rights, Annual Report April 1998 – March 1999, Government printers: Pretoria, 1999, 39).

[1040] In mid-1997 Teresa Tyacke, the Land Rights Unit Co-ordinator, went on maternity leave. She returned in early 1998 as a Restitution Officer. Alongside her was Phumzile Matikinca, who was an experienced, politically-astute fieldworker. At the end of 1997, the capacity of all field-staff was assessed, and those deemed to possess qualities needed to manage projects were accorded 'senior' status. Both Tyacke and Matikinca were appointed as Senior Officers. Restitution was the only programme area within BRC that was this well resourced.

[1041] Cole et al, 1996, 34

[1042] Ibid, 1996, 58 (not my emphasis)

The key point for my purpose is that Cole and Nyoni diagnosed that the organisation was weak 'on the ground', at the level of communities. BRC was struggling to play a meaningful role in the delivery of land reform, yet it had abandoned mobilisation as a method of work. Hence the evaluators recommended that the organisation should review its external context, develop a new strategic vision, and "re-insert a notion of community empowerment strategies into the overall strategic framework".[1043]

When I arrived at BRC at the beginning of 1997, I was concerned by what struck me as a lack of technical ability. For example, those charged with land use planning did not have the necessary land use planning competence; those employed as researchers did not have basic research skills, and so on. At the time I believed that this limitation, combined with the above-mentioned problems with BRC's community work, would invariably lead to a string of negative consequences in the field. Thus I motivated that external engagement should be curtailed, in favour of internal capacity building (through reading, writing and training). Consequently, the only external project work implemented in the first half of 1997 was at Thornhill, Gasela, Isidenge and Zweledinga farms.[1044] The point is that I insisted on, as managing director, specialisation and technical proficiency. In sum, the BRC that began thinking about how to insert betterment into restitution was one that had lost its ability to engage communities and that believed in technical solutions.

The first recorded discussion of the betterment issue by the restitution team took place in April 1998. The minutes of the meeting reflect three key issues. Firstly, it is noted that "Gwili-Gwili at Keiskammahoek has been considered for being taken forward with its restitution claim".[1045] Secondly, there is indication of a preference to take the claim forward via the court, rather than through the commission. The minutes read as follows: "the case will bypass the commission and go straight to the land claims court".[1046] However it was acknowledged that the organisation did not have a comprehensive understanding of court processes (more specifically timeframes and requirements) and that these would have to be investigated before a final decision could be taken. Thirdly, there is an indication that the responsible staff had a notion of legal precedence: "If the case is successful over a

[1043] Ibid, 1996, 60
[1044] BRC, 1997b
[1045] BRC, 'Restitution Programme: Minutes of meeting dated 21/04/1998', Unpublished document accessed in BRC Resource Centre, 1998c, 2. Interestingly, in line with the earlier discussions driven by the Research Unit, there was consultation with Keiskammahoek Transitional Representative Council about case selection.
[1046] Ibid, 1998c, 2

million people removed due to betterment will benefit from that exercise".[1047] At a follow-up meeting a month later, one of the programme officers was tasked to prepare a discussion document that would enable the organisation to take final decisions about how to move forward. It was stipulated that this document should recommend a betterment village on which future work would be focused.[1048]

A three page document, called 'Betterment – Options for Land Reform', was prepared by Tyacke, and discussed in June. Its tone and message is one of caution; Tyacke called the final section of her document, "My Concerns". There were two sets of concerns outlined in the document. First, doubts were raised about the strategic appropriateness of trying to force betterment into the restitution programme. Some of the issues raised in this regard were as follows: South Africa had adopted a conservative macro-economic policy, which meant that it would be difficult to engineer an expansion of the restitution programme; there was generally poor levels of land reform implementation capacity; and "the context of a restitution process which is not really working at present and has a huge number of claims submitted". [1049] Second, the document raised issues that would undermine the chances of BRC actually winning the case. It suggested that betterment dispossession may not satisfy all the criteria of the restitution act. There was particular concern around whether or not the implementation of betterment resulted in dispossession.

> In general the extent of land was not decreased – boundaries [stayed] the same… In terms of the current restitution framework a land right is only lost when the physical access to land is removed. A detailed argument will have to be presented to explain the concept of a land right and how therefore people lost land rights without losing an extent of land.[1050]

Also, Tyacke regarded betterment as an event (rather than as a process that commenced with the formulation of policy and enacting of legislation, from the late 1920s onwards). She correctly understood that people's rights were whittled away through this process, but erroneously concluded on this basis that "land rights were lost long before betterment".[1051] Finally, she argued that the likelihood of the court ruling in BRC's favour, without the support of the Commission or the Department, was limited; "the Court is being criticized for not taking decisions. I have been told that if you want to…have a chance of getting a

[1047] Ibid, 1998c, 2
[1048] BRC, 'Notes on Restitution Meeting – 8 May 1998', unpublished document in BRC Resource Centre, 1998d
[1049] BRC, 'Betterment – Options for Land Reform', unpublished document in BRC Resource Centre, 1998e, 3
[1050] Ibid, 1998e, 1, 2
[1051] Ibid, 1998e, 2

favorable ruling you should have the support of the Commission or DLA. We don't have that". [1052] Finally, the document points out that BRC would have to solicit adequate legal assistance (possibly from the Legal Resources Centre) as a prerequisite for taking the case to court.

Despite Tyacke's ambivalence on the issue, by July 1998 the organisation had decided to proceed by taking a test case to court.[1053] At this key moment within BRC the evident truth that betterment dispossessed people held out over concerns about a lack of evidence of dispossession; melancholic truth overcame technical reason. From then onwards, for BRC the truth of betterment as dispossession, and therefore as part of the restitution process was located in a notion of truth residing in the history of the Bantustans and apartheid writ large, and in contemporary poverty and under-development. This also meant that BRC developed, from the time of this decision, an understanding of betterment as within restitution, based on the broad suffering and marginality of those who had been subjected to betterment. That is, historical narratives of apartheid Bantustan marginality provided the accredited knowledge (the rationale) to pursue demands for justice and the need for development through restitution.[1054]

The May document was cautious about the prospects of successfully redressing betterment dispossession through restitution, but it did put forward what proved to be a compelling argument in favour of selecting Cata as the test case in this regard. The main factor taken into account by BRC in selecting Cata was the availability of relevant research.[1055] Cata was considerably more researched than Gwili-Gwili, and there seemed to be a significant amount of detailed information on the implementation of betterment in Cata and the effects of the implementation. More specifically, Chris de Wet had undertaken considerable doctoral and post-doctoral work in Cata, with a focus on betterment, and BRC hoped that the scope and status of this information would prove invaluable, for two reasons. First it would lessen the research burden that would have to be carried by BRC, and second it would lend weight to the cause of the organization if it could link political with academic historical truth. As de Wet later testified, his work "was

[1052] Ibid, 1998e, 3
[1053] Ibid, 1998b, 19
[1054] This characterization may be generalizable to some extent of exercises in the production of historical truth outside the academy. It points to some of the dangers facing the production of historical knowledge, for example manipulation and treachery in pursuit of the desired outcome, or less cynically merely wandering up the garden path without any actual evidence.
[1055] Another factor was that Cata was smaller than Gwili-Gwili, and therefore more manageable (BRC, 1998e, 2, 3).

conducted in a straight academic context, long before the idea of restitution had become part of the political debate in South Africa. I submit it therefore speaks all the more persuasively for the necessity for restitution for the community of Cata".[1056] It was exactly this discourse of academic disinterest, objectivity and credibility that the organization sought to harness, in its favor. Hence Cata was selected ahead of Gwili-Gwili.

BRC took the decision to take the Cata case to court in mid-1998. Because the deadline for the submission of claims was 31 December 1998, this meant that the organisation only had six months to prepare, construct and submit its legal papers. The preparation included securing the support of key role-players, namely the community of Cata, a reputable human rights lawyer (the services of Clive Plasket were obtained), the expert witness (Chris de Wet), and the Keiskammahoek Transitional Representative Council (the then local authority responsible for Cata). BRC started with Plasket and de Wet; it met them in Grahamstown in July.[1057] From BRC's perspective, it was not an easy discussion. Neither Plasket nor de Wet was convinced that betterment had entailed dispossession (in the restitution sense). Just as Tyacke had argued two months earlier, they emphasized that the outside boundary of Cata did not change and that the community did not lose access to its land. Where was the dispossession? Show us on the map, they implored.[1058] That the BRC team failed to convince them in the meeting to take/ support the case confirms that it had not yet, by that stage, conceptualised the dispossession in terms of restitution criteria. But Plasket and de Wet indicated that they would apply their respective minds further to the issue, and communicate their respective decisions about their participation in the case to the organisation. By the end of August, both had agreed to participate in the case.[1059]

BRC's initial engagement with the Cata community was similarly ambivalent. The main reservation expressed by the community leadership was a reluctance to take the government that it supported to court.[1060] The leadership did not want to be seen to be in conflict with the ANC government. But it did accept that the legal route was made available through ANC-motivated legislation, and on this basis agreed on 1 September that Cata

[1056] Plasket, 1998, Annexure 3, 11
[1057] BRC, 1998b, 19
[1058] I led BRC's negotiating team in the meeting.
[1059] BRC, 1998b, 19
[1060] From the onset of its work in Cata, BRC engaged the civic (as opposed to traditional) leadership. At that time, it was associated with the South African National Civics Organisation (SANCO).

would be the test case.[1061] Arguably, the ambivalence of the leadership reinforced technicist tendencies within BRC. Certainly, that first engagement established the primary character and purpose of BRC's interaction with the community over the next two to three years, namely to obtain mandates from the leadership. BRC did not engage the community leadership in order to debate issues and to formulate strategy jointly; this was done in the organisation's offices. Strategy was set in East London, and ratified in Cata.

After the key stakeholders had endorsed the decision to mount the legal challenge and the principal role-players were in place, the next task was to decide on the legal strategy that should be employed and to implement it accordingly. It was decided that the Notice of Motion should revolve around a main affidavit to be made by a duly nominated representative of the Cata community and that this should be reinforced by supporting affidavits, to be made by other community members and by de Wet. Zithobhile Welcome Gcilitshana was selected to make the main affidavit. The final quarter of the year was spent preparing the required documentation, which was ultimately lodged in the registry of the court on 21 December 1998.[1062]

In compiling the legal papers, Plasket and BRC relied heavily on academic work. To some extent, once BRC selected Cata above Gwili-Gwili, it was likely that it would use this work as a prominent source of information. However, the selection of Cata did not necessarily imply that BRC would undertake negligible new research. More specifically, it did not mean that the organization would not gather substantive information from Cata people who had direct, personal experience of betterment. But this is the route that was taken by Plasket and BRC. That is, the argument and the knowledge presented in the main affidavit were not those of Gcilitshana (or any other Cata person), rather they were those of Plasket, Westaway, Tyacke and de Wet.[1063] The affidavit is properly understood as the product of a vanguard approach; BRC (with technical support from Plasket) took full control of the process of constituting the restitution claim of the Cata people. The only testimony that was gathered from Gcilitshana was his personal history, in relation to the planning and implementation of betterment in Cata. The main arguments were formulated on the basis of pre-existing academic knowledge, and these were then given a veneer of authenticity by shrouding them with parts of Gcilitshana's life story. It should also be emphasized in this

[1061] BRC, 1998b, 20
[1062] Ibid, 1998b, 21
[1063] Matikinca was not involved in the preparation of the legal documentation.

regard that BRC did not collect any new evidence about the extent of dispossession experienced in Cata; there was a sole reliance on de Wet's work in this regard. This approach was not pre-ordained; BRC and Plasket could have made different choices; they could have generated knowledge based on local testimony and they could have formulated arguments deriving from local experience. The time constraints were real, the orientation within BRC was academic rather than participatory, and the legal discourse reinforced the technical approach, but it should be clearly understood that if BRC had made different choices in how it went about putting the case together, there would have been a different set of outcomes.

Before taking a look at the substance of the documentation, and in particular of the main affidavit, it is necessary to reflect briefly on the fact that the claim was lodged a mere ten days before the deadline for the lodgement of claims. This meant that the case would not be heard within the lodgement period, and would therefore fail to establish a precedent to inform whether or not betterment claims should be lodged. During the initial discussions about betterment in BRC's restitution team, the assumption and expectation was that the case would be heard and resolved before the cut-off date, so that communities dispossessed by betterment would know, in time, whether or not to lodge restitution claims. In retrospect BRC got this calculation badly wrong. Even if the legal papers had been lodged by mid-year it is likely that the verdict would not have been made by December. This note underlines the organization's inexperience at the time with restitution in general and with the legal route in particular.

When it realized that the precedent value of the Cata claim would be limited to the post-lodgement phase of the restitution programme, it hurriedly fabricated a 'plan B' to encourage betterment communities to lodge claims, in about November 1998. This entailed two components. First, the field-staff of the organization were required to lodge all claims from the communal villages of Keiskammahoek district. (Ultimately, an additional seven claims were lodged in this regard.) Second, BRC staff met with delegations of some Transitional Representative Councils that covered villages in the Ciskei and western Transkei. It was hoped that councilors would then assist these villages to lodge their respective claims, but this tactic yielded poor results. As a result, by 31 December very few betterment claims had been lodged.[1064]

[1064] BRC press statements and publicity material released in 2002/3 estimated that 5% of betterment claims had been lodged. Subsequently, I have perused RLCC data sheets, comparing these to villages that are part

Understanding, valuing and quantifying the loss

The main affidavit is a wide-ranging document that comprises the following sections: the settlement of Cata, legislation of relevance, betterment planning, betterment planning at Cata, implementation of betterment planning at Cata, consent to betterment, the effect of betterment planning, and relief. Some sections are more coherent and compelling than others. For example, the section dealing with legislation provides a useful overview of the origins and evolution of betterment legislation, which lays the basis for the argument that it was racially-discriminatory in its intent and effects.[1065] The section on the effects of the implementation of betterment in Cata is interesting, not least because it seeks to establish that betterment involved the dispossession of land rights and thus fulfils the central criteria of the Restitution of Land Rights Act. It makes mention of the following specific dimensions of dispossession: the demolition of homes, dispossession of "members of the community of their rights to use and enjoy their residential sites, free from hindrance", reduction in the size of residential sites, dispossession of arable rights and reduction of the size of arable land holdings, dispossession "of members of the community of their communal rights in the land" (eg collective community management of the land through the application of rules of customary law, flexible land use, etc).[1066] Although this amounts to a useful qualitative assessment of the dispossession of land rights effected through the implementation of betterment, the affidavit does not provide quantitative detail.

After some discussion between BRC and Plasket about the kind of redress that should be sought, it was decided to demand that restitution should provide some of the developmental stimulus that had been promised by betterment but never delivered. "[T]he compensation sought by the community relates essentially to the provision of services and development opportunities".[1067] The document then goes on to motivate for specific remedies in relation to the harm wrought by betterment. For example, "betterment planning has had a drastic and dramatic effect on the people of Chatha as a community. It has changed the way we live and the places where we live. It has brought us together physically. This has had the effect of making it necessary, for the better functioning of the

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of the Vulamasango Singene campaign. These perusals indicated that 5% was very optimistic. In 2007, a government task team estimated that only 1% of betterment claims in the Eastern Cape Province had been lodged.

[1065] Plasket, 1998, main affidavit, 4 – 13

[1066] Ibid, 1998, 23 – 26

[1067] Ibid, 1998, 27

community, to have a community hall, which we do not have at present".[1068] The full list of issues included in the proposed compensation package was a community hall, sanitation infrastructure, internal and external fencing, internal and external roads, conservation measures, skills training, income generation opportunities, and primary school upgrading. The proposed interventions were estimated to require expenditure of just over R 6 million.[1069] In retrospect, it is strange that BRC and Plasket chose to demand compensation in relation to the false promises of the apartheid state, rather than the dispossession of rights caused by betterment. The BRC archive reveals that the organization was aware of the limitations of its approach. On 4 December 1998 Tyacke wrote as follows to Plasket:

> We have all been struggling with how to quantify the loss because so much of it is based on a qualitative loss. We think that limiting it mainly to promises that were made and not kept undermines what people lost. We also think that the affidavit is very strong in covering three aspects of loss [quantifiable losses, qualifiable losses and false promises]… All of these losses cause pain and suffering. As compensation for these losses we list the development needs of Chata. These needs are costed but it is too difficult to quantify the losses.[1070]

In sum, the legal documentation lodged on 23 December 1998 is properly regarded as the first comprehensive attempt at formulating an evidence-led truth pertaining to betterment dispossession, through the discursive lens of restitution. That is, the document argues that betterment dispossession fulfils the criteria laid out in the Restitution of Land Rights Act, and therefore should be righted through this legislation. The evidence is primarily legal and focuses particularly on an attempt to constitute betterment as racially discriminatory and as entailing the dispossession of rights, and to establish the Cata case as a valid and precedent setting restitution claim.

During the first quarter of 1999, there were inconclusive, confusing interactions between the court, the department and BRC.[1071] However, late in that period, the Chief Director of

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[1068] Ibid, 1998, 27, 28
[1069] Ibid, 1998, 27 – 29
[1070] Tyacke, T. e-mail message without subject name sent to Plasket on 4 December 1998 at 16h00, Copy of e-mail in BRC Resource Centre, 1998a
[1071] It should be noted that there was a vacuum of authority in the Regional Land Claims Commission at this time. Dr Mayende had resigned as commissioner, but his successor had not yet been appointed. Instead, Michael Worsnip had been installed by Minister Hanekom as a caretaker commissioner. Worsnip's main interest was to structure the office in an appropriate manner and to improve operational systems. He did not involve himself in policy discussions. Hence the RLCC was not involved centrally in the negotiations process until the final quarter of 1999, when the new commissioner, Tozi Gwanya, began making his presence in the commission felt.

Restitution in the DLA, Jean du Plessis, proposed what he termed "one round of out-of-court negotiations, without prejudice".[1072] This meant that in the event that the negotiations process broke down, the parties would return to court, without either of their respective cases having being jeopardized through the negotiations process. The reason that du Plessis put forward for the negotiations was that it would be more appropriate to resolve the Cata case through constructive interaction than in the conflictual theater of a court. BRC agreed to this suggestion "based on the understanding that a possible outcome of the meeting was that DLA would decide that all betterment cases should be compensated through the restitution programme".[1073] That is, BRC's consent was based on an expectation that negotiated agreements would have wide-ranging policy significance.

The first (and in fact only) face-to-face negotiation meeting took place on 16 April 1999. It was attended by representatives of DLA, the RLCC and BRC. WZ Gcilitshana was the only representative of the Cata community, and the meeting was conducted in English. After initial exchanges, it quickly emerged that the key issues to be negotiated and resolved related to the nature, extent and value of rights held by the people of Cata and subsequently dispossessed through the implementation of betterment.[1074] In an effort to assess whether or not there was possible convergence between the parties on these issues, it was agreed that the DLA would pen its understanding of the nature and extent of rights dispossessed, by 7 May 1999. (As I showed in Chapter Four, government had earlier disputed that betterment was racially-discriminatory in its legislative origins and implementation. However, this point was not contested by government in the meeting, and never emerged subsequently in the negotiations as a controversial issue.[1075])

Both parties emerged from the meeting optimistic that a negotiated settlement was possible. Du Plessis was quoted as follows in a Daily Dispatch article on 21 April: "We are not conceding the claim but have entered no-prejudice negotiations and we feel there is a strong likelihood that we can reach settlement".[1076] At the time, Westaway laid out the pending challenge as follows: "We have to find a common understanding on the nature of rights lost and then put a value on those rights. If we reach an agreement on these issues,

[1072] BRC, 'Six-monthly report: January to June 1999', unpublished document in BRC Resource Centre, 1999, 22
[1073] BRC, 'Notes on negotiation meeting – Chatha community betterment claim – 16th April 1999', unpublished document in BRC Resource Centre, 1999a
[1074] Ibid, 1999a
[1075] I was present at the meeting.
[1076] 'Government, community in bid to settle', Daily Dispatch, 21 April 1999, 2

we will have an agreement… We believe that all cases where communal land rights were lost due to betterment should fall within the restitution process".[1077] In the next few weeks, du Plessis drew on the assistance of DLA consultancy capacity to prepare a departmental response. He duly delivered the document, as promised, on 7 May. DLA suggested that the most useful way to reach a shared understanding of the rights' issues was to

> break this claim into 2 component parts.
>
> 1. Rights to use and enjoy residential sites and arable allotments, and
> 2. Rights to decide upon the use of land, in particular common property resources such as grazing land.
>
> This division is consistent with the fact that individuals and families generally have strong exclusive rights to residential plots and fields under customary communal systems, whilst control of 'common property' such as grazing areas is generally exercised by the group under a more fluid 'rules based' process.[1078]

DLA largely accepted the interpretation and understanding of the dispossession of individual land rights, as described in the Notice of Motion. The department went further by suggesting that these rights were properly regarded as prescriptive rights (and therefore, in the terms of the White Paper, akin to full ownership). A further contribution of this document is that it suggested a clear approach to the outstanding issues of quantification and valuation. To quote from the DLA document:

> we would recommend that the areas of land which people used and occupied as fields and residential sites be quantified as well as the area of fields and residential land which they received in compensation. The second area should be deducted from the first and the 'uncompensated' area thereby arrived at. Once an agreed valuation of arable and residential land in

[1077] Ibid, 1999, 2. This quote is significant for two reasons. First it indicates that although BRC had failed in its rather naïve attempt to oversee the resolution of the Cata case before the cut-off date, it still held onto the hope that its eventual resolution would nevertheless have broad policy implications, effecting all betterment cases. Second it shows that BRC had not yet adopted a strictly demarcated, phased strategy for dealing with the long-term advocacy challenge of betterment in relation to restitution, namely to eventually effect a re-opening of the lodgement process for those dispossessed through betterment. Once this strategy was in place, BRC decided not to indicate any support for a call to re-open lodgement until the government had uncontrovertibly reversed its policy stance as far as lodged betterment claims were concerned.

[1078] Du Plessis, J. (for the Department of Land Affairs), 'Draft: without prejudice. Attempted description of the nature and extent of the rights lost through the betterment process at Chata, 7 May 1999', Unpublished document accessed in BRC Resource Centre, 1999, 1

the area has been determined this could be applied to the uncompensated area and offered to the claimants.[1079]

Whereas the DLA adopted an accommodating stance in relation to the dispossession of individual rights, its approach to what it termed the "second component part" of the claim was less accommodating. Perhaps this is not surprising because this component dealt with the destruction of a tenure system and way of life - the full dimensions of communal loss; it was less tangible and quantifiable than the first component. The department failed to see past two issues in this regard, namely that the outside boundaries had not changed and that there seemed to be no impediment preventing a return to pre-betterment tenure arrangements as far as the commonage was concerned. Thus the department asked, in bold typeface, "why is the remedy sought not the direct remedy to the problem cited, in other words that the right to allocate and decide on the use of the land be restored to the community?"[1080] It went on to contend that "that there would be a problem with the department compensating people for land which they, as a community, have not in fact lost".[1081] On the basis of these and other points, the department argued that the "obvious remedy" was restoration to the community of the right to control communal resources. Beyond this, the department offered nothing, but it did leave one issue hanging, namely compensation for loss of effective use of the commonage from the implementation of betterment onwards, during what it termed the "long years".[1082]

On 23 May BRC and the Cata leadership met to formulate a response to the position taken by DLA. This task was complicated by the fact that DLA had conceded part of the claim, but not the whole claim. The leadership was inconclusive and ambiguous in its discussions; these were reported as follows by BRC (in the third person). "The process of betterment had led them to poverty. They used to have many animals and now no longer have cattle and sheep. They have to buy animals for ceremonies. They had been discouraged from keeping livestock, which were impounded in the forest. They had not only lost land but also property. DLA did not recognize the extent of the damage – they used to have several houses. They were given the ultimatum to move before the bulldozer flattened their houses. They were happy that DLA recognized some of their loss".[1083] At

[1079] Ibid, 1999, 2
[1080] Ibid, 1999, 3
[1081] Ibid, 1999, 3
[1082] Ibid, 1999, 4
[1083] Tyacke, T. 'Chatha community meeting, 23rd May 1999', unpublished document accessed in BRC Resource Centre, 1999

the end of the discussions between BRC and the Cata leadership, BRC was given a mandate to draft a response to DLA.[1084]

BRC decided to declare agreement in relation to the dispossession of individual rights but to push for concessions for the destruction of the tenure system and dispossession of communal rights.[1085] The response that was sent on 28 May attempted to give DLA a fuller understanding of the consequences of the imposition of betterment on the community of Cata. The document was a desperate, ultimately unconvincing attempt to win the deadlocked part of the claim. Its tone is set in the early paragraphs.

> Limiting the definition of what people lost to control over an extent of land and therefore the remedy to restoring the right to control land use would undermine what people lost as a community. We need to recognise the rights that made up that control and which rendered the removal of the control so devastating. In addition to access to and control over an extent of land being removed, a quality and way of life and in fact, a communal tenure system, were destroyed by the removal of that control through betterment planning. The discussion of remedy must be based on a full understanding of what people lost and the nature of the damage that was inflicted through the dispossession.[1086]

The document then goes on to summarise BRC's understanding of land rights exercised before and lost through betterment, the effect of the exercising of those rights in the pre-betterment period, and the effect of the loss of land rights.[1087] In attempting to provide this detail, the organization would have benefited through drawing on the insight of Verdery and Humphrey, who note that value is "created in an entire agglomeration of political and social institutions. When these fall apart, that value is lost, even when the object remains materially unchanged".[1088] Dispossession of communal land rights in Cata destroyed the prevailing practices of local governance, social interaction, neighbourliness and family management. Because betterment undermined the political and social institutions that were a fundamental part of the communal tenure arrangements in Cata, it devalued the communal land resource. However, the BRC attempt reflected an organisation that was not clear about the fabricated and contested nature of the limits of restitution, not

[1084] Ibid, 1999
[1085] BRC, 'Re: Description of the nature and extent of land rights at Chatha, 28 May 1999', unpublished document accessed in BRC Resource Centre, 1999b, 1
[1086] Ibid, 1999b, 1
[1087] Ibid, 1999b, 1 – 4
[1088] Verdery & Humphrey, 2004, 19

cognizant of its own implication in the prevailing regime of truth, inadequately informed of critical theoretical insights about property, nor sufficiently close to community experience and testimony to articulate a detailed, personalized narrative about the full extent of the experience and consequences of betterment dispossession.

DLA empathized with BRC's pleadings for concessions, but did not yield any more ground.

> We acknowledge the terrible suffering caused by Betterment and by the many other aspects of apartheid. We acknowledge that people suffered the destruction of 'a way of life and a system of tenure'. But the Act only allows us a certain distance in formulating a remedy. Insofar as you are concerned about the other losses suffered by the people, for example quality of life, you should in our view pursue other, mainly developmental, avenues of redress, and not the Restitution process… We…acknowledge that people in the situation of the Chatha claimants, and many others, deserve a remedy which goes beyond restitution of land rights. But the Restitution Act is limited to land and land rights.[1089]

BRC consulted with Plasket, who advised that the community should accept DLA's understanding of the dispossession and the deal that would stem from it, because it was unlikely that the court would yield a better outcome. After a discussion with the community on 8 July and subsequent telephonic exchange, it was decided that BRC would send a reply to DLA that would accept the offer, but press for a supplementary award for hardship and damages caused by betterment. This was sent on 29 July.[1090] DLA responded on 3 September, welcoming the positive response of the community to the department's offer. But it noted that it was not possible to agree to the proposal of 10% for hardship, damages and effective loss without further information on the Cata case as well as policy development on the side of the department. To take the claim toward settlement, du Plessis suggested that BRC should make research proposals about how to gather the information that was required in order to calculate individual compensation amounts.[1091]

[1089] Du Plessis, J. (for the Department of Land Affairs), 'Description of the Nature and Extent of Land Rights at Chata, 17 June 1999', Unpublished document accessed in BRC Resource Centre, 1999a, 1, 2
[1090] BRC, 'Chatha Negotiation meeting - 8th July 1999', Unpublished document accessed in BRC Resource Centre, 1999c, 1
[1091] Du Plessis, J. (for the Department of Land Affairs), 'Description of the Nature and Extent of Land Rights at Chata, 3 September 1999', Unpublished document accessed in BRC Resource Centre, 1999b, 1, 2

On 29 September, BRC proposed that the individual compensation (for dispossessed arable and residential rights) should be calculated in average terms, based on de Wet's research.[1092] It suggested further that de Wet's work would assist with the compilation of a beneficiary list of individual claimants. BRC also made proposals about the valuation exercise, and offered to make arrangements for this exercise to commence.[1093] I pause here for a moment to reflect on BRC's embrace of the notion of average loss and its particular way of arriving at average figures in the case of Cata. The organization supported the method of determining compensation through averages because it believed this to be progressive. That is, it believed that those who were dispossessed of less (than the average) then, probably had less (than the average) now; and conversely, those who were dispossessed of more (than the average) then, probably had more (than the average) now. By paying out averaged-out compensation, BRC held, one would effect a measure of internal redistribution of the redress, in favour of the poor. BRC had chosen Cata because of the availability of de Wet's research, so it is understandable that the organization proposed (and used) this work to determine average losses. But it should be noted that the organization did have a choice in this regard; it could for example have conducted new research that may have brought the claimants into closer proximity to the dispossession suffered by themselves or by their direct descendants.

In thinking about the notion of the average and its deployment, it is instructive to draw on the conceptual insights of Baucom. According to him, the modern present in which we live – the age of finance capital - is set apart from those preceding it, by the central importance and pervasive influence of insurance culture. In this culture, value is "*always* autonomous from its object, *always* only a matter of agreement".[1094] Or, stated otherwise, the contemporary modern began at the moment that "the speculative epistemology" that underpins finance capital detached value "from the life of things" and rearticulated it "in the novelistic theatre of the typicalizing imagination".[1095] Just as insurance is at the heart of finance capital, so the concept of the average (the typical) is at the heart of insurance.[1096] Insurance culture dominates many aspects of modern society, including our notions of law

[1092] This was in line with community discussions in July (BRC, 1999c, 1).
[1093] Tyacke, T. (for the Border Rural Committee), 'Re: Chatha Land Claim – Proposal for Calculation of Compensation, 29 September 1999', Unpublished document accessed in BRC Resource Centre, 1999a, 1
[1094] Baucom, 2005, 95, 107
[1095] Ibid, 2005, 106
[1096] Ibid, 2005, 107. Interestingly, Baucom has argued that insurance is like an applied historicism for the market. Historicism is the capacity to "situate an individual work, object, or event within the determining historical circumstances of its age, to discover in the individual not what is exceptional *to* but what is typical

and justice. More specially, the legal system has been financialized, converted into "a scene of exchange", reinvented "as a mechanism designed not to dispense justice but money" (in relation to insured values).[1097]

In developing his arguments about justice further, Baucom draws on the work of Adam Smith. Smith argues that whereas law regulates "the dispensation of justice… it is sentiment that inspires a passion *for* justice".[1098] Sentiment is regarded as the antithesis of self-interest, as a commitment to social good. But not even sentiment is immune from the logic of finance capital; Smith held that propriety is "the internal economy of sentiment", "the capitalisation of sentiment", "justice's price mechanism".[1099] The way that propriety regulates sentimental justice is that it first determines the magnitude of the injustice in question and then fixes the magnitude of society's response to the injustice.[1100] But Smith's interest was in determining the nominal (rather than real) value of injustice and suffering, and his theory was thus "ultimately conducive to rather than critical of the general operations of capital and to the ever-greater epistemological expansion of capitalism's market of abstract and equivalent values".[1101] Placed in this light, restitution can be understood to be retrospective insurance for the holders of dispossessed land rights. BRC was thus operating within an epistemology that detached value from the life of things, and instead found it in fabricated averages. The extent to which BRC felt comfortable to operate within this regime is reflected in its decision to draw exclusively on de Wet's research to determine averages, rather than returning to the sites of dispossession and to the dispossessed themselves. Through this method, BRC asserted that an average household was dispossessed of 3.5 thatched houses with a diameter of 5 meters, 0.25 morgen (0.21 ha) of residential land, 1.9 morgen (1.63 ha) of arable land.[1102] In retrospect, BRC's propriety looks like one that was satisfied with minimal nominal value (which, it should be emphasised, is very different from maximum real value). BRC's

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of a given historical moment" (Ibid, 2005, 40). In other words, historicism is strongly informed by the speculative epistemology of finance capital.

