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AFTER RESTITUTION: COMMUNITY, LITIGATION AND GOVERNANCE IN SOUTH AFRICAN LAND REFORM

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Abstract

This article considers the fracturing of “community” and the turn to litigation in the wake of nominally settled land restitution claims in South Africa. We describe emergent incongruence between groups of claimants, the projects of restitution, and the new legal entities that represent the claimants. As a result, discontented South African land claimants are challenging the new legal entities created in the restitution process, rather than the state and private sector actors upon which development-oriented Settlement Agreements depend. We focus on two of the earliest and largest land claims involving urban land and protected areas, District Six and Dwesa-Cwebe, but our argument extends beyond these cases. We then consider the implications of increased claimant litigation for the governance of relations between claimants and the state, and the management of dissent in the context of neoliberalization. In conclusion, we argue that struggles among claimants undermine the potential for more concerted action to address the shortcomings of restitution.

LAND RESTITUTION IN SOUTH AFRICA is a drawn-out and complicated process that often frustrates claimants’ initial expectations for quick and fair settlement. Even where leaders successfully articulated claimants’ aspirations in collective projects, and then tirelessly worked to bring the promises of land restitution to fruition, they have often met with serious challenges as the process has dragged on. This tension is critical to understanding the social and political conflict in many land reform cases in South Africa during and after the settlements of claims. The pressures experienced by intermediaries who stand between increasingly impatient claimants and an indifferent or obstructionist state are well expressed by Clive Felix, an urban development facilitator and key figure in the innovative city-wide claim in Port Elizabeth:

We’ve had all these delays [in achieving land restitution]. And these things are sometimes very difficult to communicate with the membership ... Because they’re rather technical and

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legal of nature, and people don't really understand it ... And people want dates, and you know sometimes you're optimistic and you give an indication about when things could be done, and it didn't happen. So you just end up in hot water all the time [laughs].²

This article examines the fragile politics of unity in South African land restitution, showing how the process has promoted the formation of legal entities that represent 'communities,' which have in turn become the focus of conflicting claims. South Africa's 1994 Restitution of Land Rights Act provided for the restitution of land rights to persons or communities dispossessed under racially discriminatory laws (later amended to include racially discriminatory policies) after 1913. While the Act allowed individuals to file claims, in practice, both the state agencies and the non-governmental organizations (NGOs) involved in supporting claimants encouraged their consolidation into collective claims for the sake of administrative ease as well as to promote the reconciliation and healing of "communities".³ Collective claims required creating legal structures to represent claimants and enable landownership, a process which fostered both the appearance of and aspirations towards unity among claimants, along with providing constitutions and governing procedures. But the unity needed to achieve full settlement of claims may not endure, particularly with lengthy post-settlement processes of compensation and development planning, as some claimants channel frustration into challenges to the legal entity that nominally represents them. The gap between legal unity and socio-political consensus produces dissent. These processes are shaped by internal dynamics among claimants, but also by their relations to the state and private sector, in the context of highly technical planning processes and development strategies that aim to enlist outside investment.

We begin by examining these patterns within the literature on land restitution in South Africa. While we engage the messiness of "community" and the myriad local dynamics, issues that have been well established in the literature, we do so in order to consider emergent structural patterns across cases as communities are transfigured into legal entities designed to advance collective projects. This analysis is extended through case studies of the Dwesa-Cwebe and District Six land claims. At Dwesa-Cwebe, community unity fractured when a self-proclaimed 'New Trust' brought a court case to remove the elected trustees. In response, courts and government agencies intervened to constitute yet another trust, known informally as Trust C, through an election process with contested legitimacy. In District Six, small but vocal groups of claimants strongly opposed the Trust's role as developer of the land, and demanded that instead of being developed

² Interview, Clive Felix, Urban Services Group, Port Elizabeth, 4 September 2006.

³ These take two forms: 'group claims', where claimants file collectively but 'settle their claim on an individual basis', and 'community claims', for cases where claimants derived their rights to the land 'from shared rules determining access to land held in common'. Christiaan Beyers, 'Does urban land restitution contribute to transformation in South Africa? Development and social citizenship struggle', *Development and Change*, 44, 4 (2013), pp. 965–989, p. 969.

in a collective settlement, land should be immediately transferred to individual claimants. While the Court ruled in favour of the Trust, it was eventually sidelined by a new claimant group set up by the Department of Rural Development and Land Reform.

Finally, we consider the implications of increased claimant litigation for the governance of relations between claimants and the state. This becomes especially salient against the backdrop of the neoliberalization of governance, in which existing and new ‘governmental technologies’ are articulated in novel ways in order to constitute autonomously regulating subjects, institutional domains, and localities, who can nevertheless be ‘governed through their freedom to choose’.⁴ In particular, we examine the impact of neoliberalization in relation to 1) the downsizing of the state and transfer of state functions to consultants; 2) the reliance on “public-private partnerships” and related attempts at enlisting the private sector in land reform; and 3) the role of law in constituting new channels of struggle that direct claimants’ attention away from the state.

If the apartheid state relied on the law to an ‘extraordinary’ degree in its efforts to implement apartheid,⁵ while the anti-apartheid movement used the law as a way to conduct ‘politics by other means’ in the face of political suppression,⁶ we suggest that the law is now playing a rather different—and unintended—role in governance and politics in post-apartheid land restitution. The restitution process, in practice and over time, requires the creation of new legal entities while simultaneously channeling claimants’ frustrations into struggles against these new legal entities. As a result, the new legal entities that are formed become targets for dissent over the shortcomings of restitution, while the state and neoliberal development strategies remain largely unchallenged.

Land restitution in South Africa

In the initial excitement that followed South Africa’s political transition in 1994, restitution was conceived with high expectations set by a morally charged ‘narrative of loss and restoration’.⁷

⁴ Nikolas Rose and Peter Miller, ‘Political power beyond the State: Problematics of government’, *British Journal of Sociology* 61, s1 (2010), pp. 297-298.

⁵ Deborah James, *Gaining ground: ‘Rights’ and ‘property’ in South African land reform* (Routledge-Cavendish, London, 2007), pp. 2-5.

⁶ Richard L. Abel, *Politics by other means: Law in the struggle against apartheid, 1980-1994* (Taylor & Francis, London, 1995).

⁷ Cherryl Walker, *Landmarked: Land claims and restitution in South Africa* (Ohio University Press, Athens, OH, 2008), p. 11.

This narrative was severely strained during the process due to the slow pace of claims settlement, and the prevalence of stakeholder conflict. Its credibility was further undermined in the post-settlement period, with its ‘tough, time-consuming work of claimant verification, pegging down the details of the agreement and implementing its terms’.⁸ While initial accounts of restitution generally focused on the claims process, an emergent literature has come to describe post-settlement development efforts and the legal struggles among claimants that have ensued. Confronting a myriad of local details, such work has frequently treated these struggles on an *ad hoc* basis. We here argue that one can identify a distinctive pattern emerging ‘after restitution’ among many successful land restitution claimants in South Africa.

