ABHANDLUNGEN • ARTICLES • ARTICLES

# The Legal Crisis of Land Restitution in South Africa: A Critical Analysis

*Samuel Freddy Khunou*[*]

**Abstract**

This article argues that land dispossession of the indigenous people (the Khoikhoi and the San) and the black communities in South Africa started long before 1913. The first process of land dispossession commenced when the first Dutch settlers arrived at the Cape of Good Hope in 1652. Thereafter, conquest and colonial settlement of the Dutch and later the British became the standard methods of land dispossession before the promulgation of the Natives' Land Act 27 of 1913. In actual fact, this Act among others, legitimised, entrenched and legalised the pre-1913 land dispossession. In addition, this obnoxious piece of legislation engendered another form of aggressive land dispossession coupled with brutal forced removals.

It is against this backdrop that this article contends that section 25 (7) of the Constitution of the Republic of South Africa, 1996 restricts the right to restitution to the 19 June 1913 contrary to the principles of equality and justice. As a result, it excludes the descendants of the communities and persons dispossessed before 1913 from the entire constitutional scheme of restitution. Furthermore, section 25 (7) fails to take into account all-inclusive history of land dispossession in South Africa. In doing so, it perpetuates the injustices of the past. Therefore, this article submits that given South Africa's sad history of land dispossession, section 25 (7) should be amended to allow (the descendants of the communities and persons dispossessed before 1913) to lodge their legitimate restitution claims.

## A. Introduction

The history of conquest and dispossession, forced removals and a racially-skewed distribution of land resources have left South Africa with a complex and difficult legacy of land

* UDE: SEC (Moretele Training College of Education), B. Juris (Unibo) LLB (UNW) LLM (UNW) LLD (NWU-Potchefstroom Campus). Samuel Freddy *Khunou* is an Associate Professor, Faculty of Law, North-West University, Mafikeng Campus. He is also a trained Advocate of the High Court of South Africa and member of the Polokwane Bar Association and his e-mail address is: freddy.khunou@nwu.ac.za. This article emanated from a Paper Presented at the 50th Anniversary Conference of the Law Faculty of the North West University (Potchefstroom Campus) Potchefstroom, 15 October 2015.

restitution. The question of land restitution is a critical and thorny issue in the history of the dispensation of land restitution in a democratic South Africa. By and large, this issue has not been given adequate constitutional attention. For instance, the framers of the Constitution of the Republic of South Africa[1] also failed to address question of land restitution adequately. This failure resulted into the constitutional crisis of land restitution which is currently the most complex quagmire on the terrain of land reform.

This article focuses on the legal crisis of land restitution with specific reference to the cut-off date of 19 June 1913 whereby rights of the ancestral land of the indigenous African people are restored by land claims driven process. There is an abundance of historical evidence which nullifies the 1913 cut-off date stipulated in section 25 (7) of the Constitution and the Restitution of Land Rights Act ('the Restitution Act').[2] This date purports to be a date which marked land dispossession in South Africa.

It is also submitted that the majority of black South Africans were deprived of their land long before 1913. It is in this context among others that this article challenges the constitutional rationality of section 25 (5) of the Constitution. This constitutional provision has unjustifiably so, restricted the process of land restitution. Therefore, it is also submitted that section 25 (5) of the Constitution is anathema to the very same Constitution which intends to achieve social justice and equality for all.

## B. Historical Context of Land Ownership

*Belinkie* wrote that pre-colonial South African societies (African indigenous people)[3] utilised collective systems of land rights which prioritised communal land uses and community interests. Individuals, who pledged allegiance to the community, were allowed to maintain individual land allotments. Those individual allotments, based on usage were inheritable in perpetuity. The head of the family regulated land usage and traditional leaders consulted both elders and those individuals living and using the land before making any decisions that could affect property rights. Under this communal system, land was distributed based on need, land use and individual status.[4]

1 Constitution of the Republic of South Africa, 1996. This Constitution provides the legal foundation for the existence of a democratic society, sets out the rights and duties of the citizens of South Africa, and defines the structure of the government. It was previously also numbered as if it was an Act of Parliament (Act 108 of 1996). However, since the passage of the Citation of Constitutional Laws Act 5 of 2005, neither it nor the Acts amending it are allocated Act numbers.

2 Act 22 of 1994. This Act provides among others for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices.

3 The words 'African indigenous people' is used interchangeably in this article to refer to the Khoisan blacks, the Tswana, Pedi, Sotho, Venda, Shangaan and Nguni people, Zulu, Xhosa, Swazi and Ndebele).

4 *Belinkie, Sasha* 'South Africa's Land Restitution Challenge: Mining Alternatives from Evolving Mineral Taxation Policies' 2015 Cornell International Law Journal 224.

However, with the arrival of Dutch settlers in 1652,[5] most of the territory named the Cape of Good Hope[6] by Portuguese navigator Bartholomew Dias was claimed by the Dutch East Indian Company (DEIC) for Holland and the entire region and adjacent settlements became the Dutch Cape colony. It is documented that the interior of what would become the Cape Colony had long been inhabited by the San and Khoikhoi. Some Xhosa and Zulu had also settled on the eastern coastline by the 17th century.[7]

The Dutch settlers first drove the Khoikhoi and the San communities out of their former grazing lands and later continued to dispossess the Xhosa and Zulu in the eastern areas of the Cape colony.[8] Most importantly, the arrival of the Dutch settlers marked the formation of a new land ownership system. This system which was foreign to the indigenous people required formal registration of the land property and did not acknowledge communal land systems and effectively engineered the process of land dispossession.[9]

The system of registered ownership was recognised, respected and protected by the Dutch authorities. For the most part, whites held their land under this system, though there

5 On 24 December 1651, Jan van Riebeeck set off from Texel in The Netherlands for the Cape of Good Hope. Van Riebeeck had signed a contract with the Dutch East India Company (DEIC) to oversee the setting up of a refreshment station to supply Dutch ships on their way to the East. On 6 April 1652, Van Riebeeck and his crew arrived at the Cape. The arrival of Jan van Riebeeck marked the beginning of permanent European settlement in the Cape of Good Hope. See in this regard, *Anon.*, 'The Arrival of Jan van Riebeeck at the Cape: 6 April 1652', http://www.sahistory.org.za/topic/arrival-jan-van-riebeeck-cape-6-april-1652 [Date of Access: 24 May 2014].

6 The Cape of Good Hope (Afrikaans: Kaap die Goeie Hoop) is a rocky headland on the Atlantic coast of the Cape Peninsula, South Africa. The history of the Cape Colony began when Portuguese navigator Bartholomew Dias became the first modern European to round the Cape 1488. Dias named the area the Cape of Good Hope. However, the Portuguese attracted by the riches of Asia, made no permanent settlement at the Cape of Good Hope. Thereafter, the Dutch settled in the area as a permanent location. After the arrival of the Dutch, the name Cape of Good Hope was officially applied to the whole Cape colony. Anon., 'Alternative Titles: Cape of Good Hope; Kaapprovinsie', http://global.britannica.com/place/Cape-Province[Date of Access: 15 September 2015].

7 *Ibid.*

8 *Garman, Anthea* 'Khoisan Revivalism: The Claims of Africa's First Indigenous Peoples' http://reference.sabinet.co.za/sa_epublication_article/rujr_n20_a23 [Date of Access: 12 September 2015]. The word 'Khoisan' is a deliberate term for the descendants of the first indigenous people of South Africa. It an anthropological word used first in the mid-20th century for the people formerly known pejoratively as 'bushmen' and 'Hottentots' respectively. However, these names are now regarded as hate speech in the new South Africa. The word 'Khoisan' is portmanteau term standing for the San (hunters/gatherers) and the Khoi (the herders). The Khoi-khoi (Khoi-khoin or Khoe-khoen) literally translated to mean 'men of men.' The Khoisan historically comprises five main groupings, namely San, Griqua, Nama, Koranna and the Cape Khoi. See also generally, *Khunou, S. F.* 'A Historical Overview of the Struggle for Freedom in the Homelands and South Africa: Towards the Attainment of Constitutional Democracy' Report Presented to the North West Provincial Heritage Resource Authority, (2015) 1.

9 *Belinkie, Sasha* 'South Africa's Land Restitution Challenge: Mining Alternatives from Evolving Mineral Taxation Policies' 2015 Cornell International Law Journal 224.

were some black people and black communities who did acquire title of this sort.[10] As a result, the system of registered ownership was used as an effective tool of land dispossession. This trend of land deprivation was taken further by the British colonialists when they endorsed their authority at the Cape in 1795 and 1806 respectively.[11]

It is evident that from the start of colonialism at the Cape colony, the rights of the African indigenous people at the Cape colony were ignored by both Dutch and British colonialists. As a result, the African indigenous people were progressively and aggressively forced out of their land by white settlers and their colonial authorities through the process of conquest accompanied by land dispossession.[12] This process of land deprivation was due to the fact that colonial settlers simply declared land as theirs because they did not recognise the indigenous land ownership.

Therefore, from the earliest days of European settlement, conflict existed between the indigenous people and the new settlers.[13] This conflict manifested itself into a series of wars between the settlers and the indigenous people. Most unfortunately, the African indigenous people were defeated by the white settlers and ultimately succumbed to their authority. Another colonial event which accelerated the process of land dispossession was the period of the Great Trek[14] which happened when the Voortrekkers (Boers)[15] moved inland

10 *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT 19/03) [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) (14 October 2003 at p 42.

