Rights-based restitution in South Africa – developmental land reform or relocation in reverse?

By

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Abstract

The main question of this thesis is to what extent the rights-based and market-driven nature of the restitution program has given rise to a legalistic and bureaucratic process that negates both the demand-driven and the developmental aspects of restitution as land reform. I answer this question by showing that the choice of a Constitutional model with a Bill of Rights provides the background for a rights-based land reform program. This is especially true for the restitution sub-program, one of the three branches along with redistribution and tenure of the overall land reform program. I then consider the debate around the property clause, and how its inclusion provided the context for a market and rights-based approach to land reform as opposed to a supply-led administrative approach. Because the property clause as a First Generation right prevents expropriation of land without market-related compensation, a complex and legalistic land reform program falling within the ambit of Second Generation rights was formulated to address the gross imbalance in land ownership in South Africa.

I argue that the contemporary origin of Second Generation human rights lies within the context of class and anti-globalisation struggles for democracy, and that they are something to be fought for and defended. I discuss the distinction between First, Second and Third Generation rights and identify four spheres within which the struggle for Second and Third Generation rights takes place within modern democratic states. These are the state, the representative public sphere, civil society and the private sphere. I then deal with the problem of trying to turn "paper rights" into realisable rights for the more disadvantaged sectors of society. I also look at what impedes their realisation. I argue that a number of strategies are necessary to ensure the delivery of Second and Third Generation rights. These are an adequate legislative framework, a good communication strategy, the development of institutional capacity to deliver, and if all else fails, access to conflict resolution mechanisms. I consider the major impediments to the realisation of Second and Third Generation rights to be the way in which they are defined in relation to First Generation rights, especially the property clause, the way in which access to rights-backed resources through formal institutions are mediated by the

operation of informal institutions, and the dearth of administrative competence in South Africa.

My point is that in order for Second and Third Generation rights to have practical benefit for the dispossessed and poor, extraordinary measures are needed. The Restitution arm of the land reform program provides in theory just such extraordinary measures, albeit for only a section of the population. I analyse the effectiveness of the Land Claims Court in assisting restitution claimants and the rural poor to realize their rights. I trace the slow and haphazard shift from a positivistic statutory interpretation (narrow, literal, legalistic) to a purposive interpretation (informed by the Constitutional spirit and social purpose of the legislation) by the Court. This is followed by an analysis of the restitution business process, which means tracing the path of the claim from lodgement to settlement. I set out the costly, complex and legalistic implementation and policy process in some detail. My argument is that in order for a rights-based approach to overcome the impediments outlined in Chapter 3, as well as the property clause in the Constitution, its architects designed a complex process that in the end proved counter-productive in terms of its original aims.

The failure of the process to deliver led in 1998 the then Minister of Land Affairs, Derek Hannekom, to appoint a Ministerial Review to investigate the problems. Problems included: slowness of delivery, the crisis of unplannability, low levels of trust between implementers, and high levels of frustration. Two issues are analysed more fully, the rights-*driven* approach as opposed to the rights-*based* approach and the lack of claimant participation in taking control of the restitution process. I examine the relationship of the Restitution Commission to the Department of Land Affairs and to municipal land use planning processes. The emphasis on rights within the restitution program had the effect of distancing restitution, especially in the first few years of the program's existence, from the rest of the land reform program, as well as from the local government process of formulating land development objectives (LDOs), and the Integrated Development Planning (IDP) process. I look at the Port Elizabeth Land and Community Restoration Association (Pelcra) as a

case study as it embodies an approach that tries to move beyond a mere reclaiming of rights in land and attempts to implement a developmental approach.

I conclude that the rights-based restitution program in spite of its many shortcomings has had some success. It has moved slowly from a overly legalistic judicial program to a more administrative but still bureaucratic process, that has delivered only 27 percent of its product as land reform, the rest going to monetary compensation mainly in urban areas. Thus it can be argued that restitution has been more successful as a program to promote reconciliation along the lines of the Truth and Reconciliation Commission, than as a land reform program, especially if one regards land reform as the restoration of rural land to the indigenous population. There have also been some successful attempts by the Commission, such as in the case of PELCRA, to integrate the processing of its claims with local government planning processes, but progress in this direction remains patchy.

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Foreword

Background to the study

This thesis is primarily concerned with the events and legislation leading up to and including the first five years of the land restitution process. The focus is thus on the decade of the 1990s. However, it is not possible to consider the issue of land reform in general and restitution in particular without reference to the preceding centuries of colonial and apartheid land dispossession. Although the spotlight is firmly on the first five years of the restitution process, where relevant reference is made to the subsequent few years (2000 -2003).

In 1997 I participated in a study to monitor and evaluate progress on land restitution within the extremely complex institutional framework that had been set up to drive the process. Subsequent to this, in 1998/99 I was granted two years leave by Rhodes University during which time I was employed as Research Coordinator/Investigations Division Manager at the Commission for Restitution of Land Rights for the Eastern Cape and Free State in East London.
During my tenure at the Commission I was engaged, in my capacity as Investigations Division Manager, in supervising a number of researchers in the processing of rural and urban claims. I was also involved in the development of a coordinated approach to outsourcing and managing large projects such as the Port Elizabeth Land and Community Restoration Association (PELCRA), Macleantown, West and East Bank in East London, and Mpofu District claims, in the Ministerial Review and its aftermath, and in a trip to Germany and Estonia to study their administrative restitution processes. I was also a member of the Department of Land Affairs national restitution policy task team set up after the Ministerial Review. I am also a non-executive director on the board of the Border Rural Committee (BRC), a land and development NGO that was until recently affiliated to the National Land Committee. Many of these institutions and processes are reflected upon and analysed in this thesis.

From a research point of view, the two years that I spent with the Commission gave me unlimited and unique access to documentation, both archival and current, workshops and meetings, restitution claimants and DLA and Commission staff and leadership that very few researchers on the "outside" would have had. From a researcher's point of view it was a most interesting time to be part of the restitution process. By the beginning of 1998 it was clear that the judicially-driven restitution program was experiencing major problems and the search for alternative ways of approaching the program was very much in process. These were exciting times, with many workshops, debates, research and policy papers the order of the day. The Ministerial Review gave Commission and DLA staff the opportunity to integrate practical experience gained in the field with the political and policy objectives to forge a more workable program. Because of my research and academic background I was fortunate to be selected to go to Germany and Estonia to study their administrative approach to restitution. With my two colleagues, Mashile Makona and Cecelia De Bruyn, I was fortunate to interview people ranging from local government officials, private attorneys, judges, to restitution and land reform personnel. On our return we compiled a research report that we presented to the DLA/Restitution Commission. One of the problems of the research was the very different conditions pertaining in two European countries moving from a situation where land had been nationalised under communism to one of privatisation, to that in post-apartheid South Africa. However, many valuable lessons were learned.

It is important to point out that throughout my involvement in both the Commission on Restitution of Land Rights and with the BRC, I have, and continue to do so in the case of the latter, engaged with them primarily as an academic sociologist and rural development researcher. As such I have remained critical, as this thesis reflects, of land reform and the restitution process. What my involvement with both the Commission and the BRC, as well as my position in the Sociology Department at Rhodes University, has afforded me, is a unique insight into the attempt to deliver restitution rights to dispossessed people, from three different vantage points, as an academic researcher, a practitioner, and as a member of an NGO that has engaged critically and constructively with the land reform process.

Methods of data collection and analysis

Macdonald and Tipton (1993:199) argue that within the positivist/empiricist tradition that underlies survey research, *validity* and *reliability* are "secured within the method itself". Thus the layout of the questionnaire, the meaning of the items, the reproducibility of the scales, the representativeness of the sample, are all "concerned with a particular predefined topic, method and data source". The same is not however true for other modes of research. The most accepted way of achieving validity within the social sciences, outside of the positivistic/empiricist tradition is through what has become known as *triangulation.* The concept is most readily associated with Denzin (1970, 1978) who developed a framework within which validity is seen as having both external and internal aspects. He defines triangulation as using an intersecting set of different research methods in a single project.

Denzin (1970) puts forward four kinds of triangulation, concerning *data, the investigator/researcher, theory* and lastly, *methodology*. Data triangulation has three subtypes: time, space and person. What this means is that data should be collected over time, in different locations, and from a range of people and institutions. Investigator triangulation requires the use of more than one researcher to research the same subject. Theory triangulation requires the application of more than one theoretical approach to develop categories of analysis. Macdonald and Tipton (1993:199) point out that this is the most difficult kind of triangulation to achieve and argue that even its proponent, ie. Denzin, can only "adduce a hypothetical example" and that "the three theoretical approaches he draws on are in fact quite closely allied". Methodological triangulation has two subtypes: within method and between method triangulation. The first refers to the inclusion of a variety of research tools to elicit different types of information, for example closed-ended and open-ended questions; the second to using different methods such as documentary research, individual interviews and participant observation.

An evaluation of the research process for this project to assess the validity of the data and analysis, using Denzin's method, reveals that many of the requirements of

the triangulation method were adhered to.

Data was collected over an extended period of time. Primary data was collected from the 1996 to the year 2000, while secondary data concerned with the social, political, economic and legal background to land restitution and land reform was collected over a period spanning a number of decades. Research information was obtained from a variety of locations, institutions and individuals: internationally (including Germany and Estonia), nationally (the Constitutional and rights process, land reform and the restitution program), provincially (the Eastern Cape Commission on Restitution of Land Rights, and the Provincial Department of Land Affairs) and locally, (the Port Elizabeth Land and Community Restoration Association and Macleantown restitution cases.

A doctoral thesis by its very nature is a singular activity and precludes investigator triangulation. I did however consider the research findings of many researchers working in the same field.

Theory triangulation was achieved in the following manner. At an epistemological level the study falls primarily within the critical perspective, although it includes phenomenological elements. Put in another way it is predominantly substantialist with aspects of subjectivism (Johnson, Dandeker and Ashworth 1984). Harvey and Macdonald (1993:7) define the critical perspective as having the following objective:

To know the world we thus have to relate observable social phenomena to the wider social context. We can only know what something means if we understand how it has come about historically or how it relates to social structures.

Although the thesis is written from a predominantly critical or substantialist perspective, I have included aspects of the subjectivist approach so as to illuminate the structural and historical aspect through giving the people affected by the processes described (the subjects) a presence. Because the primary focus of the

thesis is the intersection of economic, political and historical events with the implementation of state policy through administrative and legal structures, actual people make an abstract appearance within the text. Their presence underlies the attempted implementation of a rights-based restitution process through both the difficulties of the demand-led aspects of the process as well as through the exploits of the various individuals, organisations and communities that shaped the design and implementation and suffered the impact of the restitution process.

The thesis also includes a number of different theories on the historical origin and the difficulties of achieving human rights, the distinction between First, Second and Third Generation rights, the theoretical issues underpinning the debate on Constitutional as opposed to sovereign parliamentary systems, civil society and the relative merits of the supply-led administrative system as opposed to the demand-led rights-based system.

Methodological triangulation was achieved through using two different research methods to obtain and crosscheck data. These were documentary research and field research. The latter is comprised of two sub-methods, namely direct observation and individual and focus group interviews.

The first method used was that of documentary research. The term "documents" covers a wide range of materials, but for the purposes of this study I will divide them into two broad categories, namely primary sources and secondary sources. Both were utilised extensively, especially primary sources. As Research Manager of the Eastern Cape Restitution Commission I had unlimited access to all claimants files, the computerised database of national claims, as well as the specific database of the PELCRA claim. Each file typically contained documents such as the official claimant application form, sworn avadavats, title deeds, historical documents pertaining to the removal both official and private, newspaper cuttings, and personal letters. In addition I had access to a large number of judgements from the Land Claims Court and the High Court, position papers, policy documents, especially those concerned with and generated in the aftermath of the Ministerial Review conducted in 1998/99.

These are listed in the references section, as are the secondary sources. Internal methodological validation was thus ensured through a careful scrutiny of a wide variety of documents.

The second research method used was that of field research, which included direct observation as well as individual and focus group interviewing. The direct observation was comprised of participant observation; with elements of what is know as "action research". Participant observation involves the researcher in participating in the activity they are studying while observing the behaviour of the participants. There are different degrees of participation, ranging form total participant (where none of the participants know that the researcher is studying them) to total observer (where the researcher sits on the sidelines and observes behaviour). Action research is a method that has the duel aim of research and action. There are three requirements. First, it is a cyclical or spiral process which alternates between action and critical reflection; second, it is primarily qualitative; and third, it is participatory in the sense that the subjects or community who are part of the study actively participate in the action-research process. This last requirement is especially important within a variant of action research known as Participatory Action Research (PAR). PAR is aimed at bringing about action that " induces positive, progressive, remedial and corrective social change or transformation" (Babbie and Mouton 2002:321).

As stated, the present study, while drawing on elements of these two methods, was more in the mould of a participant observation study than an action research one. For two years I participated in the activities of both the Restitution Commission as well as the Border Rural Committee, kept careful notes and collected as much documentation as possible. Although much of the research completed during the two years led to action in the form of the processing of claimants claims and the award of monetary compensation or land and developmental services, there was no intention on my part to do an action research study nor was the process set up to be participatory in the sense described above.

Much has been written about participant observation and objectivity (Babbie 1989: 286-289, Harvey and MacDonald 1993: 186-188) I will not enter into that debate here. Suffice to say that I have endeavoured at all times during the research process and in the writing of this thesis to engage with my research data in an ethical manner and have relied on peer review in terms of presenting papers at conferences and ongoing debate around many of the issues dealt with in this thesis.

The second aspect of field research conducted for this study was that of individual and focus group interviews. Babbie and Mouton (2002:289) state that qualitative interviewing design is characterised by being "flexible, iterative and continuous, rather than being prepared in advance and locked in stone". The idea, and one that was relentlessly pursued in this study, was to gather information based on a loose framework of questions, but to have the freedom to explore interesting aspects, which in turn would yield further and more refined questions for future interviews, especially after careful analysis of the data obtained from each interview. A number of individual interviews as well as focus groups were conducted in South Africa, Germany and Estonia. A full list of the judges, researchers, government officials, NGO personnel, and restitution claimants interviewed is included in the footnotes and references. Focus groups were conducted as an alternative to individual interviews as much for the sake of convenience (enabling me to interview a number of people at the same time), as it was to get people to discuss issues and come to a deeper understanding than they would have had they been interviewed on their own.

It is generally accepted within the academic fraternity that objectivity is something to strive for but not entirely achievable. The best we can do as social scientists is to make our prejudices clear, to lay our epistemological, methodological and moral cards on the table. Epistemologically I have tried to co-join a realist and phenomenological approach, methodologically to analyse the structures that underlie social phenomena but to recognise the subjective experiences of individual actors. Morally, I am prejudiced towards redistributive justice to achieve equity within a framework of sustainable development. I believe that these rights have to be fought for by citizen action within the arena of civil society-state relations (participatory

democracy) in order for them to be realised in a meaningful way, especially within land reform.

Acknowledgement

A number of people have made this thesis not only possible but have actively contributed to the shaping of its content. Three people stand out above the rest. The first is Fred Hendricks my supervisor who offered advice and encouragement. Thank you. The other two are my wife Sarah Sephton and my son Daniel. Sarah assisted me with some of the legal aspects but also spent many hours on her own with Daniel while I grappled with the intricacies of restitution and rights. Thank you to both of you.

I would also like to acknowledge the contribution of all the restitution practitioners and claimants that grace these pages, especially those involved in the Port Elizabeth Land and Community Restoration Association claim. Finally, thank you to my parents Andrew and Petro Roodt who have always believed in me and encouraged me in my endeavours.

Introduction

The loss of land and the human rights abuses that accompanied this loss through colonial conquest, racial segregation and class domination in South Africa has been well documented by a range of scholars from different theoretical backgrounds. So too has the struggles against this domination and discrimination, ranging from the day to day battle for survival so eloquently portrayed by Sol Plaatjie, to the more academic class analysis of the Marxist political-economists of the 1970s such as Harold Wolpe and Martin Legassick.

Loss of land and its return has been a central concern for liberation movements in anti-colonial struggles around the world. South Africa is no exception, although the largely urban focus and support base of South Africa's dominant political party, the African National Congress has led commentators such as Levine and Weiner (1997) to argue that land reform, especially rural land reform, has not received the attention that it should have. The lack of centrality of the land question in the policies of the ANC pointed to by Levine and Weiner was further exacerbated by the compromises the liberation movement and its allies were forced to make during the negotiations process that led to the formulation of first the Interim Constitution and then the final 1996 Constitution. Another factor was the type of land reform model favoured by the ANC itself.

The major compromise the liberation movement and its allies made with regard to land reform was the acceptance of a property clause in the Constitution. What this clause effectively did was to entrench three and a half centuries of colonial dispossession in a situation where over 87 per cent of the land was owned by a small white minority, and forced the state and the dispossessed indigenous population to engage in complicated and legalistic procedures to buy the land back for purposes of restitution and redistribution. The ANC government argues that the property clause is a feature of many Constitutions around the world and that it is

necessary to maintain confidence in the land market.

The emphasis on the market is an intrinsic feature of the new land reform model developed by the ANC during the negotiations process, and one favoured by the World Bank which assisted in its formulation. In a post-cold war globalizing world dominated increasingly by neo-liberalism, the United States of America and international financial institutions, supply-driven administrative approaches to land reform and socially-engineered re-settlement schemes were no longer in favour. Instead, the emphasis was on market-driven demand-led approaches delivered through a mix of rights-based and discretionary administrative procedures. If the equitable distribution of land and the socio-economic upliftment of the dispossessed is the ultimate aim of the market-driven model, then a central question needs to be asked: to what extent can land reform and development, as Second and Third Generation rights in the Constitution, triumph over the property clause and the defence of social and economic privilege that this represents? (as a First Generation right).

For the land restitution program, which is the central concern of this thesis, the rights-based approach with a dedicated Restitution Act, Land Claims Court, Commission, and the dedicated support of many institutions of civil society, the chances would seem reasonable; more so than the discretionary administratively delivered redistribution and tenure branches of the land reform program. But the rights-based restitution program may have a greater chance of success than rdistribution, but its ability to address the vast inequality in land ownership is limited by the narrow parameters of its mandate, the legalistic application of the registration process, and the strict application of the qualificatory criteria, especially the 1913cut-off date. The further narrowing of the parameters due to the Cremin judgement, which insisted that only direct descendents qualify, and the initial exclusion of betterment claims, further serves to limit the extent of restitution's contribution to addressing the urgent need for land reform in South Africa. Those qualifying for restitution make up a small proportion of those in need of land, and an even smaller proportion of the total population.

Structure of the thesis

In Chapter one I set out the research questions on which the thesis is based. The broad research question is to what extent the rights-based and market-driven nature of the restitution program has given rise to a legalistic and bureaucratic process that negates both the demand-driven and the developmental aspects of restitution as land reform? This formulation gives rise to a number of sub-concerns, such as whether the (over)emphasis on rights leads to a situation where the restitution process is *rights-driven* rather than rights-based. Also, does the decision to make land reform market-driven (property clause, willing seller, willing buyer) impede the implementation of land reform in general and restitution in particular? Does the rights-based and market-driven approach to the restitution program make it legalistic and bureaucratic? Another concern is the extent to which the restitution process is demand-driven, or to put it in another way, to what extent are claimants able to actively participate in the restitution process and make informed decisions about the options available? Lastly, to what extent does the (over)emphasis on rights in the restitution process lead to a disjuncture between the program and broader developmental processes (integrated development planning at local level)?

I answer these questions by showing why South Africa's legislators chose a Constitutional model with a Bill of Rights as opposed to a Sovereign Parliament model. For the ANC the commitment to a Bill of Rights goes back to the Freedom Charter and the emphasis was on the protection and promotion of Second Generation socio-economic rights, whereas for the National Party and its allies, First Generation rights such as the property clause were paramount. This provides the background for a rights-based land reform program, especially restitution. I then consider the debate around the property clause, and how its inclusion provided the context for a rights-based approach to land reform as opposed to a supply-led administrative approach. Two other issues of relevance to shaping the land reform program are the market-based approach and the demand-led aspect. The first is encouraged by the World Bank involvement in the formulation of the land reform program and necessitated by the property clause, while the second is inspired by the post-cold war emphasis on civil society and participatory democracy. Having

analysed the rights–based nature of land restitution in South Africa, I turn in Chapter 2 to an examination of where the rights phenomenon originated.

In Chapter two I examine the concept of human rights. My purpose is to look briefly at the philosophical foundations of human rights, specifically the consensus amongst many scholars that the issue of human rights stems from a liberal political tradition, while others, stress its world-wide modern post-second world war origins. I argue that rights within the context of class and anti-globalisation struggles for democracy are something to be fought for and defended. I discuss the distinction between First, Second and Third Generation rights and identify four spheres in which the struggle for Second and Third Generation rights takes place within modern democratic states. These are the state, the representative public sphere, civil society and the private sphere. Having explained the philosophical foundations of human rights and identified the spheres within which they need to be realised, I look at the question of why especially Second and Third Generation rights are so difficult to implement.

The third chapter deals with the problem of trying to turn "paper rights" into real rights for the more disadvantaged sectors of society, and what impedes their realisation. I argue that a number of strategies are necessary to ensure the delivery of Second and Third Generation rights. These are an adequate legislative framework, a good communication strategy, the development of institutional capacity to deliver, and if all else fails, access to conflict resolution mechanisms. I consider the major impediments to the realisation of Second and Third Generation rights to be the way in which they are defined in relation to First Generation rights, the way in which access to rights-backed resources through formal institutions are mediated by the operation of informal institutions, and the dearth of administrative competence in South Africa. Chapters two and three are thus an attempt to examine the human rights phenomena and the impediments to their realisation. My point is that in order for Second and Third Generation rights to have practical benefit for the dispossessed and poor, extraordinary measures are needed. The Restitution arm of

the land reform program provides just such extraordinary measures, and I turn in the following chapters to a study of its different aspects.

Chapter four examines the role of the Land Claims Court (LCC) in the restitution process. In this chapter I start by outlining what the aims of restitution are, and then proceed to analyse the effectiveness of the Land Claims Court, as well as the High Court in assisting restitution claimants and the rural poor to realise their rights. I trace the original rationale of the policy makers for the Court and examine the difference between the High Court and the Land Claims court. This involves a brief discussion of the adversarial and inquisitorial modes of operation as well as the slow and haphazard shift from a positivistic statutory interpretation (narrow, literal, legalistic) to a purposive interpretation (informed by the Constitutional spirit and social purpose of the legislation) by both courts.

In Chapter five I examine the second main aspect of the restitution program. I look at the way in which the Commission on Restitution of Land Rights operates. This entails an analysis of its business process, which means tracing the path of the claim from lodgement to settlement. I set out the costly, complex and legalistic implementation and policy process in some detail. My argument is that in order for a rights-based approach to overcome the impediments outlined in Chapter 3, as well as the property clause in the Constitution, its architects designed a complex process that in the end proved counter-productive in terms of its original aims. The failure of the process to deliver led in 1998 to the then Minister of Land Affairs, Derek Hannekom to appoint a Ministerial Review to investigate the problems.

Chapter six examines the 1998 Ministerial Review. I sketch the background to the Review, the establishment of the Review Team, and then outline the findings. These include: slowness of delivery, a lack of ability to plan, low levels of trust between implementers, and high levels of frustration. Two issues are analysed more fully, the rights-*driven* approach as opposed to the rights-*based* approach and the lack of claimant participation in taking control of the restitution process, in particular in the choosing of restitution options. Both of these issues underlie the broader problem of the lack of integration of restitution with the land reform program as a whole, and

with land and development planning at local government level. I take up this issue in the next chapter.

In Chapter seven I examine the relationship of the Restitution Commission to the Department of Land Affairs and to municipal land use planning processes. The emphasis on rights within the restitution program had the effect of distancing restitution, especially in the first few years of the program's existence, from the rest of the land reform program, as well as from the local government process of formulating land development objectives (LDOs), and the Integrated Development Planning (IDP) process. I examine a number of initiatives that emerged which attempted to integrate restitution with municipal planning processes. These included the Port Elizabeth Land and Community Restoration Association (PELCRA) claim in Port Elizabeth, Macleantown near East London, the Development Facilitation Act Task Team within the DLA and the Gauteng Regional Land Claims Commission's attempts to pioneer a development integrated approach.

In chapter eight I look at PELCRA as a case study as it embodies an approach that tries to move beyond a mere reclaiming of rights in land and attempts to implement a developmental approach. This chapter includes the history of forced removals in Port Elizabeth, a description of the land claimed and nature of the rights lost, the early struggle for restoration prior to the establishment of the Commission, and an account of how PELCRA's claim was characterised by an attempt to develop a genuine demand-led participatory approach. The rest of the chapter outlines PELCRA's unique restitution process, characterised not only by its integration into state planning processes and its developmental aims, but also by its emphasis on equity.

In the concluding chapter I argue that in a situation of such gross inequality of land ownership as we have in South Africa, the entrenchment of a property clause in the Constitution opts for short-term stability in the land market in an attempt to attract foreign investment for medium and long-term instability. In such a situation of gross inequality in land ownership and the economic and social inequality attendant on this fact, a market-led and demand-driven approach to land reform that has to fashion

itself around the impediment of the property clause is not able to deliver the requisite quantity and quality of land and development to make a real difference.

This shortcoming applies to a greater extent to the administratively delivered redistribution and tenure branches of the program, as both the Pretoria head office and many of the provincial offices are administratively challenged, overly bureaucratic, under funded, and lacking in the ability to communicate effectively with a largely impoverished and illiterate population.

The rights-based restitution program on the other hand, in spite of its many shortcomings, has had greater success. It has moved slowly from a overly legalistic judicial program to a more administrative but still bureaucratic process, that has delivered only 27 percent of its product as land reform, the rest going to monetary compensation mainly in urban areas. Thus it could be argued that restitution has been more successful as a program to promote reconciliation along the lines of the Truth and Reconciliation Commission, than as a land reform program, especially if land reform is seen as the restoration of rural land to the indigenous population. There have also been some successful attempts by the Commission, for example in the case of PELCRA, to integrate the processing of its claims with local government planning processes, but progress in this direction remains patchy.

Chapter 1

Of Sovereign Parliaments and Constitutional rights

1.1 Introduction

> Unless we settle the land question, we do not have a country. If we handle it badly, we tear South Africa to pieces. If we manage it well, we create the foundations of a truly united nation. The massively unequal distribution of land is not just the unfortunate legacy of apartheid. It is the totally unacceptable continuation of apartheid. Unless we solve the land question, we cannot solve the human question, we cannot deracialise the economy, we cannot achieve in the future a secure legal regime where property rights are respected by all. The legacy of forced removals and dispossession must be addressed as a fundamental point of departure to any future land policy. Effective measures to ensure that landless people gain access to land on fair terms and a legal process to deal with competing claims to land, will be introduced by an ANC government as a matter of priority. – *Cyril Ramaphosa, African National Congress (ANC) Secretary General, addressing the Land and Agriculture Policy Centre (LAPC) conference, 1993.*

More than ten years have passed since the ANC Secretary General's passionate exposition of the centrality of the land question in overcoming the massive inequalities generated by colonialism and apartheid in South Africa, and his commitment of the party to "effective measures" to address the problem. In those ten years, momentous for more than the fact that they span the end of one millennium and the beginning of another, much has happened to bring to fruition the commitment made on the eve of South Africa's first democratic general election. But in spite of the much that has happened, the land reform program in South Africa has not effectively addressed the land question.

The success of the multi-party negotiations in the transition of South Africa from an apartheid state to a democratic one, almost certainly saved the country from exploding into a fully-fledged civil war. Prior to 1994 many people lost their lives as the apartheid regime tried to limit the impact of the transition through hit squads, political assassinations and the setting up of pockets of armed resistance. The most extreme example was in KwaZulu-Natal, where 17 000 people died in the decade preceding constitutional negotiations in a concerted war for political control of the province between the ANC and the Zulu nationalist movement Inkatha (Institute of Peace and Conflict Studies 2003:3). The negotiations also led to the drawing up of the interim and final Constitutions, the latter with a Bill of Rights, giving direction to and limiting under the scrutiny of the courts, the formulation of laws by parliament and their implementation by the state. These negotiations were hard fought, on both the side of the establishment with their vested minority interests and on the side of the liberation movement in all its diversity (communists, African nationalists, trade unionists, NGO activists, through to left/liberal rights activists), all in the shadow of the globalising international community and its financial representatives such as the World Bank, International Monetary Fund and World Trade Organisation.

Importantly, the Bill of Rights addressed the issue of land, one of the most hotly debated issues in the constitution and one of the last to be finalised, especially the question of property rights. In an attempt to address the concerns of property owners, while putting in place a land reform program to address the concerns of the landless, the Constitution provides for the protection of existing property rights but also contains measures that enable the state to redistribute land within a market-driven model. Underlying this rights-based approach was the belief that it was necessary to maintain confidence in the land market, to attract foreign investment and to learn from the lessons of other countries that have attempted to implement supply-led land reform. Supporters of the rights-based approach to land reform, such as the ANC and its think-tanks such as the Centre for Applied Legal Studies at the University of the Witwatersrand (Wits) and the Land and Agriculture Policy Centre (LAPC), originally believed that the constitution and the Bill of Rights provide adequate power for the state, the landless and civil society to overcome the

impediment of the protection of property clause (Swanson1992; LAPC 1993). Underlying this approach is the justiciability of so-called "second generation rights", such a the right to restitution, tenure upgrade and redistribution, that would ensure that private land rights are not sacrosanct and place an obligation on the state to provide land to those who need it to survive.

For many critics, such as the National Land Committee (NLC), Levine and Weiner (1997) and Bernstein (1997), the injunction on the state to protect existing property rights (obtained through force and discriminatory legislation over hundreds of years of colonialism, segregation and apartheid) while addressing the needs of the landless and rightless majority in more than a cosmetic way, resulted in a conundrum which would effectively provide more work for the legal fraternity than for those entrusted with the implementation of the land reform program. They argue for the removal of the property clause and a supply-led administrative approach with large-scale expropriation without market-related compensation of land by the state, as the only effective means of addressing the radical imbalance in racial land ownership in South Africa.

A third approach, which I will designate as "developmentalist", argues for the integration of restitution with the other two sub-programs of the land reform program (tenure reform and redistribution) and the integration of all three land reform components into provincial, district and local level planning. This position is one that emerged within the Restitution Commission from 1998 onwards, within the Regional Land Claims Commission for the Eastern Cape and Free State, as well as in Gauteng and some of the other provinces. Thus land reform is seen as an integral component of a coherent rural and urban development strategy, driven by a real involvement of local participants. The integration of restitution with the tenure and redistribution components of the land reform program, challenges the underlying assumption of both the above approaches, but especially the former, that the restoration of land rights is an end in itself. This argument is based on two points. That restitution cannot be separated from the other components of land and agrarian reform because to give back what people lost is in most cases inadequate given the

growth in communities and extended families and because people had so little in the first place due to colonial conquest prior to 1913. In addition restitution in many cases involves tenure upgrade. Secondly, land and agrarian reform cannot be separated from the issue of development because all land falls under local government and in order for successful restitution claimants to receive services and infrastructure they need to be included in provincial and local integrated development planning. I would argue that the effective integration of restitution into local planning will also eliminate the lengthy delays in proposed land development where restitution claims are pending but not prioritised by the Commission on Restitution of Land Rights.

In reality South Africa's land reform program contains elements of all three positions outlined above. Restitution, the Extension of Security of Tenure (ESTA), and the Interim Protection of Informal Rights Act (IPILRA) are rights-based programs/acts that have relied on the courts to enforce their provisions. This is especially true for the restitution program in the early days of its existence. The redistribution and tenure programs are discretionary and have been implemented through the administrative mechanism of the provincial Department of Land Affairs offices with major inputs from private consultants. Since 1998 there have been initiatives to move restitution to a more decentralised administrative approach, for a closer working relationship with the redistribution leg of the land reform program, and to integrate both restitution and redistribution projects with provincial and district planning in an attempt to insure a modicum of post-settlement developmental viability. However, these efforts have not been very successful and many problems remain.

In this thesis I will consider land restitution as a constitutional right and examine it within the context of reconciliation, land reform and development. The reason for this is that internationally, and South Africa is no exception, land restitution is expected to not only restore what was lost (either materially or symbolically) but because of its cost, to contribute to land reform, democratic restructuring and social and economic development. This leads me to consider the following theoretical issues:

- What is a right? How did we arrive at this emphasis on human rights? What is the difference between First, Second and Third Generation rights? Is there a contradiction in liberal capitalist states between First, and Second and Third Generation Rights?
- What are the major impediments to the delivery (or realisation) of rights, especially Second and Third Generation rights? How do you overcome the contradiction between First, and Second and Third Generation rights?
- Do attempts to deliver rights sometimes become an end in itself (a rights-*driven* process)? Does the contradiction between First, and Second and Third Generation rights (the latter two taken together) contribute to this?
- Why should rights be part of a broader process of land reform, the development of democracy and socio-economic development?

The same questions can be reformulated in a more substantive way. The broad research question on which this thesis is based is the following: to what extent did the rights-based and market-driven nature of the restitution program give rise to a legalistic and bureaucratic process that negated both the demand-driven and the developmental aspects of restitution as land reform? This formulation gives rise to a number of sub-concerns:

- Did the (over)emphasis on rights lead to a situation where the restitution process was *rights-driven* rather than rights-based?[1]
- Did the decision to make land reform market-driven (property clause, willing seller, willing buyer) impede the implementation of land reform in general and restitution in particular?
- Did the rights-based and market-driven approach to the restitution program make it legalistic and bureaucratic?
- To what extent was the restitution process demand-driven, or to put it in another way, to what extent were claimants able to actively participate in the restitution process and make informed decisions about the options available?

[1] Rights-*driven* as opposed to the more usual rights-based makes the point that restitution was driven largely by the Court and Commission staff and that its prime focus is on the restoration of a right in land rather than a claimant-driven process (participatory) that is developmental and sustainable and integrated into municipal planning.

- To what extent did the (over)emphasis on rights in the restitution process lead to a disjuncture between the program and broader developmental processes (integrated development planning at local level)?

The process of land reform in general and restitution in particular cannot be understood outside of the context of the broader political process leading up to the 1994 democratic elections. A number of issues are of relevance. Firstly, the negotiations leading to the drawing up of the interim and final Constitution and the inclusion of a Bill of Rights emphasising not only first generation civil and political rights (including property rights), but also social and economic rights, provided the context for the rights-based land reform program. Secondly, the involvement of the International Bank of Reconstruction and Development, the World Bank (WB), helped to entrench a market-based approach. Thirdly, the anti-statist tendency prevalent in the wake of the collapse of the Soviet Union and its Eastern European satellites, as well as the resurgence of the civil society/participatory democracy paradigms tipped the scales toward a demand-driven rather than a supply driven administrative approach.

South Africa's land reform program is thus the outcome of a number of choices made in the lead up to and during the negotiations leading to the adoption of the final Constitution. These choices, amongst others, were between a Sovereign Parliament model and a Constitutional Bill of Rights model; a Bill of rights with a property clause or one without; a non-market and a market-driven model; and a supply-driven administrative and a demand-driven participative model.

Due to a variety of influences and compromises the legislators chose a constitutional model including a Bill of Rights with a property clause and for the land reform program a market-driven, demand-led participative model. As I will show in subsequent chapters, certain of these elements have proved to be ineffective or been subverted in practice. I will argue in this thesis that to a large extent this ineffectiveness and subversion is as a result of the inappropriateness of this model to the conditions existent in South Africa as it ignores the extremes of inequality in land ownership and the extent of poverty with its attendant symptoms. In the next

two sections, I will look at why South Africa's legislators chose a Constitutional model as opposed to a Sovereign Parliament model, and how this provided the context for a rights-based approach to land reform as opposed to a supply-led administrative approach. I will also assess the impact of the property clause on land reform and the restitution process.

1.2 Of Sovereign Parliaments and Constitutional rights

In the early 1990s, due to international pressure and resistance from the liberation movements and their internal allies, the De Klerk regime was forced to unban the ANC, PAC and the South African Communist party, lift the state of emergency and release Nelson Mandela to enter into a process of negotiations that lead to South Africa's first democratic elections. The representatives of the various parties at the World Trade Centre had to make a number of choices during the negotiations process. One of the fundamental choices on a broad political level, was the choice between a Constitutional dispensation with a Bill of Rights (as in the United States of America) or for a Sovereign Parliamentary system (as in Great Britain and France).

The first option involves the adoption of a Constitution with a Bill of Rights setting out clearly First Generation civil and political rights and Second Generation social and economic rights. The purpose of such a Constitution with a Bill of Rights is to provide guidelines to Parliament in terms of law and policy-making, to give the courts the power to decide whether laws passed by parliament are just in terms of the Constitution, but more importantly, to provide guidelines to the courts to ensure that every citizen has the right to administrative action that is lawful, reasonable and fair. As Devenish argues:

> Judicial intervention is no longer premised on the idea that courts are simply applying the will of an omnipotent parliament. Their role is to articulate a number of immanent principles which must guide the exercise of administrative action, and to interpret legislation in the light of principles and ethos of the Constitution....(2001:6).

First Generation rights are considered justiciable, while there is some debate as to the justiciability of Second Generation social and economic rights (Ambrose 1995, Haysom 1991, Leyshon 1990). Thome (1993:3) suggests that constitutions serve two overlapping functions: "they protect individual rights, and they form an obstacle to certain political changes which would have been carried out had the majority had its way". The latter is considered a protection against simple majoritarianism.

Opponents of this approach, that is those that support a Sovereign Parliamentary system, argue that rights depend not on legally enforced constitutions, but on law made by elected and accountable members of parliament as an expression of the sovereign will of the people. As Henkin states, "people can enjoy no rights in competition with Parliament...any other approach would automatically undermine the means through which people exercise their sovereign, general will" (in Leyshon 1990:10) In essence what this means is a choice between constitutionally and judicially limited government, as is the case in the United States of America, and unlimited government such as the Parliamentary Sovereign French model. It is argued, by Leyshon amongst others, that the latter allows a more unfettered and substantial transformation of society.

The reasons for South Africa settling on the Constitutional Bill of Rights model are complex and many. Suffice to say here that it was a combination of a desire on the part of the liberation movement and its allies to move as far away as possible from the brutal excesses of a rightless past for the majority of South Africans, the human-rights background of many of the negotiators and legislators, and the fears of the white minority of a majority-ruled Parliament. While there may have been agreement between the liberation movement and the white minority over the need for a Constitution and a Bill of Rights, the emphasis in terms of rights was quite different. For the former the inclusion of second generation rights to empower the new government and to oblige the national, provincial and local administrations to address the inequality in the allocation of resources was paramount. For the latter, first generation rights, such as the right to freedom, privacy, speech, to vote, religion, and most importantly, to private property, were more important.

In South Africa the appeal of a Constitutional Bill of Rights model over a Sovereign Parliamentary approach came from all sides of the political spectrum.

From the perspective of the ANC and its allies, which I will designate by the popular epithet of "Mass Democratic Movement" (MDM), the attraction of a Sovereign Parliament and the potential of this model for the implementation of rapid and unencumbered (by a conservative judiciary inherited from the apartheid regime) transition, was offset by a number of collectively more important issues. Thome (1993:3) asks the important question: why should a government which represents the majority be restrained by constitutional provisions? The answers to this question are two-fold. There is no doubt that historical events in the decades prior to the negotiations played a major role in the choice, but as important were the arguments provided by constitutional writers internationally, drawing on what Haysom characterises as "human rights jurisprudence"(1991:102). I will consider the historical experiences and then look at the theoretical constitutional rationale.

The first was the need to make a complete break from the apartheid autocracy with its lack of rights for the majority of the population, and its rule by an unrepresentative parliament which under former President PW Botha was virtually a rubber stamp for the executive/military alliance that ruled largely by decree. The previous regime according to South African constitutional writer Van der Vyver (1989:140) had perverted the doctrine of parliamentary sovereignty. This "perversion" of parliamentary sovereignty, led many critics to perceive it as a fundamental flaw in the model itself, and to argue strongly for a Constitution to protect the citizenry from such excesses by any future government. A Constitution was seen as particularly necessary given South Africa's fractured past.

Secondly, there was the realisation that in a negotiated transition, in a situation where conservative and in many cases reactionary elements in both the private and public sector would still be in place and in a position to undermine a transformation agenda, Constitutionally guaranteed rights offered the best protection to the

previously disenfranchised sectors of the population. It was envisaged that these Constitutional rights would be enforceable by the judiciary and driven by an alliance of groupings broadly sympathetic to the program of the majority party, both within the state and civil society. The irony of course is that constitutional rights protect the privileged as well, often more so than the formerly disenfranchised. For the MDM the extent to which constitutional rights would be able to offer sufficient protection to the latter hinged on the outcome of the negotiated settlement, which process determined the strength of the second generation social rights in relation to the first generation rights.

Thirdly, human rights activists within the MDM, against the background of the rise of the doctrine of participatory democracy/human rights/civil society and the collapse of the totalitarian regimes associated with the Soviet Block and in parts of Africa, Asia and South America, realised the need for the entrenchment of constitutional legally enforceable rights to protect citizens against the excesses and administrative inertia of future governments, no matter how "progressive" their initial image. Human rights activists, looking beyond the euphoria of the coming democratic elections and the ascendance of the liberation movement to power, realised that the future held no guarantees for either the people or the incumbent ANC and its allies. This maxim was clearly demonstrated by the demise of the Congress Party of India as the ruling party, "that once impregnable organisation (that) lost its mystique as the natural party of the government" (Leyshon 1990:8).

For the ANC the commitment to a Bill of Rights goes back to the Freedom Charter drawn up in 1955. This tradition was continued in the ANC's *Constitutional Guidelines for a New South Africa* released in 1989. In October 1990 the ANC's Legal and Constitutional Committee published a draft Bill of Rights, drawing from and going beyond the previous two documents. It incorporated First and Second generation rights based on "advances which have taken place in human rights jurisprudence in the last half century" (Haysom 1991:102). One of the main aims of the draft Bill was, through its commitment to political pluralism, cultural and religious freedom, to counter the pre-1994 government's insistence on the political protection of minority group rights. According to Haysom (1991:103), a member of the ANCs

Constitutional committee at the time, "by unambiguously guaranteeing political and cultural rights - as individual rights enforceable by an independent judiciary - the Bill undermines the need - and hence the demand - for group rights". However, in spite of the constitution's guarantee of individual rights, protection of language rights, one of the defining characteristic of groups, found its way into the South African constitution.

But the main attraction for the ANC of constitutionally-entrenched rights went beyond mere tactical intervention. The explanatory note to the proposed Bill argues that:

> The idea of basic rights and freedoms means the most to those who have suffered the most. In South African conditions, a Bill of Rights becomes a fundamental anti-apartheid document. It guarantees equal rights for all citizens and defends each and every one of us against the kinds of tyranny and abuse which have flowed daily from the apartheid state. It is not the Constitution which creates the rights, rather, the Constitution recognises and protects the rights which have been gained in struggle, struggle by the people of South Africa and struggle by the people the world over (Quoted in Haysom,1991:103).

Judge Albie Sachs (in Budlender 1998:1-14) shows that the "the great prototype Bill of Rights contained in the early amendments to the US Constitution, was designed to root out once and for all the kinds of oppressive behaviour indulged in by supporters of the Crown. Applied to South Africa ...the Bill of Rights would confront and outlaw all specific forms of oppression associated with apartheid: the whole system of racial domination, the pass laws, legally enforced removals, the Group Areas legislation".

For those participants in the negotiations process with a vested interest in the apartheid status quo, such as the predominantly white parties and the bantustan-based leaders, the implementation of a Bill of Rights would serve a different purpose, namely the safeguarding of economic and property assets. Leyshon

(1990:2-3) points to the differences with regard to a proposed Bill of Rights between what he terms an "attempt to preserve the White South African way of life" by the South African Law Commission with an emphasis on First Generation civil and political rights, including a property clause, and the above mentioned emphasis of the ANC on Second Generation social and economic rights.

The rejection of the Parliamentary sovereignty model by the white parties was also based on the belief that while such a model worked fairly well in the "politically sophisticated societies such as Britain or New Zealand" with their "well-developed, multi-party democracy where individualism and pluralism are the admired hallmarks of civilised living...South Africa is a politically unsophisticated society where multi-partyism, the alternation of power phenomenon and political pluralism are unfamiliar" (Leyshon 1990:6-7).

There was thus a consensus, albeit with a different emphasis, amongst the opposing forces at the constitutional negotiations that a constitutional model with a Bill of Rights as opposed to a sovereign parliamentary model was the appropriate one for South Africa. The stumbling block, and one of the last issues to be settled, was whether to include property clause or not.

1.3 Property rights

As Budlender (1998:1-3) points out, the question of property rights was one of the most controversial issues in the constitutional negotiations over the Bill of Rights. The main issue was whether property rights should be included or not. For those parties at the negotiation table that were representing a constituency with formally registered property and rights the main issues were threefold. To entrench these rights as firmly as possible to prevent any future expropriation for the purposes of restitution and redistribution, if expropriation had to happen to make it legally as difficult as possible, and to ensure that internationally accepted standards or current market value would be paid where the state did manage to expropriate privately owned land.

For activists and policy-makers representing the landless majority who had been denied formal ownership of land outside of the Bantustans, the entrenchment of property rights in the Constitution represented a double-edged sword. The one edge represented what the liberation and land struggle had been all about: the extension of legally enforceable property rights to the rightless and the provision of secure tenure to all, to prevent the state from ever again acting in the arbitrary and autocratic manner of the past. As Claasens has noted:

> It is because of the legal status of underlying land rights that the betterment programme of the 50s and 60s could not be legally challenged and stopped despite the massive physical opposition to the programme in many rural areas. The lack of legal recognition of rights is also one of the factors which enabled forced removals and stopped settled communities being able to challenge the fact that many of those removed from white areas were dumped on their land. It is also the reason why homeland politicians and some chiefs were able to appropriate the benefits from development projects on communal land, whilst the people whose homes and fields were confiscated in the process received no compensation or benefits (2000:130).

The other edge of the entrenched property rights sword was the fear that it would prevent any meaningful land reform from taking place. Opponents of the property clause pointed to the experience of other countries with entrenched property rights, especially the United States (US). Richard Bauman quotes Professor Laurence Tribe in setting out the dominant US judicial approach to the impairment of the right of property and the freedom to contract during what is known as the Lochner era:

> ...any statute which was imposed upon individuals or corporations in order to redistribute resources and thus benefit some person at the expense of others (for that is how redistribution was then conceived) would extend beyond the implicit boundaries of legislative authority. Such a law would thus violate natural

> rights of property and contract, rights lying at the very core of the private domain (1992: 356).

Bauman (1992:359) concluded that the fluctuating interpretation of property guarantees in the US should warn the constitutional architects of other national regimes that there are dangers in simply copying the US formula.

Budlender points out another danger of an entrenched property clause in the Bill of Rights when he expresses doubts as to whether, in a changing society, courts are suitable institutions to decide what are really disputes about conflicting priorities in the use of the society's resources:

> You do not have to believe that judges are simply representatives of the ruling class, to believe that by their background and experience judges will inevitably lean towards protecting familiar vested interests (1992:300).

Klug expresses similar reservations as to the role of the courts:

> The tendency of courts in similar situations is to grant strict protection to owners - often trumping all other provisions in the constitution with severe implications for the upholding of the rule of law and the constitution itself (1993:2).

In spite of the reservations and the fact that the property clause was one of the three last issues to be resolved by the Constitutional Assembly, it was eventually included in the Constitution. This represented a major victory for the National Party and its allies, the beneficiaries of hundreds of years of colonial conquest and dispossession as well as of the legislated discrimination of the segregation and apartheid regimes. The inclusion of the property clause entrenched as legitimate one of the most unequal racially-based distributions of land ownership in the world. This skewed ownership of land surpasses even Zimbabwe, where unequal land ownership has led to a virtual civil war. In Zimbabwe at independence the ratio of settler to

indigenous land holding was 50:50, in South Africa it was close to 88:12 in favour of South Africans of settler descent.[2]

In order to justify a property clause in a situation of such gross inequality, and given the emotional, political and cultural feelings around land and liberation in Africa, there must have been very compelling reasons for the liberation movement to agree to its inclusion. It may be surmised that in order to reach a negotiated settlement a number of compromises had to be made to allay the fears of the white minority. A second, and probably more powerful reason, was the influence of the World Bank/International Monetary Fund on the African National Congress to ensure a stable property market in order to attract foreign investment and to restructure agricultural markets so that they are open to world trade and responsive to international prices. As Williams argues:

> The World Bank took the lead in the early stages of preparing the Rural Restructuring programme for South Africa. It produced a series of papers on the relevance of international experience for land reform policies in South Africa and, through the Land and Agricultural Policy Centre, (LAPC) funded a series of background papers by South Africans. These were presented in summary form at a conference organised by the LAPC and selectively incorporated into "Options for Land Reform and Rural Restructuring", which was presented to the conference on behalf of the World Bank. "Options" clearly states its guiding principle... political and economic liberalisation. At the heart of such a process would be a new agricultural pricing and marketing policy and a program for land reform (1993:225).

One of the South African papers alluded to by Williams was by John Strasma (1993). Entitled "International Experience with Market-Based Measures", it consisted of a review of market-driven land reform around the world, but also set out the essential

[2] The 1913 Land Act set aside just over 7% of South Africa's land for the indigenous population in the reserves, the 1936 Native Trust and Land Act increased this to a total of 13.6%, but not all of this land had been allocated by 1994.

elements of an efficient land market, the types of market-based measures to redistribute land and to increase demand. He contended that:

> Land reforms are often regarded as quite different from market-orientated policies. Yet experience in many counties has shown that land reforms also work best when they use market-based rules rather than arbitrary political decisions by public sector functionaries. In essence, a land reform does not give owners the chance to refuse to sell land which the state wishes to buy. In that sense, it is not a market-based measure. Rather, it is a state intervention in the land market – but it need not discard all market-related policies in the process (1993:28).

Ironically, the compromise made to create a stable land market, could be the very reason for instability in the future. Although Zimbabwe is very different to South Africa in terms of its reliance on agriculture as a means of subsistence[3], with the majority of South Africa's rural population proletarianised, the spectre of land invasions due to the slow implementation of the land reform program in the latter looms larger today than it did a few years ago.

Having made the compromise, for the policy makers of the liberation movement and their allies the issue was to attempt, what some would consider an impossibility, to ensure that a property clause did not favour existing property owners at the expense of land reform. In other words it was necessary to deal with existing property rights and with the rights of those who lost property under apartheid.

There were a number of ways, land rights campaigners argued, to ensure, that victims of forced removals and people who had been prevented from acquiring land received priority treatment under the new Constitution, in spite of a protection of property clause. In Germany for example, although a property clause is included in the Constitution, if it can be shown that the current owner acquired the land in bad faith, that is through abusing their position or through the implementation of racist

[3] See for example Hendricks, F "Questioning the Land Question – Agrarian Transition, land tenure and rural development in the former settler colonies of Southern Africa" Unpublished paper, Rhodes University, Grahamstown, 1996.

laws and practices (under the Nazi or East German regimes), the land may be expropriated and returned to the rightful owner or their heirs without any compensation (De Bruyn et al 1999). The problem with this kind of argument in South Africa is that all white land ownership was predicated on a lengthy and sustained process of colonial dispossession and apartheid discrimination; one could therefore argue that the entire system was based on bad faith. Klug argued in 1993 for a general restitutionary clause to insulate land reform from effective constitutional challenge, and used the example of Papa New Guinea:

> An interesting example of a general restitutionary clause is subsection 54 of the constitution of Papa New Guinea which exempts from the general property clause any law that provides for the recognition of claimed title to land where: (1) there is genuine dispute whether it was acquired validly or at all from customary owners and, (2) if the land were acquired compulsorily the acquisition would comply with the present constitution's protection from unjust deprivation of property.

Land rights activists took the process further than merely trying to block the likely negative effects of a property clause, arguing that the state had a duty to provide land to people who needed it to survive. This is clearly stated by Roger Plant:

> Persons who are utterly dependent on land for access to survival, and who have no alternative means of subsistence, must be considered to have an economic and social right to the land in general (in Budlender 1993:6).

Budlender (1993:6) argued that a Constitutional right to land has to be conceptualised differently from the classical first generation right. Prior to the adoption of the Bill of Rights in the early 1990s there was much debate on the issue of second generation social and economic rights, specifically with regard to the justiciabilty of these rights. Haysom (1991:107) used the example of the Indian Supreme court, which demonstrated that aspirational policy directives can be given

effect so as to direct the state to protect basic survival needs without entering the terrain of pure politics. Skeweyiwa entered the fray in the following manner:

> There are some lawyers who argue that these rights should not appear in a Bill of Rights at all, since they are not enforceable through recourse to the courts. We do not agree. These rights are contained in nearly all contemporary human rights documents. In Europe they appear in the Charter of Social Rights. In the Irish, Indian and Namibian Constitutions, they appear as Directives of State Policy. Our approach has been to identify certain needs as being so basic as to constitute the foundation of human rights claims, namely, the rights to nutrition education, health, shelter, employment and a minimum income (in Haysom 1991:107).

South African legal/land academics and activists spent much time examining what Plant terms "the social function of property", drawing on international experience from Western Europe and Latin America amongst others (1993:18). He argued that it is a legal concept, seeking the middle ground between unfettered market approaches and socialist options. It enshrines the constitutional principle that private land rights are not sacrosanct, but have to be tempered by other social considerations (1993:18).

Thus the first generation property clause in the Bill of Rights is tempered by a number of rights for landless people and places additional obligation on government to offer historically dispossessed South Africans greater protection under the law. It calls on government to undertake legislative steps to redress the imbalance resulting from racially-discriminatory laws and practices through land, water and other reforms. These concerns are addressed in a number of ways.

The Bill of Rights addresses the need for greater security of tenure in Section 25 (6), explicitly recognizing that the majority of black people in South Africa have insecure land tenure as a result of apartheid's discriminatory land policies. It provides the vision for a program of land restitution, whereby those who were dispossessed are entitled to a return of their land or equitable redress in Section 25 (7). The Bill of

Rights attempts to transform South Africa's history of arbitrary land evictions and forced removals by indicating that no one can be evicted from their property without a court order which considers all relevant circumstances in 26 (3). The Bill of Rights places an obligation on government to foster conditions which enable citizens to gain access to land on an equitable basis in Section 25 (5) - the basis on which the state can redistribute land and other natural resources (Legal Resources Centre, 1999).

