

6. THE LAND RESTITUTION PROGRAMME

“It is my unqualified contention that it is impossible – and indeed no-one really contemplates it – to compensate for the major injustices of the [Group Areas] Act. There can be no compensation for changing a man’s whole life on the grounds of his race.”¹

Introduction

This chapter analyses the success of the Restitution Programme based on the objectives that are set out (for Restitution) in the 1997 White Paper on South African Land Policy². *“The goal of the restitution policy is to restore land [1] provide other redistributing remedies [2] to people dispossessed by racially discriminatory legislation, in such a way as to provide support to the vital process of reconciliation [3], reconstruction [4], and development [5]. And “Restitution is an integral part of the broader land reform programmes and is closely linked to the need for the redistribution of land and tenure reform [6]. And “The programme’s purpose is restitution of land . . . in order to promote justice [7] and reconciliation. The analysis in this chapter is further guided by the interviews I conducted with South African actors and commentators, as well as, by a reading of international case studies, notable Chile, Brazil, Mexico, Peru, Australia and (to a lesser extent) China. In addition, the chapter draws on a variety of South African case studies and land restitution projects.*

This chapter covers the period 1994 to 2002, with emphasis on the late 1990s. Some post 2002 information has been incorporated (particularly restitution figures) since these will influence any analysis significantly.

Section one describes how contributions and pressures from various actors, including representatives from the African National Congress, the World Bank and Non-governmental organisations (like the National Land Committee) combined to result in a technical, legalistic, court-based restitution programme, essentially separate from the other two aspects of the land reform programme in South Africa – redistribution and tenure reform.

Section two is a discussion of the basic components and procedures of the land Restitution Programme and focuses on the Restitution of Land Rights Act 22 of 1994, the Commission for the Restitution of Land Rights and the Land Claims Court.

Section three is an account of the performance of the Restitution Programme from approximately 1996 to June 2003 and indicates how many claims were settled, how many beneficiaries benefited and how many hectares were distributed at particular moments of the process.

The bulk of the chapter discusses problems encountered (both in the development and implementation phases) of the Restitution Programme. These include the exclusion of

¹ Paton A, *The People Wept*, pamphlet, 1957

² White Paper on South African Land Reform Policy, 1997, p. 52, section 4.13

important categories of people (section four), the 1913 cut-off date and the emotional aspects of dispossession (section five), and the legalistic nature of the process and the consequent marginalisation of beneficiaries (section six). Section six draws extensively on comparative material from Mexico, Brazil and Chile. Section seven focuses on expropriation and compensation policies, section eight on the complex nature of claims, section nine on the lack of community cohesion, section ten on questions around the accountability of leadership, and section eleven focuses on the arguable resuscitation of the institution of traditional authority. Sections 13 analyses the structures, functioning and relationship between the Restitution institutions – the Land Claims Commission, the Land Claims Court and the Department of Land Affairs, and also discusses the process of administrative change that has taken place in the Restitution Programme. Section 14 highlights the debate around the relative importance of restoring land rights or promoting development, by focussing on the arguably increasing reliance on settling claims (particularly urban claims) through financial compensation.

1. Policy Development

In 1992 and 1993, ANC land policy documents argued for the development of a court-based restitution process, which would compensate those who were forcibly removed. The 1992 policy paper suggested that court decisions should be based on five criteria, namely, land use and productive potential, traditional and long-standing occupation of a piece of land, birthright as well as legal title deeds, dispossession under apartheid legislation and the need for land.³ A small ANC working group started to develop the Restitution Programme (one of the three pillars of the National Land Reform Programme), in 1993. This culminated in the Restitution of Land Rights Act 22 of 1994, which together with the Constitution formed the basis of the Restitution Programme. The Restitution of Land Rights Act was one of the first pieces of legislation to be passed by the new government, probably because the restitution process was politically expedient and widely perceived as legitimate.

Apart from the ANC, there were primarily two groups⁴ influencing the development and the nature of restitution policy - i.e. a technical, legal, court-based procedure essentially separate from the other two pillars of the land reform programme. World Bank representatives played a key role in early policy development. At the 1993, LAPC and World Bank conference in Swaziland, World Bank representatives suggested the creation of a “separate judicial process” that would address issues of justice as opposed to issues of equity (redistribution and tenure reform).⁵ These representatives argued that a judicial process with cut-off dates, similar to the court procedure used in Chile under Allende, could be used to “*settle claims to specific plots of land of groups evicted from their land*”

³ ANC, *n' Beter Lewe vir Almal*, ANC Department of Information and Publicity, JHB, 1993 & ANC, 1992 Land Policy Document, Education Section, April, 1992

⁴ Representatives from the World Bank and land and rural non-governmental organisations.

⁵ Binswanger H & Deininger K, "South African Land Policy: the legacy of history and current options", in *Agricultural Reform in South Africa*, Van Zyl J, Kirsten J & Binswanger H (Eds.), Oxford University Press, Cape Town, 1996

under apartheid".⁶ Incidentally, the use of the Chilean example seems peculiar, since, the land reform programmes in Chile, under both Frei and Allende, were slow and ineffective. Partly because of complex litigation procedures, which forced the Chilean Land Reform Agency (CORA) to spend large amounts of its limited resources on lengthy and complicated court cases.⁷ Furthermore, the omission of historians from the group of World Bank commissioned South African researchers ensured that the policy discussions were not located in the protracted history of dispossession and contributed to a more technical (i.e. the 1913 cut-off date), as opposed to a more social justice, approach.⁸

A second influential group, in the pre-1994 restitution policy debates, consisted of local NGO activists from the National Land Committee (NLC) and its affiliates, the Legal Resources Centre (LRC) and the Centre for Applied Legal Studies (CALs). In Brown et al.⁹ an employee of a land NGO is quoted as saying that "*the NLC and its affiliates were responsible not only for successful lobbying for the Restitution Act, but also for nominating most of the Regional Land Claims Commissioners (RLCC) and the Chief Land Claims Commissioner (CLCC)*".¹⁰ Most of these NGOs had been involved in resisting forced removals during apartheid and brought this mindset to the policy debates.¹¹ The legalistic nature of the restitution programme is partly a reflection of the fact that many of the NGO activists involved in the policy formulation process had legal backgrounds (i.e. LRC & CALs). It is this "hybrid of pressures" that led to the introduction of a restitution programme and which distinguishes South Africa from other southern African land reform programmes where "*historic rights were put aside in favour of more simple land redistribution*".¹²

2. The Restitution Programme

The Restitution of Land Rights Act 22 of 1994, was enacted in terms of the Interim Constitution of the Republic of South Africa Act 200 of 1993. The Restitution of Land Rights Act entitles communities and individuals to restitution if: (a) such a person (or direct descendant of such a person) or community was dispossessed of such rights; and (b) such dispossession was effected under the purpose of furthering the object of any law, which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2) of the Constitution Act 1993, had that section been in operation

⁶ Binswanger H & Deininger K, "South African Land Policy: the legacy of history and current options", in Agricultural Reform in South Africa, Van Zyl J, Kirsten J & Binswanger H (Eds.), Oxford University Press, Cape Town, 1996

⁷ See Brown M.R, "Radical Reform in Chile 1964-1973" & Jarvis L.S, "The unravelling of Chile's Agrarian Reform 1973 – 1986" & Thome J.R, "Law, Conflict and Change in Chile 1964 - 1973" in Searching for Agrarian Reform in Latin America, Thiesenhusen W.C (Ed.), Unwin Hyman, London, 1989

⁸ Interview with Andile Mngxitama, Senior Researcher NLC, June 7, 2001 & Williams G, Ewert J, Hamann J & Vink N, "Liberalising markets and reforming land in South Africa", Journal of Contemporary African Studies, 16.1, 1996

⁹ Brown M, Erasmus J, Kingwill R, Murray C & Roodt M, Land Restitution in South Africa: A long way home, Idasa, Cape Town, 1998

¹⁰ See subsequent discussion in this chapter.

¹¹ Interviews with Geoff Budlender, Dave Husy & Andile Mngxitama (see references for details)

¹² Cliffe L, "Land Reform in South Africa", Review of African Political Economy, No. 84, 2000

at the time of such dispossession.¹³ Section 1 (7) of the Act defines a direct descendant to include the spouse or partner in a customary union, whether such a union has been registered or not. In terms of Section 1 (4) a community is any group of persons whose rights in land are derived from shared rules determining access to land held in common by such a group.¹⁴ The legal parameters for restitution are further contained in section 25(7) of the 1996 Constitution, which states that, “*A person or community dispossessed of property after June 19 1913, as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress*”. Although the Act does not prescribe specific solutions for individual cases, it does provide a framework that includes five types of restitution; restoration of original land, provision of alternative land, payment of financial compensation, provision of alternative relief and/or priority access to other government housing and land development programmes.¹⁵

Section 4 of the Restitution Act and Section 123 of the Interim Constitution provided the legislation for the establishment of the Commission on the Restitution of Land Rights and the Land Claims Court (both established in 1995). The Commission, which is an independent body that reports directly to Parliament, consists of a Chief and Deputy Land Claims Commissioner, Regional Commissioners and other members appointed by the Minister of Land Affairs. Four Regional Land Claims Commissioners were appointed. One in East London to receive claims from the Eastern Cape and the Free State, one in Cape Town to receive claims from the Western and Northern Cape, one in Pietermaritzburg to deal with claims from KwaZulu-Natal and one in Pretoria to deal with claims from Gauteng, North West, Mpumalanga and Limpopo provinces. (This structure changed in 1997, when the Commission was incorporated into the Department of Land Affairs).

Claims for restitution are lodged with the Commission for the Restitution of Land Rights, which according to the 1997 White Paper on Land Reform is responsible to publicise the process and provide information, to investigate and mediate claims, to settle claims through negotiations and to assist communities and individuals to lodge claims. Section 11 of the Act stipulates that claims should be lodged with the Land Claims Commissioner, who, if satisfied that the claim meets the legal requirements set out in the Act, must publish a notice of the claim in the Government Gazette. The Commissioner must also inform (in writing) the owner of the land in question and any other party that may have an interest in the claim. According to Section 11 (7), once a claim has been published in the Government Gazette,

- a) no person may alienate the land in question without one months written notice to the Regional Land Claims Commissioner
- b) no person may, in an improper manner, obstruct the passage of the claim

¹³ Dawood Z, “Is Restitution in need of a remedy”, Report Paper for the NLC, April 1998

¹⁴ Details also available in Jaichand V, Restitution of Land Rights: A Workbook, Lex Patia, PTA, 1997, p. 54

¹⁵ Department of Land Affairs, White Paper on South African Land Policy, Pretoria, April 1997

- c) no claimant, who was resident on the claimed land at the date of commencement of the Act, may be evicted from the land in question without the written consent of the Chief Land Claims Commissioner
- d) no improvements on the land may be removed, destroyed or damaged, and
- e) no claimant or other person may enter upon, or occupy, the land without permission from the owner or lawful occupier.¹⁶

The Commission has wide-ranging investigative powers that include the power to demand information from government departments, organisations and individuals.¹⁷

Section 12 (1) of the Act empowers the Land Claims Commissioner to assist a claimant who is unable to provide the necessary information for an adequate submission. The Commission refers claims to the Land Claims Court in cases where claims generate conflict (or have the potential to do so) or where attempts at negotiation and mediation have failed. The Land Claims Commission embarks on mediation efforts in cases where

- a) there are two or more competing claims to a particular right in land
- b) there are competing groups within a claimant community
- c) the owner or holder of rights in the claimed land is not the state and such holder is opposed to the claim, or
- d) there are issues that can only be resolved through mediation and negotiation.¹⁸

The Chief Land Claims Commissioner has the right to suggest mediation and to appoint a suitably qualified administrative officer of the Commission, or independent mediator.¹⁹

In addition, the Commission submits reports and acts in an advisory capacity to the Minister of Land Affairs.²⁰

The Land Claims Court is responsible for adjudicating land claims and determining compensation. The Restitution of Land Rights Act stipulates that in passing judgement the Court has to take the following principles into account:

- (a) The desirability of providing restitution of rights in land or compensation to people who were dispossessed of their land rights as a result of or in pursuance of racially discriminatory laws,
- (b) The desirability of addressing past violations of human rights,
- (c) Meeting the objectives of equity and justice,
- (d) Attempting to avoid social disruption and
- (e) The principles set out in the Constitution.²¹

