

# LAND RESTITUTION AND RECONCILIATION IN SOUTH AFRICA

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## 6.1 INTRODUCTION

Schemes of property rights rectification are seldom influenced in the real world by a profound understanding of property theory. Still, the political dynamics that drive such schemes are almost always informed by intuited understandings of the meaning and importance of property rights. And property theorists, for all their abstractions, often attempt to spell out the implications of their theories for real world problems.<sup>1</sup> It would therefore be surprising if property theory had nothing to say about how schemes of property rights rectification ought to be implemented. It should also be possible to assess such schemes from the perspective of property theory, using competing theoretical understandings of property rights to explain the practical problems encountered, and, conversely, using practical problems to assess the relative merits of competing theoretical understandings.

This chapter aims to construct a dialogue of this sort between Robert Nozick's historical entitlement theory of property<sup>2</sup> and the

The author was a member of the ANC Land Claims Court Working Group that developed the policy on which the Restitution of Land Rights Act 22 of 1994 (Restitution Act) was based. He accordingly writes from the position of a participant-observer, and the criticisms in this chapter of the way in which the land restitution process in South Africa was conceived are directed as much at himself as anyone else.

<sup>1</sup> See, for example, Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990) at 317–469.

<sup>2</sup> Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974).

South African scheme for restitution of land rights. Section 6.2 briefly states Nozick's theory before contrasting it with its main theoretical rival: 'general-right-based' arguments for private property.<sup>3</sup> Because of their concern for the connection between property rights and personality, it is argued, general-right-based arguments provide a more convincing explanation of the moral wrong done to property holders when their rights are unjustly taken away. They also suggest an approach to the rectification of past unjust transfers that has much in common with the idea of restorative justice. At a theoretical level, therefore, one should expect a property rights rectification scheme that was premised on a general-right-based argument for private property to outperform a Nozickian scheme in certain respects. By the same token, a property rights rectification scheme that was premised solely on a Nozickian approach might be expected to encounter certain problems, such as an inability properly to redress the moral wrong done to victims of past unjust transfers, and a concomitant failure to contribute to the broader process of reconciliation in the country concerned.

Section 6.3 takes the first step in testing this hypothesis by setting out the legal framework for land restitution in South Africa. The political dynamics characterising the transition to democracy, this section argues, ensured that the restitution scheme adopted in 1994 was essentially Nozickian in character. That being the case, the problems that the theoretical section predicts for a scheme of this type should be discernible in the literature on the South African land restitution process. Reviewing the literature, Section 6.4 finds that the consensus of opinion is indeed that, while remarkable in many respects, the land restitution process in South Africa has largely failed to redress the moral harm done to victims of apartheid forced removals. There is also considerable doubt among commentators about the extent to which the process has contributed to national reconciliation. The hypothesis about the problems likely to be encountered by a Nozickian property rights rectification scheme is confirmed to this extent. The conclusion at Section 6.5 reflects on what might still be done to change the way in which the land restitution process is being implemented in South Africa so as to enhance its contribution to national reconciliation.

<sup>3</sup> The term is Jeremy Waldron's, as explained below.

## 6.2 PROPERTY THEORY AND THE RECTIFICATION OF PAST UNJUST TRANSFERS

Property theory is concerned with the distribution of material resources in society.<sup>4</sup> The main preoccupation of this field has been the justification of private property, and by extension, the circumstances under which the state may regulate or otherwise interfere with property rights. Schemes of property rights rectification are just one example of such interference, albeit crucially different, most property theorists would say, from attempts to reallocate property rights in pursuit of some or other preferred distribution of material resources.

What distinguishes Nozick's historical entitlement theory from most others is that it permits the state to interfere with property rights only in the most basic case – the rectification of past unjust transfers. Ironically, by limiting the grounds for state interference in this way, Nozick argues the case for rectification more forcefully than other, more 'progressive' theorists, for whom the arguments in favour of rectifying past unjust transfers are so self-evident as not to be worth making. It is for this reason that Nozick's argument provides a useful starting point when thinking about the theoretical basis for property rights rectification. But it is no more than a starting point because, by his own admission, Nozick sketches only the outline of a theory, without providing a fully elaborated rectification principle.

Before examining Nozick's theory in more detail, it is necessary first to identify the general type of property theory to which it belongs, in order later on to contrast Nozick's theory with other property theories, and their (mostly) implied approach to the rectification of past unjust transfers. Here it is convenient to follow Jeremy Waldron's general classification of the different kinds of arguments for private property into utilitarian and right-based arguments.<sup>5</sup> Whereas utilitarian arguments justify private property for the contribution this institution makes to general welfare,<sup>6</sup> Waldron reminds us, right-based arguments

<sup>4</sup> See, for example, L.C. Becker, *Property Rights: Philosophic Foundations* (London: Routledge and Kegan Paul, 1977); C.B. Macpherson (ed.), *Property: Mainstream and Critical Positions* (Toronto: Toronto University Press, 1978); J.R. Pennock and J.W. Chapman (eds.), *Nomos XXII: Property* (New York: New York University Press, 1980); Alan Ryan, *Property and Political Theory* (Oxford: Basil Blackwell, 1984); Andrew Reeve, *Property* (London: MacMillan, 1985); James O. Grunbaum, *Private Ownership* (London: Routledge and Kegan Paul, 1987).

<sup>5</sup> Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988) at 116.

<sup>6</sup> Waldron, *Private Property* at 6.

justify private property because it promotes certain *individual* interests that are said to be worth promoting, either in their own right or for other reasons.<sup>7</sup>

So much is uncontroversial. Waldron's main theoretical concern, however, is to draw a further distinction between two types of right-based argument for private property: special-right-based (or 'SR-based') arguments, which he finds most clearly articulated in Nozick's *Anarchy, State, and Utopia*, and general-right-based (or 'GR-based') arguments, of which Hegel's *Philosophy of Right* is said to be the best example.<sup>8</sup> A SR-based argument for private property, Waldron says, is one that justifies private property as being necessary for the protection of property rights that happen to have been legitimately acquired by, or transferred to, the holder.<sup>9</sup> A GR-based argument, by contrast, justifies private property as essential to the 'development of individual freedom'.<sup>10</sup> Whereas, on the SR-based approach, it is not necessary for everyone to have property (because the right to private property protects only rights contingently acquired), on a GR-based approach this situation would not be just, and the property rights order would have to be redesigned, or property rights redistributed, to satisfy the claims of those who have less than they need.

Nozick's historical entitlement theory, Waldron argues, is 'almost a pure case of an SR-based argument for private property'<sup>11</sup> because it makes all property rights contingent on past actions, and concedes no space for a general right to hold property by virtue of one's humanity.<sup>12</sup> In Nozick's theory, there are only two bases on which a person may legitimately hold property: either the person must have appropriated the property right in a manner that was just, or she must have received the property right by reason of a transfer that was just.<sup>13</sup> Where one or the other of these principles is violated, Nozick's third principle, the principle of rectification of injustice, permits state interference to re-legitimise the property rights order.

The well-known problem with Nozick's theory is that he does not specify his three principles in any detail.<sup>14</sup> His principle of justice in

<sup>7</sup> Waldron, *Private Property* at 347.

<sup>8</sup> G.W.F. Hegel, *Elements of the Philosophy of Right*, trans. H.B. Nisbet and edited by Allen W. Wood (Cambridge: Cambridge University Press, 1991).

