

LAND RESTITUTION IN SOUTH AFRICA

By

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Abstract

In spite of much that has happened, the land reform program in South Africa has not effectively addressed the land question, much less so the agrarian question.

The multi-party negotiations in 1994 led to the drawing up of the interim and final constitutions, the latter with a Bill of Rights, giving direction to and limiting under the scrutiny of the courts, the formulation of laws by parliament and their implementation by the state. Importantly, the Bill of Rights addressed the issue of land, one of the most hotly debated issues in the constitution and one of the last to be finalised, especially the question of property rights. In an attempt to address the concerns of property owners, while putting in place a land reform program to address the concerns of the landless, the Constitution provides for the protection of existing property rights but also contains measures that enable the state to redistribute land within a market-driven model.

Underlying this rights-based approach was the belief that it was necessary to maintain confidence in the land market, to attract foreign investment and to learn from the lessons of other countries that have attempted to implement supply-led land reform. Supporters of the rights-based approach to land reform believe(d) that the constitution and the Bill of Rights provide adequate power for the state, the landless and civil society to overcome the impediment of the protection of property clause. Underlying this approach is the justiciability of so-called "second generation rights", such a the right to restitution, tenure upgrade and redistribution, that would ensure that private land rights are not sacrosanct and place an obligation on the state to provide land to those who need it to survive.

For many critics, the injunction on the state to protect existing property rights (obtained through force and discriminatory legislation over hundreds of years of colonialism, segregation and apartheid) while addressing the needs of the landless and rightless majority in more than a cosmetic way, resulted in a conundrum which would effectively provide more work for the legal fraternity than for those entrusted

with the implementation of the land reform program. They argue for the removal of the property clause and a supply-led administrative approach with large-scale expropriation without market-related compensation of land by the state, as the only effective means of addressing the radical imbalance in racial land ownership in South Africa.

A third approach, which I will designate as “developmentalist”, argues for the integration of restitution with the other two sub-programs of the land reform program (tenure reform and redistribution) and the integration of all three land reform components into provincial, district and local level planning. Thus land reform is seen as an integral component of a coherent rural and urban development strategy, driven by a real involvement of local participants. The integration of restitution with the tenure and redistribution components of the land reform program, and of land reform challenges the underlying assumption in both the above approaches, but especially the former, that the restoration of land rights as an end in itself is the primary objective of land reform, especially restitution.

The broad research question on which this paper is based is the following: to what extent has a rights-based restitution sub-program as part of a broader land reform program been able to address the serious imbalance in land ownership in South Africa and ensure that a *right in land* translates into a real socio-economic right in terms of security of tenure, basic services and provision of livelihood?

Apartheid relocation

South Africa has experienced a long history of colonial conquest and dispossession. This process included the conquest of the San (Bushmen) by the Bantu speaking people who colonized the southern reaches of Africa prior to the advent of European colonisation. The latter started in earnest in 1652 with the arrival of the Dutch at the Cape. By the early 1900s the process of European land conquest was all but complete, with the majority of the original inhabitants, constituting approximately 80 percent of the population, confined to reserves that made up seven percent of the land surface of the country. In 1936 these reserves were extended to 13 percent of the total land.

In the 1950s the *Apartheid* State began to implement its legislated relocation policies. This included both mass removals and the implementation of influx control. Despite resistance, it is estimated that close to 5 million people were forcibly removed and dumped in resettlement camps in the *Bantustans*, as the reserves became known. The resistance to removals culminated in the establishment of residents associations in the early 1980s, which in conjunction with civic organisations around the country conducted a national campaign to put an end to relocation, especially mass removals. This campaign achieved its aims in 1984, when the then National Party State was forced to abandon its policy of racially based spatial segregation.

From the 1970s into the 1980s, nowhere was the struggle against the *apartheid* State more keenly waged, than at the local level. All over South Africa's townships, the inhabitants felt the impact of *apartheid* most directly in the course of their daily lives and with their interaction with the local state. From lack of housing, education, medical facilities, transport and infrastructure, to the brutality of the police and other *apartheid* functionaries, it was at the local level that *apartheid* had its greatest impact on people's lives. And no institution was more hated than the collaborationist black local authorities, which came in a baffling variety of guises as the *apartheid* State strove to achieve some measure of legitimacy for its segregationist policies.

Duncan Village in East London is a good example of a community that was subjected to the full force of the *Apartheid* State's policies. With the demolition of the shanty houses and the relocation of the occupants, Duncan Village became the classic *apartheid* dormitory township. Spatially and socially transformed and tightly controlled by the Eastern Cape urban administration board, movement of Africans in and out of the area were carefully monitored, and influx control strictly enforced.¹ When relocation ended in 1984, only 30,000 people remained in Duncan Village. The township was placed under the authority of a Black Local Authority (BLA) in 1979, which became known as the Gompo Town Council. As with other BLAs in South African townships in the 1980s, it did not enjoy any legitimacy, and at the height of the national uprisings in 1986, the councillors were forced to resign. Control of the township then passed on to the militant Duncan Village Resident's Association.

The result was a massive densification of the township as the DVRA allocated tiny plots where incoming migrants from the rural areas surrounding East London, the Ciskei and the Transkei constructed dwellings with any material that came to hand. From 30 000 people in 1984, it is estimated that there are over 100 000 people (estimates vary from 80 000 to 150 000) crammed into 360 hectares. In the most dense parts, this means a total of 2 125 people per hectare, making Duncan Village one of the most overcrowded townships in South Africa.²

West Bank in East London is another example. The location or village known as Nongqongqo was a small urban location which housed approximately 7 000 African and Coloured residents. It was the original village and first location of East London and served primarily as a source of labour for workshops, transport and packing concerns in the East London harbour. The village, which was also known as the West Bank (of the Buffalo river) was a stable and peaceful community that accommodated an ethnically mixed population of Xhosa, Fingoes (Mfengu), Pondos, Zulus, Sothos, and Coloured people.

At the time of removals in 1965 residents lived in a variety of structures, ranging from well-constructed wood and iron houses, rectangular municipal houses, concrete *rondawels* (round huts), and wood and iron adjoining shacks, the latter rented out to permanent tenants. Despite a lack of facilities, a strong sense of community existed, with sports teams (rugby, cricket, tennis), choirs and concerts forming a focal point of recreational activities. A large number of informal businesses operated often from people's homes, and because of the settlement's proximity to the city and harbour, people did not have to travel long distances to work.