Our analysis identifies four stages in restitution: mobilization of claimants and the consolidation of a “community”; formation of a *collective project* that aims to achieve settlement of an aggregate claim; creation of a *legal entity* to represent the “community” as the process moves forward; and finally, increasing *disharmony and dissent* among the claimants over the form and leadership of the legal entity that nominally represents them. This disharmony results in part from a growing disjunction between community, project and legal entity. The mobilization of raised “community” hopes appeared to materialize in a collective project; however, as the realization of the project was indefinitely deferred, frustration within groups becomes manifested in challenges to its leadership — now entrenched as the governing body of a legal Trust or Communal Property Association.

Prospective claimants initially mobilized in anticipation of land restitution, often in collaboration with activist NGOs. Particularly in rural claims, but also in larger urban claims, NGOs and government alike encouraged the formation of large collective claims.⁹ Would-be-claimants were typically differentiated along multiple lines: tenure status prior to removals (such as former titleholders versus tenants), relationships to traditional authority structures, current socio-economic backgrounds, geographical residence, and ethnic, religious or racial identities. Leaders emerged drawing variously on local histories and identities and on their ability to broker relations with the state and NGOs. As these leaders mobilized subgroups of members to take collective action, the process demanded identifiable criteria for membership.¹⁰ In such struggles to establish a broader group that incorporated various subgroups, some were inevitably marginalized, alienated or excluded, thus generating the potential for resentment.

In some cases, disaffected or excluded groups contended with the claimants from early on, often in competing claims that were rejected early in the claims process. Frode Sundnes, for

⁸ *Ibid.*, p. 21; cf. Derick Fay and Deborah James, “‘Restoring what was ours’: An introduction”, in Derick Fay and Deborah James (eds), *The rights and wrongs of land restitution: ‘Restoring what was ours’* (Routledge-Cavendish, London, 2009), pp. 1-23.

⁹ Sustainable Development Consortium, *A settlement and implementation support strategy* (Commission on Restitution of Land Rights, Pretoria, 2007); Deborah James, “‘After years in the wilderness’: The discourse of land claims in the new South Africa”, *Journal of Peasant Studies* 27, 3 (2000), pp. 142-161, p. 144.

¹⁰ Cf. James, *Gaining ground*.

example, shows how the Dukuduku Land Claims committee was, in practice, threatened by preexisting leadership structures.¹¹ More commonly, an appearance of unity early in the restitution process faded as lines of division within communities (re)emerged over time. Thus, Steven Robins describes the image of ‘cohesive and “harmonious” San community’ produced by the #khomani San land claimants and their lawyers during the restitution process, and the ‘conflict between “traditionalists” and “western bushmen”’ that resulted in the post-settlement phase.¹² The cases of District Six and Dwesa-Cwebe, discussed at length below, have followed suit.

Mobilization around restitution entails the formation of collective projects to achieve a particular end. In the context of restitution, collective projects aim in the broadest terms to settle claims for a group of claimants. The project plan and its strategy for achieving settlement may actualize a vision of the group of its own existence and purpose in the future.¹³

Implementation, however, is extraordinarily complex in cases involving land restoration. An array of legal, bureaucratic, and planning exercises are involved in transferring, dividing, allocating, and developing land, requiring institutional arrangements for the use of land and the distribution of any income from it. Often it entails measures that diverge considerably from the expectations of many claimants, both in the technical details of land use planning and in the entrepreneurial expectations that the state and consultants place upon claimants.¹⁴ Yves van Leynseele and Paul Hebinck highlight the complexities and technicalities involved in planning a five-stage ‘agrivillage’ settlement process in two claims in KwaZulu-Natal, and the contradictions between claimants’ expectations and the eventual projects.¹⁵ Likewise, Michael Barry shows the difficulties of coordinating claimants’ settlement plans with the contradictory and uncertain action of diverse government departments at Elandskloof.¹⁶ Bill Derman, Anne Hellum and Tshililo Manenzhe recount the transformation of restitution of commercial farms in Limpopo into a set of ‘joint ventures’ with ‘strategic partners’.¹⁷ Working through such issues is

¹¹ Frode Sundnes, ‘The past in the present: Struggles over land and community in relation to the Dukuduku claim for land restitution, South Africa’, *Forum for Development Studies* 40, 1, (2013), pp. 69-86.

¹² Steven Robins ‘NGOs, “Bushmen” and Double Vision: The #khomani San Land Claim and the Cultural Politics of “Community” and “Development” in the Kalahari’, *Journal of Southern African Studies* 27, 4 (2001), pp. 833-853, p. 833.

¹³ Beyers, ‘Does urban land restitution contribute’, pp. 979-980.

¹⁴ Deborah James, ‘Citizenship and land in South Africa: From rights to responsibilities’, *Critique of Anthropology* 33, 1, (2013), pp. 26-46.

¹⁵ Yves van Leynseele and Paul Hebinck, ‘Through the prism: Local reworking of land restitution settlements in South Africa’, in Fay and James (eds), *The rights and wrongs of land restitution*, pp. 163-183.

¹⁶ Michael Barry, ‘Land restitution and communal property associations: The Elandskloof case’, *Land Use Policy* 28 (2010), pp. 139-150.

¹⁷ Bill Derman, Anne Hellum, and Tshililo Manenzhe, ‘Land Rights, Human Rights and Development: Contestations in Land Restitution, Limpopo Province, South Africa’, in Bill Derman, Anne Hellum, and Kristin Sandvik (eds), *Worlds of human rights: The ambiguities of rights claiming in Africa* (Brill, Leiden, 2013), pp. 49-82.

not only time consuming; the eventual legal settlements often compromise the original vision of many claimants, who grow to mistrust the process going forward.

For a “community” to become a legal actor, and a landowner, it requires a legal form. Legalization is a requirement of the restitution program, and in the South African context, the legal entities that come to represent claimant “communities” are typically Trusts or Communal Property Associations (CPAs), with formal requirements for constitutions, governing procedures and legal registration. If participation in restitution, as one reviewer put it, ‘[draws claimants] into the world of sworn statements, title deeds, elections and ministerial orders from the moment they initiate a claim’, these apparently mundane acts contribute to a process of legal subject formation, encouraging claimants to think of land ownership as defined through legal title and themselves as legal actors who can seek recourse in the law. Likewise, they create the possibility that the law could be used to overturn or challenge the new legal entities. On one hand, this is an apparently mundane requirement of the restitution program, but on the other, it creates the possibility for such “communities” to be ‘ever more legalistic in regulating their internal lives and in dealing with others’,¹⁸ both in their internal governance and in their responses to the breakdown of imagined and strategic unities. The legal forms that communities take, we argue, shape both their politics and the politics of restitution more broadly.