[1097] Ibid, 2005, 135

[1098] Ibid, 2005, 245

[1099] Ibid, 2005, 245

[1100] Ibid, 2005, 245

[1101] Ibid, 2005, 245

[1102] Department of Land Affairs (DLA), 'Memorandum: Chatha Land Claim, Keiskammahoek, Eastern Cape: Request for Ratification of Negotiations Framework and Mandate to Negotiate a Settlement of the Claim', Unpublished government memorandum accessed in BRC Resource Centre, 2000, Section 2.4

approach, like that of Smith, complied with the general workings of capital and its promotion of abstract values.

In early October BRC and DLA agreed telephonically that BRC would make proposals on the monetary value of the dispossessed rights. In order to do this, the organisation contracted an agricultural economist, Jock Danckwerts, to undertake the necessary work.[1103] Apart from commissioning Danckwerts to calculate the monetary value of the dispossessed agricultural and residential land, BRC also asked him to calculate the value of the loss of production resulting from the dispossession of arable land. (It should also be noted that BRC's instruction to Danckwerts was to maximise the monetary value of the claim without jeopardising his professional integrity.)[1104] Furthermore, the organisation also set about placing a monetary value on the replacement value of dispossessed residential structures. By the beginning of December, all the initial valuation work had been completed, allowing BRC to summarise the findings as follows:

- Loss of arable land R 4 075
- Loss of residential land R 5 880
- Loss of production (maize) R 7 820
- Loss of dwellings R15 466.[1105]

DLA raised various technical queries regarding the valuation methodologies and figures, which were resolved – in favour of the Cata claimants – without much difficulty. Of the three aspects of the dispossession covered in the eventual agreement (ie arable land, residential land and dwellings), one of the figures (namely that for arable land) is identical to that cited above, and the other two figures (namely for residential land and dwellings) are higher than the initial BRC valuations.

The two parties were unable to reach agreement about compensating the claimants for loss of production. In late November, du Plessis stated that these losses could not be included "in any settlement, without a firm instruction from the court".[1106] The matter of loss of production does not feature again in correspondence between BRC and DLA. It seems that BRC decided that the gains made in the negotiation process balanced out the set-backs suffered. Although there had been no dispute about residential land rights since the

[1103] BRC appointed Danckwerts on the advice of Plasket
[1104] I personally gave him this instruction during a meeting in Grahamstown in October 1999.
[1105] Tyacke, T. (for the Border Rural Committee), 'Chatha Claim – MVOC – Authority Used, 1 December 1999', Unpublished document accessed in BRC Resource Centre, 1999b, 2
[1106] Du Plessis, J. 'Re: Fwd: Chatha Betterment Claim, 23 November 1999' (e-mail message), Unpublished document accessed in BRC Resource Centre, 1999c

initial DLA position in May, dispossessed dwellings and their value had not been formally placed on the negotiating table before November/ December 1999. DLA agreed that they should be included, without argument. This gain took BRC by surprise, to the extent that it did not consider the issue of the loss of production worth pursuing any further.[1107]

It is notable that the Cata case received a fillip in the final quarter of the year with two key people in the department, namely the Director-General Geoff Budlender and the newly appointed Eastern Cape Claims Commissioner Tozie Gwanya, both lending their support to the claim.[1108] This was a significant development because up until that time Jean du Plessis had been solely responsible for negotiating the settlement on behalf of the department, and it is unclear how much support he enjoyed either in Pretoria or in East London, before Budlender and Gwanya entered the fray. This raises the point that the negotiating process was not a case of 'goodies versus baddies'. BRC was not uniformly good, government was not uniformly bad. Rather, there were contestations on both sides, within BRC and within government on key issues; and there were both more and less constructive individuals on each side.

After the technical valuation issues had been resolved, the parties set about preparing a formal 'Mandate to Negotiate' (hereafter referred to as the mandate) and then monitoring and nurturing its passage through the department and ministry. This document was necessary to give the outcome of the negotiations formal departmental and ministerial support, and to mandate designated officials to deal with all outstanding negotiation issues, within a prescribed framework. The mandate summarized the negotiated outcome as follows:

> While the claim was made on the basis of relief aimed at community development, in negotiations… all parties have agreed that the rights held were primarily of an individual/ family nature. The rights to arable fields and residential sites were fundamentally individual rights and it is on this basis that they were strong, enforceable rights… Before betterment, people had rights to residential sites and arable land that dated back to 1853 and were passed on from one generation to the next. These were individual or family based rights to exclusive use areas which

[1107] Personal recollection
[1108] Gwanya, T. 'Memo: Chatha Betterment Land Claim: MVOC Proposal, 19 November 1999' (e-mail message), Unpublished document accessed in BRC Resource Centre, 1999; Budlender, G. 'Chatha Betterment Claim 23 November 1999' (e-mail message), Unpublished document accessed in BRC Resource Centre, 1999

were equivalent to at least perpetual usufruct rights or 'beneficial occupation' as referred to in the Restitution of Land Rights Act.[1109]

In approving the broad framework that had been agreed upon in the informal negotiations, the mandate specified that:

> The calculation of the value of the claims… ie R31 697.50 per duly verified family, is approved, on condition that 50% of this amount be paid as financial compensation, and 50% be utilized in terms of a development plan to be jointly formulated between the claimants and the State;
>
> The State agrees to the restoration to the claimant community of any control over and usage of communal land lost as a result of Betterment, via existing and future tenure upgrade programmes of the Department of Land Affairs.[1110]

The Mandate was signed by the Minister in April 2000. I clearly remember my own elation on hearing the news that the Minister had signed, and my anticipation of the response that the BRC team would receive from the Cata people when conveying the news to them. Because of my office-bound position at BRC I did not attend many community meetings, but I was determined to be at the meeting that would inform the Cata community of the signing. I accompanied Matikinca to the village on 14 May. My expectations of the news being greeted with ululations were not met; the community received the news in a mild-mannered way, with ambiguity. Whilst the people were happy that a deal had been reached and that verified families would be compensated for betterment losses, certain community members expressed disappointment and displeasure that as much as half of the compensation would be set aside for development. BRC's minutes of the meeting record that there was a question from the floor about "whether it is constitutional for the DLA to take a unilateral decision by enforcing 50% of the financial compensation to be used for the development of Chata".[1111] Over time, community displeasure about this decision has waxed and waned.[1112] However, the key point here is that, in the intensity of the negotiation process, BRC failed to implement even its reduced commitment to community involvement, namely obtaining proper mandates before entering into

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[1109] Department of Land Affairs (DLA), 2000, Section 2.3
[1110] Ibid, 2000, Section 7.2
[1111] BRC, 'Chata general meeting – 14/05/00', Unpublished document accessed in BRC Resource Centre, 2000
[1112] Some of the community leaders that voiced concern in the May meeting, for example Nkosalizwe Gcilitshana, changed their attitude and became prominent backers of the development process in the village. A minority of village residents, under the leadership of former headman Makhosi Jama, remain resentful, in late 2008, that their compensation has been used to fund development processes, and have therefore opposed these processes.

agreements with government. It is clear that the primary interest of BRC in the first quarter of 2000 was different from that of the community. BRC's priority was a policy victory (an acknowledgement by the state that betterment dispossession fulfilled the criteria of the Restitution of Land Rights Act); the communities' interest lay in maximizing the financial compensation that would be directly paid out to verified families. Because Minister Didiza indicated (through Chief Commission Gwanya) that she would not settle the claim unless a minimum of 50% would be set aside for development, BRC did not resist this stipulation.

The Cata Settlement Agreement was prepared and finalized in line with the Mandate to Negotiate. It was signed by all parties on 7 October 2000. The financial compensation was paid out to the 334 verified claimant households just before Christmas 2000. Interestingly, from the moment that the money was paid out, the financial compensation was termed 'Teresa' by the recipients, and the community at large.[1113] It is significant that the people associated the money with an individual white outsider, rather than with the dispossession that they suffered in the 1960s, with the post-1994 restitution process, with government or even with BRC. The money was perceived to have come mysteriously or miraculously, rather than logically, from the respondent. This is a further indication that the process that resolved the claim was essentially technical rather than participatory, that it was located more in East London than in Cata. It was a missed opportunity to undergo both a wide-ranging popular education effort covering issues such as apartheid, betterment, land tenure and democracy, as well as a popular, subaltern process of memory, imagination and knowledge production, aimed at establishing new sources for a counter-archive on betterment.

This criticism should be qualified with recognition that BRC did, to some extent, find the lost news of the news of the loss; it did assemble an archive counter to that of the apartheid project, and it did imagine some of the suppressed phantasms. Before October 2000, betterment was not regarded as having been central to the apartheid project and had not entailed the dispossession of land rights; individual families had not been forcibly removed from their properties. The Cata truths overcame these assertions of the apartheid archive. Not only did Cata restitution process find lost truths; these truths had outcomes that were of clear, direct benefit to its people and those beyond it. More specifically, the effects of the truth of the Settlement Agreement included the flow of money and resources

[1113] When the compensation was paid out in another nine Keiskammahoek villages in 2002, it was also called Teresa there, even though Ms Tyacke had resigned from the employ of BRC in 2001.

into the Cata community. Academic history all too readily ignores and seldom unlocks such effects of truth, those that benefit the oppressed and the marginalised. Yet this value – material and political relevance – is fundamental to the mission of addressing the formative injustices of the ongoing past, those that define the essence of our present.

It is necessary to distinguish between aspects and dimensions of the lost news that BRC managed to recover, and those that it attempted but failed to recover. (There are without doubt dimensions that BRC did not attempt to recover, and which remain unknown, deep in the darkness.) The two most important truths established through the Cata settlement agreement are that betterment dispossession (generally speaking) satisfies the criteria of the Restitution of Land Rights Act and should therefore be compensated through legislation, and that families in communal localities were (specifically) dispossessed of valuable individual rights through the implementation of betterment. The recovery of this previously-lost news of the news of loss is a clear instance of the production of truth on the side of resistance.

BRC set out to but failed to establish truths about communal and production losses. Above I have outlined BRC's desperate but ultimately superficial and unsuccessful attempts to convince government to compensate the people of Cata for the dispossession of their communal tenure rights and way of life. I will not repeat this here, but I should qualify my critique of the effectiveness of BRC's work in this regard with the acknowledgement that government did recognise that the implementation of betterment involved the dispossession of the commonage, and hence it agreed to transfer ownership of this land to a communal legal entity. It is notable in this regard however that, more than eight years after the signing of the settlement agreement, the state has not yet transferred ownership of the commonage to the Cata Communal Property Association (CPA). (The CPA was established in 2004 for this very purpose.) An underlying reason for government inaction on this front is probably that, as discussed in chapter 4, the overall thrust of post-1994 tenure reform policy has been to consolidate the powers of the Minister and traditional authorities, rather than to devolve control to local communities. Whilst government did agree in 2000 to transfer ownership of the commons back to the Cata people, BRC failed to open a meaningful dialogue on redress for the consequences of state destruction of the prevailing communal tenure regime.

There are at least two categories of reason for BRC's inability to put substantial or compelling arguments on the table in relation to the dispossession of a communal way of life. The first set of reasons revolves around BRC's orientation toward academic knowledge, away from local knowledge. This accounts for BRC's relative distance from the constituency, the claimants, and their lived history and experience, and it meant that the organization did not have a clear understanding about the make-up of the communal, and hence what the people had been dispossessed of. Without doubt, this weakness was exacerbated by the fact that the two BRC people who were directly responsible for formulating the advocacy positions were English-speaking, middle-class whites.[1114] Secondly, and more fundamentally, BRC operated inside, rather than outside, the prevailing new South African regime of truth. And it positioned itself in a pragmatic, fairly neutral manner in relation to the regime. Not surprisingly therefore, BRC did not adopt a critical stance in relation to some of its basic notions, or native concepts, such as property, individualisation, commodification, development, rights, democracy, culture, and tradition. It complied, easily, with the basic workings of the regime. This said, it would be foolhardy to assume that if BRC had formulated compelling truth-claims about the destruction of communal life, then government would have confirmed and recognised these. Decision-making power was vested in government, and government acted, naturally, in the interests of domination, whereas BRC positioned itself on the side of resistance. Government certainly had no interest in combating the prevailing truth regime; on the contrary, it acted to consolidate and shore it up.

In the discussion in chapter 2 about the relationship between property discourse and restitution, I drew on arguments by the likes of Blomley and Povinelli to assert that restitution is framed by government authorities to fit with the narrow strictures of liberal capitalism. Put another way, those claims that comply with the structure and shape, norms and standards of hegemonic notions of property are accommodated; those that are unfamiliar or unusual are not (or, if they are, they tend to be minimised). Specifically, the strictures of capitalism support private claims, and undermine communal claims. The total amount of restitution compensation in Cata was derived through summing the valuations of a variety of dispossessed private or individual rights. I have also already explained how the promotion of the private/ denigration of the communal in South Africa has underpinned the grand narrative of restitution; the essentialisation of the Bantustans as customary, indigenous, traditional, communal, and their consequent dismissal as valueless is one of

[1114] Ashley Westaway and Teresa Tyacke

the basic assertions of this narrative. Unsurprisingly therefore, government had no interest in understanding that betterment caused destruction of communal life in Cata, let alone in considering appropriate redress in this regard.

A key aspect of the insurance culture that prevails in this age of finance capital is that value has been detached from the life of things, and found instead in fabricated averages. In this age, loss can only be discerned and validated, and hence given a value, if the object of loss can be abstracted and typified. If the object of loss is particular and unique, then the loss is ignored or ejected. In the of Cata case, it was precisely those elements of the claim easily abstracted and averaged, that were settled. It was straightforward to imagine an average Cata household having been dispossessed of 3.5 thatched houses with a diameter of 5 meters each, 0.21 ha of residential land and 1.63 ha of arable land. Conversely, the parties could not reach agreement on those aspects of the claim that were particular and unfamiliar. In the case of Cata, it was precisely the communal aspects of the claim that were unique and unknown. Following Spivak (the singular), Glissant (the exceptional), Derrida (the irreducible) and Adorno (the wound), Baucom develops a particular understanding of the unexchangable.[1115] This is premised on a rejection of the powerful classical Hegelian concept of justice as exchange.[1116] He articulates the unexchangable as

> that thing which melancholy refuses to surrender or exchange, that thing which melancholy values because it is utterly non-fungible, without substitute, the very form of incommensurable form, and, hence, for Hegel, that which is without value and without the domain of justice and, for Spivak, that which is invaluable, exceptional, the priceless fundament of justice.[1117]

It may be tempting to think of the communal in Cata as an object that has refused to disclose its value to justice, refused to surrender itself to the “market of substitutive recompense” that underpins modern justice.[1118] If this were the case, perhaps we could join Baucom in celebrating that the Cata people did not surrender or cede the value of their communal loss to the market, that damage – in this instance – was not “absolutized”.[1119] But this would be an uninformed conclusion; if BRC had been more oriented to community knowledge, then it is conceivable that the organisation could have abstracted and typified

[1115] Baucom, 2005, 73
[1116] Ibid, 2005, 62
[1117] Ibid, 2005, 74
[1118] Ibid, 2005, 64
[1119] Ibid, 2005, 65

additional aspects of the communal dispossession (additional, that is, to the aspect of the dispossession of the commonage, as a land parcel). Whether or not government would have responded favourably to such truth-claims is another matter. For now though, it is clear that these aspects of communal dispossession remain part of the lost news of the news of loss.

BRC's attempt to engage government on compensation for productive losses resulting from the dispossession of arable land was short-lived, but it did meet the two criteria outlined above, that communal dispossession failed to meet. More specifically, BRC's assertions both related to private losses and they were abstracted, typified and averaged. Moreover, the losses were quantified in a conservative manner, meaning that the cost of compensation would have been negligible. Nevertheless, government resisted BRC's overtures. Because BRC was apparently surprised by government's concession of compensation for the value of residential structures, at exactly the same time that it formally placed compensation for productive losses on the table, it immediately withdrew it from the table. Internally, BRC justified the withdrawal of this demand on the grounds that the Cata case was a test case about betterment, not about so-called consequential losses.[1120]

The question remains: why was government adamant, in late 1999, that it would not pay compensation for productive losses without an instruction from the court? Was it merely because restitution policy ruled out compensation for consequential losses, that is, losses that resulted from the underlying dispossession? Possibly, but it is useful to reinsert bifurcation into the argument here. A fundamental assertion of the anti-apartheid and post-anti-apartheid narratives is that the Bantustans were (and still are) economic deserts. Not a single flower bloomed then or blooms now. Therefore, the concept of compensating for productive losses in a Bantustan was anathema to government. Had the departmental negotiators consented to compensate for the production forgone in the long years following dispossession, they would not only have subjected government to an increased restitution bill, they would also have challenged the prevailing post-1994 development discourse.

[1120] I formulated and therefore supported this argument.

Both BRC and government operated from the inside, from within the regime of truth. They brought different perspectives to the negotiation table, and they represented different interests, but their underlying assumptions were probably very similar. Although BRC stood on the side of resistance and the government stood on the side of domination, there was considerable common ground between the parties because they were products and subjects of the same regime of truth. Consequently, they reached a settlement fairly easily. All the while, the people of Cata were at a distance, in the margins – as they had been during the pre-1994 era.

Reinforcing the Cata approach through policy and replication

When he approved the recommendations of the Cata Mandate to Negotiate on 19 February 2000, the Acting Director-General Glen Thomas, made the following qualifying written comments: "While in principle I agree with the recommendations made, I still strongly feel that the Commission should start…a process of developing policy on 'betterment claims which will guide the department in settling such claims".[1121] Minister Didiza endorsed Thomas' remarks, which resulted in BRC giving the broader policy issue priority and urgent attention, in order to avert delaying the final settlement of the Cata case. The organisation decided to play a proactive role in this process; after consultations with the regional commissioner in late April, it prepared a document called 'A Contribution to the Policy Process'.[1122] In this document BRC attempted to secure the precedent value of the Cata.[1123] The key point in this regard is that BRC regarded the Cata case as an important, resounding victory, and it therefore sought to abstract and generalize the settlement agreement, in its entirety, for policy purposes. The way that it did this was through setting out the case in some detail, bolstering certain assumptions and assertions underpinning it through supplementary academic argument, and then abstracting key approaches and understandings into policy positions. This is another instance then, of the usage of academic notions of truth production and effects of truth, to produce truth in a

[1121] DLA, 2000, 7
[1122] BRC, 'Six-monthly Report: January to June 2000', Unpublished document accessed in BRC Resource Centre, 2000a, 37
[1123] BRC similarly drew on the Mgwali case to inform policy for betterment dispossession in quitrent areas. Just as BRC had selected Cata as its test case relating to betterment dispossession in communal areas, it later, after 1998, decided to select Mgwali as the case to test betterment dispossession in quitrent areas. This decision was taken in the wake of the breakdown of the tenure test case process. It was possible because the Mgwali quitrenters had earlier lodged a restitution claim. BRC proposals for settling Mgwali were in line with the recommendations formulated during the tenure test case process, as described above. Although the Mgwali case had not proceeded far by mid-2000, BRC and the RLCC (in particular Gwanya) had reached common understandings about the fundamentals of the case. (It should be noted however, that relations between BRC and the Mgwali quitrenters broke down shortly thereafter, and by late 2008 their case had not yet been resolved.)

nonacademic context. The main assertion that seemed to BRC at the time to require academic underpinning was that rights to residential and arable land in communal areas were vested in individual households during the pre-betterment period. Two types of academic work were used, namely social science (especially the research of Catherine Cross) and legal case work (of Heinz Klug).[1124] BRC relied heavily on the latter, more specifically Klug's work on the nineteenth century case *Hermansberg Mission Society v Commissioner of Native Affairs and Darius Mogale*. It is unnecessary to explore all the details of the case or of Klug's arguments in this regard. However some of the conclusions that he draws were very significant for the policy ambitions of BRC. Most importantly, he argues that strong individual rights were foundational in pre-colonial communal systems and that their destruction therefore lay at the heart of the colonial mission. In this light, betterment can be seen as a key strategy of subjugation used by the apartheid regime. To quote from Klug:

> The creation of a segregated system of land holding in which African rights were confined to areas designated for African occupation could be justified only if the indigenous system differed from the British, so that reserves were, in terms of property law, to be reserves of the rightless, legally dependent on chiefs and communalism, despite documented patterns of individual use. A recognition that these observed patterns of individual use inside reserves were akin to ownership – even if individuals could not alienate – would have created the possibility of conceiving of such rights having existed outside the reserves or even have suggested that such rights might be established in areas designated for European colonial settlement… Having constructed a vision for African land tenure under 'customary law' in which the most important rights…were vested exclusively in the political authority embodied in the chief, it was a short step to the assertion that the loss of sovereign powers to the colonial authority made African land rights subject to administrative authority. This collapse of property rights into the realm of the chiefly authority had equally debilitating consequences for the political rights of Africans… [T]he preservation of native lands and traditional authorities

[1124] Cross, C. 'An Alternate Legality: the Property Rights Question in relation to South African Land Reform', South African Journal on Human Rights, Vol 8 No 3, 305 – 331; Klug, H. 'Defining the Property Rights of Others: Political power, indigenous tenure and the construction of customary land law', Unpublished paper accessed in BRC Resource Centre, 1995

> became the justification for the exclusion of Africans from broader political participation.[1125]

Klug concludes his paper by arguing that an understanding of how customary tenure was manipulated by colonial intervention paves the way for "a greater recognition of the land rights of individuals and families under indigenous law".[1126] BRC asserts in its policy document that the manner in which restitution was applied in the Cata case, reflects exactly such recognition.[1127]

This position tallies with recent work undertaken by Cousins, who has attempted to discern principles that have informed South African tenure systems over the past century and a half or so. One of the principles that he detects is "land and resource rights include… strong individual and family rights to residential and arable land".[1128] Just as the policy process confirmed this strength of the Cata deal, it also mirrored its weakness in relation to the dispossession of group rights. BRC's contribution to the policy process, which had a major impact on the final outcome, was explicit in recognizing the bifurcated character of the Cata deal. Specifically, it acknowledges that the negotiating parties had agreed that the "restitution process deals primarily with measurable loss of land rights, not the destruction of tenure systems… and the consequences of this destruction".[1129] There is a certain resignation to this statement. And it denies the essentially communal nature of the rights that people were dispossessed of in the process of betterment villagization. The majority of Cousins' durable principles that inform South Africa's tenure regimes, revolve more around the group than the individual. He articulates these as follows:

> Land and resource rights are directly embedded in a range of social relationships and units, including households and kinship networks; the relevant social identities are often multiple, overlapping and therefore 'nested' or layered in nature…
> Rights are derived primarily from accepted membership of a social unit…
> Land and resource rights include… access to a range of common property resources such as grazing, forests and water.[1130]

[1125] Klug, 1995, 20, 21, 33 – 35. There are clear similarities between Klug's conclusion and the arguments of Ashforth presented in Chapter 4.
[1126] Ibid, 1995, 35
[1127] BRC, 'Betterment Removals and Restitution: A contribution towards the envisaged policy process, June 2000', Unpublished document accessed in BRC Resource Centre, 2000b, 9
[1128] Cousins, B. 'More than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy', in Journal of Agrarian Change, Vol 7 No 3, July 2007, 293
[1129] BRC, 2000b, 15
[1130] Cousins, 2007, 293

On 16 July 2000, the RLCC in the Eastern Cape convened a restitution indaba to attempt to reach consensus about betterment and restitution. BRC presented its paper to the meeting, and it was favourably received.[1131] Consensus was easily achieved. After the indaba, BRC was contracted by the Eastern Cape Regional Land Commission to amend and then convert its 'contribution' document into a policy paper for government. This was done, and the document was formally ratified by the Commission for the Restitution of Land Rights (at national level) in November 2000. Subsequent public comments made by the Minister confirmed that the paper had been adopted by government as its new policy to deal with betterment claims that had been lodged before the end of 1998. Unsurprisingly, the revised policy document did not make any advances in relation to restituting the communal. So, whereas BRC had managed to use the restitution process to reinsert the individual into the communal, it had been unable to use the process to contribute to a restoration of the integrity of the communal, or better put, a progressive reconfiguration of the communal.

Ironically though, the manner in which compensation is dealt with in both the Cata agreement and the policy document does recognize the communal context. The decision in the Cata agreement and the recommendation in the policy document to set aside considerable resources for community development reflected a clear, deliberate assertion of the significance of the communal. The policy document reads as follows: "In communal areas, it is appropriate for the compensation to balance individual and group interests. Although individual rights were strong, they were exercised within the context of the group. Thus it would not be reflective of the land rights [that were] dispossessed if the full extent of the compensation was paid to individual families. The group should benefit in some way".[1132] A further twist of irony is that over the past few years, resistance against the decision to set resources aside for development has come from the former headmen in the Keiskammahoek area. That is, it has come from the so-called custodians of the communal.

Once it was clear that the Cata claim would be settled (in mid-2000), BRC's emphasis shifted to the other communal betterment claims that it had lodged from seven villages in Keiskammahoek. The reason for this is that the organization sought to make the Cata precedent (or put another way, revised government policy on betterment dispossession)

[1131] I presented the paper and fielded questions that arose.
[1132] BRC, 2000b, 20. This section was repeated in the policy memorandum ultimately approved.

irreversible through applying it on a reasonably large scale.[1133] It is not necessary to explore the minutiae of the historical production process in these cases. There are only two aspects that require some attention here, namely research method and community engagement. In the case of Cata, BRC drew exclusively on the academic research of de Wet. This luxury was not available in the other Keiskammahoek villages because there was no existing research material. Therefore, BRC was required to undertake new research. There are two key points to make about the process that BRC designed. First, the organization did not seek to go beyond the Cata framework. That is, it set up the process to quantify losses pertaining to private residential and arable lands; nothing more, and nothing less. Second, it designed a research method that sought to meet the academic standard of triangulation. The three sources that the organization drew from were official records (betterment plans), popular memory (elicited through questionnaires) and physical evidence (measuring the sizes of ruined houses and abandoned gardens and fields). The different sources yielded different findings.[1134] In order to mediate these differences and generally to interpret the research findings, BRC requested the Provincial Land Claims Commissioner (Tozi Gwanya) to make definitive rulings for purposes of the compensation package. He approached this task progressively; he opted to go with the highest figures in all instances and his interpretations also bolstered the quantifications of dispossessed rights.[1135]

Popular discontent in Cata in 2001/2 about key elements of the agreement (especially the 50/50 compensation split and the beneficiary list) conscientised BRC about the risks associated with limited consultation.[1136] Consequently, the organization was determined to improve community consultation in the Keiskammahoek cases. Specifically, BRC formalized the negotiation process; amongst other things, it arranged face-to-face exchanges between representatives of the claimants and the state. Also, it ensured that community resolutions that needed to be taken were done formally and procedurally. Despite increased community participation, the end result of the negotiations was the same as terms of the Cata settlement; that is, 50% of the value of the monetary value of the dispossessed rights was paid to verified claimants and the other 50% was set aside for community development.

[1133] At that time, a successful outcome to the policy process described above was not a foregone conclusion.
[1134] BRC, 'Six-monthly Report: January to June 2001', Unpublished document in BRC Resource Centre, 2001, 10, 11
[1135] For example, 'a step is a meter'.
[1136] BRC, 'Six-monthly Report: January to June 2002', Unpublished document in BRC Resource Centre, 2002, 12

The Keiskammahoek claims were settled on 16 June 2002. The approved valuation amounts were as follows:

- Loss of arable land R 839
- Loss of residential land R 21 938
- Loss of dwellings R 32 787

This gave a total valuation figure of R55 564 per household, well above the Cata figure of R31 697. (On top of this, government added the restitution discretionary and planning grants, as was the case in the Cata settlement.) BRC attempted to strengthen the institutional, technical and consultative processes underpinning the Keiskammahoek claims, and this is reflected in the terms of the agreement signed in 2002. However, even though the compensation paid was considerably higher than Cata, the structure and framework of the agreement were a carbon copy of the Cata agreement.

Relating to the loss in the post-2002 period

I now consider the Cata settlement agreement in retrospect, from inside and outside perspectives. First I describe how the people of Cata have related to the dispossession in the aftermath of the restitution settlement. In thinking about the post-settlement phase of restitution, du Toit has invoked Zizek's concept of the 'loss of the loss'. In Zizek's conception, this Hegelian notion refers to the "the experience of how we never had what we have lost".[1137] In a restitution context du Toit uses this term to describe claimants' realization that "we never had what we thought we lost". Therefore, for him the "terrible truth of Restitution has thus far been that the moment of return to the land is often a moment of disappointment and anti-climax".[1138] He goes on to argue that when claimants are wrenched from their notions of their past in this manner, they come face-to-face with present difficulties.[1139] Although du Toit invokes Zizek's notion to explain phenomenon in cases of restoration (as opposed to cases settled through compensation and development), it is an interesting concept to deploy in these cases as well. The reason for this is that the notion can be read, in conjunction with Baucom's critique of justice as exchange as well as the work of Verdery and Humphrey, to identify restitution as the

[1137] Zizek, S. For they know not what they do: Enjoyment as a political factor, Verso: London, 1991, 168
[1138] Du Toit, 1999, 13
[1139] Ibid, 1999, 14

moment when the connection between the dispossessed and the dispossession is severed.

In the case of Cata, I do not think that the people have experienced the post-settlement phase as a loss of their loss, as an overdue confrontation with a difficult present. The reason for this is that it seems that few Cata people have had strong ties to what they had previously had and what they had been dispossessed of, for a long time. When BRC undertook research toward making a DVD documentary in mid-2006, I was initially surprised by the testimony of Nompumelelo Tete. She had never, not once, brought her children to visit the erstwhile family homestead, the place where she was born, despite the fact that it is a mere one kilometre's walk from her current place of employment (the Cata clinic in Skafu). But I should not have been; many people from Cata are disassociated from the pre-betterment period and the losses they suffered. Perhaps an important reason for this is that it is just too painful for the people to think about betterment dispossession. Imagine, for a moment, if you had to look across a valley, every day of your life, at the ruins and remnants of the home, garden and fields that were once yours. Understand also, that white society and power had no regard for the possessions, values, experiences, systems of the people of Cata. These people have been devalued and dehumanised for the last century at least.

The main way in which the people of Cata have related to the agreement and to the losses that underpin it, revolves primarily around the monetary value ascribed to the dispossessed rights. Above I noted the discrepancy between the values ascribed to the Cata and Keiskammahoek rights. Understandably, the disjuncture between compensation per household in the Cata settlement and compensation per household in the settlement of all other communal claims in the Keiskammahoek district rankled in the minds of the Cata leadership and broad community. On the very occasion of the signing of the Keiskammahoek agreement, there was a group of Cata residents (mainly people in leadership positions) present there to register objection to the disjuncture. This necessitated that Commissioner Gwanya address them publicly at the conclusion of the formal ceremony, arguing that the Cata claim was settled on the basis of scientific studies, that its terms were conclusive and that the case would not be re-considered.[1140]

[1140] I was present in Keiskammahoek on 16 June 2002.

