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Book section

Original citation:
Originally published in James, Deborah (2017) *Undoing apartheid? From land reform to credit reform in South Africa.* In: Christophers, Brett, Mann, Geoff and Leyshon, Andrew, (eds.) Money and Finance After the Crisis: Critical Thinking for Uncertain Times. Wiley-Blackwell, London, UK. ISBN 9781119051435

Forthcoming, in Brett Christophers, Geoff Mann and Andrew Leyshon (eds.) (2016) *Money and Finance after the Crisis: Critical Thinking for Uncertain Times*, Wiley-Blackwell

Undoing apartheid? From land reform to credit reform in South Africa[1]

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Both land and credit in South Africa - the twin bases of apartheid - proved to need reforming when that country gained its political freedom. Both proved problematic. Land reform was charged with remedying all the problems of apartheid, but people had little wish to return to a forgotten rural past. Instead they desired upward mobility and a modern lifestyle, of a kind that only access to credit could deliver. Although the state was able to deliver democratic freedoms, it could not—in a newly liberalised economy—deliver the means necessary to enjoy the life of the free person: only borrowing could do that. Curbing it would require not only that 'reckless lenders' stop extending loans but also that 'reckless borrowers' stop availing themselves of these. But if lenders operated by the logic of the self-regulating free market, then why was state regulation required to restrain them from offering products that were leading borrowers into penury?

Keywords;

Land, credit, reform, apartheid, South Africa, financialisation, indebtedness.

Forms of injustice left over when an authoritarian regime is in its dying throes, says legal anthropologist Sally Falk Moore, are never easy to eradicate. At moments of fundamental political transition, there are limits on the ability of new governments, and the new laws they pass, to shape the activities and dispositions of citizens. Times of change, often preceded by struggle and suffering, seem to offer the opportunity to rearrange political and economic regimes and to deliver justice to those who never before dared to hope for better, but implementing 'reversionary legislation' is difficult (Falk Moore 2011). What happens to those with an existing stake in the system? How far can new arrangements be forced to accommodate the continuation of certain older ones? When governments use wide-reaching legislative programmes to implant new regimes, their decrees sometimes simply exist alongside local mores: existing 'ways of behaving … exist parallel to and under the eyes of a new government' (ibid: p.7). Alterations can seldom be forced by fiat. This paper looks through the prism of land reform, which attempted to address one of apartheid's more notorious and obvious aspects of dispossession, to explore some of these questions about the limits to planned and legislated intervention in a related, less obvious, and lesser-known aspect of South Africa's discriminatory system: 'credit apartheid'.

[1] This research was funded by a grant from the Economic and Social Research Council (award RES-062-23-1290), which I gratefully acknowledge. Opinions expressed are my own. The research, using participant observation and interviews, was part of a broader study on indebtedness and financialisation. Thanks to those with whom I held discussions during my fieldwork. For comment on earlier versions of this paper I am grateful to participants in the Department of History Colloquia Series talk, University of British Columbia, and in particular to Dianne Newell who invited me.

Lack of access to both land and credit was key in underpinning apartheid. Both aspects proved to need reform when, more than 20 years back, South Africa gained its political freedom. At the moment of democracy in 1994, returning land to those deprived of it appeared the most pressing. Credit reform, although already perceived as necessary, was not yet as urgent. When that urgency increased, around 10 years later, it was partly because of what had happened in the meantime. In part reflecting the spread of financialisation worldwide, but also for reasons specific to the local context, credit provision and take-up had rapidly escalated over a very short period. New sources were added to existing ones as access to credit was democratised and black people demanded, and obtained, access to credit at previously unheard-of levels. The rapid growth of a new black middle class during the 1990s would have been impossible without borrowing, but the debts newly-incurred by this group, as by those aspiring to similar levels of upward mobility, were proving unserviceable.

Land reform did not materialise as it was supposed to. More longed-for and planned-for than achieved, it proved to be (and has increasingly become) a smokescreen for other more urgent deliverables which might have fulfilled the promises of citizenship more effectively. Seemingly more unattainable as the 1990s wore on, these included regular and well-paid employment for all, and the efficient provision of municipal services. Many of land-reform's intended beneficiaries were in any case more oriented to modern conditions and wage-work or salaried employment than to 'back-to-the-land' rurality. So the promises of democracy had to be delivered by other means. Although a number of the newly aspirant were employed, especially in public service jobs, the requirements of their new middle-class lifestyle outweighed the relatively modest salaries they were paid. The only way to get a house, a car, send one's children to university – as well as supporting less fortunate relatives—was on credit.

Thus, at precisely the moment when surging levels of consumer indebtedness made the need to regulate credit access most visible and urgent, the putative beneficiaries of such reforms had most to lose from regulation. This has proved so far to be an insurmountable obstacle. Because credit was having to carry the whole weight of the expectations and aspirations democracy unleashed—those expectations upon which the somewhat misguided initiatives of land reform had *not* delivered – attempts to regulate it were strenuously resisted, not only by the new lenders who were cashing in on profits from high-interest unsecured loans, but also by their clients who wanted to carry on borrowing.