11 *Belinkie, Sasha* 'South Africa's Land Restitution Challenge: Mining Alternatives from Evolving Mineral Taxation Policies' 2015 Cornell International Law Journal 224.

12 *Belling, Frank Edward Albert* 'Case Studies of the Changing Interpretations of Land Restitution Legislation in South Africa' (Unpublished Degree of Master of Technologiae: University of South Africa 2008) 45.

13 *De Villiers, Bertus* 'Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia', April 2003, Konrad-Adenauer-Stiftung, Johannesburg 46.

14 *Ritner, Peter* The Death of Africa (New York 1960) 30. *Muller, Christoffel Frederik Jacobus* 'The Period of the Great Trek 1834-1854' in *Muller, Christoffel Frederik Jacobus* (ed) Five Hundred Years: A History of South Africa (Pretoria 1980) 137-138. *Ritner* is on record citing MacMillan categorically labelling the Great Trek as the 'great disaster of South African history.' Perhaps it was for this reason that the Great Trek was described as fundamentally a desperate protest against equality between black and white. One of the main reasons why the Dutch settlers left the Cape was that the British policy of relaxing control over labour and other markets increased the economic pressure on the Dutch pastoralists and led to increasing antagonism between these two white groups. On the whole, the *voortrekker* (Boer) conservatism had expressed itself in terms, which epitomized themselves in the Great Trek. Some of the *voortrekkers* claimed Christian motives for their departure from the Cape Colony. According to *Chidester*, Anna Steenkamp, niece of the *voortrekker* leader, Piet Retief, explained their departure as follows: 'As their being place on an equal footing with non-Christians [blacks], contrary to the laws of God and the natural distinction of race and religion, so that it was intolerable for any descent Christian to bow down beneath such a yoke, wherefore we rather withdrew in order thus to preserve our doctrines in purity.''.

15 The Editors of Encyclopaedia Britannica 'Voortrekker' http://global.britannica.com/EBchecked/topic/632827/Voortrekker [Date of Access: 27 April 2014]. The Afrikaans word '*Voortrekkers*' literally means in English 'those who go ahead.' The word basically refers to any of the Boers

displacing indigenous Africans as they went along. In 1839, the Boers established the republic of Natalia[16] largely on the territory occupied and owned by the Zulu chiefdoms under the mighty Zulu Kingdom.[17] The establishment of the Boer republic Natalia culminated into an aggressive process of land dispossession.

On similar vein, land became an even more central issue during the establishment and independence of the two Boer republics of Transvaal Republic or Zuid Afrikaansche Republiek (ZAR)[18] and Orange Free State in 1852 and 1854 respectively.[19] The simple question to be asked is: whose land was declared the Boer republics of Orange Free State and Transvaal Republic? It is recorded that those land areas were the territories of the Tswana, the Pedi, the South Sotho, the Venda, the Shangaan and the Swazi who occupied them before the arrival of the voortrekkers or boers.[20]

In Transvaal, for instance it was no longer sufficient for black people to live on their land but they had to purchase it. Essentially, black people were forced to purchase their own land.[21] In order to entrench their authority over the black communities and their land, the

(Dutch settlers or their descendants) or as they came to be called in the 20th century, the Afrikaners who left the British Cape Colony in South Africa after 1834 and migrated into the interior highveld north of the Orange River. They found black communities in the interior that evolved into the colony of Natal and the independent Boer states of the Orange Free State and the South African Republic or the Republic of Transvaal. The '*Voortrekkers*' label is used for the Boers who participated in the organised migration of systematic colonisation commonly referred to as the Great Trek. The Great Trek consisted of a number of mass movements under a number of different leaders including among others Hendrik Potgieter, Sarel Cilliers, Pieter Uys, Gerrit Maritz, Piet Retief and Andries Pretorius.

16 The Natalia Republic was a short-lived Boer republic established by the Boers shortly after the Battle of Blood River. This republic was conquered and annexed by Britain in 1843.

17 It well documented that towards the end of the 18th century, small tribal communities of Southern Africa merged into larger communities as the result of protracted wars. The rise of the Zulu Kingdom falls into this period. Through incredible atrocities and cruelties the infamous Zulu warrior Shaka gained control over a number of Zulu clans. He expanded his territory systematically and established the Zulu Kingdom. Anon 'The Zulu Kingdom', http://www.southafrica-travel.net/history/eh_zulu.htm [Date of Access: 15 September 2015].

18 The Dutch name 'Zuid-Afrikaansche Republiek' (ZAR) often referred to as the Republic of Transvaal was an independent Boer republic from 1852 to 1902. The ZAR defeated the British in what was often referred to as the First Boer War of 1880 and remained independent until the end of the Second Boer War (Anglo-Boer War) on 31 May 1902 when it was forced to surrender to the British. The territory of the ZAR became known after this war as the Transvaal Colony.

19 The independence of the Boers of the Orange Free State was recognised by Great Britain on 17 February 1854. However, this Boer republic became independent on 23 February 1854 with the signing of the Bloemfontein or Orange River Convention.

20 *Dhlamini, Sephiwe* 'Taking Land Reform Seriously: From Willing Seller-Willing Buyer to Expropriation' (Unpublished Dissertation of Master of Laws in Human Rights) 7.

21 *Molotlegi, Leruo Tshekedi* 'The Role of Traditional Leadership in South Africa' Unpublished paper presented at the University of Pretoria (September 2003) 2.

Boer authorities passed a plethora of racially discriminatory resolutions or laws to legalise and enforce the process of dispossession.[22]

For instance, when the Transvaal republic was established, the resolutions were adopted to declare that land grants for black people were only for occupation and not ownership. This meant that blacks were recognised by the Transvaal authorities as occupiers and not the owners of land.[23] Therefore, in an attempt to reinforce this notion, each citizen or burgher[24] of the Transvaal republic was permitted to claim a farm of 3000 morgen. The grants of the farms were performed informally by the *landdrost*[25] who issued certificates of registration for land.

The process of land dispossession was further stimulated by the concession of the Transvaal government that white settlers who had settled in the Transvaal before 1852 would qualify for two farms per household free of charge.[26] To give effect to the process of legal dispossession, on 28 November 1853, the Transvaal *Volksraad*[27] adopted Article 124 of the Resolution which read, *inter alia,* as follows:[28]

> *With regards to land granted to kaffirs [blacks] for occupation, the Commandants-General and Commandants are ordered, where it is necessary to grant [them land for occupation] … The Raad has resolved that such a farm be occupied by them and their descendants conditionally as long as they behave in accordance with the law*

22 *Dhlamini, Sephiwe* 'Taking Land Reform Seriously: From Willing Seller-Willing Buyer to Expropriation' (Unpublished Dissertation of Master of Laws in Human Rights) 7. The word 'resolution' is used in this article to refer to the laws which were passed and adopted by the *Volksraad* or parliaments of the Boer republics.

23 Report by the Commissioner for Native Affairs 'Relative to the Acquisition and Tenure of Land by Natives in the Transvaal' (1904) 20.

24 The Dutch word 'burgher' means a citizen of a town or city who is typically a member of the wealthy bourgeoisie.

25 The Afrikaans term 'landdrost' comes from the Dutch word 'land' or 'country' plus the word 'drost' which literally means sheriff. However, in South African context, the word 'landdrost' was used during the Boer republics and possibly during the apartheid era to refer to the chief magistrate of a particular district.

26 *Bergh, Johannes Stephanus* 'We Must Never Forget Where We Come From: The Bafokeng and their Land in the 19th Century Transvaal' History in Africa (2005)' http://muse.jhu.edu/journals/hia/summary/v 032/32.1bergh.html [Date of Access: 12 September 2015].

27 The Afrikaans word 'volksraad' literally means in English 'people's council.' The word 'volksraad' is a portmanteau of 'volk' (people) and 'raad' (council). However, volksraad was used generally to refer to the legislative assembly or parliament of the Boer republics.

28 *Bergh, Johannes Stephanus* 'We Must Never Forget Where We Come From: The Bafokeng and their Land in the 19th Century Transvaal' History in Africa (2005)' http://muse.jhu.edu/journals/hia/summary/v 032/32.1bergh.html [Date of Access: 12 September 2015]. Commandant-general was a military rank in the Boer republics of Transvaal and the Orange Free State. Later, this rank was used in the Union of South Africa and the Republic of South Africa respectively. The commandant-general was the head of the armed forces. On the other hand, commandant is a title often given to the officer in charge of the army.

> *and obediently. In case of disobedience such tenure may be declared lapsed.' (Underlining supplied)*

The African land occupation (and not ownership) was dependent on good behaviour. The condition of good behaviour made land tenure of the black people in Transvaal vulnerable. This meant that black communities who were considered by the white authorities to be unruly were simply removed from their land. Moreover, in 1855 the system of land deprivation was reinforced further by the *Volksraad* Resolution which among others read as follows:[29]

> *... No one who is not a recognised burgher [Boer] shall have any right to possess immoveable property in freehold ... All coloured [black] persons are excluded herefrom and the burgher's right may never be granted to them ...*

In addition to the above resolutions, in 1858 the *Volksraad* approved Article 147 of the Instructions to Field-Cornet[30] which provided among others that '*all land assigned to Chiefs is granted to them for perpetual use, but not as their property*.'[31] It is quite clear that the above *Volksraad* resolutions of the Transvaal republic deprived the African communities of land ownership. In most cases, brutal force was applied to crash the African resistance in a violent manner. As the result, the Africans became the squatters in their own land.

