

**THE PROBLEMS OF TRUSTEESHIP IN  
SOUTH AFRICA**

**“LAND AND FREEDOM”: THE 18<sup>TH</sup>  
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# THE PROBLEMS OF TRUSTEESHIP IN SOUTH AFRICA<sup>1</sup>

## Introduction

When I first encountered the Call for Papers for this conference, I was attracted by the conference organizers' association of the concepts of 'Land' and 'Freedom'. In South Africa, as you may well know, one's 'freedom' (or lack thereof) was, to a large extent, related to the 'land' or physical space which was allocated to one under the form of social engineering known as apartheid.

Also, 'land' and 'freedom' have been issues with which I have been occupied over the past five years or so. In 1994, while completing an Honours degree in History, I began researching the history of land rights in the area now known as KwaZulu-Natal. 1994, you will recall, was also the year of South Africa's first democratic elections, in which the 'land issue' featured prominently. I developed an academic interest in land-related issues, and went on to work in two organizations, the Commission on Restitution of Land Rights and the Department of Land Affairs, in two different provinces, KwaZulu-Natal and the Northern Province, of South Africa.

This conference is thus an opportunity for me to synthesize some of my academic interests with my work experience. It is a limited contribution on a specific issue, but I hope it will be informative and enhance your understanding of the challenges facing post-apartheid South Africa. Also, I am confident that the perspectives and insights I gain here will enable me to make a significant contribution to the academic and policy debates in South Africa.

## Origins of the policy of trusteeship

It is widely acknowledged that a form of trusteeship, where the king or chief held trusteeship over the land on behalf of the people as a whole, prevailed in Bantu-speaking communities of pre-colonial South Africa.<sup>2</sup>

The encounter of these communities with the forces of European expansion altered the forms in which land was conceived and held. For example, the grants of land by the leaders of indigenous communities to white traders, missionaries and settlers may have been interpreted differently by the various parties to the agreements.

The area between the Tugela and Umzimkulu Rivers, now part of the province of KwaZulu-Natal, became a site where different ideas of land policy competed for dominance. One such policy was that of trusteeship and was favoured by the colonial administration in Natal. Its origins can be traced to the British annexation of Natal,

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<sup>1</sup> I wish to express my gratitude to AusAid International Seminar Support Programme which funded my participation at this conference, and to acknowledge the invaluable assistance rendered by Dr Nancy Wright.

<sup>2</sup> T R H Davenport, 'Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the state to impose political and economic control', *Acta Juridica*, 1985, 53.

and the attempts by the administration to deal with the large African population of the colony, and to adjudicate between the claims and counter-claims to rights in land of the Boer, British and African constituencies.

A report by Henry Cloete in 1843 proposed the establishment of “locations” or reserves. In 1846, the Lieutenant-Governor of Natal, Martin West, appointed what became known as the ‘Location Commission’ with instructions to make the Location policy practicable and to indicate the areas where the Locations were to be set up. The Commission made several recommendations on how the locations could be made active agencies of civilisation. The Colonial Office agreed with the general spirit of the Commission findings but found the cost too prohibitive.<sup>3</sup>

On the question of land titles, the Commission recommended that as the only means of giving the Africans legal right to any locations appropriated for their use, such locations should be vested in the hands of trustees. Africans whose improved conditions of life rendered such action desirable could apply for freehold grants. It was intended that legal titles should be issued to each tribe, and where a tribe was divided, to each section of a tribe, that the titles should be vested in trustees, one of whom should be the chief of the tribe, and that the trustees should have the power to divide the lands into similar smaller tracts and apportion them among different sections of the tribe, and where practicable or expedient, into family holdings and unfettered titles.<sup>4</sup>

Such a trust- the Umnini Tribal Trust- was created by indenture of the 27th May 1858 in respect of the Amatuli tribe, which had been moved from their ancestral lands.<sup>5</sup>

In addition to the concerns raised by the Colonial Office, the recommendations of the Location Commission were opposed by some colonial officials, the Voortrekkers and the British settlers. Instead, in 1852 a commission was appointed by Lieutenant-Governor Benjamin Pine to review the existing policy and make recommendations for suitable changes. The composition differed from the previous Commission, which was criticized as consisting entirely of officials and foreigners, and instead, had a majority of land-owning colonists over officials. According to the Commission, the Location system had failed to secure ‘an abundant and continuous supply of Kaffir<sup>6</sup> labour’, which they believed, was what the fledgling Colony needed.<sup>7</sup>

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<sup>3</sup> E H Brookes & C B de Webb, *A History of Natal*, (Pietermaritzburg: University of Natal Press, 1987, 2<sup>nd</sup> ed.), 59.

<sup>4</sup> E H Brookes, *White rule in South Africa, 1830-1910: varieties in governmental policies affecting Africans*, (Pietermaritzburg : University of Natal Press, 1974), 163.