In sum, the short period of twenty-something years since the advent of democracy has seen a rapid transition. An earlier era characterised by evocative discourses about restored citizenship, to which land was a concrete means, has been brought into sudden and uncomfortable juxtaposition with a later era dominated by neoliberal-style speculation. Alongside, and gradually supplanting, a discourse of land as ensuring livelihoods and wellbeing for the not-so-well-off, new enunciations emphasise land's potential as an 'asset class' for would-be investors. The transition from a state-planned economy to a rapidly liberalising one has seen these older discourses disappear, introducing newer ones as if by stealth. Where land is concerned, what was previously seen as a means to regain sovereignty is now, where money is concerned, something in which financiers have begun to show interest via sovereign wealth funds and the like (Ducastel and Anseeuw 2013). The original land dispossession through which black people were turned into wage-slaves has morphed into a new dispossession characterised by the characteristically 21st-century form of debt-slavery: 'working for *mashonisa*'(the loan shark). Paradoxically, this developed to its fullest extent only after the moment of political freedom. Whereas the deprivations involved in land alienation were enacted upon an unwilling populace, the disadvantages of overindebtedness are more insidious because they entail willing participation and collusion on the part of those involved.

In the case of both land and credit, older practices and institutions have proven able to adapt, existing in parallel with a new regime. Explaining the limits to reform lies beyond invoking a nation's reluctance or inability to police and enforce the new laws (once-in-place). It goes beyond the assertion that the old laws might have worked perfectly well had they been properly enforced—although that is certainly part of it. It also requires more than simply asserting that established interests resist transformation. (Critical accounts have shown that the South African democratic transition was limited in scope (Adam *et al*. 1998; Bond 2000; Marais 2001) because the struggle leaders-turned-liberation-elite struck deals with the corporate sector which meant that there were very few changes in the character of South African capitalism.) Though that, too, is part of the explanation.

Further reasons for the peculiarity, and partial failure, of this reversionary legislation must be sought at other levels. Before exploring these in detail, the first section of the paper gives a brief account of the recent lending boom and the inability of existing legal frameworks to keep it in check. The second explains the *longue durée* of both land and credit apartheid in historical terms. The third gives an account of the attempts, post-apartheid, to impose new regulations. Among several reasons these failed to take root, as the fourth section demonstrates, is the fact that, given the longstanding character of these twin systems of discrimination, numerous intermediaries and agents have entrenched interests in the status quo. The very attempts to tackle this problem by incorporating the marginal and previously politically disenfranchised, and to create a single economic framework from a dual one by changing the character of savings, consumption, investment and property ownership, have simply entrenched these interests. All of these factors play key roles in shaping a peculiar contradiction: a perceived need to restrict a credit system for the good of people who, by and large, would prefer that borrowing and lending continue unchecked.

Credit boom/South Africa's financialization

Credit apartheid, in its newest incarnation, is a localized, vernacularized version of the global phenomenon we have come to know as financialisation: something said to have taken hold in South Africa in the late 1990s and early 2000s, accounting for the country's 'jobless growth' during that period (Barchiesi 2014; Marais 2011, p. 124–28, 132–39). Here, as elsewhere in the globe, this recently-evolving version of capitalism, with a growing preponderance of finance in economy, politics and everyday life, has not only transformed society as a whole (Friedman & Friedman 2008; Kalb 2005b, 2012, 2013; Smith 2011), but also implanted itself in the everyday of communities and households via the 'financialisation of daily life' (Langley 2008; Martin 2002; Krige 2014). From creditors' point of view, financialisation describes a new 'pattern of accumulation in which profit making occurs increasingly through financial channels rather than through trade and commodity production'; for borrowers, it means they are 'confronted daily with new financial products' (Krippner 2005, p.173–4), and those previously unschooled in matters of saving, borrowing and repaying are enjoined actively to start modelling their use of money along more formal lines, and to become 'financially literate' (Kear 2013).

In South Africa, data show a huge growth in borrowing during the early 1990s. In 2011, household debt stood at R1.2-trillion, up from R300-billion in 2002: as a percentage of disposable income it was 76%, ratcheting up from 50% in 2002. In 2014, a World Bank report claimed that South Africans were borrowing more than any other country.[2] The particularities of the South African transition help to explain this apparent epidemic of borrowing. Following the first democratic elections in 1994, a concerted attempt to abolish the various aspects of apartheid coincided with a massive rise in expectations. This demand for credit was met with a burgeoning supply. As members of a rising black middle class replaced the (mostly white) incumbents of the previous civil service, these newly-redundant public servants started lending money to those replacing them – and others—at high rates of interest. Other micro-lenders soon joined them, some formal and technically legal, others informal and classified as loan sharks. Big banks and mainstream retailers, many of which had formerly been reluctant to offer credit to black people, joined in. Salaries deposited in people's bank accounts thus started circulating throughout the system, with a considerable proportion – plus interest – ending up in lenders' pockets. In the case of salaried and waged borrowers, lenders incurred few risks: they were using borrowers' salaries as a form of collateral (Roth 2004, 78; see Anders 2009, p.76; Maurer 2012). But in those cases termed 'unsecured lending', where collateral was lacking, interest rates were even higher. This sharp rise in interest rates was made possible when, during the period of rapid liberalisation in the 1990s, the state repealed the terms of the Usury Act in the interests of expanded credit access. The Reserve Bank reported that unsecured lending had nearly tripled between 2009 and 2013 to 10.5% of total credit. Borrowers in the unsecured category were *not* repaying their loans: nearly half were at least three months behind on debt payments.[3]