Similar resolutions were passed by the *Volksraad* of the Boer Republic of Orange Free State to bring about the process of land dispossession. Although the Boer republic of Natalia was short-lived due to the British annexation, a comparable pattern of land dispossession was followed to deprive the African people particularly the Zulus of their land. It was through the racially discriminatory resolutions or laws that black communities lost vast tracts of land during the independence of the Boer republics. Generally, the British colonies of Natal and Cape, and the Boer Republics of Transvaal and Orange Free State restricted the right of black people to land. However, this was applied differently. In a situation where complete dispossession could not materialise, the Cape Colony allowed black ownership of land on a limited scale.[32]

29 *Croucamp, André* and *Roberts, Bea* 'A Short History of the Bakgatla Ba Kgafela' 2011 Totem Media (Pty) Ltd 3.

30 *Braun, Frederick Lindsay* Colonial Survey and Native Landscapes in Rural South Africa: The Politics of Divided Space in the Cape and Transvaal (Brill 2014) 199. The Afrikaans word 'Veldcornet' (English: Field-Cornet) literally means in English sheriff. Field-Cornet was the officer of government in the Boer republics. He performed various government functions including the removal of the communities from their land with the assistance of the Boer army.

31 *Croucamp, André* and *Roberts, Bea* 'A Short History of the Bakgatla Ba Kgafela' 2011 Totem Media (Pty) Ltd 3.

32 For more information regarding the land policy of Transvaal, see *Molokoe, Benjamin Kenalemang Matshidiso* 'A Historical Study of the Bakwena Ba Mogopa as Victims of Forced Removals, 1983-1994' (Unpublished Masters Degree: North West University (Potchefstroom Campus, 1998) 29.

However, the Orange Free State republic rejected the notion of black ownership while the British colony of Natal and Transvaal republic favoured the forms of trusteeship in case where black people had registered ownership of land.[33] The white authorities mainly in the Boer republics revealed a racist attitude against black land ownership. For example, in the Orange Free State there was an outright ban on the purchase of land by black people.

The Orange Free State's authority always maintained that the African people were not supposed to own land but to provide cheap labour on white farms, mines and factories. Even so, after the Anglo-Boer War of 1899-1902,[34] the Boer republics were dissolved. Subsequently, the Peace Treaty of Vereeniging between the English and Afrikaners' leaders set the stage for social, political and economic reconstruction of South Africa in 1902. After the signing of the Treaty, the British imperial government in London withdrew Britain's political power from South Africa and handed over all power to the white minorities namely; the British and the Afrikaners. These two white groups were given a blank cheque by Britain to determine the political future of South Africa.[35]

The debate on the African rights which included among others the right to own property in the Union of South Africa shifted from Britain to the former four colonies themselves.[36] The political leaders of these colonies hoped that by setting up the Union, they would put an end to the dispute that caused the Anglo-Boer War and promoted the economic and political development of South Africa as a whole. They believed that this could be attained without the political participation of the African people in the Union government.[37]

As a result, an agreement or contract was written into the South African Act of Edward Vll C 9 of 1909.[38] However, when the four colonies (later provinces) amalgamated to form

33 In terms of the system of trusteeship, the land purchased by the Africans was registered in the name of a government official and held in trust on their behalf. Basically, the African chiefs were deemed not to be fit to administer the land of their communities. Therefore, the government factionary was always designated to control and administer land of the African communities through the system of trusteeship. This system somehow made land dispossession easy because government as a trustee could remove the communities in terms of its own authority over the land properties. Therefore, it can be argued that the system of trusteeship limited African land ownership and made it vulnerable to dispossession in the hands of the government as a trustee. Anon 'Parliamentary Exhibition, June 2013: 'South Africa, Our Land: The 1913 Land Act: One Hundred Years on' http://www.parliament.gov.za/content/Land%20Act%20-%20Paper%20-%20Maru2%20-%20Final.pdf [Date of Access: 13 September 2015].

34 The Anglo-Boer War or Second Boer War was fought from 11 October 1899 until 31 May 1902 between the British and the Boer Republics of Transvaal and Orange Free State. The war ended in victory for Britain and the annexation of both republics. A number of interrelated factors led to the Anglo-Boer War. These included among others the conflicting political ideologies of imperialism and republicanism and the discovery of gold on the Witwatersrand.

35 *Basil Davidson* Modern Africa: A Social and Political History (Pinelands 1994) 37.

36 *Ronald Oliver et al* Africa Since 1800 (United Kingdom 1967) 178.

37 *Ibid.*

38 South Africa Act of Edward VII C 9 of 1909. Hereafter referred to as the 1910 Constitution of the Union of South Africa. Section 4 of Act of 1909 proclaimed the Union of South Africa and provid-

the Union of South Africa,[39] control of land became the backbone of racial segregation. At the time the Union of South Africa was formed, vast tracts of land were already in the hands of white minority. As if it was not enough, the process of land dispossession was taken further by the white leaders within the Union of South Africa with much rigour and in a unified and uniform manner. At that point in juncture, both the English and the Afrikaner groups confronted the question of land dispossession jointly with a determined effort.

As already emphasised above, land dispossession had taken place in the Boer republics and the British colonies under separate policies and legislative frameworks. Therefore, in 1910 when these former Boer republics and the British colonies amalgamated there was no overall coherence of land dispossession. It was for this reason among others that in 1913, the Union parliament enacted the Natives' Land Act.[40] This notorious Act was widely regarded as one of the 'keystones in the house of colonialism and its concomitant apartheid.'[41]

Most significantly, the obnoxious Natives' Land Act confirmed and legalised land which was acquired by whites through conquest and racially discriminatory laws before 1913. In other words, the Natives' Land Act actually ratified the pre-1913 land dispossession that started centuries earlier thereby legitimising the already acquired 'land loot' and laying the basis for further dispossession. As already highlighted above, the land dispossession started in 1652 and went on to rear its ugly face in the Boer republics and the British colonies of Natal and Cape. Therefore, the Natives' Land Act among others protected this pre-1913 land grabbing.

ed that the King with the advice of the Privy Council had powers to declare the colonies of the Cape of Good Hope, Natal, the Transvaal and the Orange Free State united under the name of the Union of South Africa.

39 *De Villiers, Bertus* 'Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia', April 2003, Konrad-Adenauer-Stiftung, Johannesburg, 46. The British Parliament created the Union of South Africa from the British colonies of the Cape of Good Hope, Natal, Orange River Colony and Transvaal through the promulgation the South African Act 9 Edward VII c 1909. It was assented to by King Edward VII on 20 September 1909 and a Royal Proclamation of the 2nd of December 1909 declared the date of the establishment of Union of South Africa to be the 31st of May 1910. During the formation of the Union of South Africa, the former colonies of Natal, Cape, Transvaal and the Orange Free State were now called the provinces. It should also be recalled that at the end of the Anglo-Boer War, the British colonised the Boer republics of Transvaal and Orange Free State. Hence, shortly thereafter the two republics were called Transvaal colony and the Orange Free State colony respectively.

40 Act 27 of 1913. This Act was subsequently renamed Bantu Land Act and Black Land Act aimed at regulating the acquisition of land by black people. The Act formed an important part of the system of apartheid and it is of great importance for both legal and historical reasons.

41 *Khunou, Samuel Freddy* 'A History of the Ruling Family of Bakwena Ba Mogopa Traditional Community: Through the Lens of Socio-Economic Trajectory' Unpublished Manuscript of the Bakwena Ba Mogopa (2014) 99-100.

Essentially, this piece of legislation divided South Africa into 'white' South Africa and 'black' South Africa. As a result, blacks were restricted to the reserves (later homelands or black South Africa) with 7% of land ownership. The political rights of blacks were restricted to these homelands which were mainly overpopulated due to shortage of land.[42] It was profoundly clear that the Natives' Land Act had various negative implications on the land ownership of the black people of South Africa which were possibly realised by the white authorities of the Union government. Due to palpable shortage of land, in 1936 African land ownership was increased to 13% by the Natives' Trust and Land Act.[43]

In 1948, the National Party (NP)[44] won the general elections and officially inaugurated the policy of apartheid[45] or separate development of the races as the only way forward. Subsequently, apartheid government gave a legislative face to existing practice of racial segregation and extended the boundaries of application of law to every aspect of African life. According to the vision of apartheid, black people who lived outside the homelands were forcefully removed from their land which was called 'black spots' to secure an exclu-

42 *De Villiers, Bertus* 'Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia', April 2003, Konrad-Adenauer-Stiftung, Johannesburg 46.

43 Act 18 of 1936. This Act was subsequently renamed the Bantu Trust and Land Act and later the Development Trust and Land Act. This Act had as its purpose the physical separation of black people from the rest of the population particularly the white population in South Africa. It further established the South African Development Trust (SADT). Section 21 of this Act declared that all land vested in the SADT or land released from the trust and registered in the name of a black person was deemed to be a black area for the purpose of territorial segregation. See in this regard, *Claassens, Aninka* Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act (Cape Town, 2008) 81.

