

## No policy for change

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### Introduction

This paper discusses whether or not the land reform policies adopted by the South African government since 1994 are adequate to bring about a fundamental change in property rights. It will show that the land reform policies in South Africa cannot bring fundamental change. The paper starts by looking at what would constitute a fundamental change in property rights and goes on to assess the land reform policies in terms of their potential to bring change and the actual experiences of implementation. The paper concludes with some thoughts on why there is no programme to bring fundamental change and suggestions for what needs to be done.

Fundamental Change in property.

Before we can look at whether or not land reform policies are adequate to bring about fundamental change in property rights we need to establish what would constitute fundamental change. It is also important to ask whether such change is even desirable. The history of apartheid and the dispossession of black people from the land that was a central part of the system are well known. This left a situation in South Africa where in 1996 white people still owned and controlled over 80%<sup>[1]</sup> of farm land despite being only 10.9%<sup>[2]</sup> of the population. Meanwhile the 76.7%<sup>[3]</sup> of the population that are African had access to less than 15%<sup>[4]</sup> of farm land. An estimated 5.3 million black South Africans lived with almost no tenure security on commercial farms owned by white farmers.<sup>[5]</sup> Black people had been denied the right to own land and, apart from a few exceptional cases, had their land rights limited to permission to occupy arrangements in former homelands and rentals of housing in urban townships. White people owned land with title deeds giving one of the strongest legal ownership rights of any country in the world. People classified as Indian and Coloured who made up another 11.5%<sup>[6]</sup> of the population had arrangements somewhere between the strong rights of Whites and the extremely weak rights of Blacks. Indians and Coloureds had a limited role in agriculture except for Indian small farm owners in Kwa-Zulu Natal and Coloured farm workers in the Western Cape.

Race and land ownership defined political and economic influence especially strongly in rural areas. In these areas the white farmers were one of the only sources of employment and had a very strong influence over local institutions especially the justice system. Despite the changes taking place since 1994 black farm residents continue to receive an inferior service from the justice system compared to white farm owners, especially where the accused is a white landowner.<sup>[7]</sup> <sup>[1]</sup> Total hectares of farmland owned as commercial farming units (82,209,571) as a percentage of total farmland (100,665,792). Figures sourced from N. Vink. Table 6 and Table 5 respectively (See Appendix A). Unpublished lecture. 2002.

<sup>[2]</sup> Statistics South Africa. Stats in Brief 2000.

<sup>[3]</sup> Ibid.

<sup>[4]</sup> Ibid note 1.

<sup>[5]</sup> A. Wildschut and S. Hulbert. A Seed Not Sown: Prospects for Agrarian Reform in South Africa. 1998.

[6] Ibid note 3.

[7] Human Rights Watch. Unequal Protection

The State Response to Violent Crime on South African Farms. 2001.

The extreme racial inequalities in property rights tend to get most attention in debates on land reform in South Africa, but there are major distortions in property rights that go beyond race. In 1996 less than 1%<sup>[1]</sup> of the population owned over 80% of farm land and over 67%<sup>[2]</sup> of the total land in the country. Even forgetting the fact that this 1% are white the inequality is extreme.

The white and black communities have traditionally been very patriarchal. Both have tended to vest ownership and control in the hands of male family heads regardless of whether it is women who do most of the work on the land. It has been well argued that the success of land reform “should be judged by the extent to which it impacts positively and progressively on reducing systematic and structural inequalities along race, gender and class lines. [3]

These extreme inequalities need to be seen in the context of the socio-economic conditions in South Africa as a whole. Official unemployment stood at 33.9%<sup>[4]</sup> in 1996 and has been growing since then. The economy has been growing at 2.7% from 1994 to 2000, which is only just above the population growth rate of 2.2%<sup>[5]</sup>, and only grew by 2.2% in 2001<sup>[6]</sup>. The highest concentration of poverty and unemployment is in the rural areas where 46.3%<sup>[7]</sup> of the population reside.