The process of removing people to their new locations took six months. In total 1 152 African and 222 Coloured families were forcibly removed with no consultation beforehand. Coloured families were moved to the East Bank locations and African families to the new Ciskei township of Mdantsane, many kilometres from the city and their places of work. Oral evidence from claimants reveal the hardship suffered at the time, emotional stress due to insecurity and uncertainty, as well as a strong sense of a loss of community. Mdantsane especially, a huge sprawling *apartheid* style township today wracked by crime and violence, represented an alien environment, with removees being scattered far and wide amongst existing residents

Restitution within national legislation

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

¹ Banks, L (1996) "Duncan Village" Monograph, Institute of Socio Economic Research, Rhodes University, East London, p 17.

² Duncan Village Planning Team Report, East London 1994, p. 5.

Restore land and to provide other restitutionary remedies to people dispossessed by racially discriminatory legislation and practice, in such a way as to provide support to the vital process of reconciliation, reconstruction and development.³

Judge Meer, in her 1997 Land Claims Court (the Court) judgement of *Dulabh v. Dulabh*, argues that the term “restitution” has a variety of different meanings in different legal contexts. Because restitution of a right in land at the time of her judgement (one of the first restitution judgements) was a novel one in South African jurisprudence, she states that it is hardly surprising that South African legal dictionaries offered no definition of restitution in this context, but only in relation to the law of contract.⁴ She does however find the following definition in Black’s Law Dictionary:

Restitution - an equitable remedy under which a person is restored to his or her original position prior to the loss or injury or placed in the position he or she would have been in had the breach not occurred. The act of making good or giving equivalent for any loss, damage or injury. The act of restoring something to its rightful owner. Compensation for the wrongful taking of property. Restoration of the status quo, the amount which would put the plaintiff in as good a position as he would have been in had no contract been made and restores to the plaintiff the value of what he parted with in terms of the contract.⁵

As can be seen from the above definitions, restitution usually involves a number of components:

1. The restoration of a right
2. The restoration of physical property lost, and/or
3. The compensation of victims
4. The reconciliation of victims and the perpetrators/beneficiaries of the original dispossession
5. The expectation that the restitution process will contribute in some way to economic upliftment and development.

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

³ *White Paper on South African land policy*. Department of Land Affairs, Pretoria, 1997, p. 52.

⁴ *Dulabh vs Dulabh*, in re Erf 1687, King William’s Town (1997) All SA 635 (LCC), 648.

⁵ *Id.*

In trying to give legislative content and meaning to the restitution process in South Africa, it is necessary to start by examining the relevant sections of the interim Constitution.

The Interim Constitution (Act 200 of 1993)

The Interim Constitution is still of relevance today with regard to the restitution process. The Interim Constitution sets out the legislative framework and importantly provides the constitutional guarantee for restitution in more detail than the final Constitution. The Interim Constitution devoted a special sub-chapter to land reform. According to Professor John Murphy the sub-chapter had four objectives:

1. First, it obliged Parliament to enact legislation for realising the restitution of land rights. This was accomplished by the Restitution of Land Rights Act 22 of 1994.
2. Secondly, it confers a constitutional right to restitution of specified categories of dispossessed persons (section 121(2)).
3. Thirdly, it compels Parliament to establish a Commission on the restitution of land rights with competence to investigate the merits of claims, to mediate and settle disputes and to draw up reports and gather evidence for the adjudication of claims (section 122).
4. Fourthly, it sets the parameters of the powers of the Land claims Court to make orders of restoration and compensation (section 123).

According to Gilfillan, the Interim Constitution went further than protecting fundamental human rights. The Interim Constitution contains:

a measure which is designed to achieve the adequate protection and advancement of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms as envisaged in *section 8(3)(a)* of the Interim Constitution. *Section 8(3)(b)* expressly grants every person or community dispossessed of rights in land before the commencement of the new constitution under any discriminatory laws the rights to claim restitution of such rights subject to and in accordance with sections *121*, *122*, and *123*.⁶

In terms of the Interim Constitution the State has a responsibility to give effect to the restitution of land rights. *Section 121* instructs the legislature to provide redress through an Act of Parliament for the victims of dispossession with respect to forced removals due to racially discriminatory laws. *Section 121(2)* specifies that a claim for restitution of land rights is a claim against the State. This means that even if there is a private owner on the land being claimed, it is the State's responsibility to buy the land, if feasible, and return it to the claimant. The rationale is that *apartheid* dispossessions were effected by the State and therefore the State is responsible for the settling of restitution claims, not the current owners.

⁶ Gilfillan, D "Acceptance Criteria for the purposes of investigating claims submitted in terms of the Restitution of Land Rights Act 22 of 1994 as amended", Commission on Restitution of Land Rights, Pretoria, internal document, 1998, p. 2.

The Interim Constitution and the Restitution Act establish a right for people who were victims of dispossession to claim restitution. Both set out qualification criteria, in *section 121(4)* of the Interim Constitution and in *section 2* of the Restitution Act. A restitution claim will be accepted for investigation where the claimant was:

- dispossessed
- of a right in land
- after 19 June 1913
- under or for the object of furthering the object of racially discriminatory laws, and,
- not paid just and equitable compensation, if expropriated under the Expropriation Act.

Restitution is not mentioned in Schedule 6 to the Interim Constitution, which deals with provincial and local government competencies, and is thus a matter provided for in national legislation. There are two main reasons for this. Firstly, the African National Congress and its allies were strongly in favour of a national land reform program and were aware of the necessity to transform the conservative Department of Agriculture and Land Affairs. This department had dealt mainly with large-scale white commercial farmers, and the aim was to transform it into an institution that could drive the land reform process and reorientate itself towards the needs of small-scale and emerging commercial black farmers. Secondly, it was recognized that the provincial departments of agriculture and land affairs did not have the capacity to implement land reform, a situation that in the Eastern Cape, for example, pertains to this day.⁷

The establishment of the Commission is dealt with in *section 122(1)* of the interim Constitution that instructs the legislature to this effect. The section as a whole sets out the powers and functions of the Commission:

- (1) (a) to investigate the merits of any claims for the restitution of rights in land;
- (b) to mediate and settle disputes arising from such claims;
- (c) to draw up reports on unsettled claims for submission as evidence to a court of law and to present any other relevant evidence to the court.
- (d) exercise and perform any such other powers and functions as may be provided for in the said Act.