44 *Koorts, Lindie* 'Watershed Moment that Hurts Millions' 24 February 2014, The Star 11. The NP was founded in order to rally the Afrikaners against the Anglicizing policies of the government of Louis Botha and Jan Christian Smuts. However, from 1933 to 1939, Hertzog and Smuts formed a coalition government and fused their respective followers into the United Party. Some nationalists, led by Daniel Francois Malan, however, held out and kept the NP alive and in 1939, reaccepted Hertzog as their leader in a reorganised opposition party known as the Re-united National Party or People's Party. The RNP returned victoriously in the 1948 elections and subsequently enacted a mass of racial legislation that was designed to preserve white supremacy in South Africa. The RNP named its policy 'apartheid.' The party went on to consolidate its power, absorbing the Afrikaner Party in 1951 and renamed itself the National Party (NP) of South Africa. The NP was long dedicated to policies of apartheid and white supremacy but by the early 1990s it had moved toward sharing power with the South Africa's black majority. In 1998, the NP further renamed itself the New National Party (NNP). However, in 2005 the NNP announced its dissolution and merger with the African National Congress (ANC).

45 Apartheid is an Afrikaans word which literally means in English 'apart' or 'separate.' It was a system of legal racial separation which dominated South Africa from 1948 until 1994. However, the mechanisms of apartheid were set in place long before 1948. Under apartheid, various races were separated into different regions and discrimination against other races such blacks, Coloureds and Indians was legally entrenched with whites among others having priority over housing, jobs, education and political power.

sively white South Africa.[46] It is important to stress the fact that most of the black spots were bought legally by blacks, either as individuals or as groups, before apartheid legislation made it illegal to do so and many had been bought as far back as before the formation of the Union of South Africa.

As a result, the apartheid regime intensified the programme of land dispossession and sharpened the 'teeth' of the Natives' Land Act through the enactment of a plethora of land legislation. Essentially, the apartheid land legislation assisted the Natives' Land Act to protect among others land properties which were looted before and after 1913. Therefore, the apartheid land legislation must be understood in the context of assisting the Natives' Land Act to safeguard among others land acquired during the heydays of Dutch and British colonialism and the Boer republics. These pieces of legislation included among others the Native Administration Act,[47] the Group Areas Act[48] the Prevention of Illegal Squatters Act[49] (PISA), the Native Laws Amendment Act[50] and the Natives Resettlement Act.[51]

46 *Anon.*, 'The Implementation of Apartheid' http://.www.apartheidmuseum.org [Date of Access: 14 August 2015]. Black spots were areas of land within white South Africa where black lived. Under the South African government's apartheid policy, this was against the law and the aim was to eliminate them.' This policy was pursued by 'removing' people usually against their will and taking them to the homelands.

47 Act 38 of 1927. This Act was later renamed the Bantu Administration Act and the Black Administration Act respectively. The central imperative behind this Act was to establish a strong and enough system of national native administration to contain the political pressures that were likely to result from the legislative measures necessary for the implementation of territorial segregation. It was, together with the Native Affairs Act 23 of 1920, part of a process of transferring power over the regulation of African life from Parliament to the executive.

48 Act 41 of 1950. On 27 April 1950, the apartheid government passed the Group Areas Act. This Act enforced the residential segregation of the different races to specific areas within the urban areas. It also restricted ownership and the occupation of land to a specific racial group. This meant that blacks could not own or occupy land in white areas and vice versa.

49 Act 52 of 1951. This was a very harsh law. It was used to forcefully remove squatting communities. It afforded landowners, local authorities and government officials many ways of evicting people or demolishing their houses to get them off the land. Many black communities bore the brunt of this Act because they were removed from their land under the pretext that they were squatters.

50 Act 54 of 1952. This Act was subsequently renamed the Bantu Laws Amendment Act and thereafter the Black Laws Amendment Act. The Act formed part of the apartheid system of racial segregation in South Africa. It limited the category of blacks who had the right to permanent residence in urban areas. Section 10 of this Act limited this to those who were born in a town and had lived there continuously for not less than 15 years, or who had been employed there continuously for at least 15 years; or who had worked continuously for the same employer for at least 10 years.

51 Act 19 of 1954. This Act was subsequently renamed the Bantu Resettlement Act and later the Bantu Resettlement Act. This Act formed part of the apartheid system of racial segregation in South Africa. It permitted the removal of blacks from any area within and next to the magisterial district of Johannesburg by the apartheid government. It was mainly designed to remove of blacks from Sophiatown to South Western Townships (SOWETO). In January 1955, the government deployed security police in Sophiatown in anticipation of a major resistance effort against forced removals. A month later residents were loaded on to trucks with their goods and forced to relocate to SOWETO. One of the townships that managed to survive forced removals was the Alexander Township,

These legislative enactments buttressed the Natives Land Act in many ways which promoted land dispossession and removals. For instance, the Native Administration Act was aimed at providing control and management of blacks which led to many forced removals. This Act gave the Governor-General (later State President) the power to move any black to any place that the government chose for the benefit of the administration of black people by the state. It was through this Act that black communities were removed from their land and resettled in the reserves.[52]

On the other hand, the Group Areas Act prevented blacks from living in the cities and urban areas while the Natives Resettlement Act was used to remove the black communities from the urban areas near Johannesburg.[53] The Native Laws Amendment Act prevented blacks to move in the land which was basically theirs while the Prevention of Illegal Squatters Act declared them illegal squatters when they insisted to stay on their land. These pieces of legislative enactments together with the Natives' Land Act protected the land already taken before 1913 and also promoted new forms of the land grabbing. In effect, these pieces of apartheid land legislation reinforced the Natives' Land Act.

The apartheid government cemented the unequal and unstable outcome of black dispossession by using Natives' Land Act and various pieces of land legislation to pre-emptively thwart black people's efforts to recover from the pre and post 1913 dispossession. Therefore, there is no gainsaying the fact that the story of the land dispossession in South Africa painted a picture of human rights violation which goes beyond 1913. The land dispossession was not only violation of the African peoples' political rights but it was also a transgression of their socio-economic rights. Both the pre and post-1913 land dispossession resulted into untold suffering, poverty and landlessness which today still prevail among the majority of the descendants of the dispossessed.

### C. Preliminary Steps of Land Reform

The important first step to start the process of land restitution was started by the National Party (NP) under the leadership of State President Frederik Willem De Klerk. In his speech at the opening of parliament on 1 February 1991, De Klerk announced that the Natives Land Act, the Development Trust and Land Act and the Group Areas Act would be repealed. Subsequently, on 12 March 1991 the NP government introduced the White Paper on

which turned 100 years in 2012. *Anon.*, 'The Natives Resettlement Act, Act No 19 of 1954 is passed' http://www.sahistory.org.za/dated-event/natives- resettlement-act-act-no-19-1954-passed [Date of Access: 12 September 2015].

52 *Ibid.*

53 *Belinkie, Sasha* 'South Africa's Land Restitution Challenge: Mining Alternatives from Evolving Mineral Taxation Policies' 2015 Cornell International Law Journal 225.

Land Reform.[54] The 1991 White Paper on Land Reform called for the abolition of all land laws based on racial discrimination. It also proposed limited land redistribution.

Basically, it protected the land properties which were already in the hands of white minority. In fact, the White Paper on Land Reform romanticised both the pre and post-1913 land dispossession by ensuring the protection of the title in land. Therefore, the 1991 White Paper on Land Reform did not bring desired changes on land reform dispensation. Following the adoption of the White Paper on Land Reform, on 5 June the Abolition of Racially Based Land Measures Bill was proposed by parliament. Thereafter, the Abolition of Racially Based Land Measures Act[55] was enacted.

It was through this Act that notorious Natives' Land Act, the Natives' Trust and Land Act and the Group Areas Act were abolished. *Weideman* wrote that although the Act was welcomed, the mere repeal of the pieces of legislation could not address the extreme inequities in access to land. There was a danger that racially based economic inequities would be entrenched under the guise of racially neutral laws. For instance, this piece of legislation did not address the question of land restitution. Whatever the case may be, still a number of important racist laws were also not repealed by the Abolition of Racially Based Land Measures Act. These included among others the Black Administration Act, the Rural Areas (House of Representatives) Act[56] and the Prevention of Illegal Squatters Act.

Therefore, one is tempted to suggest that the NP government's land reform dispensation of 1991 was simple and predictable and it limited reform while maintaining the *status quo* in property ownership. The Abolition of Racially Based Land Measures Act and the 1991 White Paper on Land Reform related mainly to agrarian rather than land reform.[57] Although the Act repealed key apartheid land laws, it did not reverse the legacy of the dispossession caused by those repealed laws.

For instance, at the time of the repeal of the said apartheid land legislation, the project of land dispossession by white minority was almost complete because they still had in their possession about 87% of the total land area of South Africa. It is for this reason among others contended that the repeal did not reverse the damage done by the Natives' Land Act and its pre-1913 land legislation.

54 The government, in anticipation of the end of apartheid, made its first comprehensive attempt to address land issues through the White Paper on Land Reform. As starting points the White Paper acknowledged access to land as a basic human right, and proposed that access be achieved through operation of a market economy in which free enterprise and private land ownership would prevail. Generally, the White Paper set out specific proposals in three designated areas: Accessibility of Rights in Land; Quality and Integrity of the Title in Land; and Effective Utilisation of Land.

