No. 09-37
October 2009

WORKING PAPER

LAND REFORM AS SOCIAL JUSTICE: The Case of South Africa

By Karol Boudreaux

Mercatus Center
George Mason University

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Introduction

In his 1976 work *Law, Legislation and Liberty*, F.A. Hayek discusses the concept of social justice. He provides an extended critique of the view that social justice is a desirable goal, pursued by redistributing resources acquired through an unplanned and impersonal market order, to increase the material equality or equality of outcome of the members of that order. In a spontaneously evolved market order social justice is, Hayek argues, essentially "meaningless."

He views the widespread pursuit of social justice as "a will-o'-the wisp . . . an attempt to satisfy a craving inherited from the traditions of the small group but which is meaningless in the Great Society of free man" (Hayek, 1976). This craving to protect friends and family from injustice and to do what we can to improve their lots is extended, in the modern world, to a desire to help and protect unknown others. The craving has transformed into a widely held belief that "'society' ought to hold itself responsible for the particular material position of all its members, and for assuring that each received what was 'due' to him" (p. 79).

Broadly speaking, calls for social justice are aimed at making life better for the less fortunate or otherwise disadvantaged members of society. Behind calls for a war to end poverty, to promote racial or gender equality, or to provide universal health care is the idea that collective action is needed to overcome a set of ills. Collective action can be undertaken voluntarily, through philanthropic or civil society efforts, or coercively, through use of government's powers.

Social justice remains a call to action for many and what is meant today by social justice is, largely, what Hayek described it as more than 30 years ago: "an attribute which the 'actions' of society, or the 'treatment' of individuals and groups by society, ought to possess" (p. 62). Put differently, social *injustice*—seen by some in the workings of the marketplace as well as in public sector actions—continues to motivate people around the world to search for solutions to what often seem to be intractable problems.

Well intentioned as such efforts may be, Hayek argues that they are typically misplaced when they focus on changing the outcomes of a system that is unplanned, such as a market order. Different outcomes in this order result from the different uses individuals make of their knowledge, situation, and talents. Individual actions may be just or unjust; but the outcomes of impersonal processes of the kind one finds in a market economy are neither just nor unjust. Rather, he argues that the concept of social justice only has meaning with regards to actions taken in organizations such as government or corporations.

[*] Karol Boudreaux is senior research fellow at the Mercatus Center at George Mason University.

Organizations such as government act unjustly when they break the basic rule of a free society, which is that the only rules that should be enforced are those that can be applied equally to all. In a Great or Open Society, the role of government is to enforce rules of just conduct and to protect individuals against infringements of their rights. These rights consist of the kinds of negative rights often contained in Bills of Rights: rights to freedom of contract, the inviolability of property, and the duty to compensate others for one's negligent or harmful behavior.

Governments rarely follow these principles, however. Hayek notes that "[h]owever far modern man accepts in principle the ideal that the same rules apply to all men, in fact he does concede it only to those whom he regards as similar to himself, and only slowly learns to extend the range of those he does accept as his likes" (p. 58). Rather, legislation often creates a system of unjust and disparate treatment. Specific commands, rather than general rules of just conduct, are imposed on individuals. Such interference with the voluntary actions of individuals leads to an outcome that is different from what it would have been in a freer society. Unjust interference creates privileges for some and imposes burdens on others.

And this is precisely what has happened, over and over again, in Africa. Putting pre-colonial history aside, the experience of Africans with colonial governments is replete with unjust policies and legislation. A short and very partial list would include legislation that imposed taxes on them without their having meaningful representation; policies that favored some ethnic groups over others in terms of education or employment opportunities; laws that segregated black Africans onto less desirable land, freeing arable lands for white settlers; and, laws that limited or denied Africans the right to vote. Sadly, post-colonial African governments have continued the sorry story of ineffective political representation, ethnic or religious discrimination, and misuse and abuse of local resources.

What is to be done in such cases? Hayek notes briefly that "[t]here are, no doubt, instances where the past development of law has introduced a bias in favour or to the disadvantage of particular groups; and such provisions ought clearly to be corrected" (p. 131). This is certainly true. As the case of African nations makes clear, governments have repeatedly enacted the kinds of unjust and coercive laws that benefit some groups to the disadvantage and harm of others. Given this injustice, what policies should be adopted to "correct" past injustice? Hayek cautions that "unless such injustice is clear and recent, it will generally be impracticable to correct" so a preferable strategy would be to accept the status quo *ex post* and, moving forward, "refrain from any measures aiming at benefiting particular individuals or groups" (p. 131).

Hayek's argument is that only relatively recent and clear injustices should be corrected by government action. And any corrective action taken should avoid imposing new discriminatory measures. But, how would these prescriptions translate into actual policy making? What kinds of policies would correct past injustice but not work a new injustice?

A Legacy of Discrimination

Before 1994, the various governments of South Africa imposed an array of laws that treated non-white citizens differently from white citizens. These laws limited the rights of non-whites to vote, to pursue certain careers, to move freely, to inter-marry with whites, and, with regard to the vast majority of the territory of the country, to own land. There was a clear, persistent, and harmful bias in favor of one group within the society at the expense of other groups.

Given the pervasive injustice of the South African system, some corrective actions are clearly needed to right past wrongs. Repealing unjust law is one way to correct such a biased environment. But what other actions could, or even should have been taken, to provide a remedy to those people who were harmed by racist legislation? The difficult challenge in a case such as South Africa is to remedy some past harms, but not to implement programs or policies that impose new harms against other groups.