<sup>5</sup> Lindsay Young, ‘The Native Policy of Benjamin Pine in Natal, 1850-1855’, *Archives Year Book for South African History* 4 (1951), 282-6; & Neo Ramoupi, ‘The amaThuli and the Mnini Trust: A Documentary and Oral History’, MA: University of Natal, 1998, 78-106.

<sup>6</sup> The word ‘Kaffir’ has since been considered offensive and is not used, except when referring to a quoted source.

<sup>7</sup> Brookes & Webb, *A History of Natal*, 69-70.

It was decided not to proceed with this scheme, which would have taken away from the Government the power of re-allocating lands between tribes. In any case, little was done to carry out the recommendations of the 1852-3 Commission.

In the early 1860s there was much public debate, official and unofficial, on the merits of allowing native titles. Put simply, the majority of colonial officials and settlers were concerned that granting titles, or the possibility thereof, would create an African majority of the electorate, and would stifle the already precarious supply of labour. Instead, in 1864 the Natal Native Trust was created, whereby the Crown alienated to it all the unalienated location and mission lands in Natal (respectively 2 262 066 and 144 192 acres) in trust for the African population as a whole.<sup>8</sup> There was no separate trust for each tribe, the trust embraced *all* the Africans concerned.<sup>9</sup> In 1864 and 1865 the Colony of Natal passed severe legislation which made it almost impossible for Africans to obtain the vote.

Where and how did these ideas of trusteeship develop? One explanation for the policies adopted by colonial administrators in the early years of the Colony may be the attitude of the Colonial Office to its colonial possessions. Sir James Stephen, assistant under-secretary for the Colonies, 1843-6, and permanent under-secretary, 1836-47, believed 'the Empire was for the most part a liability, not an asset- a trust which brought little or no advantage to the trustee'.<sup>10</sup> That administrators, in Britain and in the colonies, were guided by fiscal concerns is not surprising. The history of colonialism, and recent studies in anthropology and cultural studies, also point to the cross-pollination of ideas on governing 'native' peoples between the colonies and the metropole.

Another explanation, by Hull, credits missionaries from the other side of the Atlantic with the development of the trusteeship system in Natal. Hull suggests that American missionaries contributed to the trusteeship policy, which established the Native Reserves in Natal in the mid-nineteenth century, and reveals how the Natalian experience helped shape official US government policies towards Indians west of the Mississippi.<sup>11</sup>

He maintains that the mid-seventeenth century concept of reservations where the indigenous populations would be protected by the central government acting a guardian or trustee was brought out to southern Africa in the mid-1830s by American

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<sup>8</sup> Brookes, *White Rule in South Africa 1830-1910*, 54. See Stanley Trapido, "Natal's non-racial Franchise, 1856-63" in proceedings of John Bird Historical Society, Durban, 1962; & Benjamin Kline, *Genesis of Apartheid: British African Policy in the Colony of Natal 1845-1893*, (New York: University Press of America), 35-67, for a discussion on the connection between the land and franchise policies in Natal.

<sup>9</sup> Brookes, *White Rule in South Africa 1830-1910*, 163.

<sup>10</sup> Brookes & Webb, *A History of Natal*, 1987.43.

<sup>11</sup> Hull, 'Native reserves and Indian reservations: what the South Africans learned from the Americans on dealing with land and indigenous populations', paper presented at the 16<sup>th</sup> Biennial Conference of the South African Historical Society, 6-9 July 1997, 1-2.

Board missionaries, in particular the Reverend Daniel Lindley, who was a member of the 1846 Location Commission.

Personal beliefs and the influence of key personalities- in particular Theophilus Shepstone- also played their part in making recommendations on native policy. Shepstone is credited with having developed the 'Natal system of indirect rule' which came to be associated with British rule in Africa, and has received a mixed reception from historians.

Although the system of native administration developed in Natal was, to an extent, unique, similar restrictive measures were being devised and implemented in the other territories of South Africa.

### **Implementation of the policy of trusteeship**

By the 1880s both Natal and the Transvaal were reluctant to encourage individual African title, and endorsed the principle of trusteeship; Natal with its Native Trust, and in the Transvaal, the Native Location Commission, set up under the Pretoria Convention of 1881, which assumed the role of trustee for all tribal lands.<sup>12</sup>

This principle was further ratified by the Cape Native Laws Commission (1883). The Commission, presided over by Sir J. D. Barry, was one of the strongest commissions ever to consider questions of native policy in southern Africa. The Commission recommended individual title for Africans as a long term objective, but 'as this was not practicable at the present, the lands in the Territories now occupied by tribes...shall, by formal title deeds, be...vested in Boards of Trustees nominated by Government, one of such trustees in each case being a chief...'<sup>13</sup>

Partly in response to the growing numbers of enfranchised Africans in the Cape and to a call for cheap labour by mine-owners and farmers, the Cape Colony passed the Glen Grey Act of 1894. The crucial element in the Glen Grey formula was the creation of a land shortage which could be brought about in two ways: by limiting the head of each family to just four morgen; and by making the eldest son in a household the sole heir to the family property. Such an arrangement, it was hoped, would reduce uncontrolled squatting and force the rest of the household into wage labour. Although the Act was essentially a racist and coercive piece of legislation, it was composed so as to accord with the best traditions of Cape 'liberalism'.<sup>14</sup> It was followed by legislation to limit the African franchise.