This set of assertions did not satisfy or convince the Cata leadership. Consequently it called BRC to a strategy meeting in August 2002. In this meeting BRC explained that the disjuncture between the two compensation figures did not derive from differences in valuation methodology.[1141] The Keiskammahoek valuator drew heavily from the methodology utilised in the Cata claim. The values (per hectare/ square metre) were identical in relation to residential land and dwellings, and in the case of the arable land, the Cata value was in fact higher. BRC argued that the difference derived from the research findings. It elaborated the Cata research drew directly and exclusively from de Wet's work whereas new triangulated research had been undertaken in the other cases. The Cata leadership responded by arguing that it was fundamentally unfair that the community that opened the way for all others should be disadvantaged. It also maintained that it was common knowledge in the district that the Cata land holdings had been the same size as or in fact larger than those in other communal areas of Keiskammahoek. Here, a further set of historical narratives and evidentiary paradigms was opened up, this time from the side of 'lived experience' and the community. Both parties agreed that the Keiskammahoek settlement shed new light on and provided new evidence that was directly relevant to the Cata case. The parties resolved to engage Gwanya further on the issue.

This meeting was held on 27 September 2002. The commissioner indicated that he would not be prepared to take the case any further without compelling evidence showing that the research data used as the basis of the claim was flawed.[1142] Thereafter BRC carried out research to check the accuracy of the de Wet work. This research was undertaken by using two pieces of information located in the Keiskammahoek Rural Survey Volumes, namely a map of Cata drawn in c1950 (showing areas used for residential, arable and grazing uses) and a photograph taken in c 1950 from the south western corner of Cata (showing numerous rondavels). The map was used to derive alternative figures for the extent of dispossession of residential and arable lands, and the photograph was used to calculate the size of dispossessed dwellings. In its documentation, BRC emphasized that the alternative research was based on evidence deriving not from the 1980s, but the 1950s. Using the Danckwerts valuation methodologies, this research suggests that the following compensation should have been applied in the Cata case:

- Loss of arable land R 5 975

[1141] BRC, 2002, 23
[1142] BRC, 2002, 24

- Loss of residential land R 14 218
- Loss of dwellings R 31 959

This amounts to a total of R52 152, which is close to the Keiskammahoek total.[1143] Effectively, BRC had mobilized a notion of documentary primary truth (based on from-the-time evidence) as against De Wet's more ethnographic study. The document – and perhaps as importantly – the 1950s map and the photograph – became strategically essential as representations of archival and real truth. That they were also visual documents added to their influence as bearers of primary truth. It was these documentary, visual effects of truth that were both recognized and used by BRC as necessary and appropriate evidence for attempting to reconstitute the settlement agreement.

The use of this evidence as primary and accurate relates to two interconnected processes. On the one hand, the official betterment archive does not, itself, contain the necessary facts in terms of quantifiable land rights and dispossession, because the apartheid state did not fashion the history of betterment in those terms. In a quite literal sense, these residences of the magistrate (the betterment archives) command the criteria of evidence, proof, testimony and witnessing to construct moral narrations that deny betterment as dispossession.[1144] On the other hand, counter sources (on betterment as dispossession) need to be constructed from the gaps and grains of evidence. Measuring, proving, and providing the necessary evidence of dispossession, is explicitly subject to the particular purpose for which this historical knowledge is focused. And in the case of restitution, the desired effect of truth is constituted through a sympathetic re-reading of the evidence of dispossession in terms of maximizing its possibilities in the gaps and grains of the racialised archive.[1145] Reading the archive from the site of restitution means privileging these moments and these documents as factual truths, even if, as histories they are constructed accuracies. Daston argues that facts are

> protean creatures, amalgamated of several different layers, like an archaeological site… Neutrality and contamination are matters of degree… Instead of asking whether facts are constructed, historical epistemology may prompt us to ask why

[1143] BRC, 'Research into the extent of dispossession at Chatha, December 2002', Unpublished document accessed in BRC Resource Centre, 2002a
[1144] I discussed processes of silencing and voicing in the production of sources and assembly of archives at length in chapter 1.
[1145] Foucault, 1980, 118 (Foucault says "that the problem does not consist in drawing the line between that in a discourse which falls under the category of scientificity or truth, and that which comes under some other category, but in seeing historically how effects of truth are produced… and the work that these effects of truth perform").

> we regard construction as a cardinal sin, incompatible with truth and intellectual honesty.[1146]

BRC located the necessary archival facts, read them as neutral, and then re-constituted them as enlisted evidence on the basis of the narrative needed for restitution. Its presentation of these facts as objective is strategic. BRC knew this, and in knowing this also recognized that there is no real singular truth lying somewhere deep in the archive, in other documents or in the academy.

The research was completed in late 2002, and presented to Gwanya in early 2003. Follow-up discussions were held with the Commissioner in February/ March and May. However, it was clear from these discussions that Gwanya was reluctant to re-open the claim. Two questions that worried him were:

- If a claim is not concluded through a settlement agreement, when is it settled?
- What would the implications be on the larger restitution programme (and the target deadline) if the Cata case were re-opened?[1147]

Further discussions were planned, but in June Gwanya was appointed as Chief Land Claims Commissioner to replace Wallace Mgoqi, who had resigned earlier in the year.

By late 2003 BRC was no longer prepared to push for a reconsideration of the terms of the Cata agreement because it was concerned that this would compromise negotiations with government pertaining to the Vulamasango Singene campaign (see Chapter 6). BRC urged for patience from the Cata leadership in this regard. In 2005, the leadership again brought the issue to BRC's attention. BRC resisted, still citing the campaign. This is another clear instance where the interests of BRC were different from those of the Cata community. Further, by 2005, BRC had started formulating an additional argument against wanting to renegotiate the terms of the settlement agreement. It held that the clearest and most constructive way to 'make up the difference' is to broker additional resources; by 2007, this strategy had already more than doubled the initial amount of money available for development.[1148] With further outstanding offers of support still pending from the Regional Land Claims Commission and Amatole District Municipality, BRC communicated that it was no longer prepared to mount and resource a formal challenge to the terms of the agreement. It is not clear how the community of Cata will relate to 'the difference' in the

[1146] Daston L, 'Marvelous Facts and Miraculous Evidence', in Chandler J, Davidson A and Harootunian H (eds), Questions of Evidence, University of Chicago Press: Chicago, 1991, 245,6
[1147] These discussions were held between Westaway and Gwanya.
[1148] Border Rural Committee, The Cata Story, BRC: East London, 2007, 11

years to come. However, the key point for my purposes here is that the people have connected to the agreement more through the financial resources that it has unlocked than through any fundamental re-connection with their experiences of dispossession. Persistent feelings of grievance derive from 'the difference', not the dispossession.

In closing this section, I briefly reflect on the manner in which the Cata dispossession and settlement agreement have been memorialised. A Cata development plan adopted by the community and the Amatole District Municipality in 2003 (as the key mechanism to give effect to the developmental compensation), identified heritage tourism as a key economic sector.[1149] The rationale for this was that Cata, being the first betterment case to be settled under the restitution programme, set a precedent for other cases to follow and had a significant impact on policy. The planners hoped to commodify the socio-political importance of Cata in this regard. Over the past few years, service providers have established a community museum with both an indoor and outdoor component (the latter is referred to as the heritage trail). The processes of conceptualising the museum and designing its exhibits were similar to those of framing the restitution claim and negotiating its resolution: they were driven by outsiders (BRC and Jos Thorne), with very little input from community members. Amongst other things, the indoor component of the museum comprises four large information panels, dealing with the pre-betterment past, a spatial contrast between pre- and post-betterment Cata, the narrative of the Settlement Agreement (restitution context, negotiations, signing), and the key consequences of the agreement.[1150] The trail was conceptualised as a personalised (outdoor) extension of the museum. Whereas the indoor section attempts to provide a conceptual, generally-true overview, the trail aims to offer personal truths, visible realities. It does this through highlighting the profiling and exploring the pre-betterment homesteads of two households, and through using a toposcope to present Cata as a landscape of dispossession. When initially discussing and conceptualising the museum, technical expert Jos Thorne reminded me that formal heritage processes are as much about remembering as they are about forgetting, that is those aspects of the subject event or phenomenon not showcased in a museum, are pushed even further into the recesses of memory, the depths of darkness, than they were before the onset of formal memorialisation. The most coherent representation of the communal is presented in the toposcope, in relation to socio-political

[1149] Amatole District Municipality, 'Chatha Integrated Development Project – Phase 1C: Development Plan', Unpublished document in BRC resource centre, 2003, 78

[1150] It also contains a model of a typical pre-betterment homestead, artifacts, paintings of pre-betterment life, and various documents pertaining to the case and implications of its settlement.

organisation of the community prior to the removal, according to village sections. There are also some lesser panderings to the communal in the museum. Since the opening of the museum in 2006 BRC has failed to encourage broader community usage of the facility (for educational, memory, or other purposes). At this stage, its appeal is limited to a handful of tourists who visit Cata.

Conclusion

Foucault was interested in producing historical truths that had strategic or political effect.[1151] A Foucauldian approach suggests then that the most useful yardstick in measuring the extent to which historical work has impacted constructively or demonstrably on the battlefield (of power relations) is the measurement of the effectiveness of the truth claims produced. In this case, the yardstick translates into two key questions: 'to what extent does the historical truth produced reflect the 1960s dispossession?' and 'to what extent does the truth reverse apartheid-effects in Cata?' I have sought to answer the first question by pointing to the bifurcated nature of the settlement agreement signed in 2000 – individual dispossession acknowledged; communal dispossession and loss of production denied. Significantly, the lines of this bifurcation closely resemble those that traverse this new South Africa. The second question will only be answered definitely in the decades to come, once it is clear what long-term impact the development process that originated in the settlement agreement has had. At the point of writing, significant gains had been made in increasing employment and income levels in the village, but question-marks remain over the sustainability of the unfolding development process.[1152] And, based on recent experience in Keiskammahoek, there are even greater question-marks over the replicability of the Cata model at significant geographic scale.[1153]

If the Cata and Keiskammahoek restitution claims had not been settled in a manner that I regarded at the time (in 2002/3) to be favourable, I would not have decided, as I did, to embark on this academic exercise. Not surprisingly, the initial pieces of work on the subject that I wrote/ co-wrote tended to celebrate the achievements.[1154] But more recently, I have found myself walking down a more self-critical path. In this journey, I have

[1151] Foucault, 1980, 64
[1152] Local employment increased from 4% in 2001 to 26% in 2007, and household incomes doubled over this period, across the board (BRC, 2007, 22, 23).
[1153] By the end of 2008, there were no signs that a meaningful development process was imminent.
[1154] Especially Westaway A and Minkley G, 'Rural Restitution: The Production of Historical Truth Outside the Academy', Working Paper 45, Fort Hare Institute of Social and Economic Research, Fort Hare University: East London, August 2003

taken courage from Foucault's wisdom about the value of introducing discontinuity into one's being. It is not fun to criticise historical processes that one has been directly involved in, or worse still, directed and managed. It is even less enjoyable to trace some of the problematic elements of these processes to one's self, as an individual. As much as the Cata truth has produced various effects in the village and beyond, this reflection on the pursuit of that truth has had effects on my person. At the end of writing this chapter, I feel like I've been cut.

Chapter 6 – Telling the truth about post-1994 prejudice: the evolution of the Vulamasango Singene Campaign (VSC)

Introduction

The Cata Settlement Agreement and the policy revision that arose from it established the truth of betterment as dispossession, but they did not address the issue of the policy prejudice in the White paper. By the end of 2000, government accepted that betterment entailed dispossession, but it refused those who had been dispossessed by betterment to gain entry to the restitution programme (that they had been locked out of the pre-1998 period). That is, BRC's historical truth claim about the pre-1994 period was accepted, but not its claim about the period 1994 – 1998. In an attempt to advance this assertion, BRC has, since 2002, driven an advocacy process known as the Vulamasango Singene (Open the doors so that we can come in) Campaign, hereafter referred to as VSC. The principal aim of the chapter is to assess the extent to which BRC has made progress in its contemporary historical claim that government acted prejudicially towards victims of betterment dispossession during the Mandela Presidency. This assessment will be made on the basis of a chronological description of the manner in which VSC has evolved over the past six years, supplemented by an analysis of some key issues pertaining to social movements, civil society and knowledge production. In order to broaden some of the perspectives, the chapter includes a comparative analysis between VSC and other social movements that have emerged in South Africa after 1994.

Background

Before laying out a brief chronology of VSC, it is useful to provide background and contextual information, both about BRC, and the relationship between the Cata process (as described in the previous chapter) and VSC. Many salient points about BRC have been made in earlier chapters. For example, it has been noted that BRC's political culture was closely associated with the Congress movement from the late 1980s onwards, into the contemporary period. The last chapter traced how BRC lost touch with much of its rural constituency in the mid-1990s and that its orientation thereafter (at least until 2002) was towards technical rather than locally-produced forms of knowledge. These points are recalled here because together they enable one to develop an understanding of the character of BRC. In summary, BRC circa 2002 was a moderate NGO, which had tenuous community links and placed a high value both on technical knowledge and the development programmes of the post-1994 government. This characterization is confirmed

by the positions taken by BRC in 1999/2000 about the rule of law and advocacy strategy. In the context of debates within the NLC, BRC argued that the constitutional framework was enabling and should therefore be respected (this ruled out land invasions as a legitimate tactic) and that advocacy was best pursued within the framework of the law.[1155] When BRC set about conceptualising an advocacy campaign to promote the historical assertion of government prejudice in the post-1994 period, it did not start this process from scratch, on a clean slate. On the contrary, it fashioned VSC out of its organisational culture, experience and character. VSC was a process borne from within the prevailing regime of truth.

The historical truth that BRC sought to produce and establish in relation to the Cata case was that betterment was an integral part of the apartheid project and that it had entailed the dispossession of land rights (and should therefore be redressed through the Restitution of Land rights Act). Its expectation through much of 1998 was that this truth would be established through a legal process that would be concluded before year-end, thus overturning the policy assertions in DLA's White Paper before the deadline for the lodgement of restitution claims. Thus BRC was in fact seeking to establish an additional historical truth, pertaining to the post-1994 period, namely that DLA's policy position was prejudicial against victims of betterment dispossession. There are two issues that should be emphasized in relation to the quality and value of this latter historical truth that BRC sought to establish through the Cata case. First, its effectiveness (the scope of its impact) was integrally related to the timing of its production. Simply put, if the Cata truth had been established before the end of 1998, it would have been directly and immediately useful to all communities dispossessed through betterment. Second, BRC held the idea that the decision of the court would have precedent value, meaning that it would produce a kind of truth more powerful than that produced through negotiations.

The case was not heard (never mind concluded) before the end of 1998, and by early 1999 it had been taken out of the legal process and placed on the negotiation table. However, even after BRC acceded to government's request to negotiate the Cata claim out of court, it incorrectly believed that the anticipated agreement would have intrinsic precedent value. In April 1999 BRC publicly affirmed its intention to maximise the precedent value of any future Cata agreement. In this context, Westaway was quoted at

[1155] BRC, 'BRC position on land invasions – 30 July 2001', unpublished document accessed in BRC Resource Centre, 2001a

the time by a Daily Dispatch journalist as saying: "We believe that all cases where communal land rights were lost due to betterment should fall within the restitution process".[1156] The increased emphasis in the negotiation process on technical matters pertaining specifically to the Cata case and BRC's growing anxiety to achieve a favourable settlement agreement, meant that it paid negligible attention to the betterment challenge for the twelve months following April 1999. In early April 2000, BRC received word that the Minister of Land Affairs had approved a framework within which designated officials were authorised to finalise the negotiation process, subject to the condition that policy be formulated to ensure coherence and consistency of future decisions.[1157] The fact that the Minister tied the settling of the Cata case to the formulation of policy increased the pressure on BRC. Consequently, BRC took the decision that the issue of unlodged betterment claims would have to be shelved, temporarily. By this stage, it had developed a view that a precondition for solving this issue was to effect and then cement official recognition that betterment dispossession satisfied the criteria of the Restitution of Land Rights Act.[1158] In other words, it decided to prioritise the settling of the Cata and Keiskammahoek claims, and the related policy process, in the short term.

For purposes of this chapter, the most important moment of the policy process came in October 2000 (the month of the signing of the Cata agreement). BRC was contacted by the Department of Land Affairs, which sought assurance that the organization accepted that the proposed policy would pertain only to lodged claims.[1159] BRC consented. This meant that BRC compromised its assertions about post-1994 prejudice in order to secure the truth of betterment as dispossession.

In 2001, BRC focused attention on using the Cata settlement and revised policy framework to settle the Keiskammahoek claims. The organization had not changed its views about post-1994 prejudice or abandoned its mission to address this, but it held that the Cata truth would only be secure once it had been effected throughout Keiskammahoek.[1160] As outlined in Chapter 5, by early 2002 it was clear that the Keiskammahoek betterment claims would be favourably settled. It was then that BRC turned its attention to the

[1156] 'Government, community in bid to settle', Daily Dispatch, 21 April 1999, 2. I refer to myself in this and other instances in the thesis as Westaway (as opposed to I) in a bid to create distance between me as academic (I) and as NGO manager (Westaway).
[1157] Department of Land Affairs (DLA), 2000, 7
[1158] BRC, 2000a, 14
[1159] Personal communication with Ria de Vos, then employed in the Restitution Policy Unit of the Department of Land Affairs
[1160] BRC, 'Annual Plan 2001', Unpublished document accessed in BRC Resource Centre, 2001b, 17

challenge of formulating a strategy on how to make compelling truth claims about post-1994 discrimination.

Vulamasango Singene Campaign (VSC) Chronology

The first avenue that BRC investigated was legal action; the organization had initially thought that it had a strong case. After all, the 1997 White Paper of the Department of Land Affairs had indicated that betterment claims would not be dealt with through the restitution programme, but rather through other land reform programmes. Government subsequently acknowledged that this was prejudicial, and in 2000 replaced it with policy that acknowledged that betterment dispossession satisfied the legal restitution criteria. This seemed to amount to tacit acknowledgment of official prejudicial exclusion of betterment claimants. However, consultation with legal experts Clive Plasket and Geoff Budlender quashed the apparent usefulness and implications of this argument. They both argued that there was negligible prospect of success through the courts because the prejudice that existed had stemmed from policy, not from law.[1161] They insisted that the Restitution of Land Rights Act did not discriminate against people dispossessed by betterment; these people had not been prohibited from lodging claims and there was nothing in the Act that diminished the prospects of such claims being favourably settled. The legal counsel suggested that the problem should be tackled politically rather than legally.

BRC took this advice and shelved its ambitions to take government to court; instead it began contemplating the challenge of convincing government through political advocacy. At that stage – April/May 2002 – it did not consider a campaign revolving around mobilization; its thinking and planning were limited to technical lobbying. Towards this end, it decided to commence the lobbying drive through taking a public stand on the matter. There were two specific matters that the organization gave consideration to, namely, building a civil society alliance to advance the cause and the timing of the initial intervention. As far as the former was concerned, BRC convinced the Eastern Cape Provincial Council of Churches (ECPCC) to join the lobbying drive.[1162] With regard to the latter, BRC decided that the intervention would commence on exactly the date of the signing of the Keiskammahoek Agreement. This decision was taken in order to obtain

[1161] Westaway had direct communication with both at the time.
[1162] A year later, in May 2003, the Eastern Cape NGO Coalition (ECNGOC) joined the campaign (BRC, 'Six-Monthly Report: January to June 2003', Unpublished report located in BRC archive, 2003, 14).

maximum media coverage without jeopardizing the signing of the agreement.[1163] On 16 June 2002 BRC and the ECPCC issued a public call on government to re-open the lodgement process for people dispossessed through betterment, on the grounds that they had been prejudiced during the pre-1999 period.[1164] The Director-General of the Department of Land Affairs responded to the June 2002 call for selective re-opening by challenging the NGOs to produce hard facts about the effects of the prejudice.[1165] BRC decided to respond to the challenge laid down by Mayende by opting to conduct sample research. More specifically, it contracted the Fort Hare Institute of Socio-Economic Research (FHISER) to assess the effects of betterment in the Middledrift area of the former Ciskei.[1166]

The research found that twenty-four locations in the Middledrift district had been subjected to betterment dispossession.[1167] Of the approximately sixty five villages situated in these locations, none had lodged a restitution claim for betterment dispossession. The research was completed by late 2002. At that point, BRC refined its advocacy strategy.[1168] Whilst it was confident about the findings of the research, it was mindful that its geographic scope was narrow. In an attempt to make it difficult for government to dismiss the research on these grounds, it decided to disseminate the research findings in the affected Middledrift villages and to organise these communities with a view to taking the advocacy process forward collaboratively with the affected Middledrift communities. It decided not to share the research with government before this community engagement had been undertaken. Community meetings were held between mid-March and early May 2003. In an attempt to hold these sessions in a systematic manner, the organisation cobbled together a standard set of agenda items and some basic methodology. Two of the items were the election of committees to take responsibility for the campaign at local level, and the signing of declaration forms by affected households.[1169] The intended purpose of the forms was twofold: to deepen awareness and education at the household level of affected

[1163] The press release was embargoed until the signing of the agreement (Eastern Cape Provincial Council of Churches ECPCC et al, 2002).
[1164] ECPCC et al, 2002
[1165] Tozi Gwanya responded as follows: Government will be worried about the financial implications, but it could happen. If there is consistency and fairness, then these people need to be considered because they had losses just as the people at Keiskammahoek did" (Quoted in BRC, 2002, 15).
[1166] BRC, 'Six-monthly Report: July to December 2002', Unpublished document accessed in BRC Resource Centre, 2002b, 12
[1167] Minkley G, 'Middledrift betterment land restitution project', Unpublished paper located in BRC archive, 2002
[1168] BRC, 2002b, 14, 15
[1169] BRC, 2003, 11

communities, and to petition the Minister. All communities covered through the March to May meetings both elected committees and agreed to administer the declaration forms.[1170] By August 2003 about 4000 signed forms had been submitted to and filed by BRC. Throughout this period, BRC convened regular leadership meetings for all committees to discuss various issues. One of the issues tabled in these community meetings was to moot an appropriate campaign slogan. On the basis of input gathered and assessed by BRC, it chose the term 'Vulamasango Singene' (Open the door so that we can come in') as the campaign slogan, and a door key as the concomitant campaign symbol. By the end of the third quarter of 2003 BRC felt that it had completed all necessary mobilisation groundwork in Middledrift.[1171] In the final quarter, BRC consolidated this work by procuring and distributing about 4000 campaign T-shirts.[1172]

Once the initial community work in Middledrift had been completed, BRC turned its attention to resuming its engagement with the Department of Land Affairs. More specifically, it sought to revive its discussion with its Director-General, Gilingwe Mayende. In order to direct this process, BRC produced briefing documentation, which was forwarded to the Office of the Director-General.[1173] During preliminary discussions with the Director-General in early September, he had committed himself to convening a meeting by October. This did not materialise and the leadership of Middledrift (with the backing of BRC) consequently resolved to embark on mass action in November. BRC informed Thoko Didiza, the Minister of Land Affairs, about this prospect through written correspondence; she responded by availing herself for a meeting on 11 November in Cape Town.[1174] The meeting took place as scheduled. The civil society delegation (which comprised Rev Ntshingwa from ECPCC, three BRC employees and two delegates from Middledrift) was impressed with Didiza's empathy, and probably a little overawed by the occasion.[1175] The civil society delegates had gone to the meeting expecting a fight, so they were surprised that Didiza readily concurred with BRC's historical assertion that those dispossessed through betterment in the Eastern Cape had been prejudiced during the lodgement phase of the restitution programme.[1176]

[1170] Ibid, 2003, 11
[1171] For an outline of these activities, see BRC, 'Six-monthly Report: July to December 2003', Unpublished document accessed in BRC Resource Centre, 2003a, 10
[1172] Committees were tasked to distribute T-shirts to households that had signed declaration forms.
[1173] BRC, 'DLA Presentation #2 – 4 August 2003', unpublished document in BRC computer archive, 2003b
[1174] BRC, 2003a, 12
[1175] Personal recollection of the meeting. Ntshingwa was chairperson of BRC's Board of Directors from the late 1990s to the early 2000s.
[1176] For an excerpt from BRC's notes of the meeting, see BRC, 2003a, 13, 14

A position expressed by the Minister was that there was no available evidence of prejudice in provinces other than the Eastern Cape, and that most of the land surface of areas in these provinces that had been dispossessed by betterment was under claim, in any case. In this regard, it is important to note that BRC had discovered an important piece of evidence by early 2003 that indicated that the Eastern Cape Commissioner had acted on the prejudice in the White Paper.[1177] In a meeting for civil society organisations in the province in October 1996 Commissioner Mayende had said the following: "the Restitution Act cannot be used in dealing with cases in the Bantustans. The Act addresses itself to laws that were designed to put people in the Bantustans, and not about when they were there".[1178] BRC decided in the November meeting that it would go along with the Minister.[1179] This had significant implications for the truth claims that BRC would garner and promote. Instead of asserting that the national government had prejudiced all those dispossessed via betterment (because of a prejudicial policy framework), BRC would henceforth emphasise the direct prejudice in the Eastern Cape because of the opinions and instructions of the Regional Land Claims Commission in general and its principal Commissioner Mayende in particular, and remain silent about the broader national quandary. [1180]

In order to work out the details of a betterment redress programme, the Minister set up a task team with the mandate to prepare a memorandum that she could table in cabinet before the December recess. In the wake of the meeting with Didiza the Middledrift

[1177] The first time that BRC used this evidence was in a May 2003 document that it prepared for DLA. BRC, 'DLA Presentation #1 – May 2003', Unpublished document accessed in BRC computer archive, 2003c, 4
[1178] Commission on the Restitution of Land Rights, 'Minutes of the Regional Land Claims Commission (EC/FS): Meeting with regional Land NGOs (22 October 1996)', Unpublished document accessed in BRC Resource Centre, 4
[1179] BRC had made an attempt in 2003 to broaden the campaign to other parts of the country, especially the northern provinces. In June its 'Programme Manager' Zanele Semane had visited three NLC affiliates based in the North-West, Mpumulanga and Limpopo Provinces. Having presented the basics of the campaign to them, Semane said that BRC did not have research information in the incidence of betterment dispossession in Bantustans such as Venda, Lebowa, Boputhatswana and Gazankulu, neither did it know whether affected communities in those areas had lodged claims (BRC, 2003, 14). The affiliates were then asked to get back to BRC if they wanted to involve themselves in the campaign. None of them came back to BRC thereafter. BRC compromised in the November meeting because it was not confident that it would retain ministerial support, could sustain a compelling argument for all Bantustans, or could count on the support of other affiliates in a future advocacy process.
[1180] Of course, the fact that Mayende had by then, moved on into the position of Director General (DG) of the Department of Land Affairs, complicated matters considerably. For example, the long delay before the approval of the departmental memorandum outlined below, seems to have been caused primarily because of indecision/ ambivalence in the office of the DG. To some extent, Mayende was being required to sign a memorandum that directly implicated himself in a mistake that was both potentially costly and embarrassing for government. No doubt, the memorandum weakened his standing and credibility in the mind of the

leadership resolved to postpone the mass action, and it set 31 January 2004 as the deadline for a successful outcome to the negotiation process (again on the advice and with the backing of BRC).[1181] The Chief Land Claims Commissioner convened two meetings of the task team, shortly after the meeting with the Minister, on 22 and 28 November. Various challenges arose during these discussions, one of which was to quantify the monetary value of land rights dispossessed. BRC took up this challenge, with the assistance of FHISER. After a superficial number crunching exercise (utilising the Keiskammahoek information together with secondary research on the implementation of betterment in the Ciskei and Transkei), BRC estimated that the value of dispossessed land rights was R12,8bn. The task team discussions proceeded relatively smoothly from a BRC perspective, because government did not resist its arguments or conclusions.[1182]

BRC managed to reflect its central demands in two memoranda prepared by the task team (namely a departmental and a cabinet memorandum). The key recommendations of the departmental memorandum read as follows:

- that betterment claimants in the Eastern Cape Province be permitted to lodge special restitution claims over a six-month period that will commence as early as possible and feasible in 2004,
- that such claims be dealt with through an administrative process using Section 6(2)(b) of the Restitution of Land Rights Act,
- that the processing of these claims be exempt from the Presidential deadline of 2005; instead that they be regarded as special claims that will be settled in alignment with other government programmes such as the ISRDP,
- that the Minister of Land Affairs should be supported in procuring additional funds from Treasury and foreign donors to settle betterment claims in the Eastern Cape.[1183]

Minister. Shortly after the memorandum had been signed, Mayende resigned his position; and was replaced by Glen Thomas.

[1181] BRC, 2003a, 10; BRC, 'Six-Monthly Report: January to June 2004', Unpublished document accessed in BRC archive, 2004a, 7

[1182] In retrospect and with the benefit of some hindsight, it is interesting to reflect on why government seemed to capitulate so easily in the early task team exchanges. There are several possible explanations, each plausible. Perhaps government did not take the negotiation process seriously, and expected it to dissipate over time. Perhaps it fed into the personal ambitions of Glen Thomas, who was then vying for the position of Director-General. (The incumbent Gilingwe Mayende was arguably personally responsible for the pre-1998 prejudice in the Eastern Cape. His 'mistake' was about to cost government over R12bn. In late 2004 Mayende left DLA, and in early 2005 Glen Thomas was appointed in his place.)

[1183] Commission for the Restitution of Land Rights (CRLR), 2004, 10

For the first twelve months of the advocacy process, BRC had not given attention to winning party political support. Perhaps this was an indication that the organisation did not initially appreciate the ambitious nature of the campaign demands. After mid-2003 BRC turned to the Alliance partners for help. BRC's positive orientation towards the ANC-led Alliance is explicitly articulated as the politics of VSC, in an information pack produced in November 2004.[1184] The narrative developed in this chapter will not spell out all BRC's engagements with Alliance structures that have taken place from mid-2003. Instead, a categorised overview, woven into the narrative, will suffice. As far as the ANC (specifically) is concerned, BRC has lobbied structures at provincial, regional and sub-regional levels. (To clarify the terminology here, the provincial level refers to the Eastern Cape, ANC regions coincide with municipal districts, for example Amatole, Chris Hani, and so on, and ANC sub-regions emulate local municipal areas such as Nkonkobe in Amatole District, Insika Yethu in Chris Hani District, and so on.) BRC's initial lobbying efforts were focused at provincial level, more specifically on the ANC Study Group on Land, chaired by Phila Nkayi.[1185] This was a structure comprising ANC members of the provincial legislature (MPLs) who were deployed in the Provincial Standing Committee on Land and Agriculture. Nkayi also chaired the standing committee. The fact that BRC targeted the provincial structure associated with legislative processes reflected the fact that it then still held that the solution to the problem lay in legislative reform. BRC's engagement of the Study Group culminated in a December letter from the then Speaker of the Provincial Legislature, Matomela, to the Minister of Land Affairs, in which he expressed his support for the Vulamasango Singene campaign. This outcome reflects the intimate relationship between the ANC as political party and the ANC as government, during the Mbeki era. BRC's engagements and lobbying interventions, both at this time and beyond, were similarly fluid, criss-crossing from party to government, and back again.