The National Unity government that was elected in 1994 and headed by Nelson Mandela developed a set of policies designed to create a more equitable, just, and economically vibrant society. Among the important policies the government developed was a complex policy of land reform designed to lead to a more equitable distribution of land within the country and greater economic growth and development. "Land reform was conceived as a positive measure to reverse the racially-skewed patterns of land ownership, *but also as an intervention to promote social justice and socio-economic equity*" (Hall, Jacobs & Lahiff, 2003, 25, emphasis added).

These skewed patterns were the result of hundreds of years of discriminatory practices towards non-whites living in South Africa. In the early years of the Cape Colonym, local black people were forced off land to make room for Dutch settlers. Other black people were imported into the colony as slaves and had only limited rights to use property. While free blacks did come to own property in freehold, particularly in the Cape Colony, many more were forced onto reserve land.

Despite their legal and political handicaps, by the end of the 19th century, blacks in South Africa were participating in local economies as traders, farmers, artisans, and professionals. Black farmers were viewed by some as unwelcome competition and in 1894 the Cape Colony passed the Glen Grey Act to limit the rights of black people in the Glen Grey Area of the Eastern Cape to own no more than 4 morgen of land in freehold and limiting the inheritability of this property to first sons (Bouch, 1993, 2). This act also opened the Glen Grey area—a relatively fertile black location—to white settlement.

In 1905, the Supreme Court of Transvaal ruled that black Africans had the right own land outside of reserves in the case *Ex part Tsewu* (Wickins, 1981, 110). At this time, black South Africans had the right to own land in the Cape Colony and Natal. But this legal victory, and the security that went along with it, was short-lived.

In 1913, the government of the young Union of South Africa, under pressure from a growing segregationist coalition, passed the infamous Natives Land Act. This act created a schedule, or listing, of all black reserves that had been established in South Africa's provinces up to that date and identified the boundaries of these reserves. With the areas in which blacks ideally should live identified, the law went on to forbid black South Africans from buying, leasing, or in any other manner acquiring land outside of these reserves unless from another black African (Feinberg, 1993, 68).[1] The law also prohibited whites from buying land in the scheduled areas.

The Natives Land Act was a crucial piece of early segregationist legislation. Historians suggest it was passed to meet labor demands of the growing mining and commercial agriculture sectors, that it was a way to limit black farmers from competing with white farmers, that it was designed to make more land available for white settlement, that it would help stop black squatting on white and government land, and that it was politically expedient as a way to win support of the segregationist movement, spearheaded by Free State politicians such as General J.B.Hertzog.

Consequences of the act were devastating economically and socially. Black South Africans were forced off white-owned land where many had entered into mutually beneficial leasing and sharecropping arrangements with white farmers. They were forced into increasingly crowded reserves where they had to compete with other families for space and fields. In his moving look at the effects of the law, Sol Plaatje wrote:

> We are told to forgive our enemies and not to let the sun go down upon our wrath, so we breathe the prayer that peace may be to the white races, and that they, including our present persecutors of the Union Parliament, may never live to find themselves deprived of all occupation and property rights in their native country as is now the case with the Native. History does not tell us of any other continent where the Bantu lived besides Africa, and if this systematic ill-treatment of the Natives by the colonists is to be the guiding principle of Europe's scramble for Africa, slavery is our only alternative; for now it is only as serfs that the Natives are legally entitled to live here (ch. 4).

Of course, things only got worse for South Africa's black citizens. The Natives (Urban Areas) Act (No. 21) of 1923 gave municipal governments rights to relocate black citizens into segregated townships. Blacks were moved to the outskirts of cities such as Cape Town and required to travel into cities for work as the government also restricted commercial activities in these areas. In 1936, the government passed the Native Trust and Land Act (No. 18) under which black South Africans lost the right to buy land in reserves, which created the system of labor tenancy that tied black farmers workers to particular farms, and which allowed the government to cleanse the country of "black spots"—parcels of rural land owned by black South Africans outside of reserves, i.e., in white areas—by expropriating property and resettling black owners into

[1] The act was never implemented in the Cape Province because doing so would limit the rights of black land owners in the province to vote so an exception was written into the act to cover the particular constitutional concerns of the Cape (Feinberg, 1993, 69).

reserves/homelands (de Wet, 1994, 362). Under the post-1948 National Party government, forcible removals and the destruction of black homes and property continued up to the 1980s under the terms of additional segregationist legislation such as the Group Areas Act (No. 41) of 1950. Since 1913, millions of black South Africans have been forced off land, had their rights to own or use land denied them, and been unjustly denied economic, social, and political opportunity in their native country. This history of government injustice surely calls for a response.

South Africa's land reform program attempts to correct past harms; whether it creates new ones in the process is a different question. Broadly speaking, these policies adopt three paths to promote equity and social justice: They allow for land to be restored to individuals or groups who were forcibly removed from their land at some point after June 1913 or for those individuals or groups to be compensated for their loss; they encourage and support land redistribution from white owners to black South Africans through a willing buyer/willing seller program that is funded with taxpayer dollars; and they attempt to improve the tenure security of farm workers and other black South Africans who live on land they do not own but which they have occupied and used for some time.

Land Reform in Post-Apartheid South Africa

By the time the political control in South Africa passed from the National Party to the National Unity government in 1994, the vast majority of farmland in the country (86 percent) and the majority of all land (68 percent) was held by white South Africans (Lahiff, 2006, 1). Millions of black South Africans were living in former homelands on poor quality land, far from jobs and economic opportunity. Over the preceding decades, millions had been forcibly removed from their homes and the land they occupied.

Overcoming the legal, economic, and cultural handicaps that the apartheid system put in place required enormous effort on the part of the new government. With limited resources, the government had to decide which issues to address quickly, which to address at a later date, and which to put to one side. Land reform was viewed as a critical issue, one that required early attention. Very early in the transition the new government set a target of redistributing 30 percent of farmlands owned by white South Africans to black citizens within 5 years. This date was later extended to 2014.

