LAND REFORM: REFLECTING ON OUR UNIQQUE SOUTH AFRICAN TAPESTRY

The tapestry of diversity encountered in South Africa exhibits a variety of multi-coloured, vibrant threads interwoven and embroidered into a unique, rich fabric. The cloth is both strong and fragile. Different strands represent cultural variety, rich in tradition, representing a broad spectrum: from ancient African culture to more recent Western influences embodying Roman-Dutch and English Law, coupled with unique South African law-strands, all catering for South African needs and demands. While not all of these threads are equal in their impact or have contributed evenly to the overall tapestry, the result is striking: colourful, diverse and dynamic. Some threads, like colonial and *apartheid* strands, very prominent at one time, have either already been removed from the tapestry or are in the process of being loosened and removed. Since joining the international community when a new constitutional dispensation commenced in 1994, foreign and international law influences have also found their way into the fabric.

Framing the tapestry is the South African Constitution, securing the fabric and ultimately holding everything together. While the tapestry is secure, the threads are not permanently fixed. Instead, individual strands can be unpicked, carefully and precisely and manipulated and rewoven - still remaining within the framework. However, when one strand is loosened, it reverberates throughout the tapestry, requiring further adjustment and re-alignment. While the strands are all separate and unique, by inter-connecting, the tapestry is formed - one stand supporting the other.

Apart from an inherent complexity of different strands, the aftermath of South Africa's history of dispossession is still lingering, compounding complexity. Despite 24 years into a new political dispensation, burning matters linked to land reform prevail. The current constitutional review of the property clause has re-ignited the much needed debate on land reform. It is in this context that I present my paper today – perhaps more general than traditional leaders and land reform only. Instead, my paper reflects on why we embarked on a land reform programme in the first place and more importantly, how the programme came about and why it looks the way it does. While that forms the bulk of my paper, the paper overall consists of 4 main parts:

Part 1 reflects on what constitutes land reform and what makes this programme unique. Inherent herewith is an outline of unique characteristics.

Part 2 reflects briefly on the progress, or lack thereof since the land reform programme was embarked on, leading to

Part 3 identifying key issues, and

Part 4, my conclusion.

I start with Part 1 where I explore the unique characteristics of the SA land reform programme.

There is no internationally-fixed definition of land reform. Instead, the crux of a specific land reform programme is determined by the particular aims and needs of the jurisdiction in question. For South Africa, historically, the approach to land was consistently interlocked with control. Underlying the links between control, land, citizenship and labour was an official, distinct racial policy. Not only was the number of racially-based land measures that had been enacted overwhelming, but the impact thereof – regarding complexity and effect – is incomparable. In this light a uniquely South African-oriented land reform programme, engineered to reflect on all of these dimensions, had to be developed.

The international approach to land reform, comprising the redistribution of agricultural land, was thus insufficient. Instead, an all-encompassing land reform programme was required, encapsulating legislative, policy and other measures, constituting actions and providing for mechanisms aimed at broadening access to land, improving security of tenure and restoring land or rights in land.

Land reform is therefore in nature complex and multidimensional. Though it extends beyond property and land law issues and also impacts on socio-economic, anthropological, developmental, environmental and sociological domains, this paper deals with the legal context.

Land reform is not a once-off activity, but is essentially a work in progress that requires monitoring, responses, adaptations and re-alignment. It also requires concerted effort and focus of many role players, at various levels. Government departments, organs of state and state institutions are all involved, each empowered and tasked with particular functions and responsibilities. NGO's are likewise integrally involved and private individuals, landowners, occupiers, tenants, beneficiaries and potential beneficiaries are also affected. In this process the courts are invariably the forum where contrasting and conflicting rights and aspirations are weighed, balanced and adjudicated on.

While land is central to land reform, it also has cross-connections with access to housing, water and basic services, impacts on planning and development, gives effect to cultural rights and religious beliefs, invariably embodies the right to family life and dignity and extends to the administration of land, including survey, deeds and registries.

The business of land reform is therefore intricate and time-consuming.

Having regard to the definition of land reform and considering the intricate tapestry alluded to above, the question arises as to what makes the South African land reform different from other programmes? What are the unique characteristics?

I distinguish between **four main categories,** under which further particular points emerge:

1. characteristics dealing with the *origin* of the land reform programme;

2. the *scope*

3. the *structure* and the *mechanics* and

4. the *nature* of the programme.