Section (d) should be read in conjunction with *section 122(2)* that states:

- (2) The procedures to be followed for dealing with claims under this section shall be prescribed by or under the said Act.

⁷ Author interview with Coleman, 2000.

These two sections expressly empower the legislature to enact an Act of Parliament enabling the Commission to exercise and perform other powers and functions and to prescribe in it the procedures to be followed for dealing with restitution claims.⁸

Section 123 deals with the nature of court orders, the restoration of State land and with the issue of “just and equitable compensation” for both the present land owner and the claimant, the latter relating to compensation paid by the State at the time of dispossession. This section sets out clearly the legalistic and complex process necessitated by the inclusion of the property clause in the Bill of Rights and the market-driven approach, as well as the decision to take into account any compensation paid at the time of the original dispossession. This latter requirement had a twofold purpose, to cut down the cost of the restitution process to the State and to prevent white claimants who received adequate compensation (often more than adequate) from succeeding with their claims. It led however, to a situation where the Department of Land Affairs (DLA), representing the State as respondent, applied this requirement literally and mechanically to all claimants. This was irrespective of the fact that compensation was often impossible to calculate as claimants were either underpaid or not paid at all, in spite of *apartheid* era documentation to the contrary. Also of relevance is the question of whether it was possible to pay disenfranchised victims of forced removals, with limited access to judicial arbitration and no choice as to where they were resettled, “just and equitable” compensation.

The Constitution (1996)

In the 1996 Constitution (the Constitution), the issue of land reform in general and restitution in particular was reduced from the four sections it occupied in the Interim Constitution (Sections 8 (3) (b), 121, 122, 123) to one section in the Bill of Rights. It is contained in Section 25 entitled “Property”. The equivalent of sub-section 8(3)(b) under the sub-chapter titled “Equality” in the Interim Constitution, which entitled people who were dispossessed of land rights under racial laws, was watered down to a more general clause, which reads:

(2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

However, *Section 25(4)* and *(5)* and *(8)* were added to reinforce the notion of a second generation right as being a real right, which is able to overcome the entrenchment of property rights and place an onus on the State to actively promote land reform. The tension between these opposing rights, i.e. the protection of property rights and the imperative for land reform remained. The three sections read as follows:

(4) *For the purpose of this section –*

⁸ Op. cit, p. 4

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources, and

(b) property is not limited to land.

(5) *The State must take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis.*

(8) *No provision of this section may impede the State from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).*

Section 36(1) deals with the limitation of rights. It states that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- the nature of the right,
- the importance of the purpose of the limitation,
- the nature and extent of the limitation,
- the relation between the limitation and its purpose, and
- less restrictive means to achieve the purpose.

Another difference between the Interim and final Constitutions is the change from "rights in property" to the more simple "property". With regard to compensation in the case of expropriation *Section 25 (3)* requires that the compensation and the time and manner of payment must reflect "an equitable balance between the public interest and the interests of those affected". Two new clauses are added with regard to circumstances which have to be taken into consideration when deciding on compensation, namely, the extent of direct State investment and subsidy in the acquisition and beneficial capital improvement of the property, and, the purpose of the expropriation (*Sections 25(4) and (5)*).

Another change is the widening of the parameters that qualify persons or communities for tenure upgrade and restitution in *sub-sections (6) and (7)*. Whereas in the Interim Constitution discrimination had to be in terms of a racial law, in the Constitution a person or community who was unable to obtain secure tenure or who lost property through a racial *practice* also qualifies for redress.

The reason for including racial practices is that under segregation and *apartheid* people often lost land due to a racial action without a specific law being applied. In the Komga district of the Eastern Cape, for example, the Eastern Cape Land Claims Commission is investigating a number of cases involving black farmers who claim to have been coerced into selling to adjacent white farmers, with the connivance of the

local magistrate. These sales were often encouraged by local state officials on the basis that the district was a “white area”.⁹ In other cases communities were forcibly removed under legislation that was not overtly racial, such as forestry, conservation, and legislation used to initiate irrigation schemes and dams. Durkje Gilfillan, the first Regional Land Claims Commissioner for Northern Province and Mpumalanga quotes the following example:

Black landowners around the present Loskop dam for example were expropriated in terms of race neutral laws, but the resultant irrigation scheme was reserved for whites only.¹⁰

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

Another tactic used by the *apartheid* State was to downgrade communities rights in land to that of squatters. For example, crown tenancy and the rights that went with it was abolished by the 1936 Land Act and affected communities declared squatters. When the land was subsequently needed for conservation purposes or forestry, often years later, the communities living on the land were removed as squatters in terms of seemingly race neutral common law or legislation dealing with trespass.

According to Gillfillan, certain legislation, though race neutral, was used exclusively to effect evictions in a racial manner:

Slum clearance was undertaken by local governments ostensibly for health reasons or to initiate low cost housing projects. The advantages and upgrading of such actions by local government benefited whites with blacks being removed to areas set aside for black occupation with little or no improvements in living standards.¹¹

The Restitution of Land Rights Act (No 22 of 1994)

The Act is based primarily on the Interim Constitution and was amended in 1997 to bring it into line with the 1996 Constitution. Further amendments were effected after the Ministerial Review in 1998. The first part deals with the general functions of the Commission. Two issues are of particular relevance. *Section 6(2)(b)* allows the Commissioner to refer a claim that does not qualify for restitution to the Minister for alternative relief under the redistribution or tenure upgrade programmes. *Sections 8* and *9* deal with the appointment of staff and consultants, the latter section being responsible for widespread unhappiness amongst Commission investigative division staff because of the insecurity of the yearly renewable contracts.

⁹ Author’s experience as Research Manager for the Eastern Cape and Free State Regional Land Claims Commission.

¹⁰ Op. cit, Gilfillan, p. 3.

¹¹ Ibid., p. 3.