<sup>9</sup> Waldron, *Private Property* at 128. <sup>10</sup> Waldron, *Private Property* at 343.

<sup>11</sup> Waldron, *Private Property* at 254. <sup>12</sup> Waldron, *Private Property* at 254.

<sup>13</sup> Nozick, *Anarchy* at 150–1.

<sup>14</sup> For a sustained critique, see Jonathan Wolff, *Robert Nozick: Property, Justice and the Minimal State* (Cambridge: Polity Press, 1991).

acquisition is loosely based on Locke's labour theory of property,<sup>15</sup> and his principle of justice in transfer would endorse most of the ways in which property rights can be transferred in modern western legal systems.<sup>16</sup> But this is as far as it goes. All that Nozick says about the rectification principle, in turn, is that it raises a number of 'issues', none of which has been properly investigated.<sup>17</sup> Among the issues Nozick lists are the duties owed by 'performers of injustice' to those who are rendered worse off, the position where the current beneficiaries of the past injustice are the descendants of 'the direct parties in the act of injustice', and the question whether an injustice is 'done to someone whose holding was itself based upon an unrectified injustice'.<sup>18</sup> Nozick does not go on to address any of these issues. Instead, he contents himself with the remark that the mere fact that one can posit plausible-seeming principles of justice on the basis of a historical entitlement theory poses a challenge to non-historical theories of the kind proposed by John Rawls.<sup>19</sup>

In much of what Nozick writes there is an assumption that violations of his first two principles may be rectified by tracing back current holdings to the point at which the unjust transfer or act of original acquisition took place. This assumption, of course, ignores the considerable counterfactual difficulties attendant on assessing what would have happened but for the unjust transfer or acquisition, both on the side of those whose rights were violated and on the side of those who benefited from the violation.<sup>20</sup> Could it be said, for example, that the same productive use of land as was made by the beneficiary of an unjust transfer would have been made by the victim but for the violation of her rights? Conversely, would the innocent beneficiary of a past unjust transfer have made equally productive use of alternative land not so tainted? The only answer Nozick gives to such conundrums is to say that, where the principle of rectification is impossible to implement for want of 'historical information', some more patterned redistribution of property rights may be justified.<sup>21</sup> This concession, however, is the barn door through which any number of rejoinders to Nozick's

<sup>15</sup> Wolff, *Robert Nozick* at 102–12; Reeve, *Property* at 132–6.

<sup>16</sup> Waldron, *Private Property* at 258. <sup>17</sup> Nozick, *Anarchy* at 152.

<sup>18</sup> Nozick, *Anarchy* at 152. <sup>19</sup> Nozick, *Anarchy* at 153–5 and 228–31.

<sup>20</sup> See Jeremy Waldron, 'Redressing Historic Injustice' (2002) 52 *University of Toronto Law Journal* 135 at 144.

<sup>21</sup> Nozick, *Anarchy* at 231 (discussed by Waldron, *Private Property* at 289, citing Lawrence Davis, 'Nozick's Entitlement Theory' in Jeffrey Paul (ed.), *Reading Nozick: Essays on 'Anarchy, State, and Utopia'* (Oxford: Basil Blackwell, 1982)).

argument may be driven. Any property rights system of a certain age and degree of complexity will consist of countless holdings that not only violate Nozick's first two principles, but do so in ways that are impossible to unravel. This being the case, Nozick's positive argument for a minimal state is an argument that applies to no actually existing society that we know of.

The other important weakness of Nozick's theory is its ambivalence about the moral harm done by an unjust transfer. On the one hand, Nozick argues that transfers that violate his first two principles, such as redistributive taxation, are tantamount to 'forced labor'.<sup>22</sup> On the other hand, however, Nozick seems to assume that, provided the information problems he describes can be overcome, any unjust transfer can be reversed, no matter how long ago it occurred or what has happened subsequently to the property right. This approach appears to deny the social character of property rights, i.e. the fact that they arise and are enjoyed within a particular historical setting, and may have a distinct cultural meaning for their holders. It also sidesteps the problem of what to do about an unjust property rights order that has been in place for some time. If people have an absolute right to their holdings under a particular, historically contingent distribution of property rights, how can one begin to redress moral wrongs that took place some time ago without perpetrating a new set of moral wrongs in the rectification process?

Because of their focus on the role of property rights in the social construction of human personality, GR-based arguments seem to provide a more promising basis for answering these questions. Common to all of these arguments, as we saw, is the claim that property rights are necessary to the 'development of individual freedom'.<sup>23</sup> On its face, this is not a proposition with which Nozick would appear to disagree. A large part of his theory, after all, is devoted towards a liberty-based defence of the right to hold on to what one has contingently acquired.<sup>24</sup> But the difference between the two approaches is that, for the GR-based approach, the holding of a minimum level of property rights is a precondition for freedom, whereas for Nozick, no one has a liberty interest in *becoming* a member of the property-owning class. This difference is crucial since it allows the GR-based approach

<sup>22</sup> Nozick, *Anarchy* at 169.    <sup>23</sup> Waldron, *Private Property* at 343.

<sup>24</sup> This is the point made in Nozick's famous 'Wilt Chamberlain' example. See Nozick, *Anarchy* at 160–4.

to overcome the inconsistency in Nozick's approach to the moral wrong done to victims of unjust transfers. For the GR-based approach, because property rights are not absolute, there is no contradiction in claiming that a moral wrong is done when property rights are unjustly taken away and in saying that, where this occurs, property rights should be restored, or alternative property rights transferred, to compensate for past wrongs.

According to Waldron, the most 'sustained' version of the GR-based argument can be found in Hegel's *Philosophy of Right*.<sup>25</sup> Waldron himself has some doubts about whether Hegel's argument can really be described as right-based,<sup>26</sup> and it is certainly not right-based in the strong sense of this term, i.e. in the modern sense of 'rights as trumps'.<sup>27</sup> Nevertheless, Hegel's account of property is probably the best known example of that family of property theories that stresses the connection between property rights and the social construction of human personality.<sup>28</sup> In the section of his *Philosophy of Right* on 'abstract right', property rights are thus depicted as the principal means by which human beings express themselves in the world.<sup>29</sup> The full richness of this phrase, of course, can only be understood in the context of Hegel's philosophy as a whole. But for purposes of this chapter the point that needs to be emphasised is that Hegel, unlike Nozick, thought that property rights were entirely relational. Hegel thus argues that the ownership of property is the 'only' means through which an individual 'distinguish[es] himself from himself', and in this way 'relates himself to another person'.<sup>30</sup> For Hegel, then, the notion that liberty consists in the capacity to hold on to what one happens to have acquired, provided that the process of acquisition or transfer was just, would have been hopelessly atomistic. Property rights, on Hegel's account, are not place-markers for individual freedom, but means towards the end of a more ethically developed, and therefore free, self.

A more modern, and certainly more accessible, version of the GR-based argument for private property can be found in Margaret Jane Radin's essay on 'Property and Personhood'.<sup>31</sup> Like Hegel, Radin's central 'premise' is that 'to achieve proper self-development – to be a

<sup>25</sup> Waldron, *Private Property* at 343.    <sup>26</sup> Waldron, *Private Property* at 343–4.

<sup>27</sup> Reeve, *Property* at 70.

<sup>28</sup> The other well-known example is T.H. Green, *Lectures on the Principles of Political Obligation* (London: Longmans, Green and Co., 1931).