Arguments for land reform in South Africa rest on several grounds, one of which is ethical: Individuals who were forced off their land by past government actions should be allowed to return to that land or should be compensated for their losses.[2] A policy of land restitution or compensation for relatively recent and identifiable losses would, arguably, be consistent with Hayek's concern that unjust government actions be

[2] Other bases for advocating land reform would include economic arguments that reforms will reduce levels of poverty and promote economic growth, that reforms will prevent political upheavals and promote political stability, and that such reforms increase human freedom and bolster democracies. These are discussed in Marc Wegerif, "A critical appraisal of South Africa's market-based land reform policy: The case of the Land Redistribution for Agricultural Development (LRAD) programme in Limpopo." Programme for Land and Agrarian Studies (PLAAS), research report no. 19, December, 2004, 4.

corrected. As discussed below, other land reform programs, such as land redistributions, are more likely to raise concerns over unequal application of laws.

Even before the transition in 1994, the National Party government passed the Abolition of Racially Based Land Measures Act (No. 108) of 1991, repealing the 1913 Native Lands Act and the 1936 Native Trust and Land Act. This was followed by the Upgrading of Land and Tenure Rights Act (No. 112) of 1991. These laws cleared the way for blacks South Africans to hold more secure rights to property and to buy and sell land. However, the land reform policies the country subsequently adopted involve considerably more than freeing land markets.

Setting the Stage

The goals of land reform are written in to the 1996 Constitution, in the main section on property, section 25. This section requires the government to take "reasonable legislative and other measures" to "foster conditions" that enable citizens to "gain access to land on an equitable basis" (sec. 25 (5)). More specifically, the section provides that people who have been disposed of their property by past discriminatory laws or practices or those whose tenure rights are insecure are entitled to tenure security, restitution of land, or "comparable redress" (sec. 25, (6, 7)). The government's efforts to shift land holding patterns are constrained by constitutional provisions that protect property rights generally (sec. 25 (1)) and that restrict expropriations to those for "a public purpose or in the public interest" that are not arbitrary and for which compensation is paid (sec. 25, (2, 3)).

In 1997 the government issued a *White Paper on South African Land Policy* that created the policy framework for land reform. The government adopted a three-pronged reform strategy: Return land to people who were forcibly evicted in the past or compensate them, redistribute land to people who suffered discrimination, and improve land tenure security for farm workers and others. The process is demand-driven in that people identify lands they wish to have restored and they bring their claims to the government for resolution. This is distinct from other land reform efforts in Africa where governments first took control of large areas of land then distributed the land to citizens (Cliffe, 2000, 276). The South African's government's role was supposed to be that of facilitator, providing monetary grants to enable black citizens to purchase land from white owners.

Land Restitution

South Africa's land restitution program is a based on the Restitution of Land Rights Act (No.22) of 1994. Under the terms of the Act individuals or communities that were removed from land as a result of racially based laws, such as the 1913 Natives Land Act or the 1936 Native Trust and Land Act could bring a claim to a regional land claims commission. These regional commissions investigate claims and prepare them for settlement. A Land Claims Court was created to litigate land claims and provide restitution orders. After 1999, the court shifted from adjudicating claims to negotiating settlement. Restitution claims are all claims against the South African state, not against

individual land owners, and litigants can seek one of three remedies: a return of the land they lost, financial compensation, or a grant of alternate land.

All restitution claims were supposed to be filed by December 31, 1998 and all cases resolved by 2008 though his latter deadline has passed and many cases are still not settled. In total, nearly 80,000 claims were filed and these covered both urban and rural areas. As of March 31, 2009, 4,296 number of cases were still unresolved, the majority of these in rural areas. Charts 1 and 2 show progress to date in this program:

Progress in Land Restitution
1995- 31 March 2009

	Claims	Hectares	Beneficiaries	Land Cost	Total Award
Eastern Cape	16194	93600	208064	213,681,581.13	1,699,379,847.17
Free State	2654	47363	40624	9,428,300.00	178,996,877.44
Guateng	13159	9476	70179	117,283,195.57	828,787,975.68
KwaZulu-Natal	14742	610996	409323	3,463,227,556.25	5,969,745,666.80
Limpopo	3067	487935	215936	2,359,532,882.37	3,193,116,183.58
Mpumalanga	2688	389395	223524	3,650,382,194.58	4,360,110,339.87
Northern Cape	3663	471896	97479	340,441,333.81	1,118,093,456.64
North West	3707	364729	169823	1,129,633,366.81	1,878,649,548.63
Western Cape	15526	3132	116297	22,584,547.00	1,124,003,718.53
Total	75400	2478522	1551249	11,306,194,957.52	20,350,883,614.34

(Source: Mphela, 2009, Slides 22–22)

Outstanding Restitution Claims by Province as of March, 2009

Eastern Cape	522
Free State	28
Northern Cape	189
Guateng	3
North West	195
KwaZulu-Natal	1652
Limpopo	422
Mpumalanga	712
Western Cape	573
Total	4296

(Source: Mphela, 2009, slide 18).