With regard to the **origin and roots** of the land reform programme three further points emerge:

a) Land reform was a product of a peaceful transition

Our programme resulted from a peaceful transition which culminated in a negotiated compromise and settlement. Because the transition was negotiated, a variety of interests were reflected in and incorporated into the final settlement. In this light the protection of existing rights, including private ownership and land rights, was confirmed. Correspondingly, transforming the ownership paradigm was also specifically provided for as the majority of subsections endorse the transformative thrust.

The peaceful settlement led government to follow the policy choice of broadening access to land via the willing-buyer-willing-seller principle. Likewise, the negotiated settlement entailed a limited restitution programme in scope and time. Colonial dispossessions would be excluded from the restitution programme and existing land rights would be protected. To that end restitution claims were lodged against the state, involving no liability for landowners.

(b) Land reform is embedded in the Constitution

It is no coincidence that the land reform programme is located in the property clause, section 25, of the Constitution. This reform-centred approach has important implications for all role players generally and for property law and land reform in particular.

Post-apartheid property law is particularly required to help bring about reforms that would eradicate the inequitable legacy as far as possible. Land reform is one, critically important sector within the arena of property law constructs and designs that is integral to reversing the inequitable legacy and is instrumental in transforming society at large.

A clearly reform-oriented property clause embeds the various sub-programmes, constituting redistribution in section 25(5), tenure reform in section 25(6) and restitution in section 25(7) of the Constitution. Embedding land reform in the Constitution has specific implications:

Firstly, it places specific responsibilities and duties on the State regarding the necessary steps it has to take to effect land reform. The State is constitutionally enjoined to attend to it meticulously.
Not only is the basic responsibility grounded in the Constitution, but the broad parameters of the various programmes are set out as well.
Secondly, on the basis that parliamentary sovereignty has been replaced by constitutional supremacy, all actions endorsing land reform stand to be tested against the Constitution. Essentially, the Constitution acts as a big "checks and balances" tool.
Thirdly, having a constitutional basis for land reform brings to the fore the technical issue as to which source of law is to be employed when a right flowing from land reform has to be enforced: should one use the land reform legislation, or the common law or can one rely directly on the Constitution itself? In this regard particular subsidiarity rules have been developed, which I will not discuss here.
Fourthly, a constitutionally embedded land reform programme has clear implications for how legislative measures have to be approached, interpreted and ultimately applied. Here the underlying values of the Constitution also come into play, namely freedom, equality and dignity. Values underpinning land reform specifically further include the commitment to orderly land reform and *ubuntu* – in the sense that it is linked with humanness and dignity.

Finally, having land reform embedded in the Constitution also underscores the links between the property clause and other related rights in the Bill of Rights. In this regard section 9 – the equality clause; section 10 – the right to dignity; section 26 – the right to access to housing; section 27 – right to access to water and sections 30 and 31, respectively the right to culture and the right to belong to a cultural community, also resonate with the effective functioning of the land reform programme. Optimal synergy between these fundamental rights and the land reform programme has unfortunately remained a challenge, especially regarding equality and dignity.
Therefore, having land reform embedded in the Constitution essentially means that it is the frame that holds the tapestry together.

(c) Land reform embodies different forms of justice

Land reform also relates to justice and fairness. Restorative justice is aimed at historical redress. This is engrained in the overall land reform programme that is aimed at redress, but is especially relevant with respect to the restitution programme. While redistributive justice also impacts on the aftermath of the racial approach to land, it is specifically linked to present inequalities and existing needs. This kind of justice also takes cognisance of what persons need on the basis of equality.

Accordingly, redistributive justice is more relevant in the redistribution programme where access to land is broadened and land is redistributed, also to persons most in need thereof. Redistributive justice also resonates in the tenure reform programme on the basis of needs and equality, keeping in mind the disparate approach where private individual ownership was essentially preserved for a particular portion of society with lesser rights and insecure tenure for the rest.

Procedural and administrative justice is prevalent in all the land reform sub-programmes where processes and procedures are set out.

The land reform programme does not embody retributive justice. That kind of justice entails punitive justice where persons are punished in the process of transformation and reform on the basis of their participation in unfair, unlawful or discriminatory practices or on the basis of their benefiting from them. Being a negotiated settlement and given the transformative thrust of the property clause, retributive justice is thus not part of the land reform programme. This resonated in the 2014-CC-judgment of the *Florence* case handed down by Justice Moseneke.

The second set of characteristics is linked to the **scope** of the land reform programme and embodies two distinctive sub-characteristics:

(a) Land reform relates to both the South African common law and customary law

From the outset it was clear that two particular strands in the tapestry, the common law and the customary law systems, would simultaneously prevail and be impacted upon under land reform. This underscored that both systems of law, embodying forms of tenure, ownership and matters linked therewith, would be legible for scrutiny and transformation and that one system would not be swept off the table in principle.