<sup>29</sup> Hegel, *Philosophy of Right* ss. 39–40.    <sup>30</sup> Hegel, *Philosophy of Right* s. 40.

<sup>31</sup> Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957.

*person* – an individual needs some control over resources in the external environment'.<sup>32</sup> The justification for private property is thus that it enables people to realise their full human potential in a community of property owners. But not all relationships between people and property, Radin observes, bear the same connection to personhood. One and the same object – the example given is that of a wedding ring – may be more important to one person's self-development (the married person whose ring it is) than another's (the jeweller who sells it to her).<sup>33</sup> Intuitively, therefore, there seems to be a distinction between 'personal property' and 'fungible property' according to how closely connected the object of the property right is to the holder's personhood. If individual self-development is the independent good that the institution of private property is intended to serve, it follows that the more closely the object of a property right is connected to personhood, the more strongly it ought to be protected.<sup>34</sup> The practical value of this approach, Radin concludes, is that it provides an explanation for the connections courts often draw between property and privacy, and property and liberty.<sup>35</sup>

Neither Hegel nor Radin spells out the implications of their approach for the rectification of past unjust transfers, but one can extrapolate such an argument from their approach to property rights as a whole. In the first place, GR-based theories of property would clearly conceptualise the harm done by a past unjust transfer in a less ambivalent way than Nozick. For GR-based arguments, the main problem with an unjust transfer is not that it undermines the legitimacy of the property rights system (the chain of just transfers in Nozick's theory) but that it violates the personhood of the holder whose property right is taken. Or, to put the point in more explicitly Hegelian terms, for the GR-based approach, the most profound negative impact of an unjust transfer is not the pecuniary loss it causes (although that is important), but the way it interferes with the ethical development of the individual – a consequence that may endure even when the holding is restored.

This understanding of the impact of an unjust transfer comes closer to our intuitive understanding of the moral wrong done when property rights are unjustly taken away. A property right contingently acquired may be contingently lost, without much harm done to the individual

<sup>32</sup> Radin, 'Property and Personhood' at 957.

<sup>33</sup> Radin, 'Property and Personhood' at 960.

<sup>34</sup> Radin, 'Property and Personhood' at 985–6.

<sup>35</sup> Radin, 'Property and Personhood' at 960.



provided compensation is paid or a substitute property right is found. And where this does not happen, the harm may always be rectified at some later date provided only that it is practically possible to unravel all the subsequent transfers in respect of the property right. Where property rights are seen as being connected to the social construction of human personality, however, any unjust transfer constitutes a direct assault on the personhood of the victim. In place of Nozick's somewhat unrealistic equation of unjust transfers with 'forced labor', the GR-based approach ascribes an appropriate level of moral censure for uncompensated transfers that interfere with ethical self-development.

These observations are sufficient to establish the intuitive 'rightness' of the GR-based approach in explaining the moral wrong done to victims of past unjust transfers. The more important question, for the purposes of this chapter, is what the GR-based approach implies for the manner in which past unjust transfers should be rectified. Here, the answer is less obvious. On the one hand, the GR-based approach would appear to be quite pessimistic about the possibility of rectifying past unjust transfers because, on this approach, the mere restoration of an unjustly taken property right, especially after a long time, is unlikely to repair the moral damage done. Any time between the unjust transfer and its rectification is time lost for the ethical development of the individual, which can never be regained. On the other hand, the GR-based approach is more optimistic in the sense that it holds out the promise that a scheme of property rights rectification, even though it cannot restore the status quo ante, may be able to provide the material basis for the victim's reintegration into the community of property owners. If the justification for private property is the role it plays in the ethical development of the individual, then the purpose of rectifying past unjust transfers on the GR-based approach is not just to set the moral record straight, but to put the individual in a position once more to function as an ethical member of society.<sup>36</sup>

At the same time, the GR-based approach would caution against a rectification process that ignored the role of the subject property right in the ethical development of the *current* property holder. Although it would not proscribe the restoration of the actual property right taken,

<sup>36</sup> For a similar argument about the non-material benefits of property rights rectification, see Bernadette Atuahene, 'Legitimizing Property Rights When Past Theft Colors the Distribution of Property' *Berkeley Journal of International Law* (forthcoming) (arguing that property rights rectification is necessary to overcome the enforced 'invisibility' of people whose property rights are unjustly transferred).

especially where the current property holder was in some way morally responsible for the past unjust transfer, it would recommend a rectification process that respected the personhood of the current property holder. This goal could be achieved in one of two ways: either by providing for the restoration of alternative property rights on which no person's ethical development depended, or by ensuring that, where it occurred, the restoration of the actual property right taken was done in a way that affirmed, as far as possible, the personhood of the current property holder.

Put like this, the GR-based argument for private property suggests an approach to property rights rectification that has much in common with the notion of restorative justice. The popularity of this idea in recent literature risks turning it into an academic fad, but – like many such fads – the core of the idea is sound. At its broadest, restorative justice signifies an approach to redressing harms that de-emphasises the punishment of the perpetrator in favour of repairing the relationship between the victim, the perpetrator and society. In the criminological literature, this model is suggested particularly for the sentencing of young offenders, whose banishment from the community by traditional forms of punishment is thought to be counter-productive.<sup>37</sup> In the transitional justice and state-agency harm literature, restorative justice is preferred as a model for rectification of past wrongs because the extent of the wrongs committed, and the need for victims and perpetrators to continue living together, is often so great as to make the idea of corrective justice seem not only counter-productive but also unattainable.<sup>38</sup>

Applied to the rectification of past unjust transfers, the restorative justice model suggests a scheme in which the current property holder and the claimant negotiate at least some of the terms according to which the past unjust transfer should be rectified, in such a way as to

<sup>37</sup> See, for example, Declan Roche, *Accountability in Restorative Justice* (Oxford University Press, 2003); Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press, 2002).

<sup>38</sup> See Jennifer J. Llewellyn, 'Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice' (2002) 52 *University of Toronto Law Journal* 253; Chris Cunneen, 'Reparations and Restorative Justice: Responding to the Gross Violation of Human Rights' in Heather Strang and John Braithwaite (eds.), *Restorative Justice and Civil Society* (Cambridge: Cambridge University Press, 2001) 83 (sounding a cautionary note about the relevance of the restorative justice model 'when the state has been the perpetrator of crime' (*Ibid.* at 83)). For a general, interdisciplinary collection, see Declan Roche (ed.), *Restorative Justice* (Aldershot: Ashgate, 2004).

restore each to a position of 'social equality'.<sup>39</sup> This model would require, in the first place, that attention be given to the need for face-to-face meetings between the claimant and the current property holder. Even where the current property holder was not morally responsible for the past unjust transfer, the fact that the rectification transfer might trigger a fresh sense of injustice suggests that such meetings could be beneficial. The second way in which a scheme of property rights rectification on the restorative justice model would differ from a scheme based on the Nozickian model would be in the time taken to carry out the rectification transfer. Since the restoration of social equality would be paramount, any undue pressure on the parties to settle quickly, or on the state to expedite the claims process, would be resisted. For the restorative justice approach, the long-term advantages of properly repairing social relationships would more than offset the short-term disadvantages attendant on the delay in legitimising the property rights order.