December 2003 and January 2004 passed without any communication from Minister Didiza to the campaign partners. Consequently, the leadership of Middledrift planned to

[1184] The pack was developed in four parts. The parts presented an introduction, an outline, background and contacts, respectively (BRC, 'Vulamasango Singene (Let us in) – Campaign Information Pack: November 2004', Unpublished document accessed in BRC Resource Centre, 2004b).
[1185] BRC, 2003a, 12. It is noteworthy that Nkayi had served on BRC's Board in the mid-1990s. The engagement between BRC and the ANC Study group had some interesting, unplanned outcomes. For example, on the request of the Nkayi, BRC addressed a National Assembly public hearing on restitution on 26 August. The campaign was well received by the parliamentarians; in 2004 they asked a written question to the Minister about how she was dealing with the underlying problem highlighted by the campaign. In answering, government acknowledged that "People dispossessed through betterment were prejudiced during the lodgement phase of the restitution programme, because of government policy at the time they did

launch public action with a rally outside Debe Nek on 12 February.[1186] In an effort to secure the continued support of the Nkonkobe Municipality for the campaign in general and more specifically for the rally, BRC invited its mayor to welcome people at the event. On 29 January BRC briefed the ward councillors about the progress that it had made as well as planned upcoming events. Having obtained written permission on 21 January from the municipality's Manager of Community Services to use the Debe Nek Stadium on 12 February, BRC submitted official notice of the rally to the Municipal Manager, on 29 January, in terms of the Regulations of Public Gathering Act. However, from early the following week it was apparent that the municipality was not favourably disposed towards the rally. On 2 February, the mayor faxed BRC as follows: "I regret to inform you that I will not be able to attend your rally. In fact, until today I was not aware of the fact that such a rally was being organised". [1187]

One of the objectives that BRC had set for the rally was to maximise media coverage. Toward this end, BRC prepared press packs, which were released on 2 February. Two newspapers, the national ThisDay and the provincial Daily Dispatch, gave the story prominent coverage.[1188] In the process of developing their news pieces, journalists from these newspapers communicated directly with the offices of the Minister and the Chief Land Claims Commissioner. These offices made negative remarks about BRC, labelling it as "mischievous" for having taken the issue to the media. On 5 February, BRC was informed by a journalist at a national newspaper that government was not favourably disposed towards the campaign organisers.[1189] Within an hour of hearing this information, BRC received a fax from Municipal Manager Mdila at Nkonkobe Municipality.[1190] In the fax he asserted that he was the only person authorised to give permission to people to utilise municipal property and stated that he had not given BRC permission to use the stadium on 12 February. BRC responded on 6 February, asking Mdila for the required permission. He

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not have a fair opportunity to lodge their claims" (National Assembly, 'National Assembly Written Reply, Internal Question Paper No: 17 – 2004', Unpublished document accessed in BRC Resource Centre, 2004).

[1186] The overall short-term strategy of the campaign partners was that there would be three expressions of mass action in the pre-election period. The first planned action was the rally, which aimed to consolidate the Middledrift base in a non confrontational manner. Thereafter, it was anticipated that the same base (together with any other campaign supporters from the former Ciskei) would march in East London and submit their demands to the RLCC. Finally, it was hoped that there could be an event of provincial proportions. On what basis BRC thought that it would be able to execute such an ambitious programme is unclear. The plans reveal the organisation's then lack of experience in mass action (just as its hopes to have had the Cata claim settled in court before the end of 1998 reflected its then lack of experience in restitution).

[1187] Nkonkobe Municipality, 'Middledrift Rally', unpublished letter located in BRC archive, 2004

[1188] For example, Hofstatter, S. 'Hope for millions denied land claims, ThisDay, 6 February, 2004, 1; Stewart, G. 'Thoko Didiza's box (editorial)', Daily Dispatch, 13 February 2004, 14

[1189] Personal communication (name withheld to protect her/ his professional credibility)

[1190] Personal recollection

chose to ignore to the request, forcing BRC to cancel the rally.[1191] From 7 – 11 February, the Nkonkobe municipality and the Regional Land Claims Commission engaged in several communications with people in Middledrift and arranged a series of meetings at village level. Based on verbal reports received by BRC at the time, the organisation came to the conclusion that these initiatives were planned to undermine the campaign.

In early February, BRC communicated with what it regarded as "friends within the ANC", to gather intelligence about the stance of the party towards the campaign.[1192] The message that came back to BRC was that VSC had no significant support within the organisation. Surface-level reasons why ANC support for the campaign disintegrated so completely in early 2004, seem to have been a mishmash of contradictory political suspicions, for example that the campaign was linked to the Democratic Alliance (DA), that it was a populist attempt to pressurise the ANC into taking positions in the run-up to the general election scheduled for April, that it was a smokescreen for a broader call for the re-opening of claims lodgement, and so on.[1193] The underlying reason was that the ANC in 2004 was controlled by the same set of interests that had been at its helm for most of the twentieth century, namely the interests of black urban capital. It would have been unexpected and out of character had the ANC demonstrated support for the campaign in early 2004.[1194]

On 28 April 2004 (the day after the inauguration of Mbeki for a second term as President and the swearing in of his new cabinet) Gwanya informed BRC that Didiza had approved the departmental memorandum that had been drafted by the task team in December. There is some evidence that BRC did think that this approval signified an irreversible advance.[1195] But the organisation developed a parallel belief that enhanced community mobilisation would be necessary in order to actually achieve the prize. The first expression of this assertion appears in the Strategic Plan for 2005 – 2009, which was written in April 2004. After reflecting on the fact that despite considerable progress in the campaign, the cabinet had not yet effected a re-opening, the document says:

[1191] BRC, 'Press Release: Rally in Middeldrift in Eastern Cape cancelled because of obstruction by Nkonkobe Municipality', Unpublished document located in BRC archive, 2004c

[1192] BRC, 2004a, 9

[1193] The fact that parliamentary interest in the issue stemmed from a Democratic Alliance (DA) Member of Parliament (MP), Eddie Trent, with connections in the Keiskammahoek area, fed into the unfounded and baseless suspicion that his party was involved in the campaign.

[1194] The Middledrift rally was ultimately held in November 2004. By that stage, BRC had managed to calm the ANC's nerves about the campaign.

[1195] BRC reported in July that the campaign had reached the milestone of a "successful conclusion of negotiation processes within the Department and Ministry of Land Affairs" (BRC, 2004a, 10). It anticipated that the negotiation process would move forward inexorably, from the department and ministry, into cabinet.

> It seems that there is one over-riding precondition that must be met in order to achieve the required breakthrough. That is, a critical mass of affected people must understand their respective histories of betterment dispossession as well as the manner in which they were prejudiced during the claim lodgement period from 1995 to 1998. This can only be achieved through a systematic and broadly-based programme of information dissemination and institution building. The key question is: how many people, or how many communities, need to be reached in order to constitute the 'critical mass' that is needed? We do not know the answer to this question. We know that 4000 people, or 40 communities, is not enough, but we do not know how many people would be sufficient.[1196]

This quotation raises the issues of both the quality of community engagement as well as the quantitative dimension. Up until the middle of 2004, BRC practised a methodology based on research, followed up by BRC-implemented community work. Limitations of this approach included that BRC could not move ahead of the relatively slow research process, and that its tempo was further limited by BRC's staff capacity. The strategic plan committed BRC to cover the Ciskei through its established research-led process, and to effect mobilisation in the Transkei through networking.[1197] No further details on the latter were provided in the plan because this thinking was undeveloped at the time. Over the next few months, it seems that BRC began thinking more seriously about the challenge of broadening the community base of the campaign. By early 2005, it was sufficiently concerned to regard the absence of community organisation in the former Transkei as "the Achilles Heel" of the campaign.[1198]

In the second half of 2004, BRC undertook networking activities specifically aimed at encouraging partner organisations to integrate the campaign into their operational work. In late August BRC addressed ECNGOC's Provincial Council about the campaign and "called for a greater involvement" of its affiliates in "the mobilisation challenge".[1199] In response to this, the Coalition office in East London organised a workshop for its members on the campaign in December. Twelve member organisations attended the meeting.[1200]

[1196] BRC, 2004, 38
[1197] Ibid, 2004, 38
[1198] BRC, 'Report of the Directors (Part of the 2004 Audited financial statements)', Unpublished document located in BRC Resource Centre, 2004d, 4
[1199] BRC, 'Six-Monthly Report: July to December 2004', Unpublished document located in BRC Resource Centre, 2004e, 12
[1200] BRC, 2004e, 12, 13

BRC offered the organisations both human and resource support to plan and implement campaign activities. However, this was contingent on the organisations' contacting BRC to request a follow-up session. The other main target of BRC's networking was the SACP. BRC addressed two regional congresses of the SACP in the second half of 2004. The two regions were Chris Hani and OR Tambo, which cover large parts of the Transkei. As a follow-up to these meetings, it was agreed that BRC would workshop specifically deployed members of the SACP to take forward the campaign in their respective areas.[1201] This envisaged collaboration with ECNGOC members and SACP regions was deemed by BRC at the time to "hold the key to mobilisation in the former Transkei".[1202]

BRC's interactions with the SACP on the campaign have disappointed it. Throughout the period from mid-2003 to 2008, BRC received a warm response and consistent solidarity from the Eastern Cape leadership of the SACP. Nevertheless, these indications of support did not translate into effective support, either at the level of lobbying nationally, or organising communities at district or local level. Two reasons for this are weak provincial leadership, and ineffectual institutional structures and processes in the Eastern Cape. Needless to say, BRC's relationship with the SACP did not yield any outcomes in relation to the mobilisation challenge in the Transkei.

During the same period, BRC continued to focus its lobbying efforts at the provincial level of the ANC; the only adjustment that BRC made was to target the Provincial Executive Committee (PEC) instead of the Study Group associated with the Parliamentary Standing Committee on Land and Agriculture.[1203] More specially, BRC lobbied influential members of the committee that it believed would both regard the campaign as important and support its central demand. The member who took the issue up most effectively was Mcebisi Jonas, who directed it onto the agenda of the Sub-committee of Economic Transformation. After BRC presented VSC to the sub-committee on 19 August, the issue was included in a discussion document (entitled 'Land Reform and the role of the ANC') that it prepared for the consideration of the PEC. The document recommended that ANC structures should support VSC.[1204] BRC was informally told that the PEC agreed with the recommendation in late 2004, but this indication was not verified. Tellingly, when BRC presented the campaign to Premier Balindlela and MEC Mamase on 9 November, neither displayed an

[1201] Ibid, 2004e, 7, 8
[1202] Ibid, 2004e, 13
[1203] Ibid, 2004e, 7
[1204] Ibid, 'Six-Monthly Report: January to June 2005', Unpublished report accessed in BRC archive, 2005, 7

understanding of, nor an interest in the campaign. There are numerous possible explanations for this contradiction. For example, it is possible that the campaign had become associated with the Stofile faction of the ANC (with which Jonas was associated), that the issue had not been clearly presented to or properly endorsed by the PEC, or that the Premier and MEC did not have regard for the PEC position (in the event that the PEC had agreed to support the campaign).

In January 2005, the Herschel Legal Advice Office (HLAO), one of the organisations that had attended the ECNGOC meeting in December, indicated to BRC that it would like to integrate campaign activities into its programmes and requested BRC to assist it to achieve this objective. This request necessitated that BRC give renewed consideration to campaign methodology. Through the experiences in Middledrift, BRC had developed certain tools and approaches. More specifically, it had developed a standardised agenda for the first meeting in any community, it had designed the declaration form and it had concluded that there were advantages to co-ordinating campaign activities from district level (through the election of a district committee) as soon as elected committees were in place in all villages. The agenda for initial engagement meetings included the dissemination of key campaign-related information and the facilitation of the election of a village committee. Although BRC had developed, conceptualised and used these tools and approaches, it had not paid attention to formalising them into a methodology that could be used by other organisations, in different parts of the province. In considering the Herschel challenge, BRC decided that it was necessary to gear up to manage a large-scale community mobilisation process and that a clear methodology needed to be a key component of management in this regard. It elaborated the methodology in a ‘step-by-step’ guide.[1205]

Based on its experience, BRC divided the mobilisation work into three phases: initial engagement, district engagement, and post-mass action. In January and February BRC drafted a step-by-step guide for phase 1, and in June/ July prepared a guide for phase 2. In the process, it tried to formalise approaches for activities that had been undertaken in an informal way in Middledrift, for example building the capacity of the village committees and facilitating the signing of declaration forms. The first phase was conceptualised to begin with the first trip to a village and to end with the election of a village representative to

[1205] Ibid, 2005, 13

serve on a district committee. In the absence of prior research, the methodology required facilitators to look for signs of betterment dispossession (ruins, aloe lines, concentrated villages, et al). The methodology also encouraged old people in the meeting to share their experiences of dispossession, as a way of confirming that betterment had been implemented locally. The second phase was defined to begin with the establishment of the district committee and to end with an evaluation of district-wide mass action. BRC conceptualised a 'speak-out' process as part of phase 2.[1206] The process included the following steps: identification of old people who had lived through the dispossession, written preparation of their respective testimonies according to a specified set of issues, identification of youth institutions and advertising of the speak-out session (targeting these institutions), convening the speak-out session, assessing the participants and completing all required reports. BRC then intended to collect and process completed forms, in order to identify the most highly rated participants. The purpose of this was to arrange a district speak-out. The stand-out participants in this process would be utilised in radio work to be carried out as part of the build-up to mass action, and during the action itself. In order to assist the village committees to manage and facilitate the speak-out processes locally, BRC prepared a standard set of forms (ie preparation sheets, speak-out agendas, assessment forms, reporting forms). A third phase was deemed to be necessary to sustain organisation and interest after the envisaged mass action.[1207] The guide included standardised reporting forms, to be completed by the facilitators after each trip or meeting described in the document.[1208] The forms were designed in a bid to enable BRC to make an assessment about the quality of the engagements, and to furnish the organisation with certain information generated through these engagements. Coupled with the institutionalisation of standard reporting forms, BRC established an information management system to underpin the administration of the campaign.[1209]

The methodological framework outlined above and its attendant information management systems provided an administrative basis for BRC to manage the expansion of the

[1206] Ibid, 'Speak-out manual for translation, August 2005', unpublished document located in BRC's computer archive, 2005a, 3, 4
[1207] Various aspects of phase 3 were piloted at different times. For example in 2006, BRC set up a provincial committee and experimented with needs assessment and community art exercises. In 2007, the focus was narrowed down to leadership level, with learning trips to Cata, and the design and implementation of a comprehensive training programme. The latter was aimed at enabling the community leaders to play an ever-greater role in the campaign. But, by the end of 2008, BRC had not formulated clear, consistent methodology for phase 3.
[1208] BRC, 'Village level step-by-step guide for campaign partners (March 2005)', unpublished document located in BRC's computer archive, 2005b
[1209] Ibid, 2005, 19

community base of the campaign. After the successful co-operation with HLAO in 2005, the above-mentioned tools were used to co-operate with the Lady Frere Legal Advice Office and Sakisizwe Municipality in 2006, and with Isinamva (a NGO based in Mount Frere) in 2007. BRC itself implemented parts of the methodology in Kingwilliamstown, Cofimvaba and Tsomo in 2005, Butterworth and Nqamakwe in 2006, and Qumbu and Tsolo in 2007. By late 2007, over 72 000 households in 700 villages had signed declaration forms.[1210] It should be noted that BRC has used the number of people who signed forms to denote the size of the campaign's membership.

During the period mid-2004 to mid-2007, BRC's main objective was to expand the community base of the campaign, in order to realise the envisaged critical mass. By the end of this period, there were 700 communities organised under the slogan of Vulamasango Singene. BRC suspended the expansion drive at that point, partially because it maintained that 700 communities constituted a critical mass, and partially because it ran out of funding to continue the process.[1211] During the three-year period, BRC's engagements with the ANC happened primarily at sub-regional level. BRC's aim in this regard was to win local ANC support in order to facilitate the work of VSC organisers in new communities. This objective was achieved in all areas mentioned in the preceding paragraph, but a few sub-regional structures formally supported the campaign through resolution or public statement. This reflected the highly centralised nature of ANC decision-making.

The rolling out of the methodology at scale, as outlined above, had the effect of formalising the campaign structure, in a fairly hierarchical way. Each participating village elected a campaign committee, and each committee subsequently selected a representative onto the district committee that it fell under.[1212] Each district committee, in turn, was required to elect five representatives onto a provincial committee. As the campaign grew, from the 40 Middledrift villages at the end of 2004 to 700 (spread across about 12 districts) by the end of 2007, it became more and more difficult for BRC to spend time at village level. Instead its energies were focused on the higher levels of the Vulamasango Singene structures. Although BRC ostensibly prioritised the building of capacity of the district and provincial

[1210] BRC information management system, November 2007
[1211] BRC, 'Six-Monthly Report: July to December 2007', Unpublished report accessed in BRC archive, 2007a, 11; BRC's campaign work was supported financially by the Embassy of Finland from 2005 to 2007.
[1212] Note that 'districts' have been demarcated differently, depending on local circumstances. Generally speaking, they have resembled erstwhile magisterial or administrative districts.

committees, an external evaluation of the organisation carried out in mid-2007 urged it to confront this challenge in a more deliberate, systematic manner.[1213] The plan that BRC drew up to guide its operations in 2007 indicated that there would be a major training programme for the district and provincial committees, yet only one module was developed and taught. Thereafter, the programme was suspended, without an evaluation having been conducted or any clear reasons for this decision provided. The manner in which district committee meetings have been conducted over recent years – specifically how they have been convened, planned and chaired by BRC employees – also leads one to question the organisation's commitment and approach to capacity building. It seems that the advances made have been limited to certain individual members of the provincial committee, who have emerged as respected, articulate leaders and spokespersons of VSC. These advances have been made on the back of relationships of trust and mentorship, rather than through systematic organisational practice. Within BRC there has been some self-critical awareness of the vanguardist role performed by the organisation in relation to VSC. This has translated into piecemeal attempts by BRC to shift the motor of agency away from itself, to the campaign committees. For example, BRC intended to pilot the implementation of what it called people's advocacy. The thinking here was that the organisation would provide resources to enable village committees to carry out advocacy activities, conceptualised and planned locally. In the documentation drawn up by BRC to motivate for people's advocacy, it likened it to water flowing naturally from a spring, which was contrasted to water flowing from a tap that was switched on and off.[1214] Despite BRC's intensions, the attempted pilot in Cofimvaba was allowed to follow a technical, party political route, and ended up being nothing more than an exercise in enhancing communication and co-ordination between local VSC structures and ANC branches.[1215]

Over the period mid-2004 to mid-2007, BRC and other VSC organisers implemented certain parts of the speak-out methodology better than others. More specifically, they facilitated many village-based processes, but very few district-level activities. With regard to the former, by April 2007, about 1000 people had testified in speak-out sessions in over 300 villages. A total of over 14 000 people had registered their attendance at these meetings.[1216] A reason that the district-level components of the speak-out were not carried

[1213] Nyoni, J., Maart, L. & Velcich, A. 'BRC External Evaluation (2004 – 2006)', Unpublished document accessed in BRC Resource Centre, 2007, 21, 22
[1214] BRC, 'Introducing the Notion of Direct People's Advocacy for Strategic Consideration (20 September 2006)', Unpublished document accessed in BRC Resource Centre, 2006, 1
[1215] Ibid, 2007a, 12 - 14
[1216] BRC information management system, March 2007

out was that BRC did not convene any mass action after a rally in Cofimvaba and a march in Kingwilliamstown in the final quarter of 2005. In 2006 and 2007 government stalled and dithered in relation to VSC, yet BRC chose to keep the campaign off the streets, and instead to busy itself with various technical tasks, such as researching the extent of dispossession in the Ciskei and Transkei for purposes of calculating budgetary implications, and designing various aspects of a possible redress programme. The technical work resulted in the task team compiling and submitting a new package of documents to the Minister of Land Affairs in April 2007.[1217] Included in the package was a memorandum that authorized the implementation of a betterment redress programme, but by the end of year the Minister had not signed the memorandum. BRC's choice not to invoke mass action, its reluctance to ruffle feathers, reflected the extent to which the organisation was embroiled in the politics of the ANC and the elected government. Certainly, the factor that BRC decision-makers held above all others in their determination not to proceed with mass action in the final half of 2007 was the highly contested ANC leadership battle in Polokwane.[1218] Ironically, despite the fact that BRC claimed to have realised the critical mass needed to win the campaign, by the end of 2008 it had not brought this mass to bear on the body politic.

In the wake of the Polokwane outcome – the ousting of the Mbeki cabal by the Zuma camp – BRC sought to communicate directly with the new ANC leadership. In particular, BRC directed its communication to the newly elected Secretary-General Gwede Mantashe. Mantashe's response was that he could not take any issue into discussions of the National Executive Committee (NEC) unless it came through proper organisational channels. Acknowledging that there were problems with the Provincial Executive Committee (PEC) in the Eastern Cape, Mantashe advised BRC to solicit the support of affected regions, namely Amatole, Chris Hani, Ukhahlamba, OR Tambo and Alred Nzo.[1219] During the second and third quarters of 2008, BRC had numerous meetings with political leaders in the regions, but none had decided to formally support VSC by late 2008, and therefore the issue had not been taken into NEC processes by then. In sum, BRC lobbied various ANC

[1217] President Mbeki shifted Thoko Didiza into the portfolio of Public Works in 2005, and appointed Lulama Xingwana into the vacant Land Affairs and Agriculture portfolio at that time.
[1218] BRC, 'Minutes of the Board meeting held at 10.30am on Tuesday 16 October 2007', Unpublished document accessed in BRC Resource Centre, 2007b, ii
[1219] Ibid, 'Six-Monthly Report: January to June 2008', Unpublished report accessed in BRC archive, 2008, 8

structures on VSC for a period of over five years from mid-2003, without obtaining clear, enduring support from the organisation.

On a technical level, the issue that the negotiation task team could not resolve was whether or not there would be provision for financial compensation in the proposed betterment redress programme.[1220] The team referred this issue to the Minister in April 2007. In a bid to resolve this matter, Minister Xingwana met with a VSC delegation (including two BRC employees) on 27 November 2007. However, the meeting only confirmed a difference of opinion on the issue. In January 2008, BRC received a report on the meeting from the Minister, in which she asserted that the two parties had agreed that there would be no financial compensation. BRC replied to the Minister, denying that such an agreement had been reached, and urging her to visit the VSC leadership in the Eastern Cape in order to discuss the issue of financial compensation. There were attempts to schedule such engagement in April and May, but these failed. Finally, Minister Xingwana met with about twenty members of the Provincial Committee on 15 June, in East London. In the meeting, the Minister acknowledged the government's responsibility for the exclusion of victims of betterment dispossession from restitution. She suggested, somewhat bizarrely, that the best way to remedy the problem would be for the two parties, the government and VSC, to jointly approach the Land Claims Court, asking it to order government to amend the Restitution of Land Rights Act, to enable those dispossessed through betterment in the Eastern Cape to lodge restitution claims. The Provincial Committee agreed with this suggestion. At an Eastern Cape Land Summit held in Mthatha two weeks later, on 27 June, the Minister publicly acknowledged government liability in the matter, and confirmed the joint legal action.[1221] By the end of September 2008, the legal counsel representing VSC had reached an advanced stage in preparing its legal papers.

Issue Analysis

In many respects, the above chronological account is more a chronicle than a narrative. Because the campaign has not yet been won, or lost; the account does not have an ending. Even its beginning is rather fuzzy – does it start in 1998 or in 2002? Essentially, the account comprises a long, continuing, middle. Although it is possible to distil some changes in BRC's strategies and tactics over the period 2002 to 2008, the over-riding

[1220] Financial compensation was retained as a compensation option in the memorandum prepared by the task team in April 2007, on the understanding that there would need to be further discussion on the matter.
[1221] BRC, 2008, 9, 10

sense is one of organisational consistency and continuity, even in the face of setback and disappointment. For this reason, it makes sense to supplement the chronological account with an analysis of VSC in relation to key issues.

An underlying, or framing, quandary that seems to inform or set up many aspects of the chronicle is that BRC, a moderate NGO fully implicated in the prevailing regime of truth, or hegemonic orthodoxy of post-1994 neo-liberal South Africa, attempted to facilitate the establishment of a social movement to challenge aspects of that very regime of truth. That BRC was a product of and was subject to the prevailing hegemonic orthodoxy has been established earlier in this thesis; the point is argued at length in Chapter 5. It is unnecessary to repeat the overall argument here, but it is useful in the context of this chapter to emphasise that BRC embraced conventional understandings of political and civil society, democracy and human rights.

According to Goodwin and Jasper, the term social movement can be applied to any "collective, organised, sustained challenge to authorities, power holders, or cultural beliefs and practices".[1222] For example, it can be used to describe organisations ranging from trade unions to religious groupings. In the past few decades, there has been attention given to modern expressions of movements characterised by "their form of organisation" (non-hierarchical), and "the importance they place on identity and agency in particular".[1223] For Desai, the main defining feature of social movements is that mass mobilisation is their "prime source of social sanction".[1224] In post-apartheid South Africa, many organisations that have been described as social movements are "community- and consumption-based rather than production- and workplace-based".[1225] These have been referred to as 'new' social movements. Usefully, Gibson notes that although new and old social movements can be "sharply divided in theory", in practice differences between them are less clear; they operate "along a continuum", rather than on different sides of a chasm.[1226]

[1222] Quoted in Gibson, N. 'Calling everything into question: Broken promises, social movements and emergent intellectual currents in post-apartheid South Africa', in N. Gibson (ed), Challenging Hegemony: Social Movements and the Quest for a New Humanism in Post-Apartheid South Africa, Africa World Press, Inc: Trenton, 2006, 15

[1223] Ibid, 2006, 16

[1224] Desai, A. 'The post-apartheid state and community movements', in Development Update Vol 5, No 2 (2004), Interfund, Johannesburg (Eds, McKinley D and Naidoo P), 63

[1225] Gibson, 2006, 29

[1226] Ibid, 2006, 18. He notes that this is particularly true in the history of resistance in South Africa, where at different stages of struggle, the ANC, Black Consciousness Movement, unions and the United Democratic Front, displayed characteristics of both new and old social movements.

Operating within the law

The first point to be made about VSC as a social movement is that BRC established it reluctantly, in the sense that the organization had hoped in early 2002 to win its demand for a selective re-opening through legal action rather than mobilization. It was only after Budlender and Plasket advised BRC that it did not have a strong legal case that it began considering a suitable political path to a solution. Initially, BRC chose lobbying, backed up by academic research, as its only tactics. Only later did it look to information dissemination, community organization and mobilization.

BRC circa 2002 placed itself unambiguously within the regime of post-1994 constitutionality and civility. Its experiences in Cata and Keiskammahoek convinced it, more than ever, that post-1994 law (the Constitution, the Restitution of land Rights Act, etc) possessed "an almost magical capacity to accomplish order, civility, justice and empowerment. And to remove inequities of all kinds".[1227] In particular, the organisation believed that human rights discourse was fundamental to progressive advocacy. On this basis, BRC was unequivocal in its commitment to work within the constitutional framework and uphold the rule of law. It is therefore no surprise that the origins and raison d'etre of VSC are located firmly within the constitutional and legal framework of post-1994 South Africa. VSC is an expression of what O'Brien calls "rightful resistance".[1228] Rightful resistance "works largely within (yet at the edges of) an existing opportunity structure", it "operates near the boundary of an authorized channel".[1229] In other words, in Foucauldian terms, it is situated within the prevailing regime of truth. More specifically, according to O'Brien, rightful resistance is a product of "opportunities created by the spread of participatory ideologies and patterns of rule rooted in notions of equality, rights, and the rule of law. It… is a sign of growing rights consciousness and a more contractual approach to political life".[1230] Thus it is no surprise that this form of action employs prevailing hegemonic discourse and legal instruments, in an opportunistic, deliberate, pragmatic manner. That is, it frames its claims in "persuasive normative language" and uses "legitimating myths" to advance its case.[1231] Without exception, it avoids the use of illegal and criminal tactics.[1232] For Habermas, "the practice of claiming basic rights" is a defining

[1227] Comaroff, J. & Comaroff, J. 'Reflections on Liberalism, Policulturalism and ID-ology: Citizenship and Difference in South Africa', in S. Robbins (ed) Limits to Liberation after Apartheid: Citizenship, Governance and Culture, David Philip: Cape Town, 2005, 45
[1228] O'Brien, KJ. 'Rightful Resistance', World Politics, Vol 49 No 1, 1996, 31 – 55
[1229] Ibid, 1996, 55, 33
[1230] Ibid, 1996, 34
[1231] Ibid, 1996, 51
[1232] Ibid, 1996, 33

feature of republican citizenship.[1233] Pieterse argues that the 1993 South African Constitution "creates massive scope for a rights-based approach to social mobilisation" in a number of forms, including direct action and discursive interventions .[1234]

There are strong similarities between the ideological underpinnings of VSC and the Treatment Action Campaign (TAC), which has advocated for the provision of treatment for people infected with HIV/ AIDS. According to Mark Heywood of the TAC, "we can win gains from this system – far-reaching reform is possible".[1235] Because it holds that there are gains to be made from the system, that reform is both possible and worthwhile, it does not seek to destroy the system. The TAC is concerned "with the politics of health, not politics *per se*".[1236] In the past decade, the TAC has focused on winning the gains rather than on protesting. National Manager Nathan Geffen puts this very succinctly: "We do not just want a voice, we want to win our demands".[1237] In order to secure the victories that it seeks, the TAC "employs the methods of civil society engagement – lobbying and coalition-building, public protest and legal action: organisations which mobilise people are firmly within civil society if they also engage the state to win concessions".[1238] Because of this, Friedman and Mottiar describe the TAC as "a social movement which chooses to operate in civil society".[1239] In this regard, it is useful to emphasise that the TAC has frequently made effective use of legal argument and action to push its advocacy agenda forward.