55 Act 108 of 1991. As already highlighted above, this Act repealed many of the apartheid laws that imposed race-based restrictions on land ownership and land use.

56 Act 9 of 1987. This Act provided for the segregation of residential and agricultural zones for the exclusive occupation of persons belonging to the coloured community.

57 *Weideman, Marinda* 'Who Shaped South Africa's Land Reform Policy?' November 2004 Politikon 220.

## D. New Constitutional Dispensation of Land Restitution

### *I. The Interim Constitution and Land Restitution*

It was at the Convention for a Democratic South Africa (CODESA)[58] where the participating political parties and working groups reached an agreement on fundamental issues pertaining to the basic principles of democratic state including the supreme Constitution with a judicially enforceable Bill of Rights entrenching universally recognised human rights, freedoms and civil liberties. These liberties and human rights are but not limited the right to property and equality.[59] Despite the periodic setbacks of the CODESA, a Draft Constitution was agreed on by November 1993 due largely to the efforts of the negotiators of the African National Congress (ANC)[60] and the NP namely; Cyrial *Ramaphosa* and Roelf *Meyer* who had established a good rapport with each other.

A 'sunset clause' (compromise clause)[61] proposed by Joe *Slovo*, the ANC and the SACP member provided a mechanism whereby the old government could participate in a power sharing role for the first term of office of the new government.[62] This 'sunset clause' was the cornerstone of the constitutional negotiations and it generally had its impact on the route which was taken in the drafting of South Africa's Constitution. The property rights of

58 In December 1991, the deliberations of the Convention for a Democratic South Africa (CODESA) commenced at Kempton Park near Johannesburg to discuss the new constitutional dispensation of South Africa. About 19 political parties, organisations and governments of South Africa and homelands participated in the deliberations of CODESA. The parties and movements from both extreme right and left boycotted the proceedings of CODESA.

59 *Khunou, Samuel Freddy* 'A Legal History of Traditional Leadership in South Africa, Botswana and Lesotho' Unpublished LLD Thesis: North West University, Potchefstroom Campus (2007) 193.

60 The African National Congress (ANC) is South Africa's governing party and has been in power since the transition to democracy in April 1994. The organisation was initially founded as the South African Native National Congress (SANNC) on 8 January 1912 in Bloemfontein. Its main aim was to fight for democracy in South Africa. The organisation was renamed the ANC in 1923. The struggle of the ANC for the liberation of the black masses came to an end in 1994 when it won the general elections and took over power from the white minority. Nelson Mandela became the first black president of the ANC led government in 1994.

61 During the constitutional negotiations, NP government's government had been pushing for a two-phase transition, with an appointed transitional government with a rotating presidency. The ANC pushed instead for a transition in a single stage to majority rule. However, the ANC compromised with the NP's demands by agreeing to the Government of National Unity (GNU) which would include all parties which obtained over 5% of the vote in democratic elections for the first five years. This meant that the NP was sure to be included. The term 'sunset clause' was used for this compromise. It allowed the gradual phasing out of white rule rather than one dramatic handover of power to the black majority. It was Joe Slovo, leader of the South African Communist Party (SACP), who proposed this breakthrough 'sunset clause' which led to the GNU for the five years following a democratic election, which gave concessions to the NP. Anon., 'ANC and the NP reach a compromise on release of more political prisoners' http://www.sahistory.org.za/article/negotiations-toward-new-south-africa-grade-12-1 [Date of Access: 12 September 2015].

62 *Wieder, Alan* 'Ruth First and Joe Slovo in the War Against Apartheid', New York 2013, 324.

the African indigenous people particularly those dispossessed prior to 1913 was badly affected by this compromise.

However, due to the constitutional negotiations, all was set for South Africa to become a democratic state. The rise to democracy in 1994 engendered a new South Africa with the adoption of a new Constitution of the Republic of South Africa ('the Interim Constitution').[63] According to Beck, the Interim Constitution took effect to serve as the country's law until a permanent Constitution could be written. Included within the Interim Constitution were a Bill of Rights and 34 entrenched principles.[64] These principles would provide for framework of the final Constitution.

It was obvious that the authors of the 34 principles were recalling the abuses of the South Africa's past. These abuses of the past include among others massive land dispossession of the African indigenous communities which occurred before and after 1913. This means that the Interim Constitution aimed at rectifying South Africa's history of land grabbing and race-based politics through among others the restitution of the country's land to its rightful owners.[65] Sections 121 of the Interim Constitution provided for the land restitution as follows:[66]

> *121 (1) An Act of Parliament shall provide for matters relating to the restitution of land rights, as envisaged in this section and in sections 122 and 123. (2) A person or a community shall be entitled to claim restitution of a right in land from the state if- (a) such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and (b) such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8 (2), had that section been in operation at the time of such dispossession. (3) The date*

63 Constitution of Republic of South Africa Act 200 of 1993. Hereafter referred to as the Interim Constitution. This Constitution was the fundamental law of South Africa from the first non-racial general election on 27 April 1994 until it was superseded by the 1996 Constitution. As a transitional Constitution, it required the newly elected parliament to also serve as a Constituent Assembly (CA) in order to adopt the final Constitution. It made provision for a major restructuring of government as a consequence of the abolition of apartheid. It also introduced an entrenched Bill of Rights against which legislation and government action could be tested and created the Constitutional Court with broad powers of judicial review.

64 Schedule 4 of the Constitution of the Republic of South Africa Act 200 of 1993 provided for the constitutional principles which included among others that the Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races. See also *Beck, Roger* The History of South Africa: 2nd ed (London 2013) 202.

65 *Belinkie, Sasha* 'South Africa's Land Restitution Challenge: Mining Alternatives from Evolving Mineral Taxation Policies' 2015 Cornell International Law Journal 221.

66 Constitution of the Republic of South Africa Act 200 of 1993. Section 122-123 provides as follows:.

> *fixed by virtue of subsection (2) (a) shall not be a date earlier than 19 June 1913. (Underlining supplied)*

It is quite clear that the Interim Constitution introduced a new phase in the land restitution process. For the first time in the history of South Africa the right to have land restored was recognised as a constitutional right. However, this constitutional arrangement did not bring an end to the public debate and concerns on the land question. Furthermore, the Interim Constitution enjoined the parliament to enact legislation to give effect among others to the restitution process. Therefore, the parliament responded to this constitutional mandate by enacting the Restitution Act.[67]

Like section 121 of the Interim Constitution, this Act provides for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices[68] and establish a Commission on Restitution of Land Rights[69] and a Land Claims Court.[70] Basically, the Restitution Act was ordained by sections 121 of the Interim Constitution.

67 Act 22 of 1994. This Act was amended in 2014 to extend the time frames of land claims by the Restitution of Land Rights Amendment Act 15 of 2014, so as to amend the cut-off date of 1998 for lodging a claim for restitution and extended it to 2019.

68 Section 2 of Act 22 of 1994. This Act provides among others as follows: (1) A person shall be entitled to restitution of a right in land if (a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or (b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or (c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who (i) is a direct descendant of a person referred to in paragraph (a); and (ii) has lodged a claim for the restitution of a right in land; or (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and (e) the claim for such restitution.

69 Section 4 and 6 of Act 22 of 1994. This Act provides for the general functions of the Commission on Restitution of Land Rights which include among others to: receive claims to the restitution of land rights; investigate the merits of any such claims; negotiate, mediate and settle disputes arising from such claims, including claims for compensation; draw up reports and recommendations on unsettled claims for submission as evidence to the Land Claims Court (including a report on the failure of any party to negotiate in good faith), and to present any other relevant evidence to the court; facilitate the submission of unsettled claims to the court; facilitate the implementation of orders made by the land claims court; assist people who obtain land as a result of an order made by the court, to make effective use of that land; and generally, to achieve the speedy finalisation of claims to restitution of land rights.

70 Section 22 of Act 22 of 1994. This Act provides the Land Claims Court among others with the power to determine a right to restitution of any right in land; to determine or approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition; and to determine the person entitled to title to land.

### *II. The 1996 Constitutional Land Settlement*

Following the Interim Constitution, the Constitution of the Republic of South Africa[71] was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997. This Constitution is the supreme law of the land and insists that the obligations imposed by it must be fulfilled.[72] No other law or government action can supersede the provisions of the Constitution. It sets a framework of land restitution in section 25 (7) as follows:[73]

> *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. (Underlining supplied)*

It is in view of the above that the critical argument of the present discourse vests on section 25 (7) of the 1996 Constitution. This constitutional provision goes further to endorse section 2 of the Restitution Act. Therefore, it is argued that section 25 (7) of the Constitution together with the Restitution Act compromise the historical question of land dispossession which took place prior to 1913.

71 Constitution of the Republic of South Africa, 1996. Herein referred to as the 'final' Constitution.

72 Section 2 of the Constitution of the Republic of South Africa, 1996.

73 Section 25 of the Constitution of the Republic of South Africa, 1996. Beside section 25 (7), other sections of section 25 of the Constitution provides among others as follows: No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application (a) for a public purpose or in the public interest; and (6) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including (a) the current use of the property; (b) the history of the acquisition and use of the property; (e) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficia1 capital improvement of the property; and (e) the purpose of the expropriation. (4) For the purposes of this section (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (6) property is not limited to land. (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. (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

## E. Constitutional Context and Interpretation

The aim of section 25 of the Constitution is to roll back the legacy of land dispossession resulting from colonialism and apartheid. However, the concerns remain about the limitation of cut-off date of 19 June 1913 imposed by this section on the terrain of land restitution claims. The question which immediately arises is: does section 25 (7) with its concomitant Restitution Act provide hope for adequate solution of the land restitution problem? Arguably, the cut-off date of 19 June 1913 ignored the real political and economic ulterior motives of the Natives' Land Act in as far as land dispossession was concerned. Therefore, section 25 (7) of the Constitution does not adequately reverse the legacy of land dispossession which dates back as far as 1652.