Sections 10 and 11 set out the steps to be followed during the lodgement and initial investigation of the claims. *Section 11* provides for the gazetting and publication of claims, an important step that means the claim has been accepted for further investigation and also allows affected parties to make representations. *Sections 12, 13 and 14* deal with further investigation and settling of claims, allowing for the grouping of claims of a similar nature within a geographical area, mediation, or referral to Court.

Sections 22 to 35 set out the powers of the Land Claims Court. *Section 33* lists the factors the court needs to take into account when considering its decision in Restitution cases, and *Section 35* sets out the awards the court is authorised to make. A 1997 amendment allows for direct access to Court by claimants.

Restitution as a rights-based legally driven process

There were a number of motivations for the establishment of a Land Claims Court in South Africa. A group of individuals from academic, legal and land organizations under the auspices of the Centre for Applied Legal Studies (CALs) at the University of the Witwatersrand, did much of the original research into the viability of a land court to drive the land reform process. In the end the participants in the process decided that a court was more suited to restitution and certain aspects of tenure security, while redistribution and tenure upgrade were more suited to an administrative process. The Court was perceived as an integral part of what was known as the “Land Claims Court Model”, which set out the specific steps through which a land claim would have to go.

The CALs group recognised that *apartheid* policies had rendered moot the claims of black people to land outside of the legal system.¹² Legislation such as the *Black Administration Act, 38 of 1927*; the *Development Trust and Land Act, 1936*; the *Group Areas Act, 1950, 1957, and 1966*; the *Community Development Act, 1966* and the *Black Resettlement Act, 1954* had systematically stripped black people of formal land rights, and were used to remove, evict and expropriate “black spot” communities, unregistered and deregistered labour tenants and disqualify urban dwellers.¹³ In spite of the lack of formal title, the CALs researchers found that claims to land by black people repeatedly referred to certain basic principles and values:

These principles, including length of occupation, birthright and secure tenure preserved through due process and contractual obligations, were often closely related to established legal concepts.¹⁴

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

¹² Swanson, *Journal of Human Rights* Vol 8 (1992), p. 332.

¹³ *Supra*, note 3, p. 54.

¹⁴ *Op. cit.*, 332.

The CALS group was in favour of a “highly particularised land claims court that would respond to the needs of only a small segment of the total population claiming land”. They argued that courts work best when they are handling disputes between specific parties.¹⁵ Based on this argument, redistribution and tenure upgrade were deemed to be outside the ambit of the court and more suited to an administrative process. The “disputes” referred to overlapping land claims where the strength of rights had to be ascertained and adjudicated, and to situations where privately or State owned land would be claimed. The latter was no doubt in anticipation of the Constitutional entrenchment of property rights, although there was some debate as to the effect the inclusion of the right to property in a bill of rights would have on the efficacy of the court.

When the new 1994 parliament debated the Act to set up the Land Claims Court and the Commission there was some concern from land activists over the proposed narrow focus of the two institutions. It had been hoped the Court would give much needed impetus to the land reform process as a whole. This stemmed from a lack of confidence in the ability of the as yet untransformed (in 1994) Department of Land Affairs to deliver the needed land administratively and the failure of the National Party government’s Advisory Commission on Land Allocation (ACLA) to deliver anything substantial. It was feared that its brief to deal only with restitution, i.e. it would only deal with communities and individuals claiming back the land they were originally removed from, coupled with the 1913 cut-off date, would exclude the majority of people involved in land struggles. For example in the Border/Kei area of the Eastern Cape, the Border Rural Committee, an affiliate of the National Land Committee, pointed out that restitution represents the smallest category of land struggles, and would exclude the needs of settled communities who need additional land, in many cases adjacent to where they have settled. The latter included:

- “Black spots” who fought against removal to the Ciskei;
- Those who fought against incorporation into the *Bantustans*;
- those who fled or were evicted from Ciskei;
- communities such as Thornhill and Zwelidinga (who had been moved to temporary land by the State because they did not want to be incorporated into the Transkei bantustan).¹⁶

It also excluded certain categories of labour tenants as well as the claims of those dispossessed under “betterment” policies, which “involved the forced removal and loss of land rights for millions of inhabitants of the former *Bantustans*”.¹⁷ The White Paper on South African Land policy argued that “betterment” claims should be dealt with by the tenure security program, land administration reform and the land redistribution support program. This was the position adopted by the first Eastern Cape Land Claims Commissioner Dr Peter Mayende. However, after the Border Rural Committee took the Chata claim (a community which had undergone betterment planning) to the court, the DLA decided that

¹⁵ Ibid, pp. 340-341.

¹⁶ “Groundwork” July 1994. Border Rural Committee, East London, p. 6.

¹⁷ *Supra*, note 3.

betterment does fall under the restitution program. The Chata claim was settled in the year 2000, opening up access for millions of other rural inhabitants to claim restitution for the losses suffered under *apartheid* betterment planning.

To a certain extent the early fears of land activists have been born out. Under the present Minister of Land Affairs, the tenure security and redistribution programmes have come to a virtual standstill, while the restitution program, slow as it may be, has achieved a degree of organizational capacity to deliver.¹⁸

In addition to the restricted brief, the CALS group put forward five broad criteria for the Land Claims Court to consider in making its decision on a claim. The criteria were drawn from the “basic principles underlying Western and African notions of property and attempted to select criteria that embodied values common in both systems”.¹⁹ The intention was that by drawing on shared values the court would be in a position to make decisions that were understood and accepted by both black and white people in terms of their understanding of land rights. The five criteria were:

Time - the length of time of physical occupation;

Birthright - people who were born on the land and used it for permanent residence would be favoured;

Investment - would include monetary investments and physical labour;

Loss - financial and emotional loss suffered during dispossession;

Social benefit - the interests of the public as a whole.²⁰

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

Where title was obtained through theft, where title holders have neglected their property, where certain people were prohibited from obtaining title because of their race, there may be a claim to the land that is far more valid than legal title.²¹

The purposive method of interpretation

¹⁸ Interview by author with Ashley Westaway, Managing Director, Border Rural Committee, East London, November 23, 2000.

¹⁹ *Supra*, note 12, p. 335.

²⁰ *Ibid*, pp. 335-336.

²¹ *Ibid*, p. 336.