For decades before this, however, borrowers did keep up their payments, at least enough to sustain the business model that underpinned credit apartheid. In this highly exclusionary system, money was lent to those in disadvantaged groups, but only in unequal ways. People disallowed from land ownership, as the next section explains, had few credit options. Buying movable property – furniture or appliances—was the next best thing to real estate. The initial purchase often accompanied a daughter's marriage and served as part of her trousseau, after which she and/or her husband would buy further items on instalments, usually at more than twice the cash price, and pay them off item by item. These were long standing arrangements: 'on all sides', observed American social worker Ray Phillips in Johannesburg in the 1930s, 'the "hire-purchase" system of acquiring pianos and furniture is responsible for much of the indebtedness of the Africans' (1938, p.41). The system was somewhat abused by clients inasmuch as they often bought items from a variety of merchants and were unable to pay them all – 'The ones who come first get the money, the rest are put off with various promises until a later time' (Phillips 1938, p.40) – but it was also laid at the retailers' door for failing to check their clients' ability to pay. 'They do not care who comes into the shop, whether he or she earns £2 10s. 0d. per month, they give him or her goods worth £40 or £50, payable monthly at 30s. or 40s. per month. Then the buyer …goes to another shop where he contracts another debt and so on continually'. In the long term, these retail businesses proved profitable: by the 2000s their practices were singled out by reformers as laying the basis for credit apartheid (Department of Trade and Industry [DTI] 2002, 2004).

During fieldwork in 2008, I got some insights into arrangements that had evolved to 'catch' the defaulters from Xolela May, a consumer rights activist and lawyer. Growing up in the black township of Langa, he regularly saw his neighbours approached by the sheriff of the court to arrange an inventory of their possessions prior to confiscation, while they stood by

[2] SA Leads the world in living on credit, *The Times*, 3 June 2015.
[3] Kevin Davie, Drowning in debt or rolling in riches, *Mail and Guardian*, 22 July 2011. Davie provides these figures but shows that they are subject to reinterpretation.

helplessly. Retailers were no longer willing to be 'put off with … promises', as in the 1930s. By the time Xolela had studied law and joined the human rights organisation the Black Sash in the 1990s, a far wider variety of lenders had begun extending credit to people formerly denied it – and this time repayments were easier to secure. Debtors were taken to court in record numbers, and repossessions carried out to an even greater extent than in Xolela's youth. Creditors, no longer standing in line to get their money, were now able to take it directly from debtors' salaries or wages, using 'garnishee' or 'emoluments attachment orders' (known as debt recovery orders in the UK).[4]

Such orders, requested by a creditor from a magistrate, require an employer to enable monthly repayment directly from the salary of a defaulting employee/debtor, with the creditor bearing a 5% charge. The order, once granted, is served on the employer by a sheriff, but the debtor must agree by signing the order. It had become commonplace for employees—especially civil servants, but also train drivers, factory workers and supermarket employees—to have substantial parts of their salaries reclaimed by creditors before they were able even to see the money. 'Of 1.2 million to 1.3 million public servants at the national and provincial level, 210,000 were affected by garnishee orders,' one newspaper reported in 2009.[5] Employers, noting the negative consequences for the wellbeing of workers – both civil servants and others—have taken some action. BMW, with its large car factories in the Eastern Cape, was granted funds by the German Development Funding Agency GTZ to commission detailed research on the effects on worker wellbeing of these debt recovery arrangements. It established that many practices used by debt collectors to 'attach'[6] workers' salaries were and are illegal. One irregularity concerned the use of signatures. Although the debtor must sign the 'consent to judgment,' as proof he or she has agreed to the arrangements, as the researcher Frans Haupt told me, 'if you have a legally and financially illiterate consumer he will sign anything, especially if you harass him at work'.[7] Another involved creditors, especially furniture retailers, obtaining orders from courts far from employees' places of work. A third involved debt collectors, paid on commission, forging debtors' signatures. (These collectors, and debt administrators who oversaw the process, were taking a cut at every stage of the process.) A fourth concerned lack of judicial oversight: frequently a relatively uneducated clerk of the court, rather than the magistrate, authorised these orders.[8]

Other creditors had more direct access to borrowers' bank accounts: unregistered loansharks or *mashonisas,* lending to salaried or waged employees, would with borrowers' agreement

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[4] This and other quoted sections in the chapter are from a conversation with Xolela May, Knysna, 8 October 2008. A garnishee order is a court order 'instructing a garnishee (a bank) that funds held on behalf of a debtor (the judgement debtor) should not be released until directed by the court. The order may also instruct the bank to pay a given sum to the judgement creditor (the person to whom a debt is owed by the judgement debtor) from these funds.' http://www.finance-glossary.com/define/garnishee-order/612/0/g. The term bears no apparent relation to the more common meaning of 'garnish': to ornament or embellish.

[5] 'Low savings a concern says Minister Gordhan,' *Engineering News*, 23 July 2009

[6] This is the technical legal term used for taking part of a salary before it is paid to the employee.

[7] Frans Haupt, Pretoria, 3 September 2008

[8] A class action court case, brought to the Western Cape High Court, ruled against some of these practices in 2015. The respondents found to have been using these techniques were drawn from among the new micro-lending companies. They included Mavava Trading, Onecor, Amplisol, Triple Advanced Investments, Bridge Debt, Las Manos Investments, Polkadots Properties, Money Box Investments, Maravedi Credit Solutions, Icom, Villa Des Roses, Triple Advanced Investments. The names give a sense of the fly-by-night character of those that had been gleaning rich pickings from the garnishee system. [8] University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others (16703/14) [2015] ZAWCHC 99 (8 July 2015), http://www.saflii.org/za/cases/ZAWCHC/2015/99.html#.

keep their ATM cards and withdraw money owed to them at month end.[9] The system overall was skewed to the advantage of lenders, who had ways of getting their money back against all the odds, and who rarely lost out or received a sanction for failing to check clients' capacity to repay. The negative consequences ranged from people resigning from their jobs to escape creditors, through cashing in their pensions, to tragic measures such as suicide. The infamous shooting of striking miners at Marikana in 2012 was yet another manifestation of the problem. Newspaper reports revealed that the miners, not necessarily in the lowest pay bracket, carried unsustainable levels of debt. This was doubly burdensome, indeed intolerable, because of the way their numerous creditors ensured repayment. Miner's pay, automatically transferred into their bank accounts at month end, was immediately 'garnished' or transferred out again, so that shortly after payday, many of them had nothing left to live on.