In terms of Section 22 (2), the Court has jurisdiction throughout the country and has all the ancillary powers necessary for the performance of its functions, including the power to grant interlocutory orders and interdicts.²² The State President, in consultation with

¹⁶ Also see Jaichand V, Restitution of Land Rights: A Workbook, Lex Patia, PTA, 1997, p. 56

¹⁷ Department of Land Affairs, White Paper on South African Land Policy, Pretoria, April 1997

¹⁸ Jaichand V, Restitution of Land Rights: A Workbook, Lex Patia, PTA, 1997, p. 57. Also see Brown M, Erasmus J, Kingwill R, Murray C & Roodt M, Land Restitution in South Africa: A long way home, Idasa, Cape Town, 1998

¹⁹ Section 13 (3)

²⁰ Section 15

²¹ Dawood Z, "Is Restitution in need of a remedy", Report Paper for the NLC, April 1998

²² Jaichand V, Restitution of Land Rights: A Workbook, Lex Patia, PTA, 1997, p. 70

the Judicial Service Commission, appoints a president and judges to the court.²³ Affected parties may appeal against Land Claims Court decisions. An appeal against the Court lies with the Constitutional Court or the Appellate Division of the Supreme Court.²⁴

The cut-off date for the submission of land claims was April 1998. From the inception of the programme there were calls for an extension of the claims period. Accordingly, the Department of Land Affairs (DLA) announced, in September 1997, that the claims period would be extended to December 31, 1998 and that the DLA would embark on a restitution awareness campaign to promote the lodging of claims.²⁵ The campaign was successful and there was a very noticeable increase in restitution claims lodged in the days and months before the final cut-off date. (Some regional offices of the Department of Land Affairs were receiving as many as 1 000 calls per day).²⁶

3. Performance of the Restitution Programme (Claims Settlement Process)²⁷

The Restitution process was extremely slow between 1994 and 1998 - by December 1998, the number of claims submitted stood at 40 000 and only 27 claims had been settled (in mid 1998 only seven claims had been settled).²⁸ The process picked up speed after this and, by November 2001, 68 878 claims had been received and 12 863 claims had been settled.²⁹ The majority of finalised claims were from the Western Cape and KwaZulu-Natal.³⁰ Although approximately 80% of the claims received were for land in urban areas, urban claimants represented only 10% of potential land restitution beneficiaries.³¹ By March 2002, 50% of the 60 000 claims lodged (figures were less than the earlier estimates of 68 878 claims) had been settled. Figures provided by the DLA in June 2003 were, 36 488 claims settled, covering 590 112 hectares, with 83 661

²³ Section 22 (4)

²⁴ Department of Land Affairs, White Paper on South African Land Policy, Pretoria, April 1997, p. 52 – 60. Also see Brown M, Erasmus J, Kingwill R, Murray C & Roodt M, Land Restitution in South Africa: A long way home, Idasa, Cape Town, 1998

²⁵ Hartley W, "ANC calls for extension of claims period" Business Day, September 3, 1997

²⁶ Business Day, "People rush to lodge claims before cut-off", December 30, 1998

²⁷ It is important to note that at the time this study was conducted it was particularly difficult to gather and analyse data on restitution, because the Department of Land Affairs did not have a national list of restitution projects. The information that was available was often out of date and was not presented according to gender, location (urban or rural) or income-generating possibilities. At the time, the Department of Land Affairs' Monitoring and Evaluation unit also did not monitor restitution projects post-settlement/ post-payment. For more current information (i.e. post June 2003) see <http://land.pwv.gov.za/restitution/default.htm>.

²⁸ Business Day, "People rush to lodge claims before cut-off", December 30, 1998

²⁹ DLA, Restitution Statistics, November 9, 2001, <http://land.pwv.gov.za/restitution/default.htm>

³⁰ Du Toit points out that a large number of the claims settled in KwaZulu-Natal, however, involved members of the Kipi claim, which was comprised of a group of 173 individual compensation claims on what is now urban land, resolved, through the most part through cash compensation payments. Further, that many of the claims in the Western Cape represent urban claims resolved around the payment of cash compensation. See Du Toit A, "The End of Restitution: Getting real about land claims", in Cousins B (ed.), At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century, PLAAS, UWC, 2000, p. 77 and see section 14 of this chapter.

³¹ For more on the urban (cash settlement) versus the rural (land restitution) debate see section 14 of this chapter.

beneficiary households and 444 002 beneficiaries.³² At this stage the number of claims lodged had increased to 72 975. Hall³³ explains that the increase in the number of claims lodged after the 31 December deadline is the result of the process of investigation and validation, when it was found that some claim forms represented more than one claim and, thus, had to be split into several claims. The rapid increase in the number of claims settled is the result of three factors. Firstly, the completion of the institutional and policy development process, secondly, administrative changes made before and after the 1998 Restitution Review, and third, the emphasis on settling smaller/ urban/ simpler claims primarily through financial compensation.

TABLE A

Date	No. of claims lodged	Urban	Rural	Number of claims settled
March 1996 ³⁴	6 894			0
April 1997 ³⁵	14 898	12 130	2 768	0
September 1997 ³⁶	17 172	14 000	3 172	
March 1998 ³⁷	24 516			7
December 1998 ³⁸	40 000	80% of claims		27
January 1999 ³⁹	54 218			
June 1999				41
October 1999 ⁴⁰				322 = 83 378 individuals. R13 million in financial compensation & 264 615 hectares of land restituted.
April 2000				3 916 = 3 056 households received financial compensation & 10 552 households received land
Early 2001 ⁴¹				8 173 claims settled, 13 777 beneficiary households, 83 772 individual beneficiaries at a cost of R321 526 061.
May 2001 ⁴²	67 531	80% of settled claims = 300 000 people	20% of settled claims = 3.6 million people	12 150

³² *The Star*, "Reversing 90 years of racial land dispossession", June 19, 2003

³³ Hall R, "Rural Restitution 2: Evaluating land and agrarian reform in South Africa", Occasional Paper Series, PLAAS, UWC, September 2003

³⁴ Marcus T, "Demand for Land", *Down to Earth*, Marcus T, Eales K & Wildschut A (Eds.), Land and Agricultural Policy Centre, Indicator Press, Natal, March 1996

³⁵ Department of Land Affairs, *White Paper on South African Land Policy*, Pretoria, April 1997

³⁶ Cook L, "Proposed Land claims extension welcomed", *Business Day*, September 25, 1997

³⁷ Dawood Z, "Is Restitution in need of a remedy", Report Paper for the NLC, April 1998

³⁸ *Business Day*, "People rush to lodge claims before cut-off", December 30, 1998

³⁹ *Sunday Times*, January 1, 1999

⁴⁰ Moloi D, "Restitution in danger of not achieving rural development", *Land and Rural Digest*, September/October 1999

⁴¹ Hall R, "Rural Restitution 2: Evaluating land and agrarian reform in South Africa", Occasional Paper Series, PLAAS, UWC, September 2003

⁴² Sapa, "Land restitution process to be completed in five years, May 16, 2001. The same figures are now available at <http://land.pwv.gov.za/restitution/default.htm>

June 2001 ⁴³				12 314 claims settled. Of the R506 million spent at the time 59% had been on financial compensation and 302 000 hectares has been restored.
July 2001 ⁴⁴	66 700			12 314 = 190 433 beneficiaries
October 2001				12 678
November 2001 ⁴⁵	68 878			12 863 = 217 940 beneficiaries or 39209 households
December 2001 ⁴⁶		R3.4 billion spent on 16330 households	R2.4 billion spent on 23081 households	
March 2002 ⁴⁷	60 000			30 000 (50% of claims) ⁴⁸ = 62 000 households/ 322 200 beneficiaries/ 427 337 hectares at R377 million plus R951 million in financial compensation.
Mid 2003 ⁴⁹	72 975			36 488 claims settled, 571 103 hectares, R440 million spent on buying land and R1 263 million on financial compensation.
June 2003 ⁵⁰				36 488 claims settled, covering 590 112 hectares, 83 661 beneficiary households or 444 002 beneficiaries.

The Department of Land Affairs estimated in mid-2002 that the majority of land claims would be settled by 2005. (At the same time, President Mbeki announced that the Restitution Programme would be completed by December 2004).⁵¹ Table A provides an indication of the rate at which claims were received and settled in the period from March 1996 to June 2003 (with some detail on the number of beneficiaries and the costs incurred by the DLA). Table B provides a provincial breakdown of the number of claims submitted and settled by November 2001.⁵²

TABLE B (Statistics as on November 9, 2001)

Total claims received	Province	Number received	Number settled	Total settled
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⁴³ Lahiff E, "Land reform in South Africa: is it meeting the challenge?", Policy Brief, no.1, PLAAS, September 2001

⁴⁴ Beeld, July 10, 2001

⁴⁵ DLA, Restitution Statistics, November 9, 2001, <http://land.pwv.gov.za/restitution/default.htm>

⁴⁶ Business Day, December 6, 2001

⁴⁷ Beeld, "Die gryse wat grond uitdeel", May 24, 2002

⁴⁸ Hall R (2003) points out that due to claim splitting, simply subtracting the number of claims settled from the number of claims lodged, as is done here, will result in an underestimation of the number of claims remaining.

⁴⁹ Hall R, "Rural Restitution 2: Evaluating land and agrarian reform in South Africa", Occasional Paper Series, PLAAS, UWC, September 2003

⁵⁰ The Star, "Reversing 90 years of racial land dispossession", June 19, 2003

⁵¹ Turner S, Land and Agrarian Reform in South Africa: A status report, 2002, Research Report no. 12, PLAAS, August 2002, p. 7

⁵² DLA, Restitution Statistics, November 9, 2001, from the DLA website

68 878				
	KwaZulu-Natal	14 808	422	
	Western Cape	11 938	4 047	
	Eastern Cape	9 292	2 902	
	Free State & Northern Cape	4 715	814	
	Gauteng & North West	15 843	3 785 in Gauteng & no figures available for North West	
	Mpumalanga	6 473	6 = 13 569 beneficiaries	
	Northern Cape	5 809	497	
				12 863 = 39 209 households/ 217 940 beneficiaries

The Land Restitution programme has generally been perceived as slow and ineffective. This is partly the result of problems, ranging from policy to the practical consequences of implementation and, post-restitution development. Policy related problems include issues of expropriation and compensation, the emotional nature of the process, the exclusion of large groups from the programme, the 1913 cut-off date and the legalistic nature of the programme. Problems arising from the implementation process include lack of community participation in the process, accountability of community leadership structures, lack of community cohesion, management and administrative issues in the Land Claims Commission, capacity constraints, the resuscitation of the chieftancy and the complex nature of claims. Furthermore, the programme has been criticised for a lack of post-restitution development planning and a perceived urban bias.

4. Exclusions

An important group of people excluded from the restitution programme were the victims of betterment planning. The 1997 White Paper on land reform argued that victims of betterment planning would obtain access to land by means of either the redistribution or tenure reform programme. Firstly, because betterment policies were not considered to be racist legislation and secondly, because the Commission's mandate did not extend to the former homeland areas. Since the inception of the Restitution Programme, the NLC and its affiliates have consistently lobbied for the inclusion of betterment victims. Following a policy discussion meeting in July 1998, a new consensus was reached and the former Minister of Land Affairs, Derek Hanekom, wrote a letter stipulating that the Commission could receive claims for betterment removals.⁵³ Although this is a welcome policy development, it does not address the fact that many betterment communities have missed out on the opportunity to claim restitution. In March 1999, the Chatha agreement in the Keiskammahoek of the former Ciskei became the first betterment claim favourably settled by the DLA. The Chatha settlement (in the form of financial compensation) amounted to R10.5 million (R31 679 per claimant). The Department of Land Affairs is also providing additional financial assistance for fencing and the upgrading of tenure rights.⁵⁴

⁵³ Interview with Dave Husy (Former Deputy Director of the NLC), May 31, 2001

⁵⁴ Economist, "Africa's big black hope", March 17–23, 2001

The appropriation of land for purposes such as agricultural projects, nature reserves and forestry, in the former homelands, has also been included in the ambit of the Restitution Programme. Relatively large land areas were appropriated for the above mentioned reasons in areas like the former Transkei. The first such case (Dwesa-Cwebe on the Eastern Cape Wild Coast) was settled in 2001. Ownership of the nature reserve (which will continue to be dedicated to conservation) was handed over to the community's Communal Property Association in 2001.⁵⁵ In the longer-term this restitution project could generate income for the beneficiaries involved, but it could also increase inequality and "ethnic" divisions among the claiming communities.⁵⁶

Certain categories of labour tenants, are included among those who lost their land rights as a result of racial oppression but, do not fall within the parameters set by the Restitution of Land Rights Act. Labour tenants who were evicted by landowners, not in terms of explicitly racial laws, but rather through common law actions or extra-legal means are excluded.⁵⁷ Labour tenants and sharecroppers who experienced a protracted process of dispossession⁵⁸ are also excluded.

