

# **MAKING RESTITUTION WORK: THE CHALLENGE OF BUILDING SUSTAINABLE GOVERNANCE AND INSTITUTIONAL STRUCTURES IN PUBLIC ADMINISTRATION**

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## **ABSTRACT**

Canada and New Zealand are recognised as leaders in implementing restitution programmes. Both countries saw fundamental changes in government policy shaped by the 1973 Calder decision and the *Treaty of Waitangi Act*, 1975. These changes in policy-making commenced from views that contested indigenous land claims and resources towards a two-way communication in which negotiations between communities became the key to success. The evolving agreements moved governments towards the stance that the settlement of claims are not so much a cost as it is a vehicle for addressing indigenous socio-economic circumstances. Negotiated agreements set out to reflect the emergence of an economic development policy objective that emphasised traditional rights.

The article highlights issues and trends that shape options for public administration in the development of governance structures that must be taken into consideration during the planning and design of restitution programmes in rural, peri-urban and urban areas. Creating sustainable post-settlement support for restitution is a major task as outcomes in the local sphere are interwoven with rights to land and resources that co-exist with the traditional and broader communal management systems. Public administrators are thus faced with major challenges in matching the needs of local government with that of rural development. At the core of restitution lie communication, entrepreneurship and business development, each a critical element in finding sustainable pathways to meet the needs of communities and improve the quality of their lives.

For this reason the article explores development objectives and the processes involved in attaining social advancement.

## INTRODUCTION

The article investigates the key areas in relation to local government's role and responsibility as an enabler, facilitator and regulator in accomplishing sustainable development outcomes through policy formulation and implementation of delivery structures that make restitution, restorative justice and resource management work. Policies provide the framework for executing a series of related decisions which involve carrying out operational plans by constantly adjusting the direction of policy to best suit the needs of the stakeholders. Municipalities carry the ultimate responsibility for success and most of all failure. Thus they are placed in the role of defining success and failure, in particular political success and failure of policies (Denders & Rose, 2005:7).

Restitution operates in a highly political environment, making it all the more visible and important to succeed. In the face that restitution addresses the loss of land rights through compensation for land of which claimants were dispossessed, meeting the expected results are therefore driven by political will to succeed and government's ability to create adequate support structures. Whilst various views highlight the significant role government and the Commission play in creating an enabling environment, it further contends that the role of the Commission does not culminate in the settlement of claims but instead underscore the importance and value that development initiatives provide by supporting a community-based natural resource management (CBNRM). It offers claimants the possibility to use the land in a feasible manner. Unfortunately, lack of adequately designed post-settlement support structures created major problems where claimants are unable to use the land as a basis for their livelihoods. Despite major investments from government in balancing land rights, outcomes continue to be unsustainable, since only one out of five restitution programmes are able to utilise their claims in a sustainable manner (Anseeuw & Mathebula, 2006:26).

## PROGRAMME FAILURE

Anseeuw and Mathebula (2006:19) cluster the main reason for programme failure into four specific groups:

- unfeasible land reform programmes;
- institutional structures that do not fit community needs;
- lack of collective action and institutional isolation; and
- administrative delays due to poor governance structures.

In contrast, Pienaar, (2007:34-45) indicates that the core problem for programme failure lies within the working definition for rights. He explains that the working definition for rights determines how restitution is applied to the nature and extent of land rights of individual users as opposed to the rights of members, how the process for the allocation of rights to members are executed and supported in the formation and choice of legal entities as well as their rights to benefits gained from land use. He alleges that the institutional and governance issues become more complex once land is transferred to a property-holding entity like a CPA or a trust, because it becomes essentially *private* land, which changes a municipality's responsibility and role as enabler, facilitator and regulator (Pienaar, 2007:64). Considering the perspective taken by Anseeuw and Mathebula (2006) and Pienaar (2007) it turns attention towards ascertaining what restitution is about, its vehicles of delivery and sets out to identify the type of conflicts that develop in rural areas where ownership and management of communal areas under private or freehold ownership seek to assert some form of municipal authority and involvement.

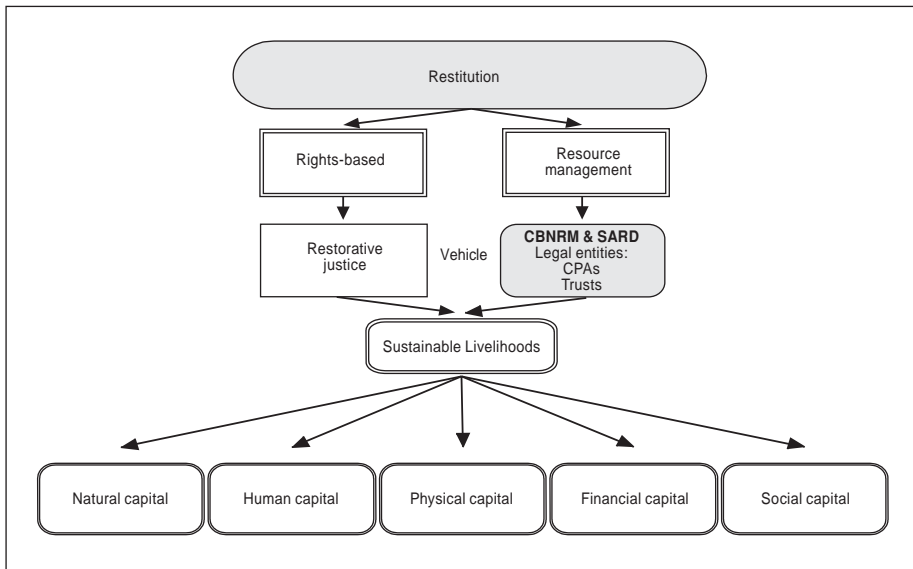
## DEFINING RESTITUTION

**R**estitution is a rights-based programme conceived as a form of restorative justice that is ingrained within a community-based natural resource management (CBNRM) system. In each of these aspects of restitution, livelihoods outline a common currency in development planning and debates that support outcomes achieved within restitution. These outcomes are strengthened through the use of sustainable livelihood approaches in which people share assets in terms of capital (human capital, social capital, physical capital, financial capital and natural capital) (Fabricius, Koch, Magome & Turner, 2004:44). The five types of capital thus become key leverage points in meeting the requirement for restitution.

After all, restitution is not so much about settling claims as it becomes a vehicle for addressing indigenous socio-economic circumstances (Anderson & Barnett, 2006:5). Figure 1 describes the process that leads towards sustainable livelihood creation. CBNRM provides a platform to manage equality of opportunity (skill, capabilities and knowledge) with its emphasis on social empowerment as this enriches the economic and political dimensions of livelihoods.