All-in-all, alongside lenders' lack of attention to borrowers' creditworthiness, illegal and unregulated collection practices set the scene for a continuation of credit apartheid: a system that arose out of systematic exclusion from certain lending arrangements, and the institutionalization – and almost inescapable inclusion – in others. Associated with an array of techniques of repossession, reckoning, evasion, and eventually financialization, together with an increased demand for consumer goods and other signs of a good life, and a growing discrepancy between income and outgoings, this system had extraordinary tenacity, and seemed as impervious to regulation as other aspects of South Africa's segregationist arrangements, such as unequal access to land. To outline the relationship between these two modalities of apartheid before discussing the attempted reforms, I draw on secondary sources from South Africa's rich radical history tradition.

Credit, land and labour – the *longue durée*

Land ownership and credit are self-evidently linked; conversely, the absence of landed property poses problems for lenders. The aspect of apartheid most notorious for its exclusionary character was legislated land dispossession. Black people moved, or were forcibly relocated, from areas the apartheid state designated as white farm land to the reserves (later bantustans or homelands) where they were subjected to imposed communal property arrangements. Many, being migrant labourers on the mines or in industry, had places to stay in the urban townships—either municipal hostel accommodation or state-owned housing—while others, settling in town more permanently, likewise rented their houses from the township authorities. In both cases they were largely excluded from owning property. In the absence of real estate to serve as collateral, the form of lending that came to predominate, as cultivators-become-migrants started buying furniture and appliances and including these in their customary marriage exchanges, and as retailers expanded their operations and aggressively marketed their products in the captive markets of the black homelands and townships, was hire purchase. The form of 'loan security' did not differ substantially: appliances were repossessed just as a house might have been. This was complemented and partly supplanted in the 1990s, when the new microlenders used civil service salaries paid directly into bank accounts 'as a collateral substitute' (Roth 2004, p.78; Maurer 2012), or offered 'unsecured' loans at much higher rates of interest (Roth 2004, p.41; Schoombie 2009), which they justified as a means of off-setting risk.

In South Africa's migrant economy, credit was linked not only to land (or the lack of it) but also to labour. To understand the particular form these linkages took, it is useful to contrast

[9] For a similar practice in India, see Parry (2012).

this with the situation that obtained in South East Asian and South Asian countries. There, paternalistic dependence combined with exploitation connected tenants to landlords who doubled as creditors, and who often milked their borrower/tenants dry over several generations while they continued to provide labour (Murray Li 2010, Martin 2010; Mosse 2004; Shah 2010). South Africa's racial laws attempted a more definitive land dispossession. This was not easily implemented, however, and in many cases it was imperceptible changes in the economy of farming rather than draconian state measures that caused cultivators, eventually, to move off their lands. Although in some cases black people did, then, remain as tenants on land they did not own (Beinart and Delius 2014), they borrowed more often from trading-store owners than from white farmers: the resulting debt relations thus linked traders and their customers rather than landlords and their tenants. And the labour supplied as an offshoot of these arrangements was to mining and industry rather than to semi-feudal landlords.

Store owners, imbued with a free-wheeling and pioneering spirit of enterprise in the late 19th/early 20th century, became the harbingers of commodification and market penetration in the rural areas where many black cultivators lived—although they plied their trade in eddies separate from the main stream of economic life, given that capital accumulation, following the mineral discoveries of the 1880s, centred on mining and farming. (Indeed, the racial/ethnic profiles of some of these traders, in a setting where many occupations were ethnically restricted and defined, ensured their marginality from the domain of production (see Hann and Hart 2012).)[10] While some traders were "sympathetic" to their black customers (Van Onselen 1996, p.186), others, in addition to selling trade-store goods, acted as independent labour recruiters who attempted to cajole black cultivators to become wage-workers in the mine economy. Men buying cattle or goods on credit were obliged to 'work it off' after the event by enrolling for contract work on the mines (Beinart 1979; Schapera 1947), or were induced to enter into contracts by wages paid in advance. The system was much abused: traders often extended such large advances that the borrower 'remained in debt even after having worked for several months', while borrowers often accepted several advances simultaneously and never repaid them (Schapera 1947). Recruited through this and other methods, the workforce expanded, 'large sums of money' were injected into the rural economy (Crush 1986, p.33), and recruiters, competing with each other, variously offered larger advances or smaller ones on better terms.

The colonial government intervened with characteristic paternalism. While regulating unsustainable practices which might have led to the collapse of agents' enterprises, it also took the line that workers' money was best removed from their control. Rather than allowing migrants to get ready access to their earnings, the authorities devised a system of deferring them, fearing that cash received immediately would be diverted from household expenses and the payment of various colonial government taxes and levies (Schapera 1947, p.106-7; First 1983). In sum, a combination of free-wheeling enterprise on one hand, and regulatory intervention on the other, laid the basis for a system in which earnings—and (much later) bank accounts used to transfer them—are viewed as legitimately controlled and/or regulated from the outside. A deeply-rooted system of 'external judicial control' over wage-earners' finances (Haupt et al. 2008, p.51) has resulted. Garnishee orders are its most recent variant.

