

# PROPERTY RIGHTS FOR ALL SOUTH AFRICANS AND THE ROLE LAND REFORM CAN PLAY IN EXPANDING PROPERTY RIGHTS

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**“What Went Wrong From The Perspective  
of The High Level Panel and  
what are the Recommendations?”**

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# HIGH LEVEL PANEL MANDATE

In Dec 2015 the Speakers' Forum (representative body of SA legislative Sector) established an independent high-level panel to assess the content and implementation of legislation passed since 1994 re effectiveness and unintended consequences.

The panel was chaired by former Pres Kgalema Motlanthe

The Panel's mandate was to review:

- legislation, assess implementation, identify gaps and propose action steps with a view to identifying laws that require strengthening, amending or change

The intervention envisaged the identification of existing legislation that enables the transformational agenda and pursuit of the developmental state, as well as laws that impede this goal.

# HLP THEMES

The work was divided into three main themes, “the ‘triple challenge’”, of:

- (i) poverty, unemployment and the equitable distribution of wealth
- (ii) land reform: restitution, redistribution and security of tenure
- (iii) social cohesion and nation-building

Resulted in voluminous commissioned reports, see

<https://www.parliament.gov.za/high-level-panel>

Collated into a single report of nearly 600 pages, see:

[https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/HLP\\_Report/HLP\\_report.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf)

# HLP REPORT

Executive summary

Ch. 1 Intro, methodology, findings & recommendations

Ch. 2 Poverty, unemployment and the equitable distribution of wealth

**Ch. 3 Land reform: restitution, redistribution, tenure security**

Ch. 4 Social cohesion and nation-building

Ch. 5 Spatial Inequality

Ch. 6 Implementation of Legislation [including gaps]

Ch. 7 Way Forward

# CH. 3 OF HLP: LAND REFORM

Report follows 3 components of land reform:

- Redistribution
- Restitution
- Tenure reform

Land reform is embedded in the Constitution and is thus a constitutional obligation

Each component governed by a particular subsection of Sec 25 of the Constitution

LR sections of report not critical of the Constitution, but of interpretation and implementation of LR

# REDISTRIBUTION, RESTITUTION AND TENURE

- Redistribution and restitution are discrete programmes with own policies and laws
- Tenure is cross cutting
- Tenure sections cover various different types of tenure insecurity
  - farm workers, communal areas, those living in shacks around the city
- Tenure also cross cutting because relates to the *form of rights* (i.e. tenure security) people will get through restitution and redistribution

# DEVASTATING CRITIQUE

- The Land Reform sections of the HLP in general present a devastating critique of the implementation of the Constitution and of the policies and laws that flow from the Constitution with respect to land reform.
- Very detailed — field work and empirically based
- Reveals the fragmentation and variability

# SUMMARY 1 POLICY INCOHERENCE

Critique of LR in HLP is mainly:

- Failure to conceptualise land reform coherently; Lack of policy coherence in relation to land
- No White Papers since 1997
- No overriding principles, guidelines and interconnections between the three programmes nor identification of priorities and criteria against which to monitor and evaluate progress in terms of the TOR
- Fragmentation between programmes and within programmes, no connecting thread drawing it all together
- Failure to prioritise land reform in the national budget, budget always been below 1% (which includes salaries and administration)
- Failure to follow a coherent path and priorities, e.g. small scale farming and acquisition of urban land with appropriate tenure for expanding urban population



# SUMMARY 2 OPAQUE MEASURES AND LACK OF ACCOUNTABILITY (ADHOCRACY)

- Incoherent policy objectives and guidelines has made it difficult for Members of Parliament to measure the content of bills against agreed policy objectives, given the latter are opaque or absent or shifting
- Constant *ad hoc* policy changes (adhocracy), some not made public, but resources were spent on them as they were implemented
- The budget was being spent on issues not approved by the Cabinet or mandated by legislation
- Poor data to monitor or evaluate what has happened

# SUMMARY 3 LACK OF INSTITUTIONAL CRITERIA/SUPPORT

- Opaque criteria and poor guidelines for selection of land, beneficiaries and projects —encourages mismanagement, ineptitude, elite capture, corruption. Poor data for M & E
- Failure to support land reform beneficiaries where land has been delivered through redistribution and restitution and to new tenure entities; and to conceptualise urban land reform
- Failure to provide land administration to those 60% of the population with off-register rights, institutional void. Rights are locally regulated, contestation and conflict-ridden
- Restitution floundering, instead of consolidating existing claims, opened up more claims, encouraging large dubious chiefly claims at expense of small groups and families