5. The 1913 cut-off date (and the emotions that accompany dispossession and restitution)

The stated purpose of the Restitution Programme is to promote reconciliation and strive for justice by restoring land (or paying compensation) to persons or communities dispossessed of their land rights after June 19, 1913 (the date on which the land Act was promulgated).⁵⁹ Although the 1997 White Paper states that claims for land lost prior to 1913 may, in some cases, be accommodated by the minister in "terms of preferential status" in the Redistribution or Tenure Reform programmes, the cut-off date probably excluded the vast majority of affected land in South Africa. Indigenous South Africans had already lost most of their land by the time the 1913 Land Act came into effect.

Land NGOs⁶⁰ and affected communities have consistently challenged and questioned the applicability of the 1913 cut-off date. As late as July 2002, Cosatu said in a press statement that it would push for the amendment of the Restitution of Land Rights Act 22 of 1994 to accommodate those who lost land before 1913.⁶¹ Critics have pointed to the arbitrary nature of the date and have argued that aboriginal title (used in Australia, Canada, New Zealand and certain West African countries) should be used to address pre-1913 claims. On the other hand, the government has argued that "*it is not possible to*

⁵⁵ Turner S, Land and Agrarian Reform in South Africa: A status report, 2002, Research Report no. 12, PLAAS, August 2002, p. 10

⁵⁶ Fay D & Palmer R, "Prospects for redistribution of wealth through land reform in Dwesa-Cwebe", in Cousins B (ed.), *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century*, PLAAS, UWC, 2000

⁵⁷ TRAC, Guidelines for Grey areas, unpublished, Marshalltown, July 6, 1995

⁵⁸ i.e. those who were repeatedly evicted and forced to move from farm to farm & See chapter one

⁵⁹ 1997 White Paper on Land Reform

⁶⁰ Especially the NLC, TRAC and the communities represented by TRAC in Mpumalanga and North West Province

⁶¹ Mail & Guardian, "COSATU publication slated land policy", July 12-18, 2002

address the pre-1913 claims through a judicial process such as Aboriginal Title Claim” because in South Africa,

- (a) most historical claims are justified on the basis of membership of a tribal kingdom or chiefdom. The entertainment of such claims could renew or prolong ethnic and racial politics.
- (b) The members of ethnically defined communities and chiefdoms and their present descendants have increased more than eight times and are scattered.
- (c) Large parts of South Africa could be subject to overlapping and competing claims where pieces of land have been occupied in succession by, for example, San, Khoi, Xhosa, Mfengu, Trekkers & British.⁶²

The government’s argument is not particularly convincing, as these problems have emerged in the context of post-1913 claims as well. A better argument might be that programmes based on Aboriginal Title have not been particularly successful.

It was only in 1992, for example, that the Australian High Court overturned a 204-year-old concept that Australia was a vast empty land when the first white settlers arrived in 1788 and recognised Aboriginal land rights for the first time. Consequently, the 1994 Native Title Act was passed, stipulating that if indigenous Australians could “prove continuous and traditional occupation” of a piece of land, they could claim it. Since then, only two claims have been settled. The Wik community in northern Queensland were granted permanent title to over 110 000 hectares in December 1997, and the Dunghutti in New South Wales received financial compensation. The chances for restitution were further reduced when the Australian Upper House passed a bill reducing Aborigine’s rights to claim access to certain categories of land in July 1998.⁶³

Article 27, of the 1917 Constitution of Mexico, provides another example. The article contained legislation for the restitution of “*ancient land which had been unjustly and illegally alienated from the Mexican people*” during the period of Spanish colonisation in the 16th century. Given the legalistic nature of the Mexican restitution programme at the time, the article required that applicants provide “proper titles” for the land claimed. Since colonial land transfers were generally semi-legal, many claimants lacked such title. Consequently, the restitution process was extremely limited.⁶⁴

To date there has only been one South African claim based on aboriginal title. The Richtersveld community, near the Namibian border, instituted an action in the Land Claims Court against the state and the diamond company Alexkor, based on aboriginal title. The community claimed 84 964 hectares on which their ancestors had lived. Legal representatives of the government and Alexkor argued that the Land Claims Court was not competent to inquire into aboriginal title.⁶⁵ The judge in the case apparently agreed. He ruled that the Court did not have the jurisdiction to decide on the rights of the Richtersveld people to land in terms of indigenous or aboriginal title and recommended

⁶² 1997 White Paper on Land Reform, p. 55 & 56

⁶³ Australia case study from Court C, “Australia: Racial lines drawn in defeat of Native Land Bill”, World News, April 10, 1998

⁶⁴ Mexican example from Markiewicz D, “Carranza: Bourgeois Entrenchment”, The Mexican Revolution and the Limits of Agrarian Reform 1915 - 1946, Lynne Rienner Publishers, London, 1993

⁶⁵ Mail & Guardian, August 25 – 30, 2000

that the Minister of Land Affairs provide alternative relief for the community.⁶⁶ The community finally obtained legal title to their land in mid-2002, through the redistribution (and not the restitution) programme. The Richtersveld community then took their case to the Supreme Court of Appeal, which ruled in February 2003 that the Richtersveld community never lost their ownership rights to the land after the British annexation of the area in 1847. The Court argued that in the 1920s, the South African government had ignored the right of the community to the land around Alexander Bay (where alluvial diamonds were discovered). The Court, therefore, ruled that the Richtersveld community is entitled to the mineral and mining rights on the land. A solution will have to be negotiated between Alexkor and the community. The community's case against the Transhex diamond mine (40 000 hectares along the Orange River) remained unresolved at the time of writing.⁶⁷

Related to the cut-off date question, is the failure of the Restitution Programme to take adequate account of the emotional nature of dispossession and restitution. The process of dispossession has ensured that the land question remains a powerful emotional and material issue. The 1997 White Paper states that the objectives of the Restitution Programme include redressing the injustices of the past and promoting reconciliation. However, the property clause in the 1996 Constitution, that legislates compensation for current land owners, and the 1913 cut-off date have convinced many protractors of the programme that no serious commitment to meeting these objectives exists.⁶⁸ As the PAC's Secretary General put it, "*the real issue is that your ancestors came here and killed our people*".⁶⁹

6. The Legalistic Nature of the process (the marginalisation of beneficiaries and the centrality of landowners)

There are several reasons why the Restitution Programme was developed and operated as a judicial system. The first was the assumption that there would be intense conflict between landowners and claimants and secondly, that the programme needed powerful legal backing for the expropriation of land in indomitable cases. Thus far, the expected conflict has not materialised. As former Director General, Geoff Budlender said, "*There was a judicial process for a very good reason, we thought that there was going to be conflict and that we had to set up a structure and process to mediate conflict. We had misunderstood the situation*".⁷⁰

Nevertheless, the legalistic and bureaucratic nature of the Restitution Programme is generally viewed as one of the principle causes for the slow pace at which claims were

⁶⁶ Mail & Guardian, March 23 – 29, 2001

⁶⁷ The Star, "Homing in on the land issue", April 1, 2003

⁶⁸ For example, Asmal K, Asmal L & Roberts R.S (Eds.), "Placing Property on a Legitimate Footing", in Reconciliation through Truth, David Philip Publishers, Cape Town, 1996 & Interview with Helena Dolny (Former Director of Land Bank), June 22, 2001

⁶⁹ This was said to a white caller on a phone-in programme on SAFM on June 26, 2001

⁷⁰ Interview with Geoff Budlender, former Director General of DLA, July 2001

settled.⁷¹ *“It was like a Ping-Pong game, there were 16 processes each one needing a decision before you could proceed; people died before their claims came through and in some cases people were panicking because the elders were 80 years old”.*⁷² It seems that policy developers underestimated the complexity involved in working through a legalistic, court-based land reform process.

The Restitution of Land Rights Amendment Bill of 1997 was introduced in an attempt to speed up the process. Following the 1998 Restitution Review⁷³, further attempts were made to create a more “administrative” restitution process. A range of administrative measures⁷⁴ were introduced and regional Commissioners were given the power to resolve uncontroversial claims, thus eliminating the need for each case to come before the Land Claims Court.⁷⁵ It is this change that lies behind the rapid increase in the claim settlement process from 1999 onwards (see Table A above). Amendments introduced in 2002, allow regional land claims commissioners to recommend to the Minister of Agriculture and Land Affairs for acquisition, not only land that is for restitution but, adjoining land to be acquired under the redistribution programme. There is also a renewed emphasis on settling claims (whether through land or financial compensation) in a manner that produces “commercially sustainable results”.⁷⁶

These figures (i.e. increased settlement) should be carefully analysed, however. The claims settled thus far have been relatively uncomplicated⁷⁷ and to a large extent this probably explains the increase. The process is likely to slow down again when more complex, mainly rural claims, are addressed.⁷⁸

Former Commissioner for Gauteng Durkje Gilfillan argues that the legal nature of the process has not been a factor in the slow process of settlement. *“Taking the court out of the process is not going to make it any faster. The real problems include a lack of government capacity and complex group dynamics. People first have to lodge claims. Then communities have to learn to work together, people have to take an interest in the process and believe that it is actually going to happen. Issues of communal ownership have to be sorted out, community membership must be determined, communities have to adopt a constitution and power struggles have to be addressed – these things take time”.*⁷⁹

⁷¹ This view was expressed in all the interviews I conducted (with the exception of former Commissioner Gilfillan) & by all the land NGOs & in much of the South African literature on land reform

⁷² Interview with Dave Husy (Former Deputy Director of the NLC), May 31, 2001. See Brown M, Erasmus J, Kingwill R, Murray C & Roodt M, Land Restitution in South Africa: A long way home, Idasa, Cape Town, 1998 for accurate information on the process.

⁷³ Du Toit A, Makhari P, Garner H and Roberts A, Report: Ministerial Review on Restitution, DLA, Pretoria, 1998

⁷⁴ For more on the administrative changes see section 13 of this chapter.

⁷⁵ Turner S & Ibsen H, “Land and agrarian reform in South Africa: A Status Report”, Occasional Paper Series, PLAAS, UWC, November, 2000

⁷⁶ Mail & Guardian, “Rural land restitution goes for broke”, June 14 – 20, 2002

⁷⁷ For example, urban claims with one beneficiary household and a cash settlement.

⁷⁸ See section 14 of this chapter for more detail on this discussion.