However, having more than one legal system involved, compounds the complexity factor.

(b) Rural contexts are emphasised in land reform

Regarding scope, the emphasis of the land reform programme has been on rural areas and the needs and demands within these contexts. Therefore, since 2009 rural development and land reform have been inextricably linked, not only with regard to departmental design, but also with regard to development programmes that feed into land reform initiatives. Unfortunately the overemphasis on rural contexts has led to a neglect of the urban environment. This is especially prevalent with regard to access to land, tenure options in urban and peri-urban areas and correspondingly, unlawful occupation.

The third set of characteristics deal with the **structure and mechanics** of the land reform programme

(a) Land reform is guided by various policy choices

As explained, the State had a duty to embark on a land reform programme. However, developing and crafting particular policy approaches was, indeed to some extent, a matter of choice, informed by, for example, political views, and economic, social and developmental factors.
Being both a developing country and democracy dealing with redress – on a scale that has not been experienced before – impacted greatly on the kind of land policy that had to be drafted. Over and above the "usual" objectives that national land policies normally pursued, an additional *reform-oriented thrust* – was required.
Key policy issues that remain pertinent revolve around the acquisition of land, beneficiary targeting, planning and design and monitoring.

(b) Land reform is characterised by an intricate grid of legislative measures

Much legislative activity occurred within the overall arena of land reform since the first exploratory land reform programme in 1991. Viewed from an overarching perspective, different categories of legislative measures emerged. Some measures pre-date the constitutional era, although most statutes flow directly from the Constitution. Apart from the Restitution of Land Rights Act, that is pertinent to the restitution programme in particular, most of the other legislative measures are not limited to 1 particular sub-programme, but extend boundaries and interact with measures in and across sub-programmes.

The intricate grid of measures exacerbate the complexity factor.

(c) Land reform relies on the integral involvement of courts

Land reform cannot function without the active involvement of South African courts. This is the case because the actual weighing, balancing and adjudication of rights, interests, claims and demands occur here. The full spectrum of our courts is involved in land reform, from magistrate's courts dealing with ESTA, right up to the Constitutional Court.

The final category deals with the **nature** of the land reform programme

(a) Land reform is a temporal process.

Land reform was approached in two phases. The first phase, which was initiated under the De Klerk-government in 1991, was an exploratory land reform programme only. Though it was grounded in policy, iiiiinitial efforts linked to upgrading and restitution were inadequate and a constitutional foundation was lacking. These shortcomings demanded and resulted in a second phase, or the all-encompassing land reform programme.

This second phase did not occur overnight either. Instead, gradually, first on the basis of the interim and thereafter embedded in the final Constitution, an all-encompassing land reform programme unfolded. Being all-encompassing by no means implied that the programme so employed was final and cast in stone from the outset.

On the contrary, the second phase of land reform in South Africa is still ongoing and requires continuous adaptations when and where necessary, underlining that land reform remains time-consuming.

(b) Land reform embodies a rights-based approach

A rights-based approach was specifically followed in contrast to the inequitable and insecure permits-based approach that prevailed in the pre-constitutional era. It was furthermore useful as rights are traditionally more effective in defending interferences and challenges. However, it is not without difficulties and limitations. Because structural poverty tends to weaken substantive rights, a rights-based approach is only as effective as the context or environment within which it functions. Being context-sensitive, a rights-based approach therefore requires constant vigilance from all role players involved.

(c) Land reform is also linked to the exercise of other basic human rights

By benefiting from the land reform programme, it may in practice enable the exercise of a right to religion or cultural beliefs or the right to family life. It is also connected to the right to dignity, the right not to be evicted arbitrarily and the right to legal representation. Thus, depending on the facts and circumstances, land reform may also be a means to another end.

(d) The land reform programme is complex

This characteristic has already been alluded to above.

This means that land reform is extremely complex to plan, implement, regulate and monitor. Often the aims and goals of land reform are onflicting and contradictory: achieving equity and restoration are not necessarily equal to commercial success, development and sustainability. Inherently, different tensions exist. While beneficiaries want restoration of what was theirs, the general public demands success and a return on the investment.

Land reform is furthermore complex because, to some extent, it is always is a state of flux. Further developments are underway as we speak.

Having regard to the above general characteristics, I now turn to **Part 2** of my paper in which I briefly reflect on progress or the lack thereof.