However, as with all Second Generation rights the major question is how to make rights realisable and overcome the problems that impede their realisation? Without a legal framework, a good communication strategy on the part of the state, the development of institutional capacity to deliver, and access to conflict resolution mechanisms that are strong enough to overcome mediation by informal institutions, these rights remain paper tigers.

The inclusion of a property clause thus necessitated a rights-based and market-driven approach to restitution and redistribution involving privately-owned land. Redistribution of state-owned land (state land disposal) although administratively processed, relies for the activation of the process, as does restitution and redistribution of privately-owned land, on demand from those in need of land. Many critics have argued that a supply-driven land reform process would be more effective given the extent of land inequality in South Africa. Why then did policy-makers reject this option?

1.4 Supply-driven administrative approaches to land reform

Many land academics and activists, such as the National Land Committee (Cousins 1999:2), Levine and Weiner (1997) and Basil Bernstein (1997), reacting to the slowness of the demand-led rights based approach have expressed a preference for a more supply-driven administrative approach to land reform. Bernstein, suggests that the:

> compromised and constrained policy framework is seen to limit the usefulness

of rights-based law, and that this legalistic approach limits the freedom of the state to implement meaningful land reform (1997).

This frustration with the rights-based, demand and market-driven approach is especially acute within the restitution leg of the land reform program. Staff of the Commission on Restitution of Land Rights have expressed on an ongoing basis their frustrations at the often ludicrous situations arising from the legalistic nature of the restitution process. Examples include white land owners holding up the process through an assertion of their property rights in court and the financial benefits which accrue to them in terms of compensation in comparison to what claimants eventually get. Valuers too, are paid enormous sums of money, on occasion more than the restitution claimants themselves, for valuing property in order to determine its historical and present market value so that the Commission may calculate the claimants due[4].

Another aspect which has sparked a call for a more pro-active state approach is the lack of integration of the restitution process with the broader land reform program and the lack of the land reform program with provincial and district development planning. These issues will be discussed in more detail in later chapters.

The question of why a supply-driven administrative approach was not implemented has been touched on in the previous section. A major influence was the underlying governmental constitutional rights-based paradigm. The adoption of a Sovereign Parliament model is in many ways more conducive to a supply-driven administrative approach. It allows the state to play a more pro-active role through parliamentary legislation in bringing about transformation. Using the example of French constitutional development between 1794 and 1945, Henkin suggests that in following the philosophical tradition of Rousseau, they have been concerned with equality and community and *the general will*, but not with rights:

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[4] These issues were frequently raised by Commission staff at planning workshops. See for example "Report on a strategic planning workshop" Du Toit, A, Program for Land and Agrarian Studies, School of Government, University of the Western Cape, May 1998.

> French priorities meant, therefore, that the primary objective was to create an activist parliament - one that would promote a welfare state. Given this context, it is a simple matter to understand why the French have been more concerned about establishing and safeguarding a representative Parliament than with the less practical idealism encapsulated in a justiciable Bill of rights (in Leyshon 1990:10).

My first point was that by deciding to opt for a Constitutional Bill of Rights, policy makers and legislators were constrained to adopt a rights-based approach to land reform, rather than a politically driven model which would have enabled the state to play a more pro-active and creative role in implementing land reform and addressing the inequality in land ownership in South Africa. A second reason as to why a market-driven as opposed to a supply-driven administrative approach was adopted was due to the influence of international development and financial institutions, primarily, the World Bank (WB).

International experience was quite clear as to the direction of land reform. Robert Plant, the Co-ordinator of the Land Rights Project, of the International Commission of Jurists, in a paper to the Land Distribution Options Workshop in Johannesburg in 1993, noted that any South African who had done the rounds of the international development and financial agencies would know, "there is tremendous scepticism today about the viability of non-market approaches to land reform as effective instruments for rural poverty alleviation"(1993:1).

Two of the WBs most active and influential participants in the formulation of the South African land reform policy, Hans Biswanger and Klaus Deininger stated:

> The reform process has often been hampered by the excessively administrative and paternalistic approach, in which a land reform agency identifies and purchases farms, designs replacement landholdings, selects beneficiaries, and often provides infrastructure, production support and marketing assistance, as

well as social services. The process is often confusing, time-consuming and frustrating to all parties (1993).

Instead they proposed a very substantial and rapid market-assisted land reform and resettlement (which) hold the greatest, if not the only, hope for peaceful development in South Africa (1992:3).

The third reason for rejecting a supply-driven administrative approach was South Africa's experience during the apartheid era with state-designed agricultural and resettlement schemes. These range from the forced resettlement of rural communities into closer settlements under the betterment schemes (see Yawitch 1981), the capital intensive and top-down managed agricultural schemes implemented by the Agricultural Development Corporations of the nominally independent bantustans in collaboration with agro-capital (see Roodt 1986), and the most infamous of all, the forced removal and resettlement of millions of people from so-called black spots into the bantustans (see Surplus People's Project 1983). The failure of state implemented schemes in other parts of the world and in Africa specifically, are well known. The Ujama experience in Nyrere's Tanzania is one of the renowned examples.

These experiences with state instituted schemes, especially those in apartheid South Africa, led Susan Lund and Peter Wakelin, both Land and Agricultural Policy Centre (LAPC) researchers at that time to conclude:

> State-designed resettlement schemes would be an ironic and tragic repeat of South Africa's social engineering history. They are expensive, economically and socially disruptive, and manipulative. They are also not conducive to building local decision-making and management capacity so urgently needed in rural communities (1993:3).

This leads to the fourth point as to why policy-makers opted for a rights-based demand-driven rather than a supply-driven approach: the early 1990s in a post-Soviet and post-African statist and post-apartheid period the concepts of civil

society, participatory democracy and human rights was high on the agenda internationally and in South Africa in particular. South Africa had just been in the 1980s through a period of intense struggle, and entered the 1990s with well organized and militant political, economic, community and civic organisations. This is true even of the rural areas, especially in the Eastern Cape, where militant resident's associations had been in the forefront of the struggle against forced removals. Many of these organisations saw themselves as nascent local government, or "organs of people's power" to use the parlance of the time. This ideal of people's power and empowerment is captured by Cyril Ramaphosa in his vision for restitution in 1993:

> ...by adopting of the very rules through which victims of forced removals were disposed as the criteria for recognizing their right of restoration we aim to empower the dispossessed to actively claim their lost lands. Empowered with the right of restoration, claimants may either have their land restored or, in the case of land where restoration would be inappropriate, the claimants may negotiate for the allocation of alternative land or compensation (1993:4).

This approach is echoed by Adams et al with regard to land reform in general:

> It is understood that the majority government will commit itself to a **demand-led affirmative action land reform.** By this we mean a series of policies which attempt to respond to the expressed demands of those in need of land. Demand-led land reform will hinge on an ability to respond to popular demand rather than a socially engineered resettlement exercise (1993:1).

These then are some of the reasons for South African policy-makers rejecting a supply-led administrative approach to land reform and adopting instead a demand-driven approach based on fundamental rights enshrined in the Bill of Rights in the Constitution, in spite of the limitations imposed by the property rights clause.

1.5 Conclusion

In this chapter I set out the research questions on which the thesis is based. The broad research question is to what extent the rights-based and market-driven nature of the restitution program has given rise to a legalistic and bureaucratic process that negates both the demand-driven and the developmental aspects of restitution as land reform.

I tried to answer this question by showing why South Africa's legislators chose a Constitutional model with a Bill of Rights as opposed to a Sovereign Parliament. For the ANC the commitment to a Bill of Rights goes back to the Freedom Charter and the emphasis was on the protection and promotion of Second Generation socio-economic rights, whereas for the National Party and its allies, First Generation rights such as the property clause were paramount. This provided the background for a rights-based and the demand-led land reform program. In section two of the chapter I examine the issue of the property clause, and how its inclusion provided the context for a market and rights-based approach to land reform as opposed to a supply-led administrative approach. The market-based approach was encouraged by the World Bank involvement in the formulation of the land reform program and necessitated by the property clause which requires land to be bought and attaches conditions to expropriation. The demand-led aspect was inspired by the post-cold war emphasis on civil society and participatory democracy. Having analysed the rights–based nature of land restitution in South Africa, I turn in Chapter 2 to the philosophical origin of human rights and examine the difference between First, Second and Third Generation rights.

Chapter 2

Human rights: First, Second and Third Generations.

2.1 Introduction

The principle that human rights should be protected, defended or fought for is generally accepted around the world. This principle is clearly expressed in a number of written charters. An example is Article 55 of the United Nations Charter, the Universal Declaration of Human Rights, the leading exposition of "contemporary human rights" (Ambrose1995:32). Howard and Donnelly call this "the international normative universality of human rights" (1997:268). However, it is clear that while very few would reject the adoption and defence of human rights, there is much disagreement as to the origin, content, and implementability of such rights. In many countries around the world the adoption of human rights constitutions, bills and charters are primarily for the purposes of international image, with abuses against citizens, especially minority groups, women and children, continuing apace. In others, where mistreatment is more in the form of neglect, Constitutions and Bills of Rights remain "paper tigers", protecting the rights of those who are able to access the relevant institutions, while the poor majority, who generally do not have the physical and knowledge resources, remain unable to access their rights. This is especially true of social and economic rights (Ambrose 1995; Couzins1997; 2001; Mohanty et al 1998).

In this chapter I am going to consider the philosophical and historical origins of human rights.

I argue against the commonly held perception that human rights are universal moral rights and against the belief that human rights originate exclusively within the liberal humanist societies of Europe and North America. I examine the contemporary, cultural and political origins of human rights, arguing that what has become known

as First Generation rights are culturally and historically derived from the liberal humanist European and North American tradition, but that Second Generation economic and social rights, as well as Third Generation "solidarity rights"[5], have their foundations in the political struggles of the post-second world war period.

I argue that with First Generation Rights, the emphasis is on the protection of the individual right, a right that is clearly conceptualised, legally enshrined and deals with the relationship between the individual and the state. Property rights fall within this category. Second and Third Generation rights however are generally far less clearly conceptualised, largely rely on normative rather than legal standards, deal with the relationship between individuals/groups and the state and often are highly complex to implement (such as land reform and development).

My concluding argument in the chapter is that in a constitutional state such as South Africa, First Generation property rights are part of and protect the status quo, while Second and Third Generation rights such as land reform and development for the poor are seeking to change the status quo and that while their inclusion in the constitution and their expression in law and policy is a good first step, there are many impediments to their realisation. In order to overcome these impediments the state has to fulfil a number of requirements, as do parliamentarians and political parties, and there is a need for the active participation by rights claimants and a strong civil society to drive the process. For land reform this includes especially political action by community-based organisations and NGOs within the land sector, such as the National Land Committee, the Landless People's Movement and the Legal Resources Centre.

2.2 Human rights: the philosophical foundations

The "philosophical" origins of the human rights phenomenon encompass far more than the traditional understanding of the concept. A reading of the various accounts

[5] These are collective human rights such as the right to peace, a healthy environment, the self-determination of peoples, to the common heritage of humankind, and to development. See the 1986 United Nations "Declaration on the Right to Development".

of the philosophical foundations reveals a concern with the historical, political, legal and cultural origins of the human rights ideal.

For western liberal writers, such as Louis Henkin, individuals by virtue of their being human possess human rights. For them, the term "human" embodies a number of rights that apply to all members of that species, regardless of their social position, ethnicity, nationality or gender. Henkin argued that human rights are universal moral rights that are fundamental to human existence and can neither be transferred, forfeited nor waived. They are demands or claims that individuals or groups make on society and are deemed essential for individual well being, dignity and fulfilment. Human rights are universal and belong to every society regardless of geography, history or culture (1990). For Henkin human rights are intrinsic to being human, clearly in the realm of what Rorty describes as a moral rationality that transcends particular or historically specific political and cultural instances (1993). This concept of rights has its origin in so-called "natural" or God-given law and according to Ambrose, led to a distinction between "the rights of man" and the "rights of citizens":

> The rights of man are those a person enjoys by being a member of the human race while the rights of the citizen include the political, economic, and social rights one enjoys by virtue of being a member of society (1995:32).

Henkin's approach is in my opinion an ahistorical and idealistic one that has more to do with a wished-for state of being than with empirical and evolutionary reality. Human rights are in Channock's (2000:17-19) words "universal" only rhetorically, something to be aspired to as opposed to what exists in reality. War, internal violence and political oppression, and not immanent progress towards rights, have dominated recent political history. Written charters of human rights, such as Constitutions and Bills of Rights, although inspired by the "rights of man" deal to a greater extent with the rights of the citizen; the political, economic and social rights one enjoys as a member of a particular society.

Another common position is that human rights originated from a liberal political tradition. Manoranjan Mohanty claims:

> The concept of human rights has evolved from a liberal humanist formulation at the time of the Universal Declaration of Human Rights in 1948, to the UN Summit on Human Rights in Vienna in 1993. It reflects the rise of democratic consciousness among people all over the world (1998:22).

While he is correct in asserting its contemporary origins, most theorists depict its liberal origins further back in history. Jon Elster traces the origins of constitutional rights to protect the individual from the excesses of majority rule back to debates at the Federal Convention in Philadelphia in 1787 and to the Assemblee Constituante in Paris in 1789-91 (Shute and Hurley 1993). Thandabantu Nhlapo argues that in "the minds of the general populace" in South Africa the language of human rights is perceived to be, in its particular history and origins, placed squarely in the Western value system:

> The Universal Declaration of Human Rights, adopted in 1948, embodied a philosophy of human rights that was directly descended from the religious, social and political struggles in England and France between the seventeenth and nineteenth centuries, and in the United States of America for part of that time.....These moves developed against the background of strong natural law and the contract theory ideas, and the present day international human rights ideal still bears the imprint of those origins (2000:155).

Mahmood Mamdani states:

> ...throughout the seventeenth-century England and eighteenth-century France, liberal thinkers tried to arrive at a system of fundamental individual rights which the state was not allowed to invade. As formulated from the seventeenth century onwards, the core of liberalism could only be defined as a theory of individual rights and limited government (1998:94).

Mamdani (1998:90) makes an interesting distinction between the human rights tradition emerging from Europe as compared to that of the United States. He argues that European theorists, both conservative and liberal, agreed on the nation state as the locus of rights: for them the rights of the citizen were essentially the right of the nation to self-determination, "that is, the right to establish their own state". For the United States after the civil war, a multi-cultural melting-pot with a recently subdued indigenous population, the right of self-determination of nations raised uncomfortable expectations:

> Hence, the significance of the shift from the "right to self-determination" of nations to the "right to non-discrimination" of individuals in US constitutional thought (1998:91).

Aligned to the view that the human rights discourse originates with the western humanist liberal tradition, is the view that intrinsic to the ideal is an attack on non-western culture. I will not go into the relationship between rights and culture in any detail[6]. There is in the ex-colonial world a genuine suspicion, and in some cases an ideologically motivated one that the human rights discourse is part and parcel of western cultural hegemony (Chanock 2000; Nhlapo 2000). For Chanock the language of culture masks a defence of privilege by national elites whose power is being eroded by globalisation. Nhlapo (2000:4) argues counter to Chanock that while this may sometimes be the case, it is not always so - for him the upholding of one's dignity requires a defence of one's culture. For him, a rights critique of indigenous culture inevitably represents a culture-bound Western assault on local dignity. Only through the maintenance of diversity can the protection of dignity be ensured, therefore the general demands for the provision of equality must be balanced with the specific recognition of difference. This is a problematic formulation as it could allow the violation of rights, such as gender rights, in the name of a particular culture. Against this view, Chanock (2000:3), and I am in agreement with him on this point,

[6] See Mamdani "Beyond rights talk and culture talk" (2000, David Philips, Cape Town) for an excellent discussion of the issue. The book is a collection of papers presented at a conference held at the University of Cape Town.

makes a plea for universalisation, "as aspiration as opposed to reality", that is, we need to aspire (struggle) towards a universal conception of human rights that transcends the peculiarities of particular cultures.

How would one go about achieving universalisation as aspiration while respecting different cultural practices? I would argue that in this era of the globalisation of culture through mass media, especially the computer-based internet, such a universalisation is on the way to being created. As I stated at the outset of this chapter, the majority of states, regardless of their "culture" accept the Universal Declaration of Human Rights. The South African constitution is an example of a negotiated human rights document forged through negotiations in a multi-cultural society. That is not the real problem. The problem is how to make these much-vaunted rights *realisable* for the general populace, especially the poor.

With regard to the issue of culture, I would argue that there is a tendency to reify it. Culture is not a static *thing*, but a constantly evolving process, which has a dialectical relationship with the material/technological environment and with other cultures. All cultures are contested terrains, with sub-cultures, ethnic groups, classes and genders trying to greater or lesser degrees to change, challenge or defend the hegemonic grand narrative which forms the backbone of a particular culture. But in the end "culture" is an ephemeral concept that can be bent to suit the needs of whoever evokes it. Like many other catchall concepts, it has different meanings in different contexts. Rhanema (1992:166) makes a similar point about the concept of "participation". He calls it a "jargon word, separate from any context (that) has been manipulated by vastly different groups of people to mean entirely different things". I am in agreement with Dyzenhaus when he says:

> ...the only culture worthy of constitutional protection is the pluralistic public culture which seeks to sustain attitudes of respect and tolerance for the traditions of different cultural groups (1991:46).

John Rawls, Professor of Philosophy at Harvard University, argues contrary to the position adopted by many others. For him respect for human rights is not particular

to liberal societies. A well-ordered hierarchical society that is peaceful and guided by some common good conception of justice, must as a consequence respect basic human rights (Rawls 1993:43):

> Basic human rights are thus conceived by Rawls not to express any foundational philosophical doctrine, but rather to express a minimum standard of well-ordered political societies guided by a common good conception of justice (Shute and Hurley 1993:8).

Like Mohanty, I am more concerned with the contemporary origins of what the Argentinean jurist and philosopher Eduardo Rabossi calls a "human rights culture" (Rorty 1993:116). Rabossi argues that this emphasis on human rights is a new, welcome fact of the post-Holocaust world and that philosophers should stop trying "to get behind or underneath this fact, stop trying to detect and defend its so-called philosophical presuppositions". His main point is that the world has changed and that the human rights phenomenon, as he calls it, renders human rights foundationalism outmoded and irrelevant (Rorty1993:116).

Martin Chanock lends credence to this view in that he argues that an examination of the major human rights declarations around the world reveal that they came about as a result of "a dramatic break with the practices, and the legal and political cultures, of the previous regimes - a denial of the immediate political and legal past - not an evolutionary process". He points out that the South African Constitution is no exception. Disjunction, for him, rather than continuity has given birth to rights:

> It is not easy to combine with this a cultural view of rights which implies that a consensus about rights is deeply embedded in, and reflective of, cultures. Rights would seem to belong to the disputed realm of politics rather than to a deeper expressive realm of culture. Human rights have depended on the deliberate (and bitterly opposed) active remaking of a new order, on a denial of the past, on a reinvention of political mythologies, not simply on an evolution of what had been historically and culturally acceptable (2000:16).

Rorty, in a slightly different vein, develops this argument further, by attempting to advance Rabosi's position that human rights foundationalism is (or should be) defunct. He makes a very particular claim: nothing relevant to moral choice separates human beings from animals except historically contingent facts of the world, or what he calls, "cultural facts" (1993:116). What Rorty is keen to do, is to refute the notion of a universal human nature, a moral rationality that transcends particular or historically specific political and cultural instances. In doing so, he is willing to risk being accused of being a cultural relativist as well as an irrationalist if that is what it takes to deny the existence of morally relevant transcultural facts. This does not mean, he argues, that one has to be an irrationalist in the sense of ceasing to make one's web of belief as coherent, and as perspicuously structured as possible. For him, rationality is simply the attempt at coherence. The task he sets himself in support of Rabossi is to make, what he characterises as "our own culture" - the human rights culture - more self-conscious and more powerful, rather than demonstrating its superiority to other cultures, by appealing to something transcultural (1993:117).

Rorti's argument, which I will outline briefly, is contained in full in his Oxford Amnesty Lecture he delivered in 1993 (Shute and Hurley 1993:111-134).

He argues that Darwin was responsible for convincing intellectuals out of the view that human beings are anything other than exceptionally talented animals and that we do not contain a special added ingredient (ie. a trans-cultural *rationality)*. Two things make human beings "exceptionally talented animals". The first is that we are future orientated (hopeful) and are capable of political action. Thus, Rorty states: if we can work together, we can make ourselves into whatever we are clever and courageous enough to imagine ourselves becoming. The second is that we can feel for each other to a greater extent than lesser animals can. Here Rorty ventures into the stuff of the sociological enterprise: the ability to put oneself in the place of the other, to recognise and overcome one's ethnocentricity, to think empathetically about other human beings. He labels this profoundly social enterprise, what sociologists

would call acquiring a sociological imagination, as "manipulating sentiments" or "sentimental education".

He asserts that the nineteenth and twentieth centuries were for the Europeans and North Americans an extraordinary period of increase in wealth, literacy and leisure. This abundance resulted in "an unprecedented acceleration in the rate of moral progress" and the realisation that humans live in an age in which they could make things much better for themselves. He gives two examples, the French Revolution and the ending of the trans-Atlantic slave trade as events which spurred nineteenth century intellectuals to this realisation.

Not all societies have had this good fortune. For Rorty, lack of respect for human rights when dealing with human beings who are not part of our family, "tribe" or culture, is not based on irrationality:

> ...most people are simply unable to understand why membership in a biological species is supposed to suffice for membership in a moral community. This is not because they are insufficiently rational. It is typically, because they live in a world in which it would be just too risky - indeed, would often be insanely dangerous - to let one's sense of moral community stretch beyond one's family, clan or tribe.

Rorty argues that Plato was wrong to think that the way to get people to be nicer to each other was to point to their common rationality. He gives many examples where this has failed to stop human rights abuses from occurring. Working class white men in the United States of America (for example) do not stop discriminating against women and Muslims because they know that they are good at mathematics, engineering or jurisprudence. Resentful young Nazi toughs were aware that many Jews were "clever and learned", but this only added to the pleasure they took in beating them up. For Rorty:

> ...everything turns on who counts as a fellow human being, as a rational agent in the only relevant sense – the sense in which rational agency is synonymous with membership in *our* moral community.

This sentiment is echoed by John Millington Synge, the Irish writer, in his description of the irreverence with which Aran Islanders in Ireland regarded the due process of law imposed by the British in the early 1900s:

> The mere fact that it is impossible to get reliable evidence (in a Court case) in the island – not because people are dishonest, but because they think the claim of kinship more sacred than the claim of abstract truth – turns the system of sworn evidence into a farce (1998:45).

To sum up Rorty's position: he argues that there is no extra-cultural rationality that western liberal society has hooked onto and that other societies have failed to do. In a manner reminiscent of Maslow's theory of the "hierarchy of needs", he posits that the emphasis on human rights that has grown out of the European Enlightenment is a product of the lack of want, and, a conscious inculcation in especially middle and upper class children of a "sentimental education". We in the west, he argues, have, to use Paulo Freire's phrase, been "conscientised" into a human rights culture - but this is no more or less rational than an ethnocentric view if the latter is necessary to protect kin and clan.

The essence of Rorty's position is that the human rights ideal is a product of embourgeoisment of European and North American society. Nowhere does he specify what type of human rights he is actually talking about. The context of his argument would have one believe that he is essentially concerned with First Generation rights and that for him a human rights culture is synonymous with western liberalism, and that like liberalism it is not only a luxury, but that it relies for its expansion on what Annette Baier calls "a progress of sentiments" (in Rorty 1997:266).

This emphasis is in major contrast with Vandana Shivji and the New Delhi scholars (see below). The only similarity with Rorty is that they similarly reject "moral absolutes of universal humanity". For Shivi, the conception of human rights must be rooted in the perspective of class struggle. A right is not seen as a standard granted as charity from above, but as a standard-bearer around which people rally for struggle from below (Ambrose 1995:30: Shivji 2000). In a similar vein a number of scholars from Africa, Asia and Europe, collaborating in the aftermath of a workshop on "Social movements, State and Democracy" held in New Delhi in India in 1992, argue for a human rights process rooted in an international struggle by social movements:

> challenging the dominant political theory of capitalist globalisation, the authors reaffirm some of the primary values of anti-colonial struggle and articulate the issues raised by contemporary social movements in the third world as democratic assertions of people's rights. Rather than locate rights in the individualist tradition of western liberalism, they are seen as an affirmation of political conditions of human existence that involves struggle against class exploitation and social oppression (Mohanty et al 1998:9).

For these writers, the purpose of this struggle for human rights is to democratise the post-colonial state through popular struggles and to make it more decentralised, responsive and participatory. In contrast to Rorty they are concerned primarily although not exclusively, with Second and Third Generation rights. It is precisely within this paradigm that I will place the struggle for the realisation of rights, specifically Second and Third Generation rights such as development and the restitution of land in South Africa. The difficulties encountered in the realisation of these post-First Generation rights will be dealt with more specifically in the next chapter. The fight for Second and Third Generation rights is one that is fundamentally different from the one for First Generation rights, as Andreas Auprich (1998:67-68) argues.

He points out that from a normative point of view, the classical human rights of what he calls "the first dimension", such as the freedom of association, the freedom of thought, conscience and religion, and we may add, the right to private property, do not cause problems concerning their concept and basic legal structure: the beneficiary is the individual citizen who is entitled to demand his/her rights from the state which has an obligation to protect these civil and political rights. This includes the procedure to enforce and execute the rights. Although he is more concerned with Third Generation rights (development), the same principle applies to Second Generation social, political and cultural rights:

> Under first dimension rights individual citizens may demand well-defined patterns of behaviour from the state but this does not apply in the case of the right to development, not only because the right to development to date does not figure in a universal legally binding instrument, but mainly because of the complex content. The old but still unsolved question is how to identify the substance of the obligation resulting from the right to development. In concrete terms this means: what is development, and how can it be defined in adequate legal terms?

Auprich points to an important distinction between First, and Second and Third Generation rights. A new feature of these rights is the mingling of individual, collective and group rights. Traditionally "peoples" could not be regarded as subjects of human rights protection. But with the STG rights peoples and groups are afforded this privilege. This emphasis accords with the sentiments of the New Delhi Scholars, that there is a need to move beyond the individualist western liberal tradition towards an affirmation of political conditions of human existence that involves struggle against class exploitation and social oppression (Mohanty et al 1998:9). What does this mean in practice?

I identify four major spheres within which the struggle for Second and Third Generation rights takes place within the modern democratic state. All of these are of direct relevance to the struggle for land reform/restitution in South Africa and will be dealt with over the next few chapters.

The first of these involves the role of the state in the delivery of Second and Third Generation rights. There is no doubt that there are a great variety of empirical incarnations of the state and that the very real instances of neglect and abuse in many parts of the world are a reality. However, in a general sense in developing countries such as South Africa the state plays a duel role as the bearer of rights (in relation to the developed world) and as the guarantor of the rights (in relation to the people within its borders). As Auprich puts it:

> To consider the state to be the holder of the right to development might somehow seem a paradox, because the state appears simultaneously as the bearer and guarantor of the right to development – not to speak of the oddity of seeing the state as the beneficiary of a human right! (1997:68).

Thus states in the developing world as the bearer of rights seek international expertise and aid, preferential access to export/import markets, and a say in international affairs. At home, in a constitutional democracy such as South Africa, the state through its political, administrative and legal apparatus is responsible for the implementation of rights. In order to do this the state needs to take the constitutional requirements seriously, develop effective policies based on these constitutional injunctions, communicate the rights and policies effectively to the general population, especially to the poor, develop the administrative capacity to implement the policies and deliver tangible rights and benefits, and if all else fails, provide access to legal mechanisms, especially for the poor, to administrative justice. These issues will be dealt with in more detail in the next chapter.

The second major component of the struggle for Second and Third Generation rights is the efficient functioning of what Freidman and Reitzes (1996:62) call the "representative public sphere". The public sphere is made up of political parties, ward representatives, parliament, and local governments. They argue that for democracy to exist the public sphere must be the primary vehicle by which citizens indicate preferences to the public representatives. The reason for this they argue, is

that in comparison to the many groups within civil society (social movements, community based organisations, NGOs) that claim to represent constituencies, municipal councillors and members of parliament, have actually put themselves to the test of election. Friedman and Reitzes recognise that the party system or parliament is not always responsive to public opinion. They use South Africa as an example of this lack of responsiveness, due to the fact that representatives are accountable to party leaders rather than the electorate. However for Friedman and Reitzes this does not mean that parliament should be by-passed with a plethora of negotiating forums that give undue influence and access to government to often unrepresentative institutions with sectarian interests such as business, labour, and community organisations. For them the answer lies with parliamentary and electoral reform (1996:63).

The third major sphere within which the struggle for STG rights takes place is that of civil society. There is a need for a strong and vibrant civil society. Civil Society (CS) is defined by Stephan as an "arena where manifold social movements ...and civic organisations from all classes...attempt to constitute themselves in an ensemble of arrangements so that they can express themselves and advance their interests" (in Drah 1995:18). There is great disagreement as to the composition of civil society, with some theorists (Friedman and Reitzes 1996; Waltzer 1992) emphasising that it is desirable, if not essential that it is made up of associations which are themselves democratically constituted. This is in order for these institutions to act as "the building blocks of a democratic society". Others, more controversially, such as Roodt and Savage (1998:328) include sub-cultures and deviant groupings (Rastafarians, surfers); Atkinson (1996:290) public interest groups, single-issue groups (anti-abortion, gun control) and Drah (1995:18) groupings in Africa " based on ties of blood, marriage, residence, clan, and ethnicity". The crucial role of civil society, for example NGOs and community-based organisations in promoting the effective resolution of restitution claims will be explored in later chapters.

The fourth major component of the struggle for STG rights is the primary or individual sphere. This sphere is ascriptive by nature and is constituted by the family, clan or the individual. In order for any rights to be realised, these basic building blocks of

society need to be mobilised but also to mobilise themselves. In situations of poverty, especially in rural areas, this is often difficult due to the time and energy people spend on the basics of survival (fetching water, wood, looking after children, working, different degrees of agriculture) combined with a illiteracy and a fatalistic/apathetic attitude to life - Freire's "culture of silence". This mobilisation/self-mobilisation of especially the rural poor has had a major impact on peoples awareness of restitution, their ability to register their claims, to participate actively in the processing of their claim and on their ability to make informed decisions as to options, both restitution and developmental. This issue will be explored in more depth in the next chapter and in other parts of the thesis.

The civil society/state model and its ability to realise human rights, especially Second and Third Generation rights such as land reform and development, need to be qualified. Neo-Marxists and old-school liberals, and what I will term the "new left" such as Poulantzas and Pateman (in Held 1993) question whether formally recognised rights are actually being realised in many capitalist countries. They point to gender, class, and racial inequalities, which have persisted, in most free-market contexts.

They argue that any assessment of freedom must be made on the basis of liberties that are tangible and capable of being deployed within the realms of both state and civil society. For them, without concrete content, liberty can scarcely be said to have a profound consequence for everyday life. People are generally restricted from participating actively in political and civil life. An important aspect is their analysis of the state. They argue that the state is enmeshed in the associations and practices of society, that it is inescapably locked into the maintenance and reproduction of the inequalities of everyday life. Therefore all citizens are not treated as free and equal. And, as elections are insufficient as mechanisms to ensure the accountability of the state, the need for a proper form of democratic regulation is acute.

Poulantzas argues that the state must be democratised by making parliament, state bureaucracies and political parties more open and accountable. At the same time the

struggle for democracy must continue at local level, in the factory, in terms of gender relations, in terms of the ecology, and so on. He suggests that there are no easy recipes. (Held, 1993) These are sentiments echoed by Nzimande in the South African context. He argues for a problematised conception of CS because "on the one hand, it is the expression of the existence of formal freedoms, while on the other it serves primarily to obscure the class foundations of society by trying to represent everyone as free to pursue their objectives without any interference from any quarter - particularly the state." (1995:106) For him, this is especially true of a country such as South Africa, which is undergoing a negotiated transition, typical of "transitions in developing countries in general", which articulate five main contradictions: class, nationalist oppression, imperialist domination, underdevelopment, and gender. (1995:105)

Nzimande argues that the state is not an "evil authoritarian" institution being confronted by a homogeneous and virtuous civil society. The state is a site of struggle being confronted by a divided civil society, and the divide corresponds to the divisions inherited from the apartheid era. This is in contrast to Atkinson, for example, who sees the strength of the business sector as a advantageous factor in confronting the state and thus preserving CS. Nzimande argues that it is precisely the alliance of powerful business interests and property owners through their chambers of commerce and ratepayers associations, and those components of the state that have the most to lose by the further realisation of "some of the critical goals of the national liberation struggle", that is the problem for the progressive faction of the state (ie. the ANC alliance), and the majority of the country's citizens.

This viewpoint is supported by Mashinini who suggests that there is a tension between the legitimacy of elected local government and accountability to CS, broadly conceived in the pluralist way:

> This tension is one of how government should get on with the business of government, and using the legitimacy it has acquired through an election victory to implement and address issues that are incorporated in its broad mandate, as opposed to continually interacting in some

> way with its constituency to ensure that it remains aware of the vast spectrum of interests in society, and continually strives to address them. (1995:117)

In other words, in a situation of negotiated transition, conservative forces within CS are still dominant in terms of economic and organisational power, and in order for the elected representatives to be able to fulfil their mandate, they need, in Mashinini's terms to get on with job, and not be paralysed by the powerful interest groups within CS who have a vested interest in development of a different kind. As he says:

> At the moment, apart from the forums, the way in which government is petitioned and communicated with is through lobbying. But lobbying benefits the privileged members of society: they are the ones who have more access to government and to political power. The premier of Gauteng is more ready to meet with business and ratepayer's associations from the northern suburbs than he is with people from Orange Farm" (1995:121)

In this scenario, a very different one to the one envisaged by Atkinson, Friedman and Reitzes, and traditional pluralist conceptions of state/CS relations, Nzimande argues that in order to be strong, the elements of civil society which are not a part of the conservative power block should not maintain a distance from the state, but should be strongly rooted in their constituency in order to fulfil "the most critical component of strengthening democracy in South Africa". (1995:108) The role of the mass organisations is to strengthen the ANC government. He quotes the structured relationship that Cosatu has with the government, and within the tripartite alliance, while still retaining its autonomy, as the ideal.

However, the slow pace of delivery of socio-economic rights such as health and land reform, have given rise to militant social movements such as the Landless People's Movement and the Treatment Action Campaign that are extremely hostile to the

state, and are pressing for their demands to be met using tactics that are often outside of the law.

2.3 Conclusion

In this chapter I considered the philosophical and historical origins of human rights.

I argued against the commonly held perception that human rights are universal moral rights and against the belief that human rights originate exclusively within the liberal humanist societies of Europe and North America. I examined the contemporary, cultural and political origins of human rights, arguing that what has become known as First Generation rights are culturally and historically derived from the liberal humanist European and North American tradition, but that Second Generation economic and social rights, as well as Third Generation "solidarity rights"[7], have their foundations in the political struggles of the post-second world war period.

I argue that with First Generation Rights, the emphasis is on the protection of the individual right, rights that are clearly conceptualised, legally enshrined and deal with the relationship between the individual and the state. Property rights fall within this category. Second and Third Generation rights however are generally far less clearly conceptualised, largely rely on normative rather than legal standards, deal with the relationship between individuals/groups and the state and are often difficult to implement. Land restitution and development in South Africa fall within this category of rights.

My concluding argument in the chapter is that in a constitutional state such as South Africa, First Generation property rights are part of and protect the status quo, while Second and Third Generation rights such as land restitution and development for the poor are seeking to change the status quo and that while their inclusion in the constitution and their expression in law and policy is a good first step, there are many impediments to their realisation. In order to overcome these impediments the

[7] These are collective human rights such as the right to peace, a healthy environment, the self-determination of peoples, to the common heritage of humankind, and to development. See the 1986 United Nations "Declaration on the Right to Development".

state has to fulfil a number of requirements, as do parliamentarians and political parties, there is a need for the active participation by rights claimants and a strong civil society to drive the process. For land reform this includes especially political action by community-based organisations and NGOs within the land sector.

In the next chapter I will look at the problem of making rights real. I will do so within the context of South Africa and its Constitution and Bill of Rights.

Chapter 3

The problem with the realisation of rights

> "I close my eyes and try to see her fighting for the right to false teeth – and for the right to electricity in her home, the right to water in her house. And the picture refuses to be born in my mind. Why would she fight for things when she does not know she has a right to them? Why would she fight when rights are not in her recollection of things she knows, things she does, things people like her do? How can she do something that is so completely foreign to her? And do it with ease?
>
> And that is what I fear. The steps you have to take to avail yourself of the opportunity the new South Africa promises all its people, simple as they appear to be, may be too much for people who have no memory of ever walking them" (Magona 1995:NI).

3.1 Introduction

The purpose of including Second and Third Generation (STG) rights in a constitution is to provide guidelines to lawmakers to formulate policy and to enable the courts to intervene where these policies are not being implemented satisfactorily. In theory these rights allow citizens to demand from the state access to basic needs, such as adequate land, housing, education, health care, nutrition, and social security. However, this inclusion of rights in the constitution often does not translate into action. The first reason for this is that Second and Third Generation rights may clash with First Generation rights. For example the right to private property may, and in South Africa it does, contradict the need for land for the majority. The major problem is whether the policies flowing out of Second and Third Generation rights are pursued with enough vigour by governments, the private sector, primary groups and individuals to overcome this contradiction. In many countries in the world it is the poorest sections of the population, and as Mamdani (1998) pointed out, migrant non-

citizens, that bear the brunt of administrative and bureaucratic bungling and neglect. Liebenberg and Pillay state that in South Africa:

> Poverty and traditional gender roles lead to black women in rural areas being disadvantaged more than men and white women by a lack of basic social services. They spend long hours collecting water and fuel to meet household needs, making it difficult for them to find the time to take advantage of employment and development opportunities. Because of expected gender roles and their extra burden of poverty, women do not participate equally in the economic and social structures of society (2000:16).

Many writers have addressed the problem of trying to turn "paper rights" into access to resources for the more disadvantaged sectors of society (Ambrose 1995; Cousins 1997, 2001; Liebenberg and Pillay 2000; Mohanty et al 1998). Liebenberg and Pillay argue that the meaning of rights develops over time through a number of processes. In South Africa these would include community organisation and activism around human rights demands; advocacy by the institutions of civil society such as NGOs, church groups, and trade unions; the active engagement with human rights issues by the Human Rights Commission and academics; appropriate legislation adopted by parliament; and, the interpretation of rights by the courts (2001:26).

Certain conditions are required for effective implementation of rights in South Africa. I argued that in order for STG rights to be effectively implemented four spheres had to operate. These are the state, its administration and courts; the public sphere, parliamentarians and political parties; civil society in its various guises, and in the primary sphere comprised of individuals, families and clans. However, a number of strategies involving an interaction of all these spheres are necessary for the successful functioning of the STG rights regime. These are a legislative framework, a good communication strategy, the development of institutional capacity, and access to conflict resolution mechanisms.

With regard to the first, that is an adequate legislative framework, the South African legislature has given the limitations imposed by the negotiated transition, done a good job. In many areas South Africa's Constitution is regarded as one of the most progressive in the world. However, as pointed out in a previous chapter, in a situation of gross inequality in the distribution of land ownership and given the unequal power relations that spring out of this fact, especially in rural areas, the limitations imposed by the property clause have resulted in legislative frameworks that offer inadequate protection to the intended beneficiaries or require expensive and complex legalistic processes to realise the right. The Restitution of Land Rights Act (Act No 22 of 1994) is an example of the latter and has been amended on numerous occasions in order to iron out problematic areas. The Extension of Security of Tenure (ESTA) (Act 62 of 1997), and the Interim Protection of Informal Rights Act (IPILRA)(Act 31 of 1996) are examples of rights based legislation that has been passed to safeguard the rural poor, although critics would argue that these laws do not provide adequate protection for farm workers (Hornby 1998). It is however in the implementation that the real problems lie.

Rights activists agree that a good communication strategy is essential in ensuring that adequate information reaches the broad mass of citizens, especially those who may potentially benefit from the realisation of these rights. (Cousins 2001:2) Liebenberg and Pillay (2000:29) suggest that effective information dissemination should be promoted by the state through educational programs, media campaigns, active support from government ministers for example in speeches, and by encouraging the work of non-governmental organisations and community-based organisations (CBOs) on socio-economic rights. This aspect of the restitution campaign will be dealt with in Chapter five.

The development of institutional capacity, both inside and outside of government, is also important in order to "advise and support rights-holders and facilitate their active use of the law (Cousins 2001:2). Liebenberg and Pillay give examples of bodies that have been set up specifically to assist people to protect their human rights. These include the South African Human Rights Commission, the Commission for Gender Equality, the Public Protector, the Auditor-General, the Public Services Commission

and many more (2000:52). I would add the Commission on Restitution of Land Rights to this list. NGOs such as the Legal Resources Centre and the various land and development NGOs such as Border Rural Committee in the Eastern Cape and the Surplus Peoples Project in the Western Cape are examples of organisations outside of the government that are dedicated to assisting people, especially disadvantaged people, in realising their rights.

Perhaps the weakest link in the chain leading to the realisation of socio-economic rights is access to courts and other conflict resolution mechanisms. A number of successful cases have been brought to the courts by the Legal Resources Centre (LRC) and to the Land Claims Court (LCC) by the Commission on Restitution of Land Rights (CRLR). The most pertinent example of the former is the class action brought by the Grahamstown office of the LRC against the Eastern Cape Welfare Department for the cancellation of disability grants and the Grootboom case against the Western Cape Department of Housing. However, the LRC has offices in only a few of the main centres. The Legal Aid Board, which is supposed to pay for legal assistance to those unable to afford it, has a shortage of funds and a huge backlog in terms of payment, such that most members of the legal fraternity other than the most junior refuse to do any work for it[8]. This means that given the huge costs of attorneys and especially advocates, the majority of South Africa's people are simply unable to afford legal representation. The same conditions apply to restitution claimants, although the Commission itself provides generalised and rudimentary legal assistance through its fulltime legal officers.

In this chapter I will look in more detail at the most common causes of the failure of rights to resources to translate into "effective command over those resources" (Cousins 2001:1).

[8] Interview with Sarah Sephton, LRC, Grahamstown. September 11, 2000.

3.2 Impediments to the realisation of socio-economic rights

3.2.1 The definition of rights

The problem with the realisation of socio-economic rights begins with the way in which different types of rights are defined. "First generation" civil and political rights frequently take precedence over "second generation" social and economic rights, which as the name of the latter suggests, is seen as second-class rights. Developmental and environmental rights, often dubbed "third generation" rights, are thus even further down the ladder of neglect. This can be seen in the light of the nature of liberal democratic states, which promote political and civil equality, but they simultaneously promote material inequality through the protection of private property. Many countries include only first generation civil and political rights in their constitutions. The United States of America is one example. In countries that do have social and economic rights in their constitutions, they are often framed in such a way as to make it difficult for them to be justiciable in a court of law. In these cases they are called ""directive principles of state policy" and are meant to serve as guidelines to the government (Liebenberg and Pillay 2000:15). The Indian, Namibian and Irish constitutions are examples of the latter approach. In South Africa during the negotiations process leading to the creation of a new constitution, a number of civil society organisations, such as human rights, and development non-governmental organisations (NGOs), church groups civics and trade unions, campaigned for the full inclusion of social and economic rights in the constitution. Fifty-five organisations presented a petition to the Constitutional Assembly in July 1995 to press for this demand, which was eventually accepted:

> South Africa became an international role-model by including socio-economic rights as enforceable rights in its Constitution ... The poor, the vulnerable and the disadvantaged have the rights to special assistance from the government to gain access to social services, resources and opportunities. They also have the right to go to court or to bodies like the South African Human Rights Commission (SAHRC) or the Commission for Gender Equality (GCE) to get a remedy if their socio-economic rights are violated (Liebenberg and Pillay 2000:17).

However, as we shall see, this is only the first step. The ability of South Africa's poor and landless to access rights driven resources has been patchy.

3.2.2 Communication and participation

Du Toit has argued that in the processing of a restitution claim, especially during the negotiations and planning stages, the role and position of claimants should be central. For him real participation means making sure that the claimants are not marginalised in any way:

> The best way to ensure that claimants are taken seriously, however, is not for another agency to step in on their behalf as their champion, but rather to use the negotiations and planning process to build institutional capacity and self-confidence within the claimant community or associations (2000:88).

The first step for people who were dispossessed of land rights (or their descendants) in demanding the restitution of their right is for them to fill in the required claims form. As there is only one regional land claims commission office per province, and in the case of Mpumalanga the office was not even in the province but in Pretoria, getting hold of the form was difficult, especially for people in the rural areas[9]. In the Eastern Cape, for example, the Commission office is situated in East London. Attempts were made to increase access by making the forms available in DLA provincial offices, but during this first phase of the restitution process there were relatively few district offices, so the effect was limited. The DLA in the Eastern Cape only had offices in East London and Port Elizabeth. NGOs such as the National Land Committee affiliates also attempted to distribute claim forms in the areas they were working.

The second problem was that once people managed to obtain the claim form, a large number did not understand the requirements or the process which was to follow. It is not possible to quantify the number or percentage but interviews with Commission staff nationally revealed that a significant number of claim forms contained

[9] Interview with Anthony Lazarus, Eastern Cape Land Committee, Somerset East, 1998.

inadequate information and were incorrectly filled in. In many cases lack of or incorrect information meant that Commission staff was unable to contact or trace claimants to investigate their claims further[10]. A delegation of claimant representatives, representing a two rural communities being assisted by the Border Rural Committee in the Eastern Cape, namely Macleantown and Cwengewe, presented a list of grievances to the Land Claims Commissioner, Dr Peter Mayende in April 1998. Their main complaints were that the claimants did not understand the restitution process and that the operations of the Commission are perceived to be legalistic. They requested a more comprehensive information brochure be made available, setting out what had to be done by claimant groups or communities in order to expedite the processing of claims (RLCC Minutes of meeting with claimants 14 April 1998).

There was recognition of this problem at a national level. At a Commission strategic planning workshop held in Cape Town in April 1998, participants drawn from regional offices around the country, identified a number of bottlenecks affecting the effectiveness of the restitution process. One of these was the lack of documentation submitted by claimants to support their claims and it was agreed that in order to address this problem claimants need to be better informed about the requirements of the restitution process and the documentation needed (Du Toit/PLAAS 1998:27).

Another problem that affected public awareness of the restitution program and was to a large extent responsible for the slow pace of claimant registration was the lack of finances and resources available to the Commission to launch an effective communications campaign. By February 1998, after the expiry of the original closing date and a few months before the expiry of the extended one (December 31 1998), the CRLR Communications Officer, Mr Human, reported to a meeting of the Land Claims Commissioners held in Pretoria that "no funds have been made available as yet but were (sic) promised R2 million by April for the Restitution Awareness Campaign. The R2 million will be used for radio campaign in all languages, printing of pamphlets and poster (sic)".(CRLR Minutes February 1998:4).

[10] Interviews with Commission staff conducted over a two year period, 1998-99.

The Restitution Awareness Campaign finally kicked off on June1 1998. In the Eastern Cape a "mini-launch" was held at the Mdantsane taxi rank as well as talk shows on Radio Umhlobo Wenene (RLCC Investigative Division Minutes May 1998: 3). However, by October (with 70 days left to the lodgement deadline) funding problems were still being experienced and plans being made to draw up a basic workshop manual and evaluation form, with the purpose of "making people aware that they have a right to claim and that they understand the process, within the government's Land Reform Programme" (RLCC Eastern Cape Communication Team Minutes October 1998).

Thus, one of Korten's basic requirements for effective participation by claimants in the process, access to relevant information, as well as Liebenberg and Pillay's requirement for the realisation of a right, was not adequately fulfilled for the first three and half years of the Commission's existence. There are indications that a number of potential claimants failed to make the extended deadline. During the process of claimant verification, the West Bank and East Bank group claims in East London, the PELCRA claim in Port Elizabeth, as well as the Macleantown claim, all turned up claimants who had not registered[11]. Similarly, a number of people from the former Transkei approached the Commission to try and register during 1999[12]. The most common reason given for failure to register before the cut-off date was that people did not know.

For those fortunate enough to have registered by the deadline, their next contact with the Commission was a letter of acknowledgement and a request for any required missing documentation. Due to the volume of claims, especially after the cut-off date, the lack of an adequate computerised data-base, and a shortage of administrative staff, claimants often had to wait months for this letter (RLCC Eastern

[11] Interviews with Clive Felix, Urban Services Group, Port Elizabeth, June 7 2000; Christo Theart of Theart Mgijima and Associates, East London, November 6 1999, and Ashley Westaway, Managing Director, Border Rural Committee, East London, March 23 2001.

[12] Interview with Zodidi Zonyane, Client Relations Officer, RLCC Eastern Cape, East London, May 26 1999.

Cape and Free State Staff Meeting Minutes: February 16 and March 30 1999). Many did not receive them at all due to inadequate information on the claim forms, relocation to another address, failure of the postal service, or due to the remoteness of their residence (deep rural areas).

For the majority of claimants the next phase in the restitution process was one of simply waiting for the Commission to prioritize their claim. For those that did not meet the criteria for prioritization the wait could be anything up to ten years or more, depending on the longevity of the restitution program. Claimants, whose claims have been prioritized, generally received a visit from a Commission field researcher. The purpose of this field visit is to obtain any outstanding documentation in the possession of the claimant family, group or community, to gather oral testimony regarding the location and extent of the land claimed, the circumstances surrounding the forced removal, especially loss and suffering experienced during the relocation. This is the claimant's first real opportunity to engage actively with Commission staff. It also affords the field researcher an opportunity to explain the restitution process and the restitution options available to them:

> It is therefore crucial for field workers to explain the restitution process to claimants in their first interface with them so that they are able to investigate deeper into the claim. This can help the claimants as well make informed decisions about their claim (RLCC Field Work Manual 1997:1).

One of the problems with this aspect of the restitution process is the superficial nature of the field worker's engagement with the community and the limited opportunity that it gives the claimants to participate meaningfully in the process. Due to the vast number of claims, the scattered nature of the claimants over vast areas, such as the Eastern Cape, the pressure to process as many claims as quickly as possible, and the limited number of restitution field researchers, most claimants were lucky to see Commission field researchers more than once or twice[13]. Du Toit puts this succinctly:

[13] Interview Kwandi Kondlo, Senior Researcher, RLCC Eastern Cape and Free State, East London, June 1998.

> ...to be offered a choice by a harried government official at a once-off workshop, between a number of cut-and dried options ("restoration", "alternative land", or "compensation") is not to be offered a choice at all. There needs to be much more scope for flexibility, and for claimants to design a range of tailor-made, integrated solutions which the entitlement can be used to underwrite. I believe in particular that, we need to much more imaginative in devising alternative forms of compensation which can allow claimants to access social goods where they are. Restitution should be allowed to deliver, not just land or cash, but schools, hospitals, roads, water and power (2000:88).

The ability to participate in an active and informed manner in demanding rights thus depends to a great extent on the willingness and ability (in terms of resources) of the state and institutions of civil society such as land NGOs to communicate effectively with claimants. Another impediment to the realisation of rights by the poor is the collusion between reactionary elements of the state and those with a vested interest in maintaining the status quo.

3.2.3 Interaction of formal and informal institutions

Cousins, drawing on a number of writers who have contributed aspects of what has become known as the environmental entitlements framework, points to the way in which access to rights-backed resources through formal institutions is mediated by the operation of informal institutions. He defines formal institutions as those backed by the law, which enforce the rules of the state. Informal institutions are upheld by mutual agreement or by relations of power and authority, with "rules enforced endogenously". He argues that the relationship between formal and informal institutions take place at a multiplicity of levels within society and within a variety of social fields where "numerous conflicting or competing rule-orders exist,

characterised more often than not by ambiguities, inconsistencies, gaps, conflicts and the like " (2001:3).

An example of informal institutions interacting with formal institutions is to be found in the implementation of the various land reform acts. This interaction is often to the detriment of the intended beneficiaries in terms of their constitutional rights contained in the acts. Both Cousins (2001) and Euijen (2001) give examples of collaboration between magistrates and white farmers in rural areas that allow the latter to escape the obligations placed on landowners by rights-based land acts. Cousins states:

> Another problem in implementing the Act (Land Reform – Labour Tenants Act 3 of 1996) lies in its reliance on local magistrate's courts to determine whether or not an evictee falls within the definition of a labour tenant (which is problematic in its definition in any case), since the local magistrates, as the NGOs have pointed out, are closely linked to farmers through local social networks (2001:5).

A similar anomaly exists in terms of the Extension of Security of Tenure Act (ESTA). Here a Land Claims Court judge, Judge Gildenhuys, declared that the onus is on the occupier (ie. the farm labourer) to show that the provisions of ESTA apply and not the landowner seeking the eviction. Euijen points out that this means that in uncontested or poorly defended cases (a likely scenario with illiterate farm labourers who do not have access to legal assistance), a landowner can ignore ESTA and bring an application to court in terms of common law thus avoiding the rights bestowed upon the occupier by the constitutionally mandated act. According to Judge Gildenhuys, in Skhosana/Roos case, there is no onus on the magistrate to assist the illiterate farm worker in this regard:

> In the present case, the first respondent was fully entitled to formulate the particulars of claim in his action for eviction the way he did (as common law rei vindicatio). The magistrate, in the absence of a plea by the applicants that they are occupiers, was also fully entitled to grant default judgement. A judicial officer must decide a case on the issues raised by the parties. His

> failure to raise or consider the possibility that the applicants could be occupiers under ESTA before granting default judgement against them was not irregular (quoted in Euijen 2001:31).

In chapter four I discuss the difference between an adversarial and a inquisitorial court system in some detail. The adversarial system, which has been the norm in South African courts, allows the judge to base his judgement on the evidence before him, no matter how incomplete, whereas an inquisitorial system requires the judge to assist the litigants in obtaining relevant evidence and make sure that the applicable legislation is applied. However, Euijen argues that even under an adversarial system:

> A magistrate or any judicial officer, particularly one created by statute, always has it as his/her first duty to satisfy themselves as to their jurisdiction. In eviction matters, the powers exercised by and the procedures which have to be followed prior to obtaining an eviction order from a magistrate in terms of the Magistrate's Courts Act, the ESTA, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) are very different. It ought to be of some moment to a magistrate to satisfy him or herself at the outset that the powers about to be exercised to secure another's eviction are the correct legal ones. Indeed at the very least, it is submitted, magistrates are obliged by provisions of the Constitution to enquire in any eviction matter whether the person sought to be evicted is being evicted from their home or residence. If the answer to the question is "yes" then the Constitution further provides that no such eviction order may be issued by a court until it has investigated all relevant circumstances (2001:35).