# PUBLIC HEARINGS

Report also informed by roundtable discussions (with reports) and public hearings on all the themes

The Speakers who were present at public hearings saw how the land issue dominated most of the public hearings

People expressed their sense of having been betrayed by government officials and politicians

Complained that the goal posts were shifting constantly

They accusing officials and politicians of diverting farms and other resources to themselves, at the expense of the rights of the poor and dispossessed

# DELIVERY FAILURES IN RESTITUTION AND REDISTRIBUTION

Report covers:

1. Failures of **delivery** in redistribution and restitution
  - Allegations of elite capture of land reform budget and farms
  - Imposition of large group model and of strategic partners – people locked into internal disputes – no agency
  - Long delays in acquiring land – allegations that some claims prioritised at the expense of others

# RESTITUTION 1

- 7 000 unsettled claims and more than 19 000 unfinalised 'old order' claims.
- At the current rate of finalising 560 claims a year, it would take at least 35 years to finalise the old order claims.
- New order claims that had already been lodged after 2014 would take 143 years to settle, and if land claims were reopened and the expected 397 000 claims were lodged, it would take 709 years to complete land restitution.
- Due to the limited capacity of the Land Claims Commission, the panel was recommending that the 1913 cut-off for claims was maintained

# RESTITUTION 2

- Land Claims Commission must be independent from govt; HLP provided draft Judicial Amendment Bill and Restitution Amendment Bill
- Claims made to same land lumped together, triggering ethnic and tribal conflict and inhibits productivity
- HLP: Break up consolidated mega 'communities — break up and subdivide large shared land allocations
- Resolve backlogged claims before other claims allowed
- Review merits of existing claims -- many do not qualify
- Land Claims Court to be stabilized -- more judges

# TENURE REFORM 1

## CONSTITUTIONAL OBLIGATIONS

- Section 25(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 was legally secure, or comparable redress; Section 26 (9) – Parliament must pass legislation to give effect to this provision
- HLP: Parliament in breach of both of these sections
- African rights historically compromised through dispossession *and* discriminatory tenure system— corresponds with geographraphic patterns of settlement and spatial inequality

# TENURE REFORM 2

## RIGHTS PARADIGM

Tenure issues are variable: farms, communal areas, urban areas, and HLP covered range of tenure contexts, each with their own sets of issues and problems, vulnerabilities, levels of insecurity  
Each with their own legal frameworks

Occupiers have blanket rights in terms of discrete laws covering communal areas, farms, informal settlements (IPIIRA, ESTA, LTA, PIE, TRANCRAA)

Farmworkers, Labour Tenants, occupiers and holders of titles/PTOs in communal areas, people in shacks around towns and cities, rural coloured settlements



## South Africans occupying land or dwellings outside formal property system in 2011

Location	Number of people	% of SA population
Communal areas	17 million	32.8%
Farm workers & dwellers	2 million	3.9%
Informal settlements	3.3 million	6.3%
Backyard shacks	1.9 million	3.8%
Inner city buildings	200, 000	0.38%
RDP houses – no titles	5 million	9.6%
RDP houses – titles inaccurate/outdated	1.5 million	3.0%
<b>Total</b>	<b>30.72 million</b>	<b>59.7%</b>

# TENURE REFORM 3

## STILL VULNERABLE AND INSECURE

- Despite rights, rights holders with 'informal' rights more vulnerable now than during apartheid, particularly in communal areas
- No expansion of land acquisition and tenure policies other than title linked to housing in urban areas, therefore rights are insecure
- Most rights holders have no evidence of their rights which exposes them to strengthened hand of traditional authorities, municipal authorities and farm owners
- People effectively dispossessed by mining and development on communal land esp. mining areas and Ingonyama Trust land KZN