Realizing the danger the Act posed to their chosen way of life, urban and rural Africans pooled their resources to wage what was at times a highly effective campaign against the Glen Grey proposals. Largely as a result of the widespread opposition to the new legislation, the Glen Grey legislation did not achieve its

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<sup>12</sup> Davenport & Hunt, *The Right to the Land*, 31.

<sup>13</sup> Report of the Cape Native Laws Commission, 1883, 40, in Davenport & Hunt, *The Right to the Land*, 37.

<sup>14</sup> *Illustrated History of South Africa: The Real Story*, (Cape Town: Reader's Digest, 1988), 206.

intended effects. But its importance cannot be dismissed as it provided one of the foundations on which National Party ideologues of the 1950s were able to build a 'native policy' for (white) South Africa.<sup>15</sup>

Policy-makers at the turn of the century were thus able to draw on the combination of the experience of Shepstone's reserve system in Natal, the principles of Rhodes' Glen Grey act of 1894 in the Cape, the racial exclusivity of the Transvaal and the Orange Free State polities, imperial law of conquest, and general British colonial policy on the governance of 'Native' races in devising a common policy for land rights in South Africa.<sup>16</sup>

The South African Native Affairs Commission (SANAC) of 1903-5 was appointed by Lord Milner in September 1903 to report generally on the practice and the aims of native policy in the southern African colonies, and 'offer recommendations to the several Governments concerned'. In paragraph 204 the Commission :

considered whether it should recommend that the Natal system or some similar embodying the principle of a separate Trust in which to vest Native lands should be adopted in the other Colonies, and the majority of the Commission decided against the principle and in favour of these lands being administered by the respective Governments, such lands having first been accurately defined by special legislative enactment and formally dedicated to the use of the Native people. Certain members claimed that the vesting of Native lands in a separate trust gave better security to the Natives than any other form, and that such better security was necessary.<sup>17</sup>

Like their predecessors in the colonies and Republics, the Commission linked the issue of 'Native' franchise with that of land tenure. According to the Commission's understanding, the tribal group, as a whole, owned all land in trust. Problems would arise when 'Natives' were given tenure of land on an individual basis, as it would encourage notions of equality with whites. The Commission was convinced of the political necessity of excluding Africans from the franchise.<sup>18</sup>

The SANAC Report was the first official South African document to legitimize the division of territory and citizenship, which would become a characteristic of the South African state in the twentieth century.<sup>19</sup>

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<sup>15</sup> *Illustrated History of South Africa: The Real Story*, 207-11. For a discussion of the background and provisions of the Glen Grey Act, see Brookes, *White Rule in South Africa*.

<sup>16</sup> Adam Ashforth, *The Politics of Official discourse in Twentieth-Century South Africa*, Oxford: Clarendon, 1990, 28 and n.60.

<sup>17</sup> Report of the South African Native Affairs Commission, i, 26-40, in Davenport and Hunt, *The Right to the Land*, 41.

<sup>18</sup> Ashforth, *Politics of Official Discourse*, 43-5.

<sup>19</sup> Ashforth, *Politics of Official Discourse*, 35.

## Extension of the policy

The policy of territorial segregation was not unique to South Africa at the time. Segregation was being advocated in the American south from about the 1890s, and Cell demonstrates that ideological links between the American South and South Africa were established from the 1890s.<sup>20</sup> There was, however, a compelling reason, other than purely ideological, for the growth of segregationist thinking among white South Africans: the potential threat an African peasantry presented to Afrikaner farmers intent on post-War reconstruction.<sup>21</sup>

The establishment of the Union of South Africa in 1910 provided the constitutional foundation for the entrenchment of segregation and its concomitant administrative machinery. The Natives' Land Act of 1913 was the first legislative attempt to divide the union into areas where Africans *could* own land and areas where they could not. The Act made provision for the release of further land for Africans and a commission under Sir William Beaumont was duly set up to assess the extent of African needs and find the land for release.<sup>22</sup>