What we have here is a complex interplay of not only informal institutions with formal ones, the collusion of farmer, magistrate and judge, but also the lack of information and legal resources of the farm worker, the refusal of even the top echelons of the legal system to abandon the tried and tested systems of the past, a refusal to embrace the spirit of the Constitution and the Bill of Rights and move, as the

constitution requires towards a more inquisitorial and purposive[14] mode of operation. The plight of poor rural people with regard to accessing rights has been the subject of judicial notice. Judge Didcott states:

> The state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons...are either unaware of or poorly informed about their legal rights and what they should do to enforce those, and where access to the professional advice and assistance they need so sorely is often difficult for financial and geographic reasons (cited in Froneman 2000:13).

It is ironic that the Land Claims Court, that was specifically set up to implement a rights-based land reform program and to operate in an inquisitorial and purposive manner, should produce judgements such as that discussed by Eujen above. Other judges in the Land Claims Court have taken a different more generous approach in keeping with the spirit of the Constitution. The result has been a set of contradictory judgements. On the other hand, there are indications that the High Court is moving, in the face of administrative anarchy, corruption and incompetence in the provinces, towards playing a more meaningful role in trying to enforce its "constitutional task of controlling public power so that it conforms to the principle of legality" (Judge Froneman J. 2000:9). Why has this administrative illegality arisen in the first place?

3.2.4. Administrative incompetence

[14] A purposive mode of interpretation takes into consideration the purpose or intent of the legislation and its compatibility with the spirit of the constitution. Also referred to by some judges as a "generous interpretation". See chapter 5 for a fuller exposition.

There is no doubt that one of the principle reasons for the lack of translation of "rights to resources" into "access to resources", is the dearth of administrative competence, especially at middle management level:

> There are still many challenges that need to be addressed, such as the continuing lack of administrative capacity on the part of some Provincial departments for effective and efficient delivery of social security services. Although there was progressive realisation of the right, the actual increase in the rate of delivery was so marginal that the full realisation of the right remains distant (South African Human Rights Commission 2001:8).

This is accompanied by a lack of motivation to improve the situation and the culture of entitlement and corruption that has developed as a result. Much of the blame for this situation can be laid at the door of the apartheid regime and its bantustan policy. For it was here that the necessity for political control of the black "independent states" political and civil servant classes spawned the Midas-head of multiple bureaucratic institutions where tax payers money sponsored an ever-growing culture of patronage with the attendant corruption and lack of accountability. But while much of the blame may be apportioned to the apartheid bantustan system, not all of it can. That the situation continues, with some notable exceptions, is largely due to a lack of political will to deal decisively with those guilty of consuming vast amounts of tax-payers money while delivering very little in terms of services or developmental resources necessary for the livelihood of especially the poor. The Public Service Accountability Monitor attached to Rhodes University in Grahamstown have documented numerous cases of state officials in the Eastern Cape who, having been found guilty of some form of corruption or malpractice, continue to draw their salaries and occupy their position[15].

Although the central theme of this thesis is the rights-based restitution process, it is instructive for comparative purposes to look at other government departments with a similar rights mandate. The restitution process will be dealt with comprehensively in

[15] See Public Service Accountability Monitor website.

the following chapters. A pertinent example of a government department failing dismally to fulfil its constitutional obligations due to administrative incompetence, corruption, and lack of political will, is the Department of Welfare in the Eastern Cape, specifically in its dealings with disabled people and their grants. In an attempt to weed out ghost beneficiaries and to update their database the department stopped payment of all disability grants leading to close to a hundred thousand people in the Eastern Cape province losing their entitlement to social grants which they had previously enjoyed, without any of them being afforded a proper hearing (Froneman 2000:6-7). Judge Froneman's judgement describes a litany of attempts by the Black Sash, the Legal Resources Centre, and the Human Rights Commission to work with the department to rectify the situation. Virtually every agreement reached (and there were many attempts) to alleviate the plight of the grantless disabled beneficiaries subsequently came to naught – through what can only be ascribed to a combination of incompetence, lack of empathy, and ultimately a lack of leadership and management with the political will to sort out the problem timeously. The LRC finally resorted to litigation. It is worth quoting Judge Froneman at length:

> The litigation campaign was interrupted when the acting permanent secretary of the welfare department requested the regional director of the LRC in Grahamstown to attend a meeting in an attempt to resolve the remaining applications against the department. The meeting was held in April 1998. A minute of the meeting reveals that the necessity for a fair procedure to be followed when reviewing social grants was again brought to the department's attention. Since August 1998 the details of approximately 2000 erstwhile beneficiaries, all of whom alleged that their grants were terminated without observance of administrative fairness, have been sent to the department. Barely one third of these cases elicited any response from the department. Of these people approximately 20% were reinstated. For more than a thousand no response has been forthcoming. A further meeting was held with the officials of the department in November 1999 to discuss the department's poor performance in rectifying matters. It was reiterated that the procedure for the cancellation of grants was defective. Further suggestions were made by LRC lawyers to expedite and alleviate matters. Nothing came of it (2000:5).

The lack of performance by the Eastern Cape Welfare Department, and the problems of state administrative departments generally may be attributed to many causes. The SAHRC report covering 1999/2000 deals with four problems within state administrative departments at both national and provincial level. They occur across provinces and departments. They are: a lack of commitment by the government to the delivery of socio-economic rights; corruption; the fact that the lion's share of the budget is spent on salaries rather than delivery of resources to the poor; and, in spite of the ever–shrinking budgets, the lack of ability to spend allocated budgets leading to monies being rolled-over from year to year.

The report addresses the government's commitment to the delivery of socio-economic rights in the following manner:

> It is unsatisfactory that measures aimed at addressing poverty reach only 3 million people when poverty statistics point to about 20 million people living below the poverty line. The fact that 2,8 million beneficiaries were reported in the previous reporting period of 1998/1999, means that there has not been any significant quantitative increase in the number of people being reached by policy measures aiming to address poverty. It is unsatisfactory that only 40% of people with disabilities are reached when it has been widely reported that people with disabilities have difficulty securing employment and other economic opportunities. The social security system in the country does not adequately address the needs of the unemployed (2001:10).

This lack of commitment to the delivery of socio-economic rights is not limited to the national government. The SAHRC report finds that most provinces still fail to demonstrate the way the measures undertaken address constitutional obligations and to give special consideration to vulnerable groups (2001:19). The bad news extends all the way to the bottom: "problems encountered in the implementation of the Consolidated Municipal Infrastructure Program (CMIP) and Rural Municipal Infrastructure Programme (RMIP) by the provinces were due to lack of capacity and

insufficient budget allocation for Local Authorities tasked with the provisioning of water and sanitary facilities (2001:25).

The report highlights the fact that both National and Provincial Treasuries have efficient monitoring systems in place as required by the Public Finance Management Act 1 of 1999 (PFMA), including an Early Warning System as a way of monitoring over or under-spending. In spite of this, the report quotes "independent research" that has shown that although budget reform and auditing systems of the Medium Term Expenditure Framework has contributed to improving financial management, several provinces still showed large rollover funds which were unspent, while others were racked by corruption and the misuse of public money (2001:32).

The large percentage of budgets spent on salaries is most marked in precisely the areas most in need of delivery of resources, namely education, health and social welfare. The salary component of provincial and national state departments is the only component of departmental budgets that is not ever rolled over due to lack of spending. Ironically, the little left of the budget after the payment of salaries for supernumeraries as well as ghosts, ie. for the delivery of the actual services that these civil servants are employed for, is rarely spent in full and is often rolled over to the never-never land of the following year. The result is a progressively worsening situation as treasury responds by lowering budget allocation. A number of instances of this sorry situation are documented by the SAHRC report. Provinces spent only 57% of budgeted expenditure between 1997/1998 and 1998/99. As the report notes, this means that provinces were even less able to keep their facilities from degrading than their budgets suggest (2001:18)

The Department of Land Affairs does not break ranks with the rest of the governmental regiment:

> Perhaps the greatest area of concern from the response of the Department of Land Affairs is that the department has consistently, and across programmes, failed to utilise the complete budgetary allocation for land reform, pointing to inefficiencies in the application of financial resources towards the land reform.

> For example, in the Land Tenure Reform programme, only about half (R24 734 000) of the allocated funds of R45 849 000 was spent. It is difficult to understand or justify such under-expenditure given the dire need for land reform in the country (2001:23).

There have in recent times been a number of challenges to the present government and the state that it presides over, about its inability and lack of will to realise constitutional rights. These challenges have occurred on a broad front, giving credence to rural consultant David Tapson's belief that "the state doesn't just deliver; it has to be forced to deliver"[16]. They include the national trade union federation the Congress of South African Trade Unions (COSATU) which has questioned the validity of the government's privatisation policies; the National Land Committee (NLC), the Landless People's Movement and the Legal Resources Centre (LRC) that have been highly critical of the state's implementation of land reform, housing and welfare policies; and a wide range of individuals, political parties, and organisations that have questioned the government's intention to spend an ever-growing number of billions of rands on military arms while failing to implement an effective and adequate HIV Aids program. These civil society challengers have utilised a wide range of tactics, from legal challenges through the courts, peaceful marches, conferences and workshops, publicity campaigns in sympathetic media, international collaboration with foreign institutions of civil society, to more radical tactics such as encouraging land invasions. There is thus an increased awareness that the courts are only one avenue – albeit a powerful one – in enforcing the realisation of rights. The efforts of civil society in working with the state where there is willingness and against it where there is not, is becoming more and more necessary. As Cousins pointed out at a LRC workshop on rights and land reform on Robin Island in 2001:

> Again it is clear that enacting the proposed law will not by itself resolve the conflicts; it may create a framework within which processes of "democratisation" of land rights can occur, but active agents will have to press their claims and struggle to make their rights realities. This may well require

[16] Interview, Dr David Tapson, Bathurst, June 6, 1996.

the kind of connection between (localised) struggles over property rights and a (wider) politics of land pointed to by Bernstein (2001:7).

3.3 Conclusion

As we have seen, many countries propound human rights, but not as many manage to turn these considerations into realisable rights, into social and economic resources necessary for life for the majority of the population. A number of basic requirements are necessary in order to turn the good intentions of paper rights into tangible rights.

The first of these is an effective communication of rights entitlement to especially the poor and illiterate sectors of society to enable them to actively participate in demanding the fulfilment of their constitutional rights, especially Second and Third Generation rights.

Another aspect is an adequate legislative framework. In the arena of land rights, the property clause in the Constitution has imposed severe limitations on the effectiveness of the legislation, due to its complexity and inadequacy in the face of existing power relations based on unequal land ownership. These existing power relations, to a large extent a product of the negotiated settlement also impact on the way in which the court system and other institutions that deal with conflict resolution operate. The operation of formal institutions tasked with the enforcement and delivery of rights are often mediated in a negative way by powerful informal institutions. Courts often operate to maintain the status quo.

Beyond the unreformed nature of the legal system is the limitation imposed by the lack of capacity within appropriate institutions whose task it is to advise, deliver and support those that are attempting to gain access to their rights. For those unable to afford the services of the legal fraternity, an efficient state-sponsored legal aid and a vibrant and well-funded legal and para-legal NGO sector, are essential. In South Africa the limitations in this sector are more marked within the state than within civil society, although even the latter has suffered reduced capacity due to drop off in

funding because of a re-channelling of financial resources by foreign donors to the state after 1994.

Another requirement for the effective delivery of socio-economic rights is an efficient state administration, at national regional and local level, with decisive political leadership and efficient management within the civil service. This is the weakest link in the Second and Third generation rights delivery chain in South Africa. In situations where state administrations act in an arbitrary and uncaring manner, are inefficient and corrupt, a lack of remedy is often due to a lack of willingness on the part of political leadership to act decisively and due to a lack of experienced and efficient management within the administration itself.

The state has targeted its budget towards those line departments that deal with the realisation of socio-economic rights, but because of the large bureaucracies inherited from the apartheid bantustan system, the large numbers of supernumeraries and ghost workers, eighty percent of the budgets of many departments go to salaries. Tragically, the remaining twenty- percent is often not spent in full and ends up back in the treasury.

There are increasing signs that the government and the state that it presides over are being challenged by institutions of civil society, through a variety of strategies. These range from attempts at collaboration (with NGOs often doing the work of the state), strikes, protest marches, court action and open acts of defiance.

In the next chapter I will begin to focus more exclusively on the restitution sub-program of the land reform program as a case study of a constitutionally-driven rights-based process. I will look at the rationale for setting up a Land Claims Court as a mechanism for the arbitration of land rights and examine some of the problems that arose in the first five years of its existence.

CHAPTER 4

The Land Claims Court

4.1 Introduction

One of the central issues in this thesis is the question of the relative strength of First, Second, and Third Generation rights. Put in another way; are Second and Third Generation rights realisable in the face of entrenched First Generation rights? Practically, can meaningful land reform in general and restitution in particular be implemented through a market-driven "willing seller, willing buyer" process while the property clause protects private property? My answer to this question is no. Some of the reasons for this pessimism have been outlined in the previous chapter. This is especially true for land reform as a whole. Restitution as a sub-program with very specific goals, an ostensible time-frame, a highly complex legislative framework, a dedicated Land Claims Court and Commission seems to offer the best-case scenario for overcoming the impediment posed by the property clause and realizing these rights. However, in practice the elaborate institutionalisation of the program in order to overcome the resistance posed by those with entrenched property rights has ironically resulted in a legalistic and bureaucratic process that is slow, overly-expensive, lacking in real participation by claimants, and especially in the first few years, lacking in integration with local level development planning and provision.

In this chapter I will start by outlining what the aims of restitution are, and then proceed to analyse the effectiveness of the Land Claims Court, as well as the High Court in assisting restitution claimants and the rural poor to realise their rights. I will trace the original rationale of the policy makers for the Court and examine the difference between the High Court and the Land Claims court. This will involve a brief discussion of the adversarial and inquisitorial modes of operation as well as the slow and haphazard shift from a positivistic statutory interpretation (narrow, literal,

legalistic) to a purposive interpretation (informed by the Constitutional spirit and social purpose of the legislation) by both courts.

4.2 Restitution definitions

Broadly, restitution means the acknowledgement of some previously committed wrong against a particular group of individuals and the granting of some form of redress. Barkan defines it as "the return of goods or property and/or the monetary compensation for wrongs of one people against another□ (1996:54). Leatherdale suggests that the primary purpose of restitution as part of land reform in the former communist states is the restoration of legal rights, social justice and the improvement of economic efficiency (1995:4).

Restitution in South Africa as defined by the white paper on land policy is to:

> Restore land and to provide other restitutionary remedies to people dispossessed by racially discriminatory legislation and practice, in such a way as to provide support to the vital process of reconciliation, reconstruction and development. (1997:54)

Judge Meer, in her 1997 Land Claims Court ("the Court") judgement of *Dulabh v Dulabh*, argues that the term "restitution" has a variety of different meanings in different legal contexts. Because restitution of a right in land at the time of her judgement (one of the first restitution judgements) was a novel one in South African jurisprudence, she states that it is hardly surprising that South African legal dictionaries offered no definition of restitution in this context, but only in relation to the law of contract (1997:648). She does however find the following definition in Black's Law Dictionary:

> Restitution - an equitable remedy under which a person is restored to his or her original position prior to the loss or injury or placed in the position he or she would have been in had the breach not occurred. The act of making good or giving equivalent for any loss, damage or injury. The act of restoring something

to its rightful owner. Compensation for the wrongful taking of property. Restoration of the status quo, the amount which would put the plaintiff in as good a position as he would have been in had no contract been made and restores to the plaintiff the value of what he parted with in terms of the contract (1997:648)

As can be seen from the above definitions, restitution may involve some or all of the following components: the restoration of a right, the restoration of physical property lost, and/or, the compensation of victims, the reconciliation of victims and the perpetrators/beneficiaries of the original dispossession, and the expectation that the restitution process will contribute in some way to economic upliftment and development.

The restitution process has to occur within the limitations of state resources and within the broader policy framework of the compensating state. With regard to physical assets lost, the primary aim of restitution is restoration. This may involve land, residential property, commercial premises, factories, works of art, vehicles, ships, and family heirlooms. If restoration is not possible, restitution may take the form of financial compensation or in the case of land, alternative land. In addition, as occurs in South Africa, claimants may be provided with priority access to existing state development programs. In many countries, such as Germany and Estonia, financial compensation has been less than the amount originally lost, due to budget constraints, other development priorities such as economic growth and job creation as well as the perceived lack of culpability of the compensating state (De Bruyn et al 1999).

4.3 The motivation for a Land Claims Court

There were a number of motivations for the establishment of a Land Claims Court in South Africa. A group of individuals from academic, legal and land organisations[17] under the auspices of the Centre for Applied Legal Studies (CALS) at the University

[17] This group included Aninka Claasens, a land activist formerly attached to the National Land Committee and Edward Swanson, a visiting researcher from Stanford University in the United States of America.

of the Witwatersrand did much of the original research into the viability of a land court to drive the land reform process. In the end the participants in the process decided that a court was more suited to restitution and certain aspects of tenure security, while redistribution and tenure upgrade were more suited to an administrative process. The Court was perceived as an integral part of what was known as the Land Claims Court Model, which set out the specific steps through which a land claim would have to go. The arguments behind these choices are discussed below.

The CALS group recognised that apartheid policies had forced black people to occupy land outside of the legal system of registration (Swanson 1995:552). Legislation such as the *Black Administration Act, 58 of 1927*; the *Development Trust and Land Act, 1956;* the *Group Areas Act, 1950, 1957, and 1966;* the *Community Development Act, 1966* and the *Black Resettlement Act, 1954* had systematically stripped black people of formal land rights, and were used to remove, evict and expropriate so-called "black spot"[18] communities, unregistered and deregistered labour tenants and disqualify urban dwellers (DLA White Paper 1997:54). In spite of the lack of formal title, the CALS researchers found that claims to land by black people repeatedly referred to certain basic principles and values:

> These principles, including length of occupation, birthright and secure tenure preserved through due process and contractual obligations, were often closely related to established legal concepts (Swanson 1995:552).

It was argued that a court could give recognition to the terms of claims by black people by applying non-racial criteria to determine the strength of the various claims to land and as such award restitution of land to people who had been forcibly dispossessed by the application of apartheid policies and legislation.

The CALS group were in favour of a highly particularised land claims court that would respond to the needs of only a small segment of the total population claiming

[18] Black spots were pockets of black settlement and de facto ownership within areas that had been declared for occupation by white farmers under apartheid. These communities were earmarked for forced relocation to the ethnic Bantustan within which the particular community fell.

land. They argued that courts work best when they are handling disputes between specific parties (Swanson 1995: 540-541). Based on this argument, redistribution and tenure upgrade were deemed to be outside the ambit of the court and more suited to an administrative process. The disputes referred to overlapping land claims where the strength of rights had to be ascertained and adjudicated, and to situations where privately or state owned land would be claimed. The latter was no doubt in anticipation of the Constitutional entrenchment of property rights, although there was some debate as to the effect the inclusion of the right to property in a Bill of Rights would have on the efficacy of the court.

When the new 1994 parliament debated the Act to set up the Land Claims Court and the Commission, there was some concern from land activists within the National Land Committee (NLC) over the proposed narrow focus of the two institutions (BRC 1994:6). It had been hoped the Court, with its handpicked transformation friendly judges with an in-depth knowledge of land issues, would give much needed impetus to the land reform process as a whole. This stemmed from a lack of confidence in the ability of the as yet untransformed (in 1994) Department of Land Affairs to deliver the needed land administratively and the failure of the National Party government's Advisory Commission on Land Allocation (ACLA) to deliver anything substantial. The NLC feared that its brief to deal only with restitution, that is, it would only deal with communities and individuals claiming back the land they were originally removed from, coupled with the 1913 cut-off date, would exclude the majority of people involved in land struggles. For example in the Border/Kei area of the Eastern Cape, the Border Rural Committee, at that time an affiliate of the National Land Committee, pointed out that restitution represents the smallest category of land struggles. In other words only those who had been forcibly removed from specific pieces of land, such as the Macleantown claimants, would qualify. It would exclude the needs of settled communities who need additional land, in many cases adjacent to where they have settled. The latter included the inhabitants of black spots who had fought against removal to the Ciskei; those who fought against incorporation into the bantustans; those who fled or were evicted from Ciskei; communities such as Thornhill and Zwelidinga (who had been moved to temporary land by the state

because they did not want to be incorporated into the Transkei bantustan) (BRC 1994:6).

It also excluded certain categories of labour tenants as well as the claims of those dispossessed under betterment policies, which involved the forced removal and loss of land rights for millions of inhabitants of the former Bantustans (DLA White Paper 1997). The White Paper on South African Land policy argued that betterment claims should be dealt with by the tenure security program, land administration reform and the land redistribution support program. This was the position adopted by the first Eastern Cape Land Claims Commissioner Dr Peter Mayende who also questioned (in the context of the Mkonde community claim at Mangqamzeni in the former Transkei) whether betterment dispossession occurred as a result of past racially discriminatory laws or practices (Hathorn 1998). However, after the Border Rural Committee took the Chata claim (a community which had undergone betterment planning) to the court, the DLA decided that betterment does fall under the restitution program. The Chata claim was settled in the year 2000, opening up access for many other rural inhabitants to claim restitution for the losses suffered under apartheid betterment planning (Groundwork May/June; July /August; September/October2000; Border Rural Committee 2000).

In addition to the restricted brief, the CALS group put forward five broad criteria for the Land Claims Court to consider in making its decision on a claim. The criteria were drawn from what they argued were the basic principles underlying Western and African notions of property and they attempted to select criteria that embodied values common in both systems (Swanson 1995:555). The intention was that by drawing on shared values the court would be in a position to make decisions that were understood and accepted by both black and white people in terms of their understanding of land rights.

The five criteria were time, birthright, investment, loss and social benefit.

Time referred to the length of time that the claimant enjoyed physical occupation. Birthright meant that people who were born on the land and used it for permanent

residence would be favoured. Investment was applied fairly broadly; it included monetary investments as well as physical labour. The degree of loss, both financial and emotional suffered during dispossession was an important criterion. Lastly, the social benefit to the public as a whole and how return of the land would affect their interests would be an important consideration.

Swanson points out that the omission of ***title*** from the list does not advantage or disadvantage title holders. Using the above criteria title may prevail, but in some cases title is not the strongest claim to the land:

> Where title was obtained through theft, where title holders have neglected their property, where certain people were prohibited from obtaining title because of their race, there may be a claim to the land that is far more valid than legal title (Swanson 1995: 556).

This argument is similar to that of Klug's (1995:2). These five criteria would operationalize what Klug calls a general constitutional claim to restitution which would provide a constitutional basis for a redistributory land reform process similar to the affirmative action clause in relation to the guarantee of equality and equal treatment (1995:2). He gives the example of Papa New Guinea where *subsection 54* of the Constitution contains a general restitutionary clause which exempts from the general property clause any law that provides for recognition of claimed title to land where: there is a genuine dispute whether it was acquired validly or at all from customary owners; and, if the land was acquired compulsorily the acquisition would comply with the present constitution's protection from unjust deprivation of property.

These measures were considered necessary in order to make the court effective and to prevent people with vested interest from sabotaging the process:

> The international experience demonstrates the risk of obstruction of a land claims process through delay, pre-emptive action, and abuse of the legal system (Klug 1995:2).

Experience in post 1994 South Africa has been mixed in this regard. A number of factors complicate the simple claim that those with entrenched property rights have tried to sabotage the process of restitution. Firstly, much of the land on which forced removals took place during the apartheid era, especially after 1948, is still in state hands. Examples in urban areas are Salisbury Park and Fairview in Port Elizabeth and District Six in Cape Town. Many of the community claims in the ex-Transkei are for land that is now state forest. Secondly, because of the parlous state of white agriculture in especially areas adjacent to bantustans many commercial white farmers are only too pleased to sell their land to the state for restitution or redistribution.[19] Thirdly, in many areas there is a realisation that in order to avert a Zimbabwe-type situation white farmers have to be seen to be co-operating with the state to implement land reform. This attitude has been actively encouraged by some of the provincial agricultural co-operatives, through involvement in institutions set up to assist new black farmers.[20] Fourthly, many claims in urban areas are for land that has been converted into industrial usage and are now occupied by large factories that employ large numbers of people. The West Bank claim in East London is a prime example of this phenomenon. The Daimler-Chrysler factory now occupies the site and is the mainstay of the East London and surrounding areas economy and it would not be in the public interest for it to be restored to its original owners. In terms of the Restitution Act the regional land claims commissioners may decide that it is not in the public interest to restore certain land. In these cases claimants will be offered alternative land or financial compensation.

A final factor militating against present owners attempting to sabotage the restitution process is the fact that where the Commission and the Court has proved the validity of a claim, in terms of Section 35(5) of the Act the Court can order the state to expropriate the land for restoration. What this section means is the effective separation of the issue of just and equitable compensation from the restitution

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[19] Interview with Martin Stein, estate agent specializing in agricultural land, Bathurst District, for LAPC survey on white farmers attitudes to land reform proposals, April 12, 1995. Stein claimed to have more farms on his books than he could sell.

[20] Interview with George Wood, Managing Director of the Eastern Cape Agricultural Co-operative, Queenstown, for the LAPC survey on white farmers attitudes to land reform proposals, April, 1995.

(restoration) of the land. In other words the state can expropriate the land and restore it to the valid claimant, while separately dealing with the issue of compensation either through negotiations or the Court. This is what happened with the Farmerfield claim near Grahamstown. Two farms were involved in the claim. Owner Mike Mullins came to an agreement with the state as to the price for one farm but not for the other. After it became clear that reaching an agreement could take some time, the state expropriated the second farm so as not to delay the restitution process. The question of compensation was then dealt with as a separate issue (RLCC Farmerfield file, 1999). The process around the Farmerfield expropriation has proved to be extremely complex, resulting in a long and unproductive delay in the actual transfer of the land to the claimants (Hall 2003: 9). As a result the state is considering amendments to the Restitution Act in 2003 which will simplify the process and allow the Minister of Land Affairs to expropriate property without a court order[21]

However, there are as many examples of active resistance to restitution claims. The resistance is usually around two issues. These are the validity of the claim and the amount of compensation offered for the land. Present owners on occasion challenge the validity of the claim in terms of the criteria laid down in the Act. The most commonly invoked dispute is around whether the dispossession occurred as a result of a racial Act or practice. To combat this tendency in the initial years of the restitution process the definition of what constituted "racial" was changed in the final Constitution. This change involved the widening of the parameters which qualify persons or communities for tenure upgrade and restitution in sub-sections (6) and (7). Whereas in the Interim Constitution discrimination had to be in terms of a racial *law*, in the Constitution a person or community who was unable to obtain secure tenure or who lost property through a racial *practice* also qualifies for redress.

The reason for including racial practices is that under segregation and apartheid people often lost land due to a racial action without a specific law being applied. In the Komga district of the Eastern Cape for example, the Eastern Cape Land Claims

[21] Interview Sarah Sephton, Director, Legal Resources Centre, Grahamstown October 22, 2003.

Commission investigated a number of cases involving black farmers who claim to have been coerced into selling to adjacent white farmers, with the connivance of the local magistrate. These sales were often encouraged by local state officials on the basis that the district was a "white area" (RLCC Komga files, 1998). In other cases communities were forcibly removed under legislation which was not overtly racial, such as forestry, conservation, and legislation used to initiate irrigation schemes and dams. Durkje Gilfillan, the first Regional Land Claims Commissioner for Northern Province and Mpumalanga quotes the following example:

> Black landowners around the present Loskop dam for example were expropriated in terms of race neutral laws, but the resultant irrigation scheme was reserved for whites only (a. 1998:3)

In addition, because the communities concerned were disenfranchised, they were less able to challenge the removals and generally not able to choose where they wanted to be resettled. The state often used these types of acts to disguise the racial intent of the removals of communities to the bantustans.

Another tactic used by the apartheid state was to downgrade community's rights in land to that of squatters. For example, crown tenancy and the rights that went with it were abolished by the 1936 Land Act and affected communities declared squatters. When the land was subsequently needed for conservation purposes or forestry, often years later, the communities living on the land were removed as squatters in terms of seemingly race neutral common law or legislation dealing with trespass (Gilfillian 1998:3). The 1939 betterment proclamation, more properly known as the Livestock Control and Improvement Proclamation no. 31 of 1939, was primarily designed to subject stock in the bantustans to "beneficial control". However it did not confine itself to this measure alone. The scheme met with active resistance in most places it was implemented. There were a number of reasons for this. The main ones were that it was racist as it only applied to black people, there was no real consultation with the people most affected, the establishment of closer settlements destroyed traditional family/clan social-spatial relations, and most importantly it did not address the real problem which was a shortage of land (Roodt and Sephton

2002:1). Its officially stated purpose was the demarcation of residential, arable and grazing areas and the establishment of rural villages, the erection of fencing and the implementation of soil conservation measures, the preservation and development of water supplies, veldt control, and development of local industries.

According to Gillfillan, certain legislation though race neutral was used exclusively to effect evictions in a racial manner: Slum clearance was undertaken by local governments ostensibly for health reasons or to initiate low cost housing projects. The advantages and upgrading of such actions by local government benefited whites with blacks being removed to areas set aside for black occupation with little or no improvements in living standards (Gilfillian 1998: 3).

The second most common dispute that landowners have with the Restitution Commission is around what constitutes "just and equitable compensation". The most common mistake made by landowners is that they believe the state is bound in terms of the Constitution to pay "market price" for their land. With regard to compensation in the case of expropriation Section 25 (3) of the Constitution requires that the compensation and the time and manner of payment must reflect "an equitable balance between the public interest and the interests of those affected". Two new clauses were added with regard to circumstances which have to be taken into consideration when deciding on compensation, namely, the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and, the purpose of the expropriation (Sections 25(4) and (5)). This means that when the state decides on compensation for privately-owned land that is being expropriated for restitution, it will take these factors into consideration in determining the price. For example, it will pay market price minus any subsidies the owner has received from the state previously such as white farmers who may have received subsidies for boundary fences from the Department of Agriculture.

Originally the CALS group intended for the court to be chaired by a Supreme (High) Court judge, as the court needed someone of stature who is familiar with legal proceedings (Swanson 1995:558). However, it was proposed that the other

members would not be judges but people with experience of land issues, such as elected claimant representatives and representatives from current possessors. Classens, a leading member of the CALS group, suggested in a speech to the Transvaal Land Restoration Committee's annual general meeting, attended by representatives from 55 dispossessed communities in the then Transvaal that:

> The judges are not meant to be the same judges as now. They are looking for different kind of judges - people who have enough experience on land issues. To be a judge of the Land Claims Court one would need 10 years experience on such issues (National Land Committee 1994:8)

The idea of elected or appointed non-legal people with extensive experience of land issues becoming members of the Court is set out in the Act in *Section 27 and 28*. Their role is to assist the presiding judge as an assessor. An assessor, in terms of the Act, will be appointed by the presiding judge from a list compiled from time to time by the Minister after inviting nominations from the general public and in consultation with the President of the Court (Restitution of Land Rights Act 22 of 1994:22).

According to the Act, an assessor is a person who, in the opinion of the minister, has the skills and knowledge relevant to the work of the Court. It is not a requirement that an assessor have any legal qualification. The power of an assessor is limited to non-legal issues:

> ...an assessor shall not decide upon a question of law or upon a question whether or not any matter constitutes a question of law (Restitution of Land Rights Act 22 of 1994:22).

Contrary to the original intention of the CALS group to appoint people with extensive experience of land issues (such as land activists and community members) it was decided to appoint senior advocates or serving judges. The judges are appointed by the State President on the advice of the Judicial Service commission. This was an important first step in putting restitution on a narrow legalistic footing. Further

impetus was given by the prevailing legal system in South Africa, and the inability of many of the judges appointed to the Land Claims Court to transcend the narrow confines of that system.

4.4 The adversarial and inquisitorial systems

In the South African legal system, the High Court acts in terms of what is known as the *adversarial* system. This means that the onus is on the prosecution and the defence, or the litigant and the respondent in civil cases, to put all relevant evidence before the judge. The judge will base his judgement on that evidence and no matter how incomplete the judge is not expected to expend any time or energy obtaining additional evidence.

The German Administrative Court, on the other hand operates in term of an *inquisitorial mode.* The Administrative Court judge acts almost like an ombudsman. They will personally investigate the particular case and do research, using the status of their office to access information which may not have been made available previously. The court deals with any disputes between a citizen and the state, as well as between state departments. Appeals against restitution decisions, made by the local or regional restitution offices, are heard by the Administrative Court, but this comprises only a small percentage of the court's workload (De Bruyn et al 1999:44)[22].

The South African Land Claims Court was set up to be inquisitorial in a similar manner to the German administrative court, as opposed to adversarial as in the South African High Court. In the early years of its establishment, the judges tended more towards the familiarity of the adversarial model, requiring claim submissions to the court to be set out in a highly technical and legalistic format such that regional land claims commissions (RLCCs) were forced to hire experienced lawyers (both internally and externally) to prepare the submissions. The claimants, on the other hand had to hire attorneys and advocates, mostly through legal aid, to argue their

[22] Interview Herr Pee, Administrative Court Judge, Berlin, Germany, June 1999.

case. The submissions with their reams of appendices (title deeds, claimant lists, minutes of meetings, historical records amongst others) had (and still do) to be duplicated (up to ten copies) at great cost and distributed to all relevant parties. Pre-trial hearings, for which provision is made in the Act, and which gave the judges an opportunity to play a more active role in directing procedures and assisting RLCC staff and claimants as to what information was required, were not utilised when the Court heard its first few cases. The Macleantown claim is a case-in-point:

> It would seem more appropriate for the Land Claims Court to rule on certain questions of general validity before the Commission, the claimants and other agencies make commitments to continue investigations, mediation, facilitation and co-ordination without knowing whether the basic criteria for restitution will be acceptable for a legal award. It would seem that the provision for pre-trial conferences in Section 51 of the Restitution Act may have anticipated this problem and its use in Macleantown at an early stage would have gone a long way to alleviate the administrative delays and problems resulting from confused ordering of the various stages of the investigation (Brown et al 1998:115).

4.4.1 Oral evidence

Because of the lack of formal tenure enjoyed by claimants prior to their forced removals the Act specifically makes provision for the admission of *any* evidence, which it considers relevant and cogent, including oral evidence, even if such evidence would not be accepted in any other court of law (Restitution of Land Rights Act 22 of 1994:55). The informal tenure under which black people held land and the lack of documentation and registration which goes with this state of affairs was further exacerbated by the politically biased nature of apartheid records and the illiteracy of the people involved in many of the claims, especially in the rural areas. As with all such oral evidence, the problem is to assess the validity of the subjective and often conflicting viewpoints of events which occurred, in many cases, decades ago. *Section 50 (2)* of the Act states:

Without derogating from the generality of the foregoing subsection, it shall be competent for any party before the Court to adduce-

a. *hearsay evidence regarding the circumstances surrounding the dispossession of the land right or rights in question and*
b. *the rules governing the allocation and occupation of land within the claimant community concerned at the time of dispossession, and*
c. *expert evidence regarding the historical and anthropological facts relevant to any particular claim.*

The Act states in *Section (5)* that the Court will give such weight to any evidence adduced in terms of *subsections (1) and (2)* as it deems appropriate.

It is clear from the above sections of the Act that the intention was for the Court to go beyond the bounds of admissible evidence acceptable in the High and Magistrates courts. In instructing the Court to allow *any* evidence, including oral evidence, which it considers relevant and cogent, the legislators recognized the extraordinary circumstances, outlined above, surrounding the circumstances of the dispossession of land in South Africa, commencing during the colonial period and coming to full fruition during the apartheid era. In addition the Act grants the President of the Court the powers to make rules to govern the procedure of the Court, including rules in *Section 52 (1)* providing for:

(b) *the circumstances under which opinion and oral evidence may be submitted to the Court;*

(d) *generally, any matter which may be necessary or useful to be prescribed for the proper despatch and conduct of the functions of the Court.*

However, the only mention in the Court Rules of evidence not normally admissible by the high and magistrates courts, is under *Section 50* which deals with pre-trial conferences. *Section (9)* deals with matters which may be dealt with at a

conference. *Sub-section (d) (ii)* authorizes the judge to deal with the admissibility under Section 50 of the Restitution of Land Rights Act of evidence which would otherwise not be admissible. The President and judges of the Court therefore had ample sanction through the Act to adopt an active or inquisitorial role that went beyond the conventional adversarial and technical/legalistic mode of the ordinary courts, but the first step in the process, the drawing up of the Court Rules, chose to confine mention of this aspect to pre-trial conferences, which as mentioned earlier, enjoyed limited usage in the early stages of the Court's existence.

As the LCC judges gained confidence and analysis of the restitution process by both independent analysts and DLA/Commission staff began to happen, pre-trial conferences and visits by judges to RLCCs were instigated in an attempt to expedite the process. This, as I will show below, did little to simplify and expedite the restitution process.

4.5 The purposive method of interpretation

Another important development within South African jurisprudence in general was the move away from treating the Constitution in the same manner as other acts of parliament. Support for this approach came from the British member of the Privy Council Lord Wilberforce. He argued that the way to interpret a Constitution was not to treat it as if it were an act of Parliament, but as requiring principles of interpretation of its own suitable to its character. Courts interpreting constitutions are required, he argued to avoid the austerity of tabulated legalism (Budlender 1998:1-8).

Judge Meer of the LCC puts forward a similar point of view in the *Dulabh case.* She argues that to fully determine the ambit of restitution, one should reach beyond the immediate linguistic context of the word restitution, its ordinary and grammatical meaning, as contained in the Interim Constitution (sections 125(5), 121(2)and 8) and the Act (section 2(1)), to its wider legal and jurisprudential context so as to give effect not only to the purpose of the legislation, but also to the sense, spirit, ethos, morality and fundamental principles of the Interim Constitution and the Act (1997:648).

This approach involves moving away from what Judge Meer terms as a legacy of a literal positivistic theory of statutory interpretation in South Africa (Dulabh vs Dulabh: 1997:648) and moving towards what Judge Dobson in his 1998 *Slamdien* judgement terms as "a purposive approach "(1998:7-10). In general this approach requires that one must ascertain the meaning of the provision to be interpreted by an analysis of its purpose. In addition, Judge Dobson argues, it requires that the judge must have regard: to the context of the provision in the sense of its historical origins; to its immediate context of the provision in the sense of its historical origins; and to its context in the sense of the statute as a whole. Further, the judge must have regard: for the subject matter and broad objects of the statute and the values which underlie it; to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated; to the precise wording of the provision, and where a constitutional right is concerned, as is the case here, adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers (1998:9).

In addition the Constitution provides a general exhortation in Section 59(2):

> When interpreting *any legislation*.... every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (my emphasis).

Judge Froneman of the High Court Eastern Cape Division, in his judgement handed down after an application for a class action by Ngxusza and others against the Department of Welfare, quoting with approval the experience of an Indian judge, states that:

> ...flexibility and a generous approach to standing in a poor country is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective (2000:17).

Budlender, in a 1998 commentary on new land laws asked whether our courts would apply a purposive interpretation that he defined as:

> giving the words a meaning which seems to be consistent with the general purpose and import of the provision in its broader constitutional context, and relying on international jurisprudence as a guide (1998:1-9).

The answer to his question seems to be that while many have delivered judgements (see Meer and Dobson above) with lengthy expositions on the purposive method of interpretation, the findings of the judgements have often failed to carry through the professed ethic inherent in this approach. This may be explained by the partial nature of the negotiated political transition and the unreformed nature of the legal system. Early restitution judgements bear testament to this, and two examples are outlined below. Mark Euijen, an advocate working for the Legal Resources Centre in Grahamstown, cites a number of examples of magistrates, as well as judges of the LCC resorting to narrow interpretations which in his opinion have disadvantaged the intended beneficiaries in cases brought under the Extension of Security of Tenure Act, No 62 of 1997. Apart from adopting an adversarial approach (placing the onus on the farm worker to prove that they are an occupier, for example) when the Constitution clearly places the onus on the court to investigate all relevant circumstances before an eviction order may be granted (Sec 26(5) of the Constitution), he suggests:

> ...the legislation is nevertheless clear enough for the Land Claims Court to have been more broad minded about its interpretation of the Act's applicability and use rights attendant upon a farm worker's right of residence had it chosen to do so (2001:65).

This often erratic functioning of the LCC, often gave rise to what were seen by Commission staff battling to make sense of a highly complex process, as leading to contradictory judgements. This did little to bridge the growing gulf between Commission staff, claimants, and land NGOs on the one hand, and the LCC judges

on the other, over the continuing legalistic and bureaucratic approach to the settlement of claims. Two examples will suffice.

The Macleantown judgement was the first to be handed down by the Land Claims Court. The LCC presented its findings after a month's deliberation. It found that it was unable to make the Deed of Settlement an Order of Court as a result of certain "omissions". In the opinion of Judge Moloto, the Commission had failed to comply with all the requirements of the Act. The Court did not dispute the validity of the claim. The central issues hinged on the definition of a *community* as opposed to a *group*. According to Judge Moloto and his assessors, a community (within which parameters the claim was framed) implied a claim for a communal piece of land, whereas a group was constituted by individual claimants each claiming a separate titled piece or pieces of land. They argued that the claims by individuals receiving their awards in individual tenure were required to be accompanied by a list bearing the names of claimants:

> It is necessary for the efficacy of any court order which will follow upon the settlement agreement that the allocation of erven to the individual claimants be made before the Court Order is issued, so that it can be contained in the order. It cannot be left to an outside body (in this case the negotiating forum) to determine how a court order will be implemented, especially where there is no mechanism to resolve dead-locks (in South African Law Reports 1272 (LCC) 1996:4).

The judgement raised a number of further issues on which the submission was vague: more precise details concerning the role of the relevant state departments and local government authority in relation to the administration and ownership of the plots to be transferred, proof of each individual dispossession; a complete Deeds Office description of each plot to be transferred; evidence that the Registrar of Deeds had been informed in terms of the Deeds Registry Act; evidence of a request for a feasibility certificate from the Minister of Land Affairs in terms of Section 15 of the Restitution Act; further evidence on the question of compensation at the time of

the removals; clarity on the legal nature of the claimants rights to the comrnonage and motivation for the upgrading of the tenants rights to those of full ownership as requested in the Deed of Settlement. The LCC also insisted that representatives show power of attorney as proof of their mandate to act on behalf of their constituents, as required by law (Brown et al 1997:102).

The judgement overturned a carefully negotiated settlement that had overcome much conflict and taken years to broker. The settlement involved white residents, the black dispossessed landowners, their erstwhile tenants, their descendants, the Department of Land Affairs, and the Amatola District Council. The most important aspect of this settlement was that it allowed the stakeholders on the ground (the so-called community) to decide what was acceptable in terms of who should be included and who received what, rather than some outside agency such as the Land Claims Court or the Commission.

The Macleantown judgement gave rise to a ponderous process of claimant verification that required the drawing up of family trees to map out descendants as well as the collection of identification documents for each and every family member. It required the identification of a specific piece of land with each original owner and the valuation of the land in order to buy it from the present owner. The exact calculation of the monetary value of each claimant's original property was also required (LCC: 1996). As a result the Judgement set back the process by more than three years and effectively excluded any descendants from acquiring land at Macleantown through the restitution process, in spite of the fact that the local authority, the DLA, the white residents and the dispossessed community had agreed that they should be allocated land.

The other controversial judgement is one known as the Cremin judgement. Here the Land Claims Court judges ruled that where the original person dispossessed is deceased, the term *direct descendant* in the Restitution Act should be narrowly interpreted to exclude any person who is not the spouse or a direct blood relation of the dispossessed person, in terms of eligibility to claim. The fact that this interpretation goes against the customary inheritance practices of the indigenous

African population and that they make up approximately 90% of the claimant body, was not deemed important in spite of a thoroughly researched and well-argued presentation by Council acting for the claimants in the Cremin case. The judges decided that the common interpretation used in the High Court should apply in the Land Claims Court as well (LCC Cremin judgment: 1998).

Things came to a head in September 1999 when the Chief Land Claims Commissioner, after a particularly technicist judgment by the court in the *Bautaung ba ga Selale v Zephanjeskraal* case called a special meeting of the Commission's legal officers to discuss the unfair rulings of the court and other critical issues in order to strategise how to deal with the Court (Note from RLCC to Legal Officers 5 September 1999). Two further initiatives took up the issue of the over-legalistic and ponderous nature of the Land Claims Court process. These were the study visit by De Bruyn (DLA), Makona and Roodt (Restitution Commission) in 1999 to Germany and Estonia to examine the workings of these two country's administrative system of restitution, and the 1998/1999 Ministerial Review under the leadership of Dr Andries Du Toit. These initiatives led to the Restitution Act being amended to allow the Commission to by-pass the Court and send claims in terms of Section 42(D), where a negotiated settlement had been reached, directly to the Minister for ratification.

4.6 Conclusion

The original motivation for the establishment of a LCC was to give legislative authority to the rights-based land reform process. Policy makers, mainly under the auspices of the CALS group based at the University of the Witwatersrand, argued that a LCC was best suited to claims to land where there were disputes between specific parties, such as restitution and farm worker claims for security of tenure. Redistribution of land, initially mainly state owned, and tenure upgrade were deemed to be more suited to an administrative process.

Critics such as affiliates of the National Land Committee (NLC) were sceptical of this approach, arguing that in order to drive the land reform process as a whole; an

institution with the legal clout of the LCC was needed. Fears were also expressed as to the capacity of the DLA to implement redistribution and tenure upgrade administratively and about the fact that a large number of land struggles fell outside of the ambit of restitution. These fears have been partly borne out; the restitution program has received greater priority and proved to be more successful in terms of speed of implementation than the other two legs of the land reform program, especially tenure upgrade. However, as this thesis will demonstrate, the pace of restitution is still unacceptably slow and way below original intentions, and its relative success in relation to redistribution and tenure is due to factors other than the LCC.

The CALS group also put forward five broad criteria for the LCC to consider in making a decision on a claim. These criteria embodied values common to both western and African notions of property, namely the length of time the land had been occupied, birthright, investments made in the land, losses suffered during dispossession all balanced against social benefit to the public. The point to note was that these criteria provided objective and accepted measures of property rights other than formal title, especially in cases where title was obtained based on some form of discrimination such as race.

The CALS policy-makers originally intended for the court to be chaired by a Supreme (High) Court judge and staffed by people not necessarily with legal backgrounds, but more importantly with experience of land issues. However, the Act eventually provided for the appointment of High Court judges, advocates and attorneys or, an *expert* in law and land matters. Non-legal land experts were relegated to the role of assessors to assist judges in non-legal land matters. The LCC, with the status of a High Court, thus took on a more legalistic slant than was originally intended by the CALS researchers.

In South Africa the High Court operates in terms of an adversarial mode, where the onus is on the prosecution and defence to place all relevant evidence before the judge. This is in contrast to the German administrative court which operates on an inquisitorial basis, enabling judges to investigate cases to acquire additional evidence and to give guidance to litigants in a dispute. It was originally intended that

the LCC Court, being a court of equity, would operate on an inquisitorial basis, but because of its legalistic composition, status on a par with the High Court, and its interaction with both magistrate's courts and the High Court, it has tended to conduct its business in an adversarial manner.

With the adoption of a Constitution and a Bill of Rights in South Africa and the concomitant human rights ethos, the courts in general have stated their intention to move from a literal, legalistic, and positivistic interpretation of the law to a more purposive method of interpretation. The latter involves interpreting statutes with(in) the general purpose (of) its broader constitutional context (Budlender 1998:1-9). Unfortunately, apart from some groundbreaking judgements such as that given by Judge Froneman in Eastern Cape Department of Welfare case outlined earlier, it appears that in many cases judges, and ironically in the LCC especially, have struggled to come to terms with the true import of the inquisitorial mode of operation and the purposive method of interpretation. They have frequently interpreted statutes in a legalistic and narrow manner rather than within the framework of a generous human rights perspective with regards to restitution claimants and farm workers in ESTA cases. The limited use of and the low status accorded to oral evidence specifically provided for in the Act in both the Court rules and in practice, provides further evidence of a lack of willingness to go beyond the parameters of conventional legalism.

In the previous and in this chapter I have shown how the restitution process came to be a rights-based, market and demand led process, set out the Constitutional and legislative basis of that process and examined the origins and practice of the Land Claims Court. In the next chapter I will examine the structure of the Commission on Restitution of Land Rights as well as its business process (the path of the claim).

CHAPTER 5

The Commission on Restitution of Land Rights and the land claims process

5.1 Introduction

In theory the restitution process, by virtue of its rights-based constitutionally backed status, does two things that favour the implementation of the sub-program and give it leverage to access resources for those that qualify. The first is the directives empowering the state to implement restitution and allow it to link the sub-program to other state developmental programs, such as subsidised housing projects, with priority status for the claimants over non-claimants. The second is that it allows landless people to demand their right in land from the state by following a set procedure facilitated through the Commission on Restitution of Land Rights (CRLR), and validated by the Land Claims Court (LCC), and after the 1998 Ministerial Review, the Minister of Land Affairs.

However, its very strength is also its greatest weakness. Being rights-based it is also forced to recognise and respect existing property rights and to pay a market-related price for any private land to be restored to its original owners. The rights enjoyed by existing property owners, their ability to defend these rights in court and to charge inflated prices for their property; as well as the state's policy to subtract any compensation paid to claimants at the time of their forced removal when determining the value of their claim, has given rise to a costly, complex and legalistic implementation and policy process that has not only affected the speed of implementation, but also reduced to the minimum the ability of claimants to participate meaningfully in the process. The latter is somewhat alleviated when claimants are assisted by lawyers or knowledgeable NGOs, but even here there is a danger of them being sidelined by their own representatives and for negotiations to be conducted on their behalf.

In this chapter I will set out the costly, complex and legalistic implementation and policy process in some detail, so as to amplify the above claims.

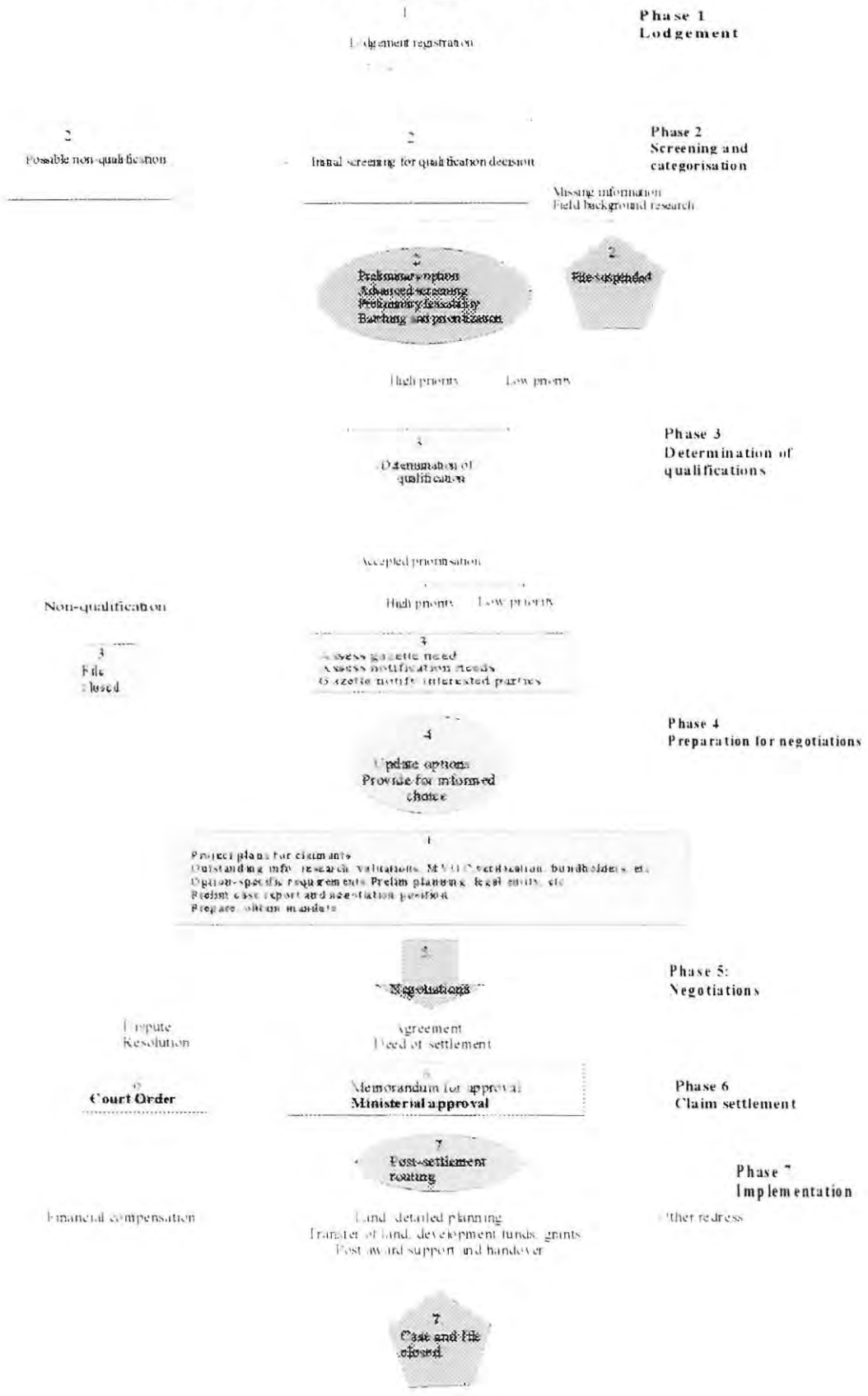
5.2 The restitution business process

The business process of the CRLR is the term used to describe the procedures and systems that have been devised to implement the core responsibility of the Commission, that is, the processing of land claims. What this entails is detailing and analysing the path of the claim, as well as the attendant problems experienced during implementation in the first five years, from lodgement through all the stages necessary for settlement to the closing of the case and the file.