In the process of sustainable livelihood creation negotiated agreements set out to reflect the emergence of an economic development policy objective that emphasise traditional rights. In addition, initiatives are more commercially orientated as the outcomes of restitution are strongly interwoven in resource conservation, agriculture development projects and sustainable rural livelihood initiatives that require partnerships and collaborations between NGOs, government and local communities in order to be successful. As natural resources drive CBNRM initiatives, it becomes imperative for natural capital (agriculture, forestry, conservation, tourism, and everyday resources such as bees, water and wood) to relate to human and social capital (Fabricius Koch *et.al.*, 2004:xiii, 23-24). Natural capital demands that both human and social capital (culture) must be appropriately deployed in order to be effective. In the same way culture is

**Figure 1: Restitution**



Source: Own (2008)

inextricably linked to the utilisation and management of natural resources, consumption use and the local belief systems that regulate norms and values within a community. As a result, local and traditional knowledge cannot be separated from CBNRM strategies as it plays a significant role in the management of natural resource use. Therefore, the status, networks, roles and relationships that shape how people co-operate their access to, as well as the use and governance of natural resources become key elements for building social capital (Fabricius, Koch *et al.*, 2004:24, 44). How communities manage each of the five types of capital does not only determine the vulnerability context that frames their lives, but it also determines their resilience to cope with shocks, stresses, trends and seasonal patterns. Consequently feasible programme outcomes are closely linked to crop and livestock production as both factors become key performance indicators in building institutional structures that guide livelihood strategies for agriculture. Similarly, the success of agriculture depends mainly upon the governance of the resource base while human capital determines the efficiency in which the governance activities are pursued.

Governance activities of CBNRM are central to the institutional and social life of rural communities. Governance activities determine the kind of resource management that takes place through the core institutions of each community. As these systems are intertwined with local governance (formal systems) and informal systems of resource management, institutions can be regarded as the mechanisms that mediate relationships between livelihood assets and livelihood strategies. The norms, beliefs, power relations and modes of social status prevailing in communities together form the glue that binds governance structures together.

Likewise, public administration provides a dominant base for values and practices that must be pursued with regard to good governance within the government spheres as it defines the way in which power is exercised both within a municipality and the communities. To put it simply, public administration is an expression of governmental power that has profound implications for the effectiveness and efficiency of government as it defines the conduct of democracy and shapes the relationship between government and its citizens. Terminology like community partnership and multi-level actors are but a few terms that pervade local politics, moving local government into an age of governance where social capital builds on participation and trust (Denders & Rose, 2005:17). For instance, in the local government discourse (sub-Saharan Africa), municipalities are dominated by catchwords such as urbanisation, globalisation and indigenous relating to concepts that offer options to Africanise. In particular, these catchwords challenge both local government and rural structures as citizens' orientations towards governments have changed in substantive terms. Democratic approaches that encourage participation within local communities have influenced their relationship with municipalities, with the most important being the increased focus citizens place on the performance of local government in the fields of economy and security (Denders & Rose, 2005:2-5).

Governance defines the rules and expectations created by the political system in which participation, rule of law, transparency, responsiveness, equity, accountability are critical elements to enhance social capital (Denders & Rose, 2005: 44-45,66; Wikipedia, 2008). In the first place social capital increases municipalities' institutional performance while an increase in organisational participation leads to the overall improvement of linkages among local communities, their governments and municipal structures. It is within these participatory structures that restorative justice forms the basis on which restitution builds its legal framework nestled in rights-based governance structures (Hall, 2003). Evidence shows that where there are clear land reform programmes and strong human rights frameworks, CBNRM has a greater chance of success (Fabricius, Koch *et al.*, 2004:74). Within the human rights framework restorative justice is defined as a set of principles seeking to balance concerns and needs of the victim and affected communities with the prerequisite to re-integrate the injured parties back into society. The process of restorative justice occurs within the three (Rs) responsibility, reintegration, reparation which means that those who committed the offence have to take the responsibility to repair the harm done parallel to the responsibility of the victim to participate and communicate with the offender (Surrey Council, 2008). By acknowledging that re-integration and assistance are critical factors in the recovery process, it not only promotes a problem solving approach to redress injustices of the past at a symbolic and material level, but it also endorses reparation by restoring land rights (Hall, 2003:1).

The application of restitution within the context of restorative justice forms an integral part of the land reform strategy as outcomes are linked to empowerment supported by sustainable livelihood strategies. Whilst delivery of land reform utilises three mechanisms (redistribution, restitution and tenure) through which government facilitates participation, accessibility and encourages democratic decision-making, citizens are increasingly

being endowed with both the right and responsibility to secure and manage the natural resources. Fabricius, Koch *et al.*, (2004:79) state that worldwide trends indicate some devolving form of ownership or use of rights over natural resources to groups of citizens organised in some kind of collective entity. The complex relationships associated with the utilisation of collective entities as a basis to manage resources and rights within restitution programmes through vital processes such as reconciliation, reconstruction and development seemed to hamper delivery of outcomes. This is, especially the case since the rights that people hold are often weak in terms of their jurisprudential validity (Kariuki, 2004:50).

## INFLUENCE OF TREATIES AND INTERNATIONAL AGREEMENTS

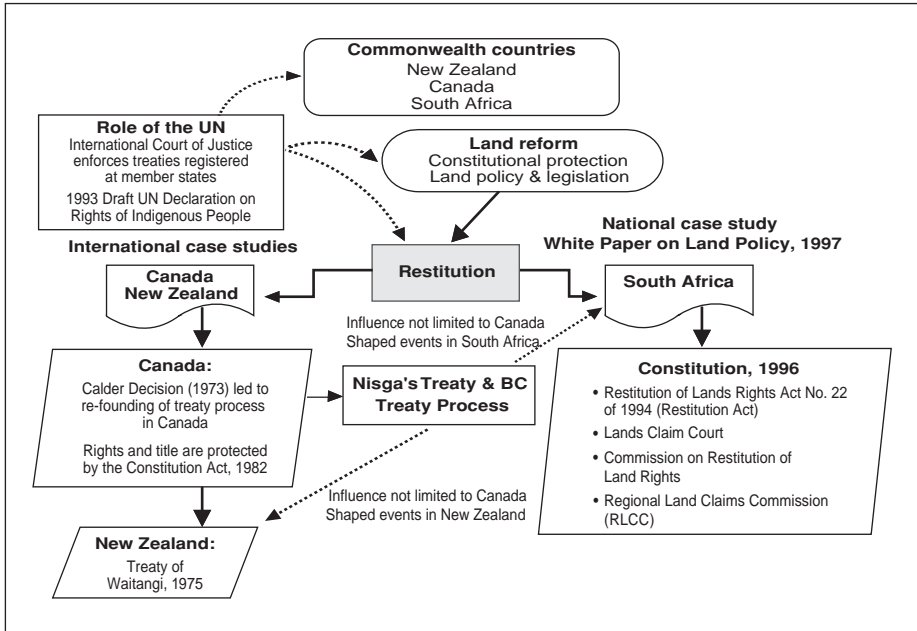
Treaties formed an important part of colonisation and its attempts to legitimise sovereignty. In comparison, different terminologies are used by each of the Commonwealth countries to describe international agreements. Nevertheless, the rules of enforcement are similar in each country. The 1993 *Draft United Nations Declaration on the Rights of Indigenous Peoples* captures the sense that drove agreements affecting rights and people-natural resource relationships in restitution initiatives in each of the Commonwealth countries (Yates, 2004:5). While treaties provide certainty about how and where rights apply, the constitutions in each of the Commonwealth countries negotiated agreements that endorsed and reflected affirmed land titles and the rights that supported interventions (Kariuki, 2004:51; Yates, 2004:5).