Apart from its significance for its demarcation of the absolute territorial limits for African occupation and ownership of land, the Natives' Land Act stimulated African resistance politics and formed the backdrop to one of South Africa's great political books, namely *Native Life in South Africa* by Sol T. Plaatje.<sup>23</sup> Published in 1916, it begins with the chilling words: 'On 20 June 1913 every Native woke up to find himself a pariah in the land of his birth'. *Native Life* provides an account of the origins of the Land Act, and its devastating effects. Written by an office-bearer of the recently formed South African Native National Congress (later to become the African National Congress), *Native Life* explores the origins of the Act, and documents the steps taken by South Africa's rulers to disenfranchise black South Africans. It is a literary masterpiece and an important political document.<sup>24</sup>

The efforts of African opposition groupings to win redress at the local and international stage were unsuccessful and the 'segregation' continued to be a feature of government native policy. It informed the core of the Prime Minister, General Hertzog's 1926 Native Bills, which proposed to extend Africans' land rights as a *quid pro quo* for their surrender of the common franchise.<sup>25</sup>

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<sup>20</sup> John W. Cell, *The Highest Stage of White Supremacy: The origins of Segregation in South Africa and the American South*, Cambridge: Cambridge University Press, 1982.

<sup>21</sup> Davenport, 'Some reflections on the history of land tenure in South Africa', 61.

<sup>22</sup> Davenport & Hunt, *The Right to the Land*, 32.

<sup>23</sup> Brian Willan, 'Introduction' in Sol. T. Plaatje, *Native Life in South Africa*, Randburg, South Africa; Ravan, 1982, 3.

<sup>24</sup> Willan, 'Introduction', 1.

<sup>25</sup> Saul Dubow, *Racial Segregation and the Origins of Apartheid in South Africa 1919-36*, London: Macmillan, 1989, 6.

Meanwhile, conditions in the Reserves were sending distress signals. The appointment of the Native Economic Commission under the chairmanship of Dr J E Holloway was the Hertzog government's response to the need to tackle the social and economic problems in the Reserves. The report of this body was paternalistic towards the black, drawing too sharp a distinction between the backwardness of African farming and the enlightenment of European methods. There was absolutely no question in their minds of revoking the Native Land Act, to whose provisions they seem to have been utterly committed, or of re-examining the problem of land tenure in any fundamental way.<sup>26</sup> The Native Economic Commission (1932) related the question of title to the problem of agricultural productivity. A noteworthy feature of the Report of this Commission was its insistence that the key to racial harmony lay in the rehabilitation of the Reserves, so that they would provide a home for the bulk of the African population.<sup>27</sup>

The recommendations of the Holloway Report to improve conditions in the reserves were not carried out, as had been the case with previous commissions of inquiry and as would recur in coming years. Hertzog was fine-tuning his 'native bills', which would extend the Natal principle of trust tenure to the Union.

The Union Minister of Native Affairs, P G W Grobler, explained the purpose of the Native Trust and Land Bill, 1936, thus:

In order to give effect to the objects of the Bill there will be established a trust, administered by the Governor-General, to be known as the South African Native Trust, into which will be merged the existing Natal and Zululand Trusts, and in which will vest all Crown land reserved for native occupation or situated within the scheduled or released areas. This represents the *extension to the whole Union of the policy which was successfully followed in Natal before Union* (my italics)...The Trust will administer a fund, called the 'South African Native Trust Fund', which will derive its revenue from sums to be appropriated by Parliament, and from such rents and other revenues as may accrue from the land under its control. These funds will be used for the acquisition and development of land for native settlement, for making advances to natives for the better development of their holdings and generally to advance the well-being of the native people; and the Trust will acquire land for native settlement in the released areas.<sup>28</sup>

It was chiefly as a result of the efforts of a Natal senator, G Heaton Nicholls, that the Natal system was incorporated as a main feature of the Native Trust and Land Act of 1936.<sup>29</sup> Senator Nicholls embarked on a campaign to promote the ideology of 'trusteeship'. In a major public statement delivered in 1935 Nicholls described

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<sup>26</sup> Davenport, 'Some reflections on the history of land tenure in South Africa', 63-4.

<sup>27</sup> Davenport & Hunt, *The Right to the Land*, 51.

<sup>28</sup> Minister of Native Affairs, H. of A. Deb., 30 April 1936, cols. 2746-50 in Davenport & Hunt, *The Right to the Land*, 45.