The restitution process started slowly (Lyne and Darroch, 2004, 3). The steps involved in restoring land to claimants has made many of these transfers time consuming, costly, and difficult both for claimants and for government officials, who are required to process tens of thousands of cases. When a restitution claim is successful the government must do one of several things. First, if the claimant prefers compensation, as most urban claimants have, the government must determine the award amount and settle the claim. If

the claim is for state-owned land the government must clarify boundaries and transfer title to successful claimants. If the claim is for privately owned land, the government negotiates a sales price with the current owner. After the government purchases the land, title is then transferred to the successful claimant/s. A similar process is involved if the claim is for alternate land. To date, the government has relied almost entirely on a willing buyer/willing seller model for these purchases. However, in 2007 it used its powers of expropriation to purchase a large piece of property owned by the Evangelical Lutheran Church of South Africa.[3]

The restitution program may be considered a qualified success. Despite these lingering cases, tens of thousands of claims have been resolved, mostly through the payment of compensation to people living in urban areas. It was a time-bound program that has managed to recognize and compensate people for harms imposed by the pre-1994 governments of South Africa. The Department of Land Affairs reports that it has restored over 2 million hectares of land to 289,937 households, which benefited 1.4 million individuals (DLA: 2008). Perhaps this model of land reform, which involves a time-limited program that compensates people who successfully establish claims over land taken from them by past government actions, is a reasonable means to correct past injustice. Claims that were more than 85 years old were rejected. The program imposes no new discriminatory measures on particular groups. In a real-world environment in which difficult policy choices must be made about how deal with the legacy of discrimination, South Africa's land restitution program may be a reasonable, if not perfect, attempt to correct past governmental injustice.

Land Redistribution

More difficult to justify, from a Hayekian perspective, is the South African land redistribution program. This is an open-ended program that seeks to revise land holding patterns in the country by enabling non-white citizens to purchase land owned by white citizens through the use of government grants. The redistribution program encourages and supports black land ownership and rural economic development. The Provision of Certain Land for Settlement Act (No. 126) of 1993 and enabling regulations provide the legal basis for redistribution.[4]

As noted above, the program has a target goal of redistributing 30 percent of agricultural land in South Africa from white farmers into the hands of black farmers by 2014. By June of 2009 6.7 percent, or 5.5 million hectares, had in fact been distributed at a cost of approximately $800 million.[5] This 30 percent figure was based on suggestions by a group of land reform exports convened by the World Bank in the early 1990s. It is not clear that it is either an appropriate or meaningful figure towards which to be aiming a

[3] See Basildon Peta, "Whites fear Mugabe-style evictions as South Africa seizes first farm," *The Independent*, February 14, 2007, available at: http://www.independent.co.uk/news/world/africa/whites-fear-mugabestyle-evictions-as-south-africa-seizes-first-farm-436297.html.
[4] The act was amended in 1998 and renamed the Provision of Land and Assistance Act (Lahiff: 6).
[5] These figures were reported in a September 2, 2009 news story entitled "South Africa: Land reform programme unsustainable," IRINNews, available online at: http://www.irinnews.org/Report.aspx?ReportId=85974.

major government policy, nor is it clear which land is subject to the 30 percent target—all agricultural land (including state-owned land) or only white-owned agricultural land. Nonetheless the government remains committed to achieving this goal which means that South Africans, particularly poor black South Africans, have raised expectations regarding these transfers. Note that claimants under this program are not seeking compensation for the loss of a particular parcel of land they occupied in the past. Instead, they are seeking secure rights to some land.

As with land redistribution, the South African government has relied on a willing buyer/willing seller strategy to reengineer land holding patterns. This program provides grants to qualified applicants to help them buy land, primarily in rural areas and for purposes of farming. In order to qualify for funding beneficiaries create a business entity to manage the property (a community land trust or community property association) and they must also create a business plan for the property which is approved, modified, or rejected by the provincial DLA.[6] Supplemental grants are available for planning purposes also.

Government support for this program has come in two forms: From 1997 to 2000, the government provided a grant of R16,000 to poor households (those earning less than R1,500/month) to buy land for subsistence purposes. This program was known as the Settlement/Land Acquisition Grant or SLAG. SLAG was replaced, in 2001, with a program called LRAD or Land Redistribution for Agricultural Development. This program is designed to help previously disadvantaged South Africans (black, colored, or Indian) to buy agricultural land or agricultural inputs. It provides larger grants (up to R100,000) to individuals, as opposed to households. LRAD did away with the requirement that beneficiaries be poor and instead focuses on supporting individuals with the capacity to be commercial farmers. These individuals are supposed to make a contribution of their own funds, their own property or equipment, or their own labor in order to qualify for a LRAD grant. LRAD beneficiaries are supposed to be full-time farmers. Provincial DLA offices may also assist beneficiaries in securing credit from the parastatal Land Bank.

The SLAG program was criticized on several grounds. On the one hand, the government was criticized for being "very slow to get started" with SLAG projects (each project had to be approved by the Minister of Land Affairs) and for being a "very poor buyer of land with long delays and uncertainties [that led] . . . owners who had been willing to sell to withdraw from deals" (Wegerif, 2004, 17). The government was also criticized for providing grants that were too small, so that beneficiaries often had to pool grants in order to buy land that they wanted. Beneficiaries created legal entities such as community land trusts or community property associations which became the legal owner of the land. In many cases these arrangements led to conflicts allocating and managing property. Because these purchasers were poor, they typically had either no additional resources to buy agricultural inputs for their new land or very limited resources and very

[6] The new government, elected in April, 2009, has reorganized a number of ministries, including the Departments of Land Affairs and of Agriculture, which are now reconfigured into a Ministry of Rural Development and Land Reform and a Ministry of Agriculture, Forestry and Fisheries.

limited abilities to obtain credit. Without additional financial or technical support from the private sector, government, or NGOs many of these beneficiaries were unable to transition to commercial farming. Many SLAG beneficiaries have either reverted to subsistence farming or have abandoned plans to farm commercially.

In contrast, the LRAD program is criticized for doing less to support very poor rural dwellers and instead concentrating on supporting those black South Africans who have more financial resources and so are more likely to succeed as commercial farmers. This shift reflects a desire on the part of the government to support the expansion of black commercial farmers: to "deracialize" commercial farming rather than radically restructure the agriculture sector in South Africa (Lahiff, 2006, 12).