Despite these successes, the TAC is not popular amongst social movements such as the Anti Privatisation Forum (APF) and Landless Peoples Movement (LPM). For these movements, the contemporary system serves the interests of a neo-liberal bloc, and it amounts to a direct assault on those living on the margins, especially the casually employed and the unemployed.[1240] Specifically in relation to land, Mngxitama argues that South African civilisation is founded on land dispossession, and characterised by blacks

[1233] J Habermas, quoted in Wilson , 2001, 3
[1234] Pieterse, E. 'Political Inventions and Interventions', in S. Robbins (ed) Limits to Liberation after Apartheid: Citizenship, Governance and Culture, David Philip: Cape Town, 2000, 127, 130
[1235] Quoted in Friedman, S. & Mottiar, S. 'A Moral to the Tale: The Treatment Action Campaign and the Politics of HIV/AIDS', A case study for the UKZN project entitled: Globalisation, Marginalisation and New Social Movements in post-Apartheid South Africa, Document accessed on www.ukzn.ac.za/CSS, 2004, 14
[1236] M Heywood quoted in ibid, 2004, 7
[1237] Ibid, 2004, 17
[1238] Ibid, 2004, 26
[1239] Ibid, 2004, 25
[1240] Desai, 2004, 66

being workers rather than owners of land (and other capital).[1241] He therefore calls for an end to this civilisation; the aim of the more radical movements is not to reform the system, but rather to replace it. Consequently, these movements tolerate, even encourage, illegal action. Because law demarcates the boundaries of the hegemonic system, its credibility and legitimacy do not hold in efforts to install anti-hegemonic approaches. Instead, in this zone, where actions are often motivated by desperation (for example to stop evictions or reconnect basic services), illegality is an expression of an alternative common sense.[1242] Whereas BRC speaks of securing and brokering state resources, activist academic Desai talks of "snatching income from the state"; he notes that "[b]arricades, burning tyres, marches on councillors houses, stealing of records that show arrears, are all part of the repertoire".[1243] Mngxitama doubts that NGOs can play any useful role in the anti-hegemonic project, because he holds that civil society is ensconced in the prevailing civilisation. In terms of his "Gramscian problematisation of 'civil society'" NGOs are the handmaidens of the state in executing "the accumulative project of capital".[1244] This view seems unnecessarily rigid and based on stereotype rather than analysis. An alternative reading of Gramsci suggests that a war of position, that is a gradual undermining of "the trench systems, earthworks and fortifications of civil society", or "the progressive disaggregation of a civilization", requires the mobilisation of a "new class core", which can be seen as a fluid rather than fixed alignment of interests.[1245] More specifically, Laclau and Mouffe argue that the identity of the allies and opponents "constantly changes" as the war unfolds.[1246]

Six years after having launched its rights-based campaign to reverse the exclusion of betterment dispossession from restitution, BRC has not reached its objective. Over the period 2002 – 2008 it has endured many setbacks, taken many knocks. In short, it has experienced what the Comaroffs call the "limits of liberalism", namely

> the limited power of [South Africa's] Constitution to make actual the entitlements it guarantees; the limited capability of its instruments of governance to reconcile the

[1241] Mngxitama, A. 'The Taming of Land Resistance: Lessons from the National Land Committee', Journal of Asian and African Studies, 2006, Vol 41 (1/2), 43. It is no surprise that Mnxgitama led the call within the NLC around 2001/2 that the organisation should support illegal land invasion as a primary strategy of land reform.
[1242] Desai, 2004, 66
[1243] Ibid, 2004, 63, 69
[1244] Mngxitama, 2006, 50
[1245] Ransome, P. Antonio Gramsci: A new introduction, Harvester Wheatsheaf: London, 1992, 146; Laclau, E. & Mouffe, C. Hegemony and Socialist Strategy: Towards a radical democratic politics, Verso: London, 1985, 70
[1246] Laclau & Mouffe, 1985, 70

> equality it promises its citizens with the stark disparities of life in an increasingly deregulated economy.[1247]

Through its not yet having re-considered how VSC is positioned in relation to the prevailing regime of truth, it appears that BRC has failed to grapple with the implications of "the most brutal of truths: that power produces rights, not rights power; that law is itself a product of the political, not a prime mover in constructing social worlds".[1248]

Single issue

Closely linked to the way in which social movements position themselves in relation to the prevailing regime of truth, or hegemonic orthodoxy, is the scope and definition of their goals or principal objectives. More specifically, the reformist movements have tended to define their missions in a fairly narrow way (hence they are sometimes referred to as single-issue organizations), whilst the radical movements have taken on more diffuse agendas. VSC was birthed by BRC in 2002 to focus on a single issue, namely to address the prejudicial treatment of victims of betterment dispossession by restitution policy. Similarly, the TAC has focused largely on the prevention and management of HIV/AIDS. More specifically, it has pursued what it has termed "issue-based incrementalism", which refers to its determination to win the treatment challenge systematically over a period of time.[1249] It has not sought to contextualise its campaign in relation to the neo-liberal macro-economics of government.[1250] This has led some to argue that although it may have won some victories "its approach has been to see these victories as a legitimisation of the state's pro-poor policies, thus further entrenching the hegemonic project of the ruling class".[1251] However, Friedman and Mottiar make interesting comments about the potential of 'single-issue campaigns' to trigger fundamental societal change.

> There is no simple distinction between a campaign which aims to change the structure of society and one which seeks immediate gains. Single issue campaigns may challenge society's ordering, if they seek to redistribute power and resources. Embarking on these campaigns, winning gains and building on these could be the most feasible way to achieve social change.[1252]

[1247] Comaroff & Comaroff, 2005, 54
[1248] Ibid , 2005, 46
[1249] Friedman & Mottiar, 2004, 16
[1250] Ibid, 2004, 7
[1251] Benjamin, N. 'Organisation Building and Mass Mobilisation', in Development Update (Mobilising for change: New social movements in South Africa), Vol 5, No 2, 2004, 79
[1252] Friedman & Mottiar, 2004, 7

O'Brien arrives at a similar conclusion about rightful resistance in general, asserting that it has the potential to "presage the stirrings of a... far-reaching counterhegemonic project".[1253]

It should also be emphasised that the TAC has pursued its advocacy agenda in a manner that has built solid bridges within civil society. It pursues alliance building in a deliberate, "thinking" manner, recognising that campaigns are won or lost on their ability to win support from significant constituencies.[1254] This approach has paid off; not only has the TAC won support from the likes of COSATU, it has also managed to sway public opinion generally, in relation to HIV/AIDS.

Despite BRC's inability to date to win the single-issue VSC, its organisers have not (until recently) attempted to link the campaign to any other social movement or civic campaign waged in either rural or urban areas of the country.[1255] In this regard, it is necessary to note that BRC deliberately distinguished VSC from the broader, more diffuse calls for the general re-opening of the lodgement process. There were two main reasons that BRC took this stand. First, it thought that the rationale for Vulamasango Singene was fundamentally different from the calls for general re-opening. It asserted that the rationale for the former was prejudice, whereas the latter was based on a variety of reasons including public irresponsibility and ineffective government communication programmes.[1256] Second, it believed that government would not respond favourably to calls for general re-opening and that it was therefore tactically necessary for Vulamasango Singene to distance itself from these calls. Consequently, the campaign was and remains marginal in the context of the land reform sector and broader civil society in general.

There is a long line of pre-eminent progressive thinkers and activists who have advanced the argument that rural and rural struggle in (South) Africa should be integrated. It is beyond the scope of this work to present a comprehensive genealogy of the evolution of

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[1253] O'Brien, 1996, 52
[1254] Friedman & Mottiar, 2004, 16
[1255] 'NGOs reject call for land grab', Daily Dispatch, 5 March 2004, 4
[1256] Westaway addressed the National Assembly in Cape Town on the campaign on 25 August 2003, just before BRC withdrew as an affiliate of the National Land Committee. At that time, the NLC was characterized by bitter, highly-charged conflict. The faction that favoured the re-instatement of a recently dismissed managing director of the national office was keen to discredit BRC and other affiliates that wanted to strengthen the governance role of the Board. In his presentation to parliament Westaway emphasized that VSC opposed calls for a general re-opening of the lodgement process. This was cited at the time by the above-mentioned faction as evidence that BRC was conservative and disinterested in the plight of the poor (Personal recollection).

this line of thought, but some of those who have contributed are Trotsky, Mbeki, Fanon, Mamdani and Hart. Trotsky believed that it was necessary to integrate the rural masses into the national struggle in South Africa, and that in order to achieve this it would be necessary for urban cadres who understood the agrarian question to conduct propaganda targeting these masses. In 1935 he wrote that

> [the Native peasant] feels very sharply the land and fiscal bondage… [P]ropaganda can and must first of all flow from the slogans of the agrarian revolution, in order that, step by step, on the basis of the experiences of the struggle, the peasantry may be brought to the necessary *political* and national conclusions.[1257]

In a different work, he summarised the situation as follows: "just as the success of the proletarian revolution depends on the peasantry, the fate of the agrarian revolution is determined in cities".[1258] Mbeki had a greater confidence in rural than urban struggle, but he consistently maintained that struggle was best undertaken in an integrated manner. "A proper blending of the peasant and worker struggles", he said "coupled with skilful timing of joint action, is a matter which must engage the serious thinking of the leadership".[1259] Further afield, but still on the African continent, Fanon held that the fight against colonialism should be waged through mixing and combining urban and rural struggles. More recently, Mamdani and Hart have advocated for an integrated approach to political engagement in the post-apartheid period. Mamdani bemoans the fact that the "prodemocracy movement of today… lacks a programme for linking the urban and the rural".[1260] Hart's comments and proposed programme of action are directly relevant to this work because they relate to rural restitution. She asserts "the need to dis-articulate or de-link the land question… from individual restitution claims, and to re-articulate or reframe it in terms of the erosion of social security, and the moral and material imperative for a social wage".[1261] Her proposed approach represents a distinct contrast to that which has been utilised to date in the Vulamasango Singene campaign.

In terms of Baucom's more abstract (but equally important) articulation, melancholy politics are pursued in relation, not in isolation. He elaborates this understanding on the back of Glissant's haunting words on drowning slaves, "For though this experience made you, original victim floating toward the sea's abysses, an exception, it became something

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[1257] Trotsky, L. 'The Agrarian and National Questions: Remarks on the Draft Theses of The Workers Party of South Africa', in Fourth International New York, Volume 6, No. 11 (Whole No. 60), November 1945, 345-347
[1258] L Trotsky quoted in Drew, 1996, 66
[1259] Mbeki, 1964, 131
[1260] Mamdani, 1996, 297
[1261] Hart, 2002, 12. Not surprisingly, she dedicated the book to Mbeki.

shared and made us, the descendants, one people among others. People do not live on exception. Relation is not made up of things that are foreign but of shared knowledge. This experience of the abyss can now be said to be the best element of exchange".[1262] Baucom understands "relation" here to be "a word for what I have been calling an interested politics of the abysmal event… *and* a word for those new 'transverse' forms of culture, identity, and solidarity that emerge from the act of holding to, enduring, relating, and avowing our (present's) relational complicity with modernity's most violent scenes of exchange".[1263] In other words, Baucom proposes that solidarity be forged through mapping out the linkages between contemporary forces of resistance. He suggests that the most significant of these forces base their struggles in historico-political understandings, and assertions of contemporary responsibility for the longevity of an abysmal past into the present. Baucom's relation is based on forging and sharing a particular understanding of the past/ present. To relate the past does not imply its abandonment or exchange, rather relation is about "living on", *together,* "within the abysmal".[1264] To relate the past is to broaden the effort to end continuing legacies of the past, today.

Through the lens of this literature, it is clear that VSC has been framed in an inappropriately narrow manner. BRC's unwillingness/ inability to integrate the campaign into urban struggles and realities, has limited its ability to grow and develop. It should be noted in this regard that BRC did have relevant experience that it could have drawn on. When it was required to facilitate the signing of 'powers of attorney' by direct descendants of dispossessed household heads from the nine Keiskammahoek villages in 2001/2, it quickly realised that many of these people were based in urban centres such as Port Elizabeth and Cape Town.[1265] Also, on a theoretical level, many of the employees of BRC understood that, despite the structural unemployment problem that has characterised the South African economy in the last three decades, migrancy has remained a crucially important feature of it in the twenty-first century, one that has a direct bearing on the Bantustan areas. Yet, the organisation did not make substantial, sustained attempts to utilise urban networks and organisations to strengthen the campaign. This is surely an underlying reason that it has been unable to secure the active support of COSATU and its affiliates (eg National Union of Mineworkers) in taking forward its struggle.

[1262] Quoted in Baucom, 2005, 310
[1263] Ibid, 2005, 311
[1264] Ibid, 2005, 332
[1265] BRC, 2002, 10

The narrow scope of the leadership of the campaign has also meant that it has overlooked the possibilities of seeking connections to struggles attempting to counter other manifestations of the bifurcated state. In Chapter 4, I showed that betterment was only one such manifestation; others include the spatial-economistic paradigm, the absence of an integrated rural development policy, and the institutionalisation of undemocratic governance in the former Bantustans. To date VSC organisers have failed to connect with struggles for alternative development paradigms and democratisation of governance. BRC's lack of support for the Basic Income Grant (BIG) and its decision not to put energy into opposing the Communal Land Rights Act (CLARA) for example, indicate that it pursued myopic, essentially conservative politics over the period 2002 – 2008. Further, there has been no significant relation in VSC during this time. The abyss of exclusion from human rights, development, democracy, citizenship in post-1994 South Africa is not populated by victims of betterment dispossession alone. With them, living bare life, are the shack-dwellers, the farm workers, the illegal immigrants. In fact the majority of the South African public live in the other half of the bifurcated state. However, campaign organisers chose not to relate to this much broader constituency.

Ensconced in majority politics

Rose dubs officially-sanctioned and -endorsed politics, that is politics that underpins formal democracy (or what he calls "the politics of party and programme"), "majority politics". Conversely, he refers to politics that operate alongside or underneath legitimised processes or the "politics of insurgent subaltern forces", as "minority politics".[1266] BRC attempted to position the campaign in between majority and minority politics.[1267] In the next section I will examine the extent to which BRC connected VSC into minority politics; in this section I focus on its relations with majority politics.

It is clear from the chronicle presented above that VSC was ensconced in majority politics over the period 2002 – 2008. BRC clamoured, in vain, to win government and ANC support; it suspended mass action for protracted periods of time at the behest of government or because it feared an imagined response from (a section of) the ANC, and it invested heavily in technical processes such as research and institutional design. This reflection leads one to surmise or assume that, over this period, BRC was infused with a

[1266] Rose, N. Powers of Freedom, Cambridge University Press: Cambridge, 1999, 279
[1267] Westaway, A. 'Fort Hare University: PhD proposal', Unpublished document accessed in BRC computer network, 2005. I am aware of the apparent irony of using my own academic thesis proposal as so-called

number of conceptions fundamental to liberal discourse, including "the idea that politics is reducible to the state or that the state is the sole domain of politics", and the assumption that political parties are links between civil society and the state.[1268]

Majority politics are not necessarily bad. Rather than making moral judgements though, it is more instructive to analyse these politics, as a fundamental component of the prevailing regime of truth. If one sets about effecting societal change, sooner or later an engagement with majority politics is probably unavoidable. For example, in the case of VSC, BRC sought the implementation of a government programme to redress betterment dispossession, and the TAC demands the public provision of anti-retroviral treatment to AIDS sufferers, amongst other measures to manage the pandemic. In both these instances, the advocating organisations uphold formal democracy, and recognise both the "legitimacy of the government and popularity of the ruling party".[1269] Both organisations go further, by asserting their interest in strengthening government, to deliver rural development and health care respectively.[1270]

The variable though, for organisations that choose to engage in majority politics, is how they devise and execute their respective exchanges. To an extent, these choices are contingent on their respective analyses of the terrain of majority politics. For example, do they view the ANC as a monolithic structure or as a contested organisation? Do they regard it as being a liberation movement beyond reproach, or are they more critical in relation to the class, demographic and other interests that it represents? Are they intimidated by its apparently legitimate grip on the body politic, or do they have the courage to speak truth to power? In terms of O'Brien's analysis, one of the most important traits of rightful resistance is that its protagonists analyse the configuration and exercise of governmental and majority power, with a view to being able to identify fractures and fissures that run through it.[1271] Once these are identified, rightful resisters exploit them, through associating adherence to official policies and values with groupings opportunistically labelled as loyal, and disregard for officialdom with disloyalty.[1272] The

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primary evidence, but in the circumstances it seems to be a defendable move, because it is reasonable to assume that I had an insight into and was accurately describing BRC intentionality at the time.

[1268] Neocosmos, M. 'Rethinking Politics in Southern Africa today: Elements of a Critique of Political Liberalism', in N. Gibson (ed), Challenging Hegemony: Social Movements and the Quest for a New Humanism in Post-Apartheid South Africa, Africa World Press, Inc: Trenton, 2006, 59, 70

[1269] Friedman & Mottiar, 2004, 13

[1270] Ibid, 2004, 16

[1271] O'Brien, 1996, 31, 44

[1272] Ibid, 1996, 33, 55

manner in which the TAC managed to cast Mbeki and Tshabalala-Msimang as disloyal to public health prerogatives, is a clear example of this dimension of rightful resistance at work. Simultaneously, the TAC classified Madlala-Routledge and Mlambo-Ngcuka as loyal, thereby winning advocates within officialdom.[1273] By contrast, BRC has not been able to dissect the ANC in the Eastern Cape during the recent period, despite it having been divided into distinct camps (headed by Stofile and George respectively). It displayed a respect for the organisation verging on unquestioning loyalty. It silenced itself, in the hope that the ANC would somehow, on its own volition, embrace VSC as its own. Unsurprisingly, this strategy has not worked.

Post-1994 organisations in South Africa are not bound to engage in majority politics. Most of the radical social movements, in fact, have regarded the ANC and government as part of the problem rather than key players that must be involved in finding solutions. The dismissive attitude of these movements to democratic South Africa was starkly illustrated through the 'No Land, No Vote' campaign of the LPM. This campaign was launched in the run-up to the 2004 general election and aimed to discourage people from participating in the election process. It was unsuccessful, in that registration levels and voter turnout remained high. The principal danger of eschewing formal democracy and alienating the ANC-led Alliance in this period has been well understood by the likes of the TAC; it has tended to undermine the prospects of advocacy success. As TAC leader Achmat explains: "A major tactical error would be to lose support among our members as other social movements have done when they are seen to be threatening democratically elected leaders".[1274] The challenge has been to balance "co-operation and conflict, partnership and challenge".[1275] BRC has overdone co-operation and partnership, and the radical movements have overdone conflict and challenge I would suggest; whereas the TAC seems to have got the balance right in the last decade.

Community engagement

Rightful resistance goes beyond engaging the state in a particular manner; it is founded on "grassroots collective action".[1276] Many comments were made in the chronicle above about how BRC engaged the communities in the Ciskei and Transkei, and structured the campaign. I will reinforce a few of these comments briefly, before embarking on a more

[1273] Ibid, 1996, 51
[1274] Friedman & Mottiar, 2004, 13
[1275] Ibid, 2004, 15
[1276] O'Brien, 1996, 51

detailed analysis of (historical) knowledge production in VSC. An unresolved quandary that is highlighted in reflecting on the manner in which BRC has attempted to orchestrate VSC, is whether it is possible or appropriate for an external NGO to facilitate the establishment of a substantial social movement with an independent identity. The resourcing and administration of the campaign have taken place through BRC, yet a fundamental component of the campaign strategy has been to establish a community-based structure with the capacity to take decisions. Specifically, by the end of 2007, there were 700 village committees, 12 district committees and a provincial committee, all of which had been elected at the relevant levels.[1277] BRC's broad conception of the respective roles of these structures has been that village committees are responsible for educating and communicating with community/ campaign members, district committees are required to co-ordinate district-level activities, specifically mass activities such as marches and rallies, and that the provincial committee is responsible for determining overall campaign strategy. Despite the apparent logic and coherence of the structure, it is clear from a perusal of BRC documents that the NGO has remained the driving force of VSC throughout its existence to date. Committee meetings (certainly at provincial and district levels) are still, at the end of 2008, convened by BRC, discussion documents and technical proposals continue to be drafted in East London, campaign strategy is determined more in the offices of BRC than by the provincial committee, and VSC activities have generally been administered and managed by BRC, not the district committees. The campaign structure has not been formally constituted; it does not exist as a legal entity; it has no assets, equipment, operating budget or employees; it is unlikely that VSC would be sustained in the event that

[1277] The TAC also has many of the hallmarks of a conventional membership organisation (Friedman & Mottiar, 2004, 3). Principally, its structural configuration is geared to facilitate organisational democracy and it places great emphasis on ensuring credible election process. The TAC has four basic structures, namely branches, provincial executive committees, a national executive committee and a national congress, which meets once every two years (Ibid, 2004, 9). The congress elects the national leadership; these ballots are supervised by the Independent Electoral Commission (IEC) of South Africa (Ibid, 2004, 9). Whereas BRC and the TAC have attempted to formalise democratic practices through their respective institutional configurations, the so-called radical movements have eschewed this approach, dismissing it as 'bureaucratic'. For example, the Anti Privatisation Forum and Anti Eviction Campaign are highly decentralised and relatively informal (Benjamin, 2004, 76, 77). According to AEC activists "'everyone is a leader' and the participation and involvement of the masses must not be replaced by forms of representative democracy as this leads to bureaucratisation" (Ibid, 2004, 85). This looseness is lauded by Benjamin on the grounds that it provides the 'flexibility' required to meet current challenges, whereas formal democracy runs the risk of sucking the life out of movements, rendering them "a bureaucratic shell" (Ibid, 2004, 91). Similarly, Greenberg warns that in "a political climate where grassroots activity is intermittent and muted, an overemphasis on structure can lead to bureaucratisation of struggle" (Greenberg, S. 'The Landless People's Movement and the Failure of Post-apartheid Land Reform', A case study for the UKZN project entitled: Globalisation, Marginalisation and New Social Movements in post-Apartheid South Africa, accessed on www.ukzn.ac.za/CSS, 2004, 22). Friedman and Mottiar argue that those analysts and activists who "exalt the looseness of social movement organisation" seem to have lost sight of the fact that "democratic structures are not impositions by bureaucrats but the means by which participants gain a say in their organisation" (Friedman & Mottiar, 2004, 11).

the BRC life-line was switched off. This situation has limited the type of resistance undertaken under the banner of VSC. Pithouse highlights compelling reasons why forces of resistance should be based in the applicable social milieu. Two of these are that a "particular extant culture has more accessible resources that can be used and developed to articulate and inspire resistances than abstract universal principle" and that this approach "puts agency and creativity within the immediate grasp of the marginalised and dominated".[1278] Similarly, Gibson notes that "the determinants of a social activity for 'framing political opportunity'… are often about subjectivity and consciousness of the situation".[1279]

BRC's inability to facilitate the establishment of independent VSC institutional capacity highlights the need to analyse the institutional methodologies and approaches of BRC. The overall point that should be made is that BRC has lacked focus in conceptualising and implementing its community work. A looseness of approach has characterised all phases of community work, from its establishment of a campaign membership base onwards. At the end of 2007, BRC asserted that the campaign had a membership of approximately 75 000 households. This is the number of household declaration forms signed by that time. There is no list of these names, and BRC has no way of confirming whether or not those who signed forms continue to attend campaign meetings.[1280] In this respect, VSC has certain similarities with the TAC, which does not distinguish between members, supporters, volunteers and activists.[1281] This limitation has had a bearing on the kinds of advocacy issues and strategies that the TAC is able to select and employ respectively. More specifically, TAC leaders recognise that its loose and relatively small membership base (of around 8 000 in 2004) constrains its campaigning options and means that it "cannot win issues by organised strength alone".[1282]

BRC's loose approach to building independent institutional capacity has been reflected in most elements of its work practice including meeting procedures, training and communication methods. The aspect that is particularly relevant in the context of this thesis is knowledge production. For Rose, a look into the various mechanisms used by

[1278] Pithouse, R. 'Solidarity, Co-option and Assimilation: The necessity, promises and pitfalls of global linkages for South African movements' in N. Gibson (ed), Challenging Hegemony: Social Movements and the Quest for a New Humanism in Post-Apartheid South Africa, Africa World Press, Inc: Trenton, 2006, 266
[1279] Gibson, 2006, 11
[1280] BRC's data-base does include the names and contact details of all members of village, district and provincial committees, that is details for over 3500 people.
[1281] Friedman & Mottiar, 2004, 3
[1282] Ibid, 2004, 3

social movements to generate truths is a key component in exploring an anatomy of the political imagination. In this regard, he posed a string of suggestive sub-questions, as follows.

> What *relation to truth* do such movements establish – do they depend upon a basis in veridical knowledge for their authority, as for example in Marxism; upon charismatic types of authority, as in millenarian sects; upon legal and juridical forms of reasoning as in demands for rights; upon alternative forms of expertise as in many environmental contests; in 'self-evidence' as when the defenders of nature or animals establish their arguments by 'bearing witness' through showing devastation or cruelty; or upon claims to a different kind of expertise based in experience, as in 'users' and 'consumers' movements in psychiatry?[1283]

The chronicle told earlier refers to a variety of mechanisms used by BRC to generate truths. Principally, it has used research and public testimony. The former has been undertaken by university researchers and BRC staff. This work has been used as the basis of all submissions to government and to inform campaign strategy. That is, in keeping with the experience in many South African social movements, it has been mainly middle class intellectuals who have developed the political analysis and framework that underpins VSC.[1284] As described above, BRC institutionalised a speak-out process during the period 2004 – 2006 as a mechanism to generate local knowledge about betterment. This was deemed necessary at the time to confirm the incidence of betterment, improve popular understanding of local histories, and strengthen the overall mobilisation drive.

BRC did not maximise the potential to produce truth that resided in the speak-out process, in relation to campaign members, the general public or future historians. It appears that BRC used the speak-out process primarily for instrumentalist purposes, to give momentum to mobilisation drives in the build-up to mass action. BRC continued convening speak-out sessions for twelve months after the last mass action event (viz the rally in Cofimvaba in December 2005), but discontinued this process in 2007 and 2008. [1285] The speak-out process had originally been designed to incorporate an element of public broadcast.

[1283] Rose, 1999, 281

[1284] Greenberg and Ndlovu note that in "many" of the movements, "mainly middle class intellectuals develop the political analysis and framework" (Greenberg, S. & Ndlovu, N. 'Civil society relationships', Development Update, Vol 5, no 2, 2004, 42).

[1285] For a statistical overview of speak-out sessions in Butterworth, Ngqamakwe, Lady Frere, Cala and Hewu conducted in 2006, see BRC, 'Six-Monthly Report: July to December 2006', Unpublished report accessed in BRC archive, 2006a, 7 – 13

However, BRC facilitated the public broadcast of people's testimonies on radio once only, namely in Cofimvaba in December 2005. By way of contrast, when Foucault and others founded the Prison Information Group in France in the early 1970s, they had one over-riding objective, namely to publicise the reality of contemporary prison life, constantly, instantly.[1286] Their strategy in this regard was clear: they created "a forum in which those who had defied moral authority could describe directly, in their own voice, the cruel ways in which an ostensibly 'humane' society had punished them".[1287] The speak-out process yielded over 1000 completed speak-out forms. These documents spell out people's experiences of betterment according to the following themes: life in the village and the homestead before betterment, events on the day of the removal, the consequences of betterment on the village and the household.[1288] BRC has not produced a consolidated assessment of the forms, neither has it overseen their translation into English. At this stage then, the forms have not yet been converted into accessible historical source documents. That is, their potential to contribute towards the formation of a counter-archive of betterment has not yet been realised.

Foucault identified an increased localisation of criticism as the "predominant feature" of resistance in Europe in the period 1965 – 1980. His emphasis in this regard was on knowledge production. He understands local knowledge as knowledge produced in "an autonomous, non-centralised" manner; and its "validity is not dependent on the approval of the established regimes of thought".[1289] Prior to this period in Europe, local knowledges had been dismissed as "naïve knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity".[1290] Thus Foucault refers to local knowledges as having previously been subjugated. The considerable extent of their emergence in the above-mentioned period led him to refer to "an *insurrection of subjugated knowledges*".[1291] Similarly, Hook and Harris think along similar lines in the context of post-1994 South Africa, by asserting that a necessary condition for effective political criticism is "the re-emergence of marginalised forms of knowledge".[1292]

[1286] Miller, 1993, 189
[1287] Ibid, 1993, 188
[1288] BRC, 2005a, 3, 4
[1289] Foucault, 1980, 81
[1290] Ibid, 1980, 81
[1291] Ibid, 1980, 80
[1292] Hook & Harris, 2000, 15

Local/ subjugated knowledges, according to Foucault, are specifically informed by "a *historical knowledge of struggles*".[1293] In this regard he refers to the human capacity to remember "hostile encounters which even up to this day have been confined to the margins of knowledge".[1294] For example, Fanon takes note of the extent to which memory of conflict with colonial powers infused the consciousness of rural people during the liberation wars.

> The memory of the anti-colonial period is very much alive in the villages, where women still croon in their children's ears songs to which the warriors marched when they went out to fight the conquerors. At twelve or thirteen years of age village children know the names of the old men who were in the last rising, and the dreams they dream… in the villages are not those of money or getting through their exams like the children of the towns, but dreams of identification with some rebel or another, the story of whose heroic death still today moves them to tears.[1295]

Feuchtwang puts forward some ideas on the link and dynamic between collective and private memory. He suggests that the link between the two is formed in relation to the experience of "cataclysmic events". These events are defined as "a limit condition: the annihilation of history and the destruction of personality… [T]hey invoke… discontinuity between the dead and the living".[1296] Feuchtwang suggests that it is these events that inform "collective being"; he calls them '"total" because "they focus the attention of all biographies within a population… studding its memories".[1297] Because they have not been translated into English, I have not undertaken a detailed analysis of the completed speak-out forms.[1298] However, I have spoken at length to BRC's fieldstaff, over a protracted period of time, about speak-out sessions in many parts of the province. This is the basis on which I have developed an understanding of some of the key issues that emerge at a general level.

First, the testimonies confirm that betterment was a 'cataclysmic' event. There was one kind of life that people lived before betterment; there is another kind of life that people lived thereafter. The former was characterised by communalism, ubuntu, farming, resilience.

[1293] Foucault, 1980, 83
[1294] Ibid, 1980, 83
[1295] Fanon, 1967, 90
[1296] Feuchtwang, S. 'Reinscriptions: Commemoration, Restoration and the Interpersonal Transmission of Histories and Memories under Modern States in Asia and Europe' in S. Radstone (ed), Memory and Methodology, Berg: Oxford, 2000, 59
[1297] Ibid, 2000, 59, 60
[1298] These are filed in BRC's office, but not translated into English.

The latter is characterised by individualism, conflict, deagrarianisation, resignation. Not surprisingly, the pre-betterment life is remembered fondly, not only as different from the present, but as better than the present. When Westaway[1299] went out as part of a film crew to make a documentary on the campaign in July 2006, he was surprised at the extent to which betterment is regarded locally as a point of discontinuity. Or re-stated, he did not expect to hear that betterment marked a clean-break in time, a moment of discontinuity in people's lived experiences. He had expected to hear people say that "betterment dispossessed us of residential land and structures, and arable land". Instead, they spoke about it having done that, and much, much more. After I had conducted research in Keiskammahoek in the early 1990s, I concluded that "betterment had a more profound impact on the Keiskammahoek district during the period 1945 to 1975 than any other government policy, economic shift or social phenomenon"[1300]. However, it is only in the wake of the speak-out process that I have begun to understand the depth of that profundity.

Second, there seems to be a discernable coherence to the speak-out testimonies. Participants from different parts of the province have described remarkably similar experiences of betterment. Even the ways in which participants have articulated their experiences have much in common, from one community and district, to the next. For example, people tended to use common phrases at key moments in their respective testimonies. "That was when the trouble started". "Previously we were free; now we are in jail". "Not even a hen crosses a residential boundary without causing conflict".[1301] This coherence underpins my claim that betterment has informed the collective being of the rural people of the province. It is a total event, one that has focused the attention of all memories and life stories in the population.

The act of telling subjugated truths about cataclysmic or abysmal events can open old wounds, or cause new pain. In the case of VSC, a focus on the pain of betterment, coupled with a realisation that the democratic government denied/ disregarded this pain in its framing of restitution policy, could undoubtedly have caused renewed grief and anger. Feuchtwang has thought about processes that enable the turning of bad deaths into good

[1299] To reiterate, I use "Westaway" / "he" when referring to myself as actor in the narrative that is discussed in the thesis, and I use "I" when referring to myself as academic, as writer of this work.
[1300] Westaway, 1993, 198
[1301] BRC, 'Vulamasango Singene', a DVD documentary accessed in BRC Resource Centre, 2006b

deaths.[1302] As a minimum condition, the death must be adequately acknowledged and mourned. There are various ways in which the need for recognition can be satisfied (compensation being one). But unless and until such mechanisms are invoked by the state or another party, grievances only deepen; "the past does not wane but intensifies".[1303] In relation to cultural property specifically, Rowlands has noted that "grief over loss" can transmit "into a grievance due to lack of recognition".[1304] More specifically, "grief becomes grievance through the idealisation of loss, when the original sense cannot be resolved through adequate mourning and where the conditions do not exist to help people forget".[1305] In my understanding the methodology of the speak-out opened the possibility to explore the transformation immanent in a politics of grievance. I take note of criticism by the likes of Scott, who doubts the potential of what she calls a politics of resentment on the grounds that it is based on an "expression of victims' anger", which "substitutes for strategic interventions aimed at structural reform".[1306] She holds that such politics are a sub-set of identity politics, and as such suffer from "the loss of futurity characteristic of the late modern age".[1307] But this is certainly not the case if one adopts Foucault's understanding of identity (subjectification) and Baucom's conception of time. Contrary to Scott's understanding, a politics of grievance can hold out a future that triumphs over pain.