Treaties or agreements have had a direct impact on the ability of beneficiaries of claims to develop and implement land use management strategies as well as their ability to use available resources productively. Indigenous land rights and resource management systems are thus interrelated. With a right of access or ownership it is argued that indigenous peoples cannot develop and implement their own community-driven development schemes or maintain control over their own development (Yates, 2004). Figure 2 presents an overview of the influence that treaties have on the management of restitution as applied in three Commonwealth Countries.

Yates (2004:2) draws attention to the two key issues that manipulate decision-making in restitution; the first is the need of understanding the specific issue of *indigenous* land rights and the second issue being resource management. Recognising the rights of indigenous peoples to land and equal participation in decision-making draw attention to the formulation of agreements and the advent of the common property theory.

In answering the demands posed by treaties, government and stakeholders realised that they must merge the indigenous perspective into a language of rights. This called for constitutional provisions and protections offered to indigenous peoples or claimants of restitution. However, it seemed to be standard practice to refrain from the term indigenous in most of the constitutions of the Commonwealth countries. Most of the Commonwealth case studies provide for human rights and land rights but did not recognise the term “indigenous” or protect the rights of “indigenous peoples” (Yates, 2004:2; Anderson & Barnett, 2006:3).

**Figure 2: Influence of treaties on the management of restitution in three Commonwealth countries**



Source: Own (2008)

## ACKNOWLEDGEMENT OF INDIGENOUS PEOPLES

Yates (2004: 4) points out that a common British colonial past drove the indigenous people of Canada, New Zealand and South Africa to give up resources which they expected to retain and receive as a result of treaties or acts. Misunderstandings about terminologies used in treaties or acts have resulted in unfair agreements and poorly defined relationships in each of these countries.

Before the legal impact of indigenous peoples on the treaties can be established it is necessary to answer the questions “what does a treaty do” and “how does it benefit indigenous people?” A treaty is described as an agreement (protocol, convention, memorandum of understanding) under international law. The agreement is entered into by governments or international organisations and must be respected by all parties (Wikipedia, 2008). The interpretation of the definition used in the treaty or agreement shapes policies and determines how policies are put together to address the rights of *indigenous people* to their traditional lands and resources (Yates, 2004; Anderson & Barnett, 2006:3). A difference in view and emphasis human rights and indigenous people within the Commonwealth countries and between the UN meant that the absence of official recognition on issues of *indigenous land rights* resulted in the neglect of policies on indigenous people and land rights.

Although treaties in Canada and New Zealand allowed indigenous people to maintain some form of autonomy, a major disadvantage was that the parties did not always appreciate or understand what the treaty or agreement stood for. Neither the Maori nor Aboriginal peoples viewed the land and its resources as something which they owned; instead they saw treaties as a basis on which the land and resources could be shared (Anderson & Barnett, 2006:3). The United Nations (UN) contends that land is central to the lives of indigenous people and underpins their economic survival, spiritual well-being and cultural identity (Yates, 2004:2). They hold the view that the concept of land embraces the whole territory (rivers, forests, mountains, sea, the surface as well as the sub-surface, natural resources) as the claim of indigenous rights to land and resources are essential to their survival and identity. The World Bank revealed that:

*Indigenous peoples are commonly amongst the poorest and most vulnerable segments of society (Yates, 2004:2).*

It recognised the critical role that political agendas play in determining how the social and economic issues are judged towards solving land and agrarian reforms. As a result, the value government awards towards solving indigenous-related problems not only influences the fiscal value placed on meeting the demands, but it also influences how problems are formulated and alternative solutions are offered to solve the problem (Cloete & Wissink, 2000: 97-101; Anderson & Barnett, 2006). Evidence of successful interventions within restitution show a strong link between the use, access to, ownership of land, development and poverty reduction. By placing the issues of land development in the context of poverty reduction it emphasises the linkages between poverty, land reform initiatives and the Millennium Development Goals (MDG) (Yates, 2004:3).

A recent landmark ruling of the South African Constitutional Court in *Alexkor Ltd v Richtersveld Community and other's* recognised indigenous people's native claims for the first time in Africa. Yates (2004:7) observes that the extent to which the constitutional and legislative enactments are implemented and proved effective, thus strongly relies on the judicial and negotiation mechanisms that are in place. Customary law and common law are contentious as traditional relationships of indigenous peoples to land and waters are not adequately encompassed by current legal concepts of ownership and rights. The right to land, however, is adequately covered. The right to land is protected in international and national laws under the right to individual property and assumes a completely different consideration when it comes to indigenous people. These findings are supported by Pienaar (2007:12) and Kariuki (2004:55) who both disclose that while obligatory legislative provision is made for rights determination, provision of support is lacking within the South African restitution environment. Moreover, obligatory legislative provision for rights determination does not feature during the planning process of restitution. In most of the cases considered within the South African restitution environment, land was merely handed over without giving any attention to *determining the rights of the individuals* who are involved in the process. Rather, land is in most cases transferred in ownership and then made available to loosely defined (open/collective membership) groups. Power dynamics and vested interest bring about an array of conflicts (Kariuki, 2004:56).



In contrast to the South African situation, Canadian courts made a clear distinction between the Aboriginal title which is described as communal and individual property. The Calder decision, 1973 confirmed the existence of Aboriginal title as a concept in the Canadian law (Yates, 2004; Anderson & Barnett, 2006). This led to negotiated agreements (since 1973) which gave governments the opportunity to define relationships and establish fair agreements. Claims to traditional lands and the right to use resources are therefore recognised, respected and promote the inherent rights and character of indigenous people.

