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**RESTITUTION OF LAND RIGHTS
AS PART OF LAND REFORM
IN SOUTH AFRICA
A CRITICAL ANALYSIS OF THE PROCESS**

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TABLE OF ABBREVIATIONS

ANC - African National Congress

AULAI - Association of University Based Legal Aid Institutions

DLA - Department of Land Affairs

ECARP - Eastern Cape Agricultural Research Project

HNP - Hertzog's National Party

ICJ - International Commission for Jurists

LHR - Lawyers for Human Rights

LRC - Legal Resources Centre

NCBPA - National Community Based Paralegal Association

NGO - Non-Governmental Organisation

OAU - Organization of African Unity

PAC - Pan Africanist Congress

SACP - South African Communist Party

SIDA - Swedish International Development Cooperation Agency

Soweto - South Western Township

ULC - University Law Clinic

Wits – University of Witwatersrand

WLC - Women's Legal Centre

ABSTRACT

In this thesis, we examine the South African restitution process through a field study conducted in South Africa. Restitution means compensation, and is in this case referring to the process of giving back land to the people that were dispossessed during the years of apartheid in South Africa. We have tried to investigate how the process functions, and its capacity to reach the goals that were instituted. In addition, we have compared the results to modern human rights regulations in the African Charter of Human Rights, to see whether South African land law is in accordance with the international rules in this matter.

In the introduction, we explain our purpose with this essay, and also state a few research questions and the methods that we have used. From there, we give a historical overview of what has happened in South Africa to lead up to the current situation, in Chapter 2. In Chapter 3, we explain how the South African Constitution of 1996 lies in the background as a foundation for the restitution, and provides a constitutional protection of owning property. Chapter 4 then deals with the human rights aspect, in order to present these values from the beginning. In Chapter 5 we make an international comparison with countries and regions that also have dealt with restitution questions. Chapter 6 specifically describes the South African Land Reform Programme, which includes redistribution, tenure reform and certain grants and support as well as restitution. The actual restitution process is then dealt with in Chapter 7. After providing some facts and definitions, we describe the institutions involved with the process. Chapter 8 explains the function of legal aid, and how that system works. In Chapter 9 we try to illustrate the process with two examples of claimants from different parts of the country, telling their stories and observations concerning the procedure. Chapter 10 then presents the critique against the restitution process and the problems and difficulties that are inevitable in such a course of action. In Chapter 11, historical customary values are examined, to see whether they fit in with both restitution and human rights. Finally, Chapter 13 provides an overview of how the different rights in land work against one another and explains which right prevails when there is a conflict. In the end of this essay is Chapter 14 with the conclusions that we have been able to draw. There is also a section about the political sensibility of this question and some final predictions of how the South African future might evolve.

1. INTRODUCTION

The history and contemporary development in South Africa is very unique. The intriguing struggle to make the country democratic in the most fundamental sense has captured many researchers and students before us. South Africa offers so much; the dynamic mixture of cultures and peoples, the strikingly beautiful landscape, the variety of nature, wild animal life and adventurous atmosphere make South Africa a diamond to explore.

Legally, the horrors of apartheid should be vanished by now and people should be able to live and develop the land accordingly. Land rights can be thought of as a cornerstone in the apartheid system. The systematic racial discrimination was manifested in many different ways, first and foremost through harsh segregation policies that deprived persons and communities of their land.

In 1994, after the breakdown of the apartheid regime, the Restitution of Land Rights Act was passed. It gives people who were deprived of their land, as a result of racial discrimination, a right to restitution. The right to restitution of land rights is one part of a comprehensive land reform programme, introduced with the aim of building national reconciliation, promoting social stability, economic growth and equality in the distribution of land ownership amongst the people of South Africa.

The right to own land is today considered to be a fundamental human right. Without the right to land people cannot survive. Therefore, the possibility of restitution of land rights, through judicial means, is extremely important to the Native and coloured people of South Africa. Not only does it give them back land to actually perform farming on, it also clearly states that what was done to them was wrong and should be compensated for and made right. It is a public apology, important both practically and symbolically.

The International Commission of Jurists in Sweden provided the original idea for this project to us already in April 2002. After receiving a Minor Field Study scholarship we were able to go to South Africa to conduct the field research. We have since, reached our own conclusions and changed the original plan several times, and we believe that the most interesting discoveries were found, looking at the restitution process as a whole. As we suspected, the

process is not working as well as the government indicates. Neither is it satisfactory to the people concerned.