Because of their concern for the connection between property rights and the social construction of human personality, GR-based arguments are more obviously compatible with this approach than Nozick's theory. A property rights rectification scheme that takes account of GR-based arguments should therefore contribute more strongly towards the aims of a national reconciliation process. Conversely, a property rights rectification scheme that ignores or downplays the role of property rights in the social construction of human personality is likely to suffer from certain problems, which, taken together, may undermine its contribution to a national reconciliation process. The next two sections explore this hypothesis in relation to the South African scheme for restitution of land rights. Section 6.3 argues that the South African scheme, not by conscious policy design but by dint of the political dynamics driving the transition, was initially very Nozickian in character. Section 6.4 examines whether the problems predicted for such a property rights rectification scheme at a theoretical level have indeed arisen.

### 6.3 THE CONSTITUTIONAL AND STATUTORY SCHEME FOR LAND RESTITUTION IN SOUTH AFRICA

Like most property rights rectification schemes, the South African scheme for land restitution was the product of a constrained policy

<sup>39</sup> Llewellyn, 'Dealing with the Legacy' at 290.

choice. Four factors, in particular, influenced the design of the scheme: the nature of the transition to democracy; the international context in which the transition took place; the prominent role played by lawyers, both in the transition and in the detailed design of land restitution policy; and the higher-order policy choice to separate the land restitution process from the truth and reconciliation process. All four of these factors influenced the design of the land restitution process in a way that favoured a Nozickian conception of property rights rectification.

South Africa's transition to democracy was the result of a negotiated transfer of power rather than a revolutionary victory.<sup>40</sup> Along with the commitment to amnesty for perpetrators of gross human rights abuses, the framework for land restitution was integral to the transitional deal struck at Kempton Park.<sup>41</sup> The content of that deal in the case of land restitution was that the restitution of land rights would not detract from the new legal order's overarching commitment to the protection of property rights.<sup>42</sup> Indeed, land restitution was central to that commitment in so far as the legitimisation of the post-apartheid property rights order was seen as a necessary condition for the constitutional protection of private property rights.

The land restitution process in South Africa was thus conceived from the outset as one designed to purge the post-apartheid property rights order of a particular set of unjust holdings, viz. those that could be related back to a dispossession suffered under a past racially discriminatory law. Although, as argued below, there were to be other parts of the land reform programme that would be more redistributive in character, the distinct purpose of land restitution was to redress the harm suffered by those who could show that they would have had a defined property right in land but for a particular past unjust transfer. In Nozickian terms, what was agreed at Kempton Park was that the historically received distribution of property rights should be protected, except where the legitimacy of a particular holding was undermined by its dependence on a prior unjust transfer. In such cases,

<sup>40</sup> See Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000).

<sup>41</sup> See Matthew Chaskalson, 'Stumbling Towards Section 28: Negotiations Over the Protection of Property Rights in the Interim Constitution' (1995) 11 *South African Journal on Human Rights* 222.

<sup>42</sup> See the discussion in the next subsection of the relationship between s. 8 (equality clause), s. 28 (property clause) and ss. 121–3 (provisions on land restitution) of the Constitution of the Republic of South Africa Act 200 of 1993.

the chain of transfers should be traced back to the past unjust transfer, and the property right restored to the person who would have held the property right but for that transfer.

The other important aspect of the transitional deal struck at Kempton Park was that the land restitution process would not reach back further than 19 June 1913, the date on which the Natives (later 'Black') Land Act was promulgated.<sup>43</sup> It was this Act that ratified the colonial land grab of the previous two and a half centuries by dividing South Africa's land surface into racial 'zones',<sup>44</sup> and prohibiting black ownership in areas set aside for white occupation. The oft-forgotten significance of the 1913 cut-off date, therefore, is that it restricted the land restitution process to claims by people who had lost their land *after* the main period of colonial conquest was already over.

That such a compromise could have been struck can be explained by the fact that it was mutually convenient to the two main negotiating parties: to the National Party for the obvious reason that it would insulate most of the white minority group's holdings from the restitution process, and to the African National Congress (ANC) because it promised to stabilise the post-apartheid property rights order in the interests of market-driven development, the economic model that was then beginning to gain ascendancy in ANC policy-making circles.

The 1913 cut-off date can, however, also be understood in Nozickian terms – as a measure designed to prevent the land restitution process from reaching back further than the historical record would allow. Since what was being attempted was the discrete targeting of a particular set of past unjust transfers, it was important that the necessary documentary evidence be available. And what better date to choose for this purpose than the date on which the racialised private property regime in land was first stabilised?<sup>45</sup>

The absence of adequate written documentation prior to 1913 was in fact one of the official explanations given for the cut-off date.<sup>46</sup>

<sup>43</sup> Act 28 of 1913.

<sup>44</sup> See Geoff Budlender and Johan Latsky, 'Unravelling Rights to Land and to Agricultural Activity in Rural Race Zones' (1990) 6 *South African Journal on Human Rights* 155.

<sup>45</sup> See Jeremy Waldron, 'The Advantages and Difficulties of the Humean Theory of Property' in Ellen Frankel Paul, Fred D. Miller and Jeffrey Paul (eds.), *Property Rights* (Cambridge University Press, 1994) 85 at 86.

<sup>46</sup> See Catherine Jenkins, 'After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa' (2000) 16 *South African Journal on Human Rights* 415 at 451 note 171 (quoting John Murphy, 'The Restitution of Land after Apartheid: The Constitutional and Legislative Framework' in Medard Rwelamira and Gerhard Werle (eds.),

The other, somewhat more alarmist explanation was that permitting the process to reach back further than this would be to invite potentially conflicting ethnic claims on the part of dispossessed tribes. These two official explanations were supplemented by the reassurance that land redistribution, as opposed to land restitution, would be used to address the land needs of those whose claims were frustrated by the cut-off date.<sup>47</sup>

The argument about the spectre of ethnic land claims was probably overstated, but is neither here nor there for the purposes of this chapter. The second argument – that land redistribution would take care of the demand for justice on the part of those whose ascendants had lost their land before 1913 – is directly relevant. Although never stated in so many words, the reliance on land redistribution as a sop to pre-1913 claimants echoes Nozick's concession – quoted at the beginning of this chapter – that, where past injustices are very great, a 'more extensive state' may be necessary 'in order to rectify them'.<sup>48</sup>

What Nozick did not contemplate, of course, was that both types of property rights rectification may be pursued in parallel: information-based rectification up to the point at which the historical record runs out, and category-based rectification for unjust transfers that occurred before this point. This is in effect what happened in South Africa, with land restitution being conceived as an attempt to do individual justice to those who could prove that their rights in land were lost as a result of a particular kind of unjust transfer after 1913, and land redistribution, at least initially,<sup>49</sup> as a welfare scheme for those who were unable to relate their demand for land to an unjust transfer of the specified type.

The second factor influencing the design of the land restitution process was the international context in which the transition to democracy took place, including, in particular, the collapse of socialism in Eastern Europe and the corresponding ascendancy of neo-liberal approaches to economic development. This context, when combined with the relative strength of the main negotiating parties, meant that the land restitution scheme agreed to at Kempton Park was both

*Confronting Past Injustices: Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa and Germany* (Durban: Butterworths, 1996) 113 at 121).

<sup>47</sup> Department of Land Affairs, *White Paper on South African Land Policy* (1997).

<sup>48</sup> Nozick, *Anarchy* at 231.