Writing in 2004, Marc Wegerif reviewed progress of the LRAD program in Limpopo province, a rural province in northeastern South Africa. Among the cases he investigated, a small number involved groups of very poor rural citizens who were able to join together to buy land. More cases involved individual claimants securing land – but to state land that had been allocated for black use under the apartheid government – not to white-owned farm land (p. 41). Wegerif discovered that the individuals who were able to purchase land under LRAD were "either business people or civil servants. . . [m]any benefited because they had the wherewithal, information and contacts to obtain state land on a lease basis some years ago. . .they then became the lucky beneficiaries of a government decision to dispose of that land through LRAD" (p. 36–37). Rather than create an open process that screened claimants on the basis of past harms, beneficiaries were selected based on political and social connections. Wegerif concludes that:

> [f]ar from endeavoring to bring poorer people into the programme, DLA and the DoA have gone out of their way to benefit those already better off and already benefiting from state land, while making access to the programme expensive (in time and transport) for poorer people, and almost totally inaccessible for the very poor. . . So far, LRAD has done nothing to stimulate land markets, has not encouraged any new investments. LRAD has not brought about any change in existing farming operations and has created no new jobs (p. 43, 44).

The experience in Limpopo may not track the experience with LRAD in other South African provinces. Further, the cases Wegerif studied were early efforts to implement LRAD. It may be that the way in which the program has been implemented has changed over the past several years.

For example, LRAD grants can be used by beneficiaries to buy equity in agricultural companies or to create joint ventures in the agriculture sector (van den Brink, et al, 2007, 180). Joint ventures create partnerships between black South Africans who want to purchase land and white commercial farmers, corporations, or state institutions. Grants enable purchases and the partnerships are seen as a way to better ensure the viability of commercial agricultural projects.

These ventures can take a number of forms including contracting arrangements where new small-scale black land owners contract with companies to supply agricultural products; equity arrangements in which new owners of a property agree to allow an agribusiness on that property to continue operations—the new owners become shareholders in the commercial venture and lease land back to the agribusiness which manages the operations and contributes capital; sharecropping arrangements; and arrangements were land reform beneficiaries lease their property back to the government but the beneficiaries manage the property (Hall, 2009, 30-32).

An example of the latter is the Makuleke concession on the northern edge of Kruger National Park, bordering Zimbabwe and Mozambique, an area that is now part of the Limpopo Transfrontier Park. A restitution claim for the land was filed by the Makuleke community in December, 1995. The community had been forcibly removed by the apartheid government from a 25,000 hectare area called Pafuri in 1969 and the area was incorporated into Kruger National Park. The community won their case and in 1998 entered into an agreement with the DLA, the South African National Parks department (SANP), as well as other government departments to take title to the Pafuri area and, in turn, to lease this land back to SANP for 25 years.

The Makuleke concession is considered a "contractual national park." It is privately owned by the Makuleke Community Property Association (CPA) created by the community's 15,000 members. The Makuleke people themselves have not resettled on the land instead; the land is managed jointly with SANP for conservation purposes and with other partners for commercial purposes. All of the commercial benefits that come from the use of the land are placed by the CPA into the Makukele Community Trust. Benefits have been used to fund community projects such as supporting local schools and expanding the electricity grid to bring power to Makuleke villages, rather than on a *per capita* basis (de Villiers and van den Berg, 2006, 23).

The CPA has entered into joint ventures with private partners to develop commercial activities in the concession. A special sub-committee of the CPA oversees these arrangements and a South African law firm assists, on a pro-bono basis, with contractual and partnership concerns. What this means, practically, is that the CPA has entered into joint ventures with professional hunters and with hospitality companies to provide services that tourists desire. At the time the land was returned to the community there were no overnight accommodations in Pafuri and little infrastructure; it is still considered to be a wild and remote destination. Since the return, two luxury lodges have been built on the property, which employ over 50 people. One lodge, the Pafuri Camp, is run in partnership with Wilderness Safari, a Johannesburg-based company that has a history of working with community groups in Namibia.[7] Commercial partners agree to hire community members when possible and agree to train staff. Wilderness Safari has funded an anti-poaching group that also trains local people. The Wilderness Safari lodges are considered to be eco-tourism facilities and the company runs a program that provides

[7] For more on the Namibia experience with community-based natural resource management see, Karol Boudreaux, "A New Call of the Wild: Community-Based Natural Resource Management in Namibia" 20 Georgetown International Environmental Law Review, 2008.

accreditation in this field. Makuleke is allowed to nominate a small number of community members to take part in this training.

The Makuleke restitution provides an example of South Africa's land reform program working relatively well. Following the legal process created under the 1994 Restitution of Land Rights Act, the government returned state-owned land to a community that had been displaced in the not-too-distant past. With secure rights over their land, the Makuleke community has been able to improve local economic opportunities, create jobs, and work with partners to improve human capital. Partnering with public and private-sector actors has allowed the community to compete with other high-end tourism operators in and around Kruger National Park. Such partnering is often considered essential to help previously disadvantaged communities to build the skills they need to develop sustainable businesses.

Critics, however, point out that some of the joint ventures black South Africans can pursue using LRAD grants "involve highly asymmetrical relations of social and economic power between the partners, and hinge on often complex arrangements that detail how costs, risks, income and benefits (frequently in the form of employment) are to be shared." (Hall, 2008, 30) Nonetheless, these projects are increasingly popular and, as demonstrated in the Makuleke case, have the benefit of providing skills, capital (in some cases), and market access (in other cases) to beneficiaries who otherwise might find it difficult to manage new properties.