The Calder decision and the *Treaty of Waitangi Act*, 1975 initiated fundamental changes both in the Canadian and New Zealand policies that underscored and governed land reform strategies. Consequently, both governments shifted away from contesting indigenous land claims and resources and emphasised negotiation and participation. They saw the settlement of indigenous claims less as a cost and more as a vehicle for addressing indigenous socio-economic circumstances (Anderson & Barnett, 2006:5). This change in policy enabled both countries to align land reform policies with a developmental approach based on a foundation of indigenous rights. Three critical success factors were highlighted by the UN and included (United Nations, 2005)

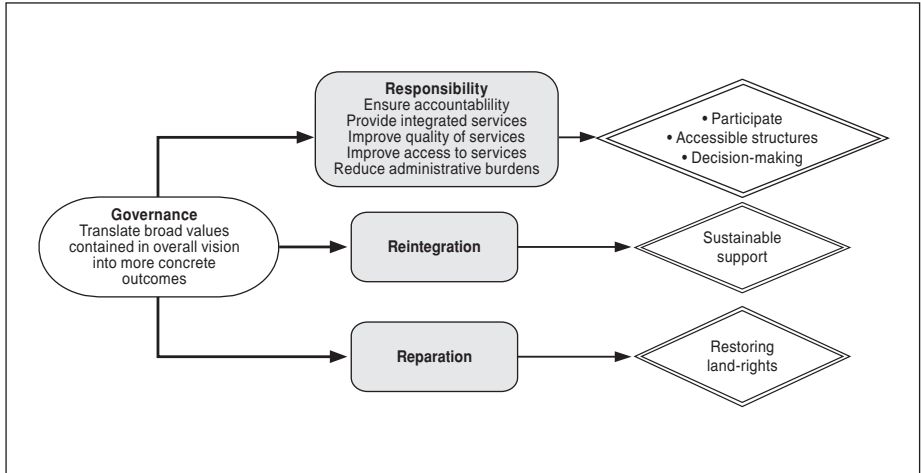
- engaging indigenous communities in the policy-making process;
- designing and implementing programmes at national and local spheres; and
- indigenous-centred approaches that encouraged representation, engagement and capacity building initiatives

Whereas South Africa saw restitution's key aim to restore rights to land and to communities or individuals. Its main objective is seen as being restorative, restitution programmes were however criticised for being at the expense of attaining socio-economic development for the claimants (Kariuki, 2004:52). Western-style property systems as opposed to property systems *indigenous to the people* came in direct conflict with values and norms upheld by local communities. Instead, policy strategies in the local spheres of government were mostly ineffective as the design of institutional and organisational structures were unable to meet the distinct needs and aspirations of different communities (United Nations, 2005:6). Figure 3 presents the main aspects that underlie governance structures supporting restitution in the local spheres of government. It also highlights the importance of rights in achieving each of the three critical success factors highlighted by the UN (2005).

## **PUBLIC ADMINISTRATION, GOVERNANCE, ACCOUNTABILITY AND GOVERNMENT**

**P**ublic administration is primarily concerned with the implementation of government policy through joint actions that seek to achieve predetermined goals within specific standards (Bayat & Meyer, 1994:3). What government accomplishes for society depends on the type of policies they formulate and choose to adopt. The effectiveness by which policies are put into practice determines how the execution of public affairs is

**Figure 3: Critical success factors necessary to achieve community engagement and indigenous-centred approaches supporting policy-making.**



Source: Own (2008)

geared towards meeting the needs of its citizens in the local sphere. Important changes in local government in the socio-economic and broader political environments have been witnessed (macro-environments) as well as the local communities (micro-environments). Changes within the macro-environments are interlinked with the micro- and meso-levels where the traditional notion in which local government is described as what the council does has been replaced by the conception in which it is conceded that public decision-making concerning local issues is increasingly involved in multi-agency workings, partnerships and policy networks which cut across organisational governance boundaries (Denvers & Rose, 2005:2-8).

In encouraging community involvement and participation the public administrator plays a critical role in ensuring that the principles of public administration, such as political supremacy, fairness and reasonableness, respect of democratic rights of the individual, accountability, efficiency and effectiveness are manifested at all times during the stages of operation (Bayat & Meyer, 1994:152). The power of citizens to utilise and penetrate government structures now demand a new ethos in which the emphasis is placed on planning *with communities* rather than the previous concept *for communities*. Complying with this demand, government is obliged to intervene in the economic and social domain of community life (Gildenhuys & Knipe, 2000:35). Empirical collectivism became a middle-of-the-road concept between the dominant individualism (*laissez-faire*) and collectivism (autocratic socialism) to realise better community life.

However, the variation that exists among communities meant that there is no single best way to organise communities or to elicit their participation. While community participation forms a central element of development, the outcomes achieved within restitution policy are closely tied to how the term *community* is defined. This is confirmed

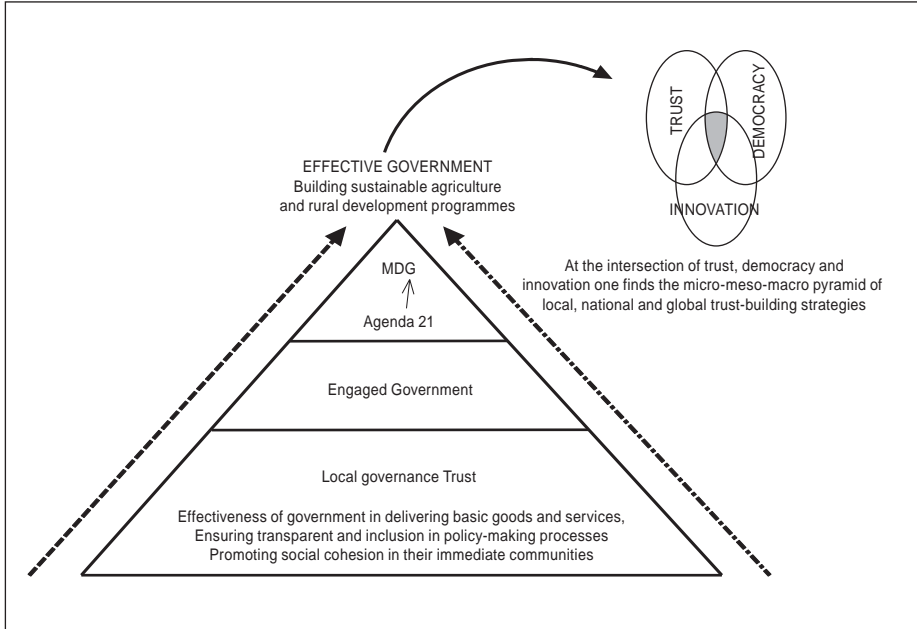
and strengthened where the term *community* is defined in an interlocking suite of land reform laws to the extent that it has become a fundamental and determinative concept in land reform process (Pienaar, 2007; Kariuki, 2004:55; Kole, 2004:1).