As well as the compelling justice and equity arguments there are strong economic arguments for changing property relations. International evidence shows an inverse relationship between farm size and productivity. This is characterised by smaller farms having a higher output per hectare, higher labour use per hectare and usually higher total factor productivity. Studies in South Africa show that the extent of this inverse relationship might be varied, especially across different types of production, and that below a certain size the trend may change, but there is still an inverse farm size efficiency relationship.<sup>[8]</sup> Van Zyl concludes that “significant efficiency gains can be made if farm sizes in the commercial sector become smaller”<sup>[9]</sup>. This is combined with an under utilisation of much of the commercially owned farmland in South Africa. In 1988 only 3% of farmers in South Africa earned 41% of the total gross farm income while 74% earned only 19% of gross farm income<sup>[10]</sup>. The indication is that significant gains could be made in productivity, economic growth and poverty reduction if substantial amounts of land are redistributed. Rogier van den Brink, et al estimated that a redistribution of 30% of commercial farmland in a five-year period could create a net gain of approximately 1.5 million rural livelihoods. [11]

A fundamental change would be one that addresses the history of racial dispossession to create patterns of land ownership that roughly reflect the demographics of the country. This requires the transfer of approximately 71million hectares or 70% of farmland to black owners. The other requirement is to reduce, regardless of race, the concentration of land in such few hands. This needs to be accompanied by a change in farming methods to maximise the economic and rural development potential of the agricultural sector. A substantial small and medium size farm sector using more labour intensive technologies can make a substantial contribution to employment creation and poverty reduction in the agricultural sector and through the multiplier effects in the non-farm rural sector<sup>[12]</sup>. To

complete the transformation the gender inequalities in land control need to ensure full participation of women in land use accompanied by ownership and control.

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## **LAND REFORM POLICIES**

The South African land reform policies of the first non-racial democratic government begin with the Constitution, the Rural Development Programme (RDP) and a process of consultation involving community level research and advice from international experts, the most influential being from the World Bank.

The RDP, which was essentially the election manifesto of the African National Congress (ANC) in 1994, had five key programmes: “meeting basic needs; developing our human resources; building the economy; democratising the state and society, and implementing the RDP.”[13] Land reform is largely dealt with under the programme of meeting basic needs and also referred to under building the economy. The RDP makes clear an intention to have a process of restitution for those dispossessed of land by racial laws and a redistribution of land to those who need it. A specific target of redistributing 30% of agricultural land within five years was set. The RDP suggests a range of measures for redistributing land including a land tax to free up land, “substantial funding”, expropriation of land, and support services to ensure effective land use. It is important to note that the RDP was completed after the interim constitution was written and put its plans for land reform within the confines of the provisions on land contained within the constitution. Not surprisingly, the RDP did not go far beyond listing a lot of good intentions and wishes. It did not address difficult issues of how to avoid or deal with the consequences of disrupting existing commercial agriculture or the resistance to fundamental change that was bound to come from landowners and from international business interests. The intentions set out in the RDP would, had they been decisively acted on, have gone some way to bringing about a fundamental transformation of property relations. The test of the RDP came at the point when it had to be made into implementable policies and laws with budgets attached. The main weakness lay in the compromises contained in the section on building the economy that fell short of mapping out a path of radical economic restructuring. The few intimations in the RDP of anything outside a narrow free-market ideology, such as statements like “increasing the public sector in strategic areas through, for example, nationalisation,” were soon vanquished from future economic policies and statements. The clause already revealed an uncertainty as it fell short of saying that there would be widespread nationalisation as part of building a strong state capable of driving economic transformation. Nationalisation, became a “for example” and is quickly followed by talk of purchasing shares in companies and joint ventures with the private sector. Talk of democratising the economy and involving workers in decisions about the economy have in practice never gone beyond rhetoric.

The constitution of South Africa[14] was a result of and a key part of the negotiated settlement that ended Apartheid. Section 25 that deals with land rights was hotly debated. The resulting compromise set the political direction for the handling of land reform and set the legal parameters within which land reform has to be dealt with. The basic land to the tiller sentiment of the freedom charter that called for land to belong to those who work it was not given expression in the constitution. The sentiment, expressed in the