Despite some useful efforts to provide more secure access to land previously disadvantaged South Africans—particularly with joint ventures—the government's land redistribution program has a poor track record. On September 1, 2009, Gugile Nkwinti, Minister of Rural Development and Land Reform, filed a reply to Parliament in which he stated that his department had purchased 2,864 farms across the country to benefit emerging farmers. However, "29 percent of the 1250 LRAD (Land Redistribution for Agricultural Development) projects reviewed have failed, and a further 22 percent are declining. Thus, 362 of the 1,250 farms are unproductive and a further 275 could possibly become unproductive if no agricultural support is received" (Daily Dispatch Online, 2008). Given real and persistent government constraints, the South African land redistribution program is failing to meet expectations and worse, is benefiting some groups at the expense of others.

Tenure Reform

Finally, the tenure reform program attempts to clarify and strengthen tenure rights of farm workers living on privately owned white farms and people living in former homelands. The legal basis for this program is the Interim Protection of Informal Land Rights Act (No. 31) of 1996. This law is designed to strengthen the tenure rights of people such as farm workers who are living on a white farmers' land but whose leasehold rights or other use rights are tenuous. Improving tenure security for South Africans is a constitutional requirement and attempts to improve tenure security have been written into a number of statutes beginning with the 1996 Interim Act.

Subsequently, the government passed the Extension of Security of Tenure Act (No. 62) of 1997 and the Land Reform (Labour Tenants) Act (No. 3) of 1996. These acts are designed to protect people living in rural areas, particularly farm workers and their family members, from arbitrary evictions. The ESTA allows farm workers who had been leasing farm land from white owners to "upgrade" their rights from tenancy into freehold (CDE, 2008, 19). Family members may also have rights to claim land after workers die. The Land Reform (Labour Tenants) Act has a different focus. This act attempts to provide greater security for people who work on farms and in exchange for their work receive access to land. The act helps these laborers become owners of the land they work.

These policies, well intentioned as they may be, created insecurity for current owners. They opened a window (time-limited) for farm workers and labor tenants to claim full ownership rights of land they occupied and used. If the claims are successful, beneficiaries purchase land they have occupied using government grants. The closing date for the program was March, 2001 and by that date over 20,000 claims had been filed. By June, 2005 only 175 claims under the LRA had been resolved. (Wegerif, Russell and Grundling, 2005: 61).

Positive results from this program are limited and unintended consequences are clear: White farmers are reportedly hiring fewer workers out of fear that they will not be able to fire workers at a later date. Commercial farmers substitute capital for labor and this process further exacerbates the very serious problems of rural unemployment in South Africa. Rather than increasing tenure security, the act may well have reduced it. Lahiff writes that the act "has had little success in preventing evictions" (2006, p. 5). According to Wegerif, Russell, and Grundling, more than two million black South Africans were moved off farmland between 1994 and 2004 (2005, p. 7). Most of the evictees are poor, earning less than R1,000 per month and have little formal education. They often end up in informal settlements with little in the way of employment opportunities. By creating a process that creates insecurity for landowners and that landowners may view as cumbersome (such as the requirement to obtain a court order to evict farm dwellers and by regulating day-to-day relations between owners and dwellers) the law may prompt preemptory evictions. Illegal evictions in one province, KwaZulu Natal, have been reported to outnumber legal evictions by 20 to 1.

In a 2008 report on land reform, the South African Centre for Development and Enterprise writes: "[n]either farmers nor the government are satisfied with progress made in this area (tenure reform in commercial farming areas)" (p. 17). More recently, Lahiff writes: "[i]n both of its key areas—regulation of evictions and promotion of long-term tenure security—*ESTA has been an abject failure*. This point has been made repeatedly by land activists and has been effectively conceded by successive Ministers of Agriculture and Land Affairs and senior officials" (2009, p. 104, emphasis added).

Reviewing the results of South Africa's three land reform programs, there seems to be widespread agreement that they have done little to alleviate poverty among the rural poor

or to promote sustainable economic development (Lahiff, 2003, 48). Reviewing progress up to 2003, Hall, Jacobs and Lahiff wrote: "It is not clear that land reform has enhanced livelihoods much beyond the survival level" (p. 21). One study argues: "Land reform has not benefited the poor significantly. The reforms that have been implemented have generally been to the benefit of a constituency that was already relatively advantaged (Seekings and Nattrass, 2005, 357). Lahiff writes:

> [t]here is no evidence to suggest that land reform has led to improved efficiency, job creation or economic growth. Some gains have undoubtedly been made, but these remain largely at the symbolic level. *Where real material advances have occurred, these can generally be attributed to the involvement of third parties, either individual mentors, agribusiness corporations, NGOs or eco-tourism investors* (2006, p. 23).

The South African government's land-reform policies are not entirely misguided. The land restitution program has compensated individuals and communities for harms they suffered as a result of forcible displacements and resettling program. These harms had to be reviewed or adjudicated and so evidence concerning the connection between the claimant and the compensation had to be established. This program recognizes that unjust laws imposed real costs on real people but does not impose new discriminatory burdens on other citizens. Given the severity of these past government actions, some recompense was appropriate on ethical and pragmatic political grounds.

But serious concerns about land reform persist. It is unclear, for example, how the government's involvement in land markets (through its grant making capacity and by assisting in land sale negotiations) has affected agricultural land prices. If farmers believe the government will pay what they demand in order to "close a deal" this creates incentives for them to raise the sales price of land. Some critics of the land reform process do argue that the government is paying too much for privately owned land. If this scenario is accurate then taxpayers are subsidizing white owners. On the other hand, if threat of expropriation is real, farmers may accept below-market prices in order to avoid even greater losses. If the background threat of expropriation or land invasion is strong enough, then farmers are transferring some of their wealth to others. In either case, some injustice is resulting from government involvement in the process (a third option, that government involvement has no impact on prices, is possible).