After 24 years it is clear that land reform is experiencing major difficulties, at an overarching as well as at sub-programme-specific levels. I have pointed out dichotomies, disconnects and gaps in previous contributions and highlight only the following here for today's purposes:

At a conceptual level uncertainty and gaps exist as to what is to be achieved and how that is to be achieved. If the end goal is unclear, it is impossible for the tools and mechanisms to be aligned sensibly. Inevitably, conceptual difficulties permeate all tools, mechanisms and approaches, with understandably dismal results.

There is generally misalignment between policies, which are direction-giving, and legislation – that has to realise aims and goals in a practical manner, and court judgments, in which legislation is interpreted and applied. These gaps and misalignments have increased in recent years.

At sub-programme level various problems have emerged. With regard to the redistribution programme the following issues remain pertinent:

The main legislative measure is a pre-constitutional measure of 1993 which is incomplete. Much of the information of the redistribution programme is furthermore found in regulations and supportive measures, which makes finding the law and applying it piecemeal and challenging. Overall, no clear guidelines exist regarding beneficiaries, how land is to be acquired and for what purposes. Further, the critical need for land in urban and peri-urban areas has fallen by the wayside in land reform approaches.

Tenure reform is extremely difficult to monitor and evaluate in practice. That is the case because an Act may provide for tenure security in theory, while, at grass roots level, insecure tenure continues. Of pertinent importance is that there is still no overarching Act to deal with insecure tenure, as required under section 25(9), especially in relation to communal land. A previous attempt failed when CLARA was declared unconstitutional. The only operative measure is the Interim Protection of Informal Land Rights Act of 1996 which has to be reactivated annually. Insecure tenure has lingered in other areas as well, including in Ingonyama trust areas and commercial farming where occupiers are often still evicted without due process. Given that private individual title has remained the sought after form of title, other forms of title had not been developed further. Hence, alignment between survey, title, deeds and registries has likewise remained single-title focused.

Where restitution projects are concerned the results are equally dismal with by far the majority of projects failing. Insufficient post-restoration support has remained lacking and collective ownership challenging and contentious. The possible re-opening of the land claims process would not only jeopardize the still outstanding 6000 claims not yet finalised, but may call into question finalised claims as well.

What are the critical challenges, constituting **Part 3:**

While the High Level Land Reform Report has identified a template of issues and problems, I highlight only some of the most pressing matters:

Finding sufficient land, at scale, at the right price and for the right purposes, is one of the outstanding issues.

Finalise all outstanding land claims as priority.

Tenure insecurity has to be dealt with speedily, both in rural areas, comprising commercial agricultural areas and communal land where trust land prevails, including the Ingonyama trust areas, and in urban areas, most notably peri –urban areas.

The disconnect between land use planning and management, survey, deeds and registries has to be addressed on an urgent basis.

So, here we are now, September 2018, some decades after framing the tapestry and adjusting and re-aligning the threads. It would not have been possible to venture into a new constitutional democracy and to endeavour reconciliation and nation building without embarking on an all-encompassing land reform programme. It was crucial that, in framing the tapestry we had to get a grip on the past, understand the present and secure the future. Hopefully the categories of characteristics above has indicated why we have embroidered the tapestry in that particular way and why it looks the way it does.

But in the process of stitching the cloth and framing it, we have let some threads fall and allowed some others to become lose. Some parts of the tapestry is unravelling, and other parts are only barely secured. By tugging too hard in one area, we risk dislodging the tapestry altogether.

What do we stand to do? Should we work on the frame of the tapestry only, or should our efforts be focused on the tapestry itself?

We are currently in the process of tampering with the frame, the Constitution, specifically section 25, in pursuit of expropriation without compensation. By only adjusting the frame, we are not going to pick up and gather the strands that we have left behind. Instead, we are only adjusting the outside and not the tapestry itself. Adjusting the frame, making it thinner or thicker does not necessary improve the tapestry or make it better, or stronger. In order to do that, we need to deal with the particular strands in the tapestry, individually and specifically.

We can still do that. It is still possible to loosen and untangle particular strings. The fibers making up the string may also be drawn apart, very carefully, and re-aligned. If need be, some splicing may even occur, thereby strengthening the fibre and making it more effective.

We know where the faults are in the tapestry, the weak points, the failing threads and scrawny fibres. I have pointed out some of them. The High Level Report elaborated on them in detail. We have to deal with the critical issues urgently and effectively. Only by tending to both the frame AND the tapestry, can we hope for success. But we have to do it now.

Pienaar JM *Land Reform* (Juta 2014).