The *International Conference on Community Engagement (ICEC)* held in Brisbane, Australia recognised in its *Brisbane Declaration on Community Engagement* that community engagement is a two-way process that offers the opportunity to develop inclusive, targeted and effective programmes and policies with an indigenous-centred approach (United Nations, 2005:7-8). Accordingly, community engagement is a critical process to effective, transparent and accountable government in public, community and private sectors as effective engagement generates better decision-making and leads to delivering sustainable economic, environmental, social and cultural benefits.

Local governance is one of the most effective ways to bring together the gaps that exist among communities, political representatives and public administrators. The strengthening of regional and local government by transferring powers and resources, deconcentrating administration and developing methods of local accountability and participatory processes are critical elements in building development administration structures (United Nations, 2005; United Nations, 2007). Nonetheless, the irony of development administration (Bayat & Meyer, 1994:159):

*...is that effective administration can stifle and inhibit political development.  
The problem is that political development is about the issue of power.*

**Figure 4 Development administration - a mechanism to build trust**



Source: Adapted from United Nations (2007:5)

*It requires the effective administration of scarce resources, but it also requires expanding access to decision-making about the resources. The latter is necessary to enhance the capacity of people to determine their own future.*

The nature of development administration can thus become a major stumbling block in restitution in that if the institutional and governance structures do not endorse the four core principles of community engagement (integrity, inclusion, influence and deliberation) as critical elements for success, there is the danger that the needs of communities are not met.

History provides a brief introduction to how development administration evolved and its subsequent influence on governance and institutional designs implemented in the local government sphere. Perhaps the most significant outcome is the mismatch that developed between rural development and urban development. During the 1970s rural development and agriculture programmes mostly failed because the participative approaches considered communities as outsiders in the overall governance and decision-making system (Kole, 2004:16-17). The integrated development approach applied during the 1970s took a top-down approach which not only made it unpopular but also too expensive to implement due to adverse policy effects, lack of government commitment, institutional neglect and co-ordination problems. It was during the 1990s until 2000s that approaches towards integration the application from a sustainable development perspective. An important principle of sustainability is equity and the benefits it brings to livelihood.

## **SUSTAINABLE LIVELIHOOD**

**T**he concepts of sustainable development evolved at the Stockholm Conference of 1972 and are contained in two bodies of literature, development and environmental conservation that encompassed the concepts of sustainable development and rural development. The challenge of improving governance and service delivery by promoting sustainable agriculture and rural development (SARD) are raised in Chapter 14 of Agenda 21 and the Rio Principles (UN Department of Economic and Social Affairs, 2007). In accordance of the multi-year programme the agriculture and rural development perspective formed an integral part with the integrated planning and management of land resources. In order to increase food production and enhance food security in an environmental sound way it was reaffirmed that the major objective of SARD was to contribute to sustainable natural resource management.

Agriculture takes a special and important place in society and helps to sustain rural life and land through socio-economic improvements facilitated through local economic development (LEDs). Noticeably, the promotion of SARD depends largely on the support and participation of rural communities, national government, private sector and international organisations in which physical capital (infrastructure provision), human capital and social capital are aimed at reducing the poverty levels. Chapter 10 of *Agenda 21* proposes that an integrated approach to planning and the management of land

resources must be taken to ensure a greater degree of community control over resources. The integrated rural development (IRD) approach taken with SARD interventions have to be aligned with the integrated approaches to planning in municipalities through the integrated development plans (IDPs) and LED strategies.

The impact of integrated planning initiatives advocated by international donor organisations saw two streams developing separately in municipal and rural development within the South African environment as municipalities were now challenged to converge and integrate IDPs with the *Integrated Sustainable Rural Development Programme* (ISRDP). The separation of urban and rural development initiatives brought with it significant challenges for the Department of Land Affairs as land reform policies often have contradictory outcomes and were not aligned with local government and rural development initiatives especially where free market principles and common property ownerships came in direct conflict with the power relationships of tribal authorities.

## CONSTITUTIONAL CONTROL IN THE SOUTH AFRICAN RESTITUTION ENVIRONMENT

The constitutional and administrative control in South Africa form the basis for all government activities (Gildenhuys & Knipe, 2000:251). The fundamental goals of the Constitution are rights and the freedom of its individual citizens, based on the Bill of Rights. The importance of the Constitution lies in its normative principles and the relationship of power between the government and its citizens. The Constitution, 1996 and the *White Paper on Reconstruction and Development*, 1994 guide the development initiatives taken in South Africa. Development is framed within the concept of a social welfare state in which government is expected to create conditions of social advancement (ANC, 1994; Van der Waldt, Van Niekerk, Doyle, Knipe & Du Toit, 2002:7).

The role of public administration is highlighted and spelt out in Section 195(1)(e) of the Constitution (Pienaar, 2007; Van der Waldt & Du Toit, 1999:13)

*...Public administration must be governed by democratic values and principles enshrined in the Constitution, including: ... (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.*

These principles form a pivotal point in the development orientated approach endorsed within the Constitution as a mechanism for service delivery through which government has to respond to people's needs through community involvement and participation. Section 25(4) of the Constitution, 1996 records the nation's commitment to land reform and to bring about equitable access to all South Africa's natural resources and compels the state to utilise available resources in such a way as to foster conditions which enable citizens to gain access to land on an equitable basis in order to redress the results of past racial discrimination. This means that the role of government and the Commission does not stop with the settlement of claims. The Constitution compels the state to engage

in development initiatives supporting community-based natural resource management (CBNRM) interventions. The *White Paper on Land Reform, 1997* indicates that land is an important resource that forms the cornerstone for the Reconstruction and Development strategy and the success of land reform contributes to economic development. Pienaar (2007:14) points out that the rights to benefit and/or use portions of land by community members must be determined prior to the commencement of initial land use in a project. He further emphasises that user rights and rights of members to benefit must receive public administrative support ensuring that the needs of local government and rural communities are matched as well as enhance each others outcomes.

Figure 5 provides a chronology of the approaches taken by the local government, rural development and land reform. The initiatives occurred separately resulting in mismatches and contradictions in policy outcomes leading to fragmentation in service delivery in the local sphere of government.