What we can see from the case of land reform in South Africa is the following: a desire to undo past harms, as well-intentioned as it may be, in no way guarantees the desired outcomes which, in this case, include a more equitable distribution of land, poverty alleviation, rural economic development, and increased tenure security (White Paper, sec. 2.1). The land redistribution program, as it is currently operating, benefits wealthier and politically well connected black South Africans more than it does the very poor. The tenure security program has created a host of unintended consequences that also harm the poor. In the real world, using the rather blunt tool of government policies to reach a goal that is as amorphous as "social justice" is exceptionally difficult. After 15 years of reform, the South African government has made only limited progress in terms of

accomplishing its goals for the land reform. And so, a question arises: Are there alternative approaches that would help accomplish these goals and, if so, how are they working?

The Private-Sector Alternative

Unlike most other sub-Saharan African countries, South Africa has a dynamic land market in which millions of hectares of land are transferred annually. Real-estate agents, mortgage lending, and private developers all contribute to help willing buyers find and negotiate with willing sellers. Some NGOs are providing micro-loans for home improvement and micro mortgages for low-income earners. Government involvement is minimal: After a property is purchased, appropriate taxes and duties are paid and deeds are registered by conveyancers at the Deeds Registry. As the black middle class grows in South Africa, more of these buyers and sellers are black South Africans.

Waiting for redistribution to happen through the market place would be one strategy for shifting land holding patterns. This non-interventionist strategy would require at least two things to bring about meaningful change. First, it would require increased economic opportunities for black South Africans so that they are better able to earn and save money to purchase property. Unfortunately, a variety of other policies adopted by the post-1994 government have limited economic opportunity for the poor (Boudreaux and van der Walt, 2009). Second, it would require a commitment on the part of the political class to allow this option to work.

Why allow such an experiment? It is a worthwhile experiment because it has already worked in South Africa. In a study of five annual census surveys of farmland transactions in the province of KwaZulu-Natal, the authors found that "there were far more private than government-assisted transactions redistributing land to disadvantaged people in KwaZulu Natal during 1997–2001" (Lyne and Darroch, 2004, 12). Most of these private transactions involved individuals buying property with cash (287); fewer used mortgage loans (184) versus 89 property sales using redistribution grants. And the land that was transferred through private markets was more valuable, based on the market value of the land, than was the land transferred with government assistance. The authors write:

> Private cash and mortgage loan purchases redistributed nearly *five* times more land wealth (R174.2 million) than did government-assisted transactions (R36.9 million) . . . *The implication is that agricultural land financed with government grants is of poor quality relative to that purchased privately* (p. 16, emphasis added).

These authors conclude that the market place has "much larger potential to redistribute farmland than what has been realized to date" (p. 19). But private-sector actions in South Africa are not limited to voluntary sales and purchases of land. The private sector is also helping black farmers to connect to markets, increase their income, and promote rural economic development. In the process, some projects are also helping to shift land into

the hands of small and medium-scale black farmers. Though limited to date, these projects are helping to increase economic opportunity in rural South Africa.

An interesting example of private-sector involvement in land reform comes from the South African sugar industry, which is represented by the South African Sugar Association. Since the 1970s, the sugar industry has been working with black sugar cane farmers in programs similar to current black economic empowerments (BEE) projects (CDE, p. 39). Since the early 1990s, the industry has been helping to support black farmers by selling them land and by supporting their efforts through a Small Grower Development Trust, which provides a variety of training opportunities and financial support. In 2000, the industry developed a Contractor Support Programme to "develop viable black contracting businesses to provide support services to small-scale growers" (Kleinbooi, p. 197). The industry has worked with the provincial Department of Agriculture in KwaZulu-Natal to provide technical assistance, mentoring services, and extension services to black smallholder farmers. It has also entered into joint ventures with black communities to manage sugar mills in the Mpumalanga province.

But the most innovative program associated with the sugar industry is the creation of the Inkezo Land Company, a private company created by means of a memorandum of understanding between the sugar industry and the Department of Land Affairs in 2004. The industry committed approximately R16.5 million to cover operating expenses for the first five years of the company's existence. Inkezo's goal is to transfer close to 80,000 hectares of sugar cane land to black owners. As Kleinbooi notes, this would be in addition to 31,000 hectare of sugar cane land that black farmers already held in freehold.

For the sugar industry, the benefits of supporting these efforts are clearly spelled out at Inkezo's website:

- The industry wants to avoid the kind of land-related violence that neighboring Zimbabwe has experienced.
- These distributions help the industry accomplish BEE goals for black empowerment.
- These distributions allow the company to diversify their supplier base. (Inkezo website, "Rationale").

The company maintains a database of land for sale and possible buyers. It provides mentoring and support services to new farmers. It also helps the industry work with the government to assess LRAD applicants (who, as we saw above, must create business plans for the land they wish to purchase). Inkezo hopes to both speed up the land transfer process and reduce costs associated with land transfers (Inkezo website, "Other Services"). So far, this seems to be working. Kleinbooi reports that by "mid-2008, Inkezo had assisted the DLA with the transfer of 19,485 hectares to the value of approximately R150 million" (p. 198) and, the time it takes to process a claim that Inkezo assists with has fallen from 18 to 3 months. This model of private-sector involvement in land reform is encouraging for a number of reasons: It is helping to move land into the hands of black farmers more efficiently than before, it couples land transfers with useful

support services, and it is supporting rural economic development—all the goals the government's land reform program espouses but has had difficulty accomplishing.