In practice, the impetus to create a legal entity and its particular form often comes not from the claimants, but from state agencies and NGOs attempting to manage the claim, contributing to potential disjunctures between differentiated claimants and the legal entities that nominally represent them. Knut Nustad describes how administrators engaging the Dukuduku community in KwaZulu-Natal ‘need ... groups ... to create something locally that resembles a bureaucracy. If the community has no appropriate committee, the NGO or state body will most often respond by forming one’.¹⁹ Maano Ramutsindela and Monene Mogashoa illustrate how the state’s preference for a single CPA structure in a redistribution project in Limpopo contradicts an economically differentiated group of claimants’ preferences for smaller structures. While officials would prefer a single legal structure to demonstrate ‘delivery’ and facilitate administration, they may be sowing the seeds for future dissent and conflict.²⁰

The result, in many restitution cases, is a situation where early inspiration gives way to disillusionment, disharmony, and legal action. Despite the appearance of unity, the collective projects of land claims intersect with other aspirations and interests. As land restitution fails to deliver the expected rewards, the putative unity between group, project and legal entity pulls

¹⁸ Jean Comaroff and John L. Comaroff, ‘Law and disorder in the postcolony: An introduction’, in (eds), *Law and disorder in the postcolony* (University of Chicago Press, Chicago, 2006), p. 24.

¹⁹ Knut G. Nustad, ‘Property, rights and community in a South African land-claim case’, *Anthropology Today* 27, 1 (2011), pp. 20-24; cf. Derman *et al.* ‘Land rights’.

²⁰ Maano Ramutsindela and Monene Mogashoa, ‘The people’s choice: options for land ownership in South Africa’s land reform’, *Social Dynamics* 39, 2 (2013), pp. 308-316.

apart. Subgroups vie to dominate or secede, strands of the project unravel as diverse stakeholders aim to maximize their own interests, and the process provides a target: the new legal entity.

Accounts of such dissent and its specifically legal form have proliferated in the recent literature. Christiaan Beyers' work on the Port Elizabeth Land and Community Restoration Association (PELCRA), an umbrella group for all claimants across the city of Port Elizabeth, tells how a subgroup of claimants, dissatisfied with the compensation negotiated by the PELCRA leadership, brought a case against the leadership and were eventually defeated in the Constitutional Court.²¹ In another urban case, Sipokazi Sambumbu recounts the fracturing of the Ndabeni Communal Property Trust over its management of land and financial resources, leading to a situation between 2007 and 2009 where 'two trusts ... were elected or appointed in separate meetings ... by separate groups [that] operated parallel to each other'.²² In a rural restitution case centered on 'betterment' resettlement in Chatha in the Eastern Cape, Chris de Wet and Eric Mgujulwa chronicle turns to legal action by claimants around discontent with the Settlement Agreement.²³ In a potential commercial farming area, Barry likewise discusses legal action against the Elandskloof CPA eight years after the restitution settlement, in which the petitioners highlighted divisions among claimants and questioned the representativeness and competency of the committee.²⁴ The Richtersveld claim, settled in 2007, had seen four lawsuits by a dissenting group against the CPA by 2010, and was characterised as 'fraught with infighting, fuelled by outside interests that have sought to insert themselves as business partners'.²⁵

Across the South African restitution landscape, we see fracturing of claimant communities, often along lines of dissent that were suppressed or restrained in the initial claim, manifesting in a turn to litigation and other appeals to the courts. Members of claimant groups are now using the law, not to challenge the state or demand delivery, but to make claims and levy accusation on one another through challenges to the new legal entities created through restitution. We turn now to case studies of District Six and Dwesa Cwebe, illustrating both the contingencies that shape the particular cases and the ways these reflect the broader pattern we are describing.

²¹ Christiaan Beyers, 'Land restitution in Port Elizabeth: Anatomy of a relative success', *Journal of Southern African Studies*, 38, 4 (2012), pp. 827-845.

²² Sipokazi Sambumbu, *Social history, public history and the politics of memory in re-making Ndabeni's pasts* (University of the Western Cape, Unpublished Masters thesis, 2010), pp. 127-128.

²³ Chris de Wet and Eric Mgujulwa, 'The Ambiguities of Using Betterment Restitution as a Vehicle for Development', in Cheryl Walker, Anna Bohlin, Ruth Hall, and Thembele Kepe (eds), *Land, memory, reconstruction, and justice: Perspectives on land claims in South Africa* (Ohio University Press, Athens, 2010), pp. 198-214.

²⁴ Barry, 'Land restitution and communal property associations'.

²⁵ Gcina Ntsaluba, 'Not yet uhuru in the Richtersveld', *Mail and Guardian*, 27 August 2010, <<http://mg.co.za/print/2010-08-27-not-yet-uhuru-in-the-richtersveld>> (22 February 2015).

Urban restitution: the case of District Six

Located in central Cape Town, District Six is one of a few remaining large-scale urban restitution cases. At the time of its proclamation as a “whites-only” area in 1966, the majority of its estimated 30,000 to 70,000 residents were classified and self-identified as “coloured”. Many “African” District Sixers had been removed to different areas in prior decades. The residents of District Six were predominantly working-class tenants, often to absentee landlords, although there were also significant numbers of resident property owners.

After most of the buildings were demolished, the Cape Technikon was built for white students in the 1980s, but about 42 hectares (of 90) was left vacant because of concerted opposition to its redevelopment as a white neighbourhood. Today the Technikon, now Cape Peninsula University of Technology, is no longer racially exclusive, and 139 houses have been completed, many of which have yet to be occupied. This constitutes a small fraction of some 1,200 District Six claimants and their families currently slated to receive homes in the area.

In District Six, mobilization for restitution began in the late 1980s with the ‘Hands off District Six’ Campaign, comprised of 21 organizations working to prevent the proposed redevelopment of an ‘open residential area’. One of the most significant outcomes of this campaign was the foundation of the District Six Museum in 1989 to memorialize the history of District Six and to consolidate former residents as a community capable of being mobilized towards obtaining redress.²⁶ Questions emerged early on regarding the possible form of land restitution. When the official restitution programme was launched, the City of Cape Town and Provincial government applied to preclude individual claims under Section 34 of the Restitution Act, which allows government bodies to develop land deemed to be in the wider public interest.