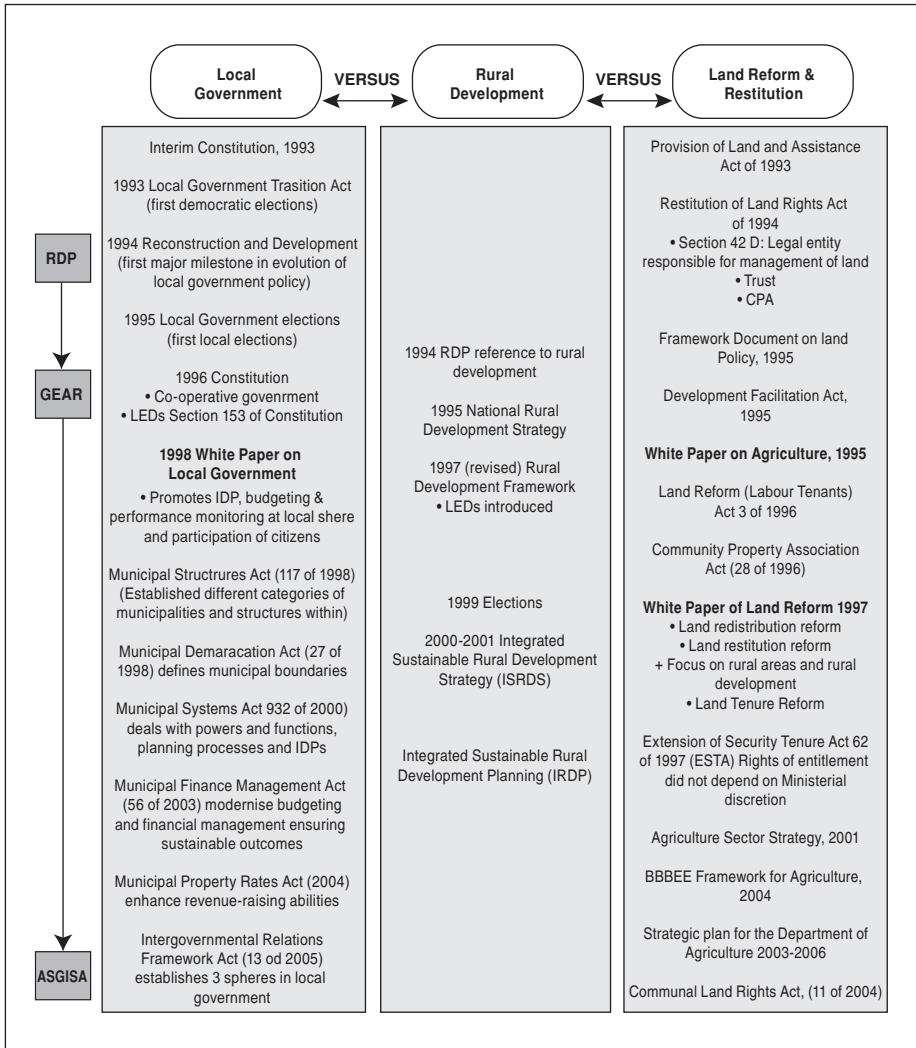
The *Community Property Association Act, 1996* (Act 28 of 1996) (CPA), *Restitution of Lands Rights Act, 1994* (Act 22 of 1994), *Interim Protection of Informal Lands Rights Act, 1996* (Act 31 of 1996) (IPILRA), *Communal Lands Rights Act, 2004* (Act 11 of 2004) (CLARA) and *Upgrading of Land Tenure Act* (ULTRA), are as seen as pivotal pieces of land reform legislation and also have profound implications for the restitution process and its ability to provide sustainable restitution support.

Statements made by Pienaar (2007:) in his report to the Department of Land Affairs, note the following issues that have to be taken into consideration when planning for restitution support

*The implementation of land reform holds major implications for municipalities in view of the fact that the state's aim to transfer 30% of all current commercial farm land to land reform beneficiaries in terms of its redistribution policy and 13% of the country's surface to communities or individuals in private ownership in terms of the Communal Land Rights Act (CLARA). The redistribution of 30% of commercial land and the implementation of CLARA aimed at the transfer of 13% of the country's surface to private legal land-holding entities will effectively place such land beyond taxation for at least the first ten years from the date of transfer as far as municipal rates are concerned.*

Pienaar (2007) argues that if appropriate legal institutional arrangements are not put in place from the outset, it will hamper future service delivery as municipalities lose large amounts of potential income that could have been used for economic development and upliftment of the communities. Restitution claimants are exempted from property taxes in terms of section 17(1)(g) of the *Property Rates Act, 2004*. A municipality may not levy a rate on a property belonging to a land reform beneficiary or his or her heirs, provided that this exclusion lapses ten years from the date on which such beneficiary's title was registered in the office of the Registrar of Deeds. Pienaar further maintains that if no proactive action is taken from the onset this will continue to be the case after the 10-year rate holiday period, complicating future planning and empowerment strategies.

**Figure 5: Chronology of policies and approached taken by Local Government, Rural development and Land Reform (restitution) in South African**



Source: Own (2008), adapted from Perret (2004:2)

## RESTITUTION IN SOUTH AFRICA

**A** growing concern over the level of fragmentation that tends to accompany rural development initiatives such as CBNRM programmes SARD programmes, are fuelled by unstable governance and institutional arrangements in the local sphere of government. There are various types of conflicts that account for the high degree of

variability in the institutional arrangements that underpin the CBNRM programmes and SARD programmes. The most problematic being the need for institutional support to legal entities and issues surrounding communal land. The *Communal Land Rights Act, 2004* (11 of 2004) defines *community* as follows:

*...community means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group.*

The working definition for community therefore becomes a core issue in how legal entities and rights are framed within the land reform (restitution) process and this has a significant impact on the design of post-settlement support for restitution programmes.

In order to rectify the challenges brought about by lack of co-ordination and conflicts at community sphere, government introduced the *Integrated Sustainable Rural Development Strategy (ISRDS)* and *Integrated Sustainable Rural Development Programme (ISRDP)* (Kole, 2004:21). The *Rural Development Framework (1997)* was developed to ensure that rural development would be maintained by co-ordinating and building the foundation of capital (human, social, physical, financial and natural) on *Local Economic Development* initiatives (LED) to create sustainable outcomes for rural livelihoods whilst also building infrastructure (Kole, 2004; Perret, 2004)

Adding to the difficulties experienced in the design of governance structures are overlapping institutions and conflicts that exist between new governance structures which are leading to *straddling or rent a crowd* syndromes. With *straddling or rent a crowd* one sees only a few people driving a project while others who are part of the community, only sign up in order to increase the grant size (Andrew, Ainslie *et al.*, 2003).