# TENURE REFORM 4

## SOME RECOMMENDATIONS

- In response to section 25(6), Interim Protection of Informal Land Rights Act (IPILRA) passed in 1996 as a holding mechanism until comprehensive law enacted to secure vulnerable tenure rights, but acceptable law not yet enacted
- IPILRA not being upheld and enforced. HLP recommends IPILRA must be enforced, strengthened and made permanent to clarify customary rights
- Ensure Mineral and Petroleum Resources Development Act (MPRDA) & Traditional Leaders Governance Framework Act (TLGFA) subject to IPILRA

# TENURE REFORM 5

## LAND RECORDS ACT

- Enact a Land Records Act to record off-register rights
- People want evidence of their rights
- Title deeds into Deeds Registries Act 47 of 1937 and Land Survey Act don't match needs
- Need a comprehensive process of trialling a new system of land records

# TENURE REFORM 6

## TRUSTEESHIP BEING CORRUPTED

- HLP maintains that the state as trustee is behaving as owner, and allowing traditional leaders to claim ownership rather than take on the role of custodianship or trusteeship
- HLP recommends unanimously to repeal or amend the Ingonyama Trust Act of 1994.
- Customary ownership had been downgraded to tenancy under this Act.

# TENURE REFORM 7

## LACK OF ADMINISTRATIVE FRAMEWORK FOR EXECUTING LAND TENURE

- HLP paints a picture of poor conceptualisation of tenure and complete systems collapse of land administration
- Land Administration was not rebuilt to serve the new rights and hence there is no administration of off-register rights for 60% of the population
- Tenure falls into the dualistic 'communal' or 'registered title deeds' binary, neither of which serve the interests of the rights holders
- Land Administration platform can be uniform and can supply a range of tenure types, just as it does for the title deeds registered in the Deeds Office

# REDISTRIBUTION 1

## CONSTITUTIONAL OBLIGATIONS

- Governed by section 25(5) of Constitution
- ‘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.’
- Envisaged transfer of white land to black people to address legacy of pre colonial dispossession
- **Not** specific legal claims by specific groups.

# REDISTRIBUTION 2

## ACQUISITION PROBLEMS

- Meaning of 'equitable access' not defined
- Amount of compensation for expropriation not yet defined – partly because very little, if any, expropriation of land for redistribution has taken place
- 25(3) lists range of factors governing compensation, including current use, past subsidies, purpose of the expropriation



# REDISTRIBUTION 3

## TRENDS SINCE 1994

- Constantly chopping and changing policy agendas and ideological positions over time
- 1. Land redistribution has fallen far short of official government targets and public expectations
- 2. AND also its focus, criteria and modus operandi have undergone several significant shifts leading to confusion on the ground and complaints of constantly shifting 'goal posts' by beneficiaries.

# REDISTRIBUTION 4

## SLOW PACE OF IN FIRST 20 YEARS

- RDP target of 30% of white agricultural land to be transferred to black people by 1999
- Means tested – poor qualified for subsidy to acquire land through SLAG
- By 1999 only 1% transferred
- By 2004 only 3%
- By 2013 only 6.5%

	<b>Acquisition</b>	<b>Tenure</b>	<b>Class agenda</b>	<b>Land use</b>
<b>SLAG (1995-2000)</b>	Market-based purchase	Transfer of title	Means-tested (ie. pro-poor)	Multiple livelihoods
<b>LRAD (2000-2010)</b>	Market-based purchase	Transfer of title	Not means-tested (unclear)	Agriculture only
<b>PLAS (2006-now)</b>	Market-based purchase	No transfer of title	Not means-tested (unclear)	Agriculture only

## REDISTRIBUTION 5

Downward trend in the pace of redistribution, measured by hectares, since 2008 (next slide)

The pace of redistribution has fluctuated with the changing of ministers and also in response to changes in budget allocation