There is possibly an overlap between a politics of grievance and a politics of melancholy. Therefore it seems relevant to reintroduce Baucom's elucidation of the notion of melancholy at this point. He draws our attention to the possibility of taking "possession of grievous experience", of holding "property in what has been lost".[1308] Baucom justifies this use of the notion of property in two ways. First, he reminds us that the term property can refer to "an attribute or quality belonging to a thing or person".[1309] For Baucom, the capacity to hold loss is "the very property… of humanity".[1310] (He contrasts this with insurance, which holds "property in what can be exchanged for what has been lost".[1311]) Second, he points out that for classical thinkers such as Locke and Hegel, property is "the outcome of an investment" in an object.[1312] In this instance, "melancholy property" is the

[1302] Feuchtwang, 2000, 69
[1303] Baucom, 2005, 21
[1304] Rowlands, 2004, 218
[1305] Ibid, 2004, 219
[1306] Scott, 2004, 266
[1307] Ibid, 2004, 266
[1308] Baucom, 2005, 203
[1309] Ibid, 2005, 203
[1310] Ibid, 2005, 204
[1311] Ibid, 2005, 204
[1312] Ibid, 2005, 204

outcome of an investment of sentiment in loss.[1313] The loss, the grievous experience that Baucom refers to, happened in the past, to the dead. The sentiment referred to originates in the "desire to speak with the dead... to drink the mysterious blood of the past, and return it, momentarily, to life"[1314]. There is little that is macabre or self-indulgent in this desire; rather its effect is to "ally melancholy with… worldly *case-driven* obsessions".[1315] Just like Foucault then, Baucom emphasises the importance of historical perspective and local/ subjugated knowledge in taking forward contemporary struggles. Through this linkage of issues, I am reminded of Adorno's invocation of wound to signify the unexchangable. Life before betterment is gone; there can be no return – in any enduring sense – to it. But that does not mean that people cannot commune with the ancestors about the time before betterment. In reminding them of the deep wound, the ancestors can help people to formulate truths about contemporary South Africa; the wound causes a pain that is uniquely conducive to the generation of present-day truths. It remains very difficult, fifteen years after 1994, for the dispossessed to face facts about the present unless these are derived from or prompted by truths about the past. There is still too much idealism associated with the liberation movement (which is now in power) to allow for widespread critical analysis to be practised as the norm. Truths about the apartheid period are a basis upon which people can potentially formulate more contested truths pertaining to the post-1994 present. In the context of this campaign, the most basic truth in this regard is that people dispossessed through the implementation of betterment, were unfairly excluded from the restitution programme. Without understanding betterment as dispossession, one cannot regard the exclusion of betterment victims from restitution as prejudice. It is arguable that VSC has not done enough to open up the wound, and to use painful truth about the past to realise and propagate the painful truth of the present. This calls to mind Fanon's famous comment about truth in relation to the anti-colonial struggle. In the context of discussing the role played by 'wily intellectuals', he commented that "the unemployed man, the starving native do not lay claim to the truth; they do not *say* that they represent the truth, for they *are* the truth".[1316] In the context of contemporary Eastern Cape, the truth is an eighty year old woman who supports four children and grandchildren on her pension of R860 per month. She was dispossessed by betterment.

[1313] Ibid, 2005, 205
[1314] Ibid, 2005, 260, 261
[1315] Ibid, 2005, 260
[1316] Fanon, 1967, 38

Conclusion

Since April 2004 national government has formally acknowledged post-1994 discrimination against victims of betterment dispossession in the Eastern Cape. In the intervening years however, it has not moved to redress this discrimination in any way. It is possible that government has no intention of righting post-1994 prejudice voluntarily. Put differently, though government acknowledges the prejudice in the 1996 Green Paper and 1997 White Paper, it is unclear how it intends to make amends in this regard. There are indications that government is intent on merely saying to the victim communities: we will ensure that you are listed for priority attention through our normal programmes. In other words, more of the same, more of nothing. A reason for government's indifference is that the campaign undermines key elements of the grand narrative underlying restitution, and the post-1994 regime of truth more broadly. VSC has sought to effect human rights, development, democracy, citizenship for those who live the bare life in the abyss. This is anathema to a government determined to manage South Africa as a bifurcatred nation-state.

The chronicle and analysis in this chapter raise issues of relevance to organised civil society in general and BRC in particular. It suggests that BRC's objective of winning VSC will be better served if it reconsiders some of the basics of the campaign, including positioning, agency, structure and knowledge production.

Chapter 7 – Two wrongs don't make a right

Introduction

The issue of human rights features prominently in various parts of this thesis. In Chapter 2, I argue that human rights discourse has been a fundamental part of the prevailing regime of truth since the 1980s. Apparent antagonists, the ANC and NP found each other easily and amicably through human rights discourse, and reflected the extent of their common interest through formulating a broad-ranging constitutional Bill of Rights. In the chapter, I use this understanding to explain the twin decision by the CODESA negotiators to protect existing apartheid property rights and to provide restitution for the dispossession of property rights due to segregation and apartheid after 1913. Chapter 3 outlines the performance of two rights-based exercises, namely the restitution, and the truth and reconciliation programmes; specifically it argues that the implementation of these processes produced effects that shored up (rather than challenged) dominant power configurations and failed to offer benefits to their supposed beneficiaries (ie victims of dispossession and human rights violations). Chapter 4 focuses specifically on the decision of the elected government to exclude dispossession in the former Bantustans (termed betterment) from the parameters of the restitution programme. That is, the right to restitution was limited to people dispossessed inside the borders of former white South Africa. It argues that this policy decision was consistent with a spate of others that also differentiated between former white South Africa and the Bantustans. This differentiation is explained by invoking the notions of bifurcation and exceptionalism. Those living bare life in the Bantustans are excluded from rights, democracy, and development, and instead subjected to custom, autocracy and welfare. In Chapters 5 and 6 I outline processes undertaken by BRC in the past ten years that attempted to establish two historical truths on the side of resistance, namely that betterment dispossessed people of land rights and that the post-1994 government unfairly excluded Bantustan inhabitants from the restitution programme. BRC undertook this work as an expression of rightful resistance. That is, the organisation operated within the established legal framework and attempted to utilise the promises of that framework to advance the above-mentioned truths. However, BRC's entanglement in the prevailing regime of truth and its complicity in majority politics meant that it advanced technical knowledge at the expense of local knowledge, that it secured individual redress but sacrificed communal compensation, and that it focused on the boardroom more than the community hall, and the politician more than the villager. In other

words, as much as BRC advanced certain rights, it also entrenched hegemonic discourses that effectively subjugate people.

This highlighting of some of the ways in which the thesis considers and positions itself in relation to rights reflects the complexity of the issue. It is not simply a matter of saying, as Derrida would have us say, that society should "more than ever stand on the side of human rights. *We need human rights*. We are in need of them and they are in need, for there is always a lack, a shortfall, a falling short, an insufficiency; human rights are never sufficient".[1317] In a bid to try to resolve some of the tensions that run through my various approaches to human rights, I put the focus squarely on the issue in this final, concluding chapter. This focus is justified, not only because of the prominence of human rights discourse in this work, but also because it has become "one of the most pressing and intractable matters of political life" globally, in the modern era.[1318] As Balfour and Cadava remind us, "the idea and the facts of human rights… now inform the political agendas of countless nations and increasingly influential transnational institutions".[1319] One of these nations is South Africa. Gouws asserts that "the discourse of rights and liberal democratic individualism has become the prevailing discourse in South Africa" in the post 1994 period.[1320] The Comaroffs concur, elaborating that the language of legality is "ubiquitous", the Constitution "biblical", and the "generic citizen… the rights-bearing individual".[1321]

It seems appropriate therefore to conclude the thesis by presenting an overview of recent critical analyses of human rights discourse. This body of work challenges contemporary assumptions about the nobility and desirability of human rights, and about the appropriateness of rightful resistance. As such it provides me with a final lens through which to survey the post-1994 landscape of property/ restitution in South Africa. In closing the thesis, I propose that the most pressing task facing South African historians is not to

[1317] Quoted in Balfour, I. & Cadava, E. 'The Claims of Human Rights: An Introduction', The South Atlantic Quarterly 103: 2/3, Duke University Press, 2004, 278, 279
[1318] Balfour & Cadava, 2004, 277
[1319] Ibid, 2004, 278. This quote hints at aspects of the modern global context within which the discourse has emerged and continues to thrive. For Spivak, the emergence of the discourse "as the global dominant [is] contingent upon the turbulence in the wake of the dissolution of imperial formations and global restructuring" (Spivak, G. 'Use and Abuse of Human Rights', boundary 2, 32:1, 2005, 145).
[1320] Gouws, A. 'Introduction', in A. Gouws (ed), (Un)thinking Citizenship: Feminist Debates in Contemporary South Africa, Ashgate: Aampshire, 2005, 8
[1321] Comaroff & Comaroff, 2005, 45, 46

consolidate the hegemonic history of human rights, but rather to formulate much-needed counter-narratives, on the ongoing history of human wrongs.

Critical Literature Review of Human Rights Discourse

The origins of human rights discourse are found in the late eighteenth century, more specifically in the Enlightenment and the Age of Revolution.[1322] In elaborating a genealogy of the discourse, I draw again on the likes of Foucault and Baucom, but also attempt to integrate classic texts by the likes of Arendt and Agamben, as well as the commentary of a wide array of critical theorists. For Hegel, the history of right (justified claim) has evolved through three stages, namely aristocratic, bourgeois and statist. Aristocratic right derived from property, bourgeois right derives from exchange, and statist right derives from jurisprudence.[1323] Foucault reminds us that the main role of the notion and assertion of right, for the past millennium, has been "to fix the legitimacy of power"; in the most recent period it has legitimised sovereign power in particular.[1324] One way that right has increased popular acceptance of sovereign power is through effacing the domination that is intrinsic to it.[1325] Through this exposition, one can comprehend the intimate relationship between right and the nation-state.

Linking the notion of sovereignty to jurisprudence, Schmitt defines a sovereign as "he who decides on the state of exception".[1326] It is usually assumed that the sovereign exercises power inside the juridical order, but the "hidden secret of modern power" is that the power to suspend legality is *the* principle of political authority.[1327] Noting the importance of the law, since the late eighteenth century, as a mechanism in establishing right,[1328] Foucault seeks to elucidate the domination that lies at its core.[1329] The law, he writes, "is a calculated and relentless pleasure, delight in the promised blood, which permits the perpetual instigation of new dominations and the staging of meticulously repeated scenes of violence".[1330] He goes on to argue that humanity does not evolve from warfare to civility,

[1322] Ibid, 2000, 4; Balfour & Cadava, 2004, 278, 282; Comaroff, 2001, 60
[1323] Baucom, 2005, 297,8
[1324] Foucault, 1980, 95
[1325] Foucault, 1980, 96
[1326] Quoted in Agamben, 1998, 11; see also Ranciere, 2004, 300
[1327] Ibid, 2004, 300
[1328] For the Comaroffs, the modenist polity "has always been rooted in a culture of legality". "The global spread of neo-liberal capitalism has intensified the grounding of citizenship in the jural". "The growing salience of the law – in fact the legalisation of politics *tout court* – is… an integral feature of the neo-liberal moment" (Comaroff & Comaroff, 2005, 45, 54).
[1329] For example, Foucault, 1980, 97
[1330] Ibid, 1977, 51

where the rule of law ensures universal reciprocity. Rather, "humanity installs each of its violences in a system of rules and thus proceeds from domination to domination".[1331] It is for this reason that he asserts that politics is the "sanctioning and upholding" of "the disequilibrium of forces that was displayed in war"; so "power is war… war continued by other means".[1332] This insight reinforces the analysis of the 1993 constitutional outcome pertaining to property/ restitution presented in chapter 2.

Human rights discourse began by being declared. The famous Declaration of 1789 and other declarations "represent the originary figure of the inscription of natural life in the juridico-political order of the nation-state".[1333] (It is useful to state the obvious: these declarations were legal statements.) Natural life here equates with Agamben's notion of bare physiological life (rather than a complete, political life – "the life of great actions and noble words"), zoe rather than bios.[1334] Arendt uses various terms to describe this state, "the abstract nakedness of being human", "mere existence", "some species of an animal species, called man", "human being in general".[1335] In this state (without profession, citizenship, opinion or distinguishing deed),[1336] (wo)man is alone in her/ his privateness, she/ he represents "nothing but [her/] his absolutely unique individuality"; "deprived of expression within and action upon a common world", such life has no significance or distinctiveness.[1337]

Agamben's claim is that declarations of right entail the expansion of the reach of the nation-state; they bring bare life within the realm of the state.[1338] This happens because declarations of right both "make natural life appear as the source and the bearer of rights", and assert government as the guardian and guarantor of rights.[1339] Modern sovereignty constituted "the bare condition" of life in order to constitute itself.[1340] Declarations of right provide "the earthly foundation of the state's legitimacy and sovereignty".[1341] The rationale and purpose of the state becomes to regulate and guarantee the expression and realisation of the rights associated with basic existence, bare life. This line of argument is

[1331] Ibid, 1977, 51
[1332] Ibid, 1980, 90, 91
[1333] G Agambem, quoted in Baucom, 2005, 189, 190
[1334] G Agamben, quoted in Ranciere, 2004, 299
[1335] Arendt, H. The Origins of Totalitarianism, George Allen and Unwin Ltd: London, 1961, 299, 301, 302
[1336] Balfour & Cadava, 2004, 281
[1337] Arendt, 1961, 302
[1338] Agamben, 1998, 127
[1339] Ibid, 1998, 127; Ranciere, 2004, 300
[1340] Baucom, 2005, 190
[1341] Agamben, 1998, 127

neatly summarised by Baucom who writes that "a global politics of human rights … must be grasped as one of the very things which links the state to and establishes its sovereignty over life itself, life stripped bare, life in its abandoned appearance as zoe".[1342] Herein lies the origins of biopower, that is sovereign power over life, which developed into one of the most important forms of power in the twentieth century. Rather than being understood as a discourse that limits or constrains the state, human rights discourse in fact "massively expands the boundaries of state control and sovereign power".[1343]

Before examining some of the ways in which human rights discourse has expanded modern state power, it is useful to spell out the content of those human rights associated with and deriving from the constitution of bare life. What rights derive from natural life? Agamben implies the emptiness of those rights that "are attributed to man (or originate in him)" because the identity or nature of this 'man' "is the immediately vanishing ground... of the citizen".[1344] It is left to Ranciere to spell this out in more explicit terms. His elucidation is based on a particular reading of Arendt; he understands her to have argued that "the Rights of Man are the rights of those who are only human beings, who have no more property left than the property of being human. Put another way, they are the rights of those who have no rights, the mere derision of right".[1345] Hence Badiou notes the relationship between human rights discourse and victimhood,[1346] and Brown observes that it takes shape "as a moral discourse centred on pain and suffering".[1347] Badiou goes on to define human rights in negative terms - "we won't massacre you, we won't torture you in caves"; human rights are "rights to non-Evil".[1348] Based on this understanding, Ranciere is cynical in his dismissal of human rights. He says that, on realising the emptiness and uselessness of rights, the powerful do the same with them "as charitable persons do with their old clothes. [They] give them to the poor".[1349] Spivak approaches the issue from a different vantage point, one that adds another layer to this insight. She speaks of human rights and human wrongs, and notes that some people always right wrongs, whilst others

[1342] Baucom, 2005, 189
[1343] Ibid, 2005, 190
[1344] Agamben, 1998, 128
[1345] Ranciere, 2004, 298
[1346] Badiou, 2001, 10
[1347] Brown, W. '"The Most We Can Hope For…": Human Rights and the Politics of Fatalism', The South Atlantic Quarterly 103: 2/3, 2004, Duke University Press, 453. She contrasts this with a "political discourse of comprehensive justice".
[1348] Badiou, 2001, 2, 9. For Badiou, human rights discourse is "the ideology of modern capitalism". The quid pro quo that people have to accept in return is quiet acquiescence – "keep quiet and worship the golden calf" (ibid, 2001, 2).
[1349] Ibid, 2004, 307

are “perennially wronged”.[1350] Amongst these latter are the rural poor, who constitute the mass of those who are the “silent victims of pervasive… human rights violations”.[1351] Such analyses suggest that we should understand human rights as the rights of those who are persistently and systematically wronged. Whereas human rights discourse promises the world to the poor, ultimately its delivers them nothing. Human rights have no substance; they are a chimeric ruse.

In the light of arguments presented in earlier chapters, this critique of human rights discourse is devastating. Chapter 4 described the Bantustans as places that are denied rights, and Chapters 5 and 6, although critical of BRC’s attempts at speaking truth to power, willed the virtue of rightful resistance. If the content of human rights is empty, then maybe custom is not so bad after all, and perhaps rightful resistance is a cul-de-sac? Such a reaction though, is inappropriate and unwarranted. The challenge is to grasp the implications of the critique for an analysis of property/ restitution in South Africa. My understanding in this regard is as follows. The twin-decision in 1993 to protect existing property rights and to make provision for a programme of restitution reflected the balance of forces at the time. That is, these decisions suited the dominant class and demographic interests in the ANC and NP. Principally, the decision amounted to an affirmation of the hegemony of private, individualized freehold property; it was part of a broader agreement that South Africa would adopt free-market economics. At the time of negotiations and constitution writing, the rural poor were weak, so the provision for restitution was not a response to their organizational or political power. This is the context that should be acknowledged in order to understand why the restitution rights of the rural poor are empty, without substance, and why the property rights of the capitalist minority have been effectively entrenched and secured. Gouws refers to this distinction between how the poor and the rich experience human rights, as the difference “between having citizenship and living it”.[1352]

The above discussion is a useful base on which to explore the productive workings of human rights discourse during modernity. For Baucom (using the words of Agamben), its primary effect has been to produce “bare life in the camp”.[1353] It has achieved this effect “in

[1350] Spivak, 2005, 137
[1351] Ibid, 2005, 144, 145
[1352] Gouws, A. ‘Shaping Women’s Citizenship: Contesting the Boundaries of State and Discourse’, in A. Gouws (ed), (Un)thinking Citizenship: Feminist Debates in Contemporary South Africa, Ashgate: Aampshire, 2005a, 87
[1353] Baucom, 2005, 189

two primary ways: via an internal (or biopolitical) regime of sovereign power and via an external (or geopolitical) regime of sovereignty".[1354] I explore each of these in turn. Arendt's work is seminal because it provided a starting-point for the development of critical thinking about human rights discourse in general and for the articulation of biopower in particular. For her, writing in the aftermath of the Holocast,[1355] human rights have content and substance but are integrally linked to national citizenship, especially of "the most prosperous and civilized societies".[1356] For her, the loss of citizenship, of national rights, entails the loss of human rights.[1357] (She notes, in this regard, that sovereign power "is nowhere more absolute than in matters of emigration, naturalization, nationality and expulsion".[1358]) This loss has various dimensions and implications, including the loss of one's home. The "routine solution" invented by the authorities to address this problem is "the internment camp".[1359] This dichotomy – between home and the camp – points to a bigger, framing disjuncture, namely living within the rule of law as opposed to being locked outside the legal framework. Ranciere underlines the "plainly contemptuous tone" of Arendt's famous quote that the plight of the rightless "is not that they are not equal before the law, but that no law exists for them, not that they are oppressed but that nobody wants even to oppress them".[1360] Although Arendt's work is now somewhat outdated, it was the first to raise some of the fundamental contradictions in human rights discourse (for example between the supposed inalienability of human rights and their actual vulnerability to sovereign dispossession,[1361] between their supposed universality and their actual dependence on a nation for their "definition, protection, and realisation",[1362] and so on). There is little doubt that it was Arendt's refugee – "the haunting opposite (and double) of the citizen"[1363] - that led to "a kind of breakdown" of then prevailing understandings of human rights.[1364]

Although biopower was founded on those rights associated with bare life, over time it has developed through constituting and appropriating an ever expanding set of rights,

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[1354] Ibid, 2005, 189
[1355] For Ranciere, just as the sovereign discretion to suspend the law is the "hidden secret" of modern power, so too the "Holocaust appears as the hidden truth of the Rights of Man – that is, the status of bare, undifferentiated life, which is the correlate of biopower" (Ranciere, 2004, 301).
[1356] Arendt, 1961, 279
[1357] Ibid, 1961, 299. See also Balfour & Cadava, 2004, 281
[1358] Arendt, 1961, 278
[1359] Ibid, 1961, 279
[1360] Ranciere, 2004, 299; Arendt, 1961, 295, 296
[1361] Ibid, 1961, 279
[1362] Balfour & Cadava, 2004, 281
[1363] Baucom, 2005, 190
[1364] Balfour & Cadava, 2004, 280

associated with bios. As Balfour and Cadava put it, during the course of the last century, "human rights have been continually broadened, elaborated, clarified and defined".[1365] The implication of this is clear – the ambit of the state, the responsibilities of the state increase apace. In this context, political struggle revolves around the ability of the poor to draw attention to the contradictions and dichotomy between the vast extent of their paper rights on the one hand, and their lived, rightless reality on the other hand. Ranciere calls this the capacity "to construct a dissensus against the denial of rights they suffer".[1366] In this model, political space is constituted by "the very gap between the abstract literalness of the rights and the polemic about their verification".[1367] Pitted against the poor are the biopower forces of consensus, which attempt to patch over "the possible gaps between appearance and reality or law and fact".[1368] Consensual voices deny the contradictions and dichotomy between law and fact. Unsurprisingly, the megaphone voices of consensus have tended to drown out the dissensual voices of the poor. In the process, political space has diminished "more and more every day".[1369] (This reduction of political space has taken place on the back of widening margins of societal inequality.) This phenomenon is described by Agamben as follows: in modern politics, "the decisive fact is that, together with the process by which exception everywhere becomes the rule, the realm of bare life – which is originally situated at the margins of the political order – gradually begins to coincide with the political realm, and exclusion and inclusion, outside and inside, bios and zoe, right and fact, enter into a zone of irreducible indistinction".[1370] In this analysis, there is a gradual convergence of modern democracy with totalitarianism.[1371] Baucom presents a closely related argument. For him, biopower results not only in aliens and refugees standing vulnerable before the law, but places citizens in a similar position. According to its discretion the state may, "at any moment", no longer recognize citizens' "signature political characteristics".[1372]

Biopower builds its consensus through a few primary devices, two of which are to remove agency from the people (and instead to place responsibility for the realisation of rights in the hands of government), and to turn the realisation of rights from a political into a technical process. For Neocosmos a central prescript of liberal discourse is the assertion

[1365] Balfour & Cadava, 2004, 277
[1366] Ranciere, 2004, 306
[1367] Ibid, 2004, 307
[1368] Ibid, 2004, 306
[1369] Ibid, 2004, 307
[1370] Agamben, 1998, 9
[1371] Ibid, 1998, 10
[1372] Baucom, 2005, 191

that “politics is reducible to the state”, or otherwise put, that “the state is the sole legitimate domain of politics”.[1373] The reason for this is that the expansion of human rights discourse is properly understood as the most important recent manifestation of the social abstraction of struggle. Past achievements, won through race-, gender-, labour-based and other struggles, are relinquished when incorporated by government in abstract form; advances made earlier have thus, more recently, been reversed. The words of Luxemburg written about a century ago, still ring true today: “there are no ‘eternal’ truths and… there are no ‘rights’… the real content of these ‘eternal’ truths, rights, and formulae is determined only by the *material* social conditions of the environment in a given historical epoch”.[1374] Wilson uses the concept of “legal fetishism” to refer to the “increasing legalization of political issues” in post-1994 South Africa.[1375] Luxemburg went on to illustrate that if then governments happened to declare a universal right to work, “it would remain only a fine-sounding phrase, and not one member of the rank and file of the reserve army of labour waiting on the sidewalk would be able to make a bowl of soup for his hungry children from that right”.[1376] Balfour and Cadava concur, arguing that for human rights to be meaningful, they must be “time-bound in their articulations, their codifications, and their applications”.[1377] For the Bantustan subject, rights to restitution, development and the like, have no material consequences; their main utility is that they open the path for incompetent, under-resourced state agencies to take full control of the (non-)planning and (non-)implementation of development processes.

In the realm of the state, the political character of human rights is eradicated and transformed into a set of technical rules and standards, “transcendental moral claims”, or “creeds of tolerance”.[1378] After this transformation, human rights become “conservative” and their content as well as the means of their delivery are “not subject to debate or contestation”.[1379] Rather, the government, from on high, is expected to guarantee, deliver and roll out rights in a formulaic, technical, objective fashion.[1380] For Neocosmos, “state fetishism is so pervasive within the hegemonic discourse that debate is structured by the apparently evident ‘common sense’ notion that the post-apartheid state can ‘deliver’

[1373] Neocosmos, 2006, 59
[1374] Luxemburg, R. “The National Question and Autonomy”, The Human Rights Reader, New York, Routledge, 1997, 291
[1375] Wilson, 2001, 29
[1376] Luxemburg, 1997, 293
[1377] Balfour & Cadava, 2004, 282
[1378] Brown, 2004, 458; Neocosmos, 2006, 67
[1379] Neocosmos, 2006, 91, 67
[1380] Ibid, 2006, 67

everything from jobs to empowerment, from development to human rights, from peace in Africa to a cure for HIV-AIDS".[1381] As shown in earlier chapters, the post-1994 South African government has not delivered substantive rights in the Bantustan and other poor areas. Rather than seeing this as a failure deriving from capacity constraints (as the likes of Wilson does), it is better understood as an expression of the government's neo-liberal development agenda.[1382] Balfour and Cadava are correct to assert that governments tend to uphold and implement human rights' codes "in grudging, half-hearted, or highly selective fashion, primarily when it suits other political agendas or does not conflict with an economic bottom-line".[1383] This insight casts new light on government's failure to implement the 2002 Keiskammahoek Settlement Agreement and to adhere to the approved recommendations of the 2004 memorandum. Government failed to implement these agreements because it did not really believe in them in the first place.

Another important consideration here is to think about the productive value of apportioning full responsibility for guaranteeing human rights to the government. In this regard, Brown suggests that rights "can themselves be tactics and vehicles of governance and domination".[1384] Within the narrow framework of "state-focused" and "technicized politics", struggle is reduced "to a demand for inclusion into an existing state domain".[1385] In the context of post-1994 South Africa, Neocosmos describes this as the restriction of public engagement to the technical and managerial dimensions of delivery.[1386] Gouws agrees. For her, liberal rights discourse – which imbues rights with "an intrinsic value", distinct from politics, but dependent on the state – diminishes political choices and leads to "passivity and reliance on the state".[1387] Balfour and Cadava note the paradox that most of the so-called new human rights (eg the right to development), far from being universal, have to be claimed. This raises all the questions associated with speech acts generally: "who gets to claim rights, how, when, where, and in what conditions of enunciation and reception?"[1388] These questions focus attention on relations of power, and are easily, emphatically answered: the rich get what they want, and the poor get old clothes and soup kitchens (if they are lucky, that is).

[1381] Ibid, 2006, 59. He reminds us that common sense is consensual sense.
[1382] Wilson, 2001, 18
[1383] Balfour & Cadava, 2004, 283
[1384] Brown, 2004, 459
[1385] Neocosmos, 2006, 67
[1386] Neocosmos, 2006, 59
[1387] Gouws, 2005, 8
[1388] Balfour & Cadava, 2004, 292

The depoliticization effected by human rights discourse is often due to the prominent role played by third parties in its execution.[1389] These parties are expected to bring rationality, impartiality and calmness to a contest, and to provide a disinterested, appropriate judgement to resolve the disputed matter. As Badiou writes, referring to the persistent influence of Kant, "[p]olitics is subordinated to ethics, to the single perspective that really matters in this conception of things: the sympathetic and indignant judgement of the spectator of the circumstances".[1390] This insight enables both a reference point for BRC's prominence in the narratives above, and a measured assessment of the organisation's penchant for technical knowledge. Without BRC, there would be neither a Cata Settlement Agreement, nor a Vulamasango Singene Campaign. The involvement of the third party has been a necessary condition for the generation of the historical truth claims discussed in the preceding chapters. Similarly, the perspectives of Baucom and Badiou lead one to surmise that it would have been unusual had BRC – as a third party – adopted anything but a technical approach. This is not to say that I seek to exonerate BRC for questionable approaches that it used and decisions that it took from 1998 to 2008, but rather to provide a theoretical context that helps to explain the organization's orientations.

In arriving at its conclusions, the third party, according to Badiou, tends to rely on "the play of necessity" as the objective basis for its judgments – capitalist economics is the science of necessity in the contemporary era.[1391] (Politics, by contrast, require a capacity and willingness to understand "the singularity of situations", and to formulate an appropriate set of human "thought-practice" in response. For Badiou, humanity – "a tissue of truths" – is imbued with these capacities.)[1392] In post-1994 South Africa, necessity has been termed (initially by the courts) "progressive realisation".[1393] This term was coined in the well-known Grootboom case, which tested the extent of citizens' right to housing. The court decided that citizens could not legitimately demand the immediate fulfilment of their need for shelter. Instead, they would have to be content with the government taking reasonable legislative, administrative, budgetary and other measures to progressively realize the right to housing.

[1389] Baucom, 2005, 298
[1390] Badiou, 2001, 9
[1391] Ibid, 2001, 32, 30
[1392] Ibid, 2001, 12, 13, 14
[1393] There is a lot of useful material on "progressive realisation" available online. See for example, Idasa, 'The Grootboom case and women's housing rights', Budget Brief, No 111, October 2002, accessed on http://www.idasa.org.za/bis.