## CHALLENGE OF BUILDING SUSTAINABLE POST-SETTLEMENT SUPPORT FOR RESTITUTION

Conducting a situational analysis is essential as this systematic process provides an evaluation of past, present and future activities that drive the restitution process (Pearce & Robinson, 2003:202). It forms the basis for building a value chain that shows clear short-, (operational excellence) medium- (customer value) and long-term objectives (build institutional and organisational structures). Furthermore, the situational analysis makes it possible to identify:

- opportunities and threats in the external environment that present the programme with market success factors (competitive analysis + market analysis) and identifying risks that threaten the survival of the programme;
- the distinctive competencies within the internal environment (build a value chain) by identifying weaknesses within the governance system thereby building on internal strengths to overcome internal weaknesses simultaneously utilising opportunities in the external environment; and
- reducing administrative delays due to weaknesses in governance structures by strengthening the distinctive competencies within the programme.

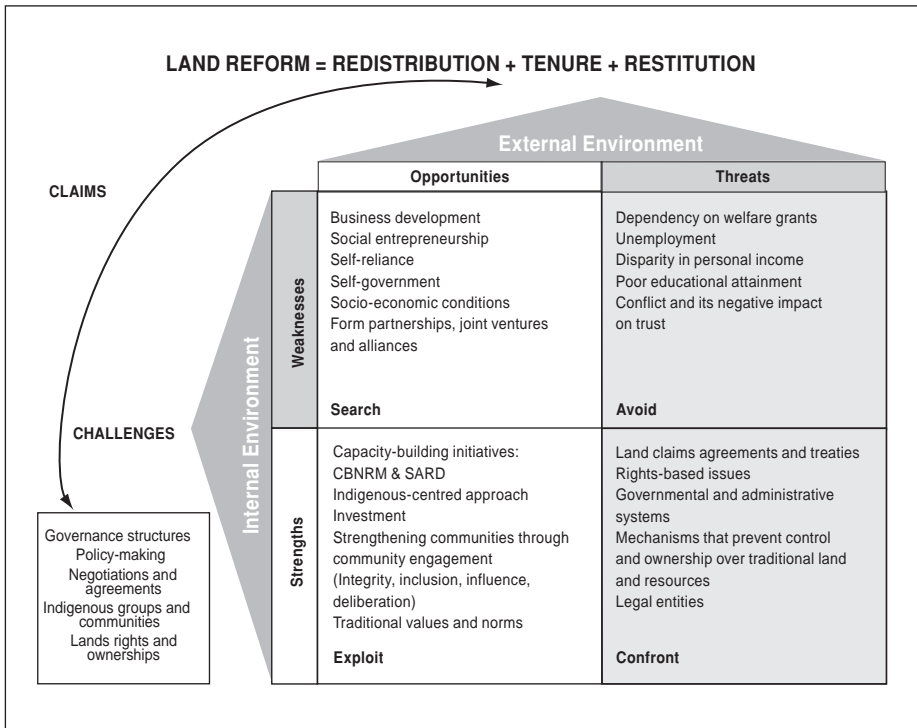


Doing a situational analysis thus becomes a valuable tool and window that presents an overview and basis for decision-making, policy-making, strategising and planning the strategic intent. In order to achieve sustainable outcomes within the restitution process it is critical to create a competitive advantage for the CBNRM and SARD programmes. Thus, creating sustainable livelihoods i.e. market success requirements (external environment) and distinctive competencies (internal environment). Figure 6 gives an overview of the external and internal environment.

Figure 6 shows those factors that must be exploited to build on the relative strengths of the programme, issues to be avoided, matters that must be confronted and searching for phenomena that will offer future opportunities in the execution of the programme. Before developing a hypothetical model for sustainable post-settlement restitution support, the following key questions assisted in identifying crucial key performance indicators necessary for attaining social advancement. According to Quade (1975:143)

*...A model....is a substitute for reality ... A representation of reality that is, hopefully, adequate for the problem at hand. It is made up of factors relevant to a particular situation and to the relationship between them.*

**Figure 6: Situational analysis**



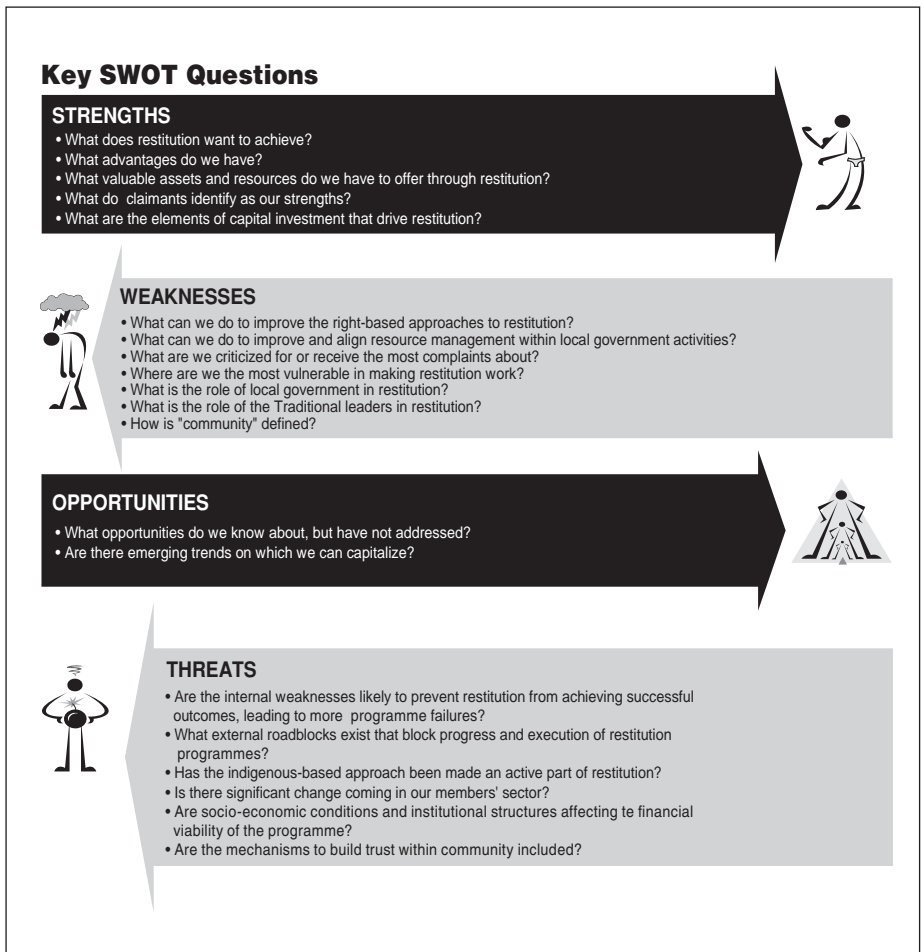
Source: Own (2008)

*We ask questions of the model and from the answers we hope to get some clues to guide us in dealing with part of the real world to which the model corresponds*

The authors focus in this discussion is on a descriptive model that analyses inputs and outcomes through a systems model. Figure 7 poses specific questions relating to those aspects identified in the overview.