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

Judge Meer of the LCC puts forward a similar point of view in the *Dulabh* case. She argues that to fully determine the ambit of restitution, one should reach beyond the immediate linguistic context of the word “restitution”, its ordinary and grammatical meaning, as contained in the Interim Constitution (sections 123(3), 121(2) and 8) and the Act (section 2(1)), to its wider legal and jurisprudential context so as to give effect not only to the purpose of the legislation, but also to the sense, spirit, ethos, morality and fundamental principles of the Interim Constitution and the Act.²²

This approach involves moving away from what Judge Meer terms as “a legacy of a literal positivistic theory of statutory interpretation in South Africa”,²³ and moving towards what Judge Dobson in his 1998 *Slamdien* judgement terms as a “purposive approach”.²⁴ In general this approach requires that one must “ascertain the meaning of the provision to be interpreted by an analysis of its purpose”. In addition it requires that the judge must:

- have regard to the context of the provision in the sense of its historical origins;
- have regard to its immediate context of the provision in the sense of its historical origins;
- have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the values which underlie it;
- have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated;
- have regard to the precise wording of the provision, and
- where a constitutional right is concerned, as is the case here, adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers.

In addition the Constitution provides a general exhortation in Section 39(2):

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

²² *Supra*, note 4, 648.

²³ *Ibid*.

²⁴ Dodson in *Slamdien vs Minister of Land Affairs*, 1998, 9

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

...flexibility and a generous approach to standing in a poor country is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective.²⁵

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

giving the words a meaning which seems to be consistent with the general purpose and import of the provision in its broader constitutional context, and relying on international jurisprudence as a guide.²⁶

The answer to his question seems to be that while many have delivered judgements (see Meer and Dobson above) with lengthy expositions on the purposive method of interpretation, the findings of the judgements have often failed to carry through the professed ethic inherent in this approach. Early restitution judgements bear testament to this, and two examples are outlined below. Mark Euijen, an advocate working for the Legal Resources Centre in Grahamstown, cites a number of examples of magistrates, as well as judges of the LCC resorting to narrow interpretations which in his (respectful) opinion have disadvantaged the intended beneficiaries in cases brought under the Extension of Security of Tenure Act, No 62 of 1997. Apart from adopting an adversarial approach (placing the onus on the farm worker to prove that they are an occupier, for example) when the Constitution clearly places the onus on the court to investigate all relevant circumstances before an eviction order may be granted (Sec 26(3) of the Constitution), he suggests:

...the legislation is nevertheless clear enough for the Land Claims Court to have been more broad minded about its interpretation of the Act's applicability and use rights attendant upon a farm worker's right of residence had it chosen to do so.²⁷

This often erratic functioning of the LCC, in terms of the tension between its sometime reversal to an adversarial and narrow (non-purposive) mode of operation and legal interpretation, despite its stated intentions to the contrary, often gave rise to what where seen by Commission staff battling to make sense of a highly complex process, as leading to contradictory judgements. This did little to bridge the growing gulf between Commission staff, claimants, and land NGOs on the one hand, and the LCC judges on the

²⁵ Ngxusza and Others v Permanent Secretary, Department of Welfare, Eastern Cape and Another 2001 (2) SA 609 (E), 17.

²⁶ Geoff Budlender, et al. (1998) *Juta's New Land Law*, Cape Town, Juta, 1, 8.

²⁷ Euijen, M. Unpublished paper "An evaluation of the reform of farm worker's security of tenure rights under the Extension of Security of Tenure Act No. 62 of 1997". Legal Resources Centre, Grahamstown, 1998, p. 65.

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

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

The *Macleantown* judgement gave rise to a ponderous process of claimant verification that required the drawing up of family trees to map out descendants as well as the collection of identification documents for each and every family member. It required the identification of a specific piece of land with each original owner and the valuation of the land in order to buy it from the present owner. The exact calculation of the monetary value of each claimants original property was also required.²⁸ As a result the Judgement set back the process by more than three years and effectively excluded any descendants from acquiring land at Macleantown through the restitution process, in spite of the fact that the local authority, the DLA, the white residents and the dispossessed community had agreed that they should be allocated land.

The other controversial judgement is one known as the *Cremin* judgement. Here the Land Claims Court judges ruled that where the original person dispossessed is deceased, the term *direct descendant* in the Restitution Act should be narrowly interpreted to exclude any person who is not the spouse or a direct blood relation of the dispossessed person, in terms of eligibility to claim. The fact that this interpretation goes against the customary inheritance practices of the indigenous African population and that they make up approximately 90 percent of the claimant body, was not deemed important in spite of a thoroughly researched and well-argued presentation by Council acting for the claimants in the *Cremin* case. The judges decided that the common interpretation used in the High Court should apply in the Land Claims Court as well.²⁹

Things came to a head in September 1999 when the Chief Land Claims Commissioner, after a particularly technician judgment by the court in the *Bautaung ba ga Selale v Zephanjeskraal* called a special meeting of the commission’s legal officers to discuss “the unfair rulings of the court and other critical issues” in order to strategize “how to deal with the Court”.³⁰

²⁸ Macleantown Residents Association: Re certain erven and commonage in Macleantown 1996 (4) SA 1272 (LCC); (1996) 3 All SA 259 (LCC).

²⁹ Ex parte Mayibuye I-Cremin Committee: re Sub section 121 of the Farm Trekboer, district of Klipriver, LCC Case No. 28/96.

³⁰ Note from RLCC to Legal Officers 3 September 1999.

The move towards a developmental approach

By the beginning of 1998 there was a realisation amongst a number of role-players involved in restitution that the program had run into serious problems that needed to be addressed as a matter of urgency. Of the eventual 63 455 claims lodged with the Commission by the cut-off date, only:

Eighteen restitution cases were resolved by the end of 1997, allowing some 27 000 people to recover approximately 150 000 hectares of land. In addition, decisions were made in respect of a further 172 cases which on the basis of research and investigation, were rejected by the Land Claims Commission as invalid....A further 20 cases had been referred to the Land Claims Court.³¹

Many of the problems outlined above contributed to the slow pace of delivery. These include the legalistic, centralised and bureaucratic nature of the restitution process, the tensions between the DLA and the Commission, and the lack of active participation of claimants in processing their claims. But some restitution role-players began to realize that the slow pace at which claims were being settled was only one aspect of the problem facing the program. In the midst of calls for “fast-tracking” of claims, for “a rolling action of delivery” and a “focus on urban individual and community claims where claimants prefer financial compensation”³², some protagonists began to draw attention to the vital issue of restitution’s contribution to land reform and development. The Green Paper on South African land policy quotes the Reconstruction and Development Programme (RDP) which sets out the relationship between restitution, land reform and development very clearly:

A national land reform programme is the central and driving force of a programme of rural development. Such a programme aims to redress effectively the injustices of forced removals and the historical denial of access to land. It aims to ensure security of tenure for rural dwellers. And in implementing the national land reform programme, and through the provision of support services, the democratic government will build the economy by generating large-scale employment, increasing rural incomes and eliminating overcrowding.³³

and,

Economic viability and environmental sustainability - planning of land reform projects developed at local level must ensure that these are economically viable and environmentally sustainable.³⁴

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

The principles of fairness and justice also require a restitution policy that considers the broader development interests of the country and ensures that limited State resources are used in a

³¹ *Department of Land Affairs Annual Report 1997*, Pretoria, p. 139.

³² Circular to Commission on Restitution of Land staff from the Office of the Chief Land Claims Commissioner, 1999:5, Pretoria, 1999.

³³ *Green Paper on South African Land Policy*, Department of Land Affairs, Pretoria., p.2.

responsible manner. To be successful, restitution needs to support, and be supported by, the reconstruction and development process.³⁵

Different aspects of this “developmental” approach were emphasised by people in different regional Commissions, more organised claimant groups such as the Port Elizabeth Land and Community Restitution Association (PELCRA), NGOs supporting claimants, such as the Urban Services Group (USG) in Port Elizabeth and the National Land Committee (NLC), and the Ministerial Review task team, the Director General of the DLA Geoff Budlender and the Development Facilitation Act (DFA) Implementation Task Team.

It is difficult to unravel exactly who took what position because not only did people’s positions change over time, especially as the policy debate began to be influenced by the engagement of restitution practitioners with the variety of claims and claimants in the field, archives, deeds offices, courts and the local state in the different provinces, but also because the difference between the two positions was often one of emphasis rather than diametrical opposition. A number of initiatives began to emerge during the period under discussion, some prior to and during 1998 through 1999, which lent impetus to the more developmental approach.

PELCRA

The first of these was the PELCRA claim in Port Elizabeth. Supported by the Delta Foundation, the Legal Resources Centre, the Urban Services Group and Metroplan, this claim charted a new path for restitution claims in a number of ways. Fundamental to this process was the need for each claimant to subscribe to a development-directed approach as a mechanism to resolve the claims. The challenge was therefore to reconcile the diversity of claims and develop an approach that deals in a fair and just manner with each claim. The chosen form of restitution was a combination of restoration and allocation of alternative land in the form of serviced erven. The outcome has been the development of a proposal that is acceptable to PELCRA and all other stakeholders that was reached through a process of lengthy negotiation. The State has been requested to develop the land to full municipal standards.³⁶

Macleantown

This is a claim for the restitution of land rights lodged by a group of claimants, through a representative body known as the Macleantown Resident’s Association (MRA), for a number of erven in Macleantown in the Magisterial District of East London, of which the claimants were dispossessed in 1970.

³⁴ Ibid, p. 5.

³⁵ *Supra*, note 3, p. 52.

³⁶ Port Elizabeth Land and Community Restoration Association 42 D Regional Land Claims Commission, Eastern Cape, submission to the Minister of Land Affairs, 1999.

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

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

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

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

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

The Macleantown project also included a redistribution component, to accommodate ex-farm workers that were initially part of the restitution claim, but did not qualify under the Act. A Project Manager was appointed by the PDLA to assist with the implementation of the project, especially the reintegration of the

community. As per agreement with the previous Minister, the claimants were allowed to return to Macleantown before the formalities of the process were completed.³⁷

The Development Facilitation Act Task Team

The Development Facilitation Act (Act 67 of 1995) (DFA), was, in the words of the DLA Director-General, Geoff Budlender, “promulgated with the objective of fast-tracking land development and providing a legal framework for integrated and sustainable land development”.³⁸ The DFA established a number of bodies, including the Provincial Development Tribunals that have “extraordinary powers in order to expedite the process of land development”.³⁹ As such its main purpose is to overcome the inequalities created by apartheid planning, and to this end section 3 of the Act puts forward a number of principles for land development. Briefly, these are that all policy, administrative practices and laws should:

- facilitate new, and recognise informal settlements;
- promote efficient and integrated land development through integrating social, economic, institutional and physical aspects, for example overcoming; the rural/urban divide, the distance between residential and work areas, promoting the densification of towns and cities, and correcting historically distorted spatial patterns of settlement while making the optimum use of existing infrastructure;
- encourage environmentally sustainable land development practices;
- promote participation by affected communities thereby developing their skills and capacities;
- promote security of tenure while providing for a wide range of alternatives;
- ensure that a competent authority co-ordinates the process at national, provincial, and local level (Development Facilitation Act (Act 67 of 1995)).

The LDOs and the restitution process

The DFA requires local authorities to formulate land development objectives (LDOs). Incorporation of restitution into the process of formulating LDOs is important for two reasons.

Firstly, Geoff Budlender points out that because municipal budgets are based on approved LDOs: “If the restitution process is not incorporated during the process of formulating LDOs, it will have major implications for the servicing and after care of the restitution projects”.⁴⁰ Given the incapacity, at that

³⁷ *Commission of Restitution of Land Rights Annual Report 1999-2000*, Pretoria, and Macleantown Resident’s Association Settlement Agreement, Regional Land Claims Commission, Eastern Cape, 1999.

³⁸ Regional Land Claims Commission, Eastern Cape, minutes of meeting with claimants, April 1998.

³⁹ *Supra*, note 25.

⁴⁰ *Ibid*.

time, of Transitional Rural Councils (TRCs) and Transitional Local Councils (TLCs) in small towns in most rural areas, and the fact that the District Councils acted as “mother local authorities” to these bodies it was necessary for District Councils to be included into this process.