[10] Many traders were Gujarati-speaking Muslims from the Punjab or Jewish refugees from Russia and its borderlands (Cobley 1990: 43; Krige 2011:137; Roth 2004: 62; Whelan 2011).

Not all black people were restricted to reserve areas, however. Those who would later become members of the emerging middle class made efforts to procure their own land in the late 19th and early 20th century. Some obtained title in recognition of former occupancy, others formed syndicates and bought land via missionaries and other intermediaries. But considerable opportunities for land speculation existed, and many black owners either lost their land after having borrowed against it, or willingly sold it to pursue education and other modern investments (Trapido 1978; Murray 1978). Those titleholders who remained on their pockets of land found themselves disadvantaged vis-à-vis white farmers, who received state subsidies, support from state marketing boards, and borrowed money on favourable terms from both commercial banks and the government's Land Bank (Beinart and Delius 1986, p.29-30; Morrell 1986, p.379-80). Despite these measures, some remained owners of their farms – so-called 'black spots' because of their situation amidst white-owned farms – from which they were forcibly removed. It was these titleholders that became a prime focus of some of the reform measures described below.

Both in its 'land' and its 'credit' variants, apartheid as fully developed by the Afrikaner nationalist government after 1948 was only the final, state-sanctioned version of what had started decades earlier in the combined forces of market and state. Inextricably interlinked from the outset, both involved exclusion from certain kinds of properties, facilities and loans, accompanied by virtually inescapable dependence on others.

Reversionary legislation new or old laws?

The post-apartheid land reform program, aimed at providing redress to those affected by apartheid's land laws, involved extensively planned and high-visibility—albeit poorly-funded (Walker 2000)—legal processes. Instigated soon after 1994, the intention was to overturn or remedy very obvious, state-sanctioned, forms of land alienation, like the forced expulsion of titleholders from farms they had purchased, and resettlement in far-off and inhospitable sites in the reserves or homelands. Under restitution (see Figure 1), 'black spots' were returned to titleholders and people and equipment transported back to start anew. The focus was overtly violent acts perpetrated by the state, especially brutal forced removals, conducted by the army and police and implemented in the name of state ideology and its racial laws.

In addition to these forms of redress, land reform also aimed to redistribute land and/or give secure tenure to those rendered homeless by the less visible forces of capitalism and the market – some of them still residing on white farms but with no legal rights to remain (see figure 1). Besides compensating those resettled by the authorities in the name of the state's racial laws, land reform also redistributed land, or gave a place to live, to those who had lost their places of residence because of changes in the economy of farming. State and market forces were entwined when the program was implemented: government funds and advice were made available, but established property rights were respected through the market-driven 'willing buyer/willing seller' model. The restorative outcomes turned out, however, to be muted. Land reform had been perhaps too focused on the overt disruptions caused by state brutality to take account of those less obvious displacements attributable to the power of capitalism and ultimately far less easy to put right (James 2007). Those parts of the programme which were implemented often laid bare and even exacerbated preexisting inequalities (Hay 2014, 2015; James 2007; Falk Moore 2011, 13), and exposed the difficulties of 'reversionary legislation' (Falk Moore 2011, p.14).

Category	*Date*	*Act*	*Intention*
Restitution	1994	Restitution of Land Rights Act	To provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices. To establish a Commission on Restitution of Land Rights (CRLR) and a Land Claims Court
Restitution/ Redistribution/ Tenure Reform	1996	Communal Property Associations Act **(CPA)**	To enable groups to acquire, hold and manage property as agreed by members and using a written constitution
Tenure Reform	1996	Land Reform (Labour Tenants) Act	To safeguard the rights of labour tenants who had been remunerated for labour primarily by the right to occupy and use land
	1996	Interim Protection of Informal Land Rights Act **(IPILRA)**	To protect people with informal rights and interests from eviction in the short term, pending more comprehensive tenure legislation (i.e. CLRA)
	1997	Extension of Security of Tenure Act **(ESTA)**	To give farm occupants rights of occupation on private land. Establishes steps to be taken before eviction of such people can occur
	2004	Communal Land Rights Act **(CLRA)**	To provide for legal security of tenure by transferring communal land to communities and provide for its democratic administration by them

Figure 1: Land Reform Legislation

(Source: www.info.gov.za/gazette/acts; Adams 2000)

In contrast to the more obvious case of land dispossession (and its necessary corollary, land reform), concern with debtors' rights took longer to surface. Credit issues were less obviously a matter for the state, more obviously something to do with the market. 'Discriminatory legislation', if it existed at all, was not a uniquely South African phenomenon. On the contrary, the Magistrates' Court Act of 1944 was imported from the UK with few modifications. Credit regulation, unlike reforms to more immediately visible aspects of the old order like land dispossession, had, on the face of it, a less obvious relationship to apartheid. Given that the new consumerism and its fall-out affected those from all races, it was far from obvious that the new excesses of lending, and the 'overborrowing' that resulted, had anything to do with the previous racist order. Indeed, this problem did not seem to be particularly South African. The everyday processes through which loans are granted, risks assessed, interest rates set, and property repossessed or wages docked when such loans are not repaid or when installments are in arrears for items bought on credit: all appear mundane and unremarkable, as well as being generic, seeming to vary little from one setting to another.