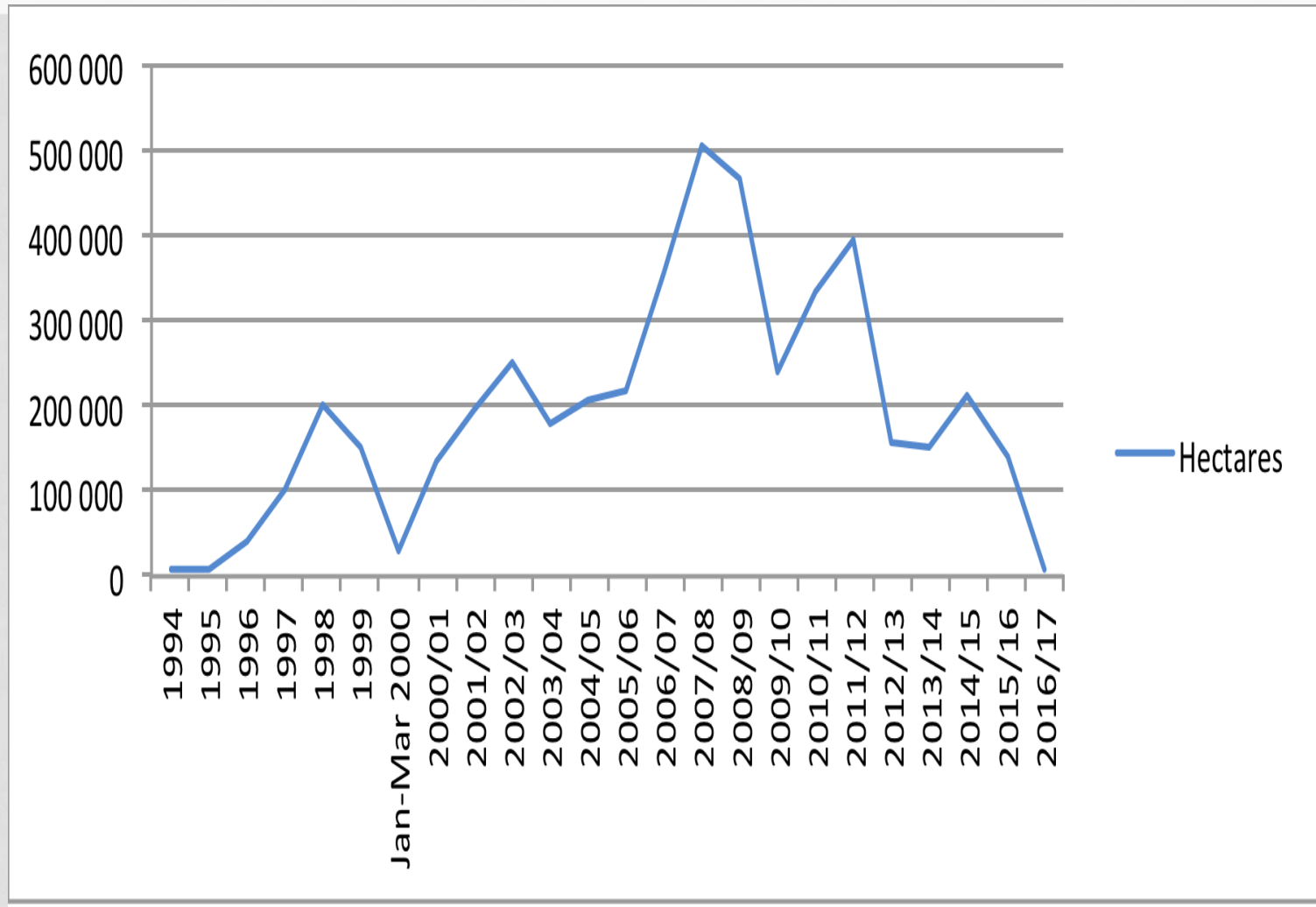
The high point of redistribution was in 2007/08

2015/16 was at the lowest level since 2000/01

# OVERLAP: DELIVERY FAILURES AND TENURE ISSUES

- The relatively few people who manage to obtain redistribution land, remain tenants of the state with 'conditional use rights' subject to 'productivity'
- Claimants amalgamated into large groups under CPAs or Trusts. No enforceable land rights vesting in families or individuals
- Superimposition of strategic partners – often white
- No agency, no ownership – makes productive agriculture impossible

## AMOUNT OF LAND TRANSFERRED THROUGH LAND REDISTRIBUTION, IN HECTARES PER YEAR



# REDISTRIBUTION 6

## GENDER, SELECTION CRITERIA, POOR DATA FOR M&E

- Gender emphasised in policy but women only 23% of beneficiaries (data unclear and difficult to interpret)
- Shift from pro-poor approach to very opaque selection criteria culminating in Recapitalisation and Development Programme (Recap)
- DPME report about Recap that no beneficiary selection criteria, and richer benefit disproportionately to poor
- No adequate criteria to measure who is benefitting – can't measure whether 'equitable' standard in 25(5) is being achieved