<sup>29</sup> Davenport, 'Some reflections on the history of land tenure in South Africa', 64-5.

trusteeship as the antithesis of the 'Cape idea of universal Parliamentary democracy' or of 'common citizenship'. Trusteeship envisaged 'areas where native interests will be paramount, where native institutions will have liberty to evolve in consonance with the growth of the native people, and where the indigenous tribal government through chiefs and councils, modified to suit local needs, must be encouraged and developed'. Nicholls extolled the virtues of trusteeship which he insisted, was not unique to South Africa, although it had been applied in Natal, Transkei and Transvaal.<sup>30</sup>

The Native Trust and Land Act of 1936, as it came to be known, contained five chapters and three schedules. Chapter I made provision for the release of areas listed in Schedule I for purposes of addition to the native areas. Chapter II established a South African Native Trust. Chapter III laid down conditions for the acquisition, tenure and disposal of land by the Trust and by natives, empowering the Trust to buy up to 7, 25 million morgen of land, of which not more than 5 028 000 could be bought in the Transvaal, 526 000 in Natal, 80 000 in the Orange Free State, and 1 616 000 in the Cape. Chapter IV prohibited the residence of natives on land outside the Native areas, unless they were the registered owners, or the servants of the owners, or registered labour tenants or squatters, or the wives or children of natives exempted under these headings, or clergy, or teachers, or sick or elderly people. Chapter V made provision for regulations, the safeguarding of African voters' rights, the application of penal sanctions and the interpretation of terms.<sup>31</sup>

As with previous legislation, African (and some white) opposition was unable to convince policymakers of the folly and short-sightedness of the intended legislation. In any case, African access to political resources was being whittled away: the government had signalled its intention to curtail the land and freedom of black South Africans.

### **Zenith of the policy**

The resolve to keep South Africa 'white' was bolstered by the National Party victory in the watershed 1948 general election. In its 'Colour Policy', the ideologues of the Party outlined the infamous 'Apartheid' policy. The general aim was stated as:

The maintenance and protection of the European population of the country as a pure white race, the maintenance and protection of the indigenous racial groups as separate communities, with prospects of developing into self-supporting communities within their own areas, and the stimulation of national pride, self-respect and mutual respect among the various races of the country.<sup>32</sup>

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<sup>30</sup> Dubow, *Racial Segregation and the Origins of Apartheid*, 145.

<sup>31</sup> Davenport & Hunt, *The Right to the Land*, 44-5.

<sup>32</sup> In Ashforth, , *Politics of Official Discourse*, 149.

Within this broad aim, the objective of complete separation was elaborated:

In their own areas the non-European racial groups will have full opportunity for development in every sphere and will be able to develop their own institutions and social services whereby the forces of the progressive non-Europeans can be harnessed for their own national development. The policy of the country must be so planned that it will eventually promote the ideal of complete separation in a national way.<sup>33</sup>

True to its word, the National Party passed several pieces of legislation-the Population Registration Act, the Group Areas Act, the Reservation of Separate Amenities Act, the Immorality Act, amongst others-which, over the next forty years or so would determine the minutiae of the lives of millions of South Africans.

Anxious to implement its policy of separate development, the government appointed the Tomlinson Commission (1955) to investigate the economic potential of the reserves. Like its predecessors, the Commission linked the question of title to productivity and stressed the importance of promoting a system of land tenure which was economically viable. It 'regarded a revision of the systems of land tenure as one of the prerequisites to the stabilization of the land in the Bantu areas and the full economic development of their potential...it is essential to break the vicious circle...and recommends that in areas where the Bantu desire that their land should be granted to them under title deed, this should be done...the abolition of the 'one-man-one-lot' policy is accordingly recommended, but care should be exercised to avoid the centralization of all the land in the hands of a few individuals...'<sup>34</sup>

The Union government reacted cautiously to the Tomlinson Commission's proposal to grant title and abolish the one-man-one-lot principle, and stated that it was '...not prepared to do away with tribal tenure of rural land and to substitute individual tenure based on purchase, nor does it propose to give preference to individual acquisition of land above Tribal and Trust purchase in the released areas. It will allow...for the possibility of individual purchase by suitable buyers and with proper safeguards in the released areas'.<sup>35</sup>

The most vehement critic of the Tomlinson Commission was Dr H F Verwoerd, who took over the Department of Native Affairs in 1951. He had not been in favour of the appointment of the Tomlinson Commission in the first place. The White Paper 'F' of 1956 discredited those parts of the report which appeared to run counter to his

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<sup>33</sup> In Ashforth, , *Politics of Official Discourse*, 149.

<sup>34</sup> Summary of the Report of the Commission for the Socio-Economic Development of the Bantu Areas within the Union of South Africa (U. G. 61-1955), 151-2, in Davenport & Hunt, *The Right to the Land*, 53.