It was belatedly realized that 'credit apartheid' had given these processes a very particular character – resulting in the kind of borrowing scenario outlined in the first section of the paper. Where other reversionary legislation was passed in the 1990s and early 2000s, with special ministries or commissions founded to oversee them, those forms of regulation protecting the consumer/borrower, although likewise debated in the 1990s, were passed only towards the end of the 2000s – since, indeed, many of the worst problems had developed in their fullest measure only towards the end of the 1990s. They were left to the Department of Trade and Industry (DTI) to monitor and implement (DTI 2002; 2004).

As was the case with land reform, actions taken to regulate credit did not emerge from nowhere, however. They were built on the longer-standing activities of civil society protagonists and activists. For example, debt activists like Xolela May, in organizations such as the Black Sash, had long been devoted to addressing the problems of easy credit, indebtedness and lack of debtor protection that had become evident well before the end of apartheid. He helped develop the National Credit Act (NCA), effective from 2007 (see Figure 2), along with its new system of debt review and debt counseling. Although a new public institution of sorts was established—the National Credit Regulator—its description as 'a consumer advocate that is charged with registering lenders' accurately depicts it as a body with limited powers, not least because of disputes between different government departments.[11]

Figure 2: Credit Reform Legislation – Aims of the National Credit Act of 2007

(based on http://www.justice.gov.za/mc/vnbp/act2005-034.pdf)

promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
ensuring consistent treatment of different credit products and different credit providers;
promoting responsibility in the credit market by- (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
addressing and correcting imbalances in negotiating power between consumers and credit providers by- (i) providing consumers with education about credit and consumer rights; (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
improving consumer credit information and reporting and regulation of credit bureaux;
addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

[11] Gabriel Davel, personal communication. Gillian Jones, Revised financial regulation bill clarifies 'twin peaks' Business Day. 17 December 2014, http://www.bdlive.co.za/business/financial/2014/12/17/revised-financial-regulation-bill-clarifies-twin-peaks

Beyond the differing extents to which reform in these contrasting cases relied on special bodies and government commissions, there are further important contrasts. The strongly 'rights-oriented' character of land reform legislation owed itself to the many lawyers employed in the programme who had previously been human rights activists. It was a result of – and a reaction to—the fact that apartheid South Africa had been 'quite self-consciously a legal order' in which 'nothing was done without legal authorisation, from removals to detentions' (Chanock, quoted in Palmer 2001). By the same token, these activists-turned-new-government-officials never doubted that an entirely new swathe of laws would be required to facilitate reform. Like those responsible for the initial dispossession, those championing the dispossessed were preoccupied with the law and with legal rights in principle enforceable in court – and were perhaps overly optimistic concerning the law's capacity to facilitate planned social change (James 2007).

In the case of credit reform, although the need for new legislation belatedly became clear, some suggested that the problems might simply be addressed under existing legislation. Xolela May told me, for example, that legal practitioners motivated by profit to act on behalf of creditors were routinely ignoring particular sections of the relevant legislation, the Magistrates' Court Act of 1944, which might have afforded debtors some protection. One section of the Act required creditors to enquire into the financial position of debtors subject to garnishee or emoluments attachment orders. It provided debtors with greater rights than normally recognized, requiring that before garnishing part of the debtor's wages, 'the court has to ensure that that debtor has remained with sufficient means in order to maintain himself and his family.'[12] Ignorant of, or flagrantly ignoring, the spirit of the law, lawyers and the debt recovery companies for whom they worked intimidated debtors into agreeing to unsustainable repayments, which might amount to more than half their monthly income.

The Magistrates' Court Act, then, was not itself inattentive to the rights of consumers; rather, the problem was that it had not been properly enforced. Many of the abuses evident when reformers took a serious look at the nature of credit were not so much inherent in the law itself but rather in the way in which it had been implemented. One lawyer brought this up in the course of the hearings in parliament preceding the passage of the NCA. Rather than passing new legislation, he suggested, why not amend the Magistrates' Court Act by making it mandatory to have judgments 'dealt with in an open court of law' rather than, often fraudulently or in ignorance, by uneducated clerks of the court?[13] All in all, the fact that the legislation was implemented without due diligence is indicative of the continuing 'advantage to creditor' in South African law, which no new legislation has been able to address (Boraine and Roestoff 2002).

What of the key aim of the new legislation—to combat the readiness with which lenders 'recklessly' extend loans to those patently unable to repay? Cases in which the court found against such lenders proved few and far between. In one instance, a home loan was extended to a person soon to retire, who would clearly have no means to repay it; in another, a number of credit providers, including several from the mainstream financial sector, were taken to

[12] Similar legislation applies in the US, where 'Exemptions are created by statutes to avoid leaving a debtor with no means of support. For example, only a certain amount of work income may be garnished'. http://legal-dictionary.thefreedictionary.com/Garnishee+order

[13] Commentary on the National Credit Bill by Vincent Van Der Merwe, J C Grobler & Burger Inc., 5 August 2005, presented to the portfolio committee for Trade and Industry.

court on behalf of debtors who had repayment commitments amounting to between 79% and 160% of their monthly income. The credit providers were found guilty. A third case demonstrates the determination of borrowers to obtain valued items at any cost: an officer in a bank was alleged to have been accepting bribes from customers in return for approving their loan applications; the bank was fined R305 million for reckless lending (James 2015, p.89)

Some policy makers were hopeful they might have magistrates settle creditor/debtor disputes—and ultimately reinstate the cap on the interest rate—by law.[14] But magistrates, schooled in the old legislation, and too little acquainted with the new, proved unwilling or unable. Even in higher courts, where action might have been possible against the reckless excesses of credit capitalism, that capitalism's greater legal muscle held sway. Small successes by legal activists exploited areas of uncertainty between the old and the new forms of legislation, but no challenge proved sufficiently robust to qualify as reform. For the most part, then, it was the behaviour of borrowers rather than that of lenders reforms attempted to amend. A few refashioned citizens, a few small-time commission agents and debt collectors punished, seemed to be the most legislative efforts might yield.