Plans for the state-controlled project included commercial property development, subsidized low-income housing, and some restitution for former owners. Several ex-resident organizations led by the District Six Civic Association, which represented mainly former tenants, opposed this effort. The opponents succeeded in obtaining the support of the major organization representing former owners, and also worked to bring marginalized African ex-residents into the claims process. When the Minister of Land Affairs arranged for negotiations amongst key players instead of heading to the Land Claims Court, it became an opportunity for prospective claimants – most of whom had not yet engaged in the process – to assert their preferences for land allocation instead of the proposed project. This led to the defeat of the City and Provincial initiative and to the establishment of the District Six Beneficiary and Redevelopment Trust

²⁶ Crain Soudien, ‘District Six: From protest to protest’, in Shamil Jeppie and Soudien (eds), *The struggle for District Six: Past and present* (Buchu Books, Cape Town, 1990), p. 172.

(Trust) in 1998 as the authoritative vehicle for claimants.²⁷ It also set in motion a new process towards a Settlement Agreement.²⁸

Central to this movement's success was the expanded inclusion of former tenants. Not only did they now outnumber former owners as claimants, but the values of their settlement packages were to be roughly equivalent, and given their greater numbers, their claims would be prioritized. The Trust and District Six Museum held off potential divisions between former tenants and former owners, in part through their symbolic work memorializing a shared past as the basis for an imagined common future.²⁹ Still, some former owners felt short-changed, and some years after the basis for unity against the City's proposal had been removed, they would contest the extension of property rights to former tenants.

From 1998 to 2005 the primary concern of the Trust was to negotiate the Settlement Agreement and related arrangements, and formal plans for redevelopment. Thus, the collective project came to be dominated by expertise-driven planning and regulatory processes. As a result, most claimants felt themselves relegated to the sidelines and unable to understand why the morally straightforward matter of righting a wrong should take so long. Part of the reason for delay was political, as the City of Cape Town lagged in its responsibilities in the process, and sometimes actively blocked it. With its earlier proposal rejected, the City appeared to have held up planning and implementation so that fewer claimants would eventually return, making more prime land available for private development.³⁰

After the Settlement Agreement, the primary political concern was to constitute an appropriate development vehicle. The City argued that the Trust's accountability would be undermined if it were the sole development agent, and called for an independent structure with broad stakeholder representation. After considerable acrimony between the City and the Trust – which saw this as a continuation of the City's attempt to wrest control from claimants – the Chief Land Claims Commissioner assumed direct responsibility for the case in 2006. Responsibility for the project was transferred from local to national government, and a steering committee was established with equal representation from all key stakeholders.

The process of delay and contestation led to a series of internal challenges to the Trust from 2005 onwards by disgruntled claimants. These challenges became increasingly legal in their form and tactics. The most vocal subgroup was the District Six Advocacy Committee (D6AC), comprised of former landowners dissatisfied with the value of their settlement and dissatisfied that former tenants were entitled to comparable settlement. The D6AC charged that the Trust

²⁷ The Trust secured broad support by adopting a 'Trust Document', but did not constitute itself as a legal entity until recently, in order to avoid taxes and resource constraints that would follow.

²⁸ Christiaan Beyers, 'Mobilizing "community" for justice in District Six: Stakeholder politics early in the land restitution process', *South African Historical Journal* 58 (2007) pp. 253-276.

²⁹ See Ciraj Rasool and Sandra Prosalendis (eds), *Recalling community in Cape Town* (South Africa, District Six Museum, 2001).

³⁰ Christiaan Beyers, 'Acrimonious stakeholder politics' in Walker, Bohlin, Hall, Kepe (eds), *Land, memory, reconstruction and justice*, pp. 143-162.

failed to consult with claimants and had been corrupt. The Trust then held its first annual general meeting in 2008, and the membership reaffirmed its mandate. The D6AC also disagreed with the decision in the initial Settlement Agreement to not only restore parcels of land to claimants, but housing as well. These were to be developed as a series of attached townhouses within a holistic planning framework for the whole neighbourhood, in order to prevent the summary sale of plots upon transfer to claimants. Former owners with the means to develop land themselves called to have their parcels restored immediately.

The D6AC also launched civil suits, alleging that the Trust was ‘illegal’ and not representative of claimants since it had not been transparently established in terms of existing legislation. This turn to law echoed the City’s call for accountability measures strictly compliant with existing legislation. In 2007, the D6AC made applications in the Land Claims Court to stop development pending a forensic audit of the Trust and demanded compliance with the Restitution Act of 1994.

The Court Case ensued in 2008, where the Judge referred the case to mediation. The Trust was compelled to amend its founding deed to the effect of weakening the trustees’ control over development and making them more accountable to claimants through required annual general meetings and five-year elected terms.³¹ The D6AC subsequently appealed to higher courts without success, partly because they revealed themselves as ill-informed about the official requirements of the land restitution process.

As the apparent unity between project and group disintegrated over time in District Six, the collective project for achieving final settlement of claims through redevelopment was reshaped, informed by a wider legitimization beyond narrow legal settlement of claims. Until recently, the Trust was able to respond to the challenges it faced, continuing to stand as the legitimate heir of the symbolic heritage of ‘community’ in District Six. At the same time, the Trust remained in contravention of its 2008 trust deed by failing to hold another annual general meeting.³² In September 2012, the Minister of Land Affairs addressed growing claimant discontentment by facilitating the creation of a new Reference Group to replace the Trust as the representative vehicle for claimants in the redevelopment of the area. Hence, the Trust was reduced largely to serving in an advisory role to the Department of Rural Development and Land Reform, but no informed observers counted it out as a potentially decisive player in the future of the claim.

After President Zuma announced new legislation opening a second phase for land restitution claims, a new group called the District Six Working Committee (D6WC) was formed in April 2013 to mobilize and represent new claimants.³³ The claims process was extended for nearly five

³¹ *Mail and Guardian*, ‘District Six uproar’, 13 March 2008, <<http://mg.co.za/article/2008-03-13-district-six-uproar>> (22 February 2015).

³² District Six Reference Group, ‘Technical team position paper on restitution and related matters’ (Department of Rural Development and Land Reform, Pretoria, 28 January 2013), p. 14. <http://www.ruraldevelopment.gov.za/phocadownload/District/2013/d6_final_draft_tech_position_paper_20130128_version_10_word_97.pdf> (15 May 2014).

³³ ‘New Group for D6’, Voice of the Cape, <<http://www.vocfm.co.za/index.php/news/district6/item/9318-new-group-for-d6>> (28 May 2013).

years from July 2014, and at a General Meeting for District Six claimants on 23 August 2014, Minister G. Nkwinti stated that some 800 new claims had already been lodged for District Six. The meeting was restricted to verified claimants, leading the D6WC to protest and to call for further development to cease until latecomer claims are processed.³⁴ This position brings considerable potential for conflict, as existing claimants will expect their claims to be settled promptly and without their value being diminished. In discussions held within a couple of weeks of the meeting, some members of distinct subgroups – representing those whose claims have been fully settled with property in District Six, claimants currently on the list to receive properties there, former titleholders among them, and latecomer claimants, each with distinctive social and economic interests – suggested that they may undertake future litigation in order to gain leverage vis-à-vis other stakeholders and subgroups.³⁵

Conservation, tourism development and restitution: the case of Dwesa-Cwebe

Dwesa-Cwebe is one of the first restitution cases involving a protected conservation area. The Dwesa and Cwebe forests surround the Mbashe River on South Africa's southeast coast.