Section 25 (7) of the Constitution ignores the fact that the Natives' Land Act entrenched and legalised the pre-1913 dispensation of land grabbing. However, it only takes into account the fact that the Natives' Land Act created and perpetuated new forms of land dispossession. It is for this reason among others that this constitutional provision and section 2 of the Restitution Act are mainly concerned with the effects of the Natives' Land Act from 1913 onwards. Historical evidence refutes the contention that legalised land grabbing started in 1913 when the Natives' Land Act was promulgated. Section 25 (7) creates the unfortunate impression that the past racially discriminatory laws of land dispossession took effect in 1913 and onwards.

This constitutional assertion and impression ignore the bulk of historical evidence which clearly demonstrates that land dispossession commenced from 1652 at the Cape of Good Hope and gradually proceeded to impose itself throughout the country. The right to property is a natural law right which does not require limitation by human authority or the Constitution. The framers of section 25 (7) of the Constitution ignored this cardinal point by being restrictive. *Roederer* and *Mellendorf* allude to John *Locke*, a natural law philosopher correctly pointing out that natural law provides persons with natural or pre-political rights to life, liberty and property.[74] The land rights of the African indigenous people are the pre-colonial/political rights. These rights are guaranteed and protected by natural law which is higher than the man-made (positive) law or the Constitution. Essentially, the property rights of the indigenous people are God-given rights and cannot simply be denied or taken away by positive law more especially in South Africa where constitutional supremacy prevails.[75]

74 *Roederer, Christopher* and *Mellendorf, Darrel* Jurisprudence (Cape Town 2004) 43.

75 The doctrine of constitutional supremacy refers to the system of government in which the law-making freedom of parliamentary supremacy cedes to the requirements of a Constitution. On the other hand, parliamentary supremacy is a peremptory rule of constitutional law, that parliament can make or repeal laws at its own will and it is supreme over the dictates of the judiciary. However, the 1996 Constitution has placed limits on the parliamentary supremacy of the National Assembly and respective provincial legislatures in South Africa. *Anon.*, 'Constitutional Supremacy Law and Legal Definition' http://definitions.uslegal.com/c/constitutional-supremacy%20/ [Date of Access: 15 September 2015].

The right to property is in no way dependent on the existence of a sovereign lawgiver but it is intrinsic part of human existence. Therefore, it is not apposite that it should be limited by any legislative instrument including the Constitution. It is therefore argued that the natural law rights to property of the majority of the African communities dispossessed before 1913 provides objective moral limit to the power of the Constitutional Assembly[76] which framed section 25 (7) of the Constitution. Hence, section 25 (7) of the Constitution particularly its component of the cut-off date of 1913 is prone to human weaknesses and limitations.

It should also be emphasised that the Constitution more particular section 25 (7) is a product of negotiated settlement. This settlement took place at the time when the battle lines were drawn between black and white communities in South Africa over a portmanteau of political and socio-economic rights particularly the right to property. In order to avert the possible civil war, the negotiators of the Constitution deemed it fit to reach a political compromise at the expense of the African indigenous communities and individuals dispossessed before 1913. Essentially, section 25 (7) is an epitome of political fraud. It is further imperative to stress the fact that the 1996 Constitution was drawn up by self-appointed interested parties.[77]

The main political actors in the constitutional negotiations were the ANC and the NP government. The obvious truth is that during the constitutional negotiations, only President De Klerk went to the negotiation table with a clear mandate which he obtained through a referendum among the white South Africans. Other than that, there was no referendum by the general public during the post drafting era to test acceptance of the Constitution.[78] In short, the majority of the South Africans mainly the black people were not given the opportunity to test the acceptability and legitimacy of the Constitution during both the pre and post drafting periods.

Therefore, it is not surprising that section 25 (7) conflicts with the entire spirit of the Constitution and creates the constitutional catastrophe. The main reason for this crisis among others is the fact that section 25 (7) is a compromised clause which is devoid of moral authority. As a result, it lays the foundation of conflictual arena with other provisions of the Constitution. For instance, the Preamble of the Constitution states among others that:[79]

> *We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land; respect those who have worked to build*

76 Section 68 of the Constitution of the Republic of South Africa Act 200 of 1993 provided for the establishment of the Constitutional Assembly (CA). The CA was the Constitution making-body which was responsible for the drafting and the adoption of the 1996 Constitution. The CA was formed by the National Assembly and the Senate, sitting jointly in parliament.

77 *Masalakae, Keneth* 'Democracy is a Myth' 15 August 2013, Business Day 12.

78 *Ibid.*

79 Preamble of the Constitution of the Republic of South Africa, 1996.

> *and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law ...*

It is quite clear from the above that the cut-off date of 1913 undermines the prevailing spirit of the preamble of the Constitution. In essence, it does not honour the communities and individuals who suffered for social justice and freedom in their struggle against land dispossession before 1913. The historical evidence of land dispossession testifies to the fact that the pre and post 1913 dispossessed suffered the injustices of the past. Most unfortunately, these injustices are not acknowledged by section 25 (7) of the Constitution which deny their descendants an opportunity to lodge pre-1913 restitution claims. Instead, this section perpetuates the injustice of the past, landlessness and poverty by fixing date of land restitution claims to 1913.

It is therefore arguable that section 25 (7) of the Constitution fails to embrace and offer morality of caring and compassion to the descendants of those who suffered the injustices of the past and dispossessed before 1913. Contrary to the prescriptions of *ubuntu*,[80] the cut-off date of 1913 together with section 2 of the Restitution Act does not heal the wounds of land dispossession engendered before 1913. By excluding the majority of the African indigenous people dispossessed before 1913, section 25 (7) of the Constitution fails to establish national sense of justice which is embedded on the ground of the jurisprudence of *ubuntu*.

Section 25 (7) fails to establish national sense of justice Instead, it favours those who were dispossessed after 1913 thereby validating unfair discrimination and dichotomy between those dispossessed before and after 1913. This unfair cataloguing of those who were

80 *Ntloedibe, Elliot* 'The Role of Traditional Leaders as the Custodians of Culture, Tradition and Land', Unpublished Paper presented at a workshop on the 'Culture, Religion and Fundamental Rights' 26-27 November 1998. And see also *S v Makwanyane and Another* 1995 (3) SA 391 (CC), where the constitutional court considered it important to recognise African values. One such value was the value of *ubuntu*. According to Makgoro J, *ubuntu* translates into humanness, personhood and morality and envelopes the key values of group solidarity, compassion respect, human dignity, reconciliation and collective unity. The court further stated that the need for *ubuntu* expresses the ethos of an instinctive capacity for and enjoyment of love towards fellow men and women, the joy of and the fulfillment involved in recognising their innate humanity, the reciprocity this generates in interaction within the collective community the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve. The principle of *ubuntu* was also considered by the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); *Badenhorst v Badenhorst* [2005] JOL 13583 (C); *AZAPO and Others v TRC and Others* 1996 (4) SA 671 (CC) and *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) BCLR 1 (CC).

dispossessed before and after 1913 undermines *ubuntu*, godly value with wish of all human beings are ordained. Ubuntu is one of the keys to permanent political settlement in South Africa and should be allowed to play a more important long term role in land restitution claims.[81]

In addition, the cut-off date of 1913 conflicts with the right to equality and human dignity of the majority of the descendants of the African indigenous people dispossessed before 1913.[82] Equality includes the full and equal enjoyment of all rights and freedoms. The Constitution also enjoins the state to promote the achievement of equality and take the legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. It is manifest that the restriction imposed by the cut-off date of 1913 on land restitution claims perpetuates unfair discrimination and inequality engendered by the pre-1913 land dispensation.

The supreme Constitution of South Africa is legitimately expected to have the retrospective application beyond 1913. Unfortunately, section 25 (7) of the Constitution missed the opportunity to traverse beyond 1913 in the interest of social justice. In addition, the cut-off date of 1913 also runs contrary to other constitutional provisions of the property clause. Section 25 (1) abhors arbitrary deprivation of property. Contrary to this constitutional provision, section 25 (7) indirectly or directly perpetuates arbitrary deprivation of property which took place before 1913. Therefore, the limitation of property rights of the communities dispossessed before 1913 is not justifiable and reasonable in an open and democratic South Africa.[83]

The conflict between section 25 (7) of the Constitution with the right to property, equality and human dignity of the pre-1913 dispossessed communities makes the call for its

81 *Bennett, Tom* 'Ubuntu: An African Equity' in *Diedrich, Frank* (ed) Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing Contemporary Jurisprudence (Cape Town 2011) 6-7.

82 Section 9 of the Constitution of the Republic of South Africa, 1996. This section provides among others that: Everyone is equal before the law and has the right to equal protection and benefit of the law. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection. On the other hand, section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.