<sup>35</sup> Government decisions on the Recommendations of the Commission for the Socio-Economic Development of the Bantu Areas within the Union of South Africa (W. P. F-'56), 4-5, in Davenport & Hunt, *The Right to the Land*, 53.

declared political objectives. Once again the government put ideological consideration before the calculations of the pragmatists on the commission, and refused to adhere to some of their key recommendations.<sup>36</sup>

Verwoerd, meanwhile, was devising more sinister measures to dispossess black South Africans of their rights to land and citizenship. This was the homelands, or 'Bantustan', policy, another of South Africa's great lexical imports. The promotion of homeland self-government, leading up to independence, was a carefully orchestrated process, which began with Verwoerd's policy statements as Prime Minister during 1959. The new policy was dictated largely by a need to provide a substitute citizenship for Africans because they were seen to be too numerous to remove from the white area, where it was considered dangerous to grant them political rights.<sup>37</sup>

The patchwork of 'homelands' which had been consolidated by the Natives' Land Acts became the basis of a new and ambitious scheme to create separate 'nation states' within South Africa, each to be developed independently of the other and offering political rights to Africans right up to independence, if they so chose. Africans living in 'white' South Africa would become citizens of whatever ethnic 'homeland' they could be traced to.

A key piece of legislation was the Promotion of Bantu Self-Government Act of 1959. Further impetus to the Bantustan system was provided by new legislation in the early 1970s. The Bantu Homelands Citizenship Act of 1970 stipulated that all Africans would become citizens of one of the Bantustans. The Bantu Homelands Constitution Act of 1971 enabled the government to bypass parliament in granting the various stages of self-government to each Bantustan.<sup>38</sup>

Tatz has correctly identified these discriminatory measures as 'shadowy' and demonstrates how, during Union and Nationalist rule Africans were not granted any substantial rights at all; in fact, they had to surrender real and established rights in exchange for *promises* of compensation. In 1913 Africans were deprived of a right of free purchase of land on the explicit understanding that definite areas would be set aside for their exclusive purchase and occupation. This promise remained unfulfilled for twenty-three years when, in terms of the Native Trust and Land Act, definite areas for Africans were set aside. From 1926 Cape Africans were asked to surrender their individual franchise, the "shadow", in return for which they would be given compensation, the "substance" of land provisions. The promise of additional land made in 1936 was not fulfilled. In 1959 Africans were deprived of their Parliamentary representation: the *quid pro quo* was the promise of future political rights in their own areas.<sup>39</sup> This double standard in the treatment of Africans was

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<sup>36</sup> Davenport, 'Some reflections on the history of land tenure in South Africa', 68.

<sup>37</sup> Davenport, 'Some reflections on the history of land tenure in South Africa', 69-70.

<sup>38</sup> Paul Maylam, *A History of the African People of South Africa from the Early Iron Age to the 1970s*, David Philip: Cape Town, 1986, 167-8.

<sup>39</sup> C. M. Tatz, *Shadow and Substance in South Africa: A Study in Land and Franchise Policies Affecting Africans, 1910-1960*, Pietermaritzburg: University of Natal Press, 1962.

consistent with government policy to make the 'Native' politically and economically subservient.

But apartheid policy was not confined to political and economic dominance. Making the plan work required social engineering on a massive scale- and over the next twenty years an estimated 3,5 million were affected by the various categories of dispossession. Entire neighbourhoods and communities disappeared literally overnight. The policy wreaked havoc not only in the rural areas but also in the cities, where an estimated 600 000 Indian, Coloured and Chinese people- and nearly 40 000 whites- were affected by Group areas legislation. Forced removals reconfigured the South African landscape and spawned a literature on the dislocation and dispossession of communities under the scheme of 'grand apartheid' which alerted the world, and the rest of South Africa, to the devastation that was being wrought.<sup>40</sup>

### **Undoing the effects of the policy**

As indicated earlier, the various restrictive measures were not passed without opposition or resistance. Early extra-parliamentary opposition groups correctly understood the crucial links between land and freedom. This connection was also perceived and articulated at grassroots level.

In the early 1950s, resistance groups in South Africa embarked on a combined effort to make the views of the people known. One such endeavour was the Congress of the People which was the consultative phase prior to the establishment of the Freedom Charter. In the rural areas, the 'first question was the land...one of the demands was LAND for the peasants... Yes, that was the first demand, which is STILL a problem today...'<sup>41</sup>

Conscious of these sentiments, the Freedom Charter contains the following clause:

#### **The land shall be shared among those who work it!**

Restriction of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it, to banish famine and land hunger;

The state shall help the peasants with implements, seed, tractors and dams to save the soil and assist the tillers;

Freedom of movement shall be guaranteed to all who work on the land;

All shall have the right to occupy land wherever they choose;

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<sup>40</sup> Cosmas Desmond, *The discarded people :an account of African resettlement in South Africa*, ( Harmondsworth, Middx. : Penguin Books, 1971); Laurine Platzky & Cheryl Walker, *The Surplus people : forced removals in South Africa, Vol. 4*, (Johannesburg : Ravan Press, 1985).

<sup>41</sup> Raymond Suttner & Jeremy Cronin, *30 Years of the Freedom Charter*, Johannesburg: Ravan Press, 36.