<sup>49</sup> In 1999, with the arrival of a new Minister of Land Affairs, the focus of land reform policy changed to promoting black commercial farming under the Land Redistribution and Agricultural Development (LRAD) programme.

legally and conceptually subordinated to the protection of private property rights. In the interim Constitution, for example, no mention was made of the restitution of land rights in the property clause, section 28. Instead, the framework for land restitution was set out in the equality clause, section 8, and three separate clauses on land restitution, sections 121–3. The placement of these latter provisions outside the Bill of Rights clearly signalled their lower normative status.

In the 1996 Constitution, the three separate clauses on land restitution were dropped in favour of a subclause on land restitution in the main property clause.<sup>50</sup> Once again, however, the intention behind this drafting choice was to make it clear that, though existing property rights would be limited by valid restitution claims, any expropriation of property rights consequent on the land restitution process should be accompanied by just and equitable compensation. In effect this meant that market value would have to be paid for any property right taken, save in those circumstances where it could be shown that the current property owner had acquired the property for less than market value.

In accordance with this constitutional framework, the statutory scheme for land restitution in the Restitution Act treats property rights in land subject to a valid restitution claim as unjust holdings, to be restored to the claimant against payment of just and equitable compensation, or retained by the landowner against the provision of equitable redress to the claimant.<sup>51</sup> In both cases, the state acts as restitution banker, interposing itself between the landowner and the claimant, and funding the costs of legitimising the property rights order from general revenue.

One of the unintended consequences of this feature of the statutory scheme for land restitution is that it precludes the need for face-to-face reconciliation between the owner of the land and the claimant. Claims are lodged with the relevant regional land claims commissioner, who conducts a preliminary investigation of the claim before gazetting it.<sup>52</sup> At this point the land may not be sold or dealt with in any way without the consent of the Commission.<sup>53</sup> After further investigation, the regional land claims commissioner must present a report to the

<sup>50</sup> Section 25(7) of the Constitution of the Republic of South Africa 1996 reads: 'A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.'

<sup>51</sup> See particularly the Restitution Act, ss. 35 and 42D. <sup>52</sup> Restitution Act, s. 11.

<sup>53</sup> Restitution Act, s. 11(7).

Chief Land Claims Commissioner.<sup>54</sup> If the restoration of the actual land claimed is recommended, the Commission must enter negotiations with the landowner for the purchase of the land, from which negotiations the land restitution claimant is excluded. Conversely, if equitable redress is recommended, the form of that redress (usually cash compensation) will be negotiated between the Commission and the claimants, again without any necessary involvement of the landowner.

In this way, the statutory scheme for land restitution precludes the need for reconciliation between black and white South Africans over the land issue. Rather than facilitating a process of national reconciliation, the state's appointed role in relation to land restitution is to smooth over any possible conflict between the race groups by making payments from general revenue, either to compensate current landowners in the event that their land is successfully claimed, or to fund the costs of equitable redress where the actual land claimed cannot be restored. As we shall see in the next section, these design elements have influenced the course of land restitution, with cash compensation becoming the main way in which urban claims have been settled, and the compensation burden in respect of rural land claims growing exponentially each year.

The third factor influencing the design of the land restitution process was the prominent role played by lawyers, both in the transition to democracy and in the formulation of restitution policy. Of course, lawyers always play significant roles in such processes. But the role played by lawyers in the drafting of the two South African constitutions is recognised as having been especially influential, to the extent that the transition to democracy in South Africa is sometimes said to have been the product of a legal rather than social revolution.<sup>55</sup> Reflecting this influence, the three sections on land restitution in the 1993 Constitution read like the heads of agreement to a commercial contract, binding the parties to adhere to certain core principles, within narrowly defined parameters.

Lawyers were also centrally involved in the working out of restitution policy, with largely the same group of lawyers responsible for the design of the policy and its translation into statutory form.<sup>56</sup> Unsurprisingly, therefore, the South African scheme for restitution of land

<sup>54</sup> Rule 15 of the Rules of the Commission on Restitution of Land Rights (GN R703 in GG 16407 of 12 May 1995).

<sup>55</sup> See Klug, *Constituting Democracy*. <sup>56</sup> The ANC Land Claims Court Working Group.



rights was conceived, in very legalistic terms, as being about the reversal of a particular set of unjust transfers, rather than the need to redress the deeper social and psychological impacts of apartheid land law. Reinforcing this approach was the fact that apartheid land law was a legislated evil, which naturally, if somewhat simplistically, suggested to lawyers that its effects could be 'unlegislated'. According to this conception, the truth and reconciliation process would be about redressing gross human rights violations that occurred mostly outside the official legal framework, and the land restitution process would be about reversing a series of forced property rights transfers which, though legally authorised, would have been precluded by a liberal constitution had such a constitution been in place at the time.<sup>57</sup>

This lawyerly approach to restitution is most obviously discernible in the prominent role given to the Land Claims Court in the Restitution Act as originally promulgated. In the absence of any reliable information on the number of claims that would be instituted, the Land Claims Court was placed at the centre of the land restitution process, with the power to assess all claims, including those resolved by way of agreement, for conformance with the criteria laid down in the Restitution Act.<sup>58</sup> In adjudicating claims according to these criteria, the Court was expected to use only slightly altered fact-finding methods from those used by an ordinary court.<sup>59</sup> Given the sheer number and complexity of the claims eventually received, the Court inevitably acted as a brake on restitution, and the model as originally conceived was replaced some five years later by a Commission-centred model.<sup>60</sup> This policy change, as explained in Section 6.4, effectively marked a shift from a Nozickian model to a more patterned, category-based model of land restitution. Instead of pushing land restitution in a GR-based direction, however, the five-year delay at the beginning of the process has imposed unrealistic time constraints on the finalisation of claims, which has precluded the search for deeper, more meaningful settlements.

The fourth factor influencing the design of the land restitution process was the macro-policy decision to separate it from the truth and reconciliation process. As we have seen, the interim Constitution contained three dedicated clauses on land restitution, whilst the

<sup>57</sup> This was in fact the precise wording of the 1993 Constitution, s. 8.

<sup>58</sup> Restitution Act, s. 22. <sup>59</sup> Restitution Act, s. 30.

<sup>60</sup> For a detailed examination of the Land Claims Court's record, see Theunis Roux, 'Pro-poor Court, Anti-poor Outcomes: Explaining the Performance of the South African Land Claims Court' (2004) 20 *South African Journal on Human Rights* 511.

constitutional basis for the amnesty process was contained in the epilogue. In the event, two separate statutes were enacted: the Restitution Act and the Promotion of National Unity and Reconciliation Act (TRC Act).<sup>61</sup> The focus of the TRC Act fell on gross human rights violations, from which category apartheid forced removals were by definition excluded.<sup>62</sup> Instead, the consensus of opinion at the time was that there should be two parallel processes for redressing apartheid wrongs, and that, for the rest, state-led attempts at redressing past injustices should take the form of welfare legislation and efforts to open up the economy to historically disadvantaged groups.<sup>63</sup>

The separation of the land restitution and TRC processes in this way had the unintended consequence that land restitution was conceived primarily as an exercise aimed at doing particular justice to victims of apartheid forced removals. The contribution of land restitution to reconciliation between black and white South Africans was a desired side effect, rather than a central policy goal of the process. When coupled with the primacy given to the constitutional protection of property rights, this policy choice produced a scheme that made the achievement of land restitution independent of the need to repair the moral and psychological damage done by apartheid land law. Instead, as we have seen, the state was interposed between white and black South Africans in the role of restitution banker, on the understanding that property rights could be restored to their rightful holders, or substituted by alternative land or money, without repairing the social relationships in which they were embedded.