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

The Ministerial Review

By June 1998 the Minister could no longer ignore the fact that the restitution process was in serious trouble. Pressure for review came from all sides. Claimants around the country were dissatisfied with the lack of progress in the processing of their claims, the manner in which they were being handled and especially the complicated and legalistic requirements of the judicial process.⁴¹ The National Land Committee, a consistent opponent of the property clause in the Constitution, had been agitating for a more pro-active supply-led restitution program, and were extremely vocal in calling for a review into the whole process:

The land reform context presented some interesting advocacy opportunities during the year. These opportunities arose because of the ongoing non-delivery of land reform, in South Africa in general, and in the Eastern Cape in particular. The Ministerial Review of Restitution, that was commissioned as a result of NLC pressure, provided space for critique and recommendations pertaining to this fundamentally important programme.⁴²

A series of workshops within the Commission and the DLA to resolve tensions between the two institutions, and to discuss the legalistic nature of the LCC and the slow pace of delivery, pointed to the need for a review of the restitution process⁴³:

It would be a very positive move for the Commission to launch a proactive and searching restitution review. It would send a signal to the outside world that the Commission was taking the initiative and playing a central and responsible role in evaluating the success of restitution. This

⁴¹ *Supra*, note 38.

⁴² Border Rural Committee Managing Director’s Annual Report to the Board, East London 1998.

⁴³ Joint workshop on Relationships, Roles, Responsibilities, and Procedures in the Restitution Process, Espada Ranch, Pretoria, February 1997; Joint problem solving workshop for researchers working in the Restitution Programme of Land Reform, Farm Inn, Pretoria, February 1998; Strategic Planning Workshop, CRLR, Ikhaya Lodge, Dunkely Square, Cape Town, April 1998.

was particularly important in view of the fact that, a review was due anyway - and an “informal” review process was taking place anyway, often in the form of “corridor gossip”.⁴⁴

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

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

In July 1998 the Minister established a Review Team convened by Dr Andries Du Toit of the Programme for Land and Agrarian Studies at the University of the Western Cape. Its brief, according to the Minister’s media release, was:

...to investigate the entire process of restitution, including the legislative framework, structures, processes and the three institutions implementing restitution.⁴⁵

His main concern was the slow pace of delivery and the concern that if restitution carried on in the same way that it had been, the “government would not meet its implementation targets as set out in the White Paper on Land Policy”.⁴⁶ The White paper sets the government the following time limits:

- a three-year period for the lodgement of claims;
- a five-year period for the Commission and Court to finalise all claims;
- a ten-year period for the implementation of all court orders.⁴⁷

It was quite clear that the Commission and Court were not going to finalise all claims within the five year period, as the three year period for the lodgement of claims had already been extended by a year and only 10 claims had been finalised by the Court by the middle of 1998,⁴⁸ and a further 8 had been referred to the Minister under section 6 (2) (b)⁴⁹. These bland statistics did not do justice to the large number of claims under various stages of investigation by the Commission. The Minister recognised this by saying that

⁴⁴ Ibid.

⁴⁵ Derek Hanekom, Minister of Agriculture and Land Affairs Media Release “Findings of the Restitution Review Process”, Pretoria, 1998.

⁴⁶ Ibid.

⁴⁷ *Supra*, note 3, p. 53.

⁴⁸ *Op. cit.*

⁴⁹ Provides for alternative relief for claimants who do not qualify for restitution.

“press reports have not accurately and fairly portrayed the amount of work actually done by the Commission and DLA”, but added: "Nevertheless, the slow pace was a concern to me. I also became aware of problems in relationships between various actors in Restitution and I believed that we needed to have a clear understanding of the source of these problems as it was my impression that they arose primarily out of the frustration with slow delivery, the root of which lay in legislative and institutional shortcomings” (Ibid).

The “problems between various actors in Restitution” did not take long to impinge on the Restitution Review process. The original proposed terms of reference for the review, drawn up by the DLA, was technician and limited in that its main focus was on generic business process mapping (i.e. outlining in detail the path of the claim from lodgement to post-settlement in each restitution office), and designed so that:

the Review takes place against the backdrop of a broad change management process in the Department of Land Affairs, which includes a Land Reform Re-engineering Project, the purpose of which is the same as the restitution review, but for land reform as a whole.⁵⁰

The “key deliverables”, to use DLA review-speak, which were to be attained in relation to “the Objective” were:

- a comprehensive process map of the present restitution business process, including regional variations;
- a clear analysis of the process map in order to identify the main impediments to delivery;

a detailed description of an implementable, redesigned restitution business process and information system, and concomitant changes to the policy and legislation.

The findings of the Restitution Review

Many of the problems identified by the Restitution Review have been discussed and I will not go into detail here. The main points of relevance are the recommendations of the Review Team with regard to the move from a judicial rights-driven approach to a rights-based approach which is developmentally sustainable; its recommendations on claimant participation and its comments on the move away from a wholly judicial approach to a decentralised administrative approach.

The findings of the Review Team revolved around five key symptoms of crisis in the restitution process:

⁵⁰ DLA MR of Restitution Process, Proposed terms of Reference, June 1998, p. 5.

- **Slowness of delivery:** At the rate that claims were being finalized it was clear that the government would not complete the process in the time frames projected.
- **A crisis of unplannability** arising out of the absence of a reliable database. The basic information necessary for planning, institutional design and resourcing in the restitution process was wanting.
- A strong perception that **there is an opposition between restitution and development.** Restitution was poorly integrated into the government’s broader Land Reform and development processes, and was in danger of becoming a “programme apart”.
- The restitution process was often characterized by **low levels of trust between implementers.**
- **High levels of frustration** within the organizations tasked with implementing restitution and among claimants themselves.⁵¹

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

Attention should be focused, not on *whether* or *not* restitution should be rights based, but on exactly *how* rights are allocated by the Restitution Act, on the *procedures* whereby these rights are given force, and the *discourses* and *practices* that arise in implementation structures.⁵²

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

The wide allocation of the right to claim means that even a single dispossession, which creates but a modest entitlement, also gives the right to contest that entitlement to scores of often conflicting descendants, all of whom have to be traced and brought to

⁵¹ Ibid.

the party. This has made the processing of claims an impossibly onerous task. This framework is ill suited to the developmental needs and specific dynamics of the restitution process. Particularly where officials are reluctant to engage with claimants about their desired outcomes, the right to restitution becomes translated into the *supposed right of each affected party to insist on specific entitlements even if these cause huge complications for other interested parties.*⁵³