People shall not be robbed of their cattle, and forced labour and farm prisons shall be abolished.<sup>42</sup>

The demand for the return of the land continued to be a feature of resistance politics over the next forty years. In 1991, the South African government scrapped the 1913 and 1936 Land Acts which had fragmented the rural regions into racially defined land parcels, and restricted control over the access, utilization and exchange of land. Simultaneously, the government proposed a new land policy by way of a White Paper on Land Reform.<sup>43</sup> The terms of the struggle changed from calling for an end to the system to seeking ways of addressing the legacies of these policies.

As expected, the land issue featured in the negotiations between the government and the various political parties and interested parties. The deliberations were posited as the dilemma of balancing the need to address the injustices of the past with the demands, being made by several powerful interest groups, to maintain the *status quo*.

The Interim Constitution, which was the product of the multiparty negotiations, adopted a moderate approach. It contained a section, 'Restitution of Land Rights' which enabled 'persons or communities dispossessed of rights to land, after 19 June 1913 [the date of the promulgation of the Natives' Land Act], in pursuance of racially discriminatory laws, and for which just and equitable compensation was not received, to claim restitution from the state'. A statutory body, the Commission on Restitution of Land Rights will administer this process, and claims will be adjudicated and relief awarded by a Land Claims Court.<sup>44</sup>

In its election manifesto, the African National Congress (ANC) identified land reform as a priority:

South Africa belongs to all who live in it. To make this a reality, an ANC government will:

- guarantee women equal rights to land and special assistance;
- assist small farmers to get access to training, credit and markets;
- encourage large-scale farming, and ensure security of tenure and all basic rights for farm workers;
- restructure development agencies and marketing boards to serve the farmers and consumers;
- guarantee victims of forced removals restitution, which should be carried out fairly through a Land Claims Court;

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<sup>42</sup> Suttner & Cronin, *30 Years of the Freedom Charter*, 263-4.

<sup>43</sup> Simon Bekker & Catherine Cross, 'The Wretched of the Earth', *Indicator*, Vol. 9 No 4, Spring 1992, 53.

<sup>44</sup> Sections 121, 122 & 123 of the Interim Constitution (1993). The entire text can be viewed at <http://www.constitution.org.za/1993cons.htm#CHAP8>

- use state land in the implementation of land reform.<sup>45</sup>

One of the first significant pieces of legislation passed by the Government of National Unity was the Restitution of Land Rights Act (Act 22 of 1994), in compliance with the requirements as contained in sections 121-3 of the Interim Constitution. The newly created Department of Land Affairs embarked on a programme to develop a policy framework for land reform. The outcome of this initiative was the establishment of a Framework Document on Land Policy, May 1995 followed by “Draft Statement of Land Policy and Principles”. These principles formed the basis for discussion at the National Conference on Land Policy in August 1995. The conference was attended by more than 1 200 delegates, of which more than 400 were from the rural areas.

The discussions at the National Land Policy Conference, and subsequent responses, formed the basis for the formulation for the Green Paper on Land Policy, February 1996. The contents of the Green Paper were discussed at a number of formal and informal fora.

Land reform measures were further defined by the property clause in the final Constitution, which respects the right to property (25 (1)), sets the parameters for legal expropriations (25 (2) & (3)), includes land reform in the public interest (25 (4)) and defines the form land reform must undertake (25 (5) (6) & (7)).

The latter sections merit special mention:

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) 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>46</sup>

Following from the Green Paper discussions and the requirements of the final Constitution, the Department of Land Affairs launched the White Paper on South

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<sup>45</sup> <http://gopher.anc.org.za/ancdocs/policy/manifesto.html>

<sup>46</sup> The entire text can be viewed at <http://www.saweb.co.za/election/constit/saconst02.html#25>

African Land Policy, April 1997, which sets out the vision and implementation strategy for South Africa's land policy. The aim of the policy is to:

- redress the injustices of the past;
- foster national reconciliation and stability;
- underpin economic growth; and
- improve household welfare and alleviate poverty.

The government's Land Reform Programme has three major elements, deriving from their respective constitutional obligations:

**Redistribution** aims to provide the disadvantaged and the poor with access to land for residential and productive purposes (Section 25 (5)).

**Tenure Reform** aims to bring all people occupying land under a unitary legally validated system of landholding, and to accommodate diverse forms of land tenure (Section 25 (6)).

**Restitution** covers cases of forced removals and dispossession of land rights which took place after 1913, and is being dealt with by the Commission on Restitution of Land Rights and the Land Claims Court (Section 25 (7)).<sup>47</sup>

This, then, is the official land reform policy of the government of South Africa. Over the past five years, it has achieved limited success.<sup>48</sup> It has also attracted its fair share of critics. I will now proceed to distill some of the criticisms of the policy as they relate to problems and challenges of the policy of trusteeship outlined earlier.