Between the 1890s and 1930s, colonial and South African governments together removed many ancestors of local residents from their homesteads in the grassland within the newly-demarcated forests. Over the same period, white settlers established the Haven Hotel and holiday cottages in the same areas. In the late 1970s, the administration of the black 'homeland' of the Republic of Transkei fenced the forests and created the Dwesa-Cwebe Nature Reserve, sealing off local access while allowing tourism facilities to remain in place on the Cwebe side.

In the transformed political climate of the early 1990s, local residents began a protracted struggle over the forests, and in the process created a 'claimant community'. Dwesa-Cwebe does not meet definitions of community in spatial, economic or cultural terms. It spans the geographic and administrative borders of Gatyana and Xhosa districts, and encompasses Xhosa-speakers of Mfengu, Gcaleka, Bomvana and Mpondo origins, with divergent histories of economic and cultural differentiation. As Derick Fay and Robin Palmer note, given these differences, 'it took outside intervention to unite the Dwesa and Cwebe claimants'; the activist NGO Transkei Land Service Organization (Tralso) brought together leaders from both sides of the Mbashe in a single claim.³⁶

³⁴ Beyers's fieldnotes on this meeting (held at the CPUT) and interviews with D6WC protesters.

³⁵ Details on the identity of interviewees are not disclosed to protect confidentiality.

³⁶ Derick Fay and Robin Palmer, 'Prospects for redistribution of wealth through land reform in Dwesa-Cwebe', in Ben Cousins (ed.), *At the crossroads: Land and agrarian reform in South Africa into the 21st Century* (University of the Western Cape, Belville, 2000), p. 196.

In the midst of a severe drought in 1993 and 1994, residents of the Cwebe and Dwesa communities launched a coordinated mass protest inside the reserves. The reserve management subsequently opened negotiations with locally elected Village Conservation Committees. These defused the immediate volatility of the situation, as Eastern Cape Nature Conservation (ECNC) made several critical concessions, establishing a permit-based system for use of forest products and making the grasslands within the reserves available for grazing until drought conditions abated.

As the negotiations continued, the claimants were enlisted into a project that reflected the interests of other stakeholders as much as their own. Early in the negotiations, claimant representatives were swayed by the argument that tourism development in a protected area offered the best hope for improving local livelihoods, and thus agreed to maintaining the protected status of the land under a system of joint management. ECNC agreed not to oppose the claim. Hopes rose further in 1997 with the launch of the Wild Coast Spatial Development Initiative, which designated Dwesa-Cwebe as a ‘node’ under a ‘public-private partnership’ to promote tourism development. Restitution was thus conjoined with goals of conservation and tourism development, shifting the projected future from one of reoccupation and direct use of forest resources to one that depended upon foregoing most use of the restituted land and attracting tourism investors.

Crafting a Settlement Agreement took until 2001, in part because of the institutional complexities of the case. The Dwesa-Cwebe “community” had emerged from the direct experience of dispossession. However, in order for them to take ownership of anything, they required a legal status, not just a population with a shared experience of exclusion. Tenure reform policy at the time aimed to allow people to ‘choose the tenure system which is appropriate to their circumstances’.³⁷ In the preliminary settlement of 1996, it was agreed that ‘ownership of land will be granted to the community, who will decide on what form of tenure they prefer’, in line with Department of Land Affairs policy.³⁸ What this meant in practice was a two-day workshop in November 1996, in which Tralso and the Department of Land Affairs presented the options of a Trust, a CPA, and freehold tenure.³⁹ The outcome of the meeting was the decision to establish seven CPAs for the villages outside of the Nature Reserve, and a Trust for the land inside the reserve, followed by a multi-year process of enumerating the residents of each CPA, drafting constitutions for the new legal entities, and re-surveying the boundaries of the CPA land and the Nature Reserve.

³⁷ South African Department of Land Affairs (SADLA), *Land affairs white paper* (SADLA, Pretoria, 1997).

³⁸ Cwebe Land Claim Deed of Settlement, signed by Waphi Siyaleko representing the Cwebe claimants and Glen Thomas representing the Department of Land Affairs, at East London, 27 June 1996. Copies held in documents provided by the Land Claims Commission to the Dwesa-Cwebe Land Trust in 1999 in preparation for the Settlement Agreement, binder I:A, and in the personal papers of Kuzile Juza, Hobeni. **IS THERE ANY MORE INFO HERE? WHO ISSUED THIS? THIS MAY EVENTUALLY END UP IN GOVERNMENT ARCHIVES, BUT THE ARCHIVES ARE NOT YET PUBLIC AND AT THIS POINT ALL COPIES ARE GREY LIT.**

³⁹ Tenure and Communal Property Association (CPA) Workshop, 25-26 November 1996, Organised by Transkei Land Service Organisation, copy held in the personal papers of Kuzile Juza, Hobeni. **ARE THESE PUBLICLY AVAILABLE? IS THERE A LINK TO SOMETHING WE COULD INCLUDE? SEE ABOVE**

This process was required for the Settlement Agreement in 2001, which pledged to restore the Dwesa-Cwebe Nature Reserve to the Dwesa-Cwebe Land Trust to be comprised of 14 trustees elected by each of the seven CPAs. Each CPA also would hold title to the land outside the reserve, in part to provide a legal basis for investors to establish tourism facilities on communal land. The Trust's resources would come from the state leasing the Nature Reserve (which would remain a protected area), private rental of the Haven Hotel and holiday cottages, and more indirectly, state development grants (a Restitution Discretionary Grant and a Settlement Planning Grant totaling R10.6 million). While the rental payments went directly to the Trust, the grants were to be administered by the Amathole District Municipality—the overarching local government entity.

Tensions within the now legally unified “community” grew acute with the failure of the Dwesa-Cwebe Development Plan and the Wild Coast Spatial Development Initiative, and an unexpected return to protectionist conservation. Since the Settlement Agreement and the creation of a Development Plan in 2003 to govern the expenditure of the development grants, the Trust was frustrated in its attempts to hold the Amathole District Municipality accountable for its responsibility to spend the grant funds on local development. The Spatial Development Initiative, in turn, failed to attract bidders, leaving the Haven Hotel under a series of short-term contracts. In the meantime, the reserve management unilaterally terminated the permit system for access to forest produce in 2000. As a 2006 review of the Settlement Agreement concluded, the agreement gave the Trust little leverage against the state:

the agreement ... spells out provisions for non-performance by the Trust but barely refers to similar possibilities for government ... ironically the sustainability is now threatened by non-performance or reluctant performance by government parties rather than by the Trust.⁴⁰

Faced with these failures, largely for reasons beyond their control or ability to remedy, the Trust became increasingly alienated from its constituents, embarrassed and reluctant to hold meetings at which they had little to report.