preamble, “that South Africa belongs to all who live in it,” finds no place in the property clause. The constitution recognises existing property rights in sections 25(1) and in section 25(2) allows for expropriation only “for a public purpose or in the public interest” and with compensation being paid. Section 25(4) goes on to say; “the public interest includes the nation’s commitment to land reform.” The constitution not only allows for expropriation, but makes specific mention that land reform is a grounds for expropriation. The compensation to be paid does not have to be at market rates, there are four other factors that have to be considered including “the purpose of the expropriation”. Section 25(8) says that “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.” Sub-sections 25(5), (6), and (7) require the state to take legislative measures to; ensure that there is equitable access to land, people with insecure tenure get secure tenure or equitable redress, and people dispossessed of land rights due to racially discriminatory laws or practices can claim back those rights. These sections oblige the state to deal with aspects of land reform while also recognising current property rights. Thus the constitution is a constraint to the changing property relations in as far as it protects existing property rights, requires compensation to be paid for land to be used for land reform and does not establish clear rights to property for all South Africans or even for those who work the land. On the other hand the constitution does create an obligation on the state to have land reform and leaves space for far reaching reforms if the state is willing and able to make available sufficient finances and to implement a programme that can make the most of the land reform possibilities within the constraints.

The 1997 White Paper on South African Land Policy sets for itself a wide range of objectives ranging from dealing with the injustices of racially based land dispossession, to promoting economic growth and providing “secure tenure for all.” The white paper also states that the vision is “of a land policy and land reform programme that contributes to reconciliation, stability, growth and development in an equitable and sustainable way.” The White paper does not offer a vision of a transformed rural society nor does it set clear targets for land redistribution. What it offers is a process, involving compromises for the sake of reconciliation, which it is hard to imagine dealing effectively with the massive apartheid created disparities in land access and economic power.

There is an emphasis in the document on giving land rights and opportunities to the poor and addressing gender issues in land ownership. But the impact of these intentions will be limited by the lack of fundamental reform of land ownership.

In the implementation plans the White paper continues to compromise and fails to provide decisive programmes for fundamental change. It sets a limited role for the state and makes it clear that “redistributive land reform will be largely based on willing-buyer willing seller arrangements.” Limiting the role of the state further it is said that the government “will in general not be the buyer or owner. Rather it will make land acquisition grants available”. Apart from the case of Labour Tenants there is no clear intention to give rights to land to those who live and work on it such as other farm dwellers. Instead they are offered access to grants for off farm settlements and on farm settlements where the owners of the land agree. This does not address at all the difficulty of accessing suitable land in the face of the intransigence of farm owners despite the fact that farm dwellers have often lived on the land for generations.

Where the white paper completely falls down is in failing to link land reform to any broader transformation of the economy. The failure to ever mention the concept of agrarian reform appears to be no accident as the policies steer clear of any restructuring of rural economic and political power relations that would need to be part of any agrarian reform programme. The agrarian reform that has gone on over the last decade in South Africa has involved the dramatic liberalisation of the agricultural sector and the engagement in international trade deals. These have happened with no reference to the land reform programme. Land reform policy has, in failing to set land reform as a central part of economic transformation accepted the current dominant economic system and therefore limited change in property rights to changes in land ownership that will not disrupt the economic order, but will if possible re-enforce it.

The budgetary commitments of the government are a practical expression of its policy priorities. In the case of land reform the budgets are the clearest indication of the lack of commitment to making land reform work and show that there is no intention of meeting even the limited promises made in policy pronouncements. In order to achieve a redistribution of only 30% of agricultural land over 15 years the government will be required to spend approximately R1.67billion Rand per year for fifteen years.[15] Unfortunately the government has only budgeted around R500million per year for the next three years for both redistribution and restitution (which does not always get used for land purchases). Over the last years even less than this has actually been spent on land for land reform. It has been argued that the budget is low due to the inability of the Department to spend the money. However, if there were a commitment to implementation the response to such capacity constraint would surely be to deal with capacity problems, including the personnel and programme management budgets, rather than cutting the budgets for these as is being done[16].