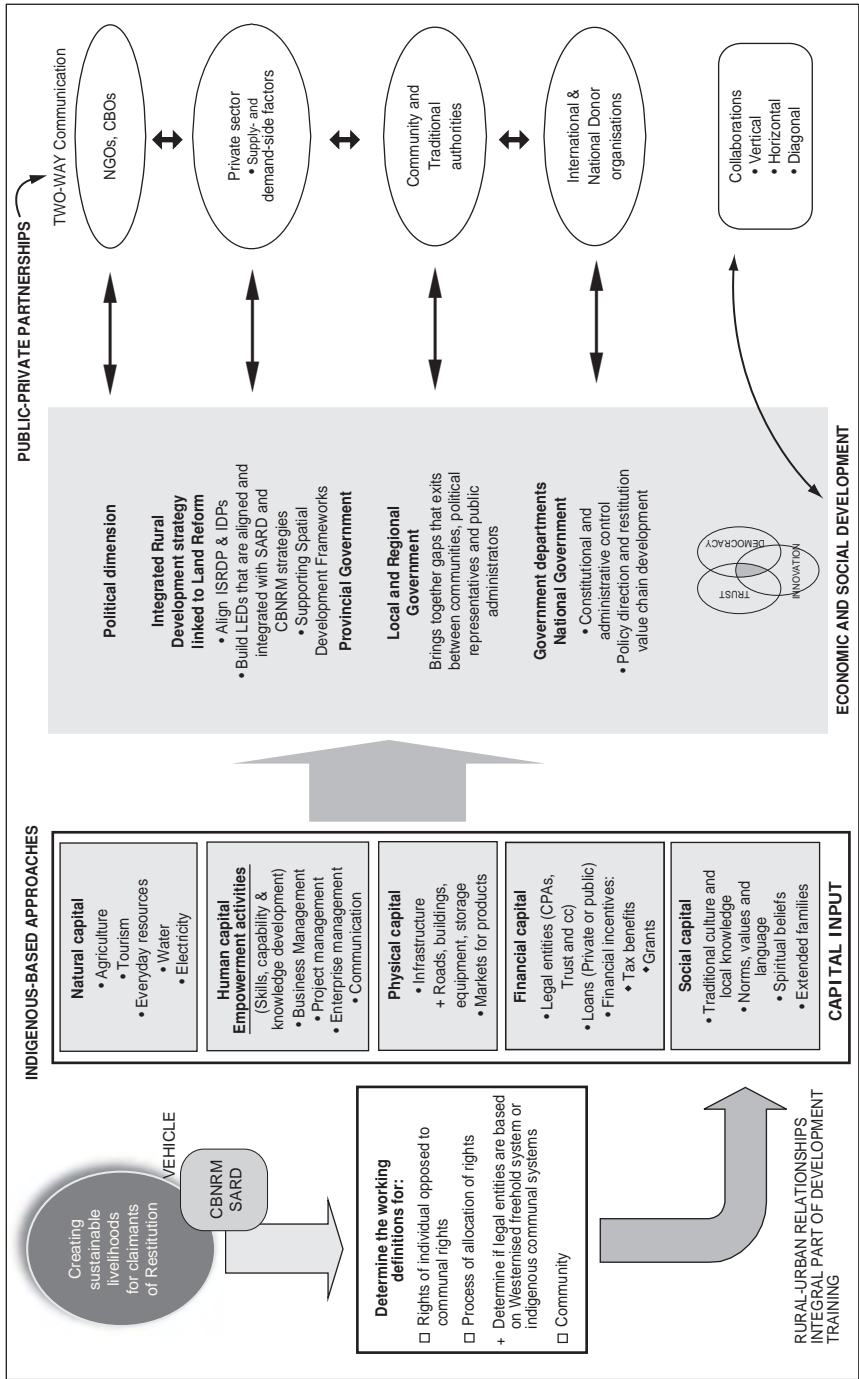
From the above questions a hypothetical model for post-settlement support was drawn up. The hypothetical model (Figure 8) highlights the impact of multifaceted issues

**Figure 7: SWOT questions guiding the development of a hypothetical model for sustainable post-settlement support in restitution**



Source: Own (2008) adapted SMART Draw Template

**Figure 8: Proposed hypothetical model for sustainable post-settlement support in restitution**



Source: Own (2008)

that influence the outcomes of restitution. Perhaps the most daunting aspect being the complexities that shape restitution. Thus, the attainment of successful outcomes turned out to be much more complex than initially thought, mainly because outcomes are exacerbated by multifaceted issues such as individual rights and land rights, choice of legal entities, how traditional culture, values and languages are aligned with local governance structures, the strategic intent and the most critical aspect, the design of the restitution value chain. The design of the restitution value chain is a product of the planning stage (innovation process) in which the potential market is identified and the demand- and supply side factors are tied to individual and mutual collaborative benefits. Public administrators in municipalities are faced with major challenges in matching the needs of the rural and urban communities.

## CONCLUSION

The reasons for programme failure are contributed to having no clear vision leading to poorly constructed value chains. The political elements of restorative justice drive restitution and while rights form a crucial element of these programmes, working definitions for rights have not been properly defined or tied to community-based resource management strategies.

Fragmentation, duplication and policies that contradict each other within local government, rural development and land reforms have shaped the outcomes in restitution. The outcomes resulted in unfeasible land reform programmes mainly because there was an absence of planning and innovation while designing a value chain for restitution. By not designing a proper value chain for restitution (defining exactly what is meant with restitution and determining the working definitions that will shape programme outcomes), major investments from government in balancing land rights continue to be unsustainable. The inability to utilise sustainable livelihood approaches in which people share assets in terms of capital (human, social, physical, financial and natural) have produced institutional structures that do not fit community needs and an inability to build supporting organisational structures (long-term views). Lack of collective action and institutional isolation occurred because municipalities showed an inability to collaborate with the local communities thereby reducing community value (medium-term views) derived from these programmes. Administrative clumsiness in municipalities exacerbated by poor governance structures have impacted on trust and performance outcomes of municipal operations (short-term views).

Restitution support is an ongoing process and does not stop when a claim is paid out. Meeting expected results are not only driven by political will but also by the will of communities or individuals to succeed. Whilst municipalities play an important role as enabler, facilitator and regulator of the process it is in the final instance the *community* versus *indigenous people's* continuous involvement and active participation in the formation of collaborative partnerships between the public and private sectors that seal the success of restitution.

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