In early 2009, a group claiming to be newly elected trustees (henceforth ‘the New Trust’) brought a suit against the Dwesa-Cwebe Land Trust, in the name of the Trust. The suit followed at least a year of preparation, and was accompanied by meetings in the seven CPAs where they recounted their unsuccessful attempts to secure financial information from the existing Trust and its bank. Around the same time, the New Trust's attorneys sent letters to the cottage owners ordering them to begin paying their rent into the account of the New Trust. The Haven Hotel leaseholder, in turn, was viewed by many supporters of the existing Trust as an ally of the New Trust.

⁴⁰ Robin Palmer, Rosalie Kingwill, Mike Coleman, and Nick Hamer, *The Dwesa-Cwebe restitution claim: A case study as preparation for a field based learning programme* (Phuhlisani Solutions CC, Mowbray, 2006), pp. 41-43.

This case was eventually turned over by the Court to mediation, which led to the Department of Land Affairs hastily sponsoring elections for new trustees (for ‘Trust C’) in November 2010. The Eastern Cape Parks and Tourism Authority, the managing agency that leases the Nature Reserve from the Trust, had been particularly compromised by the uncertain legal status of the Trusts. It had inherited a 21 year lease initiated in 2001 by Eastern Cape Nature Conservation (its institutional predecessor), and found itself with a mandate and a deadline to expand the reserve’s commercial potential and build local support for continued conservation, but without a single stable community legal entity with which it could negotiate.

In the meantime, two more self-identified Trusts arrived on the scene. Leaders of Cwebe CPA, one of the seven communities represented in the Dwesa-Cwebe Land Trust, claimed that they were forming another Trust as they declared their independence from the New Trust and its successor, Trust C, complaining of haste and lack of publicity around the electoral process. A fifth group (‘Trust D’) declared itself at the end of 2010 to be the authentic representative of the subset of families in the area whose ancestors had actually resided within the boundaries of the Nature Reserve, and who had only reluctantly agreed to allowing the reserve to remain a protected area. Proposals to allow them residential rights in the reserve and/or additional compensation had been dropped from the negotiation process early, but with the Trusts in disarray, they hoped to revisit these claims. These groups of claimants embraced the idioms of the law; despite having no legal status, they chose to call themselves “Trusts” as a way to assert their positions in the claim and post-settlement struggles.

Understanding the process

Given the prevalence of conflict among land claimants in the longer-term, earlier appearances of collective unity seem a fleeting achievement. Across cases, it is clear that claimants were frequently divided on substantive issues along lines that cut across the nascent claimant community. The restitution process, however, demanded a unified front in order to effectively engage with the Land Claims Commission, other state actors, and other non-claimant stakeholders, and to found a single collective project. This was particularly the case in the optimistic political climate of the mid-1990s. Claimants and leaders found unity in common elements of experience of loss and displacement, often linked to a broader ‘restitution narrative’ and the project of national liberation. Nonetheless, early resentments and divisions remained as latent tensions and often resurfaced as the project of achieving full and effective claims settlement dragged out.

“Community” became a frame that allowed recognition of suffering and entitlement between claimants and the state. In practice, however, there was a discrepancy between symbolically charged aspirations towards obtaining restorative justice and what was possible within

restitution,⁴¹ particularly where the process depends not only upon the claimants' leaders but also the state and private sector. The tensions that emerged were not simply the result of gaps between expectations and what the process actually delivered. They further resulted from the dialectical relationship between the emergent "community" and the state. At the point of founding a project, most typically in the lead-up to and conclusion of a Settlement Agreement, an image of unity was reinforced from without by political rhetoric concerned to showcase progress in the restitution program, as well as from within by community leaders who were swept up by the apparent momentum of developments. Aspirations were harnessed and disciplined in the process of forming a practically realizable project and creating institutional vehicles to carry it out.

These relationships produced specific organizational dynamics and challenges. While they operated in the name of "community", the processes of forming and carrying out projects that putatively reflect claimant aspirations seldom involved all or even a broad cross-section of members; rather they relied upon the executive committees of new legal entities. These legal entities comprised a subset of claimants with a specialized knowledge of the process and its constraints, and who had struggled to convey this to their constituents and to represent fully the range of dissenting opinion.

Publicly responsible to their constituents, they also took on gatekeeping and steering roles, with privileged access to information by comparison to their parent bodies.⁴² These issues are of course typical of committees in various settings, but are especially acute in land restitution, where educational inequalities, constrained information flows, and the sheer complexity of development planning and legal restitution processes can heighten the exclusivity of CPA and Trust committees. On one hand, they may become alienated from the constituents as their work distances them from direct engagement/mobilization with community members. On the other, they maintain a stake in public representations of consensus/stability as a basis for attracting the support of outsiders and maintaining an appearance of legitimacy. Likewise, the state and NGOs have a stake in preserving these representations, both to present a public claim of success and to have a single (purportedly) representative body with which to engage.

Over time, new legal entities came to be firmly established within the restitution process, despite being viewed with increasing suspicion by some claimants. Discontented claimants exposed vulnerabilities of community leaders, who frequently failed to adequately consult with their constituents as the settlement process advanced. On a sympathetic reading, this lack of consultation stemmed from leaders trying to expedite the process of achieving claims settlement as delays conflicted with the expectations of claimants, and from the project and leadership becoming absorbed by expertise-driven processes of planning and development. Political scandals involving claimant leaders, especially those including charges of corruption or

⁴¹ Andries du Toit, 'The end of restitution: Getting real about land claims', in Ben Cousins (eds), *At the crossroads*, pp. 75-91; Walker, *Landmarked*.

⁴² Cf. Frederick George Bailey, *Morality and expediency: the folklore of academic politics* (Aldine Publishing Company, Chicago, 1977), pp. 64-65.

favoritism, further fueled questions regarding their legitimacy. The resulting resentment among claimants often was combined with older resentments of claimants who continue to feel that their interests and experiences are marginalized or inadequately represented.