The current government inherited the land held in trust for African people from the previous government. With the dissolution of the homelands and the South African Development Trust, the Minister of Land Affairs became the trustee of some 17 million ha of former Transkei, Bophutatswana, Venda and Ciskei (TBVC) and South African Development Trust (SADT) land. Because the land is still nominally owned by the state, various decisions in respect of the land have legal status, only if taken by the Minister as trustee or nominee. These decisions relate to matters such as township

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<sup>47</sup> White Paper, 37-75. See <http://www.southafrica-newyork.net/landaffairs.htm> for a summary of the Land Reform Programme. I have been unsuccessful in accessing either the Department of Land Affairs' or the Commission's Internet sites-both bodies have been undergoing organisational changes, and have been attempting to revamp their public image. The Land Claims Court can be accessed via the Wits Law School at <http://www.law.wits.ac.za>

<sup>48</sup> Various Annual Reports of the Department of Land Affairs, the Commission on Restitution of Land Rights, and other government publications.

development, subdivision, servitudes, leases, mortgages, and sales. Land administration has not proven easy.

The government acknowledged that the legal insecurity of land 'held in trust' made it difficult for people to protect their land. The lack of legally enforceable rights to land caused problems such vulnerability to interference or confiscation of rights; difficulty in raising development finance; maladministration; corruption.<sup>49</sup>

Cross warns that the result of a lack of tenure could be inconsistency, administrative paralysis and a serious temptation to corruption. She describes the limitations of the existing and impending legislation and suggests that one of the reasons why the issue of tenure has not been sufficiently addressed is possible reaction from traditional leaders.<sup>50</sup>

Traditional leadership has been identified as an issue of importance for land rights and land reform. The final Constitution entrenches traditional authorities and indigenous law as a distinct and separate system of law and governance. The role or status of traditional authorities is not clear but may well be interpreted as including their function in land allocation and control. The Department of Land Affairs thus has to contend with this very important constituency.<sup>51</sup>

However, the actions of the Department have questioned the government's commitment to recognizing the role of traditional leaders in African society. Land previously held in trust is being handed back-but not to the tribe or the chief-but as private freehold land. This approach has several weak points, which DLA attempts to address with 'interim measures' which govern the day-to-day administration of trust land.<sup>52</sup>

The Minister of Land Affairs described what he considered to be the dilemma of trusteeship-to whom should the land be restored?

Ironically I, as the Minister of Land Affairs have inherited the status of trustee or nominal owner of much of this land. My view, and that of my department, is that this land does not belong to the government at all but to the people who are the rightful historical owners of this land...Problems in transferring land from the state to the rightful owners-time consuming, intricate process, likely to awaken boundary and ownership disputes, budget and capacity limitations...issue of the identity of the owner..chiefs? tribal authorities? Provinces? Local authorities?...The Department of Land Affairs is under great pressure from these institutions to have state land transferred to them. We are refusing to do so, just as we are refusing to transfer the land to any other

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<sup>49</sup> White Paper on South African Land Policy, Department of Land Affairs, 1997, 30-1.

<sup>50</sup> Catherine Cross, 'Losing the Land: Securing Tenure in Tribal Areas', *Indicator*, Vol. 12 No 2, Autumn 1995, 23-4.

<sup>51</sup> Marcus, 'The Constitutional Interlocutor', 171-2.

<sup>52</sup> Cross, 'Rural Land Tenure Reform', 73.

institution. We believe that the land belongs to the people and that they must make choices about the institutions which will manage and preserve their land... Popular institutions have nothing to fear from our approach...<sup>53</sup>

Traditional leaders, however, are not satisfied with this approach, which, they believe, sets out to undermine their position:

"Looking at the land question, title deeds to certain land ... which was taken away from the tribal leaders have not been restored. The present government does not want to restore title deeds to the tribal authority."<sup>54</sup>

Traditional leaders at least have a forum to articulate their concerns. What is less evident is the involvement of those most affected by these deliberations. The White Paper tenure proposals are right in their basic principles, but do not amount to tenure reform yet: reform has to deal with the content of rights. The other problem is access to tenure reform.<sup>55</sup> Access to any government programmes or non-government services is hampered by poor infrastructure and lack of organizational capacity in the rural areas. Successful land reform and rural development will require the full participation of all levels of government and strata of civil society.

The challenge, then, is not just to redefine rights to land, but to foster the conditions to enable the intended beneficiaries of land reform to participate fully in the political and economic arena. Only then will the obligations of the trustee be met.

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<sup>53</sup> Speech presented by Minister Derek Hanekom at the Contralesa National Conference and Annual General Meeting, 4 October 1997, in *Tenure Newsletter*, Vol. 2, No 1 1998, 13-6.

<sup>54</sup> 'Betrayed' chiefs cut ANC ties, Mail & Guardian, 3 October 1997.

<sup>55</sup> Cross, 'Rural Land Tenure Reform', 76.