# REDISTRIBUTION 7

## OUTCOMES OF 2005 NW STUDY

- one-third were locked in intractable conflict and, as a result, the majority of their members had lost interest in the project and had de facto exited
- 55% of projects had no implements for production and 27% had inadequate implements
- more than a quarter of projects had not produced anything since taking ownership of their land



# REDISTRIBUTION 8

## PROBLEMATIC MODELS

- Problems with the type of **business plans** required for project approval
- Report critiques the business plans themselves which are highly problematic
- Business Plans in any case widely ignored and, even where they are applied there is no correlation or negative correlation with project success
- Blame put on project members e.g. conflict, lack of skills and poor management but there is irrefutable evidence of inadequate support from government institutions
- HLP critiques the model of agriculture applied, which has defaulted to large scale commercial enterprises rather than small-scale agriculture which HLP report supports

# REDISTRIBUTION 9

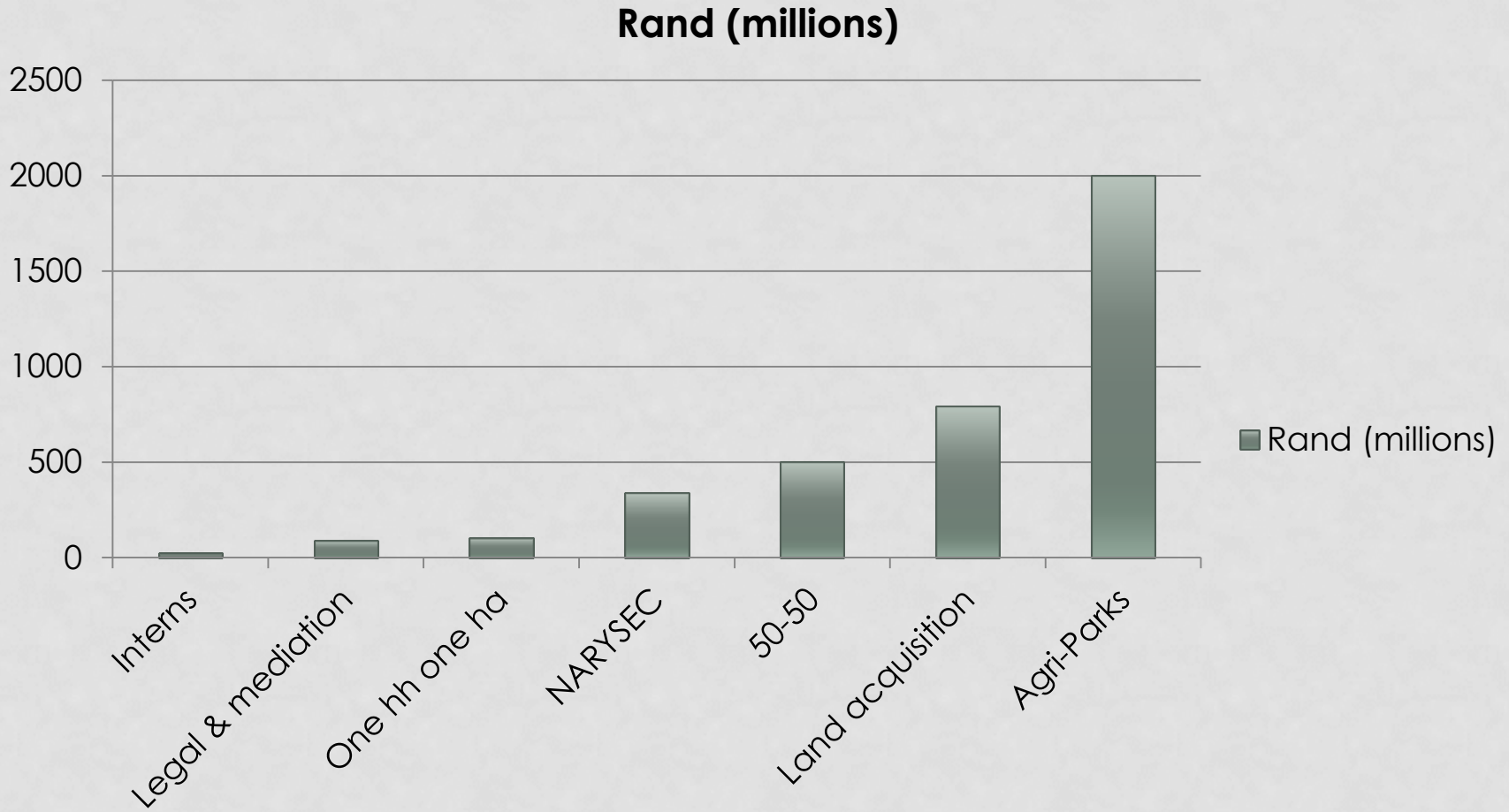
## PROBLEMS WITH STRATEGIC PARTNERS AND LACK OF POST-TRANSFER SUPPORT

- Problems with quality of the relationship between beneficiaries and mentors/strategic partners, particularly control over land, capital and production
- Complain that strategic partners are imposed on them and they have no decision-making powers. Relationships are unequal and no processes to deal with this problem
- Major problems of post transfer support and coordination between DRDLR and DAFFA are repeatedly documented in research studies

# FIGURE 2: LAND REFORM GRANTS COMPARED TO LAND REFORM EXPENDITURE FOR 1996/97-2014/15 PERIOD (IN MILLION RANDS)



# FIGURE 3: RE-ALLOCATION OF LAND REFORM BUDGET, 2016/17



# REDISTRIBUTION 10

## NO LEGAL FRAMEWORKS AND GUIDELINES

- Who should get the land?
- How should land be used, type & scale of farming
- Lack of focus on settlement and multiple livelihoods
- Lack of focus on how land reform will help address spatial inequality — absence of **area-based land acquisition planning and priorities**
- i.e. no coherent policies and guidelines on how land should be identified and acquired
- Redistribution is restricted to properties that are offered for sale – i.e. no targeting
- What rights should beneficiaries have and why? Should they be owners? Or long-term lessees?