We recognize the importance of the contingencies of particular cases within the overall tendency towards the legalization of struggle. The history of mobilization clearly shapes dissent, and hence the form of current and future competition over resources. In District Six, former owners, who felt that former tenants were being prioritized, mobilized as the putatively true and rightful community. Although the D6AC legal challenge was unsuccessful, it delayed the settlement process and focused public attention on the compliance of community representatives with state regulations and procedures, and eventually resulted in direct state intervention. This in turn led to the formation of new claimant sub-groups with distinct interests, paving the way for further conflict and legal struggle. At Dwesa-Cwebe, as development activities framed around Dwesa-Cwebe as an entity failed to deliver anticipated benefits, numerous fault lines arose, reflecting longstanding local rivalries, substantive disagreements about the Haven Hotel and holiday cottages, challenges from resurgent traditional authorities, and complaints about lack of access to forest resources. The ensuing legal challenge to the original Trust by a putative new Trust precipitated the formation of additional Trusts, one state-sponsored and two corresponding to historico-political divisions among claimants, each pursuing their own set of legal struggles. Despite the unique circumstances of every land claim and the contingencies that shaped the particular dissenting groups, it is striking that dissent has not only turned inward, pitting claimants against their leaders, but also often taken legal form, aimed at overturning or replacing the legal entity that was created to represent the claimants. Moreover, initial legal challenges have not so much resolved disagreements, but multiplied and compounded them.

Legal struggles, governance and dissent

If these legal struggles result from dynamics inherent to the restitution process, they are also consistent with a wider trend within neoliberal governance, which has been accompanied by an increasing conduct of political struggles through legal forms.⁴³ Our concern is not so much with neoliberalism writ large, as with a range of analytically separable and contextually variable processes of neoliberalization that encompass changes in the nature and scale of the state and in subject formation.⁴⁴ In particular, we highlight three themes: first, the diminished role of the state

⁴³ Comaroff and Comaroff, *Law and Disorder*; Comaroff and Comaroff, 'Reflections on the Anthropology of Law, Governance and Sovereignty', in Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Julia Eckert (eds), *Rules of Law and Laws of Ruling: On the governance of law* (Ashgate Publishing, Farnham, 2009); J. Eckert, B. Donahoe, C. Strümpell, and Z.Ö. Biner (eds), *Law against the state: Ethnographic forays into law's transformations* (Cambridge University Press, Cambridge, 2012).

⁴⁴ See, for example, Noel Castree, 'Neoliberalising nature: processes, effects, and evaluations', *Environment and Planning A*, 40, 1, (2008), pp. 153-173; Mathieu Hilgers, 'The historicity of the neoliberal state', *Social Anthropology*, 20, 1, (2012), pp. 80-94.

in planning and managing development, and the concomitant rise of new forms of regulation; second, the way that some communities have come to be positioned not only as assuming responsibility for development and service delivery, but as legal actors, holding title to property and expected to enter into contracts through “public-private” development strategies; and third, the prominence of the law as a source of recourse and rights, in a context where the capacity of the state through administrative channels is diminished, and the increasing exercise of these rights in contests between actors in civil society.

The downsizing of the state and an attendant emphasis on private enterprise as the driver of development is reflected both in the capacity of the state and the character of settlements and post-settlement politics. Debate on the relation of South African land reform to neoliberalism has generally concentrated on the market-oriented land redistribution program, whereas land restitution is a ‘rights-based’ process, ideally driven by claimants and not state intervention.

Nevertheless, broader processes of neoliberalization have impacted restitution. The effort to curtail state expenditure is reflected in overall budgets for restitution that are inadequate to the task. These resource constraints have been exacerbated by a lack of capacity in the Commission in the processing of claims, indifference and at times active political obstruction by local state officials.⁴⁵ Limited budgets and capacity have been compounded by the exceedingly incremental unfolding of planning and development processes: preparing plans that can be integrated with local and regional level planning frameworks, setting up appropriate development vehicles, conducting environmental assessments, putting out tenders, and so on. Frequently, the state contracts out these tasks to consultants (both donor and government) with little long-term stake in the projects and technical expertise that is far removed from the competencies of a claimant.⁴⁶

At the same time, the downsizing of the state has been accompanied by neoliberal development strategies that rely upon “public-private” partnerships and other forms of non-state investment, and an emphasis on the commercialization of restituted land. These strategies have had several consequences for claimant communities. They contribute to the impetus to create legal entities, as they have frequently required claimants to engage investors across class, ethnic, linguistic, and other social boundaries, conditions of potential mistrust where legal instruments appear essential to formalize these new relationships.⁴⁷ A generation ago, a more authoritarian state might have simply run tourism operations directly or through a parastatal (as in the case of the Haven Hotel under the Transkei homeland); with the transfer of ownership to claimants and the demise of state-run enterprises, outside investors can now approach communities directly, in turn making legal entities and contracts even more necessary to capture benefits from restitution.

⁴⁵ Cherryl Walker, ‘Finite land: Challenges institutionalising land restitution in South Africa, 1995-2000’, *Journal of Southern African Studies*, 38, 4 (2012), pp. 809-826.

⁴⁶ Van Leynseele and Hebinck, ‘Through the prism’; Paul Hebinck, Derick Fay, and Kwandiwe Kondlo, ‘Land and agrarian reform in South Africa: Caught by continuities’, *Journal of Agrarian Change*, 11, 2 (2011), pp. 220-240; Derman *et al.* ‘Land rights’.

⁴⁷ Comaroff and Comaroff, *Law and Disorder*, p. 32.

“Public-private” partnerships have also created conditions that allow powerful actors to exert increasing pressure on land, particularly in post-settlement contexts where the state has withdrawn from its commitments. Once a dissenting challenge is established from among the rank of claimants, external parties often seek to take advantage of the situation. At Dwesa-Cwebe, many backers of the original Trust suspected that the lawsuit by the New Trust was financed by the Haven Hotel operator, who sought community leaders who would be willing to extend his contract for the hotel. In Cape Town, the D6AC’s class-based agenda aligned with the City’s strategic interest in the profitable use of District Six land for more affluent residential and commercial development. The earlier centrality of claimant communities in the process was thus undercut, as they found themselves as one party among others at the table.

Finally, where other state agencies may appear ineffective or too implicated in relations with existing Trusts or CPAs, the court also offers the prospect of a hearing before a potentially powerful arbiter outside the existing restitution process.⁴⁸ While other aspects of South Africa’s post-apartheid transformation may be lagging or unrealized, the law holds out the promise of effectiveness, re-presented in media discussions of constitutional rights and the independence of the courts. Members of the challenging group are also able to constitute and buttress their moral authority by invoking the discourse of human rights and the normative weight of the constitution, and thus appealing to principles and rights beyond their particular case.

Other options for dissenters to approach the state are limited by the history of engagement. The Trust or CPA typically was the principal negotiating party in relations with the state and other actors, with accompanying legitimacy and authority, a relatively entrenched power network, and an accumulated concentration of capacity and expertise. Given the firmly established legal and socio-political infrastructure between the CPA or Trust and the other stakeholders, the only way for challengers to definitively take their cause forward in the period after settlement involved legal challenges to the very constitution of the Trust/CPA, or to the legitimacy of its existence.