⁷⁹ Interview with Durkje Gilfillan (Former Land Claims Commissioner), June 1, 2001

Evidence from the Mexican land reform process appears to support former Commissioner Gilfillan's argument. The Mexican government of Alvaro Obregon managed to redistribute more land than the preceding government of President Carranza, for example, despite having a similarly complicated court-based procedure. Communities had to lodge a claim with the local Agrarian Commission, which then had four months to accept or reject the claim. If accepted, the claims would go to a Special Executive Committee, which could make a provisional grant. From there, the claim went to the National Agrarian Commission, then to the President, and finally to the Secretariat of Agriculture.⁸⁰

The problems with a court-based restitution programme are located elsewhere. Firstly, a legal approach "*undermines formal commitments to popular participatory reconstruction and development*"⁸¹ because complicated legal procedures place a limit on the ability of marginalised people/potential beneficiaries to participate in the process. In South Africa, the legalistic nature of the restitution programme has ensured that lawyers and government officials "are the central actors in the process", while claimants can "only observe from the sidelines".⁸² "*People do not understand the [Restitution] process. People think that restitution means that they can go back to the land. People do not understand that they can sometimes be compensated in other ways. People also do not understand the law and the court procedure. They do not know how to fill in the court application. And, they think that once you fill in your application you get your land back*".⁸³

Secondly, court proceedings provide landowners with the opportunity to contest and refute claims and can, therefore, prolong, or limit the scope of, the land reform programme. Legal loopholes are particularly dangerous in situations where the former land-owning class has been able to retain political and economic power or, where the power relations in rural areas have not been significantly transformed. In Peru, for example, large-scale landowners utilised this opportunity to influence legislation, which led to changes in the Agrarian Reform Law of 1964. The Agrarian Reform Law initially limited legal ownership to 150 hectares of irrigated land or its equivalent.⁸⁴ In Mexico in 1917, large-scale landowners used the court procedure and their privileged positions in Mexican society to circumvent land reform laws and consequently very little land was redistributed (only 0.3% of all agricultural land in three years).⁸⁵ Under Cardenas' land reform programme, landowners in Mexico evaded legislated land ceilings by dividing their properties into smaller units and registering these in the names of family members,

⁸⁰ Friedrich P, "Agrarian Revolt", Agrarian Revolt in a Mexican Village, Prentice Hall, New Jersey, 1970

⁸¹ Levin R.M, "Land Restitution, the Chieftancy and Territoriality: The case of the Mmaboi Land Claim in South Africa's Northern Province, Centre for African Studies, March 1996

⁸² Du Toit A, "The End of Restitution: Getting real about land claims", in Cousins B (ed.), At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century, PLAAS, UWC, 2000

⁸³ Interview with David Manzini (DLA Project Officer, Mpumalanga), May 25, 2001

⁸⁴ Lastarria-Cornhiels, "Agrarian Reforms of the 1960's and 1970'2 in Peru", Searching for Agrarian Reform in Latin America, Thiesenhusen W.C (Ed.), Unwin Hyman, London, 1989

⁸⁵ Markiewicz D, "Carranza: Bourgeois Entrenchment", The Mexican Revolution and the Limits of Agrarian Reform 1915 - 1946, Lynne Rienner Publishers, London, 1993

friends or other trusted name lenders.⁸⁶ Similarly, although the various Mexican land reform programmes were centrally administered, landowners used their political and economic power to obtain certificates of exclusion from expropriation from local government offices.⁸⁷

In Brazil, the government's failure to contain the political and economic power of the land-owning class has severely limited the extent of land reform programmes and contributed to the high-levels of land related violence. Landowners' power extends to influence over the judiciary, as evidenced by the irregularities in legal procedures reported by Amnesty International and, the fact that landowners continue to hire groups of gunmen/mercenaries to act against the landless.⁸⁸ Furthermore, large-scale landowners in Brazil have managed to overturn legislation implemented by the Brazilian government, as was the case with Decree 22 discussed below.

Decree 22 (enshrined in the 1988 Constitution of the Federative Republic of Brazil) gave indigenous Brazilians the right to land traditionally occupied by them. Such land would be demarcated exclusively for use by indigenous Brazilians over a five-year period (to be completed in 1993).⁸⁹ The Decree was overturned and replaced by Decree 1775 of 1996, as a result of legal arguments made by Sattin, an agribusiness firm, during a Supreme Court hearing. Lawyers for Sattin argued that Decree 22 was unconstitutional because it did not allow for "the right to contest" guaranteed by the Brazilian constitution. Decree 1775, therefore, allows for legal challenges to demarcation. Consequently, previously demarcated areas have been reduced, as these areas were opened up for acquisition by large-scale landowners, including mining and forestry companies.⁹⁰ In fact, up to 80% of Brazil's demarcated areas has been acquired by farmers and miners.⁹¹ Decree 1775 has also excluded the possibility of expanding the currently demarcated territories, which size is insufficient for the survival of certain groups, for example the Guarani-Kaiowa in the state of Mato Grosso do Sul.⁹² A broad range of organisations in Brazil, including the Landless People's Movement (MST), the Council for the Articulations of Indian Peoples and Organisations of Brazil, unions and a number of other agrarian and rural based organisations, have subsequently called for the revocation of Decree 1775/96.⁹³

A particularly startling example of the power of former landowners to limit and, in this case reverse, land reform can be found in Chile in the 1970s. The Popular Unity Party,

⁸⁶ Otero G, "Agrarian Reform in Mexico: Capitalism and the State", Searching for Agrarian Reform in Latin America, Thiesenhusen W.C (Ed.), Unwin Hyman, 1989

⁸⁷ Heath J.R, "Evaluating the Impact of Mexico's Land Reform on Agricultural Productivity", World Development, Vol.20, No.5 1992

⁸⁸ Amnesty International, Report Brazil: The Criminilisation of Rural Activism - The Case of Frei Anasta Ribeiro, October 1996 & Amnesty International, Report Brazil: Politically Motivated Criminal Charges Against Land Reform Activists, Amnesty International, August 1997 & See chapter 11 on Direct Action and Land Reform for more detailed accounts.

⁸⁹ Earthaction, Brazilian Rainforests - The New Threat, Earthaction Home Page, 1996

⁹⁰ Oxfam, "Land Rights in Brazil", One World, 1996

⁹¹ Earthaction, Brazilian Rainforests - The New Threat, Earthaction Home Page, 1996

⁹² Servico Brasileiro de Justica e Paz, News from Brazil, No.219, March 4, 1996

⁹³ Servico Brasileiro de Justica e Paz, "Land Issues: Urgent Appeal", News from Brazil, Number 182, June 8, 1995

under the leadership of Salvador Allende, came to power in 1970 and immediately proposed an extensive programme of land and agrarian reform. This programme was proposed as a method that would fundamentally restructure the social and economic order in Chile, by redistributing wealth and opportunities and, was based on the party's particular view of development (which closely resembled dependency theory). Chile, and other developing countries, it was argued, was economically stagnant because of an unequal economic world order that relegated Chile and other underdeveloped countries to a status of dependence on dominant international economies. This unequal economic world order was the inevitable result of international capitalism and served the interests of rich and powerful world economies, which in turn, exploited Chile and other developing countries as sources of primary goods (minerals and agriculture) and cheap labour. This unequal division of access to economic goods and political power was also reflected in the Chilean domestic situation. The rich and land-owning classes in Chile profited from this unequal distribution of power and wealth internationally, and in turn, exploited the poor and marginalised among the Chilean population. The (simplified) solution to underdevelopment and economic stagnation lay in reducing Chile's dependence on world powers, as well as, reducing the dependence of the Chilean poor on the rich and land-owning classes by fundamentally transforming the social, political and economic order in Chile. In addition, production and the economic gains of production would be focussed at and, invested in, Chilean society. As such, the Chilean economy would change from an export-orientated economy to an economy aimed at domestic food production and income generation.

The proposed agrarian reform programme would include changes in the tenure system, an emphasis on co-operative production, beneficiary participation, the provision of assistance and training to marginalised groups and those in need, as well as, technological improvements in agricultural production. The Popular Unity Party proposed the expropriation of all farms, exceeding 80 hectares, in priority zones.

However, Allende's Popular Unity Party had come to power with only 36% of the Chilean vote and its consequent minority status in the Chilean Congress prevented it from passing any of its proposed land reform legislation. The Allende government, therefore, had to rely on land reform legislation introduced by the former government of Eduardo Frei. Frei's legislation was contained in articles 67, 69 and 81 of the Agrarian Reform Law 16.640 of 1967. The legislation allowed for expropriation of farms larger than 80 hectares, under-utilised farms, and farms which failed to comply with labour laws. Full, commercial value, compensation was to be paid to former landowners by the state, and landowners could choose the parts of their farms that they would like to retain (normally the most productive parts, or areas in which water and/or other infrastructure were located).

Allende's forced reliance on land reform legislation passed by former governments, severely limited the extent of land reform that the socialist government was able to introduce – this in a context of increasing land need and increasing land invasions. Furthermore, the legal nature and conflict-resolution mechanisms of the land reform legislation, inherited by the socialist government, contributed to a slow and ineffective

process of expropriation and redistribution, as complex litigation created administrative bottlenecks in the process. The Chilean land reform agency, CORA, was forced to spend large amounts of already inadequate financial resources in fighting lengthy and complicated court cases. Finally, this slow and legally contested process of land reform contributed directly to rural polarisation and the environment that facilitated the 1973 military coup and, the reversal of the land reform programme under the leadership of Augusto Pinochet. The military coup, for example, was supported by conservative former landowners. The military government, therefore, terminated all land reform programmes, annulled the Chilean land reform agency, returned 28% of expropriated land to former landowners, withdrew all support for land reform beneficiaries and introduced macro-economic and agricultural policies that discriminated against and undermined resource-poor and emergent farmers.⁹⁴

The land reform programme introduced in China in the 1940s, under the leadership of Mao Tse Tung, on the other hand, contained as a principle element the elimination of the power of former landowners, moneylenders and traders in rural areas. This was achieved through extensive violence against former landowners, as well as, a policy of forced expropriation without compensation. As a result, 47 million hectares were distributed to some 300 million peasants and landless people in China's rural areas.⁹⁵

Interestingly, farmers in particular regions of South Africa have initiated the establishment of funds/trusts to collectively dispute all claims against farmland.⁹⁶ The problems of court-based restitution programmes also extend to the processes of expropriation and compensation.

7. Expropriation and Compensation (and the cost of Restitution)⁹⁷

Pre-1994 land reform policy debates, within the ANC, paid significant attention to the constitutional protection of property rights and “*there was heated debate about under what circumstances property can be expropriated and when and how much compensation would be necessary*”.⁹⁸ Proponents for wide-ranging powers of expropriation and limited compensation argued that it was not just to compensate the beneficiaries of apartheid, that the market-based system would not make sufficient amounts of land available for redistribution and that expropriation, with limited compensation, would reduce the financial burden on the state. Others argued for partial expropriation – expropriation with limited or no compensation of certain categories of land including foreign owned land,

⁹⁴ The Chilean example is based on information from Thome J.R, "Law, Conflict and Change in Chile 1964 - 1973", Searching for Agrarian Reform in Latin America, Thiesenhusen W.C, (Ed.), Unwin Hyman, London, 1989 & Jarvis L.S, "The unravelling of Chile's Agrarian Reform 1973 – 1986", Searching for Agrarian Reform In Latin America, Thiesenhusen W.C (Ed.), Unwin Hyman, London, 1989 & Brown M.R, "Radical Reform in Chile 1964-1973", Searching for Agrarian Reform in Latin America, Thiesenhusen W.C (Ed.), Unwin Hyman, London, 1989

⁹⁵ El-Ghonemy M.R, "China", The Political Economy of Rural Poverty, Routledge, London, 1990

⁹⁶ NLC, Land Restitution Media Fact Sheet, not dated

⁹⁷ This section of the chapter is closely related to the discussion in section 14 on the urban (cash settlement) versus rural (land restitution) debate, and should also be read with the figures (provided in section three of this chapter) in mind.

⁹⁸ Interview with Geoff Budlender, former Director General of DLA, July 2001

under-utilised land, indebted land, marginal land (for residential purposes) and land required for restitution.⁹⁹ (Internationally, partial expropriation is widely used as a method of land reform. In Brazil, chapter three, article 184 of the 1988 Constitution stipulates that the government has the right to expropriate land if it is in the social interest or, for the purpose of agrarian reform. Productive property, however, cannot be expropriated.¹⁰⁰ An interesting example of partial expropriation can be found in Peru, where the Agrarian Reform Law of 1969 stipulated that in cases where landowners did not comply with labour legislation, farms could be expropriated.¹⁰¹)

Some arguments against expropriation, in South Africa, were that it would result in a complicated and lengthy court process and that it could generate political opposition. In Peru, for example, land reform was limited partly because of the excessive bureaucratic and administrative procedures associated with expropriation.¹⁰² (The first objection would only apply if a legalistic system was used and, with regard to the second objection, political opposition is just as likely to emerge if a market-based system is utilised). World Bank representatives argued that market assisted land reform and expropriation, with compensation at market prices, would be the most advantageous.¹⁰³

The compromise that was reached is reflected in the Reconstruction and Development Programme (RDP) and the 1996 Constitution. The RDP stated that expropriation should occur in accordance with the Constitution (Section 2.4.7). The Constitution stated in Section 25 (1) that, *“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application – (a) for a public purpose or in the public interest; (b) subject to compensation, the amount of which has, either been agreed to by those affected or, decided or approved by a court. (3) The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including – (a) the current use of the property; (b) the history of acquisition and the use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation. (4) For the purpose of this section – (a) the public interest includes the nation’s commitment to land reform and reforms to bring about equitable access to all South Africa’s natural resources; and (b) property is not limited to land”*.¹⁰⁴