In order to understand the complex business process of the CRLR, I will describe and analyse briefly each of the seven phases illustrated graphically in Flowchart 1. This analysis will involve the multiplicity of factors that bedevil the smooth flow of the claim from step to step. In reality each claim or group of claims present unique characteristics, some may go smoothly through every step while others, due to a host of reasons - such as overlapping rights, lack of evidence, conflictual participants, lack of co-operation from claimants or present owner, tardiness of Commission staff dealing with the claim, lack of co-operation from the deeds office, archives, local authorities, valuers, the Director General and the Minister of Land Affairs - may get stuck, side-lined, forgotten about, or purposely held back. More importantly, many of the steps may be collapsed into a simpler process, some steps ignored completely and others paid lip service to, depending on the expertise, patience, and commitment of the Commission staff member dealing with it at a particular stage.

Issues that require more in-depth analysis, such as the issue of claimant verification, the monetary value of the claim (mvoc), and the rights-driven (Du Toit 2000:80) nature of the process, will be discussed under separate heading afterwards. The flowchart is based, with minor changes for the sake of clarity, on one devised by the

LAND RESTITUTION BUSINESS PROCESS



DLA Business Process Re-engineering Task Team in 1999, as part of the implementation of the recommendations of the Ministerial Review of 1998.

5.2.1 Phase 1: Lodgement

5.2.1.1 The main issues

The lodgement of a land claim with the CRLR may seem to be a simple matter of filling in the required form, attaching the relevant supporting documents and handing it in to the Commission offices in the relevant province. Closer scrutiny of the lodgement process reveals that claimants experienced a number of problems in conforming to the requirements of the process. These problems were caused by legal and bureaucratic complexity and inefficiency in a situation where the majority of people affected by apartheid dispossessions (potential claimants) are poor, rural and often illiterate. Because of the nature of their land rights they often do not have any documents to support their claim. In addition, lack of a co-ordinated publicity strategy on the part of the Commission until the last few months of the lodgement period, meant that, especially in far flung rural areas, people were unaware of the requirements of the lodgement process. Thus one of the basic requirements to make rights real, that of an adequate communication strategy on the part of the state, (Liebenberg and Pillay 2000:29) was not met for the major duration of the lodgement process.

In this section I will examine the socio-economic profile of the claimants, outline the requirements of the lodgement process, and look at some of the problems that occurred.

5.2.1.2 The socio-economic profile

The majority of people affected by apartheid forced removals were black, poor and rural (Surplus People's Project1985). Even where urban removals occurred, the majority of the people affected were working class or unemployed, often without registered land rights. Two examples will suffice.

In the Westbank claim in East London, where 1200 families were forcibly removed in 1965 from the present Daimler-Chrysler factory site adjacent to the Buffalo River harbour to Mdantsane and Duncan Village, the people were from poverty-stricken homes, the majority being tenants, sub-tenants or municipal renters:

> The economic profile for the location suggests that there was little economic differentiation within the village. Most male household heads were labourers who earned weekly wages of between 1-3 pounds. Their wives mostly did not work and stayed at home...To highlight the generalised poverty in the area one of our informants explained: 'the people of West bank were poor, our families struggled to make ends meet, and our children went to school without shoes (Bank et al 1999: 5-9).

The Port Elizabeth Community Restoration Association (PELCRA) represents claimants that were dispossessed from four areas in Port Elizabeth: Fairview, Salisbury Park, Korsten and South End, of a total of 1275 erven during the period 1960s and 1970s. Group areas in Port Elizabeth were specified under Proclamation 144 of 1961 (Roodt and Schuster 1999:1). Christopher estimates that 15 000 people were relocated from an approximately 3200 inner city properties during this wave of apartheid removals (Roodt and Schuster 1999:1). The claimant profile shows that here too the majority of claimants came from poor families. In order to speed up the processing of the claim, claimants were divided into three ownership groups based on the value of the properties originally lost. Of the four affected areas, namely South End, Korsten, Fairview and Salisbury Park, the majority of the claimants fell into the bottom category (RLCC/Metroplan Claimant list 2000).

Returning to the general figures for the Eastern Cape as a whole, rural claimants outnumber urban ones considerably. An examination of the claims lodged with RLCC for Eastern Cape by the cut off date (31 December 1998) show the following:

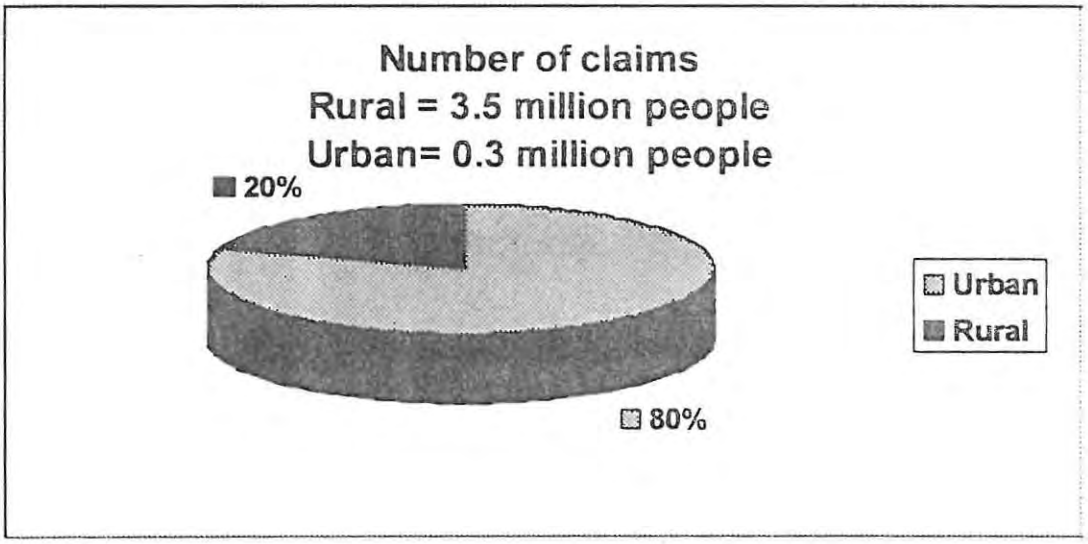
Table 1.

Eastern Cape urban claims	5800
Eastern Cape rural claims	1200
Total	7000
Claims received in December 1998	3975 (including Free State Province)

Source: Investigative Division Annual Report, RLCC Eastern Cape and Free State, March 1999.

The first point to note is that the figures above are misleading in that while it appears that the majority of claims are urban, this is true only insofar as claim forms lodged are concerned. *See graphs one and two attached.* Urban claimants tend to lodge as *individuals* or as *families* (in cases where the original person dispossessed is deceased), while rural claimants are in many cases *communities*. Du Toit gives the example of the Makulele in the Northern Province, where one claim involved between 8000 and 10 000 individuals (2000:77). In the Eastern Cape the Fatman family claim involves twelve title deeds and a four generation extended family with over fifty members (Investigative Division Annual Report, RLCC Eastern Cape and Free State, March 1999). DLA officials estimated in 1999 that urban claims could represent as little as 10% of the total number of people involved in restitution claims (Du Toit 2000:77).

By the December 31 1998, the extended deadline for the submission of claims, a total of 63 455 claim forms were lodged, by March 2001 this figure had been adjusted (due to the validation process) to 68 878 (CRLR Annual Report 2000-2001), and by 2003 to 72 975 (Hall 2003:21). By 2003, 36 908 claims had been settled


Number of claims
Rural = 3.5 million people
Urban= 0.3 million people
20%
80%
Urban
Rural

affecting 89 511 households with 450 116 beneficiaries. A total of 591 721 hectares was transferred.

Using figures supplied by the CRLR, Hall has calculated that of a total capital expenditure of R1 854 424 650 by the end of 2002, only 23% was spent on land. This is because of the large number of especially urban claims, 77% which have been settled with financial compensation. Of those claims settled with land in rural areas, 4 715 (out of a total of 19 140) have been settled, with more than 80% being settled with land (Hall 2003).

5.2.1.3 The requirements

A small number of claims were lodged with the Advisory Commission on Land Allocation set up by the previous government prior to the 1995 elections. These claims were transferred to the present Commission when it opened for business on 1 May 1995. Initially all claims had to be lodged within three years of that date, ie. by 1 May 1998. This was later extended to 31 December 1998 to accommodate the vast numbers of people who had not managed to lodge their claims within the prescribed period.

In terms of the Rules Regarding the Procedure of Commission set out in the Schedule in the Government Gazette of 12 May 1995 as required by Section 16(1) of the Restitution of Land Rights Act of 1995, a claimant is required to lodge a claim in writing on an official claim form or at least one that is substantially in the form of the official version. The claimant is also required to submit relevant additional documents to substantiate the claim. The form and documents had to be submitted to the regional office of the Commission which had jurisdiction over the land in respect of which a claim was instituted (Government Gazette 1995 No 16507:8).

On lodgement of the claim form the Commission staff were required to acknowledge receipt of the form and the attached documents and to inform the claimant that the Commission was considering their claim in order to decide whether it would be

further investigated. The rules of procedure also made provision for claims handed to the provincial office of the DLA and the Commission head office to be sent to the regional Commissions.

5.2.1.4 The problems

In practice many claim forms were handed in on scraps of paper, often with minimal details, without any documents, and often to NGO offices, Provincial Department of Land Affairs offices, and even police stations[23]. In a number of cases a lack of telephones and postal addresses made communication with claimants, in order to clarify and obtain more information, extremely difficult if not impossible. This made the process of registration and filing of claims very difficult, as it was often not clear as to which district or region the claim belonged to.

With large group claims such as West Bank in East London, many of the potential claimants failed to fill in forms as they believed the committee representing them had lodged a claim on their behalf.[24] This belief led to many problems later on because unlike a community claim where a representative committee or a designated individual may submit a single claim form on behalf of the community, with a group claim where each member of the group is claiming for the loss of a separate title or land right, an individual claim form for each member of the group has to be lodged. A similar situation arose with the Kipi claim in Kwa-Zulu Natal:

> Thus Kipi, which was lodged on a single claim form by a committee representing the Kipi community and processed and initially counted by the RLCCs office as one claim, involving one set of negotiations between the interested parties, turns out to have involved 175 claims to historic land rights that were held individually by 175 claimant families (Restitution Transformation Project Information Management Task Team: Final Report 1999:5).

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[23] Interview with Ms Zodidi Zondani, Client Relations Officer, Regional Land Claims Commission, Eastern Cape and Free State, East London, January 16, 1999.
[24] Interview with Mr Christo Theart, Project Consultant, West Bank restitution claim, East London, October 15, 1999.

One of the main problems experienced by the claimants was an inability to understand the claim form. This was as much due to the high levels of functional illiteracy amongst a large number of the claimants as it was due to the bad design of the claim form[25]. Some of the problems with the claim form was that it was not comprehensive enough to deal with different types of claims, that it was never updated during the three and half year lodgement period in spite of the experiences of Commission researchers with the claim form in the field, it did not reflect the legal requirements of or the amendments to the Act, it was badly designed and lacked space for the relevant information, and as a result of the above, made screening, categorization and prioritisation of claims extremely difficult if not impossible (Wolfson:1998:16). As a result a large amount of irrelevant information was included often to the detriment of required information.

The most common problem, especially with claims where the dispossession occurred in the earlier part of the century and/or the original person(s) were deceased, was an inability to provide an accurate description of the land lost. The Guba claim in the Indwe district of the Eastern Cape is an example of the former. A large number of Indwe Coal Mine employees who had been settled on mine land and in many cases were growing food crops for other employees, were forcibly removed by the state after the mine went bankrupt in 1918. Their descendants who lodged the claim in 1996 have very little idea of the extent or nature of their forefathers land rights[26]. This issue will be discussed further in the next section.

5.2.2 Phase 2: Screening, categorization and prioritization

The next problem for the Commission staff, after lodgement and registration, was dealing with the screening, categorization and prioritization of claims. Two aspects need to be noted. Initial screening was essentially done to determine what information is available in the file and, if sufficient information is available, to start

[25] Interview Cuma Sangqu, Community Liason Officer, RLCC Eastern Cape and Free State, East London August 12 1998.
[26] Interview with Guba claimant committee, Guba, September 16 1998.

making tentative decisions as to whether the claim meets the criteria for acceptance for further investigation. If sufficient information was not available, it entailed sending a request to the claimant for further information, or if considered necessary assigning a field researcher to visit the claimant/s in order to obtain the necessary information. Advanced screening was done to determine the preliminary feasibility in terms of the option chosen by the claimant/s, ie. restoration of land lost, alternative land, or monetary compensation, and to categorise or batch claims in order to prioritise them. These steps were fine in theory, but highly problematic in practice given the lack of or confusing information contained in most claim files.

5.2.2.1 Screening

The term screening refers to the process of going through claim files to assess firstly whether the claim complies with the acceptance criteria set out in *Section11(1)* of the Act. *Section 11(1)* contains within it reference to *Sections 1A* (definition of a right in land) and *2(1)*(entitlement to restitution). In practice it was rarely possible to make a decision as to the acceptability in terms of Section 11(1) criteria, without further research, so at this stage screening was generally part of the ongoing process to determine whether the claim should be suspended or continue to be investigated.

5.2.2.2 Categorisation

Categorisation is a relatively simple process although it is also afflicted by some of the ambiguities which beset the screening and prioritisation. It entails sorting claims into various categories such as by district, rural/urban, claims where compensation is sought as opposed to restoration of land and so on. The purpose is to assist in the prioritisation of claims. As with screening and prioritisation the biggest problem is lack of information on the claim form and the absence of supporting documentation.

5.2.2.3 Prioritisation

Once claims have been lodged, registered, screened and categorised, they are ready for prioritisation. Prioritisation is essential in a situation where nationally the final total for claims lodged was 63 455, affecting an estimated 5 million people[27] (CRLR Annual Report, April 1998 - March 1999: 9).

Prioritisation was especially difficult in the first three and a half years of the Commission's existence, with the constant flow of new claims coming in, and the knowledge that thousands, if not millions of people had not yet lodged. Lack of a co-ordinated and properly funded publicity campaign[28], the socio-economic and rural background of the majority of claimants, and the complicated requirements of the process, resulted in the extension of the original final date for submissions. In the extension period funding was obtained from the Belgian government[29] and a concerted and nationally co-ordinated publicity campaign, dubbed the Restitution Awareness Campaign, was launched. Carried out in conjunction with NGOs and the DLA provincial offices, it targeted rural areas. This campaign was adjudged a success by staff of the organisations involved[30]. As can be seen from Table 1 above, of the 9615 claims received in total for the Eastern Cape and Free State, almost 4000 were received in the last month of the lodgement period, when the campaign reached its peak. However, the targeting of rural areas resulted in some urban areas being neglected, with many people not registering properly or being unaware of the final closing date for lodgement[31].

In addition to the large number of claims received over an extended period, the Commission in its first few years of existence was understaffed, lacked equipment, and especially, did not have a computerised data base (Brown et al 1998:19; RLCC Campaign response management team minutes June 30 1998). A great amount of

[27] This figure escalated further to 72 975 claims as the verification process advanced.
[28] Interview Vuyelwa Vika, Communications Officer, RLCC Eastern Cape and Free State, East London, March 10 1998.
[29] Interview Schalk van der Sandt, Deputy Director, RLCC Eastern Cape and Free State, East London, March 12 2001.
[30] Interviews with Theresa Tyake, Border Rural Committee Restitution Programme and Vuyelwa Vika, Communications Officer, RLCC Eastern Cape and Free State, East London, East London, during January 1999.
[31] Interview with the East Bank Restitution Committee, East London, December 6 1998.

sustained pressure was brought to bear on Commission staff, especially by urban claimants with access to phones and in close proximity to the Commission offices, to prioritise and process particular claims. Claimants that could afford to hire legal representation and others that were assisted by NGOs such as the Border Rural Committee and the Legal Resource Centre, were often able, through regular queries and lobbying, to get Commission staff to prioritise claims which would not normally have qualified in terms of the criteria laid down by the Act (RLCC Investigative Division Meeting Minutes July 13 1998:6).

The Act sets out criteria for the prioritisation of claims in *Section 6(2)(d)*. Priority should be given to claims that affect large numbers of people, where substantial loss has been suffered and where people currently have pressing needs. It was envisaged that these measures would ensure that priority would be given to rural community claims (Winkler 1996:1). However, the provisions of *Sections 12(5)* and *(5)* of the Act which allows the Chief Land Claims Commissioner to group and process individual urban claims together if they are in the same geographical area and the circumstances of their removal was similar, changed that. High profile claims such as Sophiatown, District Six, PELCRA, West Bank, Cato Manor and various other urban group claims have enjoyed priority due in no small measure to the organised and politicised nature of their leadership. In some of these cases NGO and corporate assistance have played a major role in providing finances, publicity and strategic advice. PELCRA in Port Elizabeth enjoyed the assistance of the Urban Services Group, Metroplan, the Legal Resource Centre and the Delta Foundation.

Other criteria were added at various times and especially after the Ministerial Review in 1998 in an attempt to speed up the process. These included that older claimants be given priority[32], and urban claims where claimants were willing to accept monetary compensation (Mgoqi 1999a). It was also decided during 1998 to fast-track claims that were straight forward and all information was readily available. Due to pressure from claimants who had lodged their claims with the Advisory Commission on Land Allocation (ACLA) and in the first year of the Commission's existence, the

[32] Many older claimants died while their claims languished in the Commission filing cabinets. One such case concerned Mrs Rachel Poppie Hoffman from Graaf Reinet, born in 1893, who passed away shortly before her claim was finalised.

principle of first in, first out (FIFO principle) was also adopted after the 1998 Ministerial Review (Mgoqi 1998:2).

These criteria for prioritisation are similar to those utilised in the German restitution process, except for one important difference. In Germany claims on property in which investors are interested are given the highest priority. The emphasis in Germany is on job creation and economic development and the restitution process has to contribute to this national goal. Another priority is Jewish claimants who were victims of Nazi expropriations. Old age and simple cases where all documentation is available are also prioritised. If none of the above applies the principle of first in, first out is utilised (De Bruyn et al 1999:52).

5.2.3 Phase 3: Determination of qualifications and gazetting

Determination of qualifications refers to a continuation of the process started in phase two under the heading of screening. It is a more serious scrutiny of prioritised claims in terms of *Section 2* of the Act.

The first criterion is to decide whether the claim has been lodged in the prescribed manner. This requires that it complies substantially with the requirements of the official claim form and that it is lodged before December 31 1998. In effect, while every effort is made to get claimants to fill in the form, the background of the majority of claimants and the inefficient design of the claim form has meant that this particular requirement was not very strictly applied.

The second criterion is to decide in terms of the definition contained in Section 1 of the Act whether the claimant has lost a right in land. The definition is fairly wide and includes:

> ...any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation

> for a continuous period of not less than 10 years prior to the dispossession in question (The Restitution of Land Rights Act No 22 of 1995).

The point to note is that the clause specifies not dispossession of land, but of *any right in land*. In other words, as in many betterment cases, people may not have been physically deprived of their land, but of the way in which they lived on it and used it. As such they are deemed to have lost certain rights in land and therefore may claim restitution[33]. A right in land, apart from those specifically mentioned in the above clause, may include, hunting rights, commonage rights, the right to water, to gather wood and building materials. Gilfillan makes two important points with regard to determining the right on which a claim is based. She points out that in South Africa:

> ...a title deed does not necessarily reflect the totality of rights held in a given parcel of land. Under common law only ownership and a few other property rights such as servitudes are seen as real rights which were capable of registration against the title deed. All other rights were seen as personal rights, easily negated by the rights of ownership and not capable of registration. As a result many of the rights capable of restitution are not reflected in the title deeds (b.1998:1).

The second point she makes is that in order for a claim to be accepted by the Commission ownership is not a pre-requisite for restitution and registered title not the only basis for a claim for rights in land:

> In resolving the claim the interest of an owner be it as a claimant or as present owner is only one of the interests and rights which need to be resolved as part of the claim. Ownership does not enjoy the same hierarchical preference in the restitution process that it enjoys in common law ownership. A right such as tenancy considered at common law to be a lesser right can displace

[33] The Chata case in the Keiskamahoek area, where claimants were awarded restitution in the form of monetary compensation for each family which had been moved into a closer settlement, is an example of restitution demanded and granted for rights in land lost. The financial compensation of R31 697.50 granted per family will be split 50/50 between the family and communal development projects.

ownership, depending on the circumstances of the case and on the decision of the Department of Land Affairs as the respondent on behalf of the state (b.1998:2).

The third criterion the screener has to consider is whether the dispossession was effected under racially discriminatory laws or practices. Legislation such as the *Black Administration Act, 38 of 1927*; the *Development Trust and Land Act, 1936;* the *Group Areas Act, 1950, 1957, and 1966;* the *Community Development Act, 1966* and the *Black Resettlement Act, 1955* had systematically stripped black people of formal land rights, and were used to remove, evict and expropriate black spot communities, unregistered and deregistered labour tenants and disqualify urban dwellers (DLA White Paper 1997:55). Racially discriminatory legislation or practices are difficult to define as many removals were carried out under the auspices of seemingly race neutral legislation for forestry and developmental purposes. This was especially true in the bantustans, where it can be argued that any removal was racially motivated as they were part of the bantustan policy of the apartheid state. This point was noted by Judge Bam, the President of the Land Claims Court, in the Farjas judgement:

> Certain factors which the Commission has to consider in deciding on whether to accept claims can easily be established. Examples of these are whether the claim has been lodged in the correct manner and whether the claimants received fair compensation and whether the dispossession took place after 19 June 1913. Certain other factors however, are far more complex. Examples of these are whether claimants received fair compensation and whether the laws which dispossessed them were racist. This last factor will often be very difficult, because South African society was so infected with laws which were directly and indirectly racist (Summary: Farjas and Another v The Regional Land Claims Commissioner, Kwa-Zulu Natal 1998:5).

The fourth criterion is whether the person or community was dispossessed of a right in land after 19 June 1913. Although there is no doubt that a cut off date is necessary, it can be argued that a large number of dispossessions did not occur as

the result of a single removal but through a cumulative process over a long period of time, sometimes commencing before 1913 but only being completed after that date. This is especially true of many so-called tribal claims which have been registered with the Commission, especially in the Eastern Cape:

> The...Commission ...has received a number of claims, especially in December 1998, from chiefs, kings, traditional leaders, tribal authorities and tribes, and CONTRALESA. These claims are, in most cases for large areas of land which originally formed part of kingdoms or tribal areas or fell under the jurisdiction of traditional authorities. It is believed that there will be similar claims and problems in Kwa-Zulu Natal, Mpumalanga and Northern Province...These are claims which have a questionable validity, *especially in terms of the 1913 cut-off date and as they include claims on improvements and developments made since the land was lost* (my italics) (Regional Land Claims Commissioner, Memorandum, January 1999).

> The fifth criterion that needs to be assessed by the Commission in terms of acceptance for further investigation is whether the claim is frivolous or vexatious. This is a particularly problematic injunction as many Commission staff, especially before the Farjas judgement, interpreted this requirement quite widely, ie. in a non-legal manner. For example, if claim forms were badly filled in and the lacking in essential information (Gilfillan b.1998:4), or if someone, such as a white farmer who received in the view of the Commissioner adequate compensation at the time of dispossession insists on claiming further compensation (Farjas claim), this would be considered "vexatious". According to Judge Dodson however, the phrase "frivolous and vexatious" has a particular meaning in law. It refers to a situation where a plaintiff has no possibility of success and brings a legal action only in order to harass the defendant (Summary: Farjas and Another v The Regional Land Claims Commissioner, Kwa-Zulu Natal 1998:5).

Any dismissal requires that full reasons are furnished for the decision and that in accordance with the rule of Natural Justice *audi alteram partem* be followed, ie

allowing the claimant to respond (to state their side of the case) to the decision within a specified period[34]. After the Farjas judgement, in which a decision by the Land Claims Commisioner for Kwa Zulu-Natal, Cheryl Walker, to dismiss a claim as frivolous and vexatious was overturned by the Land Claims Court, Commissioners have been reluctant to avail themselves of this option (RLCC Co-ordinating Forum meeting Minutes June 1998). In the judgement the Court declared that it was not for Commissioners to decide on whether a claim was frivolous or vexatious, but for the Court.

Once it has been determined that the prioritized claim qualifies for acceptance in terms of *Section 11(1)* criteria, a decision is made as to whether it deserves *high* priority or *low* priority.

5.2.3.1 Gazetting and notification

The next step in a prioritized claim's life is that a notice setting out the main facts of the case is published in the Government Gazette, in local newspapers and a notice posted in a public place (such as the local municipal offices, police station, library, community hall), in order to allow any person affected by the claim to make representations to the Commissioner if they so wish. As soon as this has been done the Commissioner is obliged, in terms of *Section 11(6)*, to notify the present owner of the claimed land and any other interested party of the claim and the provisions of *subsection 7*. The latter subsection prevents any person obstructing the passage of the claim or selling the property, making any changes or developments in bad faith on the land. This is to prevent people from selling the land to a person who is not aware of the claim, damaging claimed land or from erecting developments which will increase their monetary compensation.

[34] Interview with Mr Xolani Maswana, Assistant Legal Officer, RLCC Eastern Cape, East London September 10 1999.

In practice the gazetting of a claim and the notification of interested parties has been a controversial issue as to exactly when it should be done (Brown et al 1998:17)[35]. The reason for this is that it is an expensive process, and if done too early, ie. without sufficient information and the claim turns out to be different to that originally gazetted, it has to be withdrawn and re-gazetted and advertised. However, unless a claim is gazetted and interested parties notified, the protection afforded by subsection 7 does not apply and theoretically the present owner may sell or develop the land.

5.2.4 Phase 4: Preparation for negotiations

5.2.4.1 Options and informed choice

In terms of *Sections 1* and *35* of the Act a claimant qualifies for various forms of restitution. These are variously, either singly or in combination, restoration of the original land lost, alternative state or private land, financial compensation, inclusion as a beneficiary in a state development program for housing or rural land, or any alternative relief that the Court, or in terms of Section 52, the Minister, may grant. It is important that the claimants (person, group or community) understand the implications of whatever option they choose. Commission staff therefore conduct with claimants at various stages during the process, and after gazetting with some degree of formality, what are known as "options workshops", a process designed to assist claimants to make informed choices with regard to the type of restitution they desire. These workshops were often problematic because of the lack of definite policy on a number of key issues, such as valuations, compensation received at the time of removals and the method used to calculate the monetary value of the claim (mvoc).

Many researchers have written about the problems attendant on the process of the restoration of the original or award of alternative land and the trauma of the reconstitution of livelihood and community (De Wet 2002, Du Toit 2000:82-3,

[35] Also interviews with Dr Peter Mayende, Chief Land Claims Commissioner, Eastern Cape and Free State during 1998.

Fakudze 2000, Lund 1998). Problems include an idealised and romantic memory of the pre-dispossession neighbourhood or community, the differences that have grown between widely dispersed removees, especially where mixed-race communities were destroyed, the fact that children have grown up and now identify with the post-removal localities, and old conflicts within so-called communities, often masked by the struggle to return, but which emerge soon after settlement. The idealised dream of the return, cherished for so long, is thus often lost and the new reality has to be grasped or rejected. Using the Slovenian political theorist Zizek's concept of "loss of the loss"[36], Du Toit sums up the difficulties and promise of this process:

> The moment of the "loss of the loss" is of course potentially an immensely fruitful one. It can be the moment at which reality, however painful it is, is accepted, and at which a more modest, more grounded process of decision-making can start on new terrain. But this is very difficult, not least because it must need involve a final and full acceptance of the difficulties of the present (2000:83).

For these and other reasons many claimants do not want to relive the trauma of another unsettling move and many prefer to opt for monetary compensation. This is a happy coincidence of interest for many within the Commission, who see monetary compensation, especially of urban claims, as a quick way of dealing with a large number of claims (Mgoqi 1999:2). There are no doubt a number of claimants who will use their monetary compensation to pay off or improve their present houses. It can thus be argued that this money has a developmental impact and is money well spent as part of the restitution process. I would argue against this position in many cases. The way in which monetary compensation is calculated is highly problematic. The method of calculation, known as the monetary value of the claim (mvoc), which will be discussed in some detail below, is often very little, especially for the poorer claimants who actually need the money the most. There is also no doubt that many claimant families will squander the money and in many cases it has already caused

[36] "Loss of the loss" for Zizek means the way in which the process of return and redemption often proves to be as difficult and painful as the original removal (Du Toit 2000:82).

major conflict within families, especially where a large number of descendants are involved[37].

The small amounts of money generated through the mvoc process for many of the claims[38] led to general disillusionment amongst Commission members[39]. This disillusionment was fuelled by their having to bear the brunt of the claimant's dissatisfaction with the settlement offers from the state. This role of representing the state was played by the DLA in all negotiations before the Ministerial inquiry in 1998 shifted that responsibility to the Commission itself. The dissatisfaction led to a move by Commission staff, led by the Gauteng office, to scrap the requirement that apartheid compensation be taken into consideration for black claimants, and put an emphasis on discouraging claimants from taking monetary compensation as an option. They proposed that all claimants should at minimum, get a serviced site in a state housing development, and argued that this approach opens the door to other government development agencies to integrate their programmes with restitution, for eg. housing, agriculture, and small business development. (Gauteng RLCC Implementation Unit, 1999). A similar approach was being developed in the Eastern Cape with the Macleantown, PELCRA and West Bank claims. This shift in policy was important in beginning the process of linking restitution with other state development programs. This shift will be discussed in detail in the next two chapters.

5.2.4.2 Gathering outstanding information

Running parallel to the options process, and often to each other, are a number of tasks that need to be completed in the investigation of the prioritized claim. These are a deeds search, documentary research, valuations (both historical and present),

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[37] As the details of the processing of particular claims are confidential, specific examples cannot be given. The Regional Land Claims Commission, Eastern Cape, has a number of such claims. In one case family members physically attacked each other in a mediation meeting (Personal communication with Nosipho Metele, Research Co-ordinator, RLCC, 16 March 1999).

[38] Briefly this involves doing a historical valuation of the claimants property at the time of dispossession, calculating what it was worth taking into consideration the effects of apartheid, taking the actual amount of (under)compensation paid at the time of dispossession, subtracting the latter from the former, and converting it to present prices using the cost of living index. This figure, know as the mvoc, forms the basis of the claimants claim, whether for restoration, alternative land or financial compensation.

[39] Interview Mashile Mokono, presently Land Claims Commissioner for Limpopo Province, Pretoria October 29, 1999. Also Restitution Indaba notes, Pretoria August 18, 1999.

calculating the mvoc, and claimant verification. The culmination of all these tasks is for the researcher/investigator to draw up a case report and a proposed negotiation position for the Minister's approval. The **deeds search** is conducted where claimants had registered land rights and is a useful way of tracing the history of ownership, the size, and which person or state department was the beneficiary of the dispossession of the land in question. The search is usually undertaken by specially appointed deeds researchers or in the case of large group claims where service providers (consultants) have been appointed, by the valuers. Initial information as to the identity of the present owner is obtained through the AKTEX computer network to which the Commission is linked, but details of the dispossession must be obtained from the deeds office itself (Brown et al 1998:21).

With claims where rights were not registered information as to occupation is obtained through oral evidence, arial photographs, historical maps, and archival documents[40]. This procedure can often take a long time, and may never be achieved to one hundred percent accuracy. Claimants are sometimes third or fourth generation descendants with only a vague notion of where their ancestors lived; boundaries may have changed, been consolidated, and conflicting oral evidence may need to be evaluated, often by researchers with very little experience of this specialized area of research (Wolfson 1998:23)[41].

The simple purpose of **documentary research** is to find any documentation which will clarify the circumstances surrounding the claimant's occupation of the land, the details of the dispossession, and the racial law or practice through which the dispossession was effected. Documentary research involves obtaining mainly official documents from state archives, municipalities, university and public libraries (such as the Rhodes Cory Library), state departments, the surveyor general's office, as

[40] The West Bank claim in East London is an example of this approach. The valuers contracted to assist in the processing of this group claim involving 1500 municipal renters, sub-renters and lodgers used historical maps and arial photographs.

[41] The main problem, identified at a DLA/Commission researcher's workshop held in Pretoria in June 1998, is that many researchers are unaware of the loss of meaning that occurs when translating oral or written information from indigenous languages into English. This results from a lack of qualified people who can translate accurately, capturing cultural and traditional meaning when appropriate (Wolfson 1998:23).

well as any documents that the claimants themselves are able to provide. The latter often consists of correspondence with lawyers, state departments, copies of title deeds, maps, photographs, wills, newspaper articles and valuers reports[42].

Official documents are a doubled-edged sword for the Commission in general and for documentary researchers in particular. A useful aspect in the processing of restitution claims is the fact that the apartheid state was extremely bureaucratic, with a vast civil service administration covering virtually every aspect of its citizens lives, from labour bureaus regulating the flows of labour to different sectors of the economy to the Department of Bantu Administration dealing with every aspect of black people's lives. The implementation of the bantustan policy and the forced removals of millions of people on the basis of their skin colour was no exception. The cynically named Department of Community Development, as well as the Department of Land Affairs, which were responsible for most of the forced removals, kept detailed files in triplicate of every removal.

A number of problems are attendant to the use of these and other official files in the processing of restitution claims. Many were destroyed in the early 1990s transition period by apartheid officials fearful of the consequences of their involvement in the removals, in other cases maliciously in an attempt to prevent restitution. Miss-filling is common and often ex-apartheid officials still in state employ block, especially black researchers, from accessing files (Wolfson 1998:22). As a result of these problems the DLA launched an Archival Project in 1998. Dedicated researchers were dispatched around the country to trace and document all state files pertaining to land, as well as to systematically reorganise the state archive in Pretoria[43].

Another problem with official documents is the bias inherent in the apartheid state's version of events that took place around forced removals. (Brown et al 1998:22, Wolfson 1998:26). Oral evidence collected from claimants often contradicted

[42] Perusal of claimant files at the RLCC Eastern Cape between January 1998 and December 1999.
[43] Interview with Justin Erasmus, Archives Project Co-ordinator, Pretoria, June 5 1998.

information contained in official documents, especially around issues of compensation paid at the time of removals[44].

Once the field (oral evidence and claimants documents), the documentary research, and in most instances the deeds research, is complete, the process of **valuations** in order to calculate the **mvoc** can proceed. Valuations refer to two different aspects of the claims process. One aspect is the assessment of the present market value of the claimed land; the other is the conducting of historical valuations by professional valuers in order to determine the true value of the property/land at the time of dispossession.

The assessment of the present market value of the claimed land has a twofold purpose depending on whether the land is privately owned or state land. If the former, the valuation is in order to pay the present owner "just and equitable" compensation in terms of the Expropriation Act , 1975 (Act No 63 of 1975), *sections 25(2)* and *(3)* of the Constitution, and *Sections 25* and *32* of the Restitution Act. In the latter, which is not done very often, the valuation is to provide the state with some idea of the value of the land when entering into negotiations with claimants.

The second aspect, the conducting of historical valuations by professional valuers in order to determine the true value of the property/land at the time of dispossession. is necessary to calculate the mvoc. The other requirement is to determine what compensation the claimant received at the time of the removal. This latter requirement is extremely controversial. During the period of apartheid removals white farmers on the borders of bantustans were expropriated in terms of the *Expropriation Act of 1975*. People expropriated in terms of this Act received market or more than market related compensation at the time of their removal. In order to make restitution affordable to the state and to discourage those who received large financial payoffs from claiming, the state will only award claimants restitution in terms of the difference between what they received at the time of dispossession and what

[44] Notes taken at the Second Joint Problem Solving Workshop for Restitution Researchers Working in the Land Reform Restitution Programme, Farm Inn, Pretoria, 3-5 June 1998.

they should have received. Unfortunately this measure does not apply only to white farmers but to all claimants. This is known as the monetary value of the claim (mvoc) and is calculated even when claimants are seeking restoration of land. The mvoc forms the basis or "bottom line" in terms of negotiations between the state and the claimant(s).

There are a number of reasons as to why this method of calculating the mvoc using historical valuations and compensation received at the time of dispossession is controversial. Commission researchers argue that from a moral point of view there can never be compensation for the pain and suffering of forced removal and dispossession. Add to this the attendant ills of banishment to distant corners of the country far away from sources of livelihood, the disintegration of family life, the breakdown of community, and the destruction of opportunity, then the issue of "just" compensation becomes even more problematic. Therefore contrary to white farmers who were forcibly removed during the apartheid era, compensation received by black people was severly circumscribed. As the Gauteng RLCC Implementation Unit argue:

> ....such compensation in respect of black people could not be used to:
> a) restore the rights they lost
> b) in the area of their choice
> c) be challenged in court, and
> d) was not for their benefit (1999:3)

On a more practical level the attempt to determine the equitable historical value of a property, both land and improvements (buildings) has its own challenges. Firstly, many claimants, especially rural illiterate people are not always clear as to the exact location or extent of the land that they are claiming. The land may have belonged to their great grandfather or grandmother. They very rarely have documents of ownership given the precarious and unregistered nature of black property ownership during colonial and apartheid South Africa. Investigation of the claim thus involves extensive fieldwork, archival and deeds research by the Commission until a property description is obtained.

The state then has to hire professional valuers at professional rates to do a historical valuation that will show what an "equitable" value would have been and what actual compensation was paid by the apartheid state. A practical example of this process is given in Chapter 8 wherein the Port Elizabeth PELCRA claim is discussed. For the first five years of the Commission's existence great confusion reigned around policy with regard to valuations. By the end of 1999 a policy paper commissioned by the Restitution Policy Task Team set up in the wake of the 1998 Ministerial Review outlined for the Minister of Land Affairs three main methods of valuation:

- an informal or desktop valuation using available historical documents;
- the comparative method;
- the cost approach method (de Vos and Hirschfeld 1999).

Each of these will be examined in turn.

Informal valuation

An informal valuation could be based on existing documents or basic research for example in newspaper archives. An example of the former could be an independent valuation commissioned by the claimant at the time of the removal or an offer to purchase prior to the removal, while an example of the latter could be finding the prices obtained by nearby properties sold under "open market" conditions in the advertising section of old newspapers. The PELCRA Committee used this method to obtain average prices in three broad bands into which claimants could be slotted in order to speed up the processing of their claims (PELCRA 1997:6-7).

Comparative method

The comparative and cost approach methods are both methods used by professional valuers.

The comparative method can be summarised as a method for valuing properties by direct comparison with sales of similar properties. Factors such as condition, size and finish of accommodation, plot size, all play a role in the analysis. The process requires a physical inspection of both the claimed property and properties which have been sold, if this is possible. Because of the effect of apartheid at the time of forced removal, the process becomes very complex and expensive:

> Comparative valuations will include procedurally through an analysis of comparable sales. Included in such an analysis will possibly be the determination of norm values over time for vacant land as well as the contribution of improvements to total market value. Price trends over the period of dispossession and removals in that area should be determined. An investigation to ascertain the impact of the Native Resettlement Act, the Group Areas Act and other related apartheid government legislation regulations on sales price will be investigated, Study of price trends in other comparable areas, preferably in the vicinity of the affected area, which were not subject to a proclamation under the racial legislation, will be conducted. Valuations have to be corrected for any negative impact of discriminatory legislation (de Vos and Hirschfeld 1999:5-6).

The problem with the comparative method with historical valuation is that many of the claimed properties have been demolished and plans no longer exist.

The cost approach method

This method entails calculating the value of the claimed property by estimating the value of the land (using the comparative method) and then adding the estimated costs of the building and improvements, less depreciation. The difficulty is that:

> Certain information needs to be obtained for a valuer to successfully use the cost approach method: the extent of the property, possible age of the buildings from the records on hand as well the description and type of construction that

may have existed and where available the condition of the buildings. The source of this would be Local Authorities, Claimants and archive records (de Vos and Hirschfeld1999:6).

All of these methods are fraught with practical and political judgements, given that it requires comparison with "similar" white areas at the time of dispossession. It also requires consideration of the effect of rumours of removals on property prices and the general racist under-valuation of black property and townships. In addition a host of methodological requirements particular to the valuations profession add to the complexity. The process is costly, time-consuming and based largely on guess-work. Valuers often take home more fees than claimants get in terms of the final settlement of the claim (Gauteng RLCC Implementation Unit 1999:1).

The monetary value of the claim (mvoc) is calculated by subtracting the actual compensation paid (derived very often from apartheid state documents and often disputed by claimants) from what valuers consider to be an "equitable" value. This mvoc then represented the basis of the restitution package to be used in negotiation between the state, represented by the Department of Land Affairs, and claimants. While this method works reasonably well with formal claims where title deeds, municipal records, and newspaper archives are available, it becomes near farcical in situations where claimants have no formal title in peri-urban and rural areas. Even where it is clear that no compensation was received, attempts to calculate the mvoc based on the historical value of what people were dispossessed of is virtually impossible. This is especially true of tenants in peri-urban areas, "squatters" in informal settlements or communities in the rural areas, especially in settlements which have been affected by betterment planning[45].

Members of the Kwa-Zulu/Natal RLCC, under the leadership of Kemraj Rambali, the Urban Research Co-ordinator argued in a submission to the Restitution Policy Task

[45] The Chata claim is a case-in-point. After the settlement of their claim, they are very unhappy because subsequent methodologies for the valuation of claims for other Keiskammahoek claimants have yielded a higher valuation than the one used for their own.

Team that tenants forcibly removed suffered a diminution of value of an interest in land as defined by the Act and that in order to value tenant claims three factors should be taken into account, namely the nature and extent of the right in land, the duration of the occupation and the type of land use. In addition they proposed that tenant claimants be granted a flat rate reparation award or developmental option under Section 33 of the Act and the upgrading of their right to full title where they choose the housing or development option (1999). These kinds of creative policy positions only started to be discussed seriously at a national policy level after the Ministerial Review in 1998. This review led to the integration of the DLA Policy Directorate and the Commission, and the establishment of the national Restitution Policy Task Force. The result of this integration was the cessation of the oppositional approach between the Commission and the Policy Directorate. The establishment of the Restitution Policy Task Force allowed policy input at a national level for the first time by regional Commission practitioners who brought practical experience of restitution implementation to the more top-down experience of the ex-DLA Policy Directorate staff.

There was a strong move within the Commission to do away with any consideration of compensation received at the time of removal, if the claimant is black. This is based on the reasoning that at the time of removals black people were unable to utilise the little compensation they received to replace what they lost. This is because they had no choice as to where they were moved to, and that the places they were removed to were often more expensive to live in (i.e. far from town, work, school). In addition they were unable to challenge the amount they were paid in court (Gauteng RLCC Implementation Unit 1999, Gilfillan 1998). A policy proposal document to give regional commissions the discretion to include or exclude compensation received was submitted to the Minister of Land Affairs. In reality this practice has long been the norm, especially with regard to informal claims where beneficial occupation can be proved.

Once the deeds search has been completed, usually parallel with documentary research but in most cases prior to the valuations[46] and mvoc, claimants need to be

[46] In some urban group claims, for example PELCRA in Port Elizabeth and West Bank in East London, where

verified. Broadly claimant verification involves identifying the rightful claimants in terms of the criteria laid down by the Act and the Cremin Land Claims Court judgement and obtaining proof (id documents, birth certificates, wills, etc) that they are who they say they are. In the case of community and group claims it also entails establishing the legitimacy of the representatives making the claim on behalf of the community or group, and establishing that the community or group is the entire group entitled to claim.

The Act entitles the original person dispossessed, or a dispossessed deceased estate, or a direct descendent of the original person dispossessed or a community or part of a community, to claim restitution (*Section 2 (1)* as amended). Caiphus Mothibe, the Restitution Policy Task Team member assigned to draw up a policy paper on claimant verification defines the aims and objectives of claimant identification and verification as involving four main aspects (1999:1).

First, to establish a link between the originally dispossessed person(s) and the claimants. In certain cases this may be a simple matter of drawing up a family tree and obtaining the correct identity documents; in others, such as community claims where the dispossession took place in the early part of the last century (such as the Eastern Cape Guba claim) it may require extensive field and archival research to locate disparate branches of the community in far-flung corners of the province or country.

Second, to identify and verify claimants entitled to claim benefit from restitution. Confusion in the first few years of the Commission's existence around the issue of who direct descendents are, was cleared up in the controversial Cremin judgement. In spite of the submission by the claimant's attorney that the purpose of the legislation was to restore the status quo ante the dispossession and that if the rules of intestate succession were applied, collateral relatives such as nephews and nieces, brothers and sisters would be entitled to claim restitution where there were

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valuations are based on a sample of claimants and the claimants agree to accept averaged settlements, the two processes may run concurrently.

no direct, natural descendents. He argued that these relatives would normally inherit and had there been no dispossession, they would have inherited the land under these circumstances (Dawood 1998:17).

Judges Moloto and Dobson disagreed and ruled that the use of the word "direct" to qualify descendent is a pointer to the adoption of the more usual meaning (ie. as defined by the High Court). This meant blood relations in the direct line of descent - subject to the inclusion of spouses and partners in customary union (Dawood 1998:17). Thus brothers and sisters and nieces and nephews are not considered direct descendents and may not claim restitution.

Third, to deal with documents or particulars to be provided by claimants entitled to claim and benefit. This may seem a straight forward requirement, but in practice can hold up the settlement of a claim for years. Claimants in many cases do not have identity documents, do not have the money to get them, or if they have applied, have to wait for long periods to get them. Death and birth certificates have often been lost, and copies take time to get. Claimants are sometimes suspicious as to the reason for submitting identity documents, fearing loss of the land they presently occupy. The Macleantown group claim near East London in the Eastern Cape is a case in point. Direct descendents are scattered all over the country. Numerous attempts by the RLCC to collect certified copies of identity documents did not yield results, and even after the claim had been settled, some key families had still not complied with this requirement[47]. Another example is the West Bank claim in East London, involving 1500 families, some with three generations of direct descendents, many living in foreign countries[48].

Four, involving all stakeholders or parties in designing the method to identify and verify the legitimate or rightful claimants in order to gain common understanding of how it will be done. In order to avoid some of the problems outlined in point three above, it is important that claimants, especially in the case of group or community claims, understand and buy into the claimant verification process.

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[47] Macleantown claimants meeting notes, Mdantsane, Fanti Qaqa School, September 11, 1999.
[48] Interview with Christo Theart, Consultant, Westbank Claim, East London, November 2, 1999.

Once the Commission researcher has obtained all the outstanding information they draw up a final or **case report** and a **negotiation position.** Prior to the 1998 Ministerial Review the negotiation position was the task of the DLA Policy Directorate as a representative of the state, but from late 1999 Commission staff took on this responsibility. Prior to the Ministerial Review the case or final research report formed the basis of the referral report for the Land Claims Court but from the beginning of 1999, cases were only rarely referred to the Court, most cases being referred to the Minister in terms of Section 42 (D).

The case report shows that the claim conforms to the requirements of the Act and contains in a coherent form all the information acquired, including documents and maps as appendices, during the completion of the steps outlined above. The negotiation position is developed by the researcher in consultation with the research co-ordinator, the legal officers, fellow members of the district team, the investigative division, and sometimes, the Commissioner. It is based on the case report, and forms the basis of the request for a mandate to negotiate from the Minister.

5.2.5 Phase 5: Negotiations

Once the case report has been drawn up and a mandate to negotiate has been received from the Minister, a negotiation team, consisting of senior Commission personnel, is assembled to negotiate a settlement agreement with all relevant stakeholders. The definition of stakeholders is a problematic issue: it needs to be sufficiently inclusive to ensure that no party directly affected by restitution of the land is left out thus rendering the settlement open to challenge in court. At the same time it is important not to include any parties with no more than a passing interest, because the more people involved in the negotiations the longer it takes to reach a settlement. Often, including people in the negotiations that have no real legal reason for being there can lend them legitimacy and allow them to obstruct the attainment of a settlement. The Dwesa-Cebe claim on the Transkei coast is a case in point. White shack-owners, with temporary land rights, narrow sectional interests and no real long-term interest in the developmental potential of the restitution settlement

between the state and the claimant communities managed to side-track the negotiations process with their demands thus adding considerably to the length of the process.

The stakeholders who are eligible to participate in the negotiations varied depending on the options chosen and type of settlement sought by the claimants. From the inception of the Commission in 1995 until the beginning of 1999 the state was represented by the DLA. Negotiations around financial compensation were between the claimants and the DLA, with the Commission acting as a facilitator and advisor to the claimants based on the research conducted into the claim. The fact that all claims are against the state represented until 1999 by the DLA, created an oppositional relationship between the Commission and the DLA. In terms of the Act, the Commission was tasked with the investigation of claims and the presentation of the final report to include in an unbiased manner the viewpoints and documentary evidence of all stakeholders with an interest in the claim. In practice, the majority of Commission researchers were drawn from activist backgrounds, many from NGOs dealing specifically with land issues[49], and they tended to interpret their role within the Commission as being to assist claimants to get the best deal they could. This was often justified by reference to the disadvantaged position of claimants, especially those in rural areas, and the advantaged position of present land holders. In a situation where there was little direct involvement of NGOs in the processing of claims:

> It has intensified the pressure on Commission staff to become directly involved in the support of claimants, and thus to take on a role, or compensate for the absence of a role, which it is not well placed to play (Restitution Review Team 1998:8).

[49] In the Eastern Cape Commission for example, in the second half of 1999, the Commissioner was the Chairperson of the Transkei Land Support Organisation, the Investigations Division Manager was on the board of the Border Rural Committee, and the Community Officer was a member of the same organisation. Both of these NGOs were affiliated to the National Land Committee at that time.

On the other hand the present land owners, that in many cases included the state represented by the DLA, were often able to muster an array of resources to fight land claims, including legal representation[50].

After the Ministerial Review the DLA dropped out of the picture and negotiations for compensation were conducted directly between the Commission and the claimants based on the negotiations mandate approved by the Regional Commissioner, the Chief Land Claims Commissioner, the Director General of the DLA, and the Minister.

Claims for the restoration of land or alternative land would also vary depending on whether the claimants were a single family, a group of individual claimants, or a community; and on whether the land was owned by the state or by a private individual or company. The basic difference between individual family claimants and group and community claimants was that the latter usually required the implementation of bulk and other services, housing subsidies, and additional land, all of which involved provincial and local authorities. Initially these requirements were seen as additional to the restitution process, something that could be negotiated between the successful claimants and the relevant authorities after the settlement process had been completed. But, as will be discussed in more detail in the next chapter, after the Ministerial Review and a number of other initiatives to integrate restitution with especially local level development initiatives, this viewpoint lost out to one where provincial and local authorities were included in the negotiations process and bound by the settlement agreement to provide services, housing subsidies where claimants qualified, and any other necessary support such as extension services in the case of rural claimants[51].

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[50] Interviews with restitution staff in the RLCC Eastern Cape and Free State, as well as from other regional RLCCs over a two year period, 1998-99.

[51] Extension services in most of the provinces, but especially in the Eastern Cape, exist more in theory than in practice due to the lack of resources, training and political will of the provincial departments of agriculture and land affairs.

In many restitution claims negotiations have proved to be a protracted process due to a number of reasons. These include in a few cases attempts by the present owners to fight the validity of the claim on the basis that the claimants lost the land due to reasons other than a racial law or practice. An example of this is the Brownlee Congregational Church in King William's Town, where the Land Claims Court found in favour of the present owner, that the land had been sold voluntarily by the church rather than through racial coercion as argued by the claimants. Other reasons for the protracted, and sometimes hostile, nature of the negotiations process is due to unrealistic demands by claimants, demands falling outside of the ambit of the restitution Act. The Fatman claim in the Eastern Cape provides an example of this type of claim. A dispute arose between the Commission and the claimants around the meaning of "just and equitable compensation" in current monetary terms. The family was of the view that the valuation report reflected biased Western standards that failed to account for both the cultural value of the property to its inhabitants at the time and the loss of crops and livestock incurred through the dispossession. (Commission on Restitution of Land Rights Annual Report 1998:66-67)[52]. Another reason for negotiations requiring much time and effort is due to differing and overlapping rights in land that have to be considered and catered for. Often in a group claim, claimants are comprised of ex-land owners, tenants or beneficial occupiers and present occupiers may be lessees, beneficial occupiers, land owners, or ex-farm labourers. The Lower Blinkwater Commonage claim near Fort Beaufort in the Eastern Cape involved protracted negotiations, eventually requiring professional mediation, due to the necessity of finding a solution that involved the present occupiers as well as the claimants in the settlement of the claim (RLCC Lower Blinkwater File, 1999).

If the participants in the negotiation process failed to reach an agreement within a time limit decided on by the Regional Land Claims Commissioner, the services of a professional facilitator or mediator would be obtained to assist in the reaching of a settlement agreement. If this measure still fails then the case would be referred to the Land Claims Court for arbitration.

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[52] During negotiations at the Port Elizabeth City Hall, one member of the family, in response to a Commission staff member's plea for them not to shoot the messenger, threatened to put an assegai through him instead.

5.2.6 Phase 6: Claim settlement

If a settlement is reached and an agreement signed then prior to 1998 the claim would be referred to the Land Claims Court to be made an order of the Court and after 1998 to the Minister for approval in terms of the amended Section 42 (D). I will outline the complex procedure for submitting a claim to the Court.

Before 1999 all claims had to be made an order of the court (validated) by the Land Claims Court. This included claims where a settlement had been reached by all the stakeholders involved. The only exceptions were claims that were referred to the Minister of Land Affairs in terms of the old Section 42 (D).In these cases, which required the claimant to renounce their right to restitution, the Minister could use his discretion to make an award he considered suitable. Submission of claims to Court involved a complex and expensive process. Once the field and documentary research, including deeds research, had been completed and synthesized into a research report, it was handed over to a senior researcher or legal officer to convert into a document for submission to the Land Claims Court, known as a "Referral Report". If the particular claim was in dispute and the Chief Land Claims Commissioner was of the opinion that it was ready to go to Court, the Referral Report consisted of a document: setting out the results of the Commission's investigation into the merits of the claim; reporting on the failure of the any party to accede to mediation; containing a list of the parties who have an interest in the claim; setting out the Commission's recommendation as to the most appropriate manner in which the claim can be resolved.

If the claim was settled, it had to include setting out the results of the Commission's investigation into the merits of the claim as well as a copy of the relevant deed of settlement together with a request signed by the parties concerned and endorsed by the Chief Land Claims Commissioner requesting that such an agreement be made

an order of the Court (Restitution of Land Rights Act No 22 of 1994, Section 14 (2) and (3)).