The private sector is involved in other ways with smallholder black sheep-farmers. Another example involves the South African National Wool Grower's Association (NWGA). Using association funds and some donor support from the British aid organization, DFID, the NWGA has created a program to assist black sheep farmers increase the yields as well as the quality of their wool and to improve the health of their livestock.

The NWGA, a private organization traditionally made up of white sheep-farmers, has targeted sheep farmers on communal lands to help them increase market opportunities and income. In the mid-1990s, the NWGA began building shearing sheds in communal areas in the Eastern Cape (Kleinbooi, 2009, 195). The sheds were an important innovation because black farmers could go there and learn to shear, sort, grade, and pack their wool more effectively.

The NWGA has also provided training in livestock and pasture and veld management and animal husbandry in addition to shearing and classifying wool. Between 2004 and 2006 over 650 shearers were trained. They have sold high-quality rams to communal farmers at reduced prices, have linked communal farmers to new markets and to research and they have advised farmers on a broad array of questions from infrastructure development to genetic improvement of flocks.

The NGWA helped the black farmers form producer groups such as shearing shed committees and woolgrowers' associations. By creating these associations, farmers were able to share costs and spread risks. They also increased their bargaining power with wool buyers. Kleinbooi reports that "between 1996 and 2000 this (these efforts) contributed to an estimated five-fold increase in the value of wool produced by the affected communities" (p. 196). More communal farmers are now selling their wool through a formal auctioning system, rather than to local traders who paid lower prices because wool tended to be unclassed or contaminated (p. 196). While the NWGA believes there is still considerable room for improvement in terms of incomes earned by communal farmers, the progress so far is encouraging.

This is the kind of support that is often cited as lacking in the government's land reform program: Black farmers get access to land but then are left on their own to manage the property, improve it, and connect to markets. The NWGA program is, admittedly, one example of how the private sector is helping black farmers gain skills, connect to world markets, and improve their livelihoods, but it is not the only one.[8]

The private sector has a vital role to play in South Africa's land reform efforts. As Hall writes, contract farming of the sort done in the sugar industry is an important model for

[8] For an example of how smallholder maize farmers are being supported, see Karol C. Boudreaux and Adam Aft, "Feeding Africa One Family at a Time," and Karol C. Boudreaux, "Seeds of Hope: Agricultural Technologies and Poverty Alleviation in Rural South Africa."

smallholder production because "it provides a means of bringing private sector support to resource-poor producers, in the form of access to input, credit, training and a secure market for produce" (2009a, p. 31). This echoes a point made by Lahiff and cited previously above: "[w]here real material advances have occurred, these can generally be attributed to the involvement of third parties, either individual mentors, agribusiness corporations, NGOs or eco-tourism investors" (2006, p. 23).

And yet, these same scholars are quite critical of the role the market can play in promoting effective land reform. Hall, for example, argues for increased use of expropriations and below-market price payments to owners to increase the rate of transfer of land in South Africa (Hall, 2009b, p. 77–79). Concerned that the marketplace does not serve the needs of the poor, Lahiff notes that: "[s]ince 2005 the Department of Land Affairs has been exploring a number of alternative policy options, including pro-active land acquisition and area-based planning. These imply a more active and strategic role for the state in land purchase negotiations, *rather than leaving it to uncoordinated negotiations between individual landowners and landless people*" (2006, p. 11, emphasis added). The ANC agrees that effective land reform cannot happen in the market. In a 2007 discussion document the ANC's Economic Transformation Committee wrote that: "[t]he willing buyer approach to land acquisition has constrained the pace and efficiency of land reform. It is clear from our experience, that *the market is unable to effectively alter the patterns of land ownership in favour of and equitable and efficient distribution of land*" (ANC, 2007, 2).

However, a variety of evidence, including land transfer censuses in KwaZulu-Natal and the efforts of the South African sugar industry to transfer land to black farmers, suggests that valuable properties *are* being transferred through the market to previously disadvantaged black South Africans in a less bureaucratic and time-consuming manner than happens through the government's land reform programs. The private sector is also providing valuable mentoring and support services to black farmers, services that the public-sector is having difficulty delivering. Contrary to claims of the ANC and others, the market in South Africa *is* helping to reshape the pattern of land ownership in the country and the private sector is helping to support the growth and development of black farmers. These efforts are directly helping to improve economic opportunity for South Africa's poorer citizens.

Conclusion

> If we wish everybody to be well off, we shall get closest to our goal, not by commanding by law that this should be achieved, or giving everybody a legal claim to what we think he ought to have, but by providing inducements for all to do as much as they can that will benefit others (Hayek, 1976, 106).

In his writings on social justice, Hayek cautions against pursuing this amorphous goal except under limited circumstances. One circumstance in which it might be appropriate to seek social justice is when a government has acted unjustly towards its citizens and when the harms the government has imposed happened in the not-too-distant past. South

Africa provides an example of a country where past government actions did impose significant harms on particular groups in the recent past. Given this reality, it may be appropriate for the post-apartheid government to pursue social justice by means of a land reform policy.

However, as this case also illustrates, even in situations where government officials have the best of intentions, using the public sector to pursue social justice is a strategy fraught with difficulties. The inevitable problems of bureaucratic impediments, turf wars between government departments, limited budgets, and limited capacity conspire to reduce the effectiveness of a planned approach to achieving social justice. In contrast, rather quietly if not perfectly, the private sector has been helping to push forward a more balanced pattern of land holding. It has been helping, in a limited but useful way, to provide skills and services to black farmers, through mentorship programs and association support.

A lesson to take away from the thorny case of South African land reform is that far from failing the country, the private sector and the market have opened a path forward, towards a future in which more black citizens own and benefit from the use of land.

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