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## **Restitution**

Restitution is informed by sub-section 25(7) of the Constitution[17] which reads “A person or community dispossessed of property rights 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.” The required Act of parliament was the Restitution of Land Rights Act. Act 22 of 1994, the first piece of legislation passed by the first democratically elected government of South Africa. This clause in the constitution already sets certain limits to restitution, such as the 1913 cut off date and the fact that the dispossession had to be in terms of specifically racial laws or practices. The Restitution Act creates further limitations such as defining racial practices as only those carried out by the state. The Act makes provisions for the establishment of a Commission for the Restitution of Land Rights (CRLR) and a Land Claims Court. This turned out to be a rather slow system over burdened with legal procedures and requirements of proof. The 1998 decision and amendments to the Act to allow the CRLR and the Minister for Agriculture and Land Affairs to settle claims administratively has led to a considerable speeding up of the land claims process.

Whatever the strengths and limitations of the restitution process by its very nature it has a limited contribution to make to a fundamental change of property relations. It is there to

deal specifically with racial dispossessions that can be proved to fit within the provisions of the Act. It has no pretensions of bringing fundamental change and no intention to transform the nature of the agricultural economy. It sets out to deal with specific unjust acts of the former regime. Of course it can contribute to changing property relations, but only to the extent that people were dispossessed after 1913 and can fit within the narrow provisions of the Act. The 1913 cut off date while probably a sensible provision, to avoid dealing with complex historical conflicts, means that restitution can only look at dispossessions that took place after the country had already been colonised and the largest land dispossessions had already taken place through that colonial process. The 1913 land Act to a large extent confirmed the boundaries of existing reserves that black people had already been forced to reside in.

Part of the consequence of restitution focusing on dealing with redress for specific injustices suffered by individuals or communities is that those who can prove that they were unjustly dispossessed of land can receive a range of possible compensation including land, but also including money. There is no right to actually get land as redress and no clause of the Act that encourages land to be the preferred form of redress. An obvious consequence of this has been a large number of claimants taking financial compensation and thus making no contribution to changing property relations. By the end of 2001 28,970 land claims had been settled with R248million Rand spent on land and R324million Rand spent on financial compensation to claimants.[18] These represent only 10,286 of 63,455 claim forms lodged before the cut off date at the end of 1998.[19]

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## **Tenure Reform**

Tenure reform is mandated by section 25(6) of the Constitution, which reads “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.”

Tenure reform has been seen as comprising two main areas of work, security of tenure for people living on farms and improving tenure security for those living in communal areas, largely the former Bantustans.

The main achievement of the tenure reform programme has been to pass a number of pieces of legislation that begin to regulate people's occupation of and eviction from other people's land. The most important pieces of legislation are the Extension of Security of Tenure Act (62 of 1997), the Land Reform (Labour Tenants) Act (3 of 1996) and the Prevention of Illegal Eviction and Occupation of Land Act (19 of 1998).[20] Aside from the labour tenants in Mpumalanga and Kwa-Zulu Natal the most important of these for most farm dwellers is the Extension of Security of Tenure Act commonly known as ESTA. These acts have brought new rights to many, but they have considerable weaknesses especially in the area of providing long-term tenure security.

ESTA sets out a procedure to be followed in order to evict people from the land, making it fairly difficult to legally evict people, but by no means impossible. Even long-term occupiers who have the strongest rights can still be evicted under circumstances where

they are found to have breached sections of the Act or there is a fundamental breach of the relationship with the owner. The biggest weakness has been the failure of the Act to move farm dwellers out of an inferior tenancy arrangement to a situation of having their own land. Section 4 of ESTA empowers the Minister to appropriate funds for “on-site and off site developments.” However the provisions of section 4 make it very difficult to force an on-site settlement where the owner is unwilling and there is no right in the legislation for a farm dweller to claim security of tenure if the government is failing to provide it for them. By the end of 1999 only nine projects giving secure tenure under section 4 of ESTA had been approved. In most cases these involved people moving off the farms where they had been occupiers.[21] In the Limpopo (Formerly Northern) Province with the second largest number of farm workers of any province there has been no ESTA section 4 settlement since the Act was promulgated four years ago. At the end of 2001 there were also no staff in the Department of Land Affairs office in the Province focussed on dealing with implementation of ESTA or any other tenure rights.[22] The issue of tenure reform in communal areas has become bogged down in unresolved national debates on the role and powers of traditional leaders. It would appear that the government is following the route of many other post independence African states in not dismantling the bifurcated state.[23] The indications from some statements of the Minister for Agriculture and Land Affairs concerning the transfer of land to traditional authorities and the paper presented by the Director for tenure reform, Dr Siphosiphanda Sibanda[24], indicate a shift towards strengthening the hand of chiefs in a reconstituted decentralised despotism under the ANC government. Perhaps the government actually finds it in their interest to leave the issue of traditional leaders to some extent unresolved so that they can maintain their broad base of electoral support, including rural youth and women while also being able to keep the chiefs on their side with concessions at key points. An example of this was the granting of 20% of seats in rural municipalities to traditional leaders just prior to the last local government elections. If this is the strategy it is a dangerous game as neither the traditional leaders nor the broader rural population will be willing to accept this for too long.[25] For now there is no post apartheid legislation to address the tenure situation on communal land and no clarity on government policy in this regard