Litigation effectively offers challengers an equal footing as legal subjects or legal “persons” with the party they are challenging and thus minimizes some of the original and/or established Trust/CPA’s advantages, such as resources, political experience, technical expertise, and rapport with a percentage of claimants over time. Taking legal action gives weight, coherence and salience to grievances. This creates the possibility of reframing others’ discontent and enlisting them to the cause and thus of potentially forming an alternative collective “project”. This is harder to do through administrative or political channels, in part because the realm for legitimate interaction with the state has by this point already been established and formalized through the existing legal entity.

⁴⁸ As Comaroff and Comaroff argue, in contexts of neoliberalization, actors frequently turn to ‘the court, [the] one institution still securely under the purview of the state, the one ostensibly capable of commensuration’. Comaroff and Comaroff, ‘Reflections’, p. 38.

The alternative of directly challenging the state is undermined by the ways that the law limits claimants' capacity to press their claims against state actors. If legal action becomes the preferred means of dissent, it is seldom directed at the state because, in terms of the Restitution Act, the state assumes the role of facilitator in post-settlement processes. Moreover, Settlement Agreements have sometimes effectively shielded the state from legal action, as in Dwesa-Cwebe.⁴⁹ The state also has the capacity to undercut and weaken its opponents by demanding extensive compliance with regulatory requirements, as in District Six.⁵⁰ In short, the state, as the quintessential legal 'repeat player', has intrinsic advantages in legal encounters with less experienced players.⁵¹ In contrast, relatively inexperienced and under-resourced legal entities are more vulnerable.

Conclusion

The weakness or absence of the state in post-settlement struggles does not mean that the processes we describe are inconsequential for governance and the management of conflict. Here we turn to debates about the implications of juridification, the notion that 'social conflicts ... are ever more mediated through the judicial system'.⁵² For many observers, this is 'a process of depoliticisation' to be regretted, as it moves issues out of the public sphere and into the hands of lawyers, courts and judges, and confines 'the transformative potential of political agitation ... to [singular] "legal cases"'.⁵³

Juridification, here in the form of legal action by claimants against new legal entities, deflects dissent away from the shortcomings of the state's land restitution program, often associated with the downsizing of state resources and capacity discussed above. In the cases we outline, litigation does not so much constitute a 'politics by other means' in which law serves as an instrument for holding the state to account, as in the context of the anti-apartheid struggle.⁵⁴ This is because the emergence of intra-claimant litigation creates a rather different legal politics. Instead of using the courts to challenge unjust legislation or remedy the wrongs of apartheid, claimants are deploying the law against fellow claimants, frequently recreating lines of division that the apartheid state

⁴⁹ Palmer et al, *The Dwesa-Cwebe restitution claim*.

⁵⁰ Beyers, 'Acrimonious'.

⁵¹ Marc Galanter, 'Why the haves come out ahead: Speculations on the limits of legal change', *Law and Society Review*, 9, 1, (1974), pp. 95-160.

⁵² Julia Eckert, et al., 'Introduction: Law's travels and transformations', in Eckert et al. (eds), *Law against the state*, pp. 1-22.

⁵³ Olaf Zenker, 'The juridification of political protest and the politicisation of legalism in South African land restitution', in Eckert et al. (eds), *Law against the state*, pp. 118-146.

⁵⁴ Abel, *Politics by other means*.

had exploited in the prior process of dispossession. Neither state nor community are exclusively to blame; rather, a set of mutually reinforcing dynamics unfold between them at multiple sites and reconstitutes each as parties engaged at a distance through a logic of indirect governance. As internecine community conflicts multiply and complicate, law begets more law, and the state duly assumes its role as law maker and keeper.

We are not arguing that officials deliberately stir up conflict; rather, we view these legal struggles as an unintended consequence of restitution in the context of neoliberalization. The restitution program in practice has created rules and processes that give rise to subjects and strategies for action, in ways that may effectively take pressure off state agencies, as claimants expend their available energy in fending off internal legal challenge(s) and making sure that they closely comply with state regulations and directives so as to avert further trouble. In practice, the Trusts and CPAs that are being targeted are frequently being held responsible for failures that are arguably not of their own making, such that potential resistance to the state is effectively and indirectly managed through legal mechanisms for displacing, allaying, and partially or temporarily resolving conflict. The outcome is to reinforce the state's authority as the ultimate legitimate arbiter, rather than position it as a party to be held accountable. Likewise, where settlements are premised upon "private-public" partnerships that fail to materialize, the turn to the law directs attention away from the failures of the market-based development strategies and towards the alleged shortcomings of leaders of the land claim.

Such displacement is compatible with the public face of land restitution. While it is practically impossible for restitution to fully deliver on its promises of restoration and transformation, post-settlement struggles are not an obstacle to high-profile public celebrations of ostensibly settled claims. Substantive issues can be left unresolved in the Settlement Agreement, while a claim is nevertheless added to a roster of nominally settled claims. Although this may be done in a good faith effort to resolve a claim, it sows the seed for future conflict among claimants – conflict that will likely proceed in courtrooms and mediation sessions outside of the attention of the media and the public.

We read the passage of the Restitution of Land Rights Amendment Act in 2014 in this light. The Act faced considerable critique and was widely interpreted as a gesture to win electoral support, particularly by promoting claims by traditional authorities. At the bill stage, critics highlighted the inadequacy of resources and incomplete resolution of thousands of existing restitution cases, a situation which will only be exacerbated with the extension of the deadline for claim submissions until 31 December 2018.⁵⁵ The Act may be effective at winning electoral support and bolstering the current government, but with declining budgets for land reform, the state is unlikely to be able to address the complaints of existing and new claimants. Fresh

⁵⁵ See, for example, Aninka Claassens, 'Haste over land rights bill not just in aid of buying votes', *Business Day*, 10 April 2014, <<http://www.bdlive.co.za/opinion/2014/04/10/haste-over-land-rights-bill-not-just-in-aid-of-buying-votes>> (3 March 2015).

demands will challenge state capacity and no doubt precipitate a host of new conflicts among claimants as well as other stakeholders, and in turn, new legal struggles.

Our analysis of the turn to litigation in South African land restitution has revealed a series of tensions within the process as a whole. The land restitution process has, in practice, encouraged claimant groups to form collective projects that translate aspirations for redress into (frequently reduced) concrete claims settlements; required the community to be constituted through a legal entity; and then left this entity to deal with demands and conflicts from among claimants as settlement processes have dragged on. Over time, this has resulted in division and dissent among claimant groups, often expressed in legal challenges to the entities representing them. More than just so many locally contingent conflicts, the numerous lawsuits against new legal entities have served to shift the role of law in the politics of land and the relations between the state and dispossessed land claimants. Where activists in the anti-apartheid movement and in post-apartheid transformation used the law in support of collective political action aimed at bringing about systemic change, here the law is being deployed for very particularistic ends, thus fracturing and deflecting more concerted expressions of dissent. This, in turn, is conducive to the indirect management of conflict in post-apartheid land reform.