Neocosmos emphasizes that an effect of the mediation of an external body to resolve an issue at stake, is that the claimants are absolved from the responsibility of taking up the issue themselves.[1394] The issue is depoliticized and the masses are demobilized. Generally speaking, it is the judiciary that plays the mediation role, but it can also be another actor in political society or a civil society actor, such as an NGO. In order to access mediation, claimants, or those who represent them, need to talk human rights language. Human rights advocates are fluent in the language, but the poor and subaltern classes do not understand nor speak the language. Hence Spivak refers to the "real epistemic discontinuity between the Southern human rights advocates and those whom they protect".[1395] For this reason, she suggests that the "absence of redress without remote mediation" is the definitive lack that all subalterns suffer from.[1396] She goes on to note that even when rural poor appear to win in court, these victories seldom bring tangible benefits; instead they sometimes lead to revenge action or spiteful inaction from state institutions.[1397] (It is notable in this regard that Irene Grootboom died in 2008, eight years after the Constitutional Court judgement, in her shack; the progressive realization of the right to housing never reached her during her lifetime.)[1398] In line with Spivak's thinking and drawing on Gramsci, Chatterjee draws a distinction between civil society practices, which are technical in nature and therefore only accessible to and implemented by middle-class professionals, and those of "mass poor populations" whose claims are "irreducibly political".[1399] Von Lieres asserts the applicability of this analysis in contemporary South Africa. She writes that "[m]arginalised communities often have difficulties advancing their interests within the framework of juridical rules. Instead of making use of rights-based politics, they rely on substantive claims".[1400]

Much of the appraisal of human rights discourse presented above draws from, or is at least in line with, a standard Marxist critique of bourgeois rights. The basic assertion of this critique is that the underclasses are systematically prevented from realizing their rights for

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[1394] Neocosmos, 2006, 68
[1395] Spivak, 2005, 139. Similarly, she later refers to "the discontinuous divide between those who right wrongs and those who are wronged" (2005, 188). She argues that even when human rights culture is implemented in the South, by Southerners, it "runs on unremitting Northern-ideological pressure" (2005, 138).
[1396] Ibid, 2005, 169
[1397] Ibid, 2005, 171
[1398] Joubert, P. 'Grootboom dies homeless and penniless', Mail & Guardian, Aug 8 to 14 2008a, 35
[1399] Neocosmos, 2006, 79. In a Gramscian framework, civil society is "well ensconced within a (bourgeois) state domain of politics and political consciousness" (Ibid, 2006, 65).
[1400] Von Lieres, B. 'Marginalisation and Citizenship in post-Apartheid South Africa, in S Robbins (ed) Limits to Liberation after Apartheid: Citizenship, Governance and Culture, David Philip: Cape Town, 2005, 31

various key reasons, including unaffordability, lack of knowledge and lack of requisite resources. Because of the fundamentally unequal nature of society, it is naïve to anticipate or expect an equality of rights.[1401] As Chatterjee argues, the appearance of equality in law, does not abolish or even lessen existing class, race and gender divisions. "Rather, the universalism of the theory of rights both presupposed and enabled a new ordering of power relations in society based precisely on these distinctions of class, race, religion, gender".[1402] More specifically, it has enabled the exclusions of the poor majority from liberal democratic politics and it has led to the rise of rampant individualism.[1403] When viewed in this light, it should come as no surprise that human rights discourse tends to emphasize and favour the rights of individuals, above those of groups; this despite the fact that the grossest violations of human rights (eg the Holocast, apartheid) were meted out to members of specific groups (eg Jews, blacks).[1404] Proponents of human rights such as Ignatieff argue that collective rights threaten the individual and undermine the legitimacy of rights.[1405] The reason for this, as renowned theorist of justice Rawls has pointed out, is that human rights discourse is "circumscribed by ideas or ideologies of Western individualism".[1406] Chapter 5 outlined how BRC supported and promoted a framework of agreement in the Cata and Keiskammahoek cases that recognized individual losses but disregarded collective dispossession. This was explained in relation to prevailing regime of truth in general and hegemonic notions of property in particular. The analysis presented here adds an extra layer of understanding, namely that human rights discourse contributes to the ramification of the individual and the decimation of the group. As Gouws writes, the "liberal rights discourse frames citizenship in South Africa around rights claiming by individuals through their engagement with the state. A lesser value is placed on the community and the collective needs of groups of people, especially defined around interests".[1407]

South Africa was and is one of the most unequal societies in the world. The literature points out that human rights discourse is implicated in the fight between forces wanting to

[1401] Ibid, 2006, 67
[1402] Chatterjee, P. The Politics of the Governed: Reflections on popular politics in most of the world, California University Press: New York, 2004, 30
[1403] Neocosmos, 2006, 68; Badiou, 2001, 4, 7. In fact, the relation between these two results is clearly apparent if adopting Ranciere's definition of democracy as "the mass-individualistic concern with individual life" (Ranciere, 2004, 300).
[1404] Balfour & Cadava, 2004, 285
[1405] Brown, 2004, 457. Badiou argues that efforts "to unite people around a positive idea of the Good" are denounced as a source of Evil (Badiou, 2001, 13).
[1406] Balfour & Cadava, 2004, 285
[1407] Gouws, 2005, 8

maintain the status quo and those seeking a redistributive remedy to the situation, or in other words, in the tension between liberty and equality.[1408] In the hegemonic liberal democratic perspective, justice and human rights are interchangeable concepts. Justice is achieved through equalising access to rights and opportunities, because there is a denial of underlying societal inequalities.[1409] Manicom points out that an effect of implementing (class blind) human rights discourses is that they advantage the already powerful and further disadvantage the already weak.[1410] It is no surprise therefore that in terms of an opposing perspective, justice is achieved through effecting substantive equality.

Having spent considerable space outlining the internal biopolitical regime of sovereignty, I now turn attention – briefly – to the external geopolitical regime, as the second technique through which human rights discourse has produced bare life in the camp. Above I explained Ranciere's understanding that human rights are empty of substance and value and therefore tossed to the rightless and the poor, like old clothes. What needs to be added to the analysis here is that these rightless and poor themselves have no mechanism whereby to use these discarded rights. For all this, Ranciere insists, the rights "are not void… they can become the rights of others".[1411] Thus they become reclaimed by the powerful, the rightful, but this time in a new guise, as international rights to monitor human rights situations and to intervene, on behalf of the rightless, to uphold human rights conventions.[1412] As Balfour and Cadava point out, the right to humanitarian interference is a euphemism for military intervention.[1413] So Spivak's suggestion that the idea of human rights "may carry within itself the agenda of a kind of social Darwinism – the fittest must shoulder the burden of righting the wrongs of the unfit – and the possibility of an alibi [for economic, military, and political intervention]", is useful.[1414] It is precisely the strongest nations that have increasingly presented themselves as "the guardians of humanity", the

[1408] Klug, 2000, 24
[1409] Gouws, 2005, 3; Gouws, 2005a, 78. For Neocosmos, liberalism cannot effect social justice because its main concern is the "harmonization" of powerful interests, rather than the pursuit of equality (Neocosmos, 2006, 83).
[1410] Manicom, L. 'Constituting 'Women' as Citizens: Ambiguities in the Making of Gendered Political Subjects in Post-Apartheid South Africa', in A. Gouws (ed), (Un)thinking Citizenship: Feminist Debates in Contemporary South Africa, Ashgate: Aampshire, 2005, 35. It is for this reason that at the time of independence in some African countries, there was a breach between rights discourse (which was used to defend racial privilege and understood as such) and the language of nationalism and social justice (which promised to bring about transformation) (Mamdani, 1997, 21). However, the latter quickly degenerated into statism and technicism, and thus failed to facilitate redistributive processes (Ibid, 1997, 21).
[1411] Ranciere, 2004, 307
[1412] Ibid, 2004, 298, 308.
[1413] Balfour & Cadava, 2004, 290
[1414] Spivak, 2005, 132

trustees of human rights.[1415] Although the right to war is supposedly conducted on behalf of the rightless in foreign countries, these people seldom (if ever) ask for assistance from the aggressor. Also, the intervening nation often flouts international law and dismisses the advice of humanitarian organisations, in arriving at the decision to go to war.[1416] In conducting the wars, the global power-houses sometimes commit human rights violations and war crimes, and then claim immunity from prosecution under international law. In other words, the "defense of human right and international justice is inevitably entangled with their transgression".[1417] The consequences in the invaded countries are dastardly: destruction, dispossession, death.[1418] Therefore Ranciere is correct to assert that the right to humanitarian war "achieves on the world stage what consensus achieves on the national stage: the erasure of the boundary between law and fact, law and lawlessness".[1419] From a post-colonial perspective, this analysis leads one to the conclusion that human rights discourse enables dominant states, working in concert with transnational agencies and NGOs, to undermine, weaken, even destroy new nations.[1420] Some observers like Neocosmos describe the human rights movement today as a civilizing crusade against the Third World. From this perspective, Neocosmos repeats the question first posed by Hardt and Hegri: should the enforcement of human rights be understood as the new form of empire? He arrives at the same answer that they arrived at: an emphatic 'yes'.[1421]

Historians and Human Rights/ Wrongs

In the opening chapter, I made reference to the well established and broadly acknowledged linkage between history and nationalism. That is, through its signification of national identity, history underpins and sustains nationalism. Here I take this further by drawing on the thinking of Chakrabarty. He uses the term "political modernity" to refer to the prevailing era, which is characterised by rule by the "institutions of the state, bureaucracy, and capitalist enterprise".[1422] (We should recall here that history is the knowledge form that corresponds to the nation state.[1423]) Chakrabarty argues that it is

[1415] Balfour & Cadava, 2004, 288. Thanks to Russell Grinker for emphasising the usefulness of trusteeship as an analytic tool of ongoing relevance in the post-colonial era.
[1416] Ranciere, 2004, 308; Balfour & Cadava, 2004, 290
[1417] Balfour & Cadava, 2004, 290
[1418] Ibid, 2004, 282
[1419] Ranciere, 2004, 309
[1420] Spivak, 2005, 134
[1421] Neocosmos, 2006, 56
[1422] Before writing Provincializing Europe, he referred to the most recent expression of political modernity as liberalism (Chakrabarty, 1995, 385).
[1423] Ibid, 1995, 385

impossible to think of political modernity without invoking key contemporary concepts that have their origins in European thought. These concepts include citizenship, civil society, human rights, equality before the law,[1424] democracy and popular sovereignty.[1425] Indeed, these concepts have become United Nations-type bottom-line essentials for an acceptable contemporary nation. It is not a simple matter of walking out of this paradigm, because there is a "deep collusion" between history, and the modernizing narratives of citizenship and human rights. [1426] History demands that we see features such as human rights as the culmination of human civilization. Therefore, for Chakrabarty, any real attempt to think otherwise, or what he calls to provincialise Europe, requires "a history that does not yet exist".[1427]

Human rights discourse is not only integral to many hegemonic contemporary institutions and configurations, we should also recall that it has informed many marginal socio-economic groups (eg caste groupings, women, anti-colonial freedom fighters, and so on) in their twentieth century struggles, by providing "a strong foundation on which to erect… critiques of socially unjust practices".[1428] This reflects the extent to which the central ideas of the Enlightenment have been appropriated throughout the postcolonies of Europe.[1429] Chakrabarty notes that "this recognition is indispensable to the project of Subaltern Studies".[1430] It is not easy to dispense with Enlightment universals such as human rights because "[w]ithout them there would be no social science that addresses issues of modern social justice".[1431] Writing specifically about South Africa, Manicom agrees that "the discourse of rights has been a primary vector for various forms of anti-colonial, anti-apartheid and now democratic struggle".[1432] Indeed, in Chapter 2 I noted the long history of human rights discourse within the ANC, and in Chapter 6 I confirmed that many post-1994 social movements base their struggles in the Bill of Rights.

Progressive thinkers and activists have a choice about how to confront and engage human rights discourse. I suggest that the following two options may hold interest and promise.

[1424] Comaroff gives particular importance to the place and role of law in modernity. For him, "the language of modernity… was the language of the law" (Comaroff, 2001, 60).
[1425] Chakrabarty, 2000, 4
[1426] Ibid, 1995, 384
[1427] Ibid, 1995, 385
[1428] Ibid, 2000, 4
[1429] Ibid, 2000, 4
[1430] Ibid, 1995, 386
[1431] Ibid, 2000, 5
[1432] Manicom, 2005, 35

First, one could go along with the likes of Said in pursuing an agitationist deployment of the discourse. He suggests that for the intellectual "to be 'for' human rights means, in effect, to be willing to venture interpretations of those rights in the same place and with the same language employed by the dominant power, to dispute its hierarchy and method, to elucidate what it has hidden, to pronounce what it has silenced or rendered unpronounceable".[1433] This approach could be understood as a type of rightful resistance that operates on the margins of the prevailing truth regime. The challenge of course, in this scenario, is to formulate those interpretations that are effective in achieving the stated objectives. As the earlier chapters have shown, operating within a regime of truth is like trying to walk down a path laid with landmines.[1434]

In exploring any innate radical possibilities within the discourse the activist would be well advised to attempt to pioneer or at least imagine a new stage in the history of right, beyond governmental sovereignty. In general terms, Foucault believed that a new form of right was needed to overcome modern power. "If one wants to look for a non-disciplinary form of power… it is not towards the ancient right of sovereignty that one should turn, but towards the possibility of a new form of right, one which must indeed be anti-disciplinarian, but at the same time liberated from the principle of sovereignty".[1435] Foucault never spoke or wrote further on this topic,[1436] so it is left to us to imagine what this new form of right might look like. In South Africa today, it would have to put the collective before the individual, equality before freedom, redistribution before growth, people before profits, society before government.

Second, one could reject rights' discourse and politics altogether, and attempt to engage in other discourses and politics. In this regard, a term that frequently appears in the literature is justice. Brown suggests that struggles for justice "may offer a more appropriate and far-reaching remedy for injustice defined as suffering *and* as systematic disenfranchisement from collaborative self-governance [compared to rights' politics]".[1437] Similarly, in South Africa, Manicom suggests that it is time to move away beyond rights-based "politics of

[1433] Said, 2000, 430
[1434] Manicom, thinking about feminist struggles specifically, wonders whether it is possible to operate within the human rights model without them being assimilated and neutralised in the process. "In what ways can a feminist politics draw on the democratic and ethical claims of citizenship within anti-hegemonic struggles while remaining alert to ways in which citizenship might work as a modality of subjection, potentially channelling opposition into containable, governable forms?" (Manicom, 2005, 23)
[1435] Foucault, 1980, 108
[1436] Miller, 1993, 292
[1437] Brown, 2004, 461, 462

inclusion", and instead propagate "a discourse of social justice" through agile alliance politics.[1438] For Neocosmos, a key component of such a discourse "must be the recovery of politics within society, in other words, the creation of a fully active and politicized citizenry"; he asserts that "[o]nly society can democratize the state, not the other way around".[1439]

Concluding Remarks

In concluding this chapter and the thesis I think about where the overall analysis of human rights discourse leaves us, as citizens, as historians. The challenges in front of us are considerable, and the choices we face are complicated. In charting a way forward, I return to the conceptual framework outlined in the first chapter. Some of the key insights presented included: an understanding of historical knowledge as produced, fabricated knowledge (as opposed to it being objectively derived from neutral, reliable primary sources), and therefore the need to deliberately produce new sources, constitute counter archives, formulate counter narratives, and establish counter historical truths; a reminder of the myth of academic disinterest and an assertion instead of the appropriateness in intellectual interest; and a problematising of traditional assumptions about time, such as the past being fixed and gone/ over, and the present being the pinnacle of historical development. With regard to the issue of time, I drew on the likes of Baucom to suggest that time accumulates rather than passes, and that it is therefore quite conceivable to imagine that we live in an era that originated a long time ago (ie that we live in the past) and that the current conjuncture does not necessarily hold within it much that is progressive.

For me, a prerequisite for the writing of effective South African history, more so than ever in 2008, is for the historian to engage with today, to understand the present and to make a political judgement in this regard. Only then can she write an effective history of the present. So I pose the following questions, again. What is the nature or character of post-1994 South Africa? Do we live in a new country, one that has no history? Or is the post-1994 era rather the latest phase of the nation born in 1910? Do we live in an integrated or a segregated country? Do we live in a country with room for all, or are most of us assigned to the camp? Does 1994 represent a moment of discontinuity, or one of profound

[1438] Manicom, 2005, 45, 46
[1439] Neocosmos, 2006, 65, 85

continuity? Does the Bill of Rights present us with opportunities to effect change, or is it a key mechanism in overseeing the maintenance of the status quo?

I am dismayed and depressed about the present. I travel frequently into the Ciskei now, as I travelled frequently into the Ciskei then. I sometimes bypass the Transkei now, as I used to bypass it then. All available statistics confirm what my eyes see – bare life in the camp now, just like it was bare life in the camp then. The latest statistics show that life in the Eastern Cape Bantustans has not improved since 1994: the average person in the rural Eastern Cape survives on R255 per month (well below the poverty line of R322 per month drawn by the Presidency in mid-2008); only 16% of the economically active population is employed; and half of the households suffer from food insecurity and rely on rivers for water.[1440] This situation is replicated across Bantustan areas in other parts of South Africa.[1441] The South Africa of today is not a new nation; it is an old, segregated, racialised, bleak country, which has a long, violent history of human wrongs. A pressing task in South Africa today is to formulate effective historical narratives about persistent, persisting human wrongs.

Once, as historians, we embrace our problematic present as the vantage point from which we survey the past, we are well placed to understand that we are directly implicated in making future history. We are roleplayers in this world, now. Ours is not to stand back in disinterested pose, and aspire to impartiality. We are not the third party, the mediator between past and present (the ongoing past). Rather, we ought to be bringing an end to the past-in-the-present, to enable the fruition of new presents. In order to do this, we need to develop an understanding of ourselves as partial, activist historians. That is, we need to bring our thought-actions, our praxis, to bear – heavily – on this world. Instead of upholding political modernity and all its concepts (including human rights discourse and the universal philosophy of history), ours is to cultivate what Baucom calls the practice of the witness.[1442]

[1440] The Fort Hare Institute of Social and Economic Research et al, 2006; Bank L and Kamman E, 'Socio-Economic Trends, Migration and Rural Housing Demand in the Eastern Cape', Unpublished report prepared for the Eastern Cape Department of Housing, accessed in BRC Resource Centre, 2008
[1441] Everatt, D. & Smith, MJ. Building sustainable livelihoods: Analysing a baseline (2006) and measurement (2008) survey in the 22 nodes of the Urban Renewal Programme and Integrated Sustainable Rural Development Programme, Government Printers: Pretoria, 2008
[1442] Baucom, 2005, 192, 300

We are called upon to witness and to archive that which has not been seen, which has been suppressed and wiped from the record. Instead of celebrating 1994 as the attainment of human rights, we are required rather to detail and to catalogue the history of ongoing human wrongs in South Africa. Ours is to assemble the "archive of melancholy witness".[1443] The formulation of such a counter-archive is the basis for the formulation of counter narratives, capable of disrupting and undermining the story of the rainbow nation. These narratives will tell the story of the persistent, still-ongoing evolution of a profoundly segregationist nation. In this narrative, 1994 features as a tragic twist in the tale – a chimera of freedom, that has materialised as condemnation to the camp.

The issue of the capability of counter narratives is important because the challenge is not to write these narratives as an end in itself, but to write narratives that produce truth-effects. There are a wide range of possible effects, for example the signing of restitution settlement agreements, the settlement of lawsuits for apartheid reparations, the mobilization of social movements demanding the fulfilment of basic human needs, and so on. This type of historical narrative is characterized by a determination to sharpen the contradictions between fact and law, to seize any advantages that may arise for the poor, and to sow seeds of dissensus in the fields of consensus. The challenge of writing effective histories of the South African present is to write histories of ongoing human wrongs. The effectiveness of this endeavour will be significantly enhanced if it is pursued collaboratively by a critical mass of interested historians.

[1443] Ibid, 2005, 192

Post-script: technical summaries of the seven chapters

Chapter 1[1444]

At the end of the first decade of the twenty-first century, the South African history establishment is now well into a protracted, multi-facetted crisis. The onset of the crisis coincided with the transition from apartheid to constitutional democracy in 1994. Because of this, some insiders regard the discipline of history as a casualty of the new South Africa. The response of historians to these challenges has been to retreat from politics and economics, and instead opt for specialized work in narrow fields with no constituency beyond the university. Some have called for broader social engagement, but these calls have not gone far enough because they have failed to question the basics of the discipline and practice of history.

In order to understand the South African crisis, the chapter delves into a consideration of the fundamentals of the discipline. Here I utilize the work of Said, Trouillot, Chakrabarty, Jenkins and others to identify and explore the key propositions of the discipline of history. These propositions can be summarized as empiricism, research neutrality, asserting the past as a fixed object, and historicism. Significantly, these propositions have remained more or less unchanged over the past two hundred years, despite the role of history in society having changed dramatically over that period. More specifically, history has moved from the centre of power in the nineteenth century, when it was integral to processes of nation-building and colonialism, to the peripheries in the twenty-first century, where its main role is to represent non-interference in the world.

The chapter looks at each of the key propositions summarized above in some detail, by critiquing each and offering alternative approaches. As a way of critiquing and moving beyond empiricism, the chapter utilizes ideas from Foucault, Trouillot and others about

[1444] I wrote this dissertation over a fairly protracted period; I have been registered as a part-time student since 2004. Therefore it was necessary for me to pay considerable attention to the editing phase of the process. In this regard, I decided to do two things, namely to amend arguments and adjust narratives to improve coherence, and to present each revised chapter to an appropriate consistency/ audience, to obtain feedback for purposes of effecting final changes. With regard to the latter, I presented Chapter 1 to a HASA Conference in Grahamstown on 8 July 2008, Chapter 2 to a public seminar in East London on 10 June 2008 convened by the Fort Hare Institute of Social and Economic Research, Chapter 3 to a conference at the University of the Western Cape (UWC) organized by Anthropology Southern Africa on 2 September 2008, Chapter 4 to a public Seminar hosted by the Programme for Land and Agrarian Studies (Plaas) at UWC on 4 September 2008 and to the Provincial Committee of VSC on 1 October 2008, and Chapters 5, 6 and 7 to BRC on 17 November 2008. The basis of these presentations was the summaries that appear in this post-script. I include them for readers who seek a quick but fairly comprehensive overview of the thesis, and to

knowledge as production, and the power relations that enable the generation of truth claims. Importantly, these insights shed light not only on the generation of voice and presence (in historical sources and the archive), but also of silence and absence. In order to hear the silenced and recognize the expunged, it is necessary for historians to focus on recovering the lost news of the news of loss. This news, which forms the basis of a counter-archive, cannot be recovered through scholarship alone; the assignment requires melancholy, fancy and artistry. In arriving at a useful approach to the writing of history, I am informed by insights such as regarding interpretation as perspective (depending on variables such as place and time), recognizing all history as narration and rhetorical construction (devoid of objective assessment mechanisms) and acknowledging the weight of historiography in defining the parameters of acceptable history. Therefore, instead of wanting to settle history, I find the prospect of unsettling it more interesting. Instead of closing debates, I would rather open them.

Pretensions of detachment and neutrality mask researchers' subjectivity and subjecthood, and their aspirations to objective scientific truth deny its discursive character. Furthermore, the apparent distance maintained by traditional historians tends to produce abstract truth claims, the type utilized only by a handful of guild colleagues. History is a clear example of a discipline that is performing its role of promoting non-interference in contemporary society; this draws attention to its essential conservativism. In place of the traditional approach, I prefer a type of history that derives from praxis, and involves intervention in contemporary political processes. In order to implement this practice, the historian needs to be interested (not disinterested), actively involved in struggles related to the object of research, self-critical, and committed to what Trouillot calls historical authenticity. This refers to a capacity to be honest to ourselves in the present in relation to our historical representations.

The assertion that the past is fixed and finished is bound up with nationalist imperatives to identify origins and essentialise identity. This understanding forms the basis for grasping the close relationship between history and nationalism; traditional historical discourse is integrally involved in the process of nation forging. Instead of looking for timeless secrets, Foucault urges the historian to uncover dissent; instead of insisting on constants, we should reveal disparity. Furthermore, various scholars have pointed to the inadequacy of

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enable readers to dip into specific chapters in line with their respective areas of interest. I do not include references in these summaries.

the notion of ‘the past’ as an object of study (and therefore basis of a discipline), and instead suggested that it be regarded as a conception of time. Once the past has been problematised as a concept, one is able to question a host of terms and notions that derive from it, such as anachronism, relic, legacy, and so on. Furthermore, one is able to imagine other conceptions of time. Importantly, Baucom has suggested that rather than regarding time as passing, we should think of it as accumulating like sediments, piled on top of one another. This conception allows us to consider the possibility of nonsynchronous time, of many pasts with a variety of trajectories, some of which persist into the present; in other words, it enables us to think about more unruly temporarilites than those prescribed by traditional history.

Historicism asserts that history moves steadily and surely along the path of civilization. Not surprisingly, it therefore presents the (western) present as the pinnacle of human development. This is a teleological discourse that justified and continues to justify various interventions globally and domestically; principally, it justifies colonialism in its various guises. Instead of insisting on the unity of historical development, I follow an approach that draws attention to its discordant character, which throws up multiple modernities; instead of confirming the prevailing perspective of regarding the present as a triumph, I suggest the deployment of techniques to analyse it as a battleground that remains contested today. Usually, radical historians draw attention to the discontinuities of historical development to undermine the triumphant present, but when the powerful insist on driving a wedge between past and present, it is useful to instead draw attention to the continuities.

In the case of South Africa, today’s winners – in government, in business, in civil society – portray the 1994 transition as marking a fundamental, clean break in time. It is broadcast as a point of absolute discontinuity, as the end of apartheid. In this narrative, a new South Africa was born on 27 April that year, one without history. Generally speaking, the narrative has been accepted by the history academy, which therefore has little to say about contemporary society. Instead, the academy busies itself, on the margins, with a wide array of specialized, faddish research topics that have no resonance with one another and negligible broader relevance. I do not ascribe to the view that 1994 constituted a break in time, because the fundamentals of the South African nation (as established in 1910) remain intact. The post-1994 variant of the South African nation has a century long history; we continue to live in the segregationist past today. The way out of the crisis for the academy is to resume the challenge of writing histories of the South

African present. In pursing a version of history that is located in the present and rooted in contemporary struggle, I place myself in a long line of South African thinkers and practitioners.

Chapter 2

In the second chapter I problematise the explanatory narrative that currently prevails about the twin history of the constitutional protection of property rights in post-1994 South Africa, and the provision for the restitution of certain land rights dispossessed during segregation and apartheid. This narrative holds that statutory forces (led by the apartheid National Party) and non-statutory forces (led by the African National Congress) clashed and engaged in highly contested negotiations about the future of South Africa in the early 1990s. It insists that one of the issues of contention about was whether or not property rights acquired during colonialism, segregation and apartheid, should be recognised. The dominant narrative holds that the NP insisted that these rights be recognised, and the ANC opposed their recognition and protection. The ANC fought a gallant, protracted fight, but in the end – in the interest of the broader goals of national liberation – compromised and reluctantly agreed with the constitutional protection of property rights. Although the NP is seen to have prevailed in relation to the overall property negotiations, the narrative holds that one concession the ANC managed to win was for the restitution of confiscated land rights. In sum, the outcome of the property negotiations is explained as an unfortunate but necessary compromise, which enabled the ANC to defeat apartheid and usher in a new era in South African history, founded on a democratic constitution. We now live in a new South Africa, one that replaced the old South Africa.

This narrative is the tale of the victor, one that continues to produce discursive effects into the present. It maintains the myths such as: the ANC represents the interests of the rural poor; and it is interested in rural transformation. An examination of the contemporary programmes and policies of the ruling party lead one to a contradictory conclusion. In the chapter I formulate a counter-narrative, based on readings from the BRC archive and a range of published and unpublished material, as well as my own understanding and experience of the transition process. With regard to written material, I have found first-hand accounts of the transition (written by people who were involved on the non-statutory side, such as Klug and Dolny) particularly useful. The counter-narrative is also informed by a reading of recent theoretical work on property.

Ever since its establishment almost one hundred years ago, the ANC has been led by black middle class interests. Initially these were based in rural areas, but in sync with urbanisation because of industrialisation, these had migrated into the cities by the 1940s. The last time that the ANC paid attention to the land question was in 1955, when it formulated the Freedom Charter; since then, up to the present, the issue has received scant attention. Rural people themselves have found it difficult to organise coherently during the past fifty years, for a variety of reasons including historical dispossession, physical location, class, gender and other divisions.

The transition from formal apartheid was negotiated at a time when a number of domestic and global contextual developments had the effect of strengthening the hand of the moderate pragmatists within the ANC, and weakening that of the leftist ideologues. On the international front, two of the key factors were the collapse of the Soviet Union, and the rise of third way politics, which was underpinned by human rights discourse. Given the class character of the ANC leadership, it endorsed the constitutional protection of property rights, as early as 1988. Instead of regarding the negotiation process as a clash of opposing forces, it is more consistent with the evidence to regard it as the moment when the ANC elite was formally co-opted by white capital, paving the way for a smooth, seamless transition across 1994. There are particular continuities between the land reform programme of the NP government, and that of the contemporary ANC government.

In order to understand underlying reasons why the principal negotiators of the South African transition agreed to provide maximum protection to property rights, I present a scan of recent theoretical work on the subject. The literature highlights that property discourse is foundational in relation to other key societal constructs and discourses such as economy, democracy and citizenship. Property provides clarity about rights to scarce resources, and therefore enables their efficient utilisation. It justifies and sanitizes ongoing processes of appropriation (from eighteenth century colonisation to contemporary biopiracy). It diminishes the public and expands the private. It produces the best democrats because property gives owners adequate freedom and autonomy, in relation to the state. Property teaches citizens about rights and responsibilities. For all these reasons, property is sacrosanct in the contemporary neo-liberal world; the South African negotiators easily and readily fell into line with this consensus. Because of all the basic, fundamental discursive work, it is necessary for property to sustain the myth of its own universality, that

ownership is within the reach of everyone, despite the fact that it is not. One of the ways that it sustains the myth is through instituting bounded restitution programmes.

The South African restitution programme is no exception in this regard. My examination of the evidence will suggest that this variant of restitution is founded on property and human rights discourses. The universality of property (the need to restore the efficacy of property) and the importance of ownership in constituting new South Africans were two key motivations for the introduction of a restitution programme. The domination of human rights discourse in the late 1980s and early 1990s accounts for the strong legal underpinnings of the programme. Like the property clause, the restitution programme was borne of consensus more than discord between the negotiating parties.

Post-1994 restitution is founded on a general interpretation of South African history, which emphasises facts such as the '87:13' racial split of land ownership (commonly understood to have arisen from the 1913 Land Act), and the considerable extent of post-1913 dispossession of land rights. Conversely, this interpretation omits other facts. More specifically, it glosses over pre-1913 dispossession and it ignores dispossession wrought through the ordinary functioning of the market. The reason that restitution silences these facts is that its role is to reinforce the segregationist South African nation (albeit in a reformed guise) and to consolidate the forces and interests of capital.

Property attempts to bind restitution, to perform a minimal role of merely sanitizing it. But restitution has some potential to unsettle property, because it requires acknowledgment of (at least some of) the history of property; that is, it opens a door for the past to re-enter the present. In the South African case, it is precisely because of the extent of post-1913 dispossession that restitution holds the potential to yield redistributive outcomes. This potential was reinforced by the institutional arrangements of the programme, which placed considerable agency and responsibility in the hands of the dispossessed themselves.

Chapter 3

The third chapter outlines the implementation of the restitution programme from 1994 to 2008. In general the sketch is presented chronologically. The initial challenge facing the newly elected government, after the promulgation of the Restitution of Land Rights Act, was to set up the institutional machinery. Thereafter, it was necessary for all interested parties (especially the responsible government agency) to facilitate the lodgement of

claims. The first significant issue raised and discussed in the chapter is the paucity of lodged claims and the implications of this for restitution in South Africa. Some of the reasons for the limited number of claims lodged include the conservative macro-economic choices made by government (and consequent budget cuts), institutional difficulties faced by the Commission for the Restitution of Land Rights, the orientation of and challenges faced by NGOs at the time, and the disorganisation of the poor.

The common thread that has run through government management of the restitution process since its inception is that it has wanted it out of the way as quickly as possible. This has translated into an over-riding concern with the speed of the settlement of claims. Dissatisfaction in this regard in the late 1990s led to an eighteen month period of review and institutional reform. Initially, in 1997, government strengthened the role of the Land Claims Court, and then, in 1998, it reversed this decision, through bolstering the Commission and changing the basic character of restitution from legal to administrative. Government introduced the Standard Settlement Offer (SSO) in 2000, in a bid to short-circuit the resolution process, and in 2002 President Mbeki announced a deadline for the completion of the programme, clearly signalling government's determination to conclude it without delay. These measures were effective, because the pace of settling claims increased exponentially in the early 2000s. But none of these measures overrode static structural configurations such as macro-economic frameworks and development geo-politics. Thus the interpretative conservativism and institutional limitations of the Commission remained its key hallmarks in the early twenty-first century. Consequently, the (almost-complete) restitution programme has not delivered any of the promised outcomes – land, development, financial compensation, or social capital – to a significant extent.

The productive value of restitution lies not in what it has delivered to the claimants (supposedly the beneficiaries of the programme), but rather in its discursive effects related to citizenship in the new South Africa. It both broadcasts the message that citizenship is being deliberately extended ('fulfilling the promise of the Constitution') and it enlists the identification of already citizens. It allows already-citizens access to a precolonial past of harmony, generosity, vibrancy and ubuntu; it enables them to regret a shared apartheid past of injustice, violation, destruction, suffering (without having to do or sacrifice anything); and it promises hope for a united future of return, homecoming and redemption. The disruptive potential of restitution has not therefore been realised to date. On the contrary, the manner in which micro restitution narratives have been assembled and the

truths that they have produced, have tended to consolidate prevailing power relations, hegemonic discourses and the underlying meta-narrative of South African history.