⁹⁹ Bonti-Ankomah S, Land Redistribution Options for South Africa, NLC, 1998

¹⁰⁰ Amnesty International, Report Brazil: Politically Motivated Criminal Charges Against Land Reform Activists, Amnesty International, August 1997

¹⁰¹ Lastarria-Cornhiels, "Agrarian Reforms of the 1960's and 1970'2 in Peru", Searching for Agrarian Reform in Latin America, Thiesenhusen W.C (Ed.), Unwin Hyman, London, 1989

¹⁰² Lastarria-Cornhiels, "Agrarian Reforms of the 1960's and 1970'2 in Peru", Searching for Agrarian Reform in Latin America, Thiesenhusen W.C (Ed.), Unwin Hyman, London, 1989

¹⁰³ Binswanger H, "The political implications of alternative models of land reform and compensation", in Agricultural Land Reform in South Africa, Van Zyl J, Kirsten J & Binswanger H (Eds.), Oxford University Press, Cape Town, 1996

¹⁰⁴ Constitution of the Republic of South Africa, Act 108 of 1996

The irony is that despite intensive debates and policy considerations, South Africa has so far witnessed only one, unsuccessful, attempt at expropriation. The Dinkwanyane community was forcibly removed between 1951 and 1961 when their farm, Boomplaats near Lydenburg in Mpumalanga, was declared a black spot. In 1995, the community lodged a claim for the return of their land.¹⁰⁵ The (then) current owner of the farm, Willem Pretorius, rejected the state's R1.472 million offer to purchase the farm. Pretorius bought 12 709 042 hectares of the farm in 1982 for R119 000 (less than market value) and received two loans at subsidised interest rates.¹⁰⁶ These factors were taken into account (following the constitution and three separate valuations) in determining the value of the farm. Pretorius responded by saying, "*I will get the money, if I have to beg, borrow or steal it*".¹⁰⁷ Pretorius was consequently served with an expropriation order on March 13, 2000. Pretorius took the matter to the Land Claims Court and was supported in his efforts by the conservative Transvaal Agricultural Union, who accused the Minister of Land Affairs of "theft" and called on "businesses and landowners not to invest in South Africa".¹⁰⁸ Shortly after this debacle, the DLA was forced to withdraw the expropriation order for "technical reasons" on March 21, 2001. It appears that the Constitution was inconsistent with an old-order law. The Land Expropriation Act of 1975 precludes expropriation of land unless it is in the public interest and, public interest does not include land reform according to the 1975 law.¹⁰⁹ The DLA has also recommitted itself to settling claims through negotiation and emphasised that expropriation would only be used as a last resort.¹¹⁰ Boomplaats was eventually sold in early 2002, with Pretorius reportedly taking "every fitting from his farmhouse" with him.¹¹¹

The issue of compensation, however, continues to be contentious. Protractors, including land NGOs, have consistently questioned the commitment to market value in determining compensation and have argued that the productive value of the land would be a better criterion for compensation. TRAC cautioned against the arbitrary methods employed to determine compensation¹¹² rates and the value¹¹³ of land. Hall¹¹⁴ pointed out that when calculating the value of land rights lost, it would be inaccurate to discount the amount of compensation paid in the past from the current compensation package, because the

¹⁰⁵ Frochtling A, *If the colours of the Rainbow could talk*, SACC, 1998

¹⁰⁶ Commission of the Restitution of Land Rights, Press Release, March 21, 2001

¹⁰⁷ Commission of the Restitution of Land Rights, Press Release, March 21, 2001

¹⁰⁸ Cook L, "Farmer falls victim of misguided TAU", *Business Day*, March 19, 2001

¹⁰⁹ *Business Day*, May 17, 2001

¹¹⁰ *Mail & Guardian*, October 19 – 25, 2001

¹¹¹ Turner S, Land and Agrarian Reform in South Africa: A status report, 2002, Research Report no. 12, PLAAS, August 2002, p. 8

¹¹² Also see chapter seven.

¹¹³ As was the case with the Putfontein claim discussed in this chapter "*Three members of the board [Land Affairs Board] differed so widely in their interpretations of Section 28(3) [how to determine compensation] of the Constitution that putative compensation for one farmer ranged from R34 000 to R131 000 for a farm that has an open market value of R160 000*", in Brown M, Erasmus J, Kingwill R, Murray C & Roodt M, *Land Restitution in South Africa: A long way home*, Idasa, Cape Town, 1998, p. 72 & 73

¹¹⁴ Hall R, "Rural Restitution 2: Evaluating land and agrarian reform in South Africa", Occasional Paper Series, PLAAS, UWC, September 2003

possible uses to which black South Africans could put the money were restricted – they could, for example, not have bought property.¹¹⁵

There are some interesting international criteria for compensation that, it seems, have not been considered in the South African context. In Peru, compensation was based on the amount former landowners had declared for tax purposes. Under the Frei administration in Chile, landowners who willingly sold their land were paid higher levels of compensation than those whose land was acquired through expropriation. This encouraged the sale of rural land and increased the availability of land for redistribution. Together with excess land, voluntary transfer accounted for approximately 70% of the land redistributed under the Frei administration.¹¹⁶

The 1997 White Paper on land reform, appears to be closer to the arguments made by World Bank representatives (discussed earlier in this section) and, stated that compensation would be paid in a “just and equitable way” based on the following factors:

- The actual price that was paid by the present owner/s at the time of acquisition
- The market value of the land including improvements at the time of acquisition
- The present day market value of the land, but excluding improvements made by the owner/s.
- The contributing value of beneficial improvements made to the property by the owner/s since the time of acquisition.
- The value of any special benefits which the owner/s received from the state.¹¹⁷

Determining compensation at market-value (i.e. full compensation) results in a host of problems and complications in the context of the Restitution programme. Firstly, an enormous financial burden is placed on the state, which requires innovative efforts to obtain sufficient financial resources. This is particularly true in a country like South Africa, where there is no funding available from a previous colonial power, as was the case in, for example, Kenya and Zimbabwe. In mid-2001, it was estimated that the cost of settling an average rural claim was between R1.5 million and R3 million. (However, in early 2001, the settlement of only one rural claim – the Mamahlola claim – cost R32 million). The projected total cost of the restitution programme (in 2001) was R30 billion, while the actual budget for restitution was R200 million.¹¹⁸ Du Toit, in 2000, estimated that based on rates current at the time it would cost R2 billion just to settle outstanding urban claims (through financial compensation) and another R20 billion to settle rural claims (through land acquisition) – thus, R22 billion.¹¹⁹ Based on Du Toit’s

¹¹⁵ Hall R, “Rural Restitution 2: Evaluating land and agrarian reform in South Africa”, Occasional Paper Series, PLAAS, UWC, September 2003

¹¹⁶ Thome J.R, “Law, Conflict and Change in Chile 1964 - 1973”, Searching for Agrarian Reform in Latin America, Thiesenhusen W.C, (Ed.), Unwin Hyman, London, 1989

¹¹⁷ Department of Land Affairs, White Paper on South African Land Policy, Pretoria, April 1997, p. 57 & 58

¹¹⁸ Lahiff E, “Land reform in South Africa: is it meeting the challenge?”, Policy Brief, no.1, PLAAS, September 2001

¹¹⁹ Du Toit A, “The End of Restitution: Getting real about land claims”, in Cousins B (ed.), At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century, PLAAS, UWC, 2000

“conservative” estimate (compared to Lahiff) the restitution budget would have to increase ten fold to meet the challenge.

The financial burden on the South African government can be reduced by engaging alternative methods of paying compensation, such as compensation paid in instalments or via stocks in government owned enterprises. In Chile (1967), the Agrarian Reform Law stipulated that landowners would be compensated in instalments over a period of ten years.¹²⁰ In Taiwan, former landowners were compensated at market value in the following way: 70% of the compensation in two annual payments over a period of 20 years and 30% in the form of stocks in government enterprises.¹²¹ In South Korea, the purchase price was paid in government bonds and many landowners were thus encouraged to sell their land on the free market out of fear of expropriation and compensation in government bonds.¹²² Other interesting examples include legislation in Brazil, under the leadership of President Fernando Henrique Cardoso, which stipulated that properties confiscated by the courts after being used to cultivate drugs could be redistributed to landless families. Also in Brazil, the government increased the agrarian reform budget by \$900 million by using proceeds from bank accounts abandoned by their holders (generally containing money obtained through criminal operations).¹²³

Secondly, the combination of a restitution programme and market-based compensation is not particularly efficient and can have negative consequences not only for communities who out of frustration may invade land, but also for landowners in terms of production. The Putfontein Farms case study conducted by Brown et al¹²⁴ should serve to illustrate the point. The Batloug community’s Land Claims Committee lodged a claim for the Putfontein Farms¹²⁵, from which they were removed in the 1970s, in early 1993. By March 1997, a community that was feeling “overwhelming frustration and helplessness” had still not received their land and were threatening to invade the land. This kind of delay is unfortunately not uncommon in the restitution programme, but what was uncommon was the response of the 15 farmers whose farms were to be bought at market-rates. The farmers took the government (DLA) to the Supreme Court arguing that the government should purchase the land within a specified period or inform them that no offer would be made. The Supreme Court agreed, setting the period at one month, because the uncertainty was negatively affecting production on landowners’ current and future farms.

Third (as discussed in the previous section and above regarding Putfontein) landowners continue to wield substantial power and can therefore influence the prices that they are paid – especially in cases where the potential beneficiaries of the restitution programme

¹²⁰ Thome J.R, "Law, Conflict and Change in Chile 1964 - 1973", Searching for Agrarian Reform in Latin America, Thiesenhusen W.C, (Ed.), Unwin Hyman, London, 1989

¹²¹ Cloete F, "Comparative lessons for land reform in South Africa", Africa Insight, Vol.22, No.4, 1992

¹²² El-Ghonemy M R, "South Korea", The Political Economy of Rural Poverty, Routledge, London, 1990

¹²³ Both Brazilian examples from Osava M, "Brazil Development: Financial Deficit main enemy of Land Reform", World News, December 4, 1997

¹²⁴ Brown M, Erasmus J, Kingwill R, Murray C & Roodt M, Land Restitution in South Africa: A long way home, Idasa, Cape Town, 1998, p. 69-82

¹²⁵ The farms are 40kms west of Ventersdorp on the West Rand.

demand a particular piece of land for “emotional”/justice and not “economic” reasons. To counter the power of landowners, expropriation (or at least a “credible threat of expropriation”¹²⁶) is necessary – as evidenced from the international experiences discussed above.

8. The complex nature of claims for restitution

In this context of contested policies, the problems emerging from implementation hardly come as a surprise. Policy developers had underestimated the complex and overlapping nature of claims. It soon became apparent that claims were “mind boggling”¹²⁷ in terms of complexity, the protracted nature of the process of dispossession (i.e. some communities had been removed several times), the destruction of community cohesion, and cases that involved multiple claimants dating back over a century. A number of South African case studies illustrate the point.

The Dunn family’s case is a particularly good example of the complex and overlapping nature of land claims, as well as, the potential for conflict. Scottish trader, John Dunn, was granted chieftanship over large tract of Zululand after the Anglo-Boer war, in 1979, in return for his contribution to the battle of Isandlwana.¹²⁸ He married 48 Zulu wives and set up a homestead at Mangete. Following an 83-year battle, title deeds to the land were given to Dunn’s descendants in the early 1990s. In 1996, the Macambini community lodged a claim against part of the land restored to the Dunn family, arguing that they were forcibly removed from the land in 1976. Approximately 1 000 members of the Macambini community subsequently invaded the land and, by February 2001, the police had to be deployed to deal with conflict in the area. The Dunn family applied (at the same time) to the Land Claims Court to have the “illegal” squatters evicted from their sugar farms. The Land Claims Court has tried to settle what it called a “volatile” matter through negotiations.¹²⁹ During this time, none of the farmers could obtain credit or make improvements to their properties and no squatters could be evicted. After a decade of conflict (that included destruction of property, arson and violence), the Mangete claim was finally settled in December 2002.¹³⁰ The Land Claims Court ordered the eviction of “illegal squatters” and also purchased an adjacent farm for the resettlement of the Macambini community. The Court did not stipulate who would pay for the evictions, clarify which 199 families are the legitimate claimants and which of the remaining 800 are not, or explain how previously hostile groups were going to live peacefully on adjacent pieces of land.