While the requirements seem simple enough, the legalistic format required by the judges of the Court in terms of layout, referencing, enclosures (known as "bundles of documents") meant that they had to be prepared by legal officers or by senior researchers with the help of a hired attorney, and sent to printers for reproduction (up to ten copies depending on the number of stakeholders involved) (RLCC Macleantown Referral Report December 1997). Erasmus describes the Court requirements:

> The responsibility of investigating and presenting the very detailed information required by the Court has severely strained the Commission's already limited capacity and must be seen as an important reason for the huge backlog in processing claims (in Brown et al 1998:16)

Once the claim was referred to the Court, the State, represented by the DLA, was obliged by the Restitution Act to appoint legal representation to argue its case as respondent:

> The State is presently obliged to appoint an advocate or an attorney to represent it in all proceedings before the Court. Not all proceedings before the Court require representation by an advocate or an attorney, for instance pre-trial proceedings where the only information or the point of view of the Department on legal issues which are not complicated are needed. Where an advocate and attorney have to be briefed under the latter circumstances unnecessary legal expenses have to be incurred (DLA Chief Directorate: Restitution 1999:2.7.4).

This meant that the claimants were obliged to seek legal representation, using in most cases the less than perfect services of the Legal Aid Board. Attorneys and advocates, arranged by the Commission through the Board, were often obtained at

the last minute, and in many cases threatened to resign half-way through a case because of overdue payments[53].

5.2.7 Phase 7: Implementation

Before the 1998 Ministerial Review this aspect of the claims process was not the responsibility of the Commission but of the DLA. After 1998 it was decided that the Commission should be responsible for the settlement of the claim from start to finish ensuring continuity. Depending on the option chosen by the claimants and agreed upon in the settlement, three possible outcomes would emerge: financial compensation, land restoration, or inclusion in an existing state development project. Most of the regional commissions set up Implementation Units to deal with the details of the land restoration process. Once the claim had been made an order of the Court or approved by the Minister, a post-settlement meeting would be held. In the case of a family claim the process would be relatively simple, but with group or community claims the process has proved to be highly complex, often taking years to complete. The PELCRA claim which will be discussed in detail in Chapter 7 was settled at the beginning of 2000 and the first physical step in the resettlement of the claimants, the construction of the bulk services, only commenced in 2004.

The reason for the slow process of post-settlement (of the claim) development and resettlement of the community or group may be attributed to a number of reasons. As this thesis is focused on the processing and settlement of the claim itself rather than the post-settlement phase, I will not go into detail. Suffice to say that in many of the large claims such as Macleantown, PELCRA, and West Bank, the large restitution settlements (PELCRA amounted to R40 million) in all three cases resulted in previously unknown claimants suddenly appearing on the scene claiming that they had been excluded. In the Macleantown case the narrow definition of restitution that resulted from the Land Claims Court judgement discussed in Chapter 3, led to the

[53] The Dwesa-Cwebe and the Brownlee Congregational Church claims in the Eastern Cape Province are two examples where claimants experienced problems with legal representation.

descendents of the original claimants launching an acrimonious attack on the Commission, the NGO that had assisted the community ("group") and on a community of redistribution beneficiaries that DLA and the Amatola District Council planned to settle adjacent to the restitution claimants. In the case of the PELCRA claim, a number of claimants who, despite concerted efforts to include them in the developmentally–driven group initiative that was based on the allocation of standardised sites in Fairview and Salisbury Park, decided to put a spanner in the works by insisting, after the settlement had been signed by the participating claimants, the Commission, the DLA, the Port Elizabeth Municipality, the Eastern Cape Department of Housing and Local Government, as well as the Provincial Housing Board, that they wanted the restoration of their original properties, which properties were right in the middle of the planned housing development.

5.3 Conclusion

Attempts to address the legalistic nature of the restitution process have met with limited success. Despite the ministerial review at the end of 1998 that was intended to move the restitution process from a legal to a more administrative approach, it is still highly legalistic and centralised. An administrative approach, based on clear policy directives, would give greater discretion to regional Commission staff to process unproblematic claims without having to acquire mandates to negotiate or having settlements ratified by the Minister or the Court. At present either the Land Claims Court or the Minister has to approve the negotiation position as well as the final settlement for each and every claim.

In the next chapter I will discuss the Ministerial Review, which attempted to probe the reasons for many of the problems outlined above.

Chapter 6

The Ministerial Review

6.1 The background to the Review

By June 1998 the Minister could no longer ignore the fact that the restitution process was in serious trouble. Pressure for the review came from all sides. Claimants around the country were dissatisfied with the lack of progress in the processing of their claims, the manner in which they were being handled and especially the complicated and legalistic requirements of the judicial process The National Land Committee had been agitating for a more pro-active restitution program, and was extremely vocal in calling for a review into the whole process:

> The land reform context presented some interesting advocacy opportunities during the year. These opportunities arose because of the ongoing non-delivery of land reform, in South Africa in general, and in the Eastern Cape in particular. The Ministerial Review of Restitution that was commissioned as a result of NLC pressure provided space for critique and recommendations pertaining to this fundamentally important programme (BRC 1998: Director's Report).

In addition, a series of workshops within the Commission and the DLA to resolve tensions between the two institutions, and to discuss the legalistic nature of the LCC and the slow pace of delivery, pointed to the need for a review of the restitution process[54]:

[54] Joint workshop on "Relationships, Roles, Responsibilites, and Procedures in the Restitution Process", Espada Ranch, Pretoria, February 1997; Joint problem solving workshop for researchers working in the Restitution Programme of Land Reform, Farm Inn, Pretoria, February 1998; Strategic Planning Workshop, CRLR, Ikhaya Lodge, Dunkely Square, Cape Town, April 1998.

> It would be a very positive move for the Commission to launch a proactive and searching restitution review. It would send a signal to the outside world that the Commission was taking the initiative and playing a central and responsible role in evaluating the success of restitution. This was particularly important in view of the fact that, a review was due anyway - and an informal review process was taking place anyway, often in the form of corridor gossip (CRLR Strategic Planning Workshop Report, April 1998).

Tensions between the Minister of Land Affairs, Derek Hannekom and the Chief Land Claims Commissioner, Joe Seremane, became apparent by the middle of 1998. The latter's style of management and leadership abilities also led to dissatisfaction within the Commission. Zohra Dawood, an NLC employee at that time, conducted interviews with Commission staff in two regional offices:

> Most interviewees levelled criticism at the office of the Chief Land Claims Commissioner. These ranged from tension caused as a result of the delegation of powers to the regional offices of the Commission, to lack of policy guidelines from the top with the result that regional commissioners used their own discretion to determine policy ...There was even a sense that the Chief Land Claims Commissioner had even pronounced wrongly on the law in some cases thus causing confusion and potential conflict (1998:8).

As a result of these problems and the attendant pressures, in July 1998 the Minister established a Review Team convened by Dr Andries Du Toit of the Programme for Land and Agrarian Studies at the University of the Western Cape.

6.2 The establishment of the Review Team

The Review Team's brief, according to the Minister's media release, was:

> ...to investigate the entire process of restitution, including the legislative framework, structures, processes and the three institutions implementing restitution (1998:1).

His main concern was the slow pace of delivery and the concern that if restitution carried on in the same way that it had been, the government would not meet its implementation targets as set out in the White Paper on Land Policy (Minister's Media Release 1998:1). The White paper sets the government a number of time limits: a three-year period for the lodgement of claims; a five-year period for the Commission and Court to finalise all claims; and, a ten-year period for the implementation of all court orders (1997:63).

It was quite clear that the Commission and Court were not going to finalise all claims within the five year period, as the three year period for the lodgement of claims had already been extended by a year and only 10 claims had been finalised by the Court by the middle of 1998 (Minister's Media Release1998:1), and a further 8 had been referred to the Minister under section 6 (2) (b)[55]. These bland statistics did not do justice to the large number of claims under various stages of investigation by the Commission. The Minister recognised this by saying that press reports have not accurately and fairly portrayed the amount of work actually done by the Commission and DLA, but added:

> Nevertheless, the slow pace was a concern to me. I also became aware of problems in relationships between various actors in Restitution and I believed that we needed to have a clear understanding of the source of these problems as it was my impression that they arose primarily out of the frustration with slow delivery, the root of which lay in legislative and institutional shortcomings (Minister's Media Release1998:1).

The problems between various actors involved in the restitution sub-program did not take long to impinge on the Restitution Review process. The original proposed terms of reference for the review, drawn up by the DLA, was technicist and limited in that its main focus was on generic business process mapping (i.e. outlining in detail the

[55] Provides for alternative relief for claimants who do not qualify for restitution.

path of the claim from lodgement to post-settlement in each restitution office), and designed so that:

> the Review takes place against the backdrop of a broad change management process in the Department of Land Affairs, which includes a Land Reform Re-engineering Project, the purpose of which is the same as the restitution review, but for land reform as a whole (DLA MR of Restitution Process, Proposed Terms of Reference, June 1998:6).

The "key deliverables", to use DLA review-speak, which were to be attained in relation to "the Objective", were a comprehensive process map of the present restitution business process, including regional variations; a clear analysis of the process map in order to identify the main impediments to delivery; a detailed description of an implementable, redesigned restitution business process and information system, and concomitant changes to the policy and legislative framework that would dramatically increase the rate of resolution of claims; a re-engineering implementation plan, with time frames and allocated tasks; and the appropriate roles of and relationships between role players reviewed in the light of the proposed changes.

The review was thus comprised of three aspects, Process Mapping and Evaluation, Redesign, and Implementation Planning (DLA MR of Restitution Process, Proposed terms of Reference, June 1998:2). The proposed team apart from Dr Du Toit was to include business process mapping experts Peter Makhari and Labat Anderson Africa, information technology design experts Knowledge Management Consultants, group process and conflict management experts, Melkamu Adisu and a legal expert, either Vincent Saldana from the Legal Resources Centre or Kate O'Reagan a judge, as well as three facilitation experts including Shamin Meer from the DLA.

Due to the unavailability of many of the proposed participants, this overambitious conglomeration finally gave way to a more streamlined team consisting of Dr Du Toit, Peter Makhari, and Alan Roberts and Heather Garner, the latter two from the

Minister's office. From the start the team was not happy with the narrow focus being pursued by the DLA:

> The terms of reference were shaped by the desire of one of the stake holders, the Department of Land Affairs, for the Review to include a process of business process mapping. The team made it clear that there were dangers in relying exclusively on this methodology. The issues in the Restitution Review were much more complex and dynamic than those that could be clearly framed within the fairly technicist and limited ambit of such an approach. A strict focus on the business process can end up functioning as a diversion, drawing attention away from many of the most contentious and contested issues within restitution (Restitution Review Team Executive Summary 1998:1).

The team, after consultation with the CRLR. DLA, LCC, and the NLC drew up a much wider frame of analysis:

> The frame of analysis was heterogeneous and multi-disciplinary. (The) fundamental approach of the team was to develop a holistic, systems-based analysis of problems in the restitution process. Such an approach focuses on a systematic analysis of decision-making within the implementation mechanism, and is geared towards showing how rational decisions that make sense in terms of the experience of particular role players can have counter-productive and unintended consequences. Within this approach, special attention was given to the discourses and practices in terms of which specific conceptualisations of restitution implementation were put into action and how these shaped the actions and perceptions of role players (Restitution Review Team Executive Summary 1998:1).

The wider consultation, especially with the National Land Committee, while ensuring a certain amount of buy-in from the different role-players, also made for some uneasy compromises in the team's brief between different and sometimes

incompatible agendas (Restitution Review Team Executive Summary 1998:1). Problems between the DLA and the Review Team continued:

> Less public, but far more difficult to manage in reality, were the unresolved tensions between the Review Team and the DLA - a stakeholder in the process - was second guessing the team and contesting the validity of its findings, even attempting to stop the team from meeting the Minister before the results of detailed mapping done by its own consultants had become available (Restitution Review Team Executive Summary 1998:2).

Caught between the feuding parties the Review Team were never going to have it easy. The Chief Land Claims Commissioner, Joe Seremane, made a public attack on the integrity and objectivity of the team, and many people within the Commission saw the review as an attempt by the DLA to take control of the restitution process:

> The building of relations of trust was made quite difficult by the fact that tensions existed between the implementing bodies, and that the team - and the Review process itself - were widely seen as being under the control and manipulated by the DLA (Restitution Review Team Executive Summary 1998::2).

6.3 The findings of the Restitution Review

Many of the problems identified by the Restitution Review have been discussed in this thesis. This chapter will concentrate on a brief outline of the key symptoms of crisis in the restitution process, and then a more specific analysis of the findings of the Review Team with regard to how the rights-based approach became a rights-*driven* approach that largely ignored issues of developmental sustainability; its recommendations on claimant participation and its comments on the move away from a wholly judicial approach to a decentralised administrative approach.

6.3.1 General findings

The findings of the Review Team revolved around five key symptoms of crisis in the restitution process. The first of these was the slowness of delivery: At the rate that claims were being finalized it was clear that the government would not complete the process in the time frames projected. Next was the crisis of unplannability arising out of the absence of a reliable database. The basic information necessary for planning, institutional design and resourcing in the restitution process was found wanting. Thirdly, there was a strong public perception that there was an opposition between restitution and development. Restitution was poorly integrated into the government's broader Land Reform and development processes, and was in danger of becoming a program apart. Another problem was that the restitution process was often characterized by low levels of trust between implementers. Lastly, there were high levels of frustration within the organisations tasked with implementing restitution and among claimants themselves (Restitution Review Team Executive Summary 1998:3).

These problems ran through all aspects of the restitution process and will be discussed in some detail in this and the following chapters.

6.3.2 The rights-driven approach

A rights-based approach to restitution implies that the program is underwritten by the Constitution, ie. that people who meet the criteria set out in Section 121(4) of the Interim Constitution, Section 25(7) of the Constitution and Section 4 of the Restitution Act, have a right to claim and to restoration or compensation. However, as outlined in Chapter 4 under restitution definitions, wherever restitution programs have been implemented, and South Africa is no exception, the right is tempered by broader political and developmental considerations. These are variously,

reconciliation, land reform, economic development, job creation, and the provision of housing:

> Restitution was envisaged as integrally linked to other aspects of land and tenure reform and as supporting the vital process of reconciliation, reconstruction and development (White Paper DLA 1997:49).

In other words it is generally accepted that the right is a means to an end and not an end in itself. When a right becomes an end in itself, at the cost of the broader developmental objectives, it is no longer a rights-*based* program, but becomes instead a rights-*driven* program. It is my contention that the restitution program in South Africa in the first five years of its life, was rights-driven rather than rights-based.

The rights-driven restitution approach had two main characteristics: the restitution process was driven largely by DLA, Commission and Land Claims Court personnel; and, according to Du Toit was a "process fuelled by the ability of particular claimants to insist on particular options in a way unsupported or unstructured by any larger development vision" (2000:87). The policymakers and institutional designers in the early 1990s, such as those at the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand, saw restitution as needing a strong Land Claims Court to drive the process and to handle disputes between specific parties (Swanson 1992:340-341). Du Toit argues that "what is striking about the early discussions that took place around the land claims issue is the extent to which they were informed by a vision of the restitution process that was profoundly litigious and adversarial in its emphasis and that the idea that land claims should contribute towards development and livelihood generation was at times characterised as simply another way of denying black people access to land" (2000:80).

This rights-based legal tradition placed land restitution firmly within the campaign for the restoration of human rights, as a liberating experience with a focus on reconciliation, not unlike the Truth and Reconciliation Commission. Two quotes from the first Chief Land Claims Commissioner, Joe Seremane illustrate this:

> Through interaction and negotiated settlements on the issue, South Africa can only stand to gain a higher form of patriotism that cements the citizens together and thus restoring human dignity to all.

and

> Experience has already been gained that restitution is making a critical contribution towards restoring justice and reconciliation and, last but not least, facilitating the process of enabling previously disadvantaged citizens to access land (CRLR First Annual Report 1996:4-6).

Proponents of this approach therefore saw the Commission's role as one of processing restitution claims as speedily as possible:

> One of the most remarkable aspects of the Restitution process has been the huge pressure placed on implementers for quick delivery. Clearly a concern with the urgency of delivery is desirable. In some ways, the pressure for quick and visible delivery has however distorted effective implementation (Draft Report Restitution Review 1998:4)

The rationale for this approach was that the role of the Commission and the LCC was to research, process and settle the issue of whether claimants had a valid claim to a land right and whether they wanted restoration of the physical land lost, alternative land, or monetary compensation. In terms of this approach restitution is seen as a special program separate from redistribution and development, as a purely legal mechanism to restore to victims of apartheid what they previously had:

> There is an argument that the central state's duty in restitution is simply to restore land rights: it should not be its role to intervene in internal development or land-use issues which should be left to local solutions.

> Restitution itself is thus a legal mechanism while the process of return and resettlement is a separate development issue (Brown et al 1998:109).

For the rights-driven proponents, the argument was that the main function of restitution was to ensure that claimants were the actual people dispossessed or their direct descendants. In cases where claimants wanted restoration or the allocation of alternative land, the concern was that they received registered title. The provision of infrastructure, housing, and service delivery was to be left to the claimants and the relevant provincial and local state departments. These comprised, amongst others, the Department of Land Affairs, the relevant District Council or municipality, the provincial Departments of Housing and Local Government (D of HLG) and Agriculture and Land Affairs (DALA). The responsibility for providing additional land for any descendents and other marginal claimants, who formed part of the restituted community, was to be handed over to the Department of Land Affairs for provision under the redistribution component of land reform.

Commissioner Mashinini of the Gauteng regional office emphasised on a number of occasions that it was not the Commission's role to get involved in the development of the restituted land nor for Commission staff to attend endless and time wasting meetings every time a developmental issue needed to be discussed.[56] This position was being strongly espoused by especially legal officers, some Commissioners and members of the Restitution Policy Directorate during the workshops and debates in the wake of the Ministerial Review[57]. The Chief Director of the Restitution Policy Directorate, Jean Du Plessis set out the rationale for this approach very clearly in an internal policy document distributed to DLA Provincial Directors and Land Claims Commissioners:

> ...restitution of land rights cannot ....be made contingent on the availability of development funds and the commitment and ability of the local, provincial or

[56] Restitution Commissioner's meeting, East London, May 7 1998.

[57] Interview with Durkie Gilfillan, Land Claims Commissioner Northern Province and Mpumalanga and Jean Du Plessis, Chief Director, DLA Restitution Policy Directorate, Esplanade Hotel, East London, December 11, 1998.

national state to provide development support. There are two reasons for this, the first is a legal one, restitution is an externally driven, legal process based on a constitutional right to make a claim against the state; and the second is political: there are 26 000 (and growing) claimants, each with the right to redress via the Court, pounding on the door to have their rights realised. To acknowledge that it is necessary to de-link restitution and development, is not to say that one will deny successful claimants access to any of the development grants, subsidies and programmes offered by the state. But it is to acknowledge that restitution negotiations and settlements will, regrettably but unavoidably, have to proceed out of synchronisation with the development process (1998:3).

The 26000 claims mentioned by Du Plessis grew to a staggering 68 878 claims affecting around four million people by March 2001 (CRLR Annual Report April 2000 – March 2001:11). The large number of claims registered became one of the main reasons advanced for adopting the rights-driven approach. The appeal of this approach is understandable given the lack of administrative capacity in the earlier years of the Commission's existence. The ostensible time-frame that restitution was to be completed within, added to the perceived need for the mass processing of claims.

Another reason for the adoption of the rights-driven approach was the political pressure to deliver rights, regardless of the developmental outcomes. This is in spite of what critics such as Richard Levin have argued. He contends that one of the major failings of the African National Congress (ANC) as a liberation movement is the failure to take account of the land question, especially the rural land question Levin and Weiner 1997). This failure is reflected in the trade-offs made and in the outcome of the hard-fought process of negotiated constitutional settlement. This may be true in terms of the compromises they were willing to make and their commitment to allocate resources to and see land reform through, but it cannot be denied that the emotional context of land dispossession, and the political promises before, during

and after the 1994 elections from parties who were part of the liberation struggle, added to the pressure to deliver:

> Soon after their unbanning in 1990, and seeing the prospect of taking reigns of government as real and imminent, the organisations which came to be known collectively as the liberation movement placed a premium on the land question, albeit to differing degrees. All these organisations presented positions which called for the restitution of land rights for victims of the apartheid policy of forced removals and for the redistribution of land to the landless (Mayende 1997:3).

Political pressure on the Commission was exerted in many ways. Members of Parliament, responding to pressure from their local constituencies, because of vested interest in the resolution of particular claims or because of a genuine interest in the development of their constituent area, would phone, visit or send representatives to Commission offices to exert pressure on the Commissioner and researchers to prioritize and process particular claims[58]. Opposition members of Parliament, often with very little knowledge of what the process of restitution actually entailed, would ask the Minister of Land Affairs questions in Parliament which would then be passed on for investigation and reply to hard pressed Commission staff in the form of a "Ministerial Enquiry"[59]. Prior to the 1999 national elections, the then Minister Derek Hannekom, no doubt seeing the writing on the wall in terms of his re-appointment ordered Commission offices around the country to finalize showcase claims at which he could appear to sign settlements with maximum publicity[60].

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[58] Interview with Herman Loots (aka James Stewart), ANC MP for Mpofu district.

[59] An example of a typical Parliamentary question (No 199900604) of this nature was one submitted by Mr A E Van Niekerk to the Minister of Land Affairs concerning delays in the process from the time a land claim is approved until the land is registered in the claimants name. He wanted to know "whether his (the Minister's) Department can provide Mr van Niekerk with a list of the a) names of persons whose land claims were approved and b) areas concerned to be registered in their names; if not, why not; if so when?".

[60] In the Eastern Cape Macleantown and PELCRA were chosen, the latter at short notice, which resulted in a the West End Community Centre in Port Elizabeth being half empty for the Minister's visit. Both events occured on Thurday 27 May 1999.

The Review Team argued that the very rights-based approach that was thought to be the central advantage for restitution claimants was responsible for making the process singularly hard to implement. Contrary to the debates preceding and accompanying the establishment of the Restitution Program as to whether the process should be rights-based or not or as to the advantages or disadvantages of a rights-based approach, they argued that:

> Attention should be focused, not on whether or not restitution should be rights based, but on exactly how rights are allocated by the Restitution Act, on the procedures whereby these rights are given force, and the discourses and practices that arise in implementation structures (Draft Report Restitution Review 1998:4)

In essence the Review Team argued that a powerful human rights ethic permeated the Commission and DLA's approach to restitution; an ethic that concentrated efforts into sorting out the minutiae of claimants rights: the right to claim, the rights of each and every descendant to a share, the monetary value of the right, the right to restoration, to monetary compensation; and led to a reluctance to engage in a meaningful way with claimants on issues of post-settlement planning, sustainability, and development. This led to a situation where the right to restitution has been confused with the right, by the claimant, to insist on particular restitution options:

> The wide allocation of the right to claim means that even a single dispossession, which creates but a modest entitlement, also gives the right to contest that entitlement to scores of often conflicting descendants, all of whom have to be traced and brought to the party. This has made the processing of claims an impossibly onerous task. This framework is ill suited to the developmental needs and specific dynamics of the restitution process. Particularly where officials are reluctant to engage with claimants about their desired outcomes, the right to restitution becomes translated into the supposed right of each affected party to insist on specific entitlements even if

> these cause huge complications for other interested parties (Draft Report Restitution Review 1998:4).

One of the reasons for the concentration of restitution implementers on the rights of claimants and their paralysis when it came to the issues of sustainability, development and land reform, was what the Review Team described as "the mismatch between the institutional, legal and policy framework and the scope and nature of demand" (Draft Report Restitution Review 1998:4). This contention by the Review Team is borne out by Swanson, a member of the Centre for Applied Legal Studies (CALS) group at the University of the Witwatersrand that was responsible for much of the research into the judicial rights-based restitution model. The CALS group designed it primarily as part of the land reform process for rural areas:

> It is important to note that most members of the group working on the land claims court are more familiar with rural African land claims than with disputes and claims arising out of Group Areas Act removals....the group did not have sufficient familiarity with the terms of the claims of people removed under the Group Areas Act to put forward any solutions with confidence....Despite the wide ambit of claims initially considered, the group finally narrowed its focus to people who had been removed from land in rural areas as a result of apartheid policies (Swanson 1992:340-341).

The majority of claims made to the Commission have however turned out to be urban claims. These comprise 80% of claims lodged involving approximately 300 000 beneficiaries (Office of the Chief Land Claims Commissioner 1999:6). This according to the Review Team has led to restitution implementers being swamped by the sheer volume of claims and sheer pressure to get cases settled so as to show some delivery, and has led to poor prioritization and vast amounts of capacity and energy being spent on individual urban restitution claims:

> Ultimately, however, the most serious problem is the fact that the legal framework of the Act as it stands, which was designed with the facilitation of

> large rural claims in mind, was poorly suited to the facilitation of large numbers of individual urban claims (Draft Report Restitution Review 1998:4).

They pointed out that the Restitution Act as originally conceived prescribes that the agreements have to be finalized by a Court. The Team raised the question of whether approval by a Court was the best way of finalizing agreements in that it required high degrees of legal precision in the information before it in order to come to a decision. This they argued, turned the Commission into an investigating arm of the Court, and required it to go to considerable additional lengths to satisfy the Court. This judicial framework had the effect of seriously disempowering administrators and officials involved in the restitution process:

> ...this framework evacuated (sic) and undermined official's policymaking and decision making skills. The normal prerogative officials have to make sometimes risky and difficult decisions was undermined, because all officials knew that ultimately questions of legal interpretation would fall on the Court (Draft Report Restitution Review 1998:5).

The Restitution Review Team recommended that the restitution process remain rights-based but that it would cease in essence to be a judicial approach. They put forward an administrative model which consisted of three main features: the decentralisation of claim investigation and resolution to regional Commission offices with Commissioners having full authority for researching, mediating and settling cases; a more empowered and active role for claimants, assisted by community organisations, NGOs and service providers, in the resolution of claims and especially in the planning of creative and developmental post claim settlement options; the integration of restitution into the broader land reform program for rural claims and with urban claims the need to involve, not only DLA and its immediate partners, but also local and provincial government, and key role players in the private sector.

The key aspects of a decentralised administrative approach was that the regional Commissions set up district teams[61] which categorise and prioritise claims so as to facilitate efficient use of resources and time in terms of investigations. Where possible claims were to be resolved through agreements between claimants and the state, and most importantly these agreements would not need to be referred to the Court in order to be given the force of law. Instead of referring them to Court, the settlement agreement would be referred initially through Section 42 D of the Act to the Minister of Land Affairs for ratification, and as the decentralisation process was more properly implemented, by the Regional Land Claims Commissioner. Cases would only be referred to the LCC where no settlement could be reached during the negotiations process (Draft Report Restitution Review 1998).

6.3.3 Claimant participation in choosing restitution options

The Review Team pointed out that the framing of the Restitution Act created a very limited conceptualization of the options claimants were entitled to: restoration of rights in land or alternative land, usually conflated with settlement on the land, or monetary compensation, with priority access to state development programs tacked on, in the minds of restitution practitioners, almost as an afterthought. The Act does not facilitate exploration of the many ways in which rights in land can vest in claimants without a physical resettlement being necessary:

> S33 of the Restitution Act only considers "feasibility" when restoration of a right in land is claimed. What should be considered is not the feasibility of restoration, but of the processes of settlement and the development plans that arise out of it. Mere restoration is almost always feasible. It is what claimants want to do with the land that might or might not be feasible. By this token, feasibility should also be considered in respect of restoration of rights in alternative land, or when priority access to development programmes is awarded (Draft Report Restitution Review 1998:5).

[61] The Eastern Province Commission for example has four district teams: Amatola, Western, Drakensberg and Stormberg, and Wild Coast and Kei.

The Review Team recognised that the participation of claimants in the demand-led rights-driven judicial restitution program was limited to filling in claim forms and choosing one of the restitution options outlined above. Very little was being done to involve NGOs, community organisations or service providers in empowering claimants to make informed choices about the wide range of possible restitution options, the problems attendant on restoration and resettlement, including community relations and possible conflict, and the process of ensuring service provision and housing as well as securing livelihood. Much has been written about the problems experienced by newly re-settled groups of claimants, especially that of reconstituting the community after years of separation. Forced removals often meant the dispersal of communities to different geographical locations according to ethnic classifications (See Dawood 1998, De Wet 2001, Fakudze 2000, Lund 1998).

The Team argued that there should be far more attention paid to empowerment and capacity-building within the claimant group. These processes had to occur in close collaboration with civil society:

> The detailed work of empowering a community to make a strong, representative and informed bid for a particular option is well beyond the capacity of the state. It will only be possible if community and group claims are well prioritised, and if the work of community development and facilitation is outsourced to organisations and individuals in civil society. This will require strong alliances with reputable NGOs and other service providers working in the area.

and

> Rather than simply naming a preferred option, claimants should be encouraged to apply their minds as to how their option could be made realistic and workable...There will also be a similar need for a greater emphasis on

> synergistic and collaborative work with local and metropolitan authorities, particularly for urban restitution (Draft Report Restitution Review 1998:18-19).

An area of weakness within the Ministerial Review Team's report is its lack of detail on the integration of restitution into the land reform program and rural development. In a response to the Teams report, Cheryl Walker, the Kwa-Zulu Natal Regional Land Claims Commissioner, commented:

> ...it is further proposed that an authoritative national level Restitution and Land Reform Steering Committee be established. Its terms of reference are not spelled out but the potential seems high for ambiguity and continued uncertainty as to where responsibility for the development of intermediate/implementation policy lies between different organisations (1998:4).

The Ministerial Review did however draw attention to the need for restitution to be integrated into local and provincial government planning. The Team, under the heading of "re-conceptualising institutional responsibilities in urban restitution" recommended that the making of policy on urban restitution needed to involve not only the DLA and its immediate partners, but also local and provincial government, as well as key role players in the private sector:

> Particularly important is the task of clarifying the role of the state as respondent in urban restitution cases. There is a real need for detailed consultation between the Minister, the DLA, Commissioners, other relevant government departments, as well as with provincial and metropolitan governments themselves, and for the building of a shared understanding of the role of local government in the restitution process (Draft Report Restitution Review 1998:13-14).

A few years down the line the recommendations have been partially implemented and partially successful. Restitution has moved slowly from an overly legalistic judicial program to a more administrative but still bureaucratic process. However,

until present the Commission has not been able to implement the decentralised administrative approach, in that the system for the finalization of claims is still highly centralized, the RLCC being unable to certify and give effect to settled claims. This inability has its roots in a number of restrictive and cumbersome practices, which is slowing down the processing and resolution of claims.

A major impediment is the lack of a decentralized capital budget for claim settlement (land acquisition, financial compensation), settlement support grant (discretionary) and planning grant. Another problem is the perceived need for every claim/researcher to obtain a preliminary negotiations framework, a negotiations mandate and then to submit a Section 42 (D) referral, via a bureaucratic route march from RLCC, to Chief Director, to CLCC, to DG, to Deputy Minister, to Minister and all the way back down again. For a long time the lack of decisions on important policy issues which would enable RLCCs to settle claims using clear and consistent rules and procedures was a major problem to settling claims as well as to developing best practise around the country. Lastly, the requirement that it is necessary for the Minister to be involved in any decision which involves the disposal of state assets, continues to make the process top-heavy.

In addition, the wish of the present Minister and her Deputy to be involved in the decision making with regard to specific claims at an even earlier stage, is another step in the opposite direction to that recommended by the Ministerial Review, part of the increasing centralization drift manifesting itself within the Commission since its integration with the DLA.

6.4 Conclusion

There are two important issues for this thesis that emerge from the Ministerial Review. The first is an assessment and critique of the participation of claimants in the processing of claims and in decisions around viable developmental options. The second, which is related, is the lack of integration of restitution with the broader land reform program and with development planning at the provincial and local

government level. The next two chapters will address these problems more specifically.

Chapter 7

Restitution and Development

7.1 Introduction

In the previous chapter I outlined the reasons for and the findings of the Ministerial Review. However, a number of claimant groups and staff of the DLA Restitution Policy Directorate and the Commission on Restitution of Land Rights were beginning to take their own initiatives to address the overly judicial, bureaucratic and rights-driven nature of the program. Restitution role-players began to realise that the slow pace at which claims were being settled was only one aspect of the problem facing the program. In the midst of calls for "fast-tracking" of claims, for "a rolling action of delivery" and a "focus on urban individual and community claims where claimants prefer financial compensation" (Mgoqi 1999), some protagonists both within the Commission and within claimant groups began to draw attention to the vital issue of restitution's contribution to land reform and development. The Green Paper on South African land policy quotes the Reconstruction and Development Programme (RDP) which sets out the relationship between land reform and development very clearly:

> A national land reform programme is the central and driving force of a programme of rural development. Such a programme aims to redress effectively the injustices of forced removals and the historical denial of access to land. It aims to ensure security of tenure for rural dwellers. And in implementing the national land reform programme, and through the provision of support services, the democratic government will build the economy by generating large-scale employment, increasing rural incomes and eliminating overcrowding (1996:2).

and

> Economic viability and environmental sustainability - Planning of land reform projects developed at local level must ensure that these are economically viable and environmentally sustainable (1996:6).

The White Paper on South African Land Policy is even more explicit:

> The principles of fairness and justice also require a restitution policy that considers the broader development interests of the country and ensures that limited state resources are used in a responsible manner. To be successful, restitution needs to support, and be supported by, the reconstruction and development process (1997:62).

The emphasis on rights within the restitution program had the effect of distancing restitution, especially in the first few years of the program's existence, from the rest of the land reform program, as well as from the local government process of formulating land development objectives (LDOs), and the Integrated Development Planning (IDP) process. In order for the restitution sub-program to be integrated into and contribute to the broader land reform program, it was necessary for the Commission to have a good relationship with the DLA and to work closely with especially the Provincial Department of Land Affairs (PDLA) offices. The PDLA was responsible for a number of aspects of the restitution process, but there was(is) also often an overlap between tenure, redistribution and restitution projects in rural areas. Unfortunately, the relationship between DLA and the Commission was anything but close in the first five years of the program. If the relationship during this period between the Commission and the DLA was not good, the relationship between the Commission and municipalities was by and large non-existent. The development of Land Development Objectives (LDOs) was required at that time by the Development Facilitation Act (Act 67 of 1996) (DFA). Municipal budgets for the provision of services were based on approved LDOs. Lack of integration of land restitution with the LDO formulation process had major implications for not only disrupting district and local municipal planning, but also implications for prejudicing claimants in terms

of the allocation of municipal funds for the above infrastructure and services in the post-settlement phase[62].

In this chapter I will examine the relationship of the Restitution Commission to the Department of Land Affairs and to the municipal land use planning process.

7.2 Restitution within land reform

The restitution process has since the inception of land reform been conceived aspart of the broader land reform program. Numerous policy documents and publicity documents set out this relationship. Derek Hannekom, the first ANC Minister of Land Affairs, put it thus in his forward to the White Paper on South African Land Policy:

> Land ownership in South Africa has long been a source of conflict. Our history of conquest and dispossession, of forced removals and racially-skewed distribution of land resources, has left us with a complex and difficult legacy. To address the consequences of this legacy, the drafters of the South African Constitution included the following three clauses....The three key elements of the land reform programme - restitution, redistribution and tenure reform - address each of these constitutional requirements (1997:I).

The establishment of a Land Claims Commission and a Land Claims Court in terms of a specific Restitution Act to investigate and ratify claims, and the fact that all claims are against the state represented until 1999 by the DLA, created an oppositional relationship between the Commission and the DLA. In terms of the Act, the Commission is tasked with the investigation of claims and the presentation of the final report to include in an unbiased manner the viewpoints and documentary evidence of all stakeholders with an interest in the claim. In practice, the majority of Commission researchers were drawn from activist backgrounds, many from NGOs dealing

[62] Post-settlement is a confusing term in that it has two meanings. The first is *post* the settlement of the claim by the Commission. The second is *post* the physical settlement by the claimant family or community on the restored land. In this case it refers to both.

specifically with land issues[63], and they tended to interpret their role within the Commission as being to assist claimants to get the best deal they could. This was often justified by reference to the disadvantaged position of claimants, especially those in rural areas, and the advantaged position of present land holders. In a situation where there was little direct involvement of NGOs in the processing of claims:

> It has intensified the pressure on Commission staff to become directly involved in the support of claimants, and thus to take on a role, or compensate for the absence of a role, which it is not well placed to play (Restitution Review Team 1998:8).

The present land owners, that in many cases included the state, represented by the DLA, were often able to muster an array of resources to fight land claims, including legal representation[64].

The hostility of the Commission staff towards the DLA stemmed from a number of perceived inadequacies in the way in which the DLA performed its obligations in terms of the Act. The DLA was responsible for a number of aspects of the restitution process. It had a responsibility to facilitate the restitution process, by providing the Commission with staff and equipment, it had to act on behalf of the state as a respondent in all restitution cases, it was responsible for getting property valuations, both present and historical, completed, it was responsible through its Restitution Policy and Research Directorate for formulating policy and assisting the Commission with archival research, and most importantly, it was responsible for post-settlement implementation (of both the claim and the community in cases of restoration or alternative land being awarded).

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[63] In the Eastern Cape Commission for example, in the second half of 1999, the Commissioner was the Chairperson of the Transkei Land Support Organisation, the Investigations Division Manager was on the board of the Border Rural Committee, and the Community Officer was a member of the same organisation. Both of these NGOs were affiliated to the National Land Committee at that time.

[64] Interviews with restitution staff in the RLCC Eastern Cape and Free State, as well as from other regional RLCCs over a two year period, 1998-99.

The first issue which caused Commission staff to adopt a hostile attitude to the DLA was the perceived contradiction between several of the DLA's roles. The Act states that all claims are against the state whether the land being claimed is state land or private land. In the case of the latter, if the claim is successful the state is obliged to buy the land from the private owner in order to return it to the claimant. The DLA, as the representative of the state, and with a responsibility to the taxpayer for the cost effective use of resources (Brown et al 1998:9), had an interest in limiting the amount or cost of land, or compensation paid. It was also responsible for obtaining valuations on which compensation to present owners was based, for developing techniques to obtain historical valuations on which the calculation of the monetary value of the claim was based (De Vos 1999), and through its Research Directorate, for doing archival research for the Commission on selected claims. This confusion of roles was described by a participant at a workshop on DLA roles and responsibilities in the restitution process as DLA wanting to be "a referee and player at the same time" (DLA/CRLR Workshop Report 1997:13). Justin Erasmus, a researcher at the DLA's Restitution Research Directorate elaborates:

> Criticism of the DLA's role as landowner (or landowner's representative) in the case of state land, and as paymaster for the purchase price or expropriation and compensation in the case of private land, again stemmed from the perceived conflict of interest between the DLA's roles as facilitator and as respondent in restitution claims. In the case of state land, the DLA as facilitator must negotiate its release from the department using the property and then organise its release from the Department of Public Works to the claimants. Some Commission staff interviewed felt these duties were in conflict with the DLA's status as an interested party (in Brown et al 1998:9).

The conflict between the Commission and the DLA was exacerbated at a regional level. Tensions in many regions, especially the Eastern Cape and KwaZulu-Natal, between the Provincial DLA offices (PDLA) and the Regional Land Claims Commissions (RLCC) developed around a number of issues. Foremost of these, in the Eastern Cape for example, was the lack of resources dedicated to restitution by

the PDLA. As has been stated above, the DLA was obligated to perform a number of restitution functions. These functions were to be divided between the national headquarters in Pretoria and the provincial offices. As the DLA's decentralisation policy was implemented, more functions would be delegated to the PDLAs. This applied to the land reform program generally. However, many problems were experienced in the implementation of the decentralisation policy. In the main, they revolved around lack of budgets, staff and delegation of functions such as the mandate to negotiate. Erasmus noted that:

> The... area of structural concern for the DLA is its stalled decentralisation policy. Although it is DLA policy that implementing restitution orders should be handled by the provincial offices, this is not possible as the provincial offices have not been given the staff, budget or negotiating mandate to fulfil this function...In the long term, then, the absence within the DLA of effective structures capable of implementing restitution settlements will become a significant problem, even if the problems within the adjudicative process are fully ironed out (in Brown et al 1998:9).

Within the limitations posed by the lack of staff, budget and delegated powers, the PDLA concentrated its resources on the implementation of the redistribution and tenure legs of the land reform program. In the Eastern Cape PDLA three staff members were entrusted with the responsibility for restitution. All three were only able to devote part of their time to this process as they were also involved in other land reform programs[65]. The lack of decentralisation meant that with every restitution claim, all DLA tasks were dealt with jointly by PDLA staff and staff of the Policy Directorate in Pretoria. PDLA staff was generally responsible for initiating the process and preparing the groundwork but any real decisions were made by staff of the Policy Directorate. The latter flew all over the country conducting negotiations on behalf of the DLA, and on the few occasions where PDLA staff took it upon themselves to make decisions, these were overturned by the Policy Directorate on

[65] Interview with Linda Faleni PDLA staff member responsible for restitution in the Eastern Cape PDLA, East London, September 7 1998.

the grounds that the PDLA staff had no mandate to make the offers or agree to the settlements that had been negotiated locally:

> By defining its role in terms of pro-active troubleshooting and crisis management, leadership here has tended to neglect the development of systems and frameworks that make for significant capacity at provincial level. Its close involvement in the negotiation of cases on the ground has militated against the setting up of frameworks and systems that would enable the involvement and empowerment of provincial implementers or policy writers at central levels. This has created a vicious cycle that has inhibited the rate of decentralisation (Restitution Review Team 1998:9).

Two examples, both in the Eastern Cape will illustrate this point.

The first is the Macleantown claim. The valuations of the present owner's properties, commissioned by the DLA but performed by the Department of Public Works, took over eight months to complete. A Deputy Director in charge of Restitution in the Eastern Cape PDLA conducted negotiations with the present owners of properties, based on the valuation report. This process was facilitated by the RLCC and after many hours of negotiations resulted in written offers being made to the present owners which they had indicated would be acceptable to them. The Policy Directorate in Pretoria refused to honour the offers on the basis that the Deputy Director had no mandate to make them[66]. Letters of retraction had to be sent to all owners, leading to fears of legal action[67], and the whole process initiated over again.

The second example concerns the Goss claim in the Transkei. After months of investigation, research and negotiations, a settlement agreement was concluded to restore land on the Transkei coast to the Goss family. The agreement involved the

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[66] Interview with Linda Faleni PDLA staff member responsible for restitution in the Eastern Cape PDLA, East London and with Elna Hirshveld, Deputy Director, DLA Policy Directorate, Pretoria, 1999.

[67] Interview with Sarah Sephton, Principal Planner, PDLA, East London, 1999.

PDLA representing the state, the local community, the local Paramount Chief, the claimants and the RLCC, and involved the return of the land, the building of a school for the local community and a hotel which would have provided jobs and related economic spin-offs, by the claimant family. The agreement was overturned by the Policy Directorate and Tenure Directorate on the basis that the Goss family were white and that they only had a "permission to occupy" prior to their dispossession. This in spite of the fact that they had owned land in the Transkei since the last century, Richard Goss the claimant was a Transkei citizen during that area's nominal "independence", and that the community and the Paramount Chief were in favour of the restoration of the land to the Goss Family [68] (Quarterly Meeting DLA/RLCC Minutes August 1998).

The integration of restitution with the broader land reform program thus failed for a number of reasons. Foremost was the activist rights-driven ethos of the majority of the Restitution Commission staff, an ethos that led them to see themselves as champions of the disadvantaged claimants, and to perceive the DLA not as fellow travellers on the land reform road, but as obstructional remnants of the apartheid era. This hostile and sometimes self-righteous attitude developed and persisted in spite of the fact that many of the DLA staff members were ex-land activists from the National Land Committee, ex-political prisoners, active ANC members and clearly dedicated to the implementation of land reform. This conflict often took on racial overtones where DLA officials were white:

> The fact that the DLA top management group is visibly white has also contributed to tensions and suspicions.... Officials on different sides sometimes seem to have acted in terms of unfounded and negative perceptions of their counterparts. The result has been a restitution process characterised by poor co-operation and by the lack of decision making based in a systematic and holistic perspective (Restitution Review Executive Summary 1998:7).

[68] Interview with Zama Memele, RLCC researcher, Zanele Dlamini and Elna Hirshveld, DLA Policy Directorate, June 14 1998.

Commission staff, especially the Regional Commissioners, added to the status of restitution as a program apart from land reform, by stressing the special constitutional status of the Commission in relation to redistribution and tenure. This was a common theme amongst Commissioners in the wake of the Ministerial Review, fuelled partly by proposals to integrate the Commission into the DLA and fears of loss of autonomy and status[69].

Adding to the lack of integration of restitution and the broader land reform program was the lack of decentralised capacity of the DLA provincial offices to deal with restitution claims, as well as the perceived (by Commission staff) contradiction in the functions of the DLA as a representative of the state in negotiations on the value of claims and their role in assisting the Commission with research and valuations. In spite of these numerous problems, an increasing number of people within both the Commission and the DLA began to recognise the destructiveness of the conflictual relationship and began to work together on specific projects. This process was given some momentum with the integration of the Commission into the DLA after the Ministerial Review. Similarly, a number of initiatives emerged which attempted to integrate restitution with municipal planning processes.

7.3 Restitution and local level development planning

7.3.1 PELCRA

The first of these was the PELCRA claim in Port Elizabeth. This claim will be discussed in more detail in the next chapter. Supported by the Delta Foundation, the Legal Resources Centre, the Urban Services Group and Metroplan, this claim charted a new path for restitution claims in a number of ways. The first claims from Port Elizabeth were received in 1993 and were originally lodged with the Commission on Land Allocation established under the provisions of the Abolition of Racially based Land Measures Act in 1993. In the same year the claimants in Port

[69] Interview Dr Peter Mayende, Regional Land Claims commissioner, RLCC, East London, December 10, 1998.

Elizabeth entered into negotiations with the Port Elizabeth Municipality to have a moratorium placed on the sale and rezoning of all land subject to restitution claims throughout the city. The claimants decided to group their claims and establish the Port Elizabeth Land and Community Restoration Association, a legally constituted voluntary association. All claims lodged with the Commission on Land Allocation were transferred to the Regional Commission on Restitution of Land Rights in 1996.

PELCRA actively engaged its members in the development of a common approach to resolving their claims. In April 1997 PELCRA submitted a pilot group proposal to the Regional Commission on Restitution of Land Rights seeking the restoration of land rights for residential purposes. The objective of the proposal was to settle claims from four areas in Port Elizabeth, South End, Fairview, Salisbury Park and Korsten. The proposal was derived through a process of negotiation and compromise between the claimants, culminating in a plan which represents the consensus reached between the members of the association. Fundamental to this process was the need for each claimant to subscribe to a development-directed approach as a mechanism to resolve the claims. The challenge was therefore to reconcile the diversity of claims and develop an approach which deals in a fair and just manner with each claim. The chosen form of restitution was a combination of restoration and allocation of alternative land in the form of serviced erven. Claimants, as indicated above, were removed from four areas but have agreed to be awarded serviced erven in two of the areas, ie. Fairview and Salisbury Park, which were at that time vacant and owned by the Provincial Housing Board (PHB). It was therefore deemed feasible for restoration (RLCC Section 42 D submission 1999:2).

A further challenge PELCRA faced was to create a basis for equity within the group, given the uniqueness of what each claimant lost. Although the association did not conduct an in-depth deeds search for the affected properties, they reviewed local records and developed a basis for determining equity. This required a compromise on the exact amount of compensation that could be expected by each claimant and the adoption of norms or standards in calculating current compensation. Various town planning issues were taken into account and a focus was placed on sustainable development directed options. The outcome has been the development of a proposal

which is acceptable to PELCRA and all other stakeholders that was reached through a process of lengthy negotiation. The State has been requested to develop the land to full municipal standards (RLCC Section 42 D Submission 1999:2).

7.3.2 Macleantown

A second claim that attempted to forge a new way of approaching restitution was the Macleantown claim. This was a claim for the restitution of land rights lodged by a group of claimants, through a representative body known as the Macleantown Resident's Association (MRA), for a number of erven in Macleantown in the Magisterial District of East London. The claimants were dispossessed in 1970.

The Macleantown claimants lost their residential, arable and commonage rights in land and were forcefully removed in terms of section 13 (2) of the Native Trust and Land Act no. 18 of 1936. The land was acquired by the state. At the time of the dispossession the claimants had been residing in Macleantown since the turn of the century. The claimants were forcibly removed and resettled on less productive land in the then Ciskei at Mpongo Location in Chalumna. Each family received only a standard quarter acre plot, the number of erven previously owned not being taken into consideration.

During the processing of the claim the claimants were divided into two groups, landowners and tenants. The landowner claimants claimed their original erven, except for nine of them, who claimed alternative land, as it was not feasible to restore their original land due to erosion and a main road cutting through the properties. The Amatola District Council (ADC) agreed to survey and allocate alternative plots of equivalent size from the commonage, and the Department of Land Affairs (DLA) agreed to purchase additional land adjacent to the commonage to increase the size of the commonage.

The ADC also surveyed, and the appointed project manager allocated, residential plots to tenant claimants. After initial resistance, the white landowners agreed to the purchase by the state of those erven claimed and not affected by erosion and the main road, and negotiations were conducted, based on valuations suggested in a report commissioned by the DLA, and vetted by the Land Affairs Board of the National Department of Public Works.

The claim was based on the injustice of the forced removal, the fact that the land to which the claimants were relocated was of considerably inferior quality and could in no way be considered to have been "just and equitable" compensation, even if the monetary payments to land owners with title (the only claimants to receive any) is taken into consideration. These factors led to the claimants living conditions deteriorating markedly, and it was argued that the restoration of the original and alternative land would go a long way towards reconstructing their fragmented communal life and improving their socio-economic position. All parties to the claim were in agreement based on these considerations.

The Macleantown claim provided a model for future claims in that the Border Rural Committee, an NGO affiliated to the National Land Committee took the initiative to set up a steering committee which included all stakeholders, including the Amatola District Council, which body was responsible, in conjunction with DLA and the Department of Local Government and Housing, for the provision of bulk infrastructure and housing to the resettled claimants. The latter department, through its Provincial Housing Board, agreed to give the claimants priority in terms of the granting of housing subsidies. A settlement agreement was signed by all parties. In addition a negotiations mandate was signed by all relevant head office functionaries, as well the Minister, making the Section 42 (d) referral a formality.

The Macleantown project also included a redistribution component, to accommodate ex-farm workers who were initially part of the restitution claim, but did not qualify under the Act. A project manager was appointed by the PDLA to assist with the implementation of the project, especially the reintegration of the community. As per agreement with the previous Minister, the claimants were allowed to return to

Macleantown before the formalities of the process were completed. (CRLR Annual Report 1999-2000; RLCC Macleantown Settlement Agreement 1999).

7.3.3 The Development Facilitation Act Task Team

The Development Facilitation Act (Act 67 of 1995) (DFA), was, in the words of the DLA Director-General, Geoff Budlender, "promulgated with the objective of fast-tracking land development and providing a legal framework for integrated and sustainable land development"(Letter to CLCC April 14 1998). The DFA established a number of bodies, including the Provincial Development Tribunals which have "extraordinary powers in order to expedite the process of land development" (Budlender, letter to CLCC April 14 1998). As such its main purpose is to overcome the inequalities created by apartheid planning, and to this end section 3 of the Act puts forward a number of principles for land development.

Briefly these are that all policy, administrative practices and laws should facilitate new and recognise informal settlements; promote efficient and integrated land development through integrating social, economic, institutional and physical aspects, for example overcoming; the rural/urban divide, the distance between residential and work areas, promoting the densification of towns and cities, and correcting historically distorted spatial patterns of settlement while making the optimum use of existing infrastructure. In addition they should encourage environmentally sustainable land development practices; promote participation by affected communities thereby developing their skills and capacities; promote security of tenure while providing for a wide range of alternatives; and ensure that a competent authority coordinates the process at national, provincial, and local level (Development Facilitation Act (Act 67 of 1996).

There was a realisation within the DLA and the Commission that as the process of lodging land development applications with Tribunals in terms of the DFA began to gain momentum in the provinces, there could be possible conflict between the DFA

and the Restitution Act. A number of issues, which will be discussed more fully below, were raised by the DFA Implementation Task Team, a DLA body set up to examine the implications of the implementation of the Act, as well as by the Commission in response. These were the lack of formal relationships between the Tribunals and the RLCCs; the lack of incorporation of restitution into the process of formulating land development objectives (LDOs) and integrated development planning (IDPs) at a local level and the question of whether the restoration of land rights under the Restitution Act overrides approved LDOs.

Before considering these questions and the impact that they had on the restitution process, it is necessary to look at the main provisions of the DFA.

Very briefly, the DFA provides for the establishment at national level of a Development and Planning Commission. Provinces may establish their own versions of this Commission or consult with the national one if they opt not to establish their own. The purpose of this Commission is to advise the government on policy and laws concerning land development at national and provincial levels. In addition to the Commission(s), the Act also provides for the establishment in the provinces of Development Tribunals. These Tribunals have the power to make decisions and resolve conflicts in respect of land development projects. The Provincial Executive Committee sets up tribunals, and members are formally appointed by the Premier, drawing together land development and legal experts, both from within and outside of government. The Tribunal is envisaged as the main mechanism for fast-tracking land development (Development Facilitation Act (Act 67 of 1996)).

The Act also requires district and local governments to formulate and implement Land Development Objectives (LDOs). The MEC of the local government body which has jurisdiction over local government in the particular province (for example the Department of Housing and Local Government in the Eastern Cape) is responsible for promulgating provincial regulations to guide local authorities on the drafting of LDOs. The MEC has to approve or reject LDOs submitted by local authorities. District Councils, as the overseeing local authority, especially with regard to rural local authorities which lack capacity, are required to compile district development

plans. Once accepted by the MEC, the particular local authority is bound in terms of its decision making on all land development, by its LDO. The Western Cape Province opted not to implement the DFA, and Kwa-Zulu Natal has an adapted version. Important related legislation for local level planning is the Local Government Transitional Act.

7.3.3.1 The Local Government Transitional Act (LGTA)

The LGTA requires each municipality to prepare an Integrated Development Plan (IDP). Each IDP must take cognizance of the general planning principles (outlined above) of the DFA, as well as the contents of the Land Development Objectives (LDOs) in Chapter 4 of the DFA. Initial concern that the development of IDPs and LDOs could lead to repetition of the same processes, has led to a commitment to a single planning process. Thus the LDOs form part of the integrated development planning process (Bartlett and Giyan 1997:1).