Finally, the NCA had some unexpected outcomes, a description of which leads us to the last section of the chapter. The intention of the Act was not only to discipline ‘reckless lenders’ but also to provide a system more affordable to those owing relatively small amounts of money and for whom bankruptcy was unaffordable (Boraine and Roestoff 2002; Schraten 2014). It laid out measures aimed at stopping harassment by creditors, allowing debt rescheduling, and providing some breathing space in which to make payments while preventing further indebtedness. But such efforts at remedy and social justice were stymied, not only by debtors’ determination to carry on borrowing, but also by the activities of intermediaries. In this case, just like the profiteering lawyers to whom Xolela alluded, existing debt administrators—a role specified under the old Magistrates’ Court Act—had spotted an opportunity and had ‘changed their hats’ to become debt counselors – a role invented by the new legislation, the National Credit Act—seeing this as an alternative source of income. People at all levels now make money by charging commissions or adding interest at every point in the value chain. Over the *longue durée*, spaces have continually opened up for such figures, who play their role in establishing the current credit/debt landscape, and in resisting reversionary legislation.

Agents and intermediaries

As hinted earlier, among the most important reasons why reform—of land or credit—was bound to be problematic owed itself to the role of intermediaries. Any apparent division between perpetrators and victims was inevitably blurred by the existence of actors with a wider range of entrenched interests than initially envisaged. Two brief examples illustrate this well.

Land reform turned out to be difficult to achieve. Despite being firmly regulated by the state, in the sphere of landholding and property ownership state law has long been out of kilter with everyday practice. When the state began its reform programme, it often found the wind taken out of its sails by small-scale intermediaries. Some were squatter landlords giving access to land not technically theirs to redistribute, while government planners hummed and hah-ed

[14] Existing legislation restricting the interest rate had been removed in 1992, ostensibly ‘to open up the market for small borrowers’: it ‘removed price control on small loans’ of under R6000 and with a duration of less than 36 months (Porteous with Hazelhurst 2004:77, 83). A cap was later reimposed at 44 percent.

about how best to plan its use. Others were more savvy about the technical specificities of the law and the relevant bureaucracy, positioning themselves between community members and remote state or NGO officials. They developed followings among the rural underclass, promising the possibility of new land holdings. Such followings had the potential to make these intermediaries eligible, alongside their clientele, as land reform beneficiaries. Illegal or semi-formal land selling or letting of this kind has been going on in different ways for over a century (Hay 2015, James 2011, for an earlier case see Stadler 1979).

Arguably, then, it is not so much that the laws before and since apartheid have been just or unjust in any one case, but that people have always had some ability to withstand these laws and simply get on with life. This is also why it took fifty years to enact the original discriminatory land laws. Overall, a simple binary between domination and resistance, conceived when legislation was designed, reduced 'the complexities of a historically produced politico-legal context' and obscured the existence of 'shifting patterns of dominance, resistance and acquiescence, which occur simultaneously' (Wilson 2001, cited in Falk Moore 2011, p.9). The starkly oppositional image of a brutal state violating its people dissolved in the face of a more complex reality, with diverse groups, entrepreneurs, and business interests colluding or resisting by turns, always defying easy classification into a schema of perpetrators and victims.

In the case of credit reform, various protagonists have taken up roles in the credit/debt machinery, in the process turning themselves into essential components of that machinery. Dodgy lawyers making money from debt recovery practices of borderline legality, and debt administrators-turned-debt-counsellors have already been mentioned. The hire purchase furniture business, because owners were socially and geographically remote from the bulk of their customers who lived in black townships and rural villages, relied—and continues to rely--on black agents. It has long been the case that the low pay and commission-based character of their work, combined with the exploitativeness of clients' borrowing terms, abetted the emergence of forms of illegal activity—'scams'—in which agents acted in complicity with clients, enabling agents to augment their wages while clients temporarily evaded repayment. Echoing and modelling itself on this system, informal moneylending concerns also used agents, and these agents have similarly played the system while keeping their employers in the dark (James 2015, p.104-5; 113-15).

The inextricable collusion of people at all levels in making money on credit, if in a less patently 'illegal' manner, is demonstrated by a matter that came up when the NCA was debated as a bill in Parliament. The Act's attempt to tackle a broad spectrum of problems relating to 'reckless lending' included some which arose from the activities of brokers and agents, as outlined above. Its aims were ambiguous, however; it was intended not only to protect vulnerable and financially uninformed borrowers from unscrupulous creditors, but also, in the new spirit of affirmative action or 'Black Economic Empowerment', to open up new possibilities for black business in fields which had previously been dominated by whites or members of other ethnic minorities originating outside South Africa. Such opportunities included microlending, as well as occupations theoretically intended as part of the solution to indebtedness, such as debt administration and debt counselling. But the work such opportunities offered would itself require regulation and consumer protection. One such opportunity, a long-standing livelihood strategy in the black community, was 'direct selling' on credit (and on commission) at workplaces.