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## **Redistribution**

In terms of a fundamental transformation of property relations “redistribution is the most critical of the three legs”[26] of land reform. “The reason for this lies in the fact that restitution is very narrowly construed and tenure security may be on very marginal land”[27]. Redistribution is the only one of the three legs of land reform that actually sets out to change property relations through the changing of the inequitable distribution of land. The success or failure of redistribution lies with the extent to which land changes hands. The redistribution programme started out with the main instrument being the provision of R15,000 and later R16,000 grants (the Settlement and Land Acquisition Grant otherwise known as SLAG) to poor families as the main strategy to enable people to buy land. There was no pro-active programme to initiate projects or target well situated land, instead it was left up to the initiative of people needing land to express their need. This was clearly ineffective especially as there was no pro-active campaign to ensure that

people were aware of the programme nor did the government respond effectively to demands that were expressed.[28] After an extensive review of this SLAG policy a new programme for redistribution, the Land Redistribution for Agricultural Development policy (LRAD) was unveiled in 2001. This policy fails to address some of the serious failings of the SLAG policy, namely the piecemeal demand led approach, and the reliance on the willing-buyer and willing seller approach which gives current owners effective control over the pace and nature of land redistribution. LRAD also raises new concerns such as the demand for a contribution in kind from beneficiaries, even less support being offered from the state to enable beneficiaries to access the programme, and a neutral stance on issues of gender and farm size that “effectively favours the more powerful elements within rural society and abdicates any responsibility for, or even understanding of, transforming the structures of inequality.”[29] The record of delivery on redistribution confirms the policy failings. By March 1999 less than 1% of land had been redistributed through nearly five years of the governments redistribution programme.[30] Since 1999 expenditure on land redistribution has slowed even further.[31]

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## CONCLUSION

The current and recent government land reform policies fall far short of creating conditions for fundamental change in property rights. They will not adequately address the racial inequality that prevails in land ownership and access and offer even less hope for any pro-poor transformation in the nature of the agricultural economy. Statements in the Reconstruction and Development Programme (RDP) drawn up in 1993 held out some hope for transformation of property rights, especially regarding land, but already there were signs that fundamental change was not on the cards. The more radical suggestions of the RDP on land were never carried through into government policies. Policies from the White paper onwards have tended to fit more and more in line with the large investor driven economic growth priorities of the government that are encapsulated in the Growth Employment And Redistribution (GEAR) policy. This approach is complimented by an incorrect assumption that the existing model of large scale farming in South Africa is highly effective. This informed proposals from groups such as the ANC aligned Macroeconomic Research Group that in 1993 were already arguing against any large-scale redistribution of land.[32] The limited budgets made available for land reform, combined with a continued commitment to paying market related prices for land, confirm a lack of government commitment to land reform. The failures of land reform delivery have conclusively exposed the policy limitations.

The lack of commitment to bringing a fundamental change in property rights is largely a result of the strong influence on the government of urban and international elites and to a lesser extent organised industrial workers. The rural vote, that has consistently gone the way of the ANC, is still taken for granted and perhaps seen as winnable through making deals with traditional leaders. Any change to prioritise fundamental changes in property rights, through a far reaching land reform, will only happen if the issue is seen as one that could decide the fate of the government. The extent to which the necessary mobilisation of rural landless is feasible is still a subject of debate. Some argue that the agrarian question has already been resolved in South Africa. Bernstein argues that the “former tillers”, mostly located in the former Bantustans, may constitute a social force capable of

shaping the future of agrarian issues.[33] The recent establishment of the Landless Peoples Movement appears to be largely premised on the same assumption along with the involvement of some current tillers, in the form of labour tenants and farm workers. Building the strength of such groupings will be the only way to ensure that a fundamental change in property rights takes place in South Africa.