The easiest way to understand the relationship between an IDP and an LDO, is to see an LDO as being concerned mainly with spatial planning or what Giyan describes as "spatial budgeting and development time frames" (Bartlett and Giyan 1997:1), while IDP is needed to ensure that the physical delivery objectives established in the LDOs are tied into an appropriate financial and institutional framework. Particularly important is the links between the objectives and the budgetary process of the municipality (Beresford 1997:4). In addition, the integrated planning process needs to incorporate the planning requirements of national departments, such as housing, transport, water, and environmental departments.

7.3.3.2 The relationship between restitution and the DFA (and LGTA)

The relationship between restitution and the DFA can be divided into two main issues. The first is the relationship between the RLCCs and the Tribunals, and the second, how restitution can be incorporated into the process of formulating LDOs. These two are connected, in the sense that a successful accomplishment of the

second issue, will feed into making the relationship between RLCCs and Tribunals more meaningful.

The DFA Implementation Task Team (DFA TT) pointed out a potential conflict between the restitution process and the implementation of the DFA. This conflict, they argued, stemmed from the lack of communication between the RLCCs and the different Development Tribunals. Importantly, this lack of communication could have resulted in Tribunals taking land development decisions on land that is subject to a restitution claim.

This potential conflict stems from the Tribunals being granted extra-ordinary powers to suspend the application of any land-related legislation on any land subject to a land development application. However, in terms of Section 33(2)(j)(vi) and Section 61 (d)(iv) of the DFA, the Restitution Act is specifically excluded from the extra-ordinary powers granted to the DFA Tribunals to suspend the application of any land-related legislation. Further, Section 11(7)(aA) of the Restitution Act prohibits the alienation, subdivision and rezoning of any land which may be the subject of a restitution claim, without giving the RLCC one months notice. Section 6(3) of the Restitution Act also gives the RLCCs power to apply to the Land Claims Court for an interdict prohibiting the alienation, subdivision and rezoning of any land which may be the subject of the order of the Court or to which a person or community is entitled to claim restitution of a right to land.

In order for the DFA and the RLRA to fulfil their functions without major disruptions to land development and to restitution, the DFA Task Team suggested that there is a need to set up proper communication channels between Tribunals, district and local governments; and the RLCCs (Task Team Report1998:2). There are a number of levels at which co-operation between these bodies could have been implemented.

The DFA Task Team suggested that the Premiers of each Province be advised of the benefit to the Tribunals if someone from the relevant RLCCs office were appointed to the Tribunal. It warned that the Premier can only be advised, and that the final decision lay with the Premier and the Provincial Legislature. In practice, the

process of selection of Tribunal members was highly politicised, and in the Eastern Cape for example, in spite of the Premier being "advised", the RLCC does not have a representative at this level. Not having this formal linkage between the Tribunals and the RLCCs meant that the Tribunals would have had to resort to subpoenaing the RLCCs, which it has the power to do, to act in an advisory capacity on hearings for particular development applications (Task Team Report1998:2). In addition, a copy of all LDOs submitted to the relevant MECs Committee is given to the Tribunal. The significance of this is that if restitution issues were incorporated into LDOs at a lower level, they would automatically be noted and be considered at Tribunal level.

The DFA Task Team also suggested that the RLCC hold quarterly meetings with the Tribunal Registrar and Designated Officers (DOs) for each Province to share information on all claims lodged in the preceding quarter as well as claims likely to be lodged in the near future. Meetings of this nature would be useful in terms of updating the Tribunal officials, the Registrar in particular, as to the progress of restitution claims incorporated in the previously submitted LDOs. In addition, DOs would be able to give the RLCC feedback as to problems experienced within their Provincial regions. This was never implemented.

In terms of Regulation 17(6) and subregulations (8) and (9) of the DFA, a land development applicant is required to, no later than 66 days prior to the date fixed by the tribunal registrar for the application to be heard by the Tribunal, to give notice of the land development application and the date of the hearing to a range of stakeholders, such as the local government, adjoining property owners, etc. These stakeholders are required to lodge any objections they have, within 21 days of receiving it or it being published, with the relevant DO.

At that time the regulations did not include the RLCCs as one of the stakeholders to be notified. The DFA Task Team suggested that the DFA regulations be amended to include the RLCC in this list. The Commission was however not in favour of this option as it puts the onus on the RLCC to investigate the type of development and to respond (Roodt 1998:4).

The preferred option, and one which was in practice in the Eastern Cape Province at the instigation of the Provincial Department of Housing and Local government, is that the DO, when receiving a land development application, informs the applicant to check with the RLCC whether there is any claim on the land. This meant that there should be a letter from the relevant RLCC confirming that the land is not subject to a restitution claim. If the land is subject to a restitution claim, then the applicant should follow the procedure required in terms of the Restitution Act by obtaining the comments of the RLCC before lodging the land development application. This option was preferred by the Commission because it puts the onus on the applicant to acquire the necessary permission from the RLCC, and requires the RLCC to (in terms of the RLRA) to merely indicate the details of the restitution claim (Roodt Ibid).

7.3.3.3 The LDOs and the restitution process

Incorporation of restitution into the process of formulating LDOs is important for two reasons.

Firstly, Budlender points out that because municipal budgets are based on approved LDOs: "If the restitution process is not incorporated during the process of formulating LDOs, it will have major implications for the servicing and after care of the restitution projects" (Letter to the CLCC, 1998:2). Given the incapacity, at that time, of TRCs and TLCs in small towns in most rural areas, and the fact that the District Councils acted as "mother local authorities" to these bodies it was necessary for District Councils to be included into this process.

Secondly, in terms of the DFA, municipalities had to apply to the DLA for funds in order to complete the rather complicated process of drawing up their LDOs. Due to lack of skills at local level, expertise often had to be bought in to assist local councillors. In order to qualify for the DLA's grant for the establishment of LDOs, one of the requirements of the DFA is that municipalities had to incorporate land reform into their LDOs. And as restitution forms one of the three pillars of land reform, it has to by definition be incorporated into any LDO.

There are three levels of authority at which restitution can interact with and be included in the process of LDO formulation: provincial, district and local. The DFA Task Team argued that in most provinces there are bodies which are responsible for the co-ordination of the LDOs and other planning processes (Task Team Report1998:3). Examples of these bodies are the DFA Task Team in Mpumalanga, and the Directorate Town and Regional Planning in the Eastern Cape. It would be possible for some sort of interaction between the RLCCs and these bodies, either through representation (in the case of a task team) or through regular liaison meetings (in the case of directorates). Access to the RLCCs computer data base by the relevant body, would also facilitate their dissemination of claims to district and local authorities during the formulation of LDOs (Roodt 1998:6).

The DFA Task Team suggested that in the provinces where agreement between Provincial government and the RLCCs exist, these should be strengthened by the involvement of organised local government (local government associations) and District and Metropolitan councils. They argued that it was not practical to involve all municipalities (1998:3). This suggestion needs to be unpacked.

As mentioned above, the incapacity of TRCs and TLCs in small rural towns, especially in former Bantustans such as the Transkei and Ciskei meant that many of them did not have the capacity to draw up comprehensive IDP/LDOs. The demarcation process was immanent at that stage, which meant that small local authorities, especially in rural areas were being amalgamated to reduce the number and to cut down overlapping planning and costs. Planning at this level, where local authorities lacked the institutional capacity and resources to complete the process on their own required IDP/LDOs which comprised simple realisable targets. In these situations, the District or Regional Councils took over much of the planning responsibility from the local authorities, within their district development plans. In general it therefore made sense for the RLCC to liaise with District or Regional Councils rather than local authorities, especially where the District Councils were involved in service provision subsequent to restitution being granted (Roodt 1998:6).

The Commission argued that there were instances where direct involvement by the RLCC in a local authority's planning process was warranted. In localities where large group claims were being processed by the RLCCs, and where municipalities (with the backing of the relevant District Council) had the capacity, this was seen as a necessity. This was especially true where restitution claims overlapped with redistribution and tenure upgrade and where restitution claimants were to be slotted into an existing or proposed development (eg. Housing project, agricultural project).

By the year 2000, none of these proposals had been taken up by the Commission on Restitution of Land. A DFA working group met intermittently, but lacked direction and authority to put these issues on the agenda. Other initiatives were in the meantime having a greater impact.

7.4 The Gauteng Development Integrated Approach

In the wake of the Ministerial Review on Restitution there was much debate on policy issues and the way forward amongst Commission members. One of the more vocal contributions came from the Gauteng and North West Regional Commission, specifically the Implementation Unit, driven by Mashila Mokono and Ken Margo. Mokono was also part of the team that visited Germany and Estonia to investigate their restitution programs in June of 1999 (See **Annexure A**). The central concern of the Gauteng Implementation Unit (GIU) was that it was pointless to return to claimants exactly what was lost through the complicated historical valuations/compensation received/monetary value of the claim process outlined in Chapter 5, because this system was costly and in most cases inaccurate:

> The present path of trying to determine the monetary value of the claim, which implies that the exact value of what was lost should be found by some how doing a historical valuation, and thereby determining and deducting the compensation received at the time, is doomed to failure (Gauteng RLCC Implementation Unit 1999:1).

They argued that its failure was due to a number of reasons. Historical records are often inconsistent and incomplete. It may be added that they are often inaccurate as well, especially when tailored so specifically to serve the ideological needs of a political system such as the apartheid one. It is a technicist method which fails by its very nature to recognize the human rights abuses meted out by the previous policies of removals and dispossession. It involves long, complicated and inevitably expensive investigations (valuations and research) which unfortunately end up enriching consultants involved. It creates an environment of hostility and the possibility of endless litigation between claimants and the state, which only benefits lawyers and so-called "expert" witnesses, as in the Highlands land claim (Gauteng RLCC Implementation Unit 1999:1).

Most importantly, the issue of subtracting compensation received at the time of the removal (converted to today's prices using the CPI Index) was unacceptable because it implies that conditions at the time were normal. Clearly they were not, as in many cases there is no proof that documented compensation was ever paid to the victims of forced removals and where it was such compensation in respect of black people could not be used to restore the rights they lost in the area of their choice. It could not be challenged in Court and was not for their personal benefit as it was often paid to the implementing department to pay for the costs of the resettlement (Gauteng RLCC Implementation Unit 1999:1).

In addition the application of the technical exercise employed (valuations, compensation, MVOC) fails to recognise other rights and opportunities lost during the dispossession and the removals. These rights and opportunities included the right to enjoy well established social networks and a stable community life, the individual right to educational and business opportunities, the right to choose your own destiny, privacy, schooling, health care and other public amenities and not to be subjected to pain and suffering (Gauteng RLCC Implementation Unit 1999:2).

7.4.1 The development integrated alternative

A more acceptable alternative the GIU argued would be a program that enabled people to develop their lives while at the same time recognizing past dispossessions:

> ...the present government must acknowledge that we cannot return precisely what was lost in the past. Therefore, we must orientate ourselves to vindicating the wrongs done in the past by making restitution awards that create a framework for the integrated development and upliftment of the economic and social lives of our people (Gauteng RLCC Implementation Unit 1999:3).

For the GIU this type of an approach would contribute to the redistribution and tenure upgrade objectives of Land Reform and the development imperatives/mandate of the Reconstruction and Development Programme of the government. Practically such an approach would involve doing away with historical valuations and the subtracting of compensation paid at the time of the removal, except in cases where it can be proven that it could have been used to fully restore the rights lost in all respects, as in the case of white farmers expropriated on the borders of bantustans. Their purpose was to bring about conformity in restitution, in that all claimants in the same area get the same award, with the emphasis on land rather than money. Their main proposal was to give claimants serviced sites in housing development initiatives preferably on the original land:

> This can then be the benchmark restitution offer to the claimants. Such a benchmark award opens the door to other government development agencies to integrate their programmes with restitution, eg. Housing, Agriculture, Small Business Development, etc (Gauteng RLCC Implementation Unit 1999:4).

In terms of this position the Commission, while retaining the urgency of processing the multitude of claims, had to involve all relevant stakeholders such as the Department of Land Affairs, the District Council, municipality, and relevant provincial departments (D of HLG and DALA) in the negotiations from the beginning of the

process. Relevant state departments thus become party to negotiations, signatories to the final deed of settlement, and as such committed to delivery of products by specific dates. The deed of settlement has the constitutional backing of the Bill of Rights and the Restitution Act, and has been ratified by either the Minister of Land Affairs or the Land Claims Court.

7.5 Conclusion

The main purpose of the development approach is to ensure that restitution does not become apartheid relocation in reverse, with people having been granted restitution, moving back to their land and having to wait for the implementation of infrastructural development, basic services, and housing with no guarantee of when it would occur. In a situation where delivery by provincial departments is very uneven, with some performing less efficiently than others, claimants could wait a long time. Factors such as the limited finances allocated to provinces due to the national government's World Bank inspired GEAR policies[70], the billions of rand spent on buying arms, ongoing corruption and misspending[71], and the lack of skilled personnel, especially at management level, are all factors which could contribute to the uncertainty.

A central mechanism in implementing this second approach was the setting up of a steering committee to co-ordinate and drive the restitution process. The steering committee was generally chaired by the Commission, but in certain instances by an NGO assisting the claimants. The PELCRA restitution claim that will be considered as a case study in the next chapter is an example of the latter which included all major stakeholders in the process.

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[70] The ex-MEC for Health in the Eastern Cape, Dr Trudie Thomas, gave this as one of her main reasons for resigning from the ruling party in April 2001.

[71] See the Public Service Accountability Monitor attached to Rhodes University Web site for a number of documented cases of corruption and lack of appropriate action in dealing with offenders. Also Judge Johan Froneman' s judgement in Eastern Cape Department of Welfare versus Ngxuza and others.

Chapter 8

The restitution development model in action: the Port Elizabeth Land and Community Restoration Association

8.1 Introduction

As has been indicated in the previous chapter, the Port Elizabeth Land and Community Restoration Association (PELCRA) is an urban group claim that displays many of the facets of the developmental restitution approach. Claimants had a highly motivated leadership group that was extremely active in demanding the realisation of the right to restitution and the assistance of a number of NGOs. Most importantly, they attempted to situate the realisation of the right within a broader developmental paradigm that emphasised equity between group members, the restoration of serviced land and housing on a large scale which will contribute to the alleviation of the massive housing shortage within Port Elizabeth as well as towards the reintegration of the apartheid spatial landscape of the city.

The term *group* as opposed to *community* refers to the fact that the claimants consist of individual families claiming separate titles (individual holdings) rather than a communally owned piece of land. The claimants decided to pool their resources as individual claimants in seeking restitution and to elect an association with an executive to represent their interests. The motivation for adopting a group approach as opposed to making individual claims has its origins in the early 1990s before the implementation of the Restitution Act, the Commission or the Land Claims Court. The association arose out of the struggle by a number of claimants assisted by the Legal Resources Centre (LRC) during that period; against the sale and development of land from which people had been removed by the Port Elizabeth municipality (PEM).

Their struggle involved a protracted period of engagement with local authorities as an integral part of the settling of the restitution claim and in the provision of infrastructure and services, additional land for productive enterprise, and housing. The claim was based on a strong commitment to a degree of equity between wealthier and poorer claimants and a realisation that restoration of exactly what was originally lost was virtually impossible in an urban setting. A strong consideration was to simplify the project so as to speed up the processing of the claims.

In order to understand how the PELCRA claimants came to formulate their claims in this manner, it is necessary to look at the background to the removals and the early years of the struggle to reclaim not only their property, but more importantly, their community.

8.2 The history of forced removals in Port Elizabeth

Port Elizabeth, according to University of Port Elizabeth geographer Anthony Christopher, has one of the worst records of forced removals in South Africa (1994). It is difficult to estimate how many people were in fact removed or prevented from settling more permanently in the city through measures such as influx control. Christopher's research reveals that racially motivated relocation started as early as the beginning of the 20th century. However, the actual removal of large numbers of people started much later. Although passed in the 1930s, the Slums Act of 1932 was only seriously applied in the 1950s when large scale racial forced removals took place under the pretext of "slum clearance". By 1960, Christopher estimates, at least 50 000 people had been displaced (1994). To give an idea of racist nature of the removals, 1.4% of the 80 600 white inhabitants were affected in the pursuit of apartheid policies, while 55% African, Coloured and Asian inhabitants were affected (Legal Resources Centre: 1995:3).

The Group Areas Act (no. 41 of 1950) was introduced by the National Party state to effect the total urban segregation of population groups. Group areas were established throughout the city through a process of planning and implementation during the period 1950 to 1985. Proclamation No.71 of 1951 placed restrictions on

ownership and occupation of properties in affected areas of the city, while the promulgation of group areas was planned. No improvements could be made or properties sold without the express consent of the Community Development Board (the Board). The status quo and racial composition of all affected areas was therefore maintained until group areas were identified. During the period 1960s and 1970s the Board began its expropriation of properties throughout Port Elizabeth. Group areas in Port Elizabeth were specified under Proclamation 144 of 1961 (Roodt and Schuster 1999:1). Christopher estimates that 15 000 people were relocated from approximately 3200 inner city properties during this second wave of apartheid removals (1994).

Many of these areas were racially mixed prior to their destruction. The land opposite Livingstone hospital, still vacant today, is a good example. It was comprised of 218 residential erven situated on some four hectares of prime inner city land with commercial potential:

> Prior to the removal this land consisted of 218 residential erven, 122 erven registered in freehold ownership by African families, 32 by whites, 27 by Chinese, 19 by coloureds and 18 by people of Asian descent (Legal Resources Centre: 1995:3).

The forced removals split these mixed communities into racially defined groups: European (whites), Coloured, Asian, Bantu. Whites were allowed to settle in any existing white area, Coloureds and Asians were moved to the Northern areas of Gelvendale, Lorraine and Malabar, while black Africans were moved to New Brighton and Ibayi:

> All in all, some 70 400 people - constituting more than half the city's total black population at that time - were affected by racist laws and policy in this way (Delta Foundation1999:5)

8.3 Description of the Land Claimed and Nature of the Rights Lost

According to PELCRA (1997) the 840 claimant families forming part of the first phase of the PELCRA group claim held their properties in full title. Claimants were dispossessed from four areas in Port Elizabeth: Fairview, Salisbury Park, Korsten and South End. These are indicated on the map below. Claimants lost in all land to the area of 484, 00 ha, including non-residential land (business, open space, community facilities and roads). The following numbers of erven were potentially subject to claims:

Fairview: 957 erven. 290 ha still vacant in the 1990s;

Salisbury Park (Mount Pleasant): 259 erven. 90 ha still vacant in the 1990s;

South End: 1254 erven with approximately eighty per cent redeveloped by the 1990s, mostly in the form of high density cluster housing;

Korsten: the Commission received 217 claims for this area.

8.4 Early struggle for restoration

The first claims from Port Elizabeth were received in 1993 and were originally lodged with the Commission on Land Allocation established under the provisions of the Abolition of Racially based Land Measures Act No 108 of 1991.The first claim was lodged on behalf of the Jacobs family on September 30 1993. They were originally removed from 130 Pine road in Fairview (LRC 1995:39). The claim was lodged by the Cape Town office of the Legal Resources Centre, and from the beginning the LRC pushed for an integrated, developmental and group approach to restitution. It was proposed that:

since the Fairview area was still largely undeveloped, the Development and Housing Board and the Municipality should report on the feasibility of establishing a residential area with public facilities for the benefit of people prejudiced as a result of Group Area removals. In the alternative, the Commission was requested to recommend the restoration of the site to the Jacobs family (LRC 1995:39).

As no response was received from the Commission on Land Allocation by October 20 1993, the LRC approached the Department of Land and Regional Affairs with a request that the Minister "declares" the land in terms of the Abolition of Racially based Land Measures Act. The publicity generated around the LRC's actions elicited a spate of instructions to the LRC to lodge further claims. On October 28 1993 around 300 victims of forced removals under the Group Areas Act held a public meeting at the Muslim Movement Hall in Parkside, Port Elizabeth, where they founded the Port Elizabeth Land and Community Restoration Association (PELCRA), a legally constituted voluntary association, "to consider options for taking forward restoration claims" (LRC 1995:39; PELCRA 1997:2).

In the same year PELCRA entered into negotiations with the Port Elizabeth Municipality to have a moratorium placed on the sale and rezoning of all land subject to restitution claims throughout the city. In spite of these negotiations the Port Elizabeth Municipality re-advertised the sale by public auction of a major portion of the site in central Korsten opposite the Livingstone hospital (Erf 6900) on November 25 1993. The sale of this land would have affected the claims of 107 families (LRC 1995:40).

During the latter part of November an alliance of PELCRA, LRC, and an NGO, the Urban Services Group (USG) campaigned to halt the sale of any land from which people had been removed. The campaign involved meetings with the PEM, mass attendance of the Municipality's Land Usage Committee by victims of forced removals and the threat of an urgent Supreme Court Action. By November 22

lawyers for the municipality informed the LRC that the PEM had decided not to go ahead with the sale of the Korsten land. On November 23 PELCRA addressed the PEM Land Usage Committee and "obtained an undertaking that a moratorium had been placed on the sale of council owned land from which people had been moved" (LRC 1995:40). The Committee supported PELCRA's proposal to establish a forum to deal with claims.

In November 1993 a developer, by the name of Wonderwonings, gave notice in the press of its intention to rezone four pieces of land situated in Fairview for the building of high density cluster housing. About a fifth of the Fairview land had at that stage already been developed and some of the properties had changed hands. PELCRA argued that the notice period was too short and that in view of the amendments to the Abolition of Racially Based Land Measures Act (ARBLMA) persons who were removed from the area were entitled to notice in the same manner as adjacent land owners. One of the claimant families, the Meyer family, who were PELCRA members, had three houses on a property which formed part of the land that Wonderwonings planned to rezone. In December 1993 PELCRA lodged an objection wherein they contended that the claimants' rights would be adversely affected since their chances to secure restitution would become more remote if the development was to take place. They also argued that as the claimants were, "as a result of the Multi-Party Negotiation agreement reached at Kempton Park on 14 November 1993, shortly to become entitled to claim restitution in a Court of law, a fundamental rethink in the City Council's approach to town and land use planning was required" (LRC 1995:41).

In December 1993, PELCRA met with Wonderwonings to discuss the rezoning of the land and its effect on the claimants. It was agreed that the developers would suspend transfer of further land from the state but they pointed out that this could derail the R 40 million development project, of which some R 5 million had already been spent. PELCRA undertook to canvass the issue with the 8 former land owners, including the Meyer family. Without informing PELCRA, or any of the other claimants of the land, Wonderwonings placed a notice in the newspaper regarding three of the four portions described above. PELCRA and its members who were removed from

the land lodged a second objection January 1994. The gist of the objection was that claimants had developed legitimate expectations to "lawful and procedurally fair administrative action in terms of Section 24 and the right to relief as provided for in Section 7 of the Draft Constitution" (LRC 1995:41).

In January 1994 a meeting was held with a number of state departments and Wonderwonings, the PEM, and PELCRA. The message from the State was that it would be prepared to play a facilitative role in assisting the establishment of a forum for the purposes of addressing land claims as part of a development directed initiative. In keeping with the ethos of the pre-1994 period, the State offer was that claimants would be entitled to a first option to buy back their land at market price. Despite this negative outcome, the parties at the meeting committed themselves to the establishment of a forum which would be inclusive of all interest groups.

Meanwhile the issue of the development of land from which people had been forcibly removed continued to simmer. Later in January the Land Usage Committee of the PEM met to consider the first application for rezoning to which the first objection by PELCRA had been made. PELCRA attempted to address the Committee but was refused permission. The only opposition to the application by Wonderwonings was from councillor Graham Richards, who later became the Town Clerk of the PEM. The committee decided to recommend the approval of the rezoning and subdivision of the one "portion" of Erf 1349 Fairview, which the City Council subsequently did. The Council claimed that the restitution issues raised on behalf of PELCRA was beyond their scope with regard to the application. This attitude of the pre-1994 councillors, and of the technical staff well into the late 1990s, was typical of many municipalities around the country[72]. Their attitude was that restitution was a political issue that had nothing to do with them. The East London Municipality with regard to the West Bank and East Bank claims was very similar, based on the erroneous premise that they were not responsible for the removals. The active role of municipalities in forced removals, especially in East London, is well documented (Banks et al 1999; Atkinson 1991; Nel 1990). Banks et al argue that:

[72] Interview Mashile Mokono, Berlin, Germany, June 9, 1999.

> The destruction of the West bank in 1965 was the turning point in the political history of East London. With West Bank earmarked for demolition and rezoning for industrial development, agony and tension mounted as the fate of over 1 200 families was decided by the Town Council (1999:19).

And Nel:

> The fact that people were, according to a former resident, "victimised and bullied into agreeing to go to Mdandtsane" indicated the determination of the authorities, both at local and governmental level to cleanse the city of its African locations (1990).

The Port Elizabeth NGO Urban Services Group, talking about the planning of Fairview within the context of the PELCRA claim pointed out that:

> Many local authorities are currently viewing the land restitution programme quite negatively. Their involvement in this issue seems to be very minimal. If land restitution is viewed more positively, it could be used more creatively to address other development objectives without negating the legitimate land claims of those previously dispossessed of land. As local authorities have been active agents in mass forced removals, they should now be as active in engaging in the restitution programme (1998:16).

Thus after the City Council approved the rezoning and subdivision of the land in favour of the developers, the affected former land owners and PELCRA had to decide whether to appeal against the decision. Their main concern if they appealed, apart from the financial loss to Wonderwonings, was the substantial loss of employment opportunities for PE inhabitants. PELCRA met with the developer again in February in an attempt to resolve the issue. Agreement was reached that PELCRA would drop its objection to the development of one portion of Erf 1349 in return for a number of concessions from Wonderwonings. These were that no additional development on Wonderwonings owned land would take place without

issues being discussed in a forum that PELCRA was proposing to establish (see below). In addition they agreed that with regard to the further transfer of land from the State to the developer in Fairview where members of PELCRA had claims, PELCRA and Wonderwonings would cooperate to resolve the issue and, if necessary, to jointly make representations to the state (LRC 1995:43).

PELCRA proposed that the key players dealing with land issues in Port Elizabeth get together to create "a mechanism for co-ordination, through which they could work towards a fair, speedy and effective restitution of land rights in Port Elizabeth" (LRC 1995:6). On February 23 the City Administration Department of the PEM convened its Steering Committee to establish a forum. All parties except SANCO met and it was agreed that PELCRA's advisors would prepare a set of guiding principles for the establishment of a forum. The key principles discussed were that the process should be inclusive and that development directed restoration options should be congruent with existing development and it should form part of existing urban development growth. The decision to establish a forum was very much in keeping with the flowering of civil society in the early 1990s around the country and the establishment of development forums to drive the Reconstruction and Development Program from the grassroots A forum was established on October 26, 1994 with the PE Municipality, the Port Elizabeth branch of the SA National Civic Organisation, PELCRA, and the Provincial Government of the Eastern Cape as founding members.

The forum held its first meeting on December 7,1994. It adopted a set of procedures, largely concerned with the functioning of the forum in relation to the TLC's town planning and land use committee, and adopted a program of action. The first meeting also addressed issues around the blanket moratorium on the sale of municipal and state owned land; issues concerning development, sub-division and rezoning of land. The meetings were open to the public, and anyone affected by these issues was encouraged to use the forum to make their views known.

A further Forum meeting was held on 3 April 1995. The Forum meeting was attended by the Regional Land Claims Commissioner Dr Peter Mayende as an observer. Prior to the meeting, discussions were held with Dr Mayende to hear his views "on the operation of the Commission, the proposed Restitution of Land Rights Regulations and a local "group" Urban Land Restitution Initiative; to update him on the PE initiative; to consider options for coordination and collaboration between the Commission the Department of Land Affairs, PELCRA, and the forum to promote the implementation of a development directed group land restitution initiative, data management and administrative systems; and to discuss the Wonderwonings / Fairview issues" (LRC 1995:6).

The forum secretariat, provided by the PEM, was supposed to take over the data base on the particulars of the PELCRA members and their claims, to register further claimants for PELCRA membership, verify claims, conduct a land audit and compile a map which would indicate all the areas in town that were subject to claims. There is no doubt that these were unrealistic ambitions on the part of the founding membership of the forum. Given the highly legalistic requirements of the restitution process and the problems attendant on the fulfilment of these outlined earlier in the thesis, it was small wonder that neither the forum nor its secretariat really got off the ground[73].

All claims lodged with the Commission on Land Allocation were transferred to the Regional Commission on Restitution of Land Rights in 1995.

8.5 A demand-led participatory approach

PELCRA stated as its objective the formulation of a creative way of making the inner city more accessible to the dispossessed communities by formulating a development proposal for vacant state owned land within the city. PELCRA actively engaged its members in the development of a common approach to resolving their claims. This

[73] Interview Clive Felix, Urban Services Group and PELCRA executive member, Port Elizabeth, March 11, 1999.

was not always an easy task, for a number of reasons. Many people were still very bitter at the destruction of their original communities, homes, and businesses and in some cases, families. A typical example was the Scharneck family. According to Louie Britton, daughter of Mr Scharneck, the family lived in Fairview and "lost everything" during the forced removals. Her father was one of the wealthiest men in the area. He had properties and businesses. Her family of twelve siblings was scattered by the removal (Eastern Province Herald July 28 2001). Others, such as the Jackson family lost twelve properties (PELCRA 1997).

It is therefore no small wonder that for many claimants the restitution process brought back bitter and painful memories. Many PELCRA meetings were highly charged as claimants relived the forced removals and worked through their feelings of loss and pain. Clive Felix, General Manager of USG, a member of the PELCRA executive and the person who chaired many of the meetings, recounted the experience:

> It is important to realise that it is okay if claimants are directing their anger at you. Perhaps it is something they need to do. At that moment they are not really attacking you. They are attacking something that you represent for them at that moment. And they often have to do that, and to get it out of their system, before they can go on working with you (Delta Foundation1999:14).

One of the major difficulties for all involved in the PELCRA claim is the fact that it is a group claim rather than a community claim. With a community claim there is a genuine historical bond between members based to a greater or lesser extent on kinship, allegiance to traditional or other leadership, a common culture and language, and most importantly, communally owned land. While this does not guarantee a lack of internal conflict or a cohesive approach to issues such as restitution, it certainly helps. With group claims there are often more factors likely to cause conflict and division than there are factors creating unity. Ironically, for the PELCRA group, the recreation of their "community" provides one of the central

reasons for the way in which they have framed their restitution bid. In the words of PELCRA Executive member, Mr Dicky Britton:

> My only hope is that these people come back together and we bring back that long lost community togetherness (Herald July 28, 2001).

This wish is echoed in a PELCRA document published by the Delta Foundation:

> At this meeting, those assembled agreed to adopt a resolution establishing an organisation. The organisation would be called the Port Elizabeth Land and Community Restoration Association (PELCRA). Through choosing this name, the claimants indicated that they sought not only the return of the land, but also the rebuilding of community (1999:9-10).

And in PELCRA's constitution:

> The community has suffered disadvantage as a result of unfair discrimination, and the Association is to promote the protection and advancement of the community (1997Annexure A:1).

The emphasis on the recreation of "the community" by the leadership reflects to a large extent the fragility of the group and their attempt to convince the individual claimants to pursue a common goal. As Du Toit notes:

> The greatest question, however, is whether PELCRA will be able to keep its membership together in the crucial months that will follow the commencement of serious negotiations. There is every possibility that many claimants may still opt out of the group, and may decide to go for individual compensation. If too many people do this, the whole initiative may be shipwrecked (Delta Foundation1999:23).

There were a number of reasons for the lack of group cohesion and the fragility of their sense of community. Foremost of these was the fact that the claimants came

from four different and distinct suburbs prior to the removals, namely South End, Korsten, Salisbury Park and Fairview. These suburbs differed markedly in character due the variation in proximity to the central business district as well as nature of the dwellings and municipal services received, which factors pointed to a difference in the class composition of the claimants:

> Municipal services were available, but varied in some areas like Fairview which did not have proper services. Furthermore, the types of improvements varied from area to area, South End had more expensive and mostly brick constructed houses, whereas dwellings in the other areas consisted of smaller houses with mostly wood and iron finishes (Melisizwe Property Group 1998:18).

Secondly, even where people came from the same suburb the apartheid removals had the effect of separating them according to racial classification and forcing them into spatially diverse locations. These racial ghettos inevitably led to an estrangement of former neighbours, with children suffering the effects of racially exclusive schooling and developing the attendant prejudices. This problem is highlighted by a member of the PELCRA Executive, Mr Dicky Britton:

> We will be restoring a community which already has links. Imagine, these people have stayed together before but they were scattered by apartheid... Some have indicated that they are not interested in going back to Fairview. They say they will sell that land and continue living where they are now (The Herald July 28, 2001).

The racialisation of the communities was reflected in the fact that initially PELCRA was dominated by coloured leadership and membership. This was partly due to the education and class background of many of the early members. However, there was a concerted effort by the leadership to broaden the membership base to include members of other racial groups, especially those from the African townships (LRC

1995:8). This was largely successful, although the leadership continued to be largely political activists from the coloured community.

A third problem is that many of the claimants could not be persuaded to join in with the group claim. The emotional attachment to the exact property that they lost during the original removals proved to be too much for many of them. This was especially the case where people lost a number of properties and as a result suffered considerable loss. These individual claimants proved to be a thorn in the side of the PELCRA executive. On many occasions they have attempted to disrupt mass meetings and even after the claim was settled a number have tried to challenge the implementation of the development project in Fairview by taking their objections to the Tribunal set up in terms of the Development Facilitation Act (see Chapter 7).[74] These individual claimants challenged the legality of the group development in Fairview and insisted on claiming the properties that they lost, some of which are situated in the centre of the proposed development.

These factors make the participation of over 800 claimants in the group claim all the more remarkable. To a large extent the continued coherence of the group during the long years that it took to make progress with the claim may be attributed to the quality and patience of the leadership, and the substantial assistance rendered to the claimants by a range of NGOs. A number of individuals and organisations stand out. Amongst the PELCRA leadership two people in particular deserve mention, firstly for their uncompromising stance against the attempts of the PEM to sell off and develop land from which claimants had been forcibly removed, and secondly for their dogged patience in dealing with the psychological trauma and anger of claimants who were forced to relive the pain of their dislocation through the process of providing information for the restitution process. The first is the Chairperson of the PELCRA executive, Mr Raymond Uren, a retired school principal and anti-apartheid activist, who made no bones about the methods employed in the early days: "In the first year of our existence, we had a very aggressive, confrontational style" (Delta Foundation1999:10). However, as the claim progressed, the leadership adopted a

[74] Interview with Clive Felix, PELCRA executive member and USG general manager, Port Elizabeth, October 27, 1999.

policy of constructive engagement with the PEM and other state institutions. For example, Mr Uren at a Strategic Planning Committee meeting in October 1999, assured the PEM that as part of the process leading to the resettlement of the claimants in Fairview and Salisbury Park, PELCRA would " make claimants aware of the rates costs and that people should commit themselves to pay rates" (SPC Minutes October 27, 1999) .

The other is Clive Felix, who served in a dual role as a PELCRA executive member and as the general manager of the Urban Services Group, one of the NGOs that have played a major role in assisting PELCRA to formulate its claim. It is difficult not to overstate his role in keeping the claimants on track with the group developmental approach, as well as his technical knowledge of planning issues in dealing with both local and provincial government:

> It's difficult, you know. I have claimants coming to my house all the time with their problems. I have to listen to them and reassure them. I have to be patient, you can't rush this thing.[75]

The attorney heading the Port Elizabeth office of Legal Resources Centre at that time, Kobus Pienaar, played an important role in providing legal backup for the PELCRA challenge and has continued to do so throughout the processing of the claim. He argues that by "using their legal muscle to block development and protect land claims, PELCRA claimants forced city government to acknowledge their existence" (Delta Foundation 1999:11).

The PELCRA leadership realised early on in the process that due to the negative and apathetic attitude of the PEM towards the issue of restitution and the lack of capacity of the CRLC that they had to take the initiative in order to realise their right to restitution. They emphasized the need for a group approach due to the fact that the restitution process was primarily geared toward rural community claims, and that

[75] Interview with Clive Felix, PELCRA executive member and USG general manager, Port Elizabeth, May 13, 1999.

these claims would enjoy precedence due to the criteria in the Restitution Act which required claims affecting large numbers of people to be prioritized:

> It was explained to the claimants that the Restitution of Land Rights Act was biased in favour of groups, who will receive priority treatment in the restitution process and who may qualify for preferential treatment in the allocation of state assistance. It was proposed that the land claims process does not appear to be sufficiently geared to handle and speedily effect restitution on an individual basis...It was explained that the RDP Land Reform Programme is aimed at redistributing land to Rural People and group solidarity and pressure will be required to ensure that effective restitution takes place in Urban areas (LRC 1995:7).

Ironically, this fear led in the first few years of the Restitution Commission's existence to the swamping of regional offices by thousands of individual urban claims, virtually paralysing the process and leading to a neglect of rural claims.[76]

In order to forge a sense of community amongst the more than 800 claimant families and their descendents who came from "many racial backgrounds and walks of life" (Delta Foundation1999:14), the leadership had to conduct an active campaign, with the assistance of the various NGOs they were working with. This campaign, which contained many of the elements necessary for claimants to "demand" the realisation of their right to restitution, encouraged maximum participation in the process. Explains Clive Felix: "You won't believe the hassle we had to go through to get where we are today. We spent hours working through issues with people, through their anger".[77] A number of mass meetings, workshops and focus groups were held to discuss issues, answer questions, allay fears, give people an understanding of the complexities of restitution, and most importantly, to give people a sense of ownership of the process. The focus groups were especially important in allowing the

[76] Interview with Eastern Cape Regional Land Claims Commissioner, Thozamile Gwanya, East London, December 8, 1999.
[77] Interview with Clive Felix, PELCRA executive member and USG general manager, Port Elizabeth, October 27, 1999.

leadership and smaller groups of claimants to strategise on how to deal with issues of central importance to a realisation of the group developmental claim.

An important element in the ability of claimants to participate actively in the processing of their claim is the extent to which claimants are informed about their rights, the institutions involved in the realisation of those rights, and the necessary steps in the process. Communication, by the state, and civil society in the form of NGOs and the media, plays a vital role in allowing citizens who qualify for rights such as restitution to make informed decisions. According to members of the PELCRA executive, it was a struggle to get adequate publicity from the mainstream newspapers such as the Eastern Province Herald or the Evening Post.[78] This was born out by the lack of press attendance at the PELCRA mass meeting when the Minister of Land Affairs, Derek Hannekom signed a memorandum of agreement with PELCRA the substance of which was the return of over 800 families forcibly removed during the apartheid years to be resettled in Fairview, a major victory for the reintegration of the Port Elizabeth apartheid spatial landscape and for the implementation of the constitutional right to restitution. The Herald newspaper carried a one paragraph story on the inside of the newspaper (Eastern Province Herald May 28, 1999). The state fared little better, the lack of funding and the problems with the Commission on Restitution of Land Right's publicity campaign was outlined in Chapter 3.

To counter these impediments to the ability of potential claimants to realise their restitution rights, PELCRA embarked on its own communication campaign:

> A lot of energy was devoted to keeping members informed and developing a strong infrastructure for the organisation. An office worker was employed for a year to help with administration, and a news letter was distributed to keep members up to date with developments (Delta Foundation 1999:15).

[78] Interview with members of the PELCRA executive, Port Elizabeth March 11, 1999.

A further problem the leadership encountered in the forging of the PELCRA community was the length of time the process took, from the early struggles against the municipality, through the delays brought on by the early inactivity of the RLCC, and then finally through the long and drawn out restitution process with its laborious and legalistic requirements. Claimant verification, with claimants and their direct descendents scattered all over the country and the world (mainly Canada and Australia), took especially long. The Project Managers, Metroplan, encountered great difficulty in obtaining the relevant affidavits and documentation from claimants:

> Mr Allison reported that letters had been dispatched to every claimant on file requesting outstanding information. In all cases the family tree affidavits were outstanding and in most cases power of attorney affidavits were outstanding...Many problems, such as: family disputes, incorrect Erf numbers, misplaced claims, etc., had already been identified and resolved (Joint Steering Committee Minutes February 10, 1999).

8.6 The Restitution Process

In April 1997 PELCRA submitted a pilot group proposal to the Regional Commission on Restitution of Land Rights seeking the restoration of land rights for residential purposes. The objective of the proposal was to settle claims from four areas in Port Elizabeth, namely South End, Fairview, Salisbury Park and Korsten. This initiative later became known as PELCRA Phase 1 Pilot Project (CRLR/DLA Memorandum of Agreement July 1998). The project came about through a process of negotiation and compromise between the claimants, culminating in a proposal which represented the consensus reached between the members of the association. Fundamental to this process was the need for each claimant to subscribe to a development-directed approach as a mechanism to resolve the claims (PELCRA 1997:2).

The challenge for the PELCRA leadership and their NGO partners was to reconcile the diversity of claims and develop an approach which dealt in a fair and just manner with each claim. The chosen form of restitution was a combination of restoration and allocation of alternative land in the form of serviced erven. Claimants, as indicated

above, were removed from four areas but agreed to be awarded serviced erven in two of the areas; Fairview and Salisbury Park, which were vacant and owned by the Provincial Housing Board (PHB). It was therefore deemed feasible for restoration and development (PELCRA 1997:4).

A further challenge PELCRA faced was to create a basis for equity within the group, given the uniqueness of what each claimant lost. Although the association did not conduct an in-depth deeds search for the affected properties, they reviewed local records and developed a basis for determining equity. This required a compromise on the exact amount of compensation (ie. the monetary value of each claimants claim) that could be expected by each claimant and the adoption of norms or standards in calculating current compensation. Various town planning issues were taken into account and a focus was placed on sustainable development directed options. The outcome was the development of a proposal which was acceptable to PELCRA and a number of stakeholders that was reached through a process of lengthy negotiation. A major component of the proposal was the request that the state develop the land to full municipal standards (Roodt and Schuster 1999:2-3).

After the presentation of the proposal to the Commission in April 1997, the PELCRA claim fell foul of the acrimonious relationship between the Commission and DLA outlined in Chapter 5. As a result of this lack of co-operation between the two institutions and the lack of resources within the Commission, the PELCRA proposal was not acted on until the end of 1997 when the Eastern Cape and Free State Commissioner at that time, Dr Peter Mayende, engaged the services of the consultant who had drawn up the proposal and business plan for the District Six claims in Cape Town.

The consultant, Simon Radcliffe of Endeva Consulting presented an elaborate proposal in February 1998 to the Commission which involved setting up a dedicated unit ("Project Team") complete with their own offices, furniture, equipment, a Head of Unit, administrative staff, facilitators, researchers, valuers, legal advisers, development planners, messengers, and a client support person for six months at

the cost (at 1998 prices) of R1, 913, 010 (Radcliffe 1998:30). This "mini-commission", as it was dubbed by Commission staff considering the proposal, was rejected as was a subsequent scaled down version presented in March 1998, in that it was far too expensive, duplicated functions already performed by the Commission and the Urban Services Group, and by the simple fact that any consultant worth their salt already had their own offices, equipment, researchers, Project Leaders, and administrative staff[79] (RLCC Investigative Division Minutes March 23, 1998; April 20, 1998[80]).

By this stage a year had passed from when PELCRA had handed in its proposal. The leadership, members, and allies such as the Urban Services Group and the LRC, were extremely disappointed at the Commission and DLA's lack of tangible action in the face of their own considerable initiative in providing a fast-tracking and developmental option. As the PELCRA publication "An approach to urban land claims" puts it:

> Since the handing in of the PELCRA proposal, the claim has been subject to a number of delays. These delays are due mostly to inaction on the part of the Commission for the Restitution of Land Rights, which did not make any progress on the claim at all for more than a year (Delta Foundation1999:20).

There are a number of reasons for the lack of action on the part of the Commission, apart from the already mentioned standoff between them and the DLA. Radcliffe, writing specifically about the Eastern Cape Commission and the PELCRA claim, outlines some of the main ones:

> The process of restitution is impeded by the complexity of the process as stipulated by the Act which requires among other things that a Deeds search

[79] A number of consultant firms who have subsequently and are presently doing work for DLA and the RLCC fit this description. Ikhwezi Development Facilitators in East London and Metroplan in Port Elizabeth are two examples.

[80] Also minutes entitled "PELCRA Proposal - Issues and Concerns" of RLCC meetings to discuss Radcliffe report, East London, March 9 and 10, 1998.

be done in order to establish the validity of the claim. This part of the process, in particular has been fraught due to the fact that they are located in Cape Town. The Commission is presently constrained by its limited financial and human resources. In addition, it is also constrained by the lack of an appropriate electronic database, although members of the Commission's staff have developed one which needs to link to the national database presently being developed (1998:3-4).

But the main reason was the lack of experience on the part of the Commissioner and his staff and the lack of policy in dealing with urban claims. It has been mentioned that the Restitution Act and the judicial process was formulated primarily with rural community claims in mind and that the DLA Restitution Directorate responsible for developing policy was mostly involved in restitution negotiation, as the representative of the state around the country. The Gauteng RLCC office, faced with a large number of urban claims, lamented the situation on many occasions:

> We would argue that it is impossible to get more than a valuer's thumb suck amount for the majority of urban claims. This would apply to those claims where there is no evidence for a breakdown of land and improvements, and the original structures have been demolished, making it impossible to obtain any kind of average value over time. This applies to almost all urban claims, in Gauteng, over 13 000 claims. No policy has been made on whether claimants affidavits will be accepted either, or whether aerial photos are any more reliable (if they can be obtained, and if the exercise is not prohibitively expensive). (Gauteng RLCC Implementation Unit 1999:1).

And in another paper on urban restitution:

> Those responsible for planning restitution policy have to urgently recognise that historic valuations for urban claims is an integral and not an ad hoc stage of the restitution process....Provision for historic valuations to establish monetary compensation must not only be built into future Commission

> budgets, but processes must be standardised and questions of who does what and how must be clarified. UNLESS THIS BOTTLENECK IS OVERCOME URBAN CLAIMS CANNOT BE RESOLVED, AND SINCE THEY CONSTITUTE 80% OF ALL CLAIMS, RESTITUTION WILL BE SEVERLY CURTAILED (emphasis in the original) (Margo 1998:3).

A meeting between the Commission, PELCRA leadership and PEM personnel at the Port Elizabeth City Hall in May 1998, where the latter two groups expressed their anger and dissatisfaction at the lack of progress being made in processing PELCRA and other claims in the city, led to the realisation by Commission staff attending the meeting that urgent action was needed. An initiative to break the standoff between the Eastern Cape Commission and the Restitution Directorate in Pretoria led to an agreement by the Chief Director Restitution, Jean Du Plessis, to attend a Commission brokered meeting with PELCRA in Port Elizabeth on June 25 1998. The main purpose of the meeting was to find an affordable and practical way of processing the PELCRA group claim based on the PELCRA proposal, to expedite the process and to obtain funding.[81]

The meeting between, the Commission, DLA and PELCRA culminated in the drawing up of a Memorandum of Agreement (MOA) which set out a clear program of action:

> The programme of action in the form of project steps shall be complied with in order to reach a full and final settlement....The Memorandum of Agreement comprises a number of steps or milestones, each to be carried out by a stakeholder and completed within a specific time frame (MOA 1998:3).

The MOA, that was signed on July 15 1998 by the three parties, involved the appointment of a Project Co-ordinator (PC) paid for by the DLA, who would be

[81] Letter to Mr Schalk van der Sandt, Deputy Director Administration, Eastern Cape RLCC from the Director: Restitution Policy. Dated 12.6.1998.

responsible for the "co-ordination of all aspects of the Phase 1 PELCRA group claim for the duration of the project" (MOA 1998:3). Metroplan, a firm of Port Elizabeth town and regional planners with a history of involvement in disadvantaged communities and low-cost housing was appointed as PCs. The PC, as were all participating parties, was accountable and reported to the RLCC via a Steering Committee (SC), chaired by the Commission. The SC met once a month. The PC's main tasks, apart from overall co-ordination, were to collect and collate all information required by the Commissioner to verify each claimant, including the establishment of a computerised data-base. The PC was assisted in this by two deeds researchers, one from the Commission and one from DLA, who went to Cape Town for extended periods to complete the research at the Deeds Office. The DLA also appointed and paid for a firm of valuers, Melisizwe Property Group, to assess the PELCRA valuation methodology. The Provincial office of the DLA (PDLA) undertook to map claims, in an effort link each claim to specific portions of land and to identify possible overlapping claims (MOA 1998:4).

8.6.1 Claimant verification

The collection of relevant information and documentation of the original owners and direct descendants was conducted by Metroplan, in order for the RLCC to verify claimants. This involved a lengthy process due to the fact that claimant families, especially in cases where the original person forcibly removed was deceased, had a number of direct descendents scattered all over the world. In many cases internal rifts and squabbles within families delayed their response in supplying the required documentation. Sometimes these problems were directly related to who was eligible to claim (for example where the original person removed had children from more than one spouse or where children were illegitimate) while in other families the estrangement was unrelated to the restitution process[82]. The length of the restitution process and its legalistic requirements also contributed to the apathy of some

[82] Interview with Russel Allison and Shakira Lillah, Metroplan in Port Elizabeth, April 22 1999.

claimants in responding to requests for information. This was pointed out by PELCRA executive member Mr Dicky Briton:

> Mr Britton emphasised the importance of the time factor to the claimants. Most claimants are frustrated as the process is already running for a few years. This could be the reason why poor response from the claimants was received (PELCRA JSC minutes.27 October 1999).

Metroplan, in consultation with the Commission, developed a standard list of information required, a family tree form, and a claimant verification form that were kept in each claimant family file. As documents and information was acquired, it was attached and ticked off, enabling Metroplan and the Commission to assess instantly what information was still required for each file and when it was complete. All information was also entered onto a computer data base for purposes of summation and statistical analysis.

Deeds searches were conducted by RLCC and DLA researchers in Cape Town. The process was complicated by the fact that the Erf numbers no longer exist as they did at the time of the removals, with most of the properties having been re-surveyed and consolidated. Claimants in most cases did not have a record of or could not remember their Erf numbers:

> Metroplan reported that, for the purposes of carrying out the deeds searches, the Erf number(s) of each claimant was required by the deeds searchers in Cape Town. This process was proceeding well although some problems were being experienced particularly in the South End area. The PEM indicated that they had records of old South End which related Erf numbers to addresses (PELCRA JSC minutes. September 17 1998).

It was suggested by the deeds researchers, Mr Mbongo and Mr Hoffman, and agreed to by the JSC that given the time constraints and the volume of claimants it was impractical to provide certified copies of every Title Deed. It was therefore

agreed to prepare a Deeds Report which would serve as an affidavit in its final form (PELCRA JSC minutes October 17 1998).

On completion of the deeds searches and the PDLA mapping process, lists of claimants and the original properties lost were prepared by Metroplan. The lists included single claims and a second list of multiple claims lodged by individual claimants. Multiple claims lodged were dealt with on their individual merits in the process of allocating serviced sites to these claimants (Metroplan claimant lists March 9 1999).

8.6.2 The Land Owners (the State)

The land at Fairview and Salisbury Park was owned and administered by the Provincial Housing Board (PHB) and is located within the boundaries of the Port Elizabeth Municipality (PEM). It was agreed within the Steering Committee, that the land be transferred from the PHB to the PEM or directly to the PELCRA Trust. This aspect was negotiated with the Department of Housing and Local government (DH+LG), under which the PHB falls. The PEM (or the Trust) agreed that it would in turn transfer the land to claimants verified by the Commission as bona fide claimants, once agreement was reached as to the acceptable options in terms of the size and location of the erven. The PEM agreed to make the land available for residential purposes at nominal cost which would not exceed R1,00 a sq m being the standard price for land for low cost housing in Port Elizabeth at that time. The cost of non-residential land was to be negotiated as part of the Stage 2 agreement. The PEM agreed to sign a land availability agreement with PELCRA which will exempt the claimants from paying rates until the development is completed.

8.6.3 Proposed settlement

In attempting to quantify the claims and develop standards for calculating compensation PELCRA established average property values in 1956 for the four

areas included in the PELCRA Phase 1 project. These averages were gleaned from archival and local newspaper records. These figures were regarded as a good reflection of average values by Meliziswe, the valuers hired to assess PELCRA's methodology (Melisizwe Property Group1998). The reason 1956 was chosen is because this was a time when property prices in the four areas were still "normal", i.e. before rumours of removals affected basic upkeep of improvements. 1956 thus provided a baseline figure from which projections on present day values, compensation and shortfalls could be calculated.

A major problem the claimants had to grapple with was how to reconcile the agreed upon principle of equity with the fact that some people lost more than others, and the significant difference between the four areas people had been removed from. South End and Korsten were both urban high density suburbs while Salisbury Park and Fairview were semi-rural with large plots of between 2000 and 8565 sq meter:

> The character of the properties in the four Subject Neighbourhood Areas differed from each other, ie various locations, Erf sizes, types of improvements, etc. South End seemed to have a more popular location because of its sea view and being close to the Central Business District. Areas such as Salisbury Park and Fairview are situated in a decentralized node, further away from the CBD and other amenities. The Korsten area was surrounded by industrial properties which in actual fact became mostly industrial zoned after it was redeveloped. The area was also affected by squatter's houses on the banks of the lake which must have had a negative influence on the property market (Melisizwe Property Group 1998:17).

In attempting to develop standards for calculating compensation the proposal as indicated in **Table 2** was developed. The average values and proportionate property sizes as a form of compensation were identified. Three levels of property sizes were identified and comparative property values determined. **Table 2** provides a diagrammatic representation of these property sizes and is not drawn to scale. In **Table 2** it is evident that smaller sites in South End were similar in value to the large

DEVELOPING EQUITY

Property Values 1956

A) South End

R4000

Fairview

R4200

B) Salisbury Park

R2400

Korsten

R2200

C) Fairview

R1700

R1300

Table 2

sites in Fairview. Sites in Korsten and Salisbury Park were comparable, with the small unserviced sites in Fairview forming the third category.