One of the reasons for the concentration of restitution implementers on the rights of claimants and their paralysis when it came to the issues of sustainability, development and land reform, was what the Review Team described as “the mismatch between the institutional, legal and policy framework and the scope and nature of demand”.⁵⁴ The Centre for Applied Legal Studies (CALs) group at the University of the Witwatersrand that was responsible for much of the research into the judicial rights-based restitution model designed it primarily as part of the land reform process for rural areas:

It is important to note that most members of the group working on the land claims court are more familiar with rural African land claims than with disputes and claims arising out of Group Areas Act removals... the group did not have sufficient familiarity with the terms of the claims of people removed under the Group Areas Act to put forward any solutions with confidence....Despite the wide ambit of claims initially considered, the group finally narrowed its focus to people who had been removed from land in rural areas as a result of *apartheid* policies.⁵⁵

The majority of claims made to the Commission have however turned out to be urban claims. These comprise 80 percent of claims lodged involving approximately 300 000 beneficiaries.⁵⁶ This, according to the Review Team, has led to restitution implementers being swamped by the sheer volume of claims and sheer pressure to get cases settled so as to show some delivery, and has led to poor prioritisation and vast amounts of capacity and energy being spent on individual urban restitution claims:

Ultimately, however, the most serious problem is the fact that the legal framework of the Act as it stands, which was designed with the facilitation of large rural claims in mind, was poorly suited to the facilitation of large numbers of individual urban claims.⁵⁷

⁵² Du Toit, A Draft Report Restitution Review 27 October 1998, Belville, p. 4.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ *Supra*, note 12, pp. 340-341.

⁵⁶ Circular to Commission on Restitution of Land staff from the Office of the Chief Land Claims Commissioner, Pretoria 1999, p. 5

⁵⁷ *Supra*, note 52, p. 4.

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

...this framework evacuated and undermined officials policymaking and decision making skills. The normal prerogative officials have to make sometimes risky and difficult decisions was undermined, because all officials knew that ultimately questions of legal interpretation would fall on the Court.⁵⁸

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

S33 of the Restitution Act only considers “feasibility” when restoration of a right in land is claimed. What should be considered is not the feasibility of restoration, but of the processes of settlement and the development plans that arise out of it. Mere restoration is almost always feasible. It is what claimants want to *do* with the land that might or might not be feasible. By this token, feasibility should also be considered in respect of restoration of rights in alternative land, or when priority access to development programmes is awarded.⁵⁹

The Review Team recognized that the participation of claimants in the demand-led rights-driven judicial restitution program was limited to filling in claim forms and choosing one of the restitution options outlined above. Very little was being done to involve NGOs, community organizations or service providers in empowering claimants to make informed choices about the wide range of possible restitution options. These include the problems attendant on restoration and resettlement, including community relations and possible conflict, and the process of ensuring service provision and housing by provincial and local government, as well as securing livelihood. Much has been written about the problems experienced by newly re-settled groups of claimants, especially that of reconstituting the community after

⁵⁸ Ibid.

⁵⁹ Ibid.

years of separation. Forced removals often meant the dispersal of communities to different geographical locations according to ethnic classifications.⁶⁰

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

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

and,

Rather than simply naming a preferred option, claimants should be encouraged to apply their minds as to how their option could be made realistic and workable...There will also be a similar need for a greater emphasis on synergistic and collaborative work with local and metropolitan authorities, particularly for urban restitution.⁶¹

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

...it is further proposed that an authoritative national level Restitution and Land Reform Steering Committee be established. Its terms of reference are not spelled out but the potential seems high for ambiguity and continued uncertainty as to where responsibility for the development of intermediate/implementation policy lies between different organisations.⁶²

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

Particularly important is the task of clarifying the role of the State as respondent in urban restitution cases. There is a real need for detailed consultation between the Minister, the DLA, Commissioners, other

⁶⁰ Dawood, Z "Is restitution in need of a remedy?" Cape Town: National Land Committee; De Wet, C "Resettlement" in Coetzee, JK et al (eds) (2001) *Development: theory, policy and practice*. Cape Town: Oxford University Press Southern Africa.

⁶¹ *Supra*, note 52, pp. 18-19.

⁶² *Ibid*, p. 4.

relevant government departments, as well as with provincial and metropolitan governments themselves, and for the building of a shared understanding of the role of local government in the restitution process.⁶³

The Gauteng Development Integrated Approach

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

The present path of trying to determine the monetary value of the claim, which implies that the exact value of what was lost should be found by somehow doing a historical valuation, and thereby determining and deducting the compensation received at the time, is doomed to failure.⁶⁴

They argued that its failure was due to a number of reasons. Historical records are often inconsistent and incomplete. It may be added that they are often inaccurate as well, especially when tailored so specifically to serve the ideological needs of a political system such as the *apartheid* one. It is a technicist method which fails “by its very nature” to recognize the human rights abuses meted out by the previous policies of removals and dispossession. It involves long, complicated and “inevitably expensive investigations (valuations and research) which unfortunately end up enriching consultants involved”. It creates an environment of hostility and the possibility of endless litigation between claimants and the State, which only benefits lawyers and so-called “expert witnesses”, as in the Highlands land claim.⁶⁵

Conclusion

It is clear that the restitution program in South Africa has been successful in providing a constitutionally backed, rights-based and legally driven process and succeeded in registering a vast number of claims, both urban and rural. Delivery in terms of the processing of claims has been slower, especially in the early years of the Commission on Restitution of Land Claims and the Land Claims Courts existence. The main reason for the slowness of the restitution program is the complicated, legalistic and bureaucratically

⁶³ Ibid, pp. 13-14.

⁶⁴ Regional Land Claims Commission, Gauteng, Implementation Unit position paper, Gauteng 1999.

⁶⁵ Ibid.

centralised process. Another major problem has been the lack of integration of the restitution process with local government land planning and development processes.

A number of initiatives, the PELCRA, *Macleantown* claims, the Development and Facilitation Task Team, the Ministerial Review and the Gauteng restitution office initiative have made valuable contributions in correcting these problems. Efforts are being made to decentralise the process, to bypass the Land Claims Court by referring completed and uncontroversial claims to the Minister for signing off, and to involve local and district government in the processing of claims in order to integrate them into a more developmental framework.