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[1] Total population of South Africa (40,583,573) divided by commercial farming units (60,938) multiplied by an estimated average family size of 6. This assumes one owner per farm unit and considers all family members as joint owners. Most farm units are registered in an individual's name, a Close Corporation or a Trust with the individual or the family as the owner/beneficiary. Some individuals and families own more than one farm unit, while some farm units are owned by farm companies that might have a larger number of shareholders. The averaging out of these different circumstances results in this being a credible estimate for the concentration of land ownership.

[2] Total hectares of farmland owned as commercial farming units (82,209,571) as a percentage of total farmland (100,665,792) and total hectares of commercial farming units as a percentage of total land area of South Africa (122,320,100). Figures sourced from N. Vink. Table 6 and Table 5 respectively (See Appendix A). Unpublished lecture. 2002.

[3] S. B. O. Gutto. Continuing the liberation through land reform: A review and critical assessment of some theories, policies and approaches. Unpublished paper presented at workshop. 2000.

[4] Statistics South Africa. Stats in Brief 2000.

[5] Ibid.

[6] T.A. Manuel, Minister of Finance. Budget Speech. 2002.

[7] Statistics South Africa. Stats in Brief 2000.

[8] J. van Zyl. The farm size-efficiency relationship. In Agricultural Land Reform in South Africa. 1996. 9] Ibid. [10] Ibid. [11] R. van den Brink, M. de Klerk and H.

Binswanger. Rural Livelihoods, fiscal costs and financing options: a first attempt at quantifying the implications of redistributive land reform. In Agricultural Land Reform in South Africa. 1996. [12] J. Kirsten and J. van Zyl. Agricultural growth linkages: international experiences and some South African estimates. In Agricultural Land Reform in South Africa. 1996. John W. Mellor. Pro-Poor Growth – The Relationship Between Agricultural Growth And Poverty Reduction. Unpublished 1999.

[13] The Reconstruction and Development Programme. 1993.

[14] The Constitution of the Republic of South Africa, 1996. Act 16 of 1996. [15] D. Mason. No proactive and broad-based and reform here! Statement released by Surplus Peoples Project Feb 2002.

[16] Ibid. [17] Ibid.

[18] W. A. Mgoqi. End of the year message by the Chief Land Claims Commissioner. 2001. [19] Restitution Statistics as at 10 January 2002. Source

<http://land.pwv.gov.za/restitution>

[20] The Prevention of Illegal Eviction and Occupation of Land Act is a piece of legislation drawn up and managed by the Department of Housing, but it impacts significantly on tenure issues as it is used by land owners for evictions and has also been used by occupiers to defend their limited rights.

[21] E. Lahiff. Debating land reform and rural development. Land Reform In South Africa: Is It Meeting The Challenge? Source: [www.uwc.ac.za/plaas](http://www.uwc.ac.za/plaas) [22] M.C.A. Wegerif. Creating Long Term Security for Farm Dwellers. A paper presented at the National Land Tenure Conference, 2001. This paper has been referred to extensively for this section on tenure of farm dwellers.

[23] M. Mamdani. Citizen and Subject. 1996. [24] S. Sibanda. The Principles Underpinning the Communal Land Rights Bill. 2001. [25] L. Ntsebeza. Unpublished lecture. 2002. [26] S. B. O. Gutto. Continuing the liberation through land reform: A review and critical assessment of some theories, policies and approaches. Unpublished paper presented at workshop. 2000. [27] Ibid. [28] Nkuzi Development Association. Northern Province District Study. 1998. [29] E.Lahiff, Nkuzi Development Association. Response to the IPLRAD proposals that remain on most important issues unchanged in the final version of LRAD, unpublished. 2000. This has been the main source for all comments on LRAD in this paper. [30] E. Lahiff. Debating land reform and rural development. Land Reform In South Africa: Is It Meeting The Challenge? Source: [www.uwc.ac.za/plaas](http://www.uwc.ac.za/plaas) [31] South African government budget 2002-3.