The rights of such sales agents were vigorously defended by one submission on the bill, which pointed out that the reason why they visit the 'work places of potential consumers to enter into loan agreements' was because such 'consumers are not able during office hours to attend at the credit provider's physical premises', and that worldwide trends in direct selling indicate that 'it is certainly convenient, speedy and efficient both for the credit provider and the consumer for the loan agreement at times, to be concluded at the consumer's work premises'. Prohibiting such a practice, the submission anticipated, would result in the closure or complete (and costly) restructuring of 'many small credit operator businesses relying solely on agents to sell their goods and/or products to employees at their work'.

> The thousands of agents currently operating within the South African framework would immediately lose their jobs resulting in catastrophic implications for their families and extended families. …by preventing business being done at work or at home a large section of the economy will effectively be destroyed overnight.[15]

The tone of the submission, made by Balboa, one of the new micro-lending organisations described in section one of this chapter, seems to be attentive to the needs of small-scale entrepreneurs. Given that Balboa's business model depended on offering unsecured loans at high rates of interest the concern expressed here could be seen as veiling naked self-interest. Yet it is likely that many of the people who borrowed money from this and other micro-lenders, operating along the same lines as 'Avon ladies' (Dolan and Scott 2009)[16] and similar multi-level marketers in schemes pervasive in South Africa, were using the borrowed money to establish their own enterprises. Borrowers, in other words, are also lenders (James 2015, p.8, 147, 198). The Act, in the end, did not require direct sellers to change their practices. To regulate might have been to circumscribe the activities of smaller operators and leave bigger ones untouched. The case starkly illustrates the contradictory character of the legislation. Every piece of protection offered to borrowers might run the risk of forfeiting a semi-formal income-generating opportunity of the kind enthusiastically embraced by those whom credit apartheid formerly marginalized.

Overall, while members of the business community reiterated the familiar claim that securing market freedom was in consumers' interests, the countervailing position, held by trade unionists and some members of the legal fraternity, was that consumers require protection, including from their own profligacy. The legislation as eventually passed maintained the appearance of an uneasy truce.

Conclusion

Initiatives such as Balboa and Avon represent but the most recent version of long-standing practices. From one point of view, they attempt to penetrate and capitalise on the financial dealings and activities of wage- and salary-earners, and grant recipients, in South Africa. Such initiatives are lauded by some for financial inclusion and democratising credit, for banking the unbanked, and for opening up borrowing to formerly marginalized groups at the 'bottom of the pyramid' (Porteous with Hazelhurst 2004, p.89). Others, suspicious of the greater inclusivity through which businesses and policy makers alike tap into informal economies or create linkages between the formal and informal, decry the 'regressive social and distributional effects' of incorporating informality (Meagher 2012, p.10). Financial inclusivity, in short, can harm those included (Epstein 2005, p.5). Such an approach implies

[15] Balboa submission on the National Credit Bill, 28 July 2005, presented to the Portfolio Committee for Trade and Industry.

[16] Avon Ladies try to make a living by direct selling of beauty products to friends and neighbours, and by recruiting them to the selling network in turn: Avon is 'the most successful direct selling empire in the industry' (Dolan and Scott 2009)

that a new and more insidiously ‘marketised’ version of capitalism is driving vulnerable people with few other livelihood options to help capitalists fleece their neighbours, and that they are thus complicit in the financialisation of daily life. But how clear-sighted a reform package would be required to regulate and ameliorate something in which such complicit participation is already well-established?

There were important distinctions between land and credit apartheid, and land and credit reform. Land arrangements were governed by far more specific, explicitly racially discriminatory laws, while credit arrangements have been governed by laws that seem, on the face of it, more global and less specifically South African. Reforming both proved difficult. If land reform was charged, at least on a symbolic level, with fixing all the problems of apartheid, then it is certainly the case that, even had these laws been accepted and implemented, it would have failed to do so. Time did not stand still: people had little wish to return to a forgotten past as pastoralists or cultivators. They wanted to move forward, they longed for—and many had already achieved—upward mobility alongside a modern, urbane and sophisticated lifestyle. Land reform nevertheless retains some force as a discourse: the state, having initially tried to curb the extent of restitution claims, has now seen fit to extend their validity into the ever-receding future. This has raised suspicions that the promised reforms are being used to defer other, more cogent demands for the restoration of citizenship.

Reforming credit is more complex, the behaviours requiring modification perhaps more puzzling. If *lenders*, for example, operate by the logic of the self-regulating free market, as they claim, then why is state regulation required to restrain them from offering products that will lead borrowers into penury, killing the goose that laid the golden egg? The assumption that *debtors* require protection (Wiggins 1997, p.511), even from themselves, has resonated widely. For those whose aim was to become modern city dwellers rather than remaining in the country to benefit from land reform, but who had slender means for doing so, access to credit simultaneously enabled their aspirations while revealing their precarious character. The state was able to deliver democratic freedoms, but it could not—in a liberalised economy—deliver the means necessary to enjoy the life of the free person. The only way to get that was ‘on tick’. Preventing such investment – not just in the frivolous consumerism over which much media hand-wringing has occurred, but also in valued long-term endeavours like higher education – would require not only that ‘reckless lenders’ stop extending loans but also that ‘reckless borrowers’ stop availing themselves of these.

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