<sup>61</sup> Act 34 of 1995. <sup>62</sup> See TRC Act, s. 1(1)(ix).

<sup>63</sup> For accounts of the TRC process and its relationship to land restitution, see Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford: Oxford University Press, 2000) at 351 (arguing that land restitution should be seen as part of the broader reconciliation process); Jeffrey Lever and Wilmot James, 'The Second Republic' in Wilmot James and Linda van de Vijver (eds.), *After the TRC: Reflections on Truth and Reconciliation in South Africa* (Athens: Ohio University Press, 2001) 191 at 195 (arguing that, given rapid urbanisation, land reform was less important to the legitimisation of property rights order in South Africa than 'the widening of human and economic capital in the nation's cities and towns'); and Charles Villa-Vicencio and Wilhelm Verwoerd (eds.), *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Cape Town: University of Cape Town Press, 2000) at 80, 157–8 and 240–1 (arguing that the separation of the TRC and land restitution processes was essentially pragmatic and that critics of the TRC's achievements should recognise that it was just one measure among many). The most comprehensive account of the TRC process, Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), makes no reference to land restitution at all.

#### 6.4 PROBLEMS ENCOUNTERED IN THE IMPLEMENTATION OF LAND RESTITUTION

For all these reasons, the constitutional and statutory scheme for land restitution in South Africa was essentially Nozickian in character. The aim of this section is to explore whether some of the problems that might have been predicted for such a scheme have indeed arisen, and in this way to test the hypothesis that a Nozickian scheme of property rights rectification, by ignoring the socio-cultural dimensions of property rights, is likely to suffer from a number of significant defects.<sup>64</sup>

As at 31 December 1998, the cut-off date for the lodgement of claims, 63 455 restitution claims had been lodged, of which seventy-two per cent were urban and twenty-eight per cent rural.<sup>65</sup> Because of the splitting of claims during the investigation process, however, the number of claims increased after the cut-off date, and by March 2004 had reached 79 693.<sup>66</sup> The rate of settlement of claims was initially very slow, with hardly any claims settled in the four-year period after the establishment of the Commission on Restitution of Land Rights in 1995. From 2000, however, the rate of settlement of claims began to speed up, with 56 650 claims settled by the end of August 2004,<sup>67</sup> and 71 654 by March 2006.<sup>68</sup> Of the claims settled by the end of August 2004, thirteen per cent were rural and eighty-seven per cent urban, with two-thirds of the urban claims settled by cash payment, and roughly half of the rural claims settled in the same way.<sup>69</sup> In total by the end of August 2004, R1.5 billion had been spent on land acquisition and R2.5 billion in cash compensation. Annual expenditure is, however, increasing rapidly as the Commission begins to settle the

<sup>64</sup> Of course, it is impossible to test this hypothesis in any kind of scientific way. What is presented here is simply an interpretation of the problems encountered in the implementation of land restitution to date. Nevertheless, to the extent that there is now some consensus of opinion in the literature on the problems encountered in the implementation of land restitution, it is possible in a very tentative way to relate those problems to the SR-based nature of the South African scheme, and in this way to shed some light both on the nature of those problems, and on the deficiencies of the SR-based approach to property.

<sup>65</sup> Since rural claims typically involve large numbers of people and large areas of land, rural claims outnumber urban claims in these respects.

<sup>66</sup> Ruth Hall, 'Land and Agrarian Reform in South Africa: A Status Report 2004' Research Report No. 20, Programme for Land and Agrarian Studies, University of the Western Cape (December 2004) at 12.

<sup>67</sup> Hall, 'Land and Agrarian Reform' at 13.

<sup>68</sup> Tozi Gwanya, 'A Reflection on What has been Achieved and What Must Still be Addressed' paper presented at conference on *Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa*, Cape Town, 13–5 September 2006 at 3.

<sup>69</sup> Hall, 'Land and Agrarian Reform' at 15.

more expensive rural land claims, with R1.8 billion spent in the 2005/2006 financial year.<sup>70</sup> As at June 2007, just over two hundred and fifty thousand households comprising about 1.3 million individuals were listed by the Commission as having benefited from land restitution.<sup>71</sup>

The fact that eighty-seven per cent of the claims settled as at the end of August 2004 were claims to urban land, whereas the initial proportion of urban claims was seventy-two per cent, indicates that urban claims were settled more rapidly than rural claims. This differential rate of settlement has been attributed to the fact that a high proportion of urban claims have been settled in cash, either through the use of a set formula based on historical land value, or through the use of Standard Settlement Offers (SSOs).<sup>72</sup> In most cases, the monetary value of SSOs is not vastly different from grants made under the (welfarist) national housing programme. These figures suggest that, in the urban context, the land restitution scheme, although initially Nozickian in conception, has progressively shifted in the course of its implementation towards a more patterned, category-based model, of the kind Nozick suggests may be necessary where a lack of historical information precludes the restoration of the actual property right lost. The irony in South Africa, of course, is that it has not so much been the lack of data that has produced this result, but the sheer number of urban land claims received, together with changed land use (either from residential to commercial, or from residential to more highly capitalised residential). Property rights rectification on the Nozickian model, it would seem, is not ideally suited to these conditions either.

In addition to the number and complexity of claims, the predominance of cash compensation in the urban context may also be attributable to the fact that urban land is more 'fungible' than rural land in Radin's sense, i.e. the fact that urban land is less closely connected to the property holder's personhood. This is not true of all urban land, of course, with places like District Six in Cape Town and Sophiatown in Johannesburg enjoying a special social and cultural significance. Nevertheless, even in these cases, the practical impossibility of restoring the socio-cultural setting in which land rights lost under apartheid were embedded seems to have been more easily accepted. The driving force behind many rural restitution claims, by

<sup>70</sup> Gwanya, 'What has been Achieved' at 3.

<sup>71</sup> Commission on Restitution of Land Rights, *Annual Report 2006/07* at 60.

<sup>72</sup> Hall, 'Land and Agrarian Reform' at 13.

contrast, appears to be a desire to restore the particular way of life destroyed by the removal.<sup>73</sup> In respect of these claims, the land restitution scheme as initially adopted has been more resistant to change.

At first blush this finding is paradoxical because, at the level of theory, it is the GR-based approach that is more inclined to stress the socio-cultural dimension of property rights. One would therefore expect a scheme that was based on a Nozickian approach to property rights rectification not to deal particularly well with claims to personal property. However, on reflection, the paradox is resolvable. The resistance of the South African land restitution scheme to change in respect of rural claims is attributable to the fact that, in respect of personal property, the Nozickian model holds out the false promise that the historical clock can be turned back, and the status quo ante restored. It is precisely because the Nozickian model ignores the socio-cultural dimension of property rights that it remains attractive to rural claimants, the substance of whose claims is often about restoring a mythologised, pre-lapsarian order, in which property rights and cultural identity were inextricably connected. As argued below, this aspect of the South African model has created false expectations about the contribution that the mere return of the land can make to redressing the moral wrong of apartheid, and has probably precluded the development of more direct, GR-based methods of acknowledging the destructive impact of forced removals on traditional ways of life.