83 Section 36 of the Constitution of the Republic of South Africa, 1996. This section provides as follows: (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation;(c) the nature and extent of the limitation;(d) the relation between the limitation and its purpose; and(e) less restrictive means to achieve the purpose.(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights. Arguably, section 2 of the Restitution Act which provides for the cut-off date of 1913 limits the right to property of the African indigenous people of South Africa in a manner which is unreasonable and unjustifiable in a democratic South Africa.

amendment. There is no gainsaying the fact that section 25 (7) entrenches and prolongs the historical inequalities of the past. The current constitutional cut-off date of 1913 does not provide adequate rectification of the sad history of land dispossession and close a chapter on land restitution. The land ownership in South Africa has long been a source of conflict and the cut-off date of 1913 does not provide the opportunity to avert this conflict which arises from the realities of land ownership in the new South Africa.

As a result, land ownership continues to be an emotional and highly charged issue with whites maintaining ownership over the vast tracts of land.[84] It is evident from the above that the South African land question is extreme and exceptional. The majority of black people were and still are squeezed into small areas of land and small numbers of white people occupied large areas of land. The framers of the 'cut-off date clause' fail to take into account the exceptional circumstances of South Africa's land dispossession. Instead, they deemed it fit to compromise the pre-1913 land claims at the expense of the majority of the indigenous communities.

### F. A Door is Slightly Ajar

The door of the pre-1913 land restitution claims was slightly opened in the case of *Alexkor Ltd and Another v Richtersveld Community and Others*.[85] The Richtersveld community claimed that they were dispossessed of a narrow strip of diamondiferous land alongside the Western Coast of the Northern Cape, an area known as the Richtersveld. The dispossession occurred after diamonds were discovered, long before 1913. Thereafter, mining rights were granted to Alexkor Limited, a state owned diamond-mining company. In the first round of adjudication *Richtersveld Community and Others v Alexkor Ltd and Another*[86], the restitution claim was dismissed. The Land Claims Court (LCC) held that the community had beneficially occupied land for a continuous period of not less than ten years prior to its dispossession after 19 June 1913. However, the court further held that the Richtersveld community had failed to prove that the dispossession was the result of discriminatory laws and practices.

Subsequently, the community appealed to the Supreme Court of Appeal (SCA).[87] Alexkor and the government contended that any rights in the subject land which the Richtersveld might have held prior to the annexation of that land by the British crown were terminated by reason of such annexation. They further contended that in any event, the dis-

84 *Belinkie, Sasha* 'South Africa's Land Restitution Challenge: Mining Alternatives from Evolving Mineral Taxation Policies' 2015 Cornell International Law Journal 221.

85 *Alexcor Ltd and Another v Richtersveld Community and Others* (CCT 19/03) [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) (14 October 2003.

86 *Richtersveld Community and Others v Alexkor and Another* [2001] 4 All SA 563, 2001 (3) SA 1293) (LCC).

87 *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) BCLR 583, (2003 (6) SA 104) (SCA).

possession of the subject land after 19 June 1913 was not consequences of racially discriminatory laws or practices.

The SCA upheld the appeal and among others found that the Richtersveld community had been in exclusive possession of the whole of the Richtersveld including the subject land, prior to and after its annexation by the British crown in 1847. The court further held that the rights of the community in land were akin to those held under common law ownership and that they constituted a 'customary law interest' as defined in the Restitution Act. The SCA further held that the manner in which the community was dispossessed of the subject land amounted to racially discriminatory practices.

Thereafter, the Richtersveld community case proceeded to the Constitutional Court (CC). The principal contention by Alexkor was that upon annexation British law became applicable to the subject land. Consequently, the British Crown became the owner of all land that had not been granted by it under some form of tenure. Alexkor further argued that as the subject land was such land, it became the property of the British Crown. In this manner, Alexkor submitted that the Richtersveld community lost all title to the subject land and as this occurred prior to 19 June 1913, the claim must fail.[88] However, the court held that it is not necessary in this case to fix the precise date or dates of possession.

The CC further found that the annexation of Richtersveld did not extinguish the right of ownership which the Richtersveld community possessed in the subject land. As a result, the court concluded that the Richtersveld community had a valid claim. The CC acknowledged the fact that Richtersveld community lost their land before the Natives' Land Act was promulgated on the basis of racial prejudice and administrative action and stated that the principle of restitution should apply. Evidently, the Richtersveld case has opened the door of land restitution to earlier aboriginal claims.[89] Therefore, the Richtersveld judgment is a step in the right direction and gives hope to the communities dispossessed before 1913.

However, the Richtersveld judgement should not be interpreted to imply in one way or the other that the CC invalidated section 25 (7) of the Constitution nor did the CC declared section 2 of the Restitution Act unconstitutional. This means that the cut-off date of 19 June 1913 which pertains to the land restitution claims is still valid and no person is legally entitled to lodge the pre-1913 restitution claims.

### G. Protagonism and Antagonism of 1913 Cut-Off Date

The discourse on land restitution claims and the legal cut-off date of 19 June 1913 has drawn the attention of both the protagonists and antagonists of the current land reform dispensation. There are forceful legal, historical and political criticisms which are levelled

88 *Alexcor Ltd and Another v Richtersveld Community and Others* (CCT 19/03) [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) (14 October 2003) at p 29.

89 *Belling, Frank Edward Albert* 'Case Studies of the Changing Interpretations of Land Restitution Legislation in South Africa' (Unpublished Degree of Master of Technologiae: University of South Africa 2008) 46.

against the 1913 cut-off date of land restitution claims. The antagonists argue that there is an overwhelming historical evidence of land dispossession which goes beyond 1913. On the other hand, the protagonists of the current land reform argued in favour of the 1913 cut-off date and contend that unrestricted land claims would not close a chapter on land restitution.

The fact that there were no cut-off dates in the process of land dispossession which took place over a long period of time, some may argue that the court should exercise their discretion when interpreting cases of land restitution. However, there is no guarantee that the courts would always exercise their discretion. Whatever the case may be, the courts are bound by the Constitution.[90] This means that over and above the discretion of the courts, they are bound to enforce and give effect to section 25 (7) of the Constitution. The antagonists of the current constitutional settlement of land restitution further argue strongly that section 25 (7) should once and for all be amended. Otherwise tension which looms over land ownership in South Africa would forever haunt the South Africa and future generations.

Despite all divergent views, it is profoundly clear from the above that colonial conquest and land dispossession started in 1652 and were deepened through different historical epochs. Therefore, it would not be surprising if the Khoisan (Western and Northern Cape), the Xhosa (Eastern Cape), the Zulu (KwaZulu-Natal) and various black communities in the former Transvaal and Orange Free State demand land claims to go beyond 1913.[91] It is reported that many traditional leaders especially in KwaZulu-Natal have made it clear that they intend to lodge land claims go beyond 1913 cut-off date.

For instance, King Goodwill *Zwelithini*, together with the Ingonyama Trust,[92] announced that they would lodge a claim for possibly the entire province of KwaZulu-Natal including the Durban Metropolitan.[93] The King further announced that their claim would cover Mpumalanga, the Eastern Cape and the Orange Free State provinces. The aim of the proposed land restitution claim is to regain land taken from the Zulu kingdom during the

90 Section 8 (1) of the Constitution of the Republic of South Africa. This section provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

91 *Belling, Frank Edward Albert* 'Case Studies of the Changing Interpretations of Land Restitution Legislation in South Africa' (Unpublished Degree of Master of Technologiae: University of South Africa 2008) 45.

92 Ingonyama Trust together with its Board members is an entity responsible for administration of Ingonyama Trust land which is about 2.8 million hectares in extent spread throughout the province of KwaZulu-Natal in the republic of South Africa. The Ingonyama Trust was established in 1994 by the KwaZulu Ingonyama Trust Act 3 of 1994 to hold the land in title for the benefit, material welfare and social well-being of the members of the tribes and communities living on the land. See in this regard, *Anon.*, 'Welcome to Ingonyama Trust Board' http://www.ingonyamatrust.org.za/ [Date of Access: 11 September 2015].

93 Durban (Zulu: eThekwini) is the largest city in the South African province of KwaZulu-Natal. After Johannesburg, the Durban Metropolitan area ranks second among the most populous urban areas in South-Africa.

colonial period from 1838 onwards[94] King *Zwelithini* argued that this land was first taken by the Voortrekkers and then the British. However, in terms of section 25 (7) of the Constitution and the Restitution of Land Rights Act[95] only people who were dispossessed of land after 1913 qualify for restitution. The Constitution prevents the Land Claims Commission from accepting any land claims for land dispossessed before 1913. The Commission has no constitutional and legislative mandate to consider claim for land taken before 1913.[96]

This means that if the King were to lodge a claim for land lost in 1838 that claim would not be valid. The same applies to any other traditional leaders who may try to claim land lost before 1913. *Belling* submitted that if the land claims are to be stretched beyond 1913, it would change South Africa into an enormous mess.[97] The critics of the pre-1913 land claims further argued that allowing pre-1913 would open a pandora box and that would be bad for land reform as it would just add complexity and extra costs. They argued that: what if the Khoisan groupings for instance say, 'we own the whole Cape Town.' So we are taking houses in Khayelisha, District 6 and etc.[98]

However, it remains a historical fact that Khoisan communities were dispossessed of their lands by Dutch and later British settlers and their colonial administrations long before the 1913.[99] It is recorded that in 1995 and 1996, South African Khoisan people attended United Nations conferences to make their presence and existence in South Africa known to the world. They succeeded in speaking for themselves rather than being spoken for by the South African government and were recognised by the United Nations (UN) as the first indigenous people of Africa. Le Fleur and Jansen quoted the UN Special Rapporteur[100] de-

94 *Anon.*, 'Custom Contested' http://www.customcontested.co.za/laws-and-policies/restitution-land-rights-amendment-bill/ [Date of Access: 10 September 2015].