The chapter introduces key facets of the Truth and Reconciliation Commission (TRC) process, in order to sharpen the analysis of the value of restitution. The TRC was cut from the same discursive cloth as restitution; the pliability of human rights discourse was demonstrated by the manner in which negotiators bypassed international convention by agreeing to pardon the wrongs of the perpetrators before recognising the rights of the victims. The restorative model, characterised by forgiveness and reconciliation, framed the TRC process, and constituted a foundation stone for the emerging rainbow nation, the project of making a new South Africa. Neither restitution nor the TRC represent prize of struggle victory, rather they are better understood as part of the price paid for political freedom.

The mandate given to the TRC was wide but ambiguous. On the one hand it was required to write a complete history of gross human rights violations during the period 1960 – 1994, but on the other, legislation defined gross human rights in a fairly narrow manner. The power configuration that emerged from CODESA and the TRC's restorative model meant that it utilised conservative notions and opted for a restricted field of study. More specifically, the TRC decided that it would only consider human rights violations that were illegal within the apartheid framework. That is, in the words of Mamdani, the TRC failed to make a distinction "between what is legal and what is legitimate, between law and right". Implications of the TRC decision included its avoidance of both the structural workings and the effects of apartheid, its narrowing down of the categories of victims and perpetrators of gross human rights violations, and its avoidance of dealing with the notion of the beneficiaries of apartheid (ie white South Africa). In so doing, the TRC reconstituted actors in the collective struggle as either innocent or guilty rights-holders or duty bearers. Two of the most important hallmarks of the TRC's version of the history of apartheid are that it is approached and assessed from a moral point of view, as having being essentially evil, and that it died on 26 April 1994. Both of these traits expose TRC history as teleological; it serves the interests of the contemporary nation-state in that it both provides lessons for its citizens about the importance of upholding liberal values and it consolidates the legitimacy of the elected government.

Because the origins of the TRC lie in the NP's demand for amnesty for apartheid crimes, it is no surprise that the institutional machinery set up to administer this process was powerful and well-resourced. In the process of its work, the Amnesty Committee not only granted amnesty to 850 applicants, it also had a major effect on the overall modalities of the TRC. In short, within a year of its establishment the TRC in general adopted what Wilson calls a legalistic forensic paradigm. This paradigm lent additional weight and authority to the historical truth claims of the TRC. The picture of the past that it painted was not any picture; it was the picture. The truth that it told was not one amongst many; it was projected and accepted as the ultimate truth. The TRC did not signal the beginning of a historical enquiry; it was a once-off event that produced official history. Already, TRC truth has produced significant effects in South African society; principally, it has played a role in enabling a smooth transition to liberal democracy and in institutionalising a culture of (individualised) human rights. The abstract logic of the TRC process demanded substantial reparations, but its effective logic and motor resulted in delayed, arbitrary, insignificant reparations. Here, as with many other aspects of the TRC, there are parallels and similarities with restitution. Reparations and restitution are no more than the shadows of amnesty and the property clause, respectively.

The historical truth produced by the CRLR and the TRC drove a wedge between an apartheid past and a democratic present. In so doing, it silenced the voices and obliterated the ongoing experiences of the mass of South Africans – black, poor, rural – who continue to live the life of subjects, not citizens. Therefore, the key task confronting historians in recent times has been to write histories of this contemporary reality, the persistent and persisting past. However, they have not been significant roleplayers in either the restitution or truth and reconciliation processes. Instead they have thrown stones from inside their glass houses, complaining about lack of analysis, insisting on the importance of professional mediation, and so on. They have sought to buy time, thinking that proper history can only follow in the wake of the helter-skelter of politics. Here they have fundamentally miscalculated and misunderstood the nature and character of the South African transition. The history that counts (in relation to the CRLR and the TRC) is that which was written over the period 1998 – 2008, not that which will be written in future. The indifference of historians to the above-mentioned processes stems from their inability or reluctance to engage in the production of effective history.

Chapter 4

The fourth chapter discusses and contextualises the exclusion of dispossession that resulted from the implementation of betterment in the former Ciskei and Transkei Bantustans, from the restitution programme. Betterment was the flagship rural development programme of the segregationist and apartheid governments. Betterment plans were formulated and implemented in the former Reserves/ Bantustans and other so-called black areas from the 1930s onwards. Under betterment, designated areas were divided into distinct land use zones, for example, for residential, arable and grazing usage. The land use categories were rigid; as a result, residents were forced to move into the demarcated residential areas, and to farm in the designated arable and grazing areas. Betterment was carried out by Native/ Bantu Commissioners in tandem with Native/ Bantu Authorities. In the process, people living in betterment areas were dispossessed of both a variety of land rights as well as a way of life. Betterment was not conceptualised with grand apartheid in mind, but its effects certainly suited that project. More specifically, the spatial workings of betterment both rendered the Bantustans easier to govern and made it possible for them to absorb thousands of surplus people. Betterment involved the removal and dispossession of millions of South Africans. More precisely, it can be conservatively estimated that more than 3 million Bantustan subjects were dispossessed by betterment.

Because of the widespread implementation of betterment and its devastating consequences, there was widespread resistance against it, especially in the mid-1950s and early-1960s. Because implementation was designed and implemented per locality, most of the resistance was similarly local in organisation and scale. A large variety of tactics were deployed across the hundreds of resisting localities. The more significant instances of resistance often involved and lent on urban influences, practices and strategies, for example forged during protest against the pass laws and in industrial disputes. Despite this dynamism and the obvious potential to galvanise local expressions into an organised struggle, resistance against betterment remained parochial, even at its zenith. A key reason for this was ANC indifference to the issue.

Although betterment facilitated the rolling out of grand apartheid, was implemented across vast swathes of the former Bantustans, and dispossessed millions with devastating consequences, post-1994 policy makers decided to exclude it from the parameters of restitution. In retrospect, this outcome was not surprising, because the policy process was dominated by essentially three interest groups, namely ANC-linked political appointees,

newly appointed civil servants with NGO backgrounds, and established apartheid-era bureaucrats. The first two groups shared a common discursive understanding of struggle and resistance, which militated against the recognition of betterment as dispossession. (The educated, politicised holders of title, who stood their ground, in the face of the bulldozers, were the recognised resisters, not the uneducated, obdurate masses in the communal areas who cut the fences and assaulted the rangers.) Further, all three groups shared a number of assumptions and biases (such as a belief in private, individual title as being superior to forms of tenure) which led them to focus on the land reform challenges in former white South Africa and to ignore or overlook those specific to the former Bantustans. There was no champion of the 'betterment issue' included in the DLA drafting team of the Green Paper. Neither did it have a champion outside the policy process. The ANC, NLC and academic communities did not lobby for its inclusion in restitution. The chapter includes a detailed case study of BRC (an NLC affiliate), to illustrate the extent to which there was consensus in civil society that betterment was not a matter that restitution could accommodate.

In order to develop a deeper, more structural understanding of why the post-1994 government excluded betterment from restitution, the chapter considers other recent policy decisions that have had a significant impact on the former Bantustans. The following areas of policy are considered: development planning, rural development, governance and tenure reform. Planning decisions have been informed by two underlying paradigms, namely the two economies thesis and the spatial development framework. Both regard the former Bantustans to be economically dysfunctional and to have limited economic potential (whereas the urban apartheid economy is deemed to be functional and regarded as having considerable economic potential). The usual refrain about rural development is that this is an area of government failure. However, it is more useful to recognise that government has in fact adopted and implemented a coherent approach to development in the former Bantustans, which can be summed up as welfare. After some contestation in the ANC about finding a balance between democratic and traditional forms of governance in rural areas, the latter emerged dominant during the Mbeki presidency. Recent legislative developments suggest that judicial powers may soon be fused with the considerable executive authority of traditional leaders, reminiscent of colonial customary power. Just as the apartheid state set up and nurtured the system of indirect rule through the institution of Bantu Authorities, the post-1994 state has retained this institution as a mechanism to achieve cheap stability in what it regards as the welfare zone of the country. Similarly, the

passing of the Communal Land Rights Act in 2004 indicated that government had decided to deal with tenure reform in the former Bantustans differently from the rest of the country. The balance between household's land rights and the land-related rights of traditional authorities was shifted towards the latter, thereby confirming the existence of a two-tier property regime in South Africa (first-class rights in former white South Africa, second-class rights in the former Bantustans). These decisions suggest that bifurcated power configurations continue to frame decision-making and policy formulation in the post-1994 South Africa, and that these arrangements still produce segregationist effects.

I close the chapter by establishing a brief genealogy of contemporary South African segregationism, which is characterised by the distinguishing of the former Bantustans from the rest of South Africa. The foundation stone of South Africa is segregationism, based on a conception of land reservation which implies a particular relationship between territory, tribe and subjecthood. Significantly, Mamdani's elaboration of colonial power emphasises its duality. Urban power spoke the language of civil society and rights, rural power of community and culture. Civil power claimed to protect rights, customary power pledged to enforce tradition. The former was organised on the principle of differentiation to check the concentration of power, the latter around the principle of fusion to ensure a unitary authority. Thus for Mamdani, the apartheid state which implemented decentralised despotism in rural areas and centralised despotism in cities is the proto-type colonial state, rather than the exception. Similarly, decolonization in Africa has typically involved deracialisation, but not the dismantling of bifurcated power configurations. Here too, the South African transition is unexceptional.

Baucom argues that the legal basis of bifurcation is a world-wide phenomenon called the state of exception. This refers to legal power to suspend the law, a power within the law to operate without the law, the power of decision over life. Its universality derives from the fact that it is the first principle of sovereignty. This power enables governments to divide their territories into normal and exceptional juridical terrains. Agamben identifies the (concentration) camp as the pure space of exception; that is, its inhabitants are stripped of every political status and wholly reduced to bare life. Before the birth of the camp, the state of exception only occurred as a temporary suspension of the rule of law to overt dangerous situations. The emergence of the camp – as a permanent spatial arrangement – indicates the rise of the state of exception as governance, as rule. It is for this reason

that Agamben refers to the camp as the hidden matrix and nomos of the political space in which we are still living.

The Reserve/ Bantustan is one of occidental modernity's classical spaces of exception and its inhabitants an example of people who live outside normal legal parameters. For the Bantustan subject, social death or bare life is not temporary or exceptional, it is the permanent norm. The underlying structure of the Bantustan system was retained in the post-1994 period. Whereas the Bantustans were reincorporated into the borders of the South African nation, they are still deliberately under-developed, fabricated as welfare zones, and subjected to arbitrary customary rule. For the Bantustan subject, 1994 meant that she was no longer regarded as an extradomestic alien, but instead became a domestic denizen. In other words, it meant that she changed from one form of haunting opposite (and double) of the citizen to another.

The conclusion that I reach is that betterment slipped off the restitution agenda in 1996, not because of government oversight or inadvertent error. It was not an exceptional policy development that went against the grain of building a coherent framework for a unitary South Africa. Rather it was one of the first clear indications that the segregationist character of the nation would remain firmly ensconced in the post-1994 period.

Chapter 5

Having completed an elaboration of the regime of truth that has informed the post-1994 period, and an exploration of the production of knowledge on the side of domination, in Chapter 5 I shift the attention to the production of truth on the side of resistance. More specifically, the chapter describes and analyses the efforts of BRC to establish the truth of betterment as dispossession (such that it met the criteria of the Restitution of Land Rights Act). One of the main aims of this undertaking is to draw attention to and understand the complexities and dynamics at play when attempting to effect regime changes from within that very regime. Apart from the prevailing regime of truth, another factor that had a significant bearing on the manner in which BRC set about its work was the internal context within the organization. Two of the hallmarks of BRC circa 1997/8 were that it had drifted far away from its rural constituency with regard to both method and knowledge production, and that its management believed strongly in the value of technical competence. Ironically, BRC displayed clumsiness and indecision (a lack of technical competence) in arriving at a decision about how to establish the truth of betterment as dispossession. After six months

of protracted and confusing discussion, in the first half of 1998, the organisation finally decided that it would take a test case to court, and it selected Cata as the case. Significantly, one of the main reasons the BRC chose Cata was the availability of relevant academic research; this had a major bearing on how the organisation went about formulating and later negotiating the claim.

The start-up phase, from July to September 1998, consisted of assembling the technical team (comprising legal capacity and an expert academic witness) and obtaining the necessary mandate from the Cata community to proceed with the case. From the very beginning then, the relationship that BRC established with the Cata community was defined by mandates and resolutions, as opposed to interaction and engagement. For the final quarter of 1998, the BRC team scurried to formulate the claim, in time for submission before the deadline at the end of the year. The strategy that it adopted in compiling the claim was that it would revolve around a main affidavit, with a variety of secondary, supporting affidavits. Ostensibly, the main affidavit would be made by a community leader, but in reality the role of this leader was limited to providing some personal testimony. The drafting of the document was performed by BRC and its legal capacity; unsurprisingly, it is a technical legal narrative that lacks local knowledge and perspective. This is a clear illustration of an NGO playing a vanguardist role. Nevertheless, the legal documentation lodged on 23 December 1998 is properly regarded as the first comprehensive attempt at formulating an evidence-led truth pertaining to betterment dispossession, through the discursive lens of restitution. That is, the document argued that betterment dispossession fulfils the criteria laid out in the Restitution of Land Rights Act, and was therefore eligible to be righted through this legislation.

In a bid to avert potentially a counter-productive showdown in court, BRC agreed to a suggestion made by DLA in early 1999 that the two parties should attempt to negotiate the case out-of-court. In the ensuing negotiations, it quickly emerged that the key issues to be negotiated and resolved related to the nature, extent and value of rights held by the people of Cata and subsequently dispossessed through the implementation of betterment. Because BRC had made its case in court papers, it was agreed that DLA should put its position forward with regard to an analysis of rights held and dispossessed. Crucially, DLA disaggregated the claim into two parts, dealing with individual and communal rights respectively. It was accommodating in its proposals with regard to the restitution of individual rights dispossessed, but less receptive to BRC’s claim for restitution stemming

from the dispossession of a communal way of life (all that it was prepared to concede was restoration of the commonage). BRC attempted to push DLA for concessions in relation to the latter, based on an attempted elaboration of the full extent of rights entailed in communal property, but this failed to move government. BRC retreated.

Having reached agreement about the qualitative framework for a settlement agreement, DLA asked BRC to propose a methodology to quantify and value individual losses. BRC proposed that average losses should be calculated based on existing academic research. DLA concurred, and the figures were calculated accordingly. BRC's recommendation of using averages indicates the extent to which it was comfortable with hegemonic insurance culture, and its sole reliance on existing research reveals that it was prepared to settle for low-end nominal propriety, rather than high-end real justice. In addition to average individual losses of residential structures and land, and arable land, the valuation exercise managed by BRC also covered lost arable production. However, DLA did not concede this claim, and BRC did not pursue it any further, apparently because it was surprised by government's agreement to compensate for residential structures (in addition to residential land). One final detail remained unresolved, namely the manner in which the valued individual losses would be restituted to the Cata community. The leadership of the village had expressed its willingness to BRC that a proportion of the compensation could be set aside for community development, but it had emphasised that this proportion should be minimised. But when the government negotiators sought Ministerial approval to conclude the negotiations within a prescribed framework, they specified that 50% of the compensation would be set aside for development. BRC did not resist this stipulation, because its priority and interest was to reach a point where betterment dispossession was recognised as fulfilling the criteria of the Restitution of land Rights Act. Not surprisingly, when BRC went to the village in May 2000 to break the news of Ministerial approval, it did not receive the hero's welcome that it had anticipated; the community's interest was to maximise short-term relief from its grinding reality of chronic poverty. But the community leadership ultimately took the pragmatic route and consented to the arrangement that has come to be known as 50/50. The deal was ratified accordingly, in October 2000.

To an extent, the settlement agreement does represent a recovery of the lost news of the news of loss. It establishes the truths that betterment had been central to the apartheid project and that it entailed the dispossession of land rights, more specifically that individual families were forcibly removed from their properties. In these respects, the Cata case

produced new sources, which undoubtedly form part of an archive that counters the apartheid project. In other respects though, specifically in respect of communal and productive losses, the lost news remains lost. Reasons that BRC failed to recover news of these losses were its epistemological orientation (toward academic, technical knowledge, away from popular, local ways of knowing) and its residing – arguably quite comfortably – within realm of the hegemonic truth regime. This regime accommodates restitution processes that fit within the narrow strictures of liberal capitalism, that is, those relating to the dispossession of familiar, recognisable rights, specifically those that are private, individual and easily typified and abstracted. Conversely it spews out the unique, the unfamiliar and the communal. Similarly, the regime denies the (past and present) economic value of the Bantustans, and thus was not amenable to the claim for productive losses.

Over the period mid-2000 to mid-2002, BRC engaged in two processes aimed to reinforce the Cata agreement and extend its bearing to other restitution cases of betterment dispossession. That is, it played a leading role in influencing a policy formulation process that was instituted by government, and it used the Cata outcome as a template for settling other communal claims in the Keiskammahoek district. The key point here is that the organisation viewed the negotiated agreement in Cata in such a positive light that it sought to bolster and fortify it. Its success in this regard meant that the communal and productive dimensions of betterment dispossession were pushed even further into the margins. The same process that gave voices to the individual aspects of the loss, silenced its communal and productive aspects.

The process of establishing a museum in Cata shared many similarities with those that negotiated the restitution claim and entrenched its outcomes. Specifically, it was driven by BRC and the exhibit designers engaged the settlement agreement in an uncritical manner. As a result, the museum celebrates rather than critiques the terms of the agreement and its outcomes. Although the facility is called a community museum, it has not yet been adopted or utilised by the local community as a memory or educational centre. In fact, the only aspect of restitution that has interested the community in the post-2000 period has been financial compensation. Specifically, some community members have lobbied to receive the developmental compensation as a supplementary cash payment, while others have railed against the disjuncture between the amount of compensation paid in Keiskammahoek, compared with Cata. Arguably, there is a deeper, keener sense of

injustice in the village today about the so-called difference than there is about the 1960s dispossession.

A Foucauldian approach suggests that the most useful yardstick in measuring the extent to which historical work has impacted constructively or demonstrably on the battlefield (of power relations) is the measurement of the effectiveness of the truth claims produced. In this case, the yardstick translates into two key questions: 'to what extent does the historical truth produced reflect the 1960s dispossession?' and 'to what extent does the truth reverse apartheid-effects in Cata?' I have sought to answer the first question by pointing to the bifurcated nature of the settlement agreement signed in 2000 – individual dispossession acknowledged; communal dispossession and loss of production denied. Significantly, the lines of this bifurcation closely resemble those that traverse this new South Africa. The second question will only be definitely answered in the decades to come, once it is clear what long-term impact the development process that originated in the settlement agreement, has had. At the point of writing, significant gains had been made in increasing employment and income levels in the village, but question-marks remain over the sustainability of the unfolding development process. And, based on recent experience in Keiskammahoek, there are even greater question-marks over the replicability of the Cata model at significant geographic scale.

Chapter 6

The Cata Settlement Agreement and the policy revision that arose from it established the truth of betterment as dispossession, but they did not address the issue of the policy prejudice in the White paper. By the end of 2000, government accepted that betterment entailed dispossession, but it refused those who had been dispossessed by betterment to gain entry to the restitution programme (that they had been locked out of the pre-1998 period). That is, BRC's historical truth claim about the pre-1994 period was accepted, but not its claim about the period 1994 – 1998. In an attempt to advance this assertion, BRC has, since 2002, driven an advocacy process known as the Vulamasango Singene (Open the doors so that we can come in) Campaign, hereafter referred to as VSC. The principal aim of the chapter is to assess the extent to which BRC has made progress in its contemporary historical claim that government acted prejudicially towards victims of betterment dispossession during the Mandela Presidency. This assessment is made on the basis of a chronological description of the manner in which VSC has evolved over the

past six years, supplemented by an analysis of some key issues pertaining to social movements, civil society and knowledge production.

Two of the main characteristics of BRC at the time that it set about conceptualizing and establishing the campaign were that it was ensconced in Congress political culture and it remained more inclined to technical than local knowledge. In 1998, BRC had hoped to address the problem of prejudice through the Cata case. However, delays in lodging and then resolving the claim meant that this did not happen. Because of the twists and turns in the Cata, Keiskammahoek and policy review processes, BRC only resumed work pertaining specifically to the prejudice in 2002. It assumed that the issue would be addressed through the courts, but well-respected lawyers advised against this strategy. Instead, BRC accepted that it would have to fight the matter politically, and decided on informed lobbying, grounded on academic research, as its principal strategy. The first area covered by research was Middledrift; the work confirmed BRC's assertions both about the extent of betterment dispossession and the dearth of restitution claims demanding compensation for betterment losses. Before discussing the research findings with government, BRC educated and organized the affected communities in Middledrift.

After completing the communities, BRC placed pressure on government to engage in formal negotiations. This produced the desired outcome when Minister Didiza hosted a VSC delegation for a meeting in Cape Town on 11 November 2003. In the meeting Didiza agreed with BRC's overall truth assertion, but she limited the scope of its validity to the Eastern Cape Province. The basic agreements reached in the meeting were spelt out in a memorandum prepared shortly after the meeting. The memorandum was submitted for formal ministerial approval in December 2003. In the meantime, the Middledrift communities gave the Minister until the end of January 2004 to sign the memorandum; if she failed to meet this deadline they indicated that they intended to invoke mass action. By the end of that month, the campaigners had not heard from Didiza, and thus they attempted to convene mass action. This failed, largely because it was thwarted by the municipal authorities, apparently in cohorts with the ANC. This took BRC by surprise because it had spent the second half of 2003 attempting to educate the members of the provincial ANC Study Group on Land, on the basics of the campaign; this attempt resulted in the Speaker of the Provincial Legislature writing to Didiza to urge her to address the problem of prejudice.

Immediately after the swearing in of Mbeki's second cabinet, in April 2004, Didiza signed the memorandum. But by then BRC had already decided that it would need to intensify the mobilization drive in the interest of winning the campaign demand. Realizing that it lacked capacity to effect large-scale mobilization on its own, BRC turned to the Eastern Cape NGO Coalition and SACP for assistance. In a bid to enable organized, standardized roll-out, BRC formulated a methodology to be utilized by all campaign partners. This methodology was the basis of agreements forged between BRC and various organizations based in the Transkei. By mid-2007, 700 communities were organized under VSC; at this point BRC asserted that it had mobilized the critical mass necessary to win the campaign and suspended the expansion drive. With the escalation in information and organizing work, BRC decided to structure the campaign under provincial and district committees. It resulted in a hierarchical organogram; although not explicitly reflected on the organogram, BRC remained entrenched at its pinnacle, as the ultimate decision-maker about campaign strategy. By late 2008, VSC had not yet managed to win coherent ANC support, nor was there adequate political will in the Ministry to provide the redress sought by the campaigners. Instead of finding and implementing a solution, government decided in mid-2008, after years of dithering, to relinquish its executive responsibility in the matter, preferring to hand over it to the courts. Despite this, and disregarding its own rationale for building up the community base underpinning the campaign, BRC has not resourced any mass action since late 2005. This is a reflection of the extent to which it has remained ensconced in majority rather than subaltern politics in recent years.

There are some clear features of VSC, which enables one to characterize it as a reformist social movement. First, as a movement born within the prevailing regime of truth, it located itself unambiguously within the bounds of legality, as an expression of what O'Brien has called rightful resistance. It uses the language of rights to promote the campaign, and explicitly denounces illegal strategies and tactics. This is a feature that it shares with the Treatment Action Campaign, and one that distinguishes it from movements such as the Anti Privatisation Forum. Second, VSC is a clear illustration of a single-issue movement. Its narrow focus and conservative politics have militated against the forging of alliances with any related campaigns and organizations, in either urban or rural areas. In this regard, it rejected the counsel of the likes of Trotsky, Mbeki, Mamdani and Hart, who urge the forging of alliances, the maximization of relation. In the pursuit of its restitution objectives, the campaign organizers lost sight of the pre-eminent importance of the global struggle for a social wage. Thereby, they have diminished their own campaign.

BRC attempted to position VSC mid-way between the politics of party and state (majority politics), and subaltern or minority politics. As far as the former is concerned, a weakness of BRC's engagement is that it was unable to fragment the government in order to advance its advocacy objectives, in a way that the TAC, for example, was able to engineer. Instead of a nuanced, incisive approach, one gets the sense that BRC viewed the ANC as an untouchable monolith throughout the 2000s. The chronicle presented in the chapter points to an organization that was more tuned into and connected with majority politics than with minority politics. BRC's approach to its VSC community work has been disorganized and loose. This is reflected in its approach to institutional building in general, and training, communication, decision-making and meeting procedures in particular. BRC's closeness to majority politics and distance from minority politics is similarly reflected in its approach to knowledge production; it has relied on technical research in its lobbying work, as opposed to realizing the potential of a local knowledge production method that it termed speak-out. More specifically, the speak-out process held the potential to hold and carry the exploration of a politics of grievance/ melancholy that could conceivably have delivered wide-spread, sustained mass mobilization. This has not been realized because of BRC's instrumentalist approach to the method.

Since April 2004 national government has formally acknowledged post-1994 discrimination against victims of betterment dispossession in the Eastern Cape. In the intervening years however, it has not moved to redress this discrimination in any way. It is possible that government has no intension of righting post-1994 prejudice voluntarily. Put differently, though government acknowledges the prejudice in the 1996 Green Paper and 1997 White Paper, it is unclear how it intends to make amends in this regard. There are indications that government is intent on merely saying to the victim communities: we will ensure that you are listed for priority attention through our normal programmes. In other words, more of the same, more of nothing. A reason for government's indifference is that the campaign undermines key elements of the grand narrative underlying restitution specifically, and the post-1994 regime of truth more broadly. VSC has sought to effect human rights, development, democracy, citizenship for those who live the bare life in the abyss. This is anathema to a government determined to manage South Africa as a bifurcatred nation-state.

The chronicle and analysis in this chapter raise issues of relevance to organised civil society in general and BRC in particular. It suggests that BRC's objective of winning VSC will be better served if it reconsiders some of the basics of the campaign, including positioning, agency, structure and knowledge production.

Chapter 7

Because the issue of human rights features prominently throughout the thesis, and in light of the dominance of human rights discourse in contemporary global processes, it is appropriate to conclude the work with a focus on the issue. This is undertaken through a reflective overview of recent critical analyses of human rights discourse. I put it to South African historians that the key to formulating effective counter-narratives at this juncture is to produce histories of ongoing human wrongs, rather than to consolidate the hegemonic history of human rights (the narrative of the new South Africa).

By 'right', we understand 'justified claim'. Because there are various ways to justify claims, there are various types of right. Statist or governmental right, which is founded on and derived from jurisprudence, has been a dominant form of right for the past three hundred years. An important form of power generated through the exercise of governmental right is sovereignty, which is the power to decide on the state of exception (ie the suspension of the law). I follow the likes of Foucault in suggesting the need for a critical understanding of the origins and operations of law and legality. Governmental right is linked to human rights discourse, like a newly-born is linked to her mother. This discourse began by being declared. The famous Declarations of the late eighteen century insisted that natural life (zoe) is the bearer of rights, and they entrusted government to regulate and guarantee the expression of these rights. These foundational legal expressions are the basis on which sovereignty is founded; they entailed the inscription of natural life into jurisprudence and thus allowed the expansion of the reach of governments into the realm of natural life.

The rights associated with zoe are empty, without substance. The straightforward reason for this is that they are the rights of those who have no rights (ie natural as opposed to political beings). Because of their uselessness, the powerful and rich do with human rights the same as they do with their old clothes, that is, they give them to the poor. Of course they are of no value to the poor either.

A primary beneficiary of human rights discourse is the nation-state. Although sovereign power over life, biopower was founded on those rights associated with zoe; over time it has developed through constituting and appropriating an ever expanding set of rights, associated with political life (bios). Consequently, the reach of government has penetrated further and further into civil society. Political contest in the current period thus revolves around the capacity to heighten the contradiction and dichotomy between full paper rights and bleak lived reality, or what Ranciere calls the challenge to construct a dissensus against the denial of rights that the poor and the marginalised suffer. Opposing these forces of resistance, the forces of domination deny contradiction and dichotomy, asserting alignment and convergence. The extent of political space tracks the effectiveness of forces of resistance in maintaining the gap between law and fact; this gap has reduced over time, rending society increasingly vulnerable to unchecked sovereign power.

In the realm of government, any political content or character of human rights is eradicated and transformed into a set of technical rules and standards. After this transformation, the content as well as the means of delivery of human rights are no longer subject to debate. Rather, the government, from on high, is expected to guarantee, deliver and roll out rights in a formulaic, technical, objective fashion. Within the narrow framework of state-focused, majority politics, struggle is reduced to a demand for inclusion into an existing state domain, and public engagement is restricted to the technical and managerial dimensions of delivery. In the process, political choices are diminished and there is increased passivity and reliance on government. In the technical determination of the delivery of human rights, third parties (such as NGOs and the courts) are often called upon to play a mediation role. They are expected to offer disinterested judgements, informed by pragmatism and rationality. An important South African example of the outcome of such a process is the Grootboom judgement, which decided that citizens could not legitimately demand the immediate fulfilment of their need for shelter, but would instead have to be content with the government taking reasonable legislative, administrative, budgetary and other measures to progressively realize the right to housing. Spivak goes so far as to say that the absence of redress without remote mediation is the definitive lack that all subalterns suffer from. It should be noted that even in cases when third parties find (or facilitate findings) in favour of the poor, these victories seldom bring tangible benefits; instead they sometimes lead to revenge action or spiteful inaction from state institutions. Chatterjee draws a distinction between civil society practices, which are technical in nature and therefore only accessible

to and implemented by middle-class professionals, and those of mass poor populations whose claims are irreducibly political.

Despite the fact that the grossest violations of human rights (eg the Holocast, apartheid) were meted out to members of specific groups (eg Jews, blacks), human rights discourse tends to emphasize and favour the rights of individuals, above those of groups;. Related to this, the literature points out that human rights discourse is implicated in the fight between forces wanting to maintain the status quo and those seeking a redistributive remedy to the situation, or in other words, in the tension between liberty and equality. In the hegemonic liberal democratic perspective, justice and human rights are interchangeable concepts. Justice is achieved through equalising access to rights and opportunities, because there is a denial of underlying societal inequalities. In a South African context, Manicom points out that an effect of implementing (class blind) human rights discourses is that they advantage the already powerful and further disadvantage the already weak. An alternative perspective asserts that justice is achieved through effecting substantive equality.

There is a deep collusion between the discipline of history and human rights discourse. Moreover, the discourse has directly informed many struggles of the past century, and is therefore ensconced amongst prominent forces of both domination and resistance. It is not possible, therefore to simply walk away from or operate outside of human rights discourse. I suggest that historians position themselves in relation to the discourse in one of two ways. Either they could follow the advice of Said in venturing interpretations of rights that expose what the authorities attempt to silence or hide; I call this an agitationist deployment of human rights discourse. Or they could look to alternative discourses, specifically those associated with justice. In mapping out the elements of what just histories of South Africa might look like, I return to the analysis presented in Chapter 1. Amongst other things, I suggest that historians ground themselves in the bleak segregationist realities of today, that they resolve to contribute towards ending this past-in-the-present, through cultivating what Baucom calls the practice of witness, and that they focus on producing sources, building archives, formulating narratives and establishing truths in relation to the history of ongoing human wrongs in South Africa (as opposed to the rainbow narrative of human rights that underpins notions of a new South Africa).

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