The bulk of the claims that remain to be settled are claims to rural land of this type. In the urban context, as noted earlier, various devices have been developed to accelerate the restitution process, which was initially very slow. The literature is unanimous in attributing this slow start to the central role given to the Land Claims Court in the original statutory scheme. As initially conceived, all restitution claims, even those resolved by agreement, had to be ratified by the Land Claims Court. This Nozickian concern for doing particular justice inevitably slowed down the restitution process. Recognising this, the legislature amended section 42D of the Restitution Act in 1999 so as to make it possible for the Minister of Land Affairs to settle land claims without

<sup>73</sup> This, at least, is the conventional view. For a recent attempt to challenge it, see Deborah James, 'White Power, Black Redress: The Racial Politics of Land Restitution and Land Reform', paper presented at conference on *Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa*, Cape Town, 13–5 September 2006 (arguing that many rural restitution claims are in fact driven by a 'modernist' desire to 'use the land in technologically sophisticated ways').

recourse to the Court.<sup>74</sup> The marked acceleration in the rate of settlement of claims after 2000 is attributable to this amendment, together with the increased use of SSOs in the settlement of urban claims.

As noted Section 6.3, however, the 1999 amendment to the Restitution Act must not be seen as marking a wholesale shift towards a GR-based model of restitution since the focus of most settlement agreements is still cash compensation for claimants or cash buyouts for landowners. Rather, the 1999 amendment must be seen as having further entrenched the state's role as restitution banker, with the only real difference being that the Land Claims Court is now effectively excluded from overseeing the appropriateness of the cash payments made, at least where there is agreement on both sides.

As far as rural restitution claims are concerned, one of the major problems encountered has been the failure of claimant communities to make productive use of their land after restoration. In contrast to the urban process, the restoration of the actual land lost or alternative land has been the favoured method of settlement of rural land claims, particularly after certain problems were experienced by the Department of Land Affairs with cash compensation.<sup>75</sup> Predictably, the settlement of rural claims in this way has proven very expensive: first, because such settlements involve high transaction costs in getting the owner to agree to sell the land (with strategic holdouts and the political sensitivity of expropriations in this context often driving the settlement offer above market value) and, second, because the cost of resettlement is very high, including as it does the preparation of a business plan and post-settlement support.

Where rural land lost under apartheid is restored, award ceremonies typically become the focal point for euphoric celebrations on the part of the claimant community. The significance of such ceremonies in redressing the moral wrong of apartheid forced removals should not be underestimated. They undoubtedly help to alleviate some of the claimant community's sense of injustice which, in many cases, has been borne over several generations without official state recognition. All too frequently, however, such ceremonies are followed by post-restitution blues as projects fail through a combination of poor

<sup>74</sup> See the Land Restitution and Reform Laws Amendment Act 18 of 1999, s. 12, substituting s. 42D, as inserted by the Land Restitution and Reform Laws Amendment Act 63 of 1997, s. 30.

<sup>75</sup> See Atuahene, 'Legitimizing Property Rights' at 39 (describing problems experienced with the cash compensation settlement of the St. Lucia community land claim, as explained in an interview with the Chief Land Claims Commissioner, Tozi Gwanya).

management skills and inadequate state support, both of which are essential to successful farming in South Africa's marginal agricultural climate.

This problem, too, may be attributed to the Nozickian elements in the initial scheme. As initially conceived, the ability of claimants to use the land productively was of no real concern, since the purpose of land restitution was to correct injustices in holdings, irrespective of the use to which the restored property right would be put. Such an approach, as noted earlier, ignores the fact that the right being restored existed within a particular socio-cultural setting, and that, though the legal form of the right may be restored, the social function of the right and its holder's capacity to use it may have changed completely.

In this respect, too, a GR-based approach might have fared better. On that approach, I have argued, the principal goal would have been to ensure that the restitution award provided the material basis for renewed ethical citizenship. It is likely, therefore, that the transfer of unproductive land or land that could not be utilised by the claimant group would have been eschewed in favour of the award of alternative property rights. Nor would cash compensation necessarily have been the default form of redress, since the state would have been obliged to ensure that the restitution award meaningfully redressed the moral wrong done by restoring the claimants to a position of social equality.

The final problem with the implementation of land restitution has been its failure thus far to contribute to racial reconciliation in South Africa. Such outcomes are, of course, notoriously difficult to measure.<sup>76</sup> What we do know, however, is that the demographics of the apartheid city and racialised landownership patterns in the South African countryside have not been radically altered by land restitution. To the extent that it is changing at all, the racial composition of formerly white residential areas is changing because of a steady increase in the size of the black middle class. Land restitution has contributed little, if anything, to this process. In rural South Africa, with less than five per cent of agricultural land redistributed so far under the land restitution and land redistribution programmes combined, the impact of land reform on the historically received landholding structure has been insignificant.

<sup>76</sup> See Hall, 'Land and Agrarian Reform' at 12. For a more optimistic view, see Gibson's chapter in this volume.

Without any outward physical signs that land restitution is changing the racial composition of the property-owning class in South Africa, it is doubtful that the moral wrong done to the victims of apartheid forced removals will be felt to have been redressed. Indeed, there is already some evidence of resentment on the part of land restitution claimants about the inadequacy or inappropriateness of cash compensation received, and the lack of state support for resettlement projects.<sup>77</sup> On the side of landowners, although many have benefited from inflated prices paid for marginal land, there are also signs of growing apprehension that the slow pace and uncertain impact of land restitution will force the state to engage in ever more desperate, and therefore unjust, implementation methods. Such fears are periodically refuelled by statements from the Department of Land Affairs that it is intent on following the 'Zimbabwe model' of land reform.<sup>78</sup>

In general, therefore, the consensus of opinion on land restitution in South Africa is that it has not yet adequately redressed the moral wrong done to victims of forced removals, and has thus failed to make a significant contribution to the national reconciliation process. In large part, this outcome is attributable to an initial preoccupation with the need to do particular justice to victims whose claims fell within the parameters agreed to at Kempton Park. Although this Nozickian approach to property rights rectification has been progressively replaced by a more patterned, category-based approach, land restitution in South Africa continues to be unconcerned about repairing the social relationships and cultural ways of life damaged by apartheid land law. As Cheryl Walker, one of the authors of the seminal study of the impact of apartheid forced removals,<sup>79</sup> puts it:

There has been a lack of attention by the state to the symbolic, cultural and psychological elements of restitution . . . only minimal attention

<sup>77</sup> See, for example, Ashley Westaway and Gary Minkley, 'Rights versus Might: Betterment-related Restitution and the "Constitutive Outside" of South Africa's New Capitalist Modernity', paper presented at the conference on *Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa*, Cape Town, 13–5 September 2006.

<sup>78</sup> The latest such statement is contained in an internal Department of Land Affairs discussion document dated 27 September 2006. This document, which does not yet constitute official policy, proposes that the state be given a right of first refusal in respect of all agricultural land. See Neels Blom, 'It's Just a Jump to the Left' *The Weekender* (21–2 October 2006); Yolandi Groenewald, 'No Need for Zim-style Land Grabs' *Mail & Guardian* (20–26 October 2006).