The Makuleke claim highlights problems around power, vested interests and the overlapping nature of claims. The Makuleke claim was formally submitted in December 1995. The claim included all land in the Pafuri triangle, a small section of the Makuya Park to which the Mutele community also claimed rights and some 300 hectares inside

¹²⁶ Hall R, “Rural Restitution 2: Evaluating land and agrarian reform in South Africa”, Occasional Paper Series, PLAAS, UWC, September 2003

¹²⁷ Interview with Dave Husy (Former Deputy Director of the NLC), May 31, 2001

¹²⁸ *Business Day*, February 20, 2001

¹²⁹ *Mail & Guardian*, March 2 – 8, 2001

¹³⁰ *Mail & Guardian*, “Call for peace in the valley”, December 6 – 12, 2002

the Madimbo Corridor that also overlapped with the Mutele land claim.¹³¹ In 1997, three other communities indicated their intentions to submit claims on the Madimbo Corridor and the Pafuri area – the Menenshe, Mphaphuli and the Mhinga tribal authorities. Agreements were reached in most cases but chief Mhinga “had a negative influence on the Makuleke claim for years”.¹³² The animosity and power struggles between the Makuleke and chief Mhinga date back to the forced removals of the 1960s and was exacerbated by Mhinga’s consistent attempts to extend his political power over the Makuleke community.¹³³

The Mojapelo case demonstrates the protracted nature of dispossession - i.e. that forced removals were often a process and not an event. The Mojapelo community were forced to “move around the broad areas of the Mojapelo tribal lands in an attempt to cling” to land.¹³⁴ In addition, the Mojapelo land claim overlaps with the land claims of at least three other communities, the Mothiba, Mothapo and Molepo.

The Tenbosh land claim illustrates the possible extent of rural claims. The Tenbosh Consolidated Land Claims Committee represents 7 000 people, laying claim to approximately 115 000 hectares of some of the most valuable farmland in South Africa (Nkomazi in eastern Mpumalanga). The area includes about 50km of the Maputo Corridor and three towns, Hectorspruit, Marloth Park and Komatipoort. Fortunately, in the Nkomazi case, landowners in the area have been very willing to participate in the resolution of the claim and to provide post-settlement support.¹³⁵

In the case of the Gatlose, Khosi and Maremane communities, the dispute is with the South African National Defence Force. The dispute started in 1995 and, was not yet resolved, in December 2002. The three communities were forcibly removed from their land (approximately 135 000 hectares) in 1977 and received no compensation. In the meantime, the South African National Defence Force (Lohatla Army Battle School) used the land as an ammunition testing and training area. The Defence Force has argued that the area is unsafe for settlement and that it would cost R200 million to clean up the contaminated areas.¹³⁶ Parts of the area have subsequently been invaded and used for grazing by members of the communities.

9. Lack of community cohesion

Communities not torn apart by the process of dispossession often disintegrated once resettlement took place. Age, gender, history, identities and authority all contributed to divisions among the beneficiaries of the Restitution Programme. In many cases, for

¹³¹ Steenkamp C. I. The Makuleke land claim: An Environmental Conflict, PhD Thesis, University of Witwatersrand, 2001

¹³² Interview with Durkje Gilfillan (Former Land Claims Commissioner), June 1, 2001

¹³³ For more detail on the Makuleke see environment section in chapter two

¹³⁴ For more detail on this case see Levin R.M, “Land Restitution, the Chieftancy and Territoriality: The case of the Mmaboi Land Claim in South Africa’s Northern Province, Centre for African Studies, March 1996

¹³⁵ *Sunday Times*, November 25, 2001

¹³⁶ Ballenger J, “Land Court sets row deadline”, *Business Day*, September 30, 1997

example the Makuleke community, it was the older generation that wanted to return to the land. Very often the younger generation was interested in employment creation, development and provision of services at current locations. The same issues played out in gender divisions, where women often preferred to stay in current locations.¹³⁷

Conflict emerged in the Elandskloof community when a number of claimants identified plots in contravention of pre-settlement agreements.¹³⁸ Historic cleavages undermined community cohesion in the Riemvasmaak community of the Northern Cape. When the community was forcibly removed in the 1970s, the government divided the members of the community along racial lines and each “race” was resettled in a different area – Xhosas in the Ciskei and “coloureds” in various towns in the Northern Cape.¹³⁹ Individuals were paid R20 in compensation for their houses, which were burnt down in order to make the land available for use by the South African National Defence Force.¹⁴⁰ By 1995, the Riemvasmaak community had resettled on their former land but cleavages continued and serious efforts were required to build community cohesion. Researchers described the mood in the settlement as one of “disillusionment”, “resentment” and “despair” – feelings that were heightened when a child was injured by a SADF landmine.¹⁴¹

The Bakwena Ba Mogopa were a prosperous¹⁴² community when the two farms to which they had title deeds, Zwartland and Hartebeeslaagte, were declared black spots in 1981. The government exploited a chieftancy dispute raging in the community at the time to affect the removal (along with violence and intimidation tactics - i.e. bulldozing three churches and a clinic and stopping the provision of bus services, pensions and water to the area¹⁴³). Following a decades long struggle, the community finally received rights to Zwartland. But, divisions relating to the old chieftancy dispute have hampered development on the farm.

10. Accountability of leadership

Disputes around authority and unaccountable leadership structures have also hampered development in restitution projects. Three South African restitution projects illustrate the point – Doornkop, Makuleke and Barolong.

An estimated 20 000 people were forcibly removed from Doornkop in 1974, when the area was declared a “slum”. The Internal Stability Unit of the South African Police later used the land. The return of sections of the community to the land, in 1995, has been laden with problems. By 1997, there was virtually no development at Doornkop, partly because the Doornkop Management Committee was neither broadly representative nor

¹³⁷ See chapter 10 on Women, Patriarchy and Land Reform

¹³⁸ Dawood Z, “Is Restitution in need of a remedy”, Report Paper for the NLC, April 1998

¹³⁹ Cousins B & Cousins D, Lessons from Riemvasmaak, University of the Western Cape, Farm Africa, January 1998

¹⁴⁰ Winberg M, Back to the Land, Porcupine Press, JHB, 1996

¹⁴¹ Winberg M, Back to the Land, Porcupine Press, JHB, 1996

¹⁴² for details see TRAC, “The Bakwena Ba Mogopa”, New Nation, March 7 1991

¹⁴³ for details see Frochtling A, If the colours of the Rainbow could talk, SACC, 1998, p. 190 - 205

legally constituted. This has made it difficult for the government and NGOs to establish a development programme since, it is unclear what the community's real needs and perceptions are.¹⁴⁴

The Barolong were forcibly removed from their land near Potchefstroom in 1974 and, went from being self-sufficient (prosperous) to receiving food handouts from Operation Hunger.¹⁴⁵ The community finally returned to their land in 1995, but by 1998 very little development had taken place and the community had still not received title deeds to the land. Leadership disputes and consequent divisions in the community have undermined the process.

The Makuleke restitution project, on the other hand, has been successful in generating income and opportunities for economic growth.¹⁴⁶ This is partly a result of the fact that the Makuleke leadership has remained "unusually accountable" to the broader community.¹⁴⁷

11. Resuscitation of the chieftancy

Levin¹⁴⁸ argues that the process of restitution is biased towards the submission of unitary claims and favours communities that can be represented by a single institution or organisation. The role of chiefs has, thus, been strengthened because chiefs are often in the position to lodge claims on behalf of communities. Levin's findings are based on a case study conducted in Mmaboi among the Mojapelo community, but evidence from other restitution projects also support his argument. As Commissioner Gilfillan said, "we dealt with a number of claims where the chiefs were just trying to muscle in, there are always power struggles and these touch on issues of traditional leaders versus democratic structures".¹⁴⁹

The Mhinga Tribal Authority's counter claim in the Makuleke case, for example, emerged out of a historic conflict between chief Mhinga and chief Makuleke. In terms of the Black Administration Act, chief Makuleke became a headman under the Mhinga chieftancy. The two land claims reflect both the Makuleke community's fight for independence and chief Mhinga's attempts to expand his authority. "*The Makuleke featured as part of an ambitious plan to re-establish Mhinga's ascendancy as the paramount in the far north. He [Mhinga] wanted to gain control of the Pafuri area through the Makuleke. Mhinga would then be top boss. He tried three times to lodge a claim and three times I dismissed it*".¹⁵⁰ As Levin points out, one of the unintended consequences of the Restitution Programme appears to be the revival of "tribal identities

¹⁴⁴ for details see TRAC, Restitution in a Presidential leads project: the case of Doornkop 42, 1996

¹⁴⁵ for details see Frochtling A, *If the colours of the Rainbow could talk*, SACC, 1998, p. 215 - 235

¹⁴⁶ See section on Environment and Land Reform in chapter 2

¹⁴⁷ Interview with Durkje Gilfillan (Former Land Claims Commissioner), June 1, 2001

¹⁴⁸ Levin R.M, "Land Restitution, the Chieftancy and Territoriality: The case of the Mmaboi Land Claim in South Africa's Northern Province, Centre for African Studies, March 1996

¹⁴⁹ Interview with Durkje Gilfillan (Former Land Claims Commissioner), June 1, 2001

¹⁵⁰ Commissioner Gilfillan as above

and conflicts through the central role chiefs play in land claims”. The resuscitation of the chieftancy also raises questions around democratic process and community participation.

12. Capacity Constraints

Neither the Department of Land Affairs, nor the NGOs involved in the restitution process, had the financial or human resources required to effectively implement the programme. The slow process of restitution ensured that the budgetary constraints¹⁵¹ on the restitution process were not really publicly recognised but, estimates are that at an annual budget of R100 million the restitution programme will only be completed in 2190.¹⁵² In 2002, researchers at PLAAS estimated that a six-fold increase in the Restitution budget was required to finalise the programme by December 2004.¹⁵³ The PLAAS researchers calculated that it would cost R28.8 billion just to settle the rural restitution claims.¹⁵⁴ The total budget for the restitution programme has, however, increased in recent years and stood at R189 456 000 for the 2001 to 2002 financial year.¹⁵⁵ The Minister of Finance, Trevor Manuel, announced in his March 2003 budget speech that an additional R1.9 million would be allocated to the Restitution Programme.¹⁵⁶ This means that the budget for Restitution will more than double in 2003. (On the other hand, critics have pointed to the fact that the allocation is for a period of two years, which means that the allocation drops dramatically for the remainder of the Medium Term Expenditure Framework. In 2004/05 the Restitution budget would increase by only 9% and drop to an increase of one percent in 2005/06.)¹⁵⁷ The Department of Land Affairs has also obtained R5 million in donor funds for the restitution programme and are expecting a further R10 million from a foreign government.¹⁵⁸ Expenditure trends on the Restitution programme also indicate a marked increase with R198 million spent in the 2000 to 2001 financial year.¹⁵⁹

Although a marked improvement, some actors¹⁶⁰ in the land reform process feel that meeting financial constraints is only a small part of the solution. “*Throwing money at it is not going to solve the problem, what is needed is a workable and well-planned process*”¹⁶¹, and sufficient staff to perform the required functions. Neither the Department of Land Affairs, nor the Commission for the Restitution of Land Rights had

¹⁵¹ Also see the discussion on the cost of market-related compensation in section seven of this chapter.

¹⁵² Turner S & Ibsen H, “Land and agrarian reform in South Africa: A Status Report”, Occasional Paper Series, PLAAS, UWC, November, 2000

¹⁵³ Turner S, Land and Agrarian Reform in South Africa: A status report, 2002, Research Report no. 12, PLAAS, August 2002, p. 7 & 8

¹⁵⁴ Mail & Guardian, “Land restitution allocation inadequate”, February 28 – March 6, 2003

¹⁵⁵ DLA, Restitution Statistics, November 9, 2001, from the DLA website

¹⁵⁶ Star, “Trevor’s plum budget”, February 27, 2003

¹⁵⁷ Mail & Guardian, “Land restitution allocation inadequate”, February 28 – March 6, 2003

¹⁵⁸ Beeld, June 30, 2001

¹⁵⁹ Didiza T, Budget Speech, Land Info, 8,1, 2001

¹⁶⁰ for example Commissioner Gilfillan & Former Deputy Director of the NLC, Dave Husy & former Director General of DLA Geoff Budlender

¹⁶¹ Interview with Commissioner Gilfillan

sufficient staff. In 1997, according to Brown et al¹⁶² staff shortages were so extreme at provincial offices of the DLA that not one office had been able to allocate staff to deal with restitution on a full-time basis.