95 Section 2 of Act 22 of 1994 confirms that only people who meet the following requirements can lodge land claims:(a) A person, community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices (b) A direct descendant of a person who was dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices (c) An administrator of the estate of a person who was dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices (d) person who was dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices but was compensated for the loss of that right in a manner which is just and equitable in line with section 25(3) of the Constitution.

96 *Anon.*, 'No Land Claim yet from Zulu King' http://www.news24.com/SouthAfrica/News/No-land-claim-yet-from-Zulu-King-20140820 [Date of Access: 18 August 2014].

97 *Belling, Frank Edward Albert* 'Case Studies of the Changing Interpretations of Land Restitution Legislation in South Africa' (Unpublished Degree of Master of Technologiae: University of South Africa 2008) 46.

98 The above are some of the comments raised by the delegates at the 50th Anniversary Conference of the Law Faculty of the North West University (Potchefstroom Campus) Potchefstroom, 15 October 2015.

99 *Le Fleur, Andrew* and *Jansen, Leslie* 'The Khoisan in Contemporary South Africa: Challenges of recognition as an indigenous people' August 2013 Konrad-Adenauer-Stiftung 1.

100 Between 28 July and 8 August 2005 the Special Rapporteur of the UN on the Human Rights and Fundamental Freedoms of Indigenous People visited South Africa. However, the visit was made

scribing the current problem of the Khoisan community development and land in its 2005 report as follows:[101]

> *The root cause hindering economic development and intergenerational cultural survival ... [of the Khoisan] has been the forced dispossession of traditional land that once formed the basis of hunter-gatherer and pastoralist economies and identities. This historic dispossession of land and natural resources has caused indigenous people to plunge from a situation of self-reliance into poverty and a dependency on external resources. The most pressing concern of all the Khoi-San communities is securing their land base, and where possible, re-establishing access to natural resources necessary for pastoralism, hunting-gathering or new land-based ventures such as farming. (Underlining supplied)*

Unless the contrary is proved, the above UN report among others calls for the restoration of the land claims of the Khoisan. For reason alluded to above, most of the restitution claims of the Khoisan travel beyond the current dispensation of the cut-off date of 1913. The Khoisan community is not extinct as it was believed in the 20th century. However, as Le Fleur and Jansen correctly pointed out, the Khoisan continued even under the watch of a democratic government to be forced into this 'amorphous identity of being labelled Coloureds.' Most lamentably, the implication of this labelling goes to their indigenous institutions; land and heritage, socio-economic circumstances and their indigenous languages. Furthermore, this categorisation of the Khoisan as the Coloureds creates the impression that they are extinct. However, quite the opposite is the truth.[102]

*Mxotwa* also confirmed that the Khoisan people were the first to lose their land long before 1913, which is deemed as a cut-off date for the restitution process by the Constitution. This has effectively cut-off the majority of the Khoisan and other black communities

at the request of the South African government. The purpose of the visit was to better understand the situation of indigenous peoples in South Africa and to learn about the government's policies to promote and protect indigenous peoples' rights. The Special Rapporteur had conversations with the government authorities at the national and provincial level, organisations of civil society, the United Nations country team and members of the donor community on the ways and means to strengthen the nation's responses to the needs and demands of indigenous communities. The UN delegation visited among others the!Xu and Khwe communities members of the National Khoi-San Council in the Northern Cape. In the Western Cape, the Griqua community of Kranshoek hosted the Special Rapporteur. The UN Special Rapporteur found among others that all indigenous peoples of South Africa were brutally oppressed by the colonial system and the apartheid regime up to 1994. The Khoi-San were dispossessed of their lands and territories and their communities and cultures were destroyed. Anon., 'Special Rapporteur of United Nations on the Human Rights and Fundamental Freedoms of Indigenous People Concludes Visit to South Africa', http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=458&LangID=E [Date of Access: 15 September 2015].

101 *Le Fleur, Andrew* and *Jansen, Leslie* 'The Khoisan in Contemporary South Africa: Challenges of recognition as an indigenous people' August 2013 Konrad-Adenauer-Stiftung 2.

102 *Ibid.*, 4.

out of the restoration process. Naturally, section 25 (7) does not sit well with the Khoisan descendants whose forefathers fought gallantly together with their fellow countrymen in wars defending the motherland and protecting their country's land from the European invaders.[103]

In 2013, in his address President Jacob Zuma speaking at the ANC's annual 8 January celebrations pledged to allow pre-1913 claims which are not sanctioned by section 25 (7) of the Constitution and the Restitution Act. However, Zuma's speech was seen by many observers as 'a populist draw card' by the ANC while the National Khoisan Traditional Council[104] saw it as an indication that the Khoisan were 'one step closer to actual freedom and living in a democratic South Africa.[105] Once again, Zuma raised the hopes of the Khoisan and other African indigenous communities which are excluded by the cut-off date of 1913 when he announced the government's willingness to consider historical claims for land lost before 1913 during his State of Nation Address (SONA)[106] in February 2013.

Zuma further encouraged the traditional leaders throughout the country to make such land claims. In his speech to the National House of Traditional Leaders[107] earlier in 2014, he told traditional leaders to get 'good lawyers' so that they could put in land claims.[108] Despite President Zuma's promise that the Restitution Act would be amended to allow people dispossessed before 1913 to lodge a claim, these amendments never took place. The Act

103 *Mxotwa, Mtobeli* 'Returning Land to the Khoisan', http://www.isr.org.za/uploads/media/solidarity_TheNewAge.pdf [Date of Access: 15 July 2015].

104 In 1999, the former South African President Nelson Mandela established the National Khoisan Council (NKC). The NKC is a negotiating forum set up to address the constitutional accommodation of the Khoisan's historical leadership within the traditional leadership and constitutional framework The NKC aims among others to unite the Khoisan communities and create a platform through which they can raise issues affecting them as a group of communities. See in this regard, *Le Fleur, Andrew* and *Jansen, Leslie* 'The Khoisan in Contemporary South Africa: Challenges of recognition as an indigenous people' August 2013, Konrad-Adenauer-Stiftung, 4.

105 *Mpofu, Michael* 'A Khoisan Leader Welcomes Pledge on Pre-1913 Land Claims', http://www.iol.co.za [Date of Access: 15 September 2014].

106 The State of the Nation Address of the President of South Africa (SONA) is an annual event in the Republic of South Africa, in which the President of South Africa reports on the status of the nation, normally to the resumption of a joint sitting of the National Assembly and the National Council of Provinces. The SONA marks the opening of the parliamentary year and is usually attended by important political and governmental figures of South Africa, including former Presidents, the Chief Justice of the Constitutional Court and other members of the judiciary, the Governor of the Reserve Bank and Ambassadors and Diplomats to the Republic.

107 National House of Traditional Leaders Act 22 of 2009. The National House of Traditional Leaders is a body composed of delegates from the Provincial Houses of Traditional Leaders of South Africa, representing the Provincial Houses at national level. It was established among others to: represent traditional leadership and their communities; advance the aspirations of the traditional leadership and their communities at national level; advance the wishes of provincial houses, traditional leadership and their communities at national government level and influence government legislative processes at national level.

108 *Anon.*, 'Custom Contested' http://www.customcontested.co.za/laws-and-policies/restitution-land-rights-amendment-bill/ [Date of Access: 10 September 2015].

still states that only people who lost land as a result of racially discriminatory practices after 1913 and before 1994 can lodge a claim.[109]

According to *Mpofu*, several policy suggestions had been made since President Zuma came into office, however there had been an 'absolute inability to confront the basic problems' of land reform. *Mpofu* quoted Hall saying that 'a lot of this policy obscurity is symptomatic of the fact that the ANC does not know what to do with the land issue.' There had been an improvement in 'rhetoric' and not implementation.[110]

## H. Conclusion

It is evident from above that section 25 (7) of the Constitution of the Republic of South Africa, 1996 has 'barricaded' the process of land restitution thereby restricting it to the cut-off date of 19 June 1913. This constitutional arrangement puts among others the process of land restitution at the cross-road. This article submits that section 25 (7) of the Constitution be amended to create a space for the land restitution claims which go beyond 19 June 1913 as evidenced by the history of land dispossession in South Africa. Equally so, the Restitution of Land Rights Act cannot escape amendment in this regard.

It is also submitted that section 25 (7) of the Constitution in its current form inhibits the process of land restitution and generates into the travesty of justice to those who suffered the injustices of land dispossession before 19 June 1913. It is submitted that as long as the land issue is not adequately resolved, the democracy in South Africa would remain a myth to the majority of the indigenous people who were subjected to a terrible state of dispossession and landlessness by the racist colonial and apartheid governments.

109 *Ibid.*

110 *Mpofu, Michael* 'A Khoisan Leader Welcomes Pledge on Pre-1913 Land Claims' http://www.iol.co.za [Date of Access: 15 September 2014].