Escalation of the value of these properties to current market value is indicated as a graph in **Figure 2**. This was not done in terms of the CPI index which would have given a far higher, and in the opinion of all stakeholders including the valuers, an unrealistic escalation, but rather at a much lower 8% being the average compounded property price increase in Port Elizabeth over the stipulated period (PELCRA 1997; Melisizwe Property Group 1998). The current value of the three identified categories was averaged at R20 000, R30 000 and R40 000 respectively. This was done in accordance with the principle of equity and cross-subsidisation inherent in the PELCRA approach. These values therefore indicated the monetary value of claims falling within the three categories. A 200 square metre serviced Erf in Fairview; valued at R10 000 was used as the basic unit or currency to compensate claimants:

A) (R40 000) was awarded ***four*** units
B) (R30 000) was awarded ***three*** units
C) (R20 000) was awarded ***two*** units

It was proposed that claimants be allowed to choose their units in different combinations depending on their needs, for example:

Example 1: Claimant falls into category A, with four units. Claimant decides to take two 200 sq metre plots and R20 000 towards the top structure or four plots with no money towards top structure;

Example 2: Claimant falls into category B, with three units. Claimant decides to take one 200 sq meter plot and R20 000 towards the top structure, or two plots and R10 000 towards the top structure;

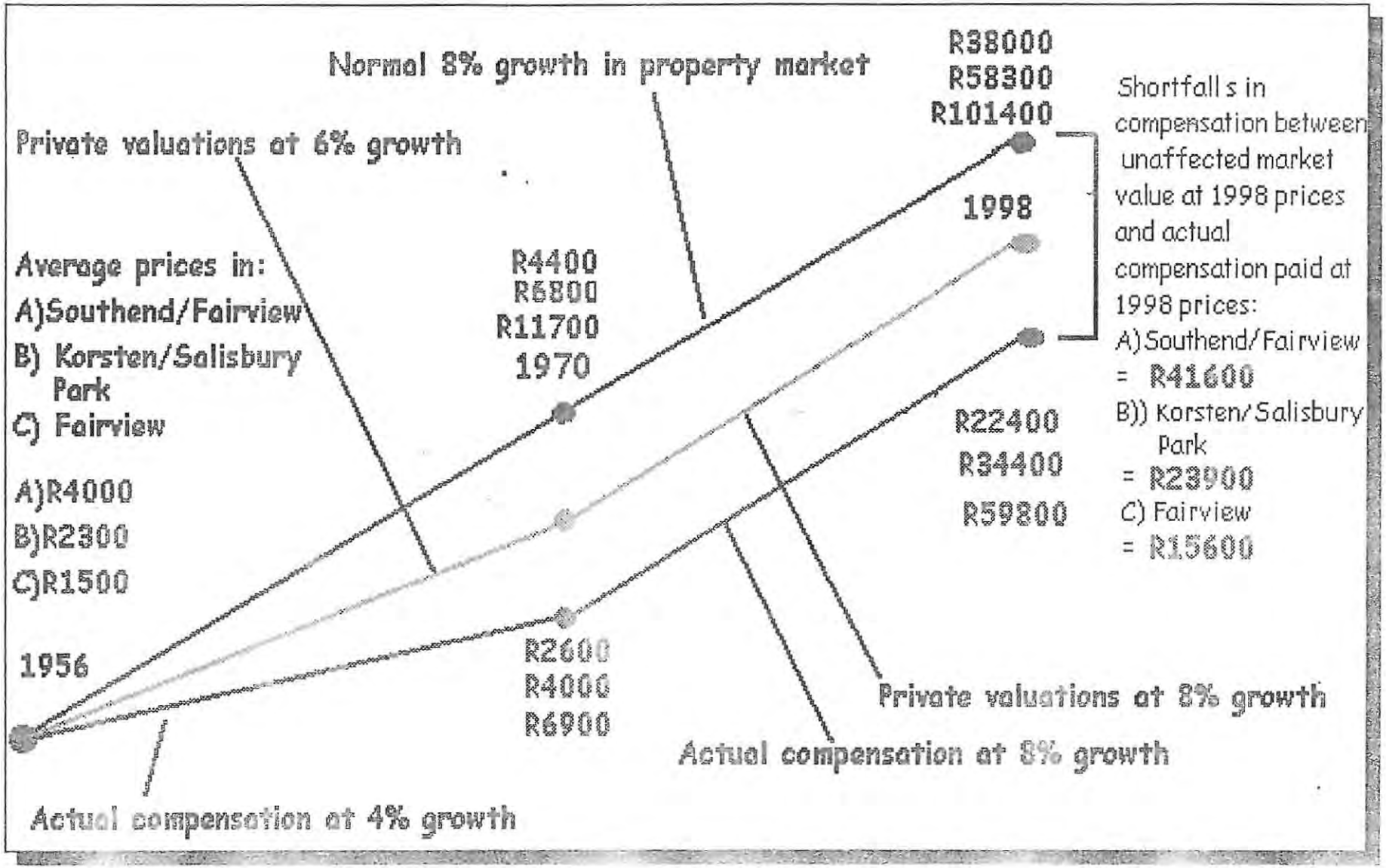

Normal 8% growth in property market
R38000
R58300
R101400
Private valuations at 6% growth
Shortfalls in compensation between unaffected market value at 1998 prices and actual compensation paid at 1998 prices:
A) Southend/Fairview = R41600
B)) Korsten/Salisbury Park = R23900
C) Fairview = R15600
1998
Average prices in:
A)Southend/Fairview
B) Korsten/Salisbury Park
C) Fairview
R4400
R6800
R11700
1970
R22400
R34400
R59800
A)R4000
B)R2300
C)R1500
1956
R2600
R4000
R6900
Private valuations at 8% growth
Actual compensation at 8% growth
Actual compensation at 4% growth

Figure 2

Example3: Claimant falls into category C, with two units. Claimant decides to take one plot and R10 000 towards the top structure or two plots only[83].

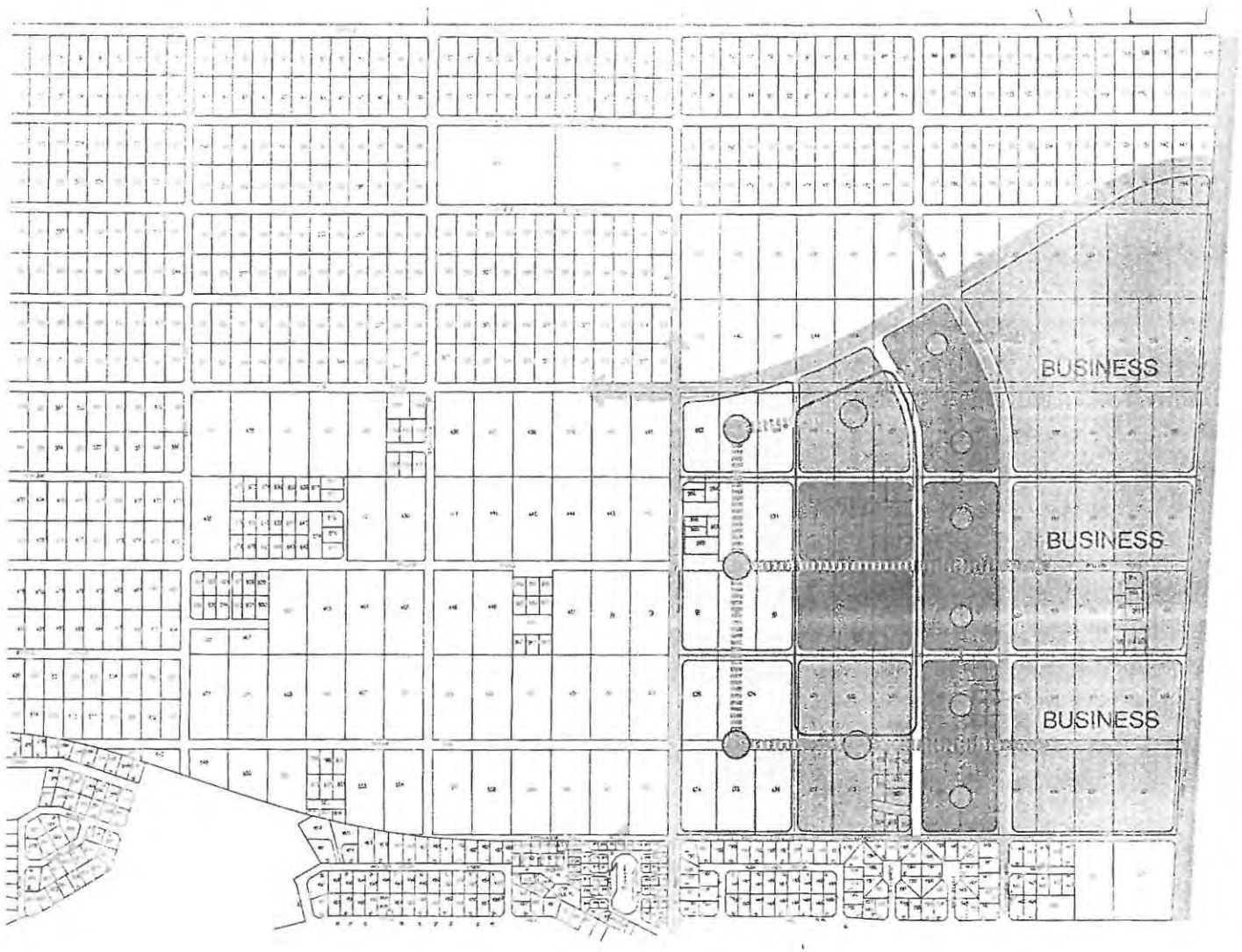
The first phase of the development of land in Fairview is indicated in **Map 1.** The residential potential of the development is indicated in three demarcated zones. These zones vary in density from high to low and accommodate the 200 square metre plots that were selected as the standard unit for compensation. A business development is zoned for the area directly adjacent to the William Moffet Expressway and is in line with the rapidly growing business zone elsewhere along this route. High density plots will be allocated closest to this business zone, medium density behind, and low density larger plots on the outer periphery. The manner in which the business zone as well as other non-residential land such as communal facilities will be developed was decided in the implementation and development stage (Stage 2). The total area required for the development was 140 ha, including non-residential land. This is considerably lower than the total land lost by claimants during the original dispossession (484,00ha) (Metroplan 1999).

8.6.4 Mandate to Negotiate

In the wake of the 1998/99 Ministerial Review, the task of negotiating on behalf of the state had passed from the DLA to the Commission. In addition, claims where a settlement agreement had been reached no longer had to be finalised in the Land Claims Court, but could be referred to the Minister of Land Affairs in terms of Section 42 D. The Commission staff dealing with the PELCRA claim therefore drew up a mandate application to negotiate on behalf of the state for a Section 42 settlement. This settlement was based on the PELCRA proposal and the subsequent process of claimant verification, valuations, physical claim mapping, land use planning, consultation with claimants and engagement with provincial and local authorities. The process was overseen by the Joint Steering Committee, chaired by the Commission. After the required "route" via the Regional Land Claims Commissioner

[83] Formula developed by Allison R, Felix C, Roodt M and Schuster L, based on PELCRA 1997 proposal.

Map 1



RESIDENTIAL POTENTIAL AREA ZONES	TOTAL ha	DENSITY du/ha	TOTAL UNITS	ESTIMATED POPULATION
HIGH DENSITY	11,9	40	476	1428
MEDIUM DENSITY	7,8	25	195	585
LOW DENSITY	10,0	15	150	450
TOTAL	29,7		851	

LAND USE

- HIGH DENSITY
- MEDIUM DENSITY
- LOW DENSITY
- COMMERCIAL
- SCHOOL
- SPORTFIELD & RECREATIONAL
- NEIGHBOURHOOD PARK
- PEDESTRIANWAYS
- ROADS

FAIRVIEW

FILENAME: REG/PEL/FAI

SCALE: 1 : 7500

DATE: 21 OCTOBER 1999

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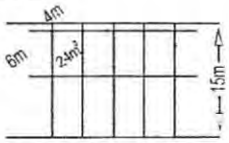
METROPLAN
TOWN AND REGIONAL PLANNERS

GROUPED OR CLUSTER HOUSING

DETERMINING THE MINIMUM ERF SIZE OF MODULE.



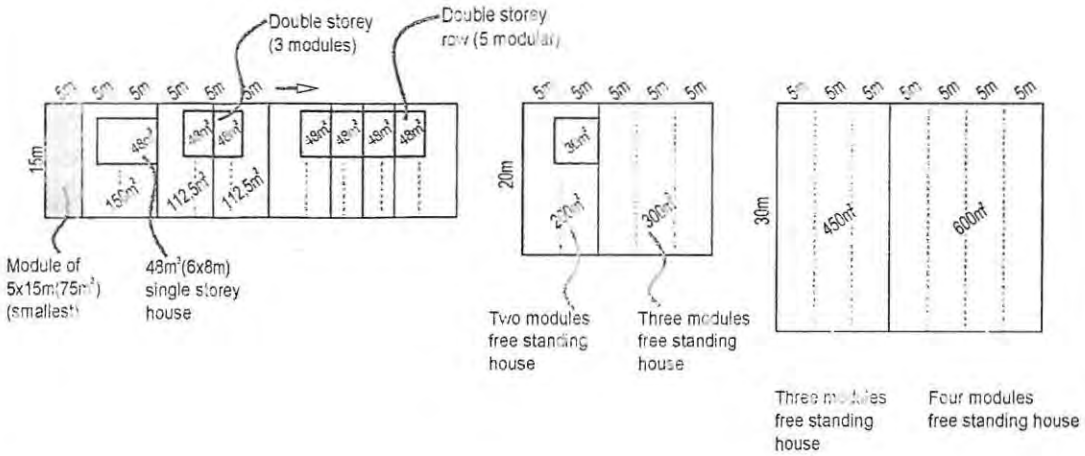
Minimum erf size of 60m² (4x15m) with double storey row of 48m² min. coverage 40%.

ERF SIZE	NO. OF MODULES	HOUSING STUCTURES
1. 75m²	1 (15m)	48m² (Double)
2. 112,5m²	1,5 (15m)	42m² (Double)
3. 150m²	2 (15m)	36m² (Single)
4. 200m²	2 (20m)	30m² (Single)
5. 300m²	3 (20m)	——
6. 450m²	3 (30m)	——
7. 600m²	4 (30m)	——
COMPENSATION COMBINATIONS		

THE ABOVE TABLE IS JUST A SUGGESTION FOR FURTHER DISCUSSION.

NOTE: TWO ALTERNATIVES

1. VARY PRODUCT WITH FIXED COSTS.
2. VARY THE COSTS WITH FIXED PRODUCTS



MOSTLY GROUPED HOUSING OF A HIGH RESIDENTIAL DENSITY - COMPENSATION COULD INCLUDE PLOT & HOUSE.	MOSTLY SMALL FREE STANDING SERVICED STANDS - MEDIUM DENSITY & PERHAPS A SMALL UNIT ON THE 200m² PLOT.	MOSTLY LARGER FREE STANDING SERVICED STANDS - LOW DENSITY MAX SIZE 600m²(20x30m)
POSITIONED CLOSE TO BUSINESS & AMENITIES - MORE URBAN.	TRANSITIONAL	MORE SUBURBAN

NOTES:

1. SMALLEST MODULE IS 5m x 15m (75m²) ONLY SUITABLE FOR GROUPED HOUSING.
2. FREE STANDING HOMES ARE TO BE ON ERVEN OF BETWEEN 200m² TO 600m².
3. THE SMALLER SINGLE ERVEN COULD ACCOMMODATE A SMALL STARTER UNIT. PERHAPS SMALLER THAN IN THE HIGH DENSITY ZONE.
4. THERE SHOULD BE A LOGICAL PROGRESSION IN COST AND PRODUCT FROM HIGH DENSITY TO LOW DENSITY

in East London, the Chief Land Claims Commissioner, the Chief Director Restitution, the Director General, and the Minister (all in Pretoria) and back down again, the Commission/DLA staff members were able to officially endorse the process and draw up a Memorandum of Understanding (MOU). The MOU was signed in Port Elizabeth in June by the Minister of Land Affairs, Derek Hannekom, as part of his 1999 election road show. The MOU paved the way for the drawing up of the final settlement agreement.

A major problem faced by the PELCRA leadership was to keep the members in agreement with the outcome of the negotiations between the organisation and the other stakeholders who were members of the Joint Steering Committee, such as the Commission/DLA, the PEM, and the Department of Housing and Local Government. Many members were angry at the slow pace of the process and reluctant to forego the restoration of exactly what they lost in terms of the equity and development approach that the leadership and the majority of the members had agreed to. On a number of occasions it took all the persuasive skills of the executive members to convince people that the chosen path was the correct one, that patience was necessary and to prevent breakaway factions from derailing the carefully negotiated outcome. As was described above, one of the factors that kept the process on track and the membership in line was the considerable patience and experience of Clive Felix from Urban Services Group and the political credibility garnered during the long years of the anti-apartheid struggle of the chairperson of PELCRA, Raymond Uren[84].

8.6.5 The Settlement Agreement

A Section 42D Framework Agreement for the settlement of the urban land claims in Port Elizabeth was drawn up by the Commission and amended and expanded substantially by the LRC's Kobus Pienaar, acting on behalf of PELCRA. Pienaar's intention was to make sure that in the event of any conflict leading to the PELCRA

[84] Interview with Clive Felix of Urban Services Group and Raymond Uren, Chairperson of PELCRA, 26 October 1999.

claim being referred to the Land Claims Court, that the document would stand up to legal scrutiny:

> My main worry about the agreement is that it is going to be very difficult for it to be understood by someone who is not in the know - and, if we fight about it at a later stage (which is likely), it is going to be open to different interpretation, if it is adopted in its current form. The court looks in the first instance at the ordinary meaning of the words of an agreement and not at what the drafters thought they were saying[85].

The agreement involved PELCRA, the DLA/Commission, Port Elizabeth Municipality and the Eastern Cape Department of Housing and Local Government. The agreement stated that the parties declare themselves willing to work toward the resolution of the claims and that the settlement be based on a phased development of land in Fairview. Because it was a group rather than a community claim, it was agreed that a development package be formulated for each individual claimant. The land would be transferred by the DH+LG to the PEM or directly to the PELCRA Trust. This aspect was settled in phase 2 of the project in favour of the latter proposal.

It was agreed that the RLCC would apply to the DH+LG, through its PHB for priority access of claimants to housing subsidies and that the land would be secured from the PEM at a nominal rate to the Developer. Membership of the Management Committee/Board was determined by PELCRA in consultation with the RLCC. Further, the agreement stipulated that the total monetary value of the claim be paid into a holding account opened by the PEM and that all interest would accrue to the Developer for the sole benefit of PELCRA members. In addition, the money allocated to the Developer was to be used solely for the development of land in Fairview, and if necessary Salisbury Park. It was agreed that the amount of R38, 200,000 be paid for the development of serviced sites as the monetary value of the group claim. Each claimant family would also receive a R3 000 discretionary grant to assist them to

[85] Kobus Pienaar, LRC Cape Town in a letter to Clive Felix of USG, copied to the Commission and Ray Uren, PELCRA Chairperson, 9 December 1999.

return to the land or to invest in addition to the top structure. The amount of R1,209,600 was also paid as a planning grant to facilitate the development in Fairview. The two latter amounts were part of the DLA's standard land reform settlement grants (CRLR 2000).

The total settlement thus amounted to R41, 929,600 made up as follows:

Total number of claimant families	**840**
Total Restitution Payment	**R 38,200,000**
Discretionary Grant	840 x R 3,000
	R2,520,000
Planning Grant	840 x R 1,440
	R1,209,600

It was recommended by the RLCC that the Minister make a Section 42D award, approving the proposed settlement, the Memorandum of Agreement, and approving the referral of the agreement to the State Attorney in terms of Treasury Instruction X12.2 (CRLR 2000).

8.7 Post Settlement

It was agreed within the JSC that the RLCC, in conjunction with the PEM, would make application through the appropriate channels to the Department of Housing and Local Government for the funding of bulk infrastructure through the latter's Consolidated Municipal Infrastructure Program (CMIP). Other possibilities were that the bulk infrastructure could be funded from the PEM's own funding or from the sale

of the commercial land which will form part of the settlement. This would allow for the provision of bulk infrastructure in Fairview and Salisbury Park (JSC minutes February 10 1999; RLCC PELCRA Section 42 D submission 1999).

Funds allocated as a result of restitution of land rights and any other funding to facilitate the development as a result of the settlement was paid into a holding account opened by the PEM:

> The PEM shall hold and administer the said amount in trust on behalf of the Claimants in terms of the Fund Administration Agreement to be concluded between the DLA (as represented by its accounting officer), the PEM and PELCRA (CRLR 2000:6).

The Section 42D framework agreement made provision for the establishment of an Interim Steering Committee to guide the implementation of the agreement, specifically the establishment by PELCRA and the DLA of a legal entity ("the Developer") to undertake the development of a land use plan and a claimant residential sites allocation scheme (CRLR 2000: 6-8). In practice this provision merely meant the continuation of the already existent Joint Steering Committee which had driven the process until then. It consisted of representatives of the DLA (Commission), PELCRA, the PEM and the DLGH, and anybody that the DLA and PELCRA thought would have the requisite skill, experience and ability to contribute to the achievement of the objectives of the Agreement:

> The function of the Interim Steering committee is to ensure the coordination of the activities of the parties for the purposes of achieving the objective of this agreement and to receive formal written reports on the progress in the matter, the lack of progress and the reasons for delays and non-performance, to review work, adjust work plans and time frames where necessary and to consider amendments to this Agreement (CRLR 2000:8).

It was also decided that poorer claimants who qualified for assistance would apply to the Department of Housing and Local Government for the R18 000 housing subsidy.

In addition those who meet the necessary criteria could also apply to the PEM under its indigent policy for rates relief (PELCRA JSC minutes.27 October 1999).

8.8 Conclusion

The PELCRA claim is notable in that it demonstrates the importance of casting the restitution process beyond the narrow confines of claiming a right in land. It is clear that restitution as a constituent of the broader struggle for human rights in South Africa has a role to play both in terms of realizing rights and in terms of the overall reconciliation of South Africa's people. But what the PELCRA claimants and their leaders have shown is that restitution is more than that. It is also coming to terms with Zizecks "loss of the loss", with accepting that while the past can never be recreated, a new and creative future is possible. The willingness of the PELCRA claimants to unite behind their leaders, in spite of the ongoing fragility of the process, and the creativity with which the leadership have engaged the state in its various guises, as the DLA, the Commission, the PEM, and the Department of Housing and Local Government, is a tribute to the character of the claimants and that leadership.

The most notable feature of the PELCRA claim however, is the emphasis that the claimants have placed on a developmental option and their attempt to re-establish themselves, with all the difficulties that it entails after the enforced separation of a few decades, as a community. The success of apartheid in forcing these formerly non-racial communities to live separate lives in their racial ghettoes, the fears and tensions that this process generated and the myths and stereotypes that have developed over the years are not to be underestimated as these "Coloureds", "Indians", "Chinese", "Bantu" and "Europeans" seek to reaffirm themselves as South Africans.

Conclusion

In the introduction I stated that in a situation of such extraordinary inequality in the distribution of land ownership, social and economic power, extraordinary measures would be needed to overcome the entrenchment of that inequality through the inclusion of the property clause in the Constitution. We have to remind ourselves that at the time of the 1994 elections white people owned approximately 88 per cent of the land and black people the remaining 12 per cent. In Zimbabwe, where at present a major crisis of forceful dispossession and land invasions is the norm, the difference in land holding was only 50:50. With the World Bank as its partner in the drafting of its land reform policy the African National Congress (ANC) gave two reasons for its acceptance of the property clause: it would protect the land rights of the majority and it was essential to maintain confidence in the land market in order to attract foreign investment.

The logical corollary of the property clause is thus a market-based land reform program, where property for land reform has to be bought by the state, communities or individuals, and expropriation may only occur under strict conditions. Whether acquired from a willing seller or expropriated, land has to be bought at market price, albeit with previous subsidies deducted.

Concomitant with the market-based approach is the rights-based approach flowing from the adoption of a Constitutional parliamentary model and the Bill of Rights. The South African Constitution contains First, Second and Third Generation rights, although they are generally subsumed under the first two. The First Generation civil and political rights include the property clause. Second Generation rights are social and economic rights such as the right to housing, healthcare, welfare and land reform. Third Generation rights are development and environmental rights. The ANC and its allies argued that the Second and Third Generation rights in the Constitution would enable the promulgation of legislation which would be justiciable in a court of law. In other words the premise is that these rights would be affirmative and substantial enough to overcome the impediment of the property clause. While the

inclusion of Second Generation rights in the Constitution is laudable, and amongst the most progressive in the world, there are a number of problems with this model.

The first is that in order to address in a reasonable way the inequality in land ownership and the economic and social inequality stemming from this imbalance, it will require the commitment of financial resources that this government is either unable or unwilling to commit. It will also require the active co-operation of the white land owners in South Africa's rural areas. Although there are at present a large number of farms available on the market, especially adjacent to the former Bantustans, many of these are marginal, in low rainfall areas and have often been over-exploited leaving them eroded and in poor condition. The main obstacle is that the present government has demonstrated its lack of commitment to provide sufficient funding for the land reform program. This under funding is not just demonstrable in terms of finance to buy land from private owners, but especially in the lack of commitment to providing a well-resourced, trained, and managed administrative apparatus to implement land reform. The failure to deliver anything substantial applies to a greater extent to the administratively delivered redistribution and tenure branches of the program, as both the Pretoria head office and many of the provincial offices are administratively challenged, overly bureaucratic, under funded, and lacking in skilled personnel with the ability to implement effective land reform. This lack of skill is demonstrated in a number of areas, a lack of vision of the broader parameters of land reform and livelihood provision, a lack of empathy with the plight of the landless poor, the lack of urgency in the implementation of projects, inability to communicate effectively with a largely functionally illiterate population, an over-reliance on consultants, and a lack of spending, especially in the early days of the program, of budgets. The Tenure Directorate can especially be singled out for its spectacular lack of performance and its inability to deliver anything significant in the area of tenure reform. Many of these problems have been exacerbated by the loss of committed and skilled personnel due to racial tension and a change of direction brought about by the election of the present Minister of Land Affairs after the 1999 election.

The rights-based restitution program has had greater success, but its ability to address the vast inequality in land ownership is limited by the narrow parameters of its mandate, the legalistic application of the registration process, and the strict application of the qualificatory criteria, especially the 1913 cut-off date. The further narrowing of the parameters due to the Cremin judgement, which insisted that only direct descendents qualify, and the initial exclusion of betterment claims, further served to limit the extent of restitution's contribution to addressing the urgent need for land reform in South Africa. Those qualifying for restitution make up a small proportion of those in need of land, and an even smaller proportion of the total population.

Judged within these limited parameters, it is possible to argue that if anything was going to succeed in overcoming the obstacle of the property clause and the other impediments outlined above, it would be the restitution program in its earliest incarnation. Equipped with its own Act, a dedicated Land Claims Court with powers equivalent to the High Court, a Commission with Commissioners and researchers drawn from the elite of anti-apartheid land activists, and a dedicated Chief Directorate in the Department of Land Affairs providing back-up, research expertise and policy formulation, not to mention the provincial DLA offices performing an additional array of functions, its chances seemed good.

However, the problems began almost with the inception of the program. The intention of its architects, the CALS group, was to establish a Land Claims Court staffed by knowledgeable land activists, sympathetic to the urgent need for land reform, who would assist claimants in the processing of their claims (inquisitorial), much in the fashion of the German administrative court, and interpret their mandate within the ambit of the Constitutional ethos (purposive). But the powers that be within the legal fraternity could not conceive of such an institution in relation to the rest of the court system and appointed judges schooled within the conventional legal system. These incumbents soon reverted to the tried and tested adversarial model operating in the High and magistrate's courts, imposing a formalistic and technical legal regime on the Commission and claimants.

For the inexperienced (in matters legal) understaffed, under-equipped and under-funded Commission this burden was too much to bear. For claimants it made a mockery of the injunction that restitution would be demand-led: mostly poor and illiterate the legalistic and technical requirements of the process all but barred them from participating actively. The legalistic direction of the program was perfectly attuned to the emphasis on the delivery of "rights in land", rather than the land itself or any accompanying development of that land. Without the active participation of the claimants the process, run by the courts and the restitution officials with the assistance of lawyers, became rights-*driven* rather than rights-based, a program separate from not only the rest of the land reform program but also from any developmental planning such as the Land Development Objectives (LDO) and Integrated Development Planning (IDP) processes at district and local municipal level.

One of the results of this preoccupation with rights has been an emphasis on financial compensation as a restitution option rather than land or a developmental outcome. Financial compensation has been seen as a desirable option in terms of fast-tracking restitution claims, especially urban claims. However it has become clear that paying people off as a rule does not make a major contribution to the Land Reform Program. The truth is that the restitution program has delivered only 27 percent of its product as land reform. Thus one could argue that restitution has been more successful as a program to promote reconciliation along the lines of the Truth and Reconciliation Commission, rather than as a land reform program, especially if one regards land reform as the restoration of rural land to the indigenous population. A number of people within the Commission have been calling for settlement options to be more actively linked to land reform and developmental programs.

The PELCRA and Macleantown claims saw attempts to draw NGOs and government departments into the process and to turn restitution rights into the restoration of physical land as well as developmental benefits. The Gauteng RLCC raised important issues around attempts to valuate claimant's original losses, to subtract compensation received and to spend vast amount of time and resources on the

intricacies of individual claims, proposing instead an option that combined simplicity of implementation with standardised land restoration and housing development.

Another attempt to change the direction of the restitution program was the Ministerial Review of 1998. Based on a thorough systems-based analysis it highlighted many of the fault-lines running through the restitution structure. Most of these have been pointed out above. It suggested a shift from a process that was dominated by the Land Claims Court and the DLA Restitution Chief Directorate based in Pretoria, to a more decentralised and administrative model that allowed initially the Minister but eventually Regional Commissioners to settle claims. It recommended that restitution needed to take more seriously the injunction to be demand-driven, but recognised that the Commission had little capacity to make this happen. To this end it envisaged a greater role for NGOs to assist claimants to participate more meaningfully in the processing of their claims, especially in considering the practical implications of their restitution options. In addition it argued for a more thorough engagement of the restitution process with government departments responsible for the provision of services and development.

A few years down the line the recommendations have been partially implemented and partially successful. Restitution has moved slowly from a overly legalistic judicial program to a more administrative but still bureaucratic process. However, until present the Commission has not been able to implement the decentralised administrative approach, in that the system for the finalization of claims is still highly centralized, the RLCC being unable to certify and give effect to settled claims. This inability has its roots in a number of restrictive and cumbersome practices, which is slowing down the processing and resolution of claims.

A major impediment is the lack of a decentralized capital budget for claim settlement (land acquisition, financial compensation), settlement support grant (discretionary) and planning grant. Another problem is the perceived need for every claim/researcher to obtain a preliminary negotiations framework, a negotiations mandate and then to submit a Section 42 (D) referral, via a bureaucratic route march from RLCC, to Chief Director, to CLCC, to DG, to Deputy Minister, to Minister and all the way back down again. For a long time the lack of decisions on important policy

issues which would enable RLCCs to settle claims using clear and consistent rules and procedures was a major problem to settling claims as well as to developing best practise around the country. Lastly, the requirement that it is necessary for the Minister to be involved in any decision which involves the disposal of state assets continues to make the process top-heavy.

In addition, the wish of the present Minister and her Deputy to be involved in the decision-making with regard to specific claims at an even earlier stage, is another step in the opposite direction to that recommended by the Ministerial Review, part of the increasing centralization drift manifesting itself within the Commission since its integration with the DLA. Within this bureaucratic inertia and the lack of integration between restitution and land reform/development, the PELCRA claim in Port Elizabeth has demonstrated what can be achieved in terms of turning Second Generation socio-economic rights into tangible benefits. However, what it has also shown is that this can only be achieved if a complex array of institutions and processes are in place and operating effectively.

The PELCRA claim has played an important role in demonstrating that within the limited ambit of the restitution sub-program, it is possible to turn the right to restitution into a tangible benefit for a defined number of people (800 families) that encompasses land reform and developmental objectives, the latter in the form of municipal services, community facilities and housing. In this case the property clause in the Constitution did not present a major obstacle as the land belonged to the state and was obtained at a nominal cost. In order to achieve these objectives a number of variables had to be in place, variables which are not readily replicable for all disadvantaged citizens in need of land and development. This is especially true for rural communities.

The PELCRA group claim was driven by a coterie of dedicated and experienced leaders, who combined initial militancy with an ability to engage constructively with local and provincial authorities around the provision of land and services. The leadership was backed by a range of NGOs who provided legal expertise and considerable financial and other resources. In the absence of an official state

communication campaign, they were able to communicate effectively with their membership. From the beginning of the process the leadership realised that they could not restore exactly what had been lost and to try to do so would require enormous capacity, resources and expenditure of money which the state did not have. Most importantly, the end result would be a disappointment.

They therefore convinced the membership to go for a group claim based on equity (with the wealthier claimants subsidising the poorer) that would yield claimants serviced sites with a considerable contribution towards housing on two of the vacant sites that the claimants had been removed from, namely Fairview and Salisbury Park. The claim also made provision for a community hall and a row of commercial properties along the William Moffat Highway, which properties would be developed by the PELCRA Trust in conjunction with commercial developers. Benefits, both financial and spin-offs in terms of business and job opportunities would accrue to claimants. The major advantage of the PELCRA approach was that apart from saving the Commission the laborious and costly task of processing individual claims, it offered the opportunity to speed up the processing of the claims. This opportunity was all but squandered by the lack of capacity and experience of the Commission, especially in the early stages of the claim.

Another advantage enjoyed by the PELCRA claimants was the fact that the verification of their claim was outsourced to a private consultant with dedicated capacity not available within the Commission itself. In addition the Steering Committee, chaired by the Investigations Division Manager of the RLCC drove the process and ensured that deadlines were met and that the process stayed on track. The processing of their claim came to its final stages in the period immediately after the completion of the Ministerial Review at the beginning of 1999; they were thus able to benefit from the changes introduced, especially the cessation of the requirement for claims to be declared an order of the court.

The most striking conclusion that can be drawn from the PELCRA case study, given the resources dedicated to and the circumstances surrounding the processing of the

claim, is that it provides a model for developmental land reform within an urban context, but it is clear that it has limited replicability especially in rural areas.

If it is accepted that restitution has a limited role to play in addressing the inequality of land ownership and development, some important lessons may be learnt from the German and Estonian restitution processes. These are based on a true administrative system, where clearly written guidelines, devolution of decision-making powers and a lack of central paternalism allow decisions to be taken at a local level. As I show in **Annexure A**, in Germany residential claims are processed, certified and given effect by clerks at local county level with appeals going to regional offices of the Office for Open Property Questions. In Estonia local municipalities deal with claims, with municipal staff processing them as part of their other duties. The major advantage of this radically decentralized system is that the municipal staff generally have a good knowledge of local conditions, including land ownership, regulations, and land use patterns and are able to make informed decisions which no bureaucrat situated in a far off capital is able to emulate. Secondly, the process is kept simple, and does not require extensive expenditure on highly specialized and over-complicated institutions.

The Estonian model offers an interesting way of combining financial compensation with a development option. If restoration of the original land or the provision of alternative land is not feasible, claimants are awarded monetary compensation in the form of vouchers. These:

> Vouchers are recorded in electronic form, and owners may receive information on transactions and the balance of their accounts by drawing statements from the bank. Vouchers are fully tradable on the market and only quit circulation when an asset is bought from the state. (de Bruyn et al, 1999:30)

Most importantly, if claimants use the voucher to buy state land or other assets such as a business that is being privatized, they will realize the full value reflected. However, if they decide to cash the voucher only the nominal value will be paid. This works out to about 20% of the paper value.

Claimants are thus encouraged to opt for a developmental or at least asset-related

option. In fact, claimants deciding on the land or business option stand to realize an even higher return than the paper value of their award, as state assets are sold at below their value.

In South Africa going for the development option rather than the financial one, may realize considerable additional benefits for claimant communities or groups. The Restitution Act provides for preferential access to state development programs by claimants. Thus a restitution award may be combined with a number of other state-sponsored options such as housing subsidies or settlement land acquisition grants, CMIP funding for bulk infrastructure, or local authority funded housing projects. In addition, state provincial departments, NGOs and the private sector may be drawn in to provide training and funding for entrepreneurial ventures, ranging from small farmer development, eco-tourism, small business development, to the development of shopping/business centres in larger urban claims.

In conclusion, I would argue that restitution is an important political program for the present government. Its purpose is to make a high profile contribution to the process of reconciliation and to limited land reform within the larger project of stability in the land market, foreign investment and export led growth. But the limited nature of the restitution sub-program and the lack of efficiency of the redistribution and tenure sub-programs in addressing the real problem of land, economic and social inequality, render this project of little long-term value. Signs of increasing discontent are apparent. The recent near-dissolution of the National Land Committee and the disaffiliation of a number of its country-wide affiliates over whether to continue to engage constructively with the state or to throw in its lot with the increasingly militant Landless People's Movement (LPM), is but one of these. The LPM has engaged in land invasions and is planning to boycott the upcoming national elections in protest against the lack of progress in land reform.

The present move to allow the Minister of Land Affairs to expropriate land without going to court will give some impetus to the restitution process, but the long-term solution to land reform, economic and social inequality, and development, lies in solving the conundrum of the need to balance investor confidence in the economy and the need for substantial land reform. The ideal from a land reform point of view, given the extent of landlessness in South Africa, would be a scrapping of the

property clause in the Constitution and a combination of efficient and well-funded supply and demand-led land restitution/redistribution integrated into local and district level planning. But given the realities of the South African economy's integration into the global world market, the already high level of unemployment in urban areas, and the South African government's commitment to its combination of neo-liberal growth strategy and to the remnants of the reconstruction and development program, this is not likely. The best that can be hoped for is thus a commitment to make the present land reform program work through increased funding for both land purchase and increased administrative and management capacity, combined with bringing white landowners on–board to donate land and provide mentoring and resources (in their own long-term interest), and the integration of land reform into local and district planning within a nationally co-ordinated rural development strategy.

Annexure A

The German and Estonian administrative land restitution programs

Introduction

Land restitution programs, whether they are rights-based or developmentally orientated or a mixture of the two; have to be delivered to the intended beneficiaries in order for the aims to be realized. There are many ways of delivering such a program, and different countries have chosen delivery regimes that are in the opinions of the policy-makers most suited to the conditions existent in the particular country. I will consider two ways of delivering land restitution in this thesis. The judicial rights-based approach was discussed in previous chapters. The administrative approach is an alternative. In reality, the two processes, the judicial and the administrative overlap and contain common elements. The main differences are the degree of procedural and legal difficulty or simplicity, the bureaucratic centralization or decentralization, and the emphasis placed on "rights" as opposed to pragmatic solutions driven by the state and civil society leading to sustainable and integrated development at local level.

The judicially driven process has tended towards a legalistic and centralized process, which limits participation by claimants and has an impetus removed from that of local government development and land planning, but provides constitutionally backed legal guarantees, impetus and protection in cases where state departments are incompetent and corrupt or both, as well as arbitration in cases of overlapping and/or contested rights. The administrative process which requires thorough, clear and precise guidelines with regard to policy issues tends towards a procedurally simpler and more decentralized process for both claimants and restitution practitioners and allows local participation and integration into broader development initiatives.

Due to the human rights focus of the constitutional negotiations in the post cold war and post apartheid period and the perception that the Department of Land Affairs would be unable to drive the restitution of land administratively, South Africa's policy-makers chose the judicial process, with a Land Claims Court operating in conjunction with the department and a Commission on Restitution of Land Rights.

Germany and Estonia, are two European countries that have opted for a more administrative approach. The Estonian model is the simplest and most decentralised of the two, with Germany's administrative system containing elements of a judicial approach. Subsequent to the 1998 Ministerial review the Restitution Commission in South Africa attempted in a rather hesitant manner to move towards a more administrative approach. There are many reasons for the slow pace of the change apart from the challenges posed by the property clause. A major one is the difference between the administrative competency at local level, with both Germany and Estonia having a well-established, qualified and efficient bureaucracy that has contributed to the success of an administratively driven restitution process. The lack of administrative and legal/research competency both within the Commission and at local government level in South Africa, especially in the rural areas and former bantustans, poses a problem for the implementation of an administratively driven process. This lack of competence is exacerbated by the absence of clear policy and precise guidelines from the national offices of the DLA and the Commission.

In this annexure I will outline and analyse the German and Estonian restitution processes. There is much to learn from the German experience, given the long process of restitution since the Second World War, involving Nazi atrocities against Jewish citizens, the Soviet occupation of East Germany, and the German Democratic Republic after that. Considering these two examples will allow me to highlight the advantages and disadvantages attached to an administrative approach to land restitution and to assess its relevance to the South African situation, especially with regard to the degree of participation by claimants in the process and the integration of the restitution process to both the broader land reform program and local level development objectives..

The German restitution process

Background and history

Germany has a population of over 82 million people living on 356 970 square kilometres of land. The population is fairly homogenous, with a majority of Germans, and several minorities, including Danes, Sorbs, and more recently Turks and Albanians. Literacy is high at 95%, a fact that makes generating publicity, creating awareness and implementation of the restitution campaign that much easier, compared to South Africa where the literacy rate is much lower.

For the purposes of restitution, the history of dispossession in Germany may be divided into three main periods:

The Third Reich (1933 to 1945): During this period the National Socialist government introduced legislation that limited the ability of Jewish people to live as normal citizens. This involved state sponsored boycotts of Jewish doctors, shops and businesses, a denial of citizenship and of social interaction with fellow Germans. As a result of this persecution many Jews were forced to emigrate. This meant the loss of property and livelihood as the sale of property was a precondition of emigration. Those that resisted the pressure to leave the country were later killed in the infamous concentration camps. It is estimated that over six million Jews lost their lives at the hands of the Nazi regime.

The Soviet Period (1945 to 1949): After the defeat and surrender of Germany in 1945, the eastern portion of the country was allocated to the Soviet Union as an occupational zone. The Soviet Military Administration introduced a program of agrarian reform through which over 3 million hectares of privately owned land was transferred to state ownership:

> Over 7 000 owners of land holdings that were over 100 hectares in size were dispossessed with no compensation and the owners were expelled from the

area or deported to concentration camps. A further 4 200 farms smaller than 100 hectares were transferred to a land pool that was established for the purpose of land reform. Land transferred to the land pool was parcelled out by Land Commissions and distributed to people such as the former labourers on the farms. It was the intent to consolidate these parcels of land into collective farms at a later stage (De Bruyn et al 1999:34).

An interesting historical note about this period is that the Soviet regime ordered the land registers for the expropriated estates to be destroyed, but this was never accomplished as the orders were not carried out and the majority of the old registers were stored for posterity in a castle in Germany (Southern 1993).

There is a certain amount of controversy surrounding claims for restitution for land lost during this period. During the negotiations with the Soviet Union for the reunification of Germany it was agreed that no land expropriated during the Soviet occupation would be restituted but that the dispossessed could claim a certain amount of compensation. There are conflicting versions as to the reasons for this agreement. The German government claims that it was a precondition, insisted on by the Soviet Union, that these properties be retained as they were. Mikhael Gorbachev, the Soviet Union leader at the time, has on two occasions denied that this is the case. In 1998 on the Crosstalk Radio Talk Show and later at a meeting in Berlin he denied that the Soviet Union had refused restitution of land as a precondition for unification. He claimed that they had merely insisted on the legality of the original land reforms (De Bruyn et al 1999:39).

The German Democratic Republic (GDR) (1949 to 1990): The land reform program begun by the Soviets continued under the GDR. The land which was redistributed by the Soviet Land Commissions was nationalised in 1952 and agricultural co-operatives set up[86]. A small number of farm owners were allowed to

[86] Interview with members of the Potsdam-Mittlemark AroV: Frau Ewhers,Frau Goebling, Frau Kumpel, and Frau Kumm, June 11 1999.

retain title to their land. Many people were, to use a legal term, "constructively dismissed"[87] from their businesses and farms. The GDR state passed legislation that was so restrictive as to prevent private enterprises from operating, causing many to go bankrupt. As a result a substantial number of people, before the erection of the Berlin Wall in 1961 and the closure of borders, emigrated to West Germany and other capitalist countries. Many others were imprisoned for their political opposition to the regime, and lost their property as a result[88].

Historical categories of dispossession

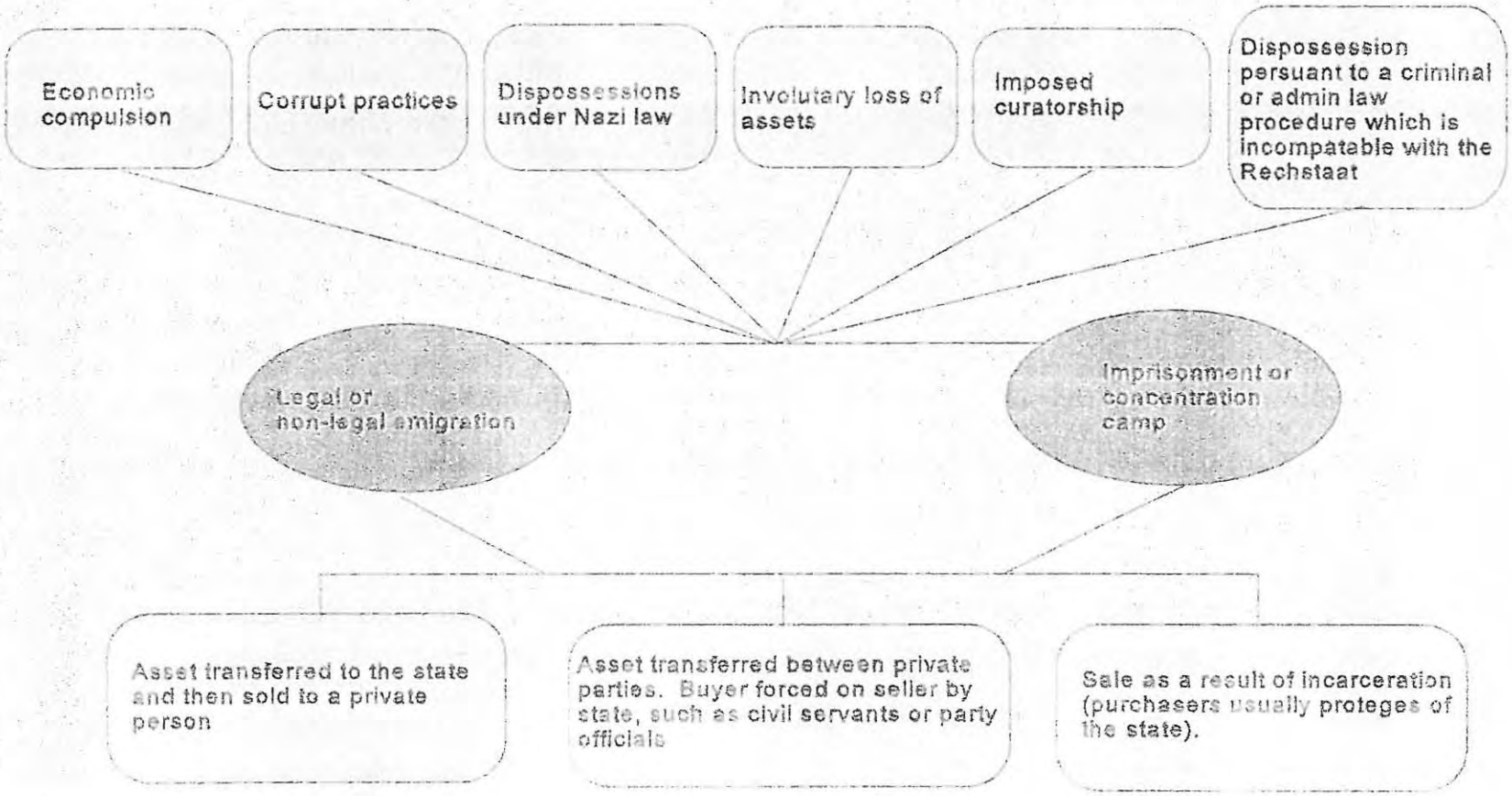
During the three periods outlined above people who were forced to emigrate or who were imprisoned or incarcerated in concentration camps generally lost their property. This included property in the broad sense of the word, such as business, residential, agricultural, movable assets including art works, investments, vehicles, ships, and jewellery. For the purposes of restitution, six types of dispossession can be identified. These categories are derived from historical events, agreed upon in the Joint Declaration that was signed as part of the unification process (Scollo-Lavizzari 1996:38). The categories and process of dispossession are outlined in the diagram below.

See Diagram Figure 1

[87] The term "constructive dismissal" refers to a situation where conditions are made so intolerable for an employee within the workplace by the employer that they are forced to resign.

[88] Checkpoint Charlie Museum, Friederich Strasse, June 9 1999.

Figure 1: Six categories of dispossession



Roedl

Business process/path of the claim[89]

Lodgement

There is no official form. The claimant writes a letter to the local (county) Office for Open Property Questions (OOPQ) known in German as the AAROV. This is the agency dealing with restitution in the case of a residential claim. If it is a business or company claim, the claimant will write to a regional OOPQ, known in German as a LAROV. The agency dealing with restitution in the case of property which belonged to the Communist Party is a federal OOPQ, known in German as a BAROV. There are over a hundred county offices, six regional (provincial) offices and one federal (national) office. The process started in 1990 and the closing date for the lodgement of claims was December 1992.

Registration of claims

Due to the large numbers of claims and the lack of preparation of the restitution offices, claimant letters were originally stored unregistered in storerooms. Claims were registered in order of receipt. For the first two years this was done manually. From 1993 a computer data base was set up at county level, but not at regional and federal (national) level. The reason is that in terms of the German Constitution no national data base is allowed. This is to protect the individual citizen's rights to privacy. As claims were registered, a letter of acknowledgement was sent to the claimant and to the present owner. Claimants did not hear from the agencies again until their claim was processed, in many cases up to five years later. A file is always opened in the name of the person who was dispossessed, not the claimant.

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[89] This section on the business process is based on interviews conducted with a number of officials and lawyers involved in the German restitution process between June 8 and June 12 1999. They were:
Herr Pee, Administrative Court Judge, Berlin June 8;
Herr Stubbeman, Frau Kornev, Frau Hedstuck, Berlin BaroV, June 8;
Herr Andreas Wilhelm and Dr Andrea von Drygalski, Poeleth and Partner Attorneys, Berlin, June 9;
Frau Ewhers, Frau Goebling, Frau Kumpel, and Frau Kumm, Potsdam-Mittlemark AroV: June 11.

GERMAN RESTITUTION PROCESS

1. LODGEMENT: I
Letter sent to local, regional or federal OPQ

Federal OPQ (1)

2. REGISTRATION OF CLAIMS:
Letter or acknowledgement sent by relevant OPQ

Regional OPQ (6)

3. INITIAL SCREENING: claims batched according to type and geographical location

Local OPQ (100)

4. PRIORITIZATION: According to criteria (investment, Jews, old age, simple claims).

5. CLAIMS PROCESSING: Documents required: Erbschein, title deeds, expropriation file

Probate Court (Erbschein)

6. VALIDATION: The Property Act sets out conditions under which claimant is entitled to restitution. Advisory Board may be consulted.

Advisory Board

7. RESTITUTION OPTIONS: Restoration, Monetary Compensation and Alternative Land

Trusteeship Organization

8. RESTORATION: If the present owner acquired the property in bad faith

9. FINANCIAL COMPENSATION: According to standard formulas taking into account area, size and use. Based on municipal valuations of 1935.

Current market value is paid if the Trusteeship Organization has approved an investment plan for the property

10. RESOLUTION OF THE CLAIM: Case Officer (depending on type of case) at local, regional or federal OPQ makes a decision on restoration or monetary compensation. Parties have 30 days to respond. (This is known as a 'hearing'). If no response, the decision becomes final.

Administrative Court

11. APPEAL: If a claimant wishes to appeal against the decision at local level, s/he may approach the regional OPQ for review. If still not satisfied, s/he may approach the Administrative Court. The Supreme Court may only be approached on matters of law

Supreme Court

As in South Africa, the present owner may not develop or sell once they have been informed of a restitution claim on the property. S/he has to keep it in good shape. Developers in Germany have to get a clearance certificate from the regional OOPQ, to show that there is no claim on the property in question.

Initial screening

There is no uniform system of grouping claims. In the larger offices, such as Berlin, claims are grouped into four types: Nazi dispossessions, German Democratic Republic dispossessions, foreign claims, and investment cases. In smaller county offices, such as Potsdam Stad, teams were set up in terms of geographical areas: three main towns, a cluster of villages, and a special team dealing with Jewish claims.

Prioritization of claims

The highest priority is given to claims on properties in which investors are interested and a feasible business investment plan exists. In these cases the investors take precedent over claimants, unless the claimant comes up with an alternative investment plan to back their claim. The emphasis here is on economic growth, job creation and the building of accommodation such as apartment and office blocks.

The second category of claims that enjoys priority with regard to processing, are Jewish claimants who were victims of Nazi expropriations. Old age is another criteria utilised with regard to prioritization of claims. Simple cases, where all relevant documentation is available, also enjoy a certain priority. Claimants who can afford to, often hire lawyers (who specialise in restitution work), to do the necessary preliminary research.

Lastly, if a claim does not fall into any of the above categories, the principle of first in, first out applies.

Claims processing

Three main documents are required by the local OOPQ clerk or regional OOPQ administrative officer to which the case is assigned:

- the Erbschein (claimant verification certificate from Court proving descendence and inheritance)
- the title deeds of the expropriated/claimed property
- the expropriation/state administration file.

To obtain the first, the Erbschein, is the responsibility of the claimant or in the case of foreign claimants, the relevant Consular officer, and no claim will be processed without it. The claimant obtains this document from the Probate Court in the district where the property is situated. Relevant documentation such as birth certificates, identity documents, and wills are submitted to the Court and after a minimum of six months the Erbschein is issued. Its purpose is to prove the chain of inheritance from the original owner to the claimant/s.

To obtain the title deeds is the responsibility of the OOPQ clerk or administration officer. These clerks are often ex-GDR personnel who were involved in the original expropriations and thus have a good knowledge of what occurred in a particular locality. The administration officers, who are senior to the clerks, are mostly West German trained lawyers. The title deeds are obtained from the county Magistrate's court. Likewise, it is the responsibility of the OOPQ clerk or administrative officer to obtain the expropriation and state administration files.

The OOPQ clerk or administration officers, use two main mechanisms to decide on the validity of a claim. The first, the "bible" of German restitution is the Property Act. The Act sets out the conditions under which a claimant is entitled to restitution:

- where a property was expropriated without compensation;
- where a person (landlord) lost ownership of a building due to the lack of economic viability of state-enforced controlled rents from his/her tenants;

- where a property was lost due to corruption on part of state or party officials;
- if a property was put under state administration under the GDR because the owner lived in West Germany after the division of Germany;
- if claims are moveable, for eg. motor vehicles;
- all Jewish expropriations are automatically regarded as having been under duress and therefore discriminatory;
- if a person suffered political persecution under the GDR or Nazis and lost property as a result.