A further part of the solution may lie in developing skills (particularly administrative skills). *“One of the biggest problems we had in the Commission was a lack of the relevant skills among staff members and the lack of a logical process.”*¹⁶³ For the Commission on the Restitution of Land Rights in particular, there was a lack of research and legal skills. *“A process has been worked out now, but in the beginning we just did our jobs the best we could. Sometimes we did things in the wrong order, and we were all learning”*.¹⁶⁴ Administrative skills were particularly lacking in the initial stages of the restitution programme and were left to “old-guard” officials. Allegations have been made that individuals used such positions to slow down the restitution process. *“It took people a long time to realise how important bureaucracy was. People from the old-guard were the only ones who understood the systems and procedures because former activists had no experience of how government worked. There was one guy who was responsible for the financial transactions between the Commission and the DLA. He personally ensured that the process became bottlenecked”*.¹⁶⁵ As Derek Hanekom explains, *“I don’t think that realistically the restitution programme could have been implemented any faster. The initial slowness was inescapable. First we had to prepare legislation. A commission had to be appointed and a court had to be established. We thought that once you were in government all you needed was for the president to say ‘there shall be a court’ and then a court would appear. In reality it does not work like that. There were many cumbersome bureaucratic procedures and one has to remember that many people had never worked in a government department before”*.¹⁶⁶

Lack of co-operation between government departments and, particularly, between the Land Claims Commission and the DLA has further contributed to the slow process of restitution.

13. The Land Claims Commission and Administrative Changes

In September 1996, former Chief Land Claims Commissioner, Joe Seremane¹⁶⁷, said that it would take 20 years to complete the land restitution process.¹⁶⁸ This assessment appears reasonable given the fact that no claims had been settled at that stage. Personality and racial tensions, as well as, lack of procedure and weak management and administrative capacity, seriously marred the performance of the Land Claims

¹⁶² Brown M, Erasmus J, Kingwill R, Murray C & Roodt M, Land Restitution in South Africa: A long way home, Idasa, Cape Town, 1998, p. 11

¹⁶³ Interview with Commissioner Gilfillan

¹⁶⁴ Interview with Commissioner Gilfillan

¹⁶⁵ Interview with Dave Husy

¹⁶⁶ Interview with Derek Hanekom (Former Minister of Land Affairs and Member of Parliament), Hartebeestpoortdam, September 8, 2002

¹⁶⁷ For a brief biography of Joe Seremane see Lelyveld J, Move Your Shadow, Abacus, London, 1987, p. 279 – 286 & 294

¹⁶⁸ Star, "Land Reform Could take years", September 9, 1996

Commission. Other problems included tensions between the Land Claims Commission and the Department of Land Affairs, having a Commission external to the DLA, the lengthy and bureaucratic process for accepting claims and human resource capacity constraints.

With regard to administration “*there was no coherent plan, we did not know how many claims there were, figures changed by the hour. There was no process and no order, and we just went on working and doing what we could*”.¹⁶⁹ Respondents, to interviews conducted by Brown et al among staff from the DLA and the Land Claims Court, noted that it was difficult to obtain information (especially correct information) from the Commission, because of the Commission’s weak administrative systems.¹⁷⁰ The actual administrative procedures for Restitution were extremely complex,¹⁷¹ but can be divided into the (1) the adjudication process and (2) the planning and implementation process. These two processes took place simultaneously, and all three the bodies (the Land Claims Commission, the Land Claims Court and the Department of Land Affairs) were involved. Quite predictably, this led to duplication, inefficiency and conflict. The problems in the adjudication process were mainly procedural and related to the legalistic requirements of the process (see section six of this chapter).

Human resource capacity constraints (also see section ten of this chapter) contributed to conflict between the Commission and the DLA and certainly hampered the performance of the Commission. This issue was partly addressed in 1998, when the DLA created 30 new posts within the Commission and obtained funding from the Netherlands government to employ a further 50 people.¹⁷² Furthermore, Brown et al found that morale was low in the Department of Land Affairs and in the Commission, and was especially low in the parts of the DLA that did not deal directly with land restitution, but were nevertheless crucial in terms of information, e.g. the Surveys and Deeds department. The legalistic requirements of investigation (see section six of this chapter) placed further pressure on the Commission, which already had limited capacity, and is one of the reasons for the initial backlog in processed claims.

Capacity constraints also extended to basic equipment. At times, the Commission did not even have telephones.¹⁷³

As noted before, there were essentially three bodies responsible for Restitution – the Department of Land Affairs, the Commission for the Restitution of Land Rights and the Land Claims Court. One of the biggest structural problems in the Restitution process was the relationship between the Commission and the Department of Land Affairs. The Commission was established as an autonomous body, but was funded by the DLA and

¹⁶⁹ Interview with Commissioner Gilfillan

¹⁷⁰ Brown M, Erasmus J, Kingwill R, Murray C & Roodt M, Land Restitution in South Africa: A long way home, Idasa, Cape Town, 1998

¹⁷¹ For a good break-down see pages 41-43 of Brown M, Erasmus J, Kingwill R, Murray C & Roodt M, Land Restitution in South Africa: A long way home, Idasa, Cape Town, 1998

¹⁷² Geoff Budlender, Letters to the editor, Mail & Guardian, October 23 – 29, 1998

¹⁷³ Brown M, Erasmus J, Kingwill R, Murray C & Roodt M, Land Restitution in South Africa: A long way home, Idasa, Cape Town, 1998

partially relied on the department for infrastructure and expertise, and the Director-General of the Department of Land Affairs was the chief accounting officer of the Commission.¹⁷⁴ At the same time, however, the Department of Land Affairs had “clumsy financial and administrative procedures” and budget restrictions. Brown et al found that the Department of Land Affairs did not respond efficiently or effectively to the Commission’s requests for infrastructure and additional staff. The DLA’s inability to respond effectively has “been seen as obstruction by some of the commission staff interviewed”. This is also evident in the following discussion regarding the conflict between Chief Land Claims Commissioner, Joe Seremane and the Department of Land Affairs in the late 1990s.

The strained relationship between the Commission and the DLA, as well as allegations of racism, came to light in October 1998, when Seremane launched a scathing attack on the DLA in the South African press. Seremane said that he was “embarrassed and frustrated”, that the budget allocations made to the Commission reduced it to the status of a “Cinderella organisation” and made the Commission “dependent on the mercy of veto powers of the DLA”.¹⁷⁵ Seremane also argued that the slow restitution process was due to racism in the Commission.¹⁷⁶ This set in motion a series of attacks and counter-attacks between members of the DLA in the South African press. Derek Hanekom dismissed the racism charges and responded by saying, “*the fact that all five Seremane’s commissioners, three of whom were black, have requested the minister to intervene because their relationship with him was becoming unworkable . . . seems to suggest that the problem is not racism and lies elsewhere*”.¹⁷⁷ Former Director General Geoff Budlender denied that budget allocations had reduced the Commission to “Cinderella” status and pointed out “*that in 1996/7 the Commission spent R7.7 million of the money allocated to it and, in 1997/8 it spent R18.6 million and this year it has been allocated R30.1 million. The fact is, that at current spending rates, the Commission will not spend more than 70% of the budget allocated for this year*”.¹⁷⁸ Shortly thereafter, in November 1998, the five Regional Land Claims Commissioners cast a vote of no confidence in Seremane, after he invited the media to attend a meeting aimed at resolving the above mentioned crisis. Geoff Budlender then wrote to minister Hanekom recommending Seremane’s dismissal.¹⁷⁹

In 1997, the Restitution of Land Rights Act 22 of 1994, had been amended to allow claimants direct access to the Land Claims Court and to give the Minister of Land Affairs more power to settle claims through negotiation (i.e. without the court). These legislative changes were followed by the 1998 Restitution Review, which introduced a number of further changes.¹⁸⁰ The Review identified “lack of leadership” as one of the four biggest

¹⁷⁴ Brown M, Erasmus J, Kingwill R, Murray C & Roodt M, Land Restitution in South Africa: A long way home, Idasa, Cape Town, 1998

¹⁷⁵ Mbhele W, "Seremane's extraordinary attack on Hanekom", Mail & Guardian, October 16 – 22, 1998

¹⁷⁶ Mbhele W, "Seremane's extraordinary attack on Hanekom", Mail & Guardian, October 16 – 22, 1998

¹⁷⁷ Derek Hanekom, Letters to the editor, Mail & Guardian, October 23 – 29, 1998

¹⁷⁸ Geoff Budlender, Letters to the editor, Mail & Guardian, October 23 – 29, 1998

¹⁷⁹ Mail & Guardian, “Hanekom fires Seremane”, November 6-12, 1998

¹⁸⁰ Du Toit A, Makhari P, Garner H and Roberts A, Report: Ministerial Review on Restitution, DLA, Pretoria, 1998

problems in the Land Claims Commission, thereby compounding the sentiments generated by the press debacle. The Land Claims Commissioner was relieved of his duties in November 1998 and the Land Claims Commission was incorporated into the DLA. The role of the Commission on the Restitution of Land Rights was expanded. As mentioned before, the Commission was further integrated into the Department of Land Affairs and commissioners were made responsible to the Director-General, creating new opportunities to link the restitution programme more closely to the overall national land reform programme.¹⁸¹ Other changes included a greater utilisation of the option to pay financial compensation. A claims validation process was introduced under Minister Didiza's leadership in June 2001. This will hopefully help to prioritise claims and provide beneficiaries with information on the status of their claims. (Commissioner Gilfillan expressed serious reservations about the validation drive, which she calls "political razzmatazz". She argued that validation is part of the normal workload and not a "drive"). Nevertheless, these changes contributed to the faster pace of claim settlement and land delivery that (to the benefit of the new minister) only became apparent from 2000 onwards.

14. Financial compensation and post-restitution development

According to the 1997 White Paper on Land Reform Policy in South Africa, one of the purposes of the Restitution programme is to "support . . . development". However, the programme seems to have focussed on the restoration of land rights. The Restitution Programme (and the emphasis on rights as opposed to development) has remained largely unchanged under the new Minister of Agriculture and Land Affairs. Didiza has, however, made some critically important observations. She questioned the rationality of spending large amounts of money on restoring land rights (or paying compensation) without integrating these efforts into a broader development process.¹⁸²

Other commentators have also pointed out that the Restitution Programme has been designed without links to planning or development processes and, that restitution projects rarely address livelihood creation.¹⁸³ Furthermore, there is no procedure or policy for post-settlement/ post-restitution support to beneficiaries. Lahiff¹⁸⁴ points out that in the absence of a systematic review, case studies suggest "*major problems in terms of inadequate infrastructural development, poor service provision and unrealistic business planning*". And that "*Where tangible developmental benefits have occurred, this has generally been attributable to considerable external support, co-ordinated planning and the active participation of claimants themselves, as in the case of the Makuleke*".

¹⁸¹ Du Toit A, Makhari P, Garner H and Roberts A, Report: Ministerial Review on Restitution, DLA, Pretoria, 1998

¹⁸² Turner S & Ibsen H, "Land and agrarian reform in South Africa: A Status Report", Occasional Paper Series, PLAAS, UWC, November, 2000

¹⁸³ Interview with Chris Williams (Director of TRAC Mpumalanga), May 24, 2001 & Interview with Ben Cousins, (Director PLAAS), July 2, 2001 & Turner S & Ibsen H, "Land and agrarian reform in South Africa: A Status Report", Occasional Paper Series, PLAAS, UWC, November, 2000

¹⁸⁴ Lahiff E, "Land reform in South Africa: is it meeting the challenge?", Policy Brief, no.1, PLAAS, September 2001

Clearly, development is a crucial issue and, many beneficiaries of the restitution programme are as impoverished as they were before they obtained their land. For example, in 1994, ten years after the forced removals, members of the Bakubung Ba Ratheo community returned to their land in the North West province. By 1996, the community still had no formal housing, electricity or water supply and required financial aid to start farming operations.¹⁸⁵ It is therefore necessary that restitution planners start placing greater emphasis on development and options for livelihood creation.

NGOs (and other commentators) have taken up a similar line, arguing that what appears to be a faster restitution process is merely the result of “an unofficial priority”¹⁸⁶, until 2002, to settle urban claims and of increasingly using the option to pay financial compensation - i.e. financial compensation is not land reform.¹⁸⁷ The argument is that a land reform programme should address the spatial legacy of apartheid (land restitution is uniquely capable in this regard) and paying financial compensation will not bring about a significant transformation of space. Furthermore, it is argued that paying financial compensation is not likely to contribute to sustainable development.