<sup>79</sup> Laurine Platzky and Cheryl Walker, *The Surplus People: Forced Removals in South Africa* (Johannesburg: Ravan Press, 1985).



has been given to the non-material issues around memory, public recognition and identity that inform many claimants.<sup>80</sup>

## 6.5 CONCLUSION

This chapter has argued that many of the problems that have been experienced with the South African land restitution scheme may be attributed to its preoccupation with purging the post-apartheid property rights order of a particular set of unjust holdings, in accordance with a Nozickian approach. The hypothesis developed about the theoretical shortcomings of the Nozickian model has been confirmed to this extent. In turn, the application of property theory to an analysis of the South African land restitution scheme has helped to explain some of the findings emerging from the literature on the implementation of land restitution. The question that needs to be asked in conclusion is whether it is still possible to adapt the way in which land restitution is being implemented so as to resolve some of these problems and enhance the contribution made by land restitution to reconciliation in South Africa.

Clearly, it is too late now to change the philosophical basis of the land restitution programme. In any case, some of the factors that constrained the initial policy choice and pushed it in a Nozickian direction are still present. Nevertheless, there are some steps that could be taken to integrate a more GR-based approach into the current process, and in this way to address the problems identified in the previous section.

The first important step would be to remove the artificial time limit imposed on the finalisation of the land restitution process.<sup>81</sup> Such measures seem to be driven by a utilitarian concern that investment in land will not be possible until all land claims have been resolved. Whilst this concern is real, especially for a developing economy such as South Africa's, it can be overstated. Property rights rectification

<sup>80</sup> Cheryl Walker, 'Urban Restitution' unpublished paper presented in Pretoria, 2003 at 10–1, quoted in Uma Dhupelia-Mesthrie, 'Tales of Urban Restitution, Black River, Rondebosch', paper presented at the conference on *Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa*, Cape Town, 13–5 September 2006 at 5. See also Jenkins, 'After the Dry White Season' at 456: 'In moving away from land restoration, at least in relation to urban claims, the government may regrettably miss an opportunity to repair some of the social damage of apartheid.'

<sup>81</sup> After initially being set at the end of 2005, the deadline for the finalisation of all restitution claims has been extended to the end of 2008.

processes in other countries have endured much longer without negatively affecting investment.<sup>82</sup> Though it may promote certainty, the problem with the setting of deadlines is that it creates a perverse incentive for claims to be settled before they have been properly resolved. Deadlines also encourage officials to settle claims by cash compensation or ill-thought-through land transfers. Such settlements are not real settlements at all. Even if all the restitution claims that have been lodged are settled in this way, the spectre of unresolved land claims will continue to undermine the legitimacy of the post-apartheid property rights order.

Flowing from this point, the second way in which the land restitution process might be adapted is through the brokering of deeper and more meaningful settlements. Although the majority of claims have been 'settled', some of the most difficult claims remain, and many of the claims that appear to have been settled in fact still require further work.<sup>83</sup> From a GR-based perspective, there is no alternative to finding an enduring solution to these claims. For claimants, the moral wrong of forced removals needs to be adequately redressed. Cheque book restitution and failed resettlement projects may be counted as settled claims in official figures, but to the extent that they are seen not to have redressed the moral wrong done to victims they will leave the business of restitution unfinished. From the landowners' side, since the expropriation of land poses a threat to personhood, it is important that any acceleration of the land restitution process be correctly handled. The danger is that a new round of forced transfers will foster a new sense of injustice.

The third way in which land restitution could be adapted along the lines of a GR-based model would be to involve current landowners in the search for settlement solutions. Of course, there are many landowners who would not want to participate in this way, and for whom monetary compensation would suffice. But opportunities should be created for meaningful participation by landowners in the design and implementation of restitution settlements where possible. The aim must be to resolve land claims in a way that respects both the claimant's and the current owner's personhood. The paradigmatic example of this approach is a restitution settlement in which the

<sup>82</sup> For example, the Australian, Canadian, New Zealand and United States aboriginal title claims processes.

<sup>83</sup> See Hall, 'Land and Agrarian Reform' at 19.

current owner continues to play a role in the management of the land, ensuring a transfer of skills to the settlement community. For the community, such settlements help to meet the immediate challenge of making productive use of the land. For current owners, this type of settlement helps to bring their psychological relationship to the land to a meaningful point of closure. Face-to-face settlements of this type may also have knock-on benefits for the broader national reconciliation process in South Africa.

The fourth thing that could be done to adapt land restitution to a GR-based model would be to invest more resources in monuments and museums, especially in the urban setting. The District Six and Apartheid Museums are good examples of what can be achieved, but more needs to be done. It is probably too late to reverse the process of cheque book restitution in urban areas. There were in any case all sorts of practical reasons why this approach was preferred. But the ephemeral nature of cash compensation settlements in urban areas needs to be counterbalanced in some way. The building of more monuments and museums would be one way of doing this. Another would be the holding of annual commemoration days, similar to the Fietas Festival in Johannesburg, which sees members of the Pageview community returning to the residential area from which they were removed.

The fifth and final suggestion emerging from this study concerns the question whether there should be a call for an apology from white South Africans for apartheid forced removals.<sup>84</sup> Such calls have been made in other Commonwealth countries, including the call in Australia for an apology to the 'stolen generation', and in Canada for an apology to the victims of the residential school system. In South Africa, because of the transition to majority rule, an apology for apartheid forced removals seems to have been considered redundant. This may have been a mistake. The simple act of an apology (though not simple to organise) could make an important contribution to the cause of racial reconciliation in South Africa. The timing of the

<sup>84</sup> The *Home for All* campaign initiated by Mary Burton and Carl Niehaus invited white South Africans to acknowledge their role as beneficiaries of apartheid and to commit themselves to redressing the apartheid legacy, but did not include a specific call for an apology for forced removals. In general on the role of apology as a form of reparation for violations of human rights, see Catherine Jenkins, 'Taking Apology Seriously' in Max du Plessis and Steve Pete (eds.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Violations* (Antwerp: Intersentia, 2007).

apology would, of course, be all important – and the ideal moment may have passed.<sup>85</sup> But an apology may still do some good if it is connected to the search for closure in respect of the land restitution process, and combined with practical efforts by white South Africans, especially in the agricultural sector, to make restitution work.

<sup>85</sup> Jenkins, 'Taking Apology Seriously'.

South Africa's Truth and Reconciliation Commission is probably one of the most famous institutions charged with the task of dealing with the past and ensuring a just and peaceful transition to a stable society. Reparation included "any form of compensation, ex gratia payment, restitution, rehabilitation or recognition" (Promotion of National Unity and Reconciliation Act No. 34, 1995). In addition to the work of the committees, the TRC itself undertook investigations and held hearings in order to establish a picture of the past (Llewellyn & Howse, 1999, p. 368). Evaluating the Role of Restorative Justice in South Africa's Reconciliation Process. In the land planning system in south africa. A Failing Formal System of Land Delivery to the Urban Poor. The location and quantity of land identification for black South African's under apartheid was tightly controlled through legislation (the Black Communities Development Act) and according to the infamous Group Areas Act of 1966, along racial lines. Insufficient quantities of land were identified. Where restitution is not feasible claimants will be encouraged to identify, plan and develop alternative land. The land redistribution programme aims improve access to land for the landless, disadvantaged and the poor. Urban land redistribution is an integral part of the national housing programme, in that the housing subsidy contains a component that pays for the cost of residential land. Twenty years after South Africa's transition to democracy, conflict over land has not been resolved. Several analysts have argued that the failure to properly attend to this matter puts the larger... Truth, Justice and Reconciliation: Judging the Fairness of Amnesty in South Africa. American Journal of Political Science 46 (3): 540-556. CrossRefGoogle Scholar. Gibson, J.L. 2004.