The second mechanism available to the OOPQ clerk/admin officer is legal advice from senior colleagues or the Advisory Board which was set up by the Ministry. Both categories are made up almost exclusively of West German trained lawyers, the latter body comprising 200 members.

The claimed properties will only be restored to the verified claimant if the present owner (if the property does not belong to the state) obtained it through some form of discrimination, ie. not in good faith. An example of this would be Nazi expropriations of Jewish property or if a GDR state or party official used their position to expropriate a property and use it for their own gain. If discrimination by the present owner is not clear from the expropriation files, the onus is on the claimant to prove it. Oral evidence in the form of an affidavit is accepted, but often further investigation and evidence is required. The claimant would generally hire a lawyer to assist them. In other words, present owners who acquired the property in good faith, ie. it was allocated to them by the GDR state after expropriation (state farm, co-operative farm, private dwelling) take precedent over the claimant.

If the property has been developed since it was expropriated, the claimant may have to pay in, usually below market value.

Financial compensation is governed by the Compensation Act. A standard formula is used which involves:

- muncipal valuations in 1935xarea (ie. Rural/urban, etc)

Size

Commercial value

brought up to 1990 prices. The final amount is considerably lower than present market value, but this is justified in terms of the fact that the present government was not responsible for the expropriations and that paying market value would bankrupt the state. It is also argued by the state that restitution is an attempt to assist in some way people who lost property, possessions, rights, not an attempt to replace exactly what was lost.

Market value or 75% of it is paid in two exceptional cases. Firstly, where a claimant opts for restoration but there is a feasible investment plan proposed by a potential investor/s. Under the auspices of the Trusteeship Organization, a body responsible for fast-tracking investment for the purposes of economic growth, the investor will pay the verified and validated claimant the full market price for the property. Secondly, where a property was expropriated by the GDR in the vicinity of the Berlin Wall under the East German Defence Law the claimant will get 75% of the present market value if they opt for compensation. If they do not opt for the compensation option they can buy the land back for 25% of its present market value. These figures are based on the fact that the GDR paid 25%of market value as compensation at the time of expropriation. Payment is made directly by the Ministry of Finance.

When the OOPQ clerk/admin officer, feels that sufficient information is available, s/he makes a decision on the type of restitution, ie. restoration or monetary compensation, or if available, alternative land. The latter is very rarely an option due to the shortage of available land in Germany, and the issue of alternative land is currently under review by Parliament with the view to having it revoked as a restitution option.

The clerk/admin officer's decision, in the form of an initial offer, endorsed by her/his supervisor (usually a middle or senior level admin officer with a legal background) is then sent to the claimant and other interested parties for their consideration. This is known as a "Hearing". It represents a final opportunity for interested parties to make submissions/objections. Only serious arguments in the form of new evidence will be entertained. If there are no submissions within one month, the decision becomes final.

If restoration is feasible and offered to the claimant, they have a limited period to decide if they want restoration or financial compensation. According to sources interviewed, only a small number of claimants opt for financial compensation if offered restoration. The reason for this is that it is possible to sell the property at market value, whereas financial compensation, as explained above, is considerably lower than market value. An interesting aspect of the process is that when making this decision (restoration or monetary compensation), the claimants are not told the amount of the compensation to be offered. It is however possible for them to work it out using the formula.

If restoration is granted, accepted and finalised (after the 30 day "Hearing" period has lapsed), the property is registered jointly in the name of the direct descendants. They are known as the "group of successors" or the "undivided community of successors". The OOPQ does not see it as its responsibility as to what happens once the land is restored. Claimants are free to decide amongst themselves as to how the property will be used/divided/sold.

Dispute resolution

In the case of a disagreement between the claimant and the clerk dealing with the claim at the local OOPQ (with regard to residential property) as to the outcome of a claim, the claimant may appeal to the regional OOPQ. Here a committee scrutinizes the file and makes a ruling, which is then communicated to interested parties.

If the claimant is still not happy, s/he may approach the Administrative Court for assistance. The Administrative Court deals with any dispute between a citizen and the state and between state departments. Restitution comprises only a small percentage of their work. Unlike the South African system, the Administrative Court judges act almost like ombudsman. They will personally investigate the particular case, ie. do research, using the status of their office to access information which may not have been previously made available, before making a ruling. With regard to particulars of the claim, the Administrative Court is the end of the line in terms of appeal. Approximately ten per cent of claims end up in the Administrative Court. Legal aid is available if a claimant can show that they earn less than a specified amount. This is known as "Beratungshilfe", and is not specific to restitution.

If the claimant wishes to challenge the law governing the restitution process, and the challenge is deemed to have import for a wide number of restitution cases, the case will be heard by the Supreme Court.

Restitution success rate

Unlike South Africa where the term restitution covers *restoration* of land, granting of *alternative* land, or the granting of *financial compensation*, in Germany the term is reserved solely for restoration of land. Thus a restitution claim is regarded as completed when it has been decided that a person qualifies for the restoration or not of the property claimed. If a person does not qualify to have the land returned to them, "the case file is closed and a new compensation case is opened" (De Bruyn et al 1999:50). This distinction is important to note, because German statistics dealing with the numbers and percentages for successfully completed restitution claims, exclude cases presently being processed for financial compensation.

Claims in terms of the Property Act:

	June 31 98	Sept 30 1998	Dec 31 1998	March 30 99
Non-business Assets: Total number of assets claimed	2 125 148	2 130 752	2 120 654	2 127 289
Total number resolved	1 893 170 (84.82%)	1 940 061 (81.7%)	1 973 430 (88.50%)	2 006 667 (89.50%)
Business assets: Total number of assets claimed	198 531	200 415	201 312	202 360
Total number resolved	159 640 (80.41%)	163 905 (81.7%)	167 874 (83.39%)	171 787 (84.89%)

(Source: De Bruyn et al 1999:50)

As can be seen from the above table, less than a decade after the process started in 1990, Germany has processed close to 90% of its claims for residential and business properties. The restitution process has not held up development, in many instances acting as a stimulus, with claimants going into partnership with national and foreign capital to develop what has in many instances become extremely valuable land. In East Berlin for example, 92% of the land was under claim. In spite of this it had the reputation at the turn of the

century as the "biggest building site in the world"[90] Restitution is thus seen as part of the economic rebuilding of East Germany, with job creation and housing as the first priority.

To achieve this development boom, investment priority procedures were introduced to create a balance between investment, job creation and development on the one hand and restitution on the other. These procedures allow for the conversion of a claimant's right to restitution (restoration of the property) to a right to compensation. This process is driven legislatively by the "Investitionsvorranggestz" or the Investment Preference Act of 1992, and institutionally by the Bundesanstalt fur vereinigungsbedingte or Trusteeship Organisation in conjunction with the municipality, county government or relevant body with power of disposal over the land (Southern 1993:694).

If an investor or developer launches an application for investment priority, the relevant authority with the help of the Trusteeship Organisation, checks that the proposed investment will create work opportunities, residential space or provide infrastructure that will stimulate further investment (Investment Preference Act of 1992: section 3). The applicant's personal and financial security is also checked. They are then invited to submit a plan setting out the project specifications, especially such issues as the duration and cost of the proposed development, the number of work opportunities which will be created and/or the residential space that will be built. The project plan is distributed to all relevant stakeholders, including the restitution claimant, who may either accept market value or the selling price of the land or submit an alternative project plan of their own. In practice, in situations where a sizeable investment/development is in the offing, the restitution claimants are often offered compensation above the selling price by the Trusteeship Organisation even if their claim has not been validated, to ensure that the development goes ahead[91]. If the investment project is not completed within the specified

[90] Interview and guided tour of Berlin with William Ramsey, June 7 1999.

[91] Interview with Trusteeship Organisation staff members, Berlin June 11. They argued that even if the claim was not valid it was cheaper in the end to get rid of the claim than have the claimant hold up the investment for months or even years while the claim was being processed,

time, the restitution claim may be revived (Investment Preference Act of 1992: section 8 and 11).

A similar measure was introduced to promote development in the rural areas of Germany. The former state co-operatives set up during the period of the GDR may also be acquired for development through investment priority procedures. Restitution claims can be suspended for a period of up 12 years if a viable investment plan is put together. The plan must involve at least one former member of the co-operative (Gruber 1993:11).

The special investment procedures thus ensure that restitution does not inhibit development by freezing land for years while claims are investigated and processed. From a restitution perspective there is a real danger that the drive to attract investors may compromise the restitution process, with the rights of claimants often being limited in favour of potential investors. Legislation on Investment Priority has been subject to several revisions and extensions, which has meant that the legal protection of claimants against investors has been gradually reduced. However, after the reunification of Germany and the urgent need to grow the economy and create employment and accommodation, the state has been politically confident enough to limit the rights of restitution claimants, in spite of the strong emotional feelings driving the process, so as to ensure the minimum disruption of society and the maximum economic growth, job creation and provision of housing.

I turn in the next section to Estonia, a country that has decentralised and simplified its restitution process, albeit with interesting innovations with regard to monetary compensation, even more than the German example.

The Estonian restitution process

Background to dispossessions

Estonia, one of the three Baltic States that achieved independence from the Soviet Union in the early 1990s, has a long history of occupation interspersed

with short periods of national sovereignty. The Nazi-Soviet non-aggression pact of 1939, which placed Estonia under the Soviet sphere of influence, was no exception. Estonia lost over 200 000 citizens during WW11. But the loss of its citizens did not cease with the end of the war that saw the formal onset of the Soviet occupation in 1944.

Nationalization and collectivization of land and political oppression saw a further 60 000 Estonians deported to concentration camps, killed or forced to flee under the Soviet regime[92].

Legislative background

The legislation on land reform puts forward the objectives of the program as: to ensure the continuity of rights of former owners, to protect the interests of current users and to establish conditions for more effective use of land (Land Reform Act of 1991). The Land Reform Act provides for restitution, compensation, privatization, municipalization and nationalization as the main components of the land reform program. Privatization is achieved through state auctions, tenders and the selling of shares. Privatization with pre-emptive rights was introduced at the demand of local governments to give local inhabitants or current leaseholders an advantage in the process (Purju 1996:6). The acquisition of land by municipalities and the national state allows for certain land to be retained for government use.

Definition of Claimants

A person may claim restitution of an asset if s/he was unlawfully expropriated in the course of repression, or lost his or her assets through nationalization or collectivization. They may also claim if they gave up or abandoned property due to state repression. In order to qualify for restitution, the dispossession

[92] Interview with Mr Artur Villemsoo of the Estonian National Land Board, Tallinn, June 15 1999.

must have occurred between June 1914 and June 1981 (Property and Ownership Reform Act (PORA), section 6).[93]

Compared to South Africa, a wider spread of heirs is allowed to claim restitution in Estonia. Testate successors of the original owner may claim to the extent specified in the will, provided that the will was legal at the time of dispossession. If no will exists, or if the will does not comply with the requirements, eligible claimants are identified through guidelines set out in the Act. According to these guidelines, direct descendants of the original owner may claim in equal shares. If these heirs are deceased, the original owner's brothers and sisters and their descendants may claim in equal shares. Descendants may only claim the share in the asset that their parent would have been entitled to.

Non-profit or religious societies may also claim restitution, provided they are still in operation and were in existence by June 1940 (PORA section 8). The right to claim restitution is transferable, and may be inherited according to civil law procedures.

Restitution Settlements

In terms of early restitution legislation, claimants could be awarded restoration of the original land lost, alternative land or compensation. The provision granting alternative land was removed as the award of alternative land proved problematic. Finding land of equal value was often difficult, leading to an unfair situation where claimants could not be given parcels of equal value to the land they originally lost. This process proved to be time-consuming, resulting in only a limited number of cases being concluded by May 1996[94].

In cases where the restoration of original land is feasible, the Act prescribes that land must be returned in a state approximating its former boundaries. A

[93] Interview (workshop) with Tallinn Municipality staff, Mr Vladimar Vlies, Mr Enno Selirand, and Ms Reet Sikk et al, Tallin, June 18 1999.
[94] Interview with Mr Artur Villemsoo, op cit.

land parcel may differ only by up to 8% of the original area, or a maximum of 5 hectares. If the area differs more than this, monetary compensation instead of restoration will be granted. The returned land must also abide by current planning and land use requirements, and the neighboring owners must consent to the restoration to the original owner.

If a building or structure that was built subsequent to the dispossession occupies the land or if the land is retained for municipal or state use, restoration is not granted. Land rezoned under the 1989 Farm Act will also not be restituted if the current user uses it actively. In urban areas land will not be restored if it is needed to service the buildings of another person (Land Reform Act section 6 and 7). Present owners of a property are not obliged to return it to a claimant if the property has been considerably altered, or if the current owner acquired the property in good faith. As Purju states:

> Property is not subject to restitution in cases where: it no longer exists in its original unitary form; if the property is in a person's bona fide possession; or in case of shares. In these cases and also where the property has perished or if the claimants wish, the property will be compensated. Property expropriated in the course of unlawful repression, and also property abandoned due to a genuine fear of repression during the period June 16th 1940 to June 1st 1981, is subject to restitution (1996:27).

A restitution claimant is not required to take over any responsibilities under an existing lease, unless they agree to it. Property will not be restored if the purpose, for which it is intended, is technically impossible.

Restitution authorities may specify that a successful claimant must use a property for its currently designated purposes for a period of five years. If the claimant does not agree with this condition, restoration may be refused (PORA section 12(3) and (6)). Partial return of land may be granted if return of the whole would not be possible, if the land lies in a protected area or if the claimant applies for the return of a detached plot of land (LRA section 6).

The restitution process

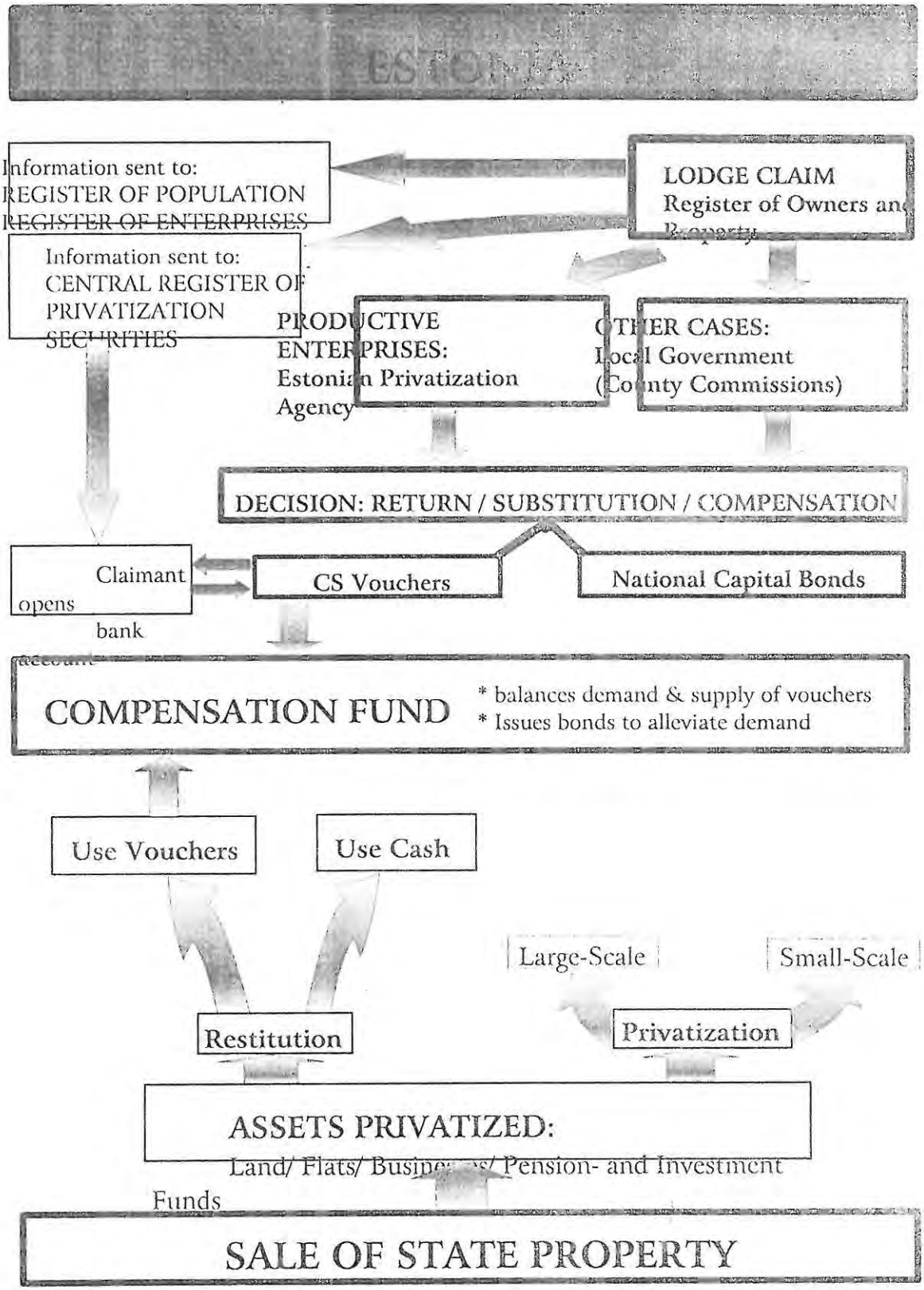
The lodgment of claims

Unlike South Africa and Germany, Estonia has no restitution commission or special offices to deal with claims. Private claims are lodged at the local municipal office within whose jurisdiction the claimed land falls. Business claims are lodged directly with the county government office. As in South Africa, Estonia has a claim form which claimants have to fill in. Claimants are required to supply documentary proof of ownership (title deed) which will usually include a description of the property. The example of Juri municipality, a small town near the capital of Estonia, Talinn, will be used to illustrate the process[95].

The investigation

Of the 22 staff employed by Juri municipality, only four deal with restitution, as part of their normal municipal duties. The municipality had 4000 claims registered initially. By June 1999 they had processed 700 claims, of these 400 were for restoration of land and 300 for monetary compensation. This is below the national average, as by 1999 Estonia had finalized just over half of its restitution claims[96]. Unlike South Africa where Restitution Commission researchers have to complete a field or preliminary research report, a documentary research report, a mandate request report and a final referral report either to the Land Claims Court or the Minister, in Estonia the municipal clerk dealing with a case does not have to prepare any report. They merely have to make sure that all the documentation required by the Act is present in the file and then make a recommendation before forwarding the file to the relevant County offices for a decision. Copies of the Title Deed, Passport, Birth

[95] Interview with Mr Tonu Tanav, Administrative officer dealing with restitution, Juri Municipality, and Mr Atur Villemsoo of the Estonian National Land Board, Juri , June 16 1999.
[96] Interview with the Parliamentary Rural Advisory Committee, Tallinn, June 15 1999.



De Bruyn et al 1999

SOURCE: DONDT

and Marriage Certificates must be included[97]. An application may be denied due to a lack of adequate documentation to substantiate a claim (PORA section 15).

Appraisal

Once the municipal officer is satisfied that relevant documentation for private claims has been obtained and s/he has made a recommendation based on the evidence, the claim files are referred to the relevant County Government for assessment and approval. Within the County Government, there are three important structures dealing with restitution: the *Preparatory group*, the *County Committee* (or in the case of urban claims a *City Committee*) and the *Central Committee*. The first two groups play an important role in the assessment of claims, while the Central Committee deals with appeals and disputes. The County/City Committees are special committees dealing with restitution, established in terms of the Property and Ownership Reform Act (1991).

The task of the preparatory group is to collect, for business claims, information on the specific claim, as well as any further information on the private claims forwarded from the municipal offices. The preparatory group is also expected to prioritize claims, giving priority to claims that privatize state owned land and to simple claims that can be dealt with speedily[98]. In the smaller counties administrative staff with little research skills perform this task. Their job is to collect information and present it to the Secretary of the County/City Committee. The Secretary assesses the information and prepares a recommendation to the Committee[99].

The committee has specific responsibilities laid down by the act:

- The committee must review and assess material substantiating claims.

[97] Interview with Mr Tonu Tanav, op cit.
[98] Interview (workshop) with Tallinn Municipality, op cit.
[99] Interview (workshop) with Tallinn Municipality , op cit.

- It must take decisions on claims and enter property to be returned into a register.

It can decide not to approve an application if it is unjustified or unsubstantiated (PORA section 15).

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The county committee is comprised of five or six persons. They examine the files, check the contents and confirm or deny the recommendations of the municipality and the preparatory committee. It consists of a Deputy County Governor, two lawyers, two or three county office staff and the municipal official who prepared the private claims. Claimants may sit in but not participate in the proceedings[100]. In a city such as the capital Tallinn the committee is much larger, apart from the legal officers; representatives from the different sections of the city as well as members of the Ownership Board attend. The committee consists of about 15 members and decisions are by simple majority vote[101].

In reviewing the claim file, the committee must appraise:

1) Whether the property complies with the specification laid down by the Act. i.e. it must have been unlawfully expropriated land with inseparably attached natural objects, structures, or other assets such as ships and agricultural inventory.
2) On what basis the original owner held the land (ownership, leasehold, etc.)
3) On what basis the expropriation took place. Types of expropriation for which restitution will be granted is set out in section 6 of the Property and Ownership Reform Act.
4) Whether the applicant qualifies as an entitled subject.[102] This refers to who qualifies for restitution and the manner in which the land was expropriated (Mokono 1999:5).

[100] Interview with Mr Tonu Tanav, op cit.
[101] Interview (workshop) with Tallinn Municipality op cit.
[102] Interview (workshop) with Tallinn Municipality op cit.

Decision

The County/City Committee takes decisions on the same day that a case is presented to them. If all the conditions for restitution are satisfied, the Committee will declare a property to be the object of ownership reform, and the applicants will be declared the entitled subjects. Applicants may submit new evidence after the Committee has made its decision. Such information will oblige the Committee to review the case, and take a new decision if necessary. After a decision is made, a period of one month is allowed for objections. If no objections are received, the decision will become valid. A rehabilitation certificate, certifying the unlawfulness of the expropriation will be issued. This certificate works like a court order and initiates the process of restoration. The case is then passed on to a working group that starts the procedure for return of or compensation for property[103].

In cases where restoration of the property is granted, a further step is required. All restoration claims have to be submitted to the city or county government to assess whether the claim can physically be implemented in terms of city/county planning priorities. These claims are considered at normal city/county government meetings[104].

Disputes

Claimants can file an appeal against the decision of the Committee within one month of the decision being taken. Such an appeal is lodged with a special body, the *Central Committee for the Return and Compensation of Unlawfully Expropriated Property* (the Central Committee). The Central Committee will review the decision of the County/City Committee and will either certify the rightness of the decision, or send the claim back the County/City Committee for further review[105]. Appeal can also be directed to the Central Committee if a claimant disagrees with the termination of the investigation into his or her claim

[103] Interview (workshop) with Tallinn Municipality op cit.
[104] Interview (workshop) with Tallinn Municipality op cit.
[105] Interview (workshop) with Tallinn Municipality op cit.

(PORA section 19). The County/City Committee will discontinue processing an application as soon as an appeal is filed. Legislation specifies that complaints must be heard within a period of two months. If a claimant does not agree with the decision of the Central Committee, a further appeal can be directed to a court of law[106].

Calculation of Compensation

Compensation is calculated using two values:

- The land use at the time of dispossession. The land use determines which set of values will be used to compensate the claimant. Available information was used to identify typical land attributes, from which different classes of land use were specified. Values were then determined for these classes, taking into account price, the land use zone and certain correction factors. Valuations were determined for the broad classes of urban land, peri-urban land and rural land.

- The 1993 values for the relevant land use are determined[107].

These values are available from set tables, which give values for rural and urban land specific to the relevant municipality[108]. In order to determine the final value, a set formula is used. The example below is for agricultural land, but the principle is the same for urban land:

Vc = [Vaq x Aaq] + [Vf x Af] + ...

Where...	Vc	=	the compensation paid
	Vaq	=	The 1993 value of agricultural land
	Aaq	=	Area of agricultural land (land use in 1940)
	Vf	=	1993 Value of forest land

[106] Interview (workshop) with Tallinn Municipality op cit.
[107] Interview with Mr Tambit Tiits, real estate expert and property valuer, Tallinn June 16 1999.
[108] Interview with Mr Tonu Tanav, op cit.

Af = Area of forest land (land use in 1949)

And +... allows for any further categories of land use to be included in the valuation.

For example, if a claimant was dispossessed of agricultural land in 1940, s/he will be awarded the 1993 value of agricultural land. This is true even if the original land use has changed since 1940.

An exception to this general formula can be found in urban area of which the land use has changed. The first hectare will be awarded the full value of urban land, while further hectares are awarded agricultural values. With rural claims, provision is made for the category 'forestland' in all calculations. This measure is aimed at increasing the value of compensation in order to make available some payment for suffering experienced during the removals[109]. A total of 30% per land parcel in rural areas is calculated as forestland[110].

The voucher system

The Estonian voucher scheme aims to compensate claimants for the forced dispossession of assets and to dispose of State assets. A special body, the Compensation fund, was established to issue compensation vouchers and to co-ordinate the process. The fund also has the responsibility of balancing the demand for restitution vouchers with the availability of funds, financed through the privatization of assets under the control of the State. When properties are sold, 50% of the value is forwarded to the Compensation Fund, 20% to the relevant local government and 20% to the Government's reserve fund (Purju 1996:35).

Estonia uses two types of privatization securities to compensate claimants. The first type is issued as compensation for years of lowly paid employment,

[109] Interview with Tambet Tiits op cit.
[110] Interview with Mr Tonu Tanav, op cit

imprisonment or years spent in exile. These vouchers may be used by a claimant to buy, from the state, his/her dwelling or to buy a property or movable asset subject to privatization (Purju op cit: 31). The second type of vouchers, 'Compensation Vouchers', are used to specifically provide compensation for unlawfully expropriated property. Compensation Vouchers are issued if the restoration of a property is not possible

An important aspect to note is that when vouchers are used to buy assets from the state, they retain their full value. However, when claimants opt for a cash pay out only the nominal value of the voucher is paid. Since the nominal value is only 20% of the paper value, it serves as an incentive for claimants to take land rather than financial compensation. The final year for cashing in vouchers is 2001[111].

Institutions responsible for implementation

The Land Board is responsible for implementing the Restitution Act and for regulating valuations. The Department of Cadastre, which falls under the Land Board, has offices in the different counties, each of which has at least one permanently employed valuer. Private valuers do individual claim valuations.

Each county office serves an average of 20 municipal authorities. Municipal officers calculate compensation for claims according to the set valuation tables. When the calculations are finalized, it is forwarded to the 'Voucher Bank', where it is checked for accuracy[112]. If all calculations are complete and correct, vouchers will be issued as compensation.

[111] Interview with Tambet Tiits op cit.
[112] Interview with Mr Tonu Tanav, op cit

Resources

Staff

Land reform involves for the country as a whole approximately 1 600 people. The Land Board employs these people at national level, the county governments at district level, and by municipalities at local level. The Land Board has a small number of staff involved directly with restitution, as the process is concentrated at lower levels. Apart from the Land Board, none of these people deal exclusively with land reform or restitution. Restitution is dealt with by designated county and municipal officers/clerks as a part of their normal local government duties. There are 15 county restitution committees, 7 city restitution committees, and over 250 municipalities[113].

Number of claims

Restitution has ensured the restoration of more hectares of land than any of the other government programs. The figures below gives the percentage of land returned through each reform program up to 1997.

	1994	1995	1996	1997(Jan-June)
Restitution	99%	98.0%	59.5%	68.1%
Privatization	0.1%	0.6%	3.0%	4.7%
Municipalization	0.1%	0.3%	0.1%	0.1%
Nationalization	.3%	1.1%	37.4%	27.1%

(Mokono 1999:11)

By August 1994, the County Commissions received a total of 206,275 applications for the restitution of 157,959 properties. Of these cases, 75% demanded restitution of their original property or other compensatory land.

[113] Interview (workshop) with Tallinn Municipality op cit.

(Purju 1996:28) By 1999, Estonia had finalized just over half of these claims for restitution[114]. A total of 54% of the land parcels in Estonia were formally registered by early 1999 (Mokono 1999:11).

Agricultural land accounted for roughly 44% of the value of land claimed and urban land for 24%. Forest land made up 2% of the total and the remainder of the value was assigned to assets (such as agricultural inventory) and buildings. (Purju 1996:28).

As a result, no claims for restitution or compensation were received for between 450,000 and 500,00 hectares of land. Such unclaimed land combined with land for which owners were compensated accounts for a total of at least 1,500,000 hectares. This implies that at least 33% of the country's surface is ownerless, of which more than 660 000 hectares is arable. Although some of this land will be privatized, it appears that a large area will remain in State ownership, as the supply for land for private agriculture exceeds the demand at present (Villemsoo and Aasae 1997:32).

Problems with restitution

As in South Africa, there are great variations in skills and abilities of staff across the institutions dealing with the process. This has contributed to delays and duplication of work. Repeated changes in the legislation have tended to delay claims when applications completed under certain procedures do not comply with later specifications (Purju op cit:15). These changes also proved cumbersome because new systems and procedures had to be relearned by implementers before the process could function effectively (Villemsoo and Aasae 1997:32).

This has led to a lack of a systematic approach with claims being processed in a sporadic manner in some instances. According to Tiit, a real estate expert and valuer, what is needed is a more coherent approach, with improved

[114] Interview with the Parliamentary Rural Advisory Committee,op cit..

batching and prioritization of claims[115].

Conclusion

One of the major recommendations emanating from the South African Ministerial Review conducted at the end of 1998 is to move from a legislatively based restitution process, where all claims irrespective of the settlement outcome had to be given effect and certified by the Land Claims Court, to an administrative system. Under the latter, claims are resolved by the signing of a settlement agreement and are given effect and certified by the Regional Land Claims Commissioner. The endorsement of the settlement of the claim by the Commissioner instead of the Land Claims Court is reflected in the 1999 amendments to the Restitution Act, namely Section 14 (b):

> (3) If in the course of an investigation by the Commission the interested parties enter into a written agreement as to how the claim should be finalized and the regional land claims commissioner having jurisdiction certifies in writing that he or she is satisfied with the agreement and that the agreement should not be referred to the Court, the agreement shall be effective only from the date of such certification or such later date as may be provided for in the agreement.

However, until present the Commission has not been able to implement the administrative approach, in that the system for the finalization of claims is still highly centralized, the RLCC being unable to certify and give effect to settled claims. This inability has its roots in a number of restrictive and cumbersome practices, which is slowing down the processing and resolution of claims:

- the lack of a decentralized capital budget for claim settlement (land acquisition, financial compensation), settlement support grant (discretionary) and planning grant;
- the perceived need for every claim/researcher to obtain a preliminary negotiations framework, a negotiations mandate and then to submit a Section 42 (D) referral, via a bureaucratic route march from RLCC, to Chief

[115] Interview with Tambet Tiits op cit.

Director, to CLCC, to DG, to Deputy Minister, to Minister and all the way back down again;

- the lack of decisions on important policy issues which would enable RLCCs to settle claims using clear and consistent rules and procedures;
- the perceived necessity for the Minister to be involved in any decision which involves the disposal of state assets.

In addition, the wish of the new Minister and her Deputy to be involved in the decision making with regard to specific claims at an even earlier stage, is another step in the opposite direction to that recommended by the Ministerial review, part of the increasing *centralization drift* manifesting itself within the Commission since its integration with the DLA.

In contrast, the German and Estonian restitution processes are based on a true administrative system, where clearly written guidelines, devolution of decision-making powers and a lack of central paternalism allow decisions to be taken at a local level. As I have shown in this annexure, in Germany residential claims are processed, certified and given effect by clerks at local county level with appeals going to regional offices of the Office for Open Property Questions. In Estonia local municipalities deal with claims, with municipal staff processing claims as part of their other duties. The major advantage of this radically decentralized system is that the municipal staff generally have a good knowledge of local conditions, including land ownership, regulations, land use patterns, etc and are able to make informed decisions which no bureaucrat situated in a far off capital is able to emulate. Secondly, the process is kept simple, and does not require extensive expenditure on highly specialized and over-complicated institutions.

A number of lessons may be drawn from the German/Estonian experience for the South African restitution process.

Firstly, policy decisions need to be made and translated into clear guidelines as to the minimum requirements needed to process claims. While not a simple matter as experience has shown, this particular aspect of the restitution process is long overdue. The on-the-ground experience of the regional offices

as well as the policy and research directorates need to be brought together in a coherent and efficient manner and set out in a written manual that will provide all staff with clear and consistent rules and procedures – from junior research officers to the Minister.

Secondly, the concept of decentralization, an intrinsic component of the administrative process, needs to be given content, with a move from deconcentration to devolution. Budgets need to be decentralized with appropriate delegations. Commissioners need to be empowered through the establishment of Claims Assessment Committees at regional level. This committee should be chaired by the Regional Commissioner and comprised of heads of divisions within the RLCC. Steering Committees for group and community claims (comprised of claimant representative bodies, NGOs, Local Government and other relevant state departments) would make representations to this committee with regard to the outcome of a claim.

Thirdly, the operation of the already instituted district teams within regional offices needs to be extended to take maximum advantage of the benefits of locality as outlined in the Estonian example above. While it is recognized that in South Africa local government structures in many cases are operating below capacity in terms of resources, there is great merit in RLCC district teams forging closer links with especially District Councils. This will facilitate interaction around the development of LDOs (in terms of the DFA) and ensure that restitution claimants are catered for in the forward planning of these institutions, especially with regard to the provision of bulk infrastructure, housing subsidies, and other development benefits.

Congruence between the district teams and the district offices of the PDLA, including shared office space at district level on a part-time basis, will further facilitate the operation of the RLCC and afford claimants more direct access, especially in far-flung corners of the province, to both staff and office. It will also ensure constructive co-operation with regard to projects where there is an overlap between restitution, redistribution and tenure projects.

Fourthly, the office of the CLCC could then play a role in assisting RLCCs with advice on complicated claims, especially where policy issues are raised, as well

as ensuring that best practices are implemented across regions.

References

A. Formal publications

Ambrose B. P. (1995) **Democratisation and the protection of Human Rights in Africa.** Westport: Praeger Publishers.

Atkinson, D. (1 996) "Civil society after the transition" in Coetzee, JK and Graaff, J ***Reconstruction, Development and People***. Johannesburg: International Thompson Publishing.

Auprich, A "A legal framework: NGO's and the human right to development" in Holland. G and Ansell, G (eds) (1998) **Winds of small change – Civil society interaction with the African state**. East London Afesis-Corplan.

Babbie, E (1989) **The practice of social research**. Belmont: Wadsworth.

Babbie, E and Mouton, J (2002) **The practice of social research**. Cape Town: Oxford University Press.

Barkan, E " Payback time: restitution and the moral economy of nations" in **Tikkun, Vol. 11, no. 5**, 1996.

Bauman, R "Property rights in the Canadian constitutional context" in **South African Journal on Human Rights.** Vol. 8, 1992.

Biswanger, H and Deininger, K (1993) "South African land policy: the legacy of history and current options" in **World Development, Vol. 21.**

Brown, M et al (1998) **Land restitution in South Africa: a long way home**. Cape Town: Idasa.

Budlender, G "The right to equitable access to land" in **South African Journal on Human Rights. Vol. 8**, 1992.

Budlender, G et al (1998) **Juta's New Land Law**. Cape Town: Juta.

Chanock, M "Culture and human rights: orientalising, occidentalising and authenticity" in Mamdani, M (ed) (2000) **Beyond Rights Talk and Culture Talk.** Cape Town: David Philip Publishers.

Christopher, A (1994) **The atlas of apartheid.** London: Routledge.

Denzin, N (1970) **The research act in sociology: a theoretical introduction to sociological methods.** London: Butterworths.

Devinish , G; Govender, K; and Hume, D (2001) **Administrative justice in South Africa**. Durban: Butterworth.

De Wet, C "Moving away from apartheid: recent rural resettlement in South Africa" in Coetzee, J K et al (eds) (2001) **Development – theory, policy and practice**. Cape Town: Oxford University Press.

Drah, K (1995) "Civil Society: Lessons and comparisons from elsewhere in Africa. Viewpoint from Ghana" in Humphries, R and Reitzes, M (eds) **Civil Society After Apartheid.** Johannesburg: Freidrich Ebert Stiftung.

Du Toit, A "The end of restitution: getting real about land claims" in Cousins, B (2000) **At the crossroads – land and agrarian reform in South Africa into the 21st century**. Cape Town: Programme for Land and Agrarian Studies, University of Western Cape.

Elster, J "Majority rule and human rights" in Shute, S and Hurley, S (Eds) (1993) **On Human Rights – the Oxford Amnesty Lectures 1993.** New York: Basic Books.

Erasmus, J "Restitution unravelled" in Brown, M et al (1998) **Land restitution in South Africa: a long way home**. Cape Town: Idasa.

Friedman S and Reitzes, M (1996) "Democratisation or Bureaucratisation?" in **Transformation 29.** Durban: University of Natal.

Harvey, L and MacDonald, M (1993) **Doing Sociology – a practical introduction**. London: Macmillan.

Haysom, N "Democracy, constitutionalism, and the ANC's Bill of Rights for a new South Africa" in **South African Journal on Human Rights.** Vol 7, 1991.

Held, D (1993) **Prospects for democracy: north, south, east, west**. Cambridge: Polity Press.

Henkin, L (1991) **The age of rights**. New York: Columbia Press.

Howard, R and Donelly, J "Liberalism and human rights: a necessary condition" in Ishay, M. R. (1997) **The Human Rights Reader.** New York: Routledge.

Ishay, M. R. (1997) **The Human Rights Reader.** New York: Routledge.

Johnson, É et al (1983) **The structure of social theory.** London: Macmillan.

Leatherdale, J " Technical, social and economic aspects of land reform in Eastern Europe" in **Overseas Development Initiative**, July 1995.

Levin, R and Weiner, D (1997) **No more tears... Struggles for land in Mpumalanga, South Africa.** Trenton, New Jersey: Africa World Press.

Liebenberg, S and Pillay, K (2000) **Socio-economic rights in South Africa.** Cape Town: Community Law Centre, University of the Western Cape.

Macdonald, K and Tipton, C (1993) "Using documents" in Gilbert, N (ed) **Researching social life.** London: SAGE Publications.

Magona, S "Walking on the moon" **New Internationalist** no. 265/March 1995.

Mamdani, M (ed) (2000) **Beyond Rights Talk and Culture Talk.** Cape Town: David Philip Publishers.

Mamdani, M (1996) **Citizen and subject: contemporary Africa and the legacy of late colonialism**. Princeton, New Jersey: Princeton University Press.

Mashinini, T (1995) "Civil Society and Representative Government" in Humphries, R and Reitzes, M (eds) **Civil Society After Apartheid**. Johannesburg: Freidrich Ebert Stiftung.

Mohanty, M and Mukherji, P. N. (eds)(1998) **People's Rights - social movements and the state in the third world.** New Delhi: Sage Publications.

Nhlapo, T "The African customary law of marriage and the rights conundrum" in Mamdani, M (ed) (2000) **Beyond Rights Talk and Culture Talk.** Cape Town: David Philip Publishers.

Nzimande, B (1995) "Civil Society and Representative Government" in Humphries, R and Reitzes, M (eds) **Civil Society After Apartheid**. Johannesburg: Freidrich Ebert Stiftung.

Platzky, L and Walker, C (1985) **The surplus people's project**. Pietermaritzburg: Afra (5 volumes).

Platzky, L and Walker, C (1985) **The surplus people: forced removals in South Africa**. Johannesburg: Raven Press.

Rawls, J "The law of peoples" in Shute S and Hurley, S (Eds) (1993) **On Human Rights – the Oxford Amnesty Lectures 1993.** New York: Basic Books.

Roodt, M and Savage, D "South Africa: the state-civil society debate" in Holland. G and Ansell, G (eds) (1998) **Winds of small change – Civil society interaction with the African state**. East London Afesis-Corplan.

Rorty, R "Human rights, rationality and sentimentality" in Shute, S and Hurley, S (Eds) (1993) **On Human Rights – the Oxford Amnesty Lectures 1993.** New York: Basic Books.

Shivji, I (1989) **The concept of human rights in Africa**. London: CODESRIA.

Shivji, I "Contradictory perspectives on rights and justice in the context of land tenure reform in Tanzania" in Mamdani, M (ed) (2000) **Beyond Rights Talk and Culture Talk.** Cape Town: David Philip Publishers.

Shute, S and Hurley, S (Eds) (1993) **On Human Rights – the Oxford Amnesty Lectures 1993.** New York: Basic Books.

Southern, D "The land question in East Germany" in **International and Comparative Law Quarterly,** Vol 42, July 1993.

Swanson, E "A land claims court for South Africa: Report on Work in Progress" in **South African Journal on Human Rights.** Vol 8, 1992.

Synge, J (1998) **The Aran Islands.** London: Dover.

Turner, S and Ibsen, H (2000) **Land and agrarian reform in South Africa - a status report.** Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape.

Van der Vyver "Comments on the Constitutional Guidelines of the ANC" in **South African Journal on Human Rights,** Vol. 5, 1989.

Waltzer, M "The civil society argument" in Moufe, C (1992) **Dimensions of radical democracy.** London: Verso.

Yawitch, J (1981) **Betterment: the myth of homeland agriculture**. Johannesburg : S A Institute of Race Relations.

B. Papers, monographs and research reports

Atkinson, D (1991) "Cities and citizenship: towards a normative analysis of the urban order in South Africa, with special reference to East London 1950-1986". Durban: University of Natal.

Banks, L (1996) "Duncan Village" Monograph, Institute of Socio Economic Research, Rhodes University, East London.

Banks, L et al "Research Report: West Bank land restitution claim: social history report" East London: Rhodes University, ISER, September 1999.

Bernstein, B (1997) "Social change in the South African countryside? Land and production, poverty and power". Occasional Paper 4, Land Reform and Agrarian Change in Southern Africa. Cape Town: Programme for Land and Agrarian Studies, University of Western Cape.

Cousins, B (1997) "How do rights become real? Formal and informal institutions in South Africa's tenure reform programme" Unpublished paper, Programme for Land and Agrarian Studies, University of the Western Cape.

Eujen, M (2001) "An evaluation of the reform of farm workers' security of tenure rights under the Extension of Security of Tenure Act, No 62 of 1997" Unpublished paper: Legal Resources Centre, Grahamstown.

Fakudze, C "Rural resettlement scheme evaluation: a case study of the Mfengu in Tsitsikama" MA thesis, Sociology and Industrial Sociology Department, Rhodes University, Grahamstown, 2000.

Gruber, R (1993) "Land ownership and conflicting claims: studies from Germany 1937-1991" Supplement to **Urban Foundation Research 4 & 5**. Johannesburg: Urban foundation.

Hall, R (2003) "Rural restitution". Occasional paper 2, Evaluating land and agrarian reform in South Africa. Cape Town: Programme for Land and Agrarian Studies, University of Western Cape.

Hendricks, F (1994) "The Crooked countryside: uneven development in rural South Africa". Unpublished paper, South African Sociological Association, University of Natal.

Hendricks, F (1996) "Questioning the land question – agrarian transition, land tenure and rural development in former settler colonies of Southern Africa". Unpublished paper, Sociology Department, Rhodes University, Grahamstown.

Leyshon, D (1990) "Doubts about the Bill of Rights" in **Comment**. Grahamstown: Rhodes University.

Lund, F (1998) "Lessons from Riemvasmaak, Volume two: Background study". Research Report No. 2. Cape Town: Programme for Land and Agrarian Studies, University of Western Cape.

Nel, E (1990) "The spatial planning of racial residential segregation in East London, 1948-1973". Johannesburg: University of the Witwatersrand.

Purju, A "The political economy of privatisation in Estonia". Centre for Economic Reform and Transformation, January 1996.

Roodt, M (1985) "Capital penetration and rural development in Bophuthatswana: a case study of the Ditsobotla dryland projects". Masters dissertation, Faculty of Arts, University of the Witwatersrand, Johannesburg.

Roodt, M and Sephton, S "Forestry restitution claims in the former Transkei". Report for Ikwezi/ RLCC Eastern Cape, East London 2002.

Scollo-Lavizzari, C (1996) "Restitution of land-rights in an administrative law environment: the German and South African experiences compared". Cape Town: University of Capetown.

Vilemsoo, A and Aasmae, I "State land disposal policy: Study on the disposal of state-owned rural land to accelerate the transfer of such land to the private sector through sale or lease". Estonian National Land Board,1997.

DLA/CRLR/LCC/PELCRA documents

Budlender, G "Letter to the Chief Land Claims Commissioner" April 14, 1998.

Busakwe, D (1997) "Apartheid dispossession – a short history" DLA Restitution Directorate training document.

Commission on Restitution of Land Rights National Office:

- Minutes February 1998;
- Note from CLCC to legal officers, September 5, 1999.
- CRLR/DLA PELCRA Memorandum of Agreement July 1998.

Commission on Restitution of Land Rights Eastern Cape and Free State:

- Investigative Division Minutes, March, April, May, July, 1998;

- Communication Team Minutes, October 1998;
- Staff meeting Minutes, February 16 and March 30, 1999;
- Campaign response management team Minutes, June 30, 1998;
- Coordinating Forum meeting Minutes, June 1998;
- Quarterly meeting DLA/RLCC Minutes, August 1998;
- PELCRA Joint Steering Committee meeting Minutes, October 17; October 27, 1998; February 10, 1999;
- Investigative Division Annual Report, March 1999;
- Campaign response management team Minutes, June 30, 1998;
- Memorandum on "tribal claims", January, 1999.

Delta Foundation "The Port Elizabeth land restitution initiative, an approach to urban land claims", Port Elizabeth, September 1999.

De Vos, R and Hirschveld, E "Submission to the Land Reform Policy Committee: underlying principles in the determination of a restitution package" Directorate: Restitution Policy, DLA, Pretoria, February 2, 1999.

De Vos, R "Draft discussion document: valuations in the restitution process". Directorate: Restitution Policy, DLA, Pretoria, May 12, 1999.

Department of Land Affairs (DLA) Chief Directorate Circular 1999.

DLA "Ministerial review of the restitution process proposed terms of reference", Pretoria June 1998.

DLA "Minister's media release", Pretoria, 1998. Also February 16, 1998 and March 4 1999.

DLA "Restitution Ministerial Review Team's brief" Pretoria, 1998.

DLA "Report on joint workshop on relationships, roles, responsibilities and procedures in the restitution process" Espada Ranch, February 1997.

DLA Development Facilitation Act Implementation Task Team "DFA-restitution relationship discussion document", Pretoria, April 1998.

Du Toit, A "Report on a strategic planning workshop held by the Commission on Restitution of Land Rights" April 1998, Ikaya Lodge, Dunkely Square.

Gauteng RLCC Implementation Unit "Proposal for the settlement of land restitution claims via the development integrated approach" July 23, 1999.

Gauteng RLCC Implementation Unit "Alternative strategy for determining monetary value of a claim (MVOC) for urban restitution" No date, circa 1999.

Gilfillan, D Internal documents on: (a)(1997) Land Claims – the Constitution and the Restitution of Land Rights Act ; (b) (1998) "Acceptance criteria for the purposes of investigating claims submitted in terms of the Restitution of Land Rights Act"; (c) (1998) "The impact of restitution on stakeholders"; (d) (1998) Delaying factors in the restitution process".

Margo, K "Discussion document on urban valuations" Office of the Regional Land Claims Commissioner Gauteng and Northwest, January 1998.

Mayende, P "The church and land restitution: time to deliver" Address to the Conference of the Eastern Cape Provincial Council of Churches, Mqanduli, August 1997.

Meliziswe Property Group "Evaluation of the PELCRA report" Port Elizabeth, December 1998.

Metroplan planning proposal for Fairview, 1999.

Mgoqi, W: Memorandum to all RLCCs from Acting Chief Land Claims Commissioner, January 13, 1998.

Mgoqi, W: Memorandum to RLCCs on streaming/batching of restitution claims from start to finish, February 15, 1999.

Mothibe, C "Claimant identification and verification" RLCC Gauteng and Northwest: Research Unit, July 24, 1998. Updated version June 11, 1999 entitled "Who is the rightful claimant and beneficiary (individual claims)".

Port Elizabeth Land and Community Restoration Association, "Submission to the Regional Land Claims Commissioner of the Eastern Cape Province for the settlement of land claims in Port Elizabeth, April 4, 1997.

Radcliffe, S "Proposal: Port Elizabeth urban land claims" Cape Town: Endeva Consulting, March 1998. There were a number of versions of this proposal.

Regional Land Claims Commission (RLCC) Eastern Cape: Farmerfield file 1999.

RLCC Eastern Cape: Komga file, 1998.

Restitution Transformation Project Information Management Task Team: Final Report July 12, 1999.

RLCC/Metroplan PELCRA Claimant list, 2000.

RLCC Macleantown Land Claims Court referral report, December 1997.

RLCC Macleantown Settlement Agreement 1999.

Restitution Review Team: Executive Summary, Restitution Review, October 1998.

Restitution Review Team: Draft Report, Restitution Review, October 1998.

Roodt, M "Commission on Restitution of Land Right's response to DLA discussion document on the relationship between the restitution process and the DFA", East London RLCC, May 1998.

Roodt, M and Schuster, L (1999) PELCRA Section 42 (D) Referral Report, RLCC Eastern Cape.

Van der Merwe, M (1997) "Notes on removals and legislation" DLA Restitution Directorate training document.

Walker, C "Comments on the the draft report of the restitution review", Pietermariztburg, October 27, 1998.

Winkler, H: letter to R, Kingwill , March 10, 1997.

Wolfson, T "Report on joint problem solving workshop for researchers working in the restitution programme of land reform" Farm Inn, Pretoria, February 25 1998. Also "The second report on joint problem solving workshop for researchers working in the restitution programme of land reform", June 12, 1998.

C. NGO/Commissions documents and publications

Adams, M et al " Agricultural supporting services for land reform" in Land and Agriculture Policy Centre (1993) **Land redistribution options conference – proceedings.** Johannesburg: LAPC.

Bartlett, C and Giyan, K "Implementing the Development Facilitation Act" in **Local Government Transformer Vol 2 No. 4 August/September 1997**. East London: Afesis-Corplan.

Beresford, S "How municipalities should plan" " in **Local Government Transformer Vol 2 No. 4 August/September 1997**. East London: Afesis-Corplan.

Border Rural Committee (1998) "Description of the nature and extent of land rights at Chata". East London. Letter to DLA Restitution Directorate, Pretoria.

Budlender, G "On shaky ground – new constitution could delay land reform" in **Land Update** No 31, May/June 1994. Johannesburg: National Land Committee.

Claasens, A "Give the Land Claims Court a chance" in **Land Update** No 32, July 1994. Johannesburg: National Land Committee.

Dawood, Z (1998) "Is restitution in need of a remedy?" Cape Town: National Land Committee.

Hathorn, M (1998) "Submission on Mkonde Claim". Legal Resources Centre, Johannesburg.

Hornby, D (1998) "All we need is a peace of land – NLC investigation into the current status of labour tenancy". Johannesburg: National Land Committee.

Institute of Peace and Conflict Studies (2003) "Armed conflict report 2000" http//www.ploughshares.ca.

Klug, H "Bedevilling agrarian reform: the impact of present and future legal frameworks" in Land and Agriculture Policy Centre (1993) **Land redistribution options conference – proceedings.** Johannesburg: LAPC.

Land and Agriculture Policy Centre (1993) **Land redistribution options conference – proceedings**. Johannesburg: LAPC.

Legal Resources Centre (1999) Pamphlet on constitutional rights.

Lund, S and Wakelin, P " Administrative requirements for rural restructuring: a summary of collected investigations and recommendations" in Land and Agriculture Policy Centre (1993) **Land redistribution options conference – proceedings.** Johannesburg: LAPC.

National Land Committee (1995) "The National Land Committee's Land Reform Policy Proposals". Johannesburg: National Land Committee.

Pienaar, K "The Port Elizabeth Land and Community Restoration Association: steps taken in the Port Elizabeth land restoration process –including a compilation of key documents" Port Elizabeth: Legal Resources Centre.

Plant, R "Non-market approaches to land reform: a review of international experience" in Land and Agriculture Policy Centre (1993) **Land redistribution options conference – proceedings.** Johannesburg: LAPC.

South African Human Rights Commission Annual Report 2001.

Thome, J "Constitutionalism, Property Rights and Agrarian Reform" in Land and Agriculture Policy Centre (1993) **Land redistribution options conference – proceedings.** Johannesburg: LAPC.

Truth and Reconciliation Commission (1996) "Chronology of apartheid legislation and political events". Background file for researchers.

Williams, G "Setting the agenda: a critique of the World Bank's rural restructuring program for South Africa" in Land and Agriculture Policy Centre (1993) **Land redistribution options conference – proceedings.** Johannesburg: LAPC.

D. Acts of Parliament and government documents

The Interim Constitution of the Republic of South Africa (Act 2000 of 1993).
The Constitution of the Republic of South Africa (Act 108 of 1996).
The Restitution of Land Rights Act (No 22 of 1994).
The Development Facilitation Act (No 67 of 1995).
The Local Government Transition Act of 1996.

Government Gazette 1995 No 16507.

Green paper on land reform, Department of Land Affairs, 1996.

White paper on land reform, Department of Land Affairs, 1997.

E. Court Judgements

1. Meer, J: Dulabh vs Dulabh, in re Erf 1687, King William's Town (1997) All SA 635 (LCC).
2. Dobson: A: Slamdien vs Minister of Land Affairs, 1998.
3. Froneman, J: Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape and Another 2001 (2) SA 609 (E).
4. Moloto, J: Macleantown Residents Association: Re certain erven and commonage in Macleantown 1996 (4) SA 1272 (LCC); (1996) 3 All SA 259 (LCC).
5. Bam, P: Ex parte Mayibuye I-Cremin Committee: re Sub section 121 of the Farm Trekboer, district of Klipriver, LCC Case no 28/96.
6. Bam, P: Farjas (PTY) Limited vs The Regional Land Claims Commissioner, KwaZulu-Natal, LCC21/96.

F. Newspaper Reports

Eastern Province Herald: October 17, 1998; May, 28, 1999; October 27, 1999; July 28, 2001.