# GENERAL PROBLEMS: LACK OF LEGAL CRITERIA AND MEASURES

- Enables elite capture
- Lack of transparency and accountability
- Makes oversight and M&E very difficult because of lack of data against which to measure whether **equitable access** has been achieved
- Difficult to measure progress and danger of getting lost in the detail
- Knock-on affect of failure of redistribution —hence restitution programme is swamped by claimants who do not qualify, but see as only way to get land

# INCOHERENCE BETWEEN REDISTRIBUTION, RESTITUTION AND TENURE REFORM

- No White Paper since 1997
- Constant ad hoc changes in law and policy
- Without coherent policy objectives, there is a danger of getting lost in the detail
- New legislation difficult to track
- Redistribution budget re-allocated to policies that are not public, without legal authority
- Redistribution not delivering secure rights to beneficiaries – abrogating right to tenure security
- Failure of redistribution crippling both tenure reform and restitution

# RECOMMENDATIONS: LEGISLATION

- HLP was a review of legislation therefore recommendations for new laws as follows:
- No recommendations to change the Constitution
- National Land Reform Framework Bill to connect land redistribution, restitution and tenure and provide coherent guidelines
- New Expropriation Bill to cover all details missing
- National Land Records Bill to ensure that evidence of off-register rights are recorded, maintained, updated, managed and incrementally implemented
- The latter requires re-conceptualisation of Land Administration and failure to provide LA infrastructure to replace apartheid LA, so new LA Bills proposed, including land adjudication and over-arching LA Bill



# PROPOSED NATIONAL LAND REFORM FRAMEWORK BILL

[Annexure to report – L1 is a draft of proposed Bill]

- The Land Framework Bill sought to provide coherence between three legs of land reform -- redistribution, restitution and tenure
- Coherent cross cutting guiding principles in respect of redistribution, restitution and tenure – how they inter-relate Defining ‘equitable access’ to land and criteria to measure progress
- Sets out beneficiary selection criteria, and
- Clear institutional arrangements (particularly at district level)
- People in the district would be able to provide direction as to who needed what land, and what land was available
- Alternative dispute resolution – Land Rights Protector