At the same time, critics have often over-generalised the problem and are in danger of prescribing solutions to potential beneficiaries, who, in some cases, genuinely prefer financial compensation (i.e. capital to invest in other business/ developmental ventures). In any case, potential beneficiaries/ claimants have a legal right to choose compensation. Furthermore, paying financial compensation can (and has) significantly speed up the claims settlement process in urban areas. In many restitution projects, tremendous effort went into establishing sustainable income generating projects.¹⁸⁸ The fact is that in many (mostly urban) cases, there is no option other than to pay financial compensation (e.g. Sophiatown). The concern that financial compensation is not likely to contribute to spatial transformation and sustainable development may have been premature. Several urban cases have been settled primarily through financial compensation but, have nevertheless, contributed to development, spatial transformation and building community cohesion.

For example, after a seven year process, the parishioners of the Christ the King Anglican Church in Sophiatown received R1.4 million in compensation for land lost during the forced removals in the mid 1950s. The money will be used to restore the church and improve community services. Attempts will also be made to gather together the parishioners who are currently scattered between Sophiatown and Soweto. This could contribute to social regeneration and community cohesion.¹⁸⁹

¹⁸⁵ for details see Frochting A, *If the colours of the Rainbow could talk*, SACC, 1998, p. 206 - 214

¹⁸⁶ Hall R, “Rural Restitution 2: Evaluating land and agrarian reform in South Africa”, Occasional Paper Series, PLAAS, UWC, September 2003

¹⁸⁷ This argument has been expressed in NLC press releases, by the Director of the NLC on SAFM on June 28, 2002, and by a number of interviewees including Budlender, Chris Williams (Director of TRAC Mpumalanga), and Tom Lebert (Deputy-Director NLC)

¹⁸⁸ The Makuleke Contractual National Park Agreement discussed in the section on environment provides an excellent example of this.

¹⁸⁹ Northcliffe/Melville Times, “Church wins lottery”, July 20, 2001

The Bakgaga Bakopa community was forcibly removed from Maleoskop (Mpumalanga) in July 1962. The property was thereafter used by the South African security forces and is littered with unexploded mines and munitions. The community's land claim was settled in February 1998. In terms of a post-settlement agreement the community will stay in their current settlement Tafelkop (twice the size of Maleoskop) and rent Maleoskop to the South African Police Services. Income from rent will be set aside for bursaries and used for development at Tafelkop.¹⁹⁰

Between 1966 and 1984, at least 60 000 people were forcibly removed from District Six – most to the wastelands of the Cape Flats. Since then, more than half the land has been sold or developed. Accordingly (of the claims lodged by September 1998) 28% were for land under existing roads, 18% for land developed by the Cape Technikon, 13% for land that lies under homes erected after the forced removals, and 41% for vacant land owned by the Western Cape government.¹⁹¹ Of the 2 400 District Six claims, one third would have their land restored (8 000 people) while, two thirds would receive financial compensation (R20 000) and/or access to government housing schemes elsewhere.¹⁹² This is not ideal, but within the confines of practicality, the project does address the spatial legacy of apartheid. In terms of development, former residents and local black businesses will be involved in the design and construction of the new houses.¹⁹³

A similar compromise was reached with the Tramway community, removed from Cape Town's inner city under the Group Areas Act in 1961. Thirty-nine families will resettle in the inner city, while 70 families opted for financial compensation.¹⁹⁴ The first land restitution claim, involving urban land in Port Elizabeth, was settled in February 2000. With the help of the Legal Resources Centre, the Urban Services Group and the Delta Foundation, the Port Elizabeth claimant group formed the Port Elizabeth Land and Community Restoration Association. Following a lengthy period of negotiation and (initially) mass action and litigation, the community presented its own model for restitution.¹⁹⁵ Four thousand people will receive land (minimum 200 square metres) near the inner city. The DLA will provide a further R42 million for residential development in the area.¹⁹⁶

The real issue is that the Restitution settlement figures are not reflecting the profound differences between urban and rural claims. Rural claims are generally far more complex and involve much larger numbers of people (the Makuleke case alone involved 10 000 beneficiaries, the Tenbush claim in Mpumalanga involves 7 000 beneficiaries and 115 000 hectares and the median number of people in an average rural claim is probably about 600). Rural claims further tend to be settled through land restitution. The Commission for the Restitution of Land Rights stated in November 2002, that it had

¹⁹⁰ Mail & Guardian, February 13- 19, 1998

¹⁹¹ Sunday Independent, "Nostalgic, cautious rebirth of District Six" March 21, 1999

¹⁹² Woza Internet, "District Six residents return after 30 years", November 27, 2000

¹⁹³ Mail & Guardian, December 1, 2000

¹⁹⁴ News, SAFM, June 28, 2001

¹⁹⁵ Du Toit A, "The End of Restitution: Getting real about land claims", in Cousins B (ed.), At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century, PLAAS, UWC, 2000

¹⁹⁶ Mail & Guardian, "Historic land restitution deal in downtown PE", February 11 – 17, 2000

settled 10 836 rural claims, and that the vast majority of the rural claims had been settled with land awards (9 764) and the remainder with financial compensation (1070).¹⁹⁷ Urban claims are normally lodged by an individual or a family and are generally settled through financial compensation.¹⁹⁸ In total, rural claimants number about 3.6 million and urban claimants 300 000. It follows that, once the emphasis shifts to the settlement of rural claims, the restitution programme will slow down again. At the same time, the actual number of beneficiaries should increase dramatically. It might therefore be more useful to assess the restitution programme in terms of the number of beneficiaries instead of the number of claims settled. Similarly, there is a significant increase in the number of claims settled (see Table A), yet, the number of beneficiaries and the total hectares restituted has not increased significantly. According to Hall, between 1998 to 2002, the average number of households per claim dropped from 432 to 2, while the average number of hectares restored per claim declined from 5 185 to 8 during the same period. This is a result of claims splitting and of settling mostly urban claims through financial compensation.¹⁹⁹

Conclusion

The Restitution Programme should (according to the 1997 White Paper) (1) restore land, (2) or provide other remedies in such a way that the programme promotes (3) reconciliation, (4) reconstruction, (5) development and (7) justice, and is (6) integrated with the Redistribution and Tenure Reform programmes. The discussion in this chapter has shown that a number of these listed objectives have not been met.

The Restitution programme has not been sufficiently “integrated” (6) with the Redistribution and Tenure Reform programmes. A hybrid of influences (most importantly representatives from the African National Congress, the World Bank and land and rural non-governmental organisations) combined to produce a rights-based legalistic restitution programme separate from the actual land reform programme (i.e. redistribution) and, which distinguishes South Africa from land reform programmes elsewhere in southern Africa where land reform programmes included only redistribution and tenure reform.

There were good reasons (or so it seemed) for adopting and developing a legalistic, court-based procedure for Restitution (and the Department of Land Affairs can be commended for its post-policy willingness to evaluate and change the Restitution Programme as required). However, the court-based procedure had two important (negative) consequences – it slowed down the claims settlement process and it marginalised potential beneficiaries while allowing landowners to play a central role in the process.

¹⁹⁷ Hall R, “Rural Restitution 2: Evaluating land and agrarian reform in South Africa”, Occasional Paper Series, PLAAS, UWC, September 2003, p. 26

¹⁹⁸ *In June 2001, average cash settlement prices were R41 000 and approximately 72% of claims came from urban areas.* Lahiff E, “Land reform in South Africa: is it meeting the challenge?”, Policy Brief, no.1, PLAAS, September 2001

¹⁹⁹ Hall R, “Rural Restitution 2: Evaluating land and agrarian reform in South Africa”, Occasional Paper Series, PLAAS, UWC, September 2003, p. 21 - 31

The Slow Claims Settlement Process

The Restitution Programme (claims settlement process) was extremely slow in the period 1994 to 1998 (with only 27 claims settled in December 1998), but then increased significantly to 36 488 claims settled by June 2003. The increased pace of claim settlement resulted from three factors, (a) the completion of the institutional and policy development process, (b) administrative changes made before and after the 1998 Restitution review (c) the fact that smaller/ urban/ simpler claims have been settled first (primarily through financial compensation).

As the interviews and case studies used in the chapter suggest, the initial slow claims settlement process was unavoidable. The problem, therefore, is located not so much in the initial slow settlement process (particularly given the commendable efforts made to speed up the process) but in the expectations that were created. The claims settlement process could not realistically have begun until the required institutional structures had been created, the necessary financial resources had become available and human capacity had been built. If this had been clarified and analysis of the Restitution process's performance in terms of settlement figures had only started in 1998, the overall analysis and perception of the Restitution Programme would have been far more favourable.

The range of administrative changes introduced to speed up the claims settlement process, before and after the 1998 Restitution Review, include the Restitution of Land Rights Amendment Bill of 1997, granting Regional Commissioners the power to resolve uncontroversial claims without appearing before the Land Claims Court, changing the leadership of the Land Claims Commission, and integrating the Commission into the Department of Land Affairs.

The emphasis on settling smaller, simpler urban claims is apparent from the claims settlement figures provided in Table A. There is a significant increase in the number of claims settled, and yet, the number of beneficiaries and the total hectares restituted has not increased significantly. According to Hall, between 1998 to 2002, the average number of households per claim dropped from 432 to 2, while the average number of hectares restored per claim declined from 5 185 to 8 during the same period.²⁰⁰

Other factors contributing to a slow claims settlement process include the method of expropriation and compensation utilised, the emotional nature of dispossession and restitution, the exclusion of certain categories of people and the 1913 cut-off date (i.e. failure to achieve justice or promote reconciliation), the technical requirements of a legalistic process, the complex and overlapping nature of claims, and the inefficient relationship between (and structure of) the Land Claims Commission, Court and the Department of Land Affairs.

Court-based procedures

²⁰⁰ Hall R, "Rural Restitution 2: Evaluating land and agrarian reform in South Africa", Occasional Paper Series, PLAAS, UWC, September 2003, p. 21 - 31

As I have demonstrated in this chapter (using a range of international case studies including Chile, Brazil, Mexico, Peru and China), court procedures are open to contestation and have their own social biases. This allows landowners (who generally are literate and educated and have access to legal services and financial resources) to become central and powerful players in the restitution process, whereas claimants (who lack the skills and resources required) are marginalised by the process. Landowners, for example, are able to significantly influence the process of valuation and the level of compensation. In turn, this makes the Restitution Programme “unaffordable”. In order to counter the influence and power of landowners (within a court-based system) it is necessary to develop innovative methods to encourage land sales and to reduce the financial burden on the state, as well as, a “credible threat of expropriation”. Innovative methods could include paying higher prices for land that is willingly sold, and much less for land that is expropriated. With regard to reducing the financial burden on the South African government, alternative methods such as paying compensation in instalments or in stocks in government owned enterprises could be used, particularly in cases of forced expropriation.

Implementation

A number of the problems in the Restitution Programme became apparent during the implementation process and these are the problems that continue to plague the Restitution Programme and which remain controversial. These include social differentiation among beneficiaries and beneficiary communities (i.e. lack of community cohesion, lack of accountable leadership), the arguable lack of development (2 & 5) in cases where financial compensation is used, and the lack of post-settlement/ post-restitution support (4).

Land claims are far more complex (as a result of social differentiation and a lack of cohesion within claimant communities) than anticipated. Claims overlap, vested interests need to be identified and accounted for, the distribution of power within communities needs to be understood and accounted for, the process of dispossession was protracted or the claimants to a particular piece of land were geographically scattered around the country, and a number of claims are very large (either in terms of the areas they affect or in terms of the number of claimants, or both). This meant that claims could not simply be settled. Individual claimants had different needs and demands, and some claimants (e.g. men in positions of power) were more able to articulate their demands than other claimants (e.g. young unemployed single mothers). As a result of these differences (and inequities) a degree of contestation on how land would be used, divided or managed, and how decisions should be taken (and by whom) emerged in a number of cases.

The Restitution Programme, while of symbolic significance, has not been adequately integrated into a broader development process, and beneficiaries of the restitution programme have in many instances not received the support that they require. Accordingly, the Restitution Programme (overall) may not meet the objectives of reconstruction, justice and development listed in the 1997 White Paper on South African

Land Reform Policy unless there is a significant increase in the financial resources allocated to Restitution, as well as, capacity building among “restitution staff”.