1.1 Purpose

Primarily we wanted to look into the restitution process to learn how it works and what is being done. We have tried to understand the reasoning behind it and how legislative decisions are made in this type of law, very different from anything that we are familiar with in Sweden. However, a presentation of the historical context of land segregation is required in the beginning of the essay, in order to understand the political and judicial factors influencing the land matter in South Africa today. Moreover, an examination of the Constitutional Property Clause and the Human Right to Property, introduced in the African Charter of Human and People's Rights, is essential in order to grasp the legal framework in which restitution of land rights is placed. Restitution is part of a larger land reform programme, which will be presented to provide an overview of the current and future land development in South Africa.

With the intention of broadening the study we have tried to place restitution in South Africa in an international context. We have briefly looked into different types of restitution throughout the world in order to understand the different political and social causes that lie behind restitution. Subsequently, we tried to draw some parallels to the situation in South Africa.

The essay also covers access to legal aid for people who claim their right to restitution, since it is an important part of the restitution process. Furthermore, with the purpose of providing the reader with a more practical anchorage we will present two restitution cases, one urban and one rural.

Thereafter, it became interesting to see what improvements could be made to meet the needs of the people. Evidently this process is very political, complicated and often met by resistance. Our goal is to show the process for what it is. In our opinion there are several issues that need attention from the public and the government.

Moreover, we have looked into the crucial issue of traditional, African customary law in South Africa. Customary law affects the nation's legal system in general, and land rights in

particular, but it is not always in accordance with human rights, as introduced in for instance the South African Bill of Rights. Is customary land rights taken in consideration by the drafters of the Restitution of Land Rights Act? And to what extent is customary law, in practice, applicable regarding restitution?

Naturally, restitution of land rights leads to conflicts between the claimant, who demands restitution of a piece of land, and the current owner who wants to keep the same piece of land. We aim to present and examine this conflict between different rights in land: the right to restitution and the constitutional right not to be deprived of property. The questions that arise are how this problem is solved, which right in land will be prioritised, and why.

1.2 Research Questions

The introductory questions that we have formulated are the following:

What are the reasons behind restitution of land rights in South Africa?

What legislation is applicable?

How does the process function?

Who is involved in the restitution process?

The main questions to be answered by our research are:

Is the restitution process working efficiently?

What can be improved?

To what extent is customary law applicable regarding restitution?

Are customary land rights in accordance with human rights, as spelled out in the African Charter of Human Rights?

According to which principles is the conflict between rights in land solved?

1.3 Method

The methods we have used have been a mixture of research techniques. Our field research conducted in South Africa gave us most of the information in various ways. At the library of

the University of the Witwatersrand we were given the opportunity to find literature suitable and necessary for our study. In addition we have read journals, articles, reports (some unpublished), court cases and legislation acts. The internet has also been an important source of information for us.

For personal opinions and a more illustrative description of the restitution process we have interviewed various representatives of groups taking part in the process. We have tried to gather a wide range of interviewees, taking gender, race, age and social background in consideration. During our journey across the country we managed to meet with people from different locations as well. In order to cover the process of restitution we have interviewed claimants, their paralegals and attorneys, co-ordinators of these groups, former employees of the Commission and Court officials.

2. THE HISTORICAL CONTEXT OF LAND SEGREGATION

2.1 White Racism and Segregation

The first white settlers came to South Africa in 1652 and this was the beginning of colonization and land segregation policy.¹ The conquest of the country by Europeans was not at all easy and predictable. There was no unity within the diverse policies in the region until 1910, when the Act of Union was created. Before, the country had been divided into a large number of chiefdoms, polities, colonies and settlements. The new, capitalist nation that was created in 1910 was an integral part of the British Empire and resolutely ingrained colonial interests and white political power.²

The belief of white supremacy, based on Darwinist notions of evolution and hierarchy applied on human races, developed not only in South Africa but also in other British colonies in Africa and Asia as well as in the United States. However, the situation in South Africa soon developed extreme characteristics: "...in South Africa it developed into a systematic and legalized discrimination shaping the economic, social and political structure of the whole country in a more persuasive way than elsewhere".³

The ideology of segregation emerged during the South African industrial revolution in the beginning of the 20th century. Above all, it was a policy imposed by the state in the interest of mine owners, white workers and farmers. The legislation that emerged during this time assured specific white class interests.⁴

2.1.1 Land Segregation Laws

In 1913 a new land law was implemented, the Native Land Act of 1913, which gave 87 percent of South Africa to the whites and 13 percent to the African and coloured people.⁵ This act established segregated possessions in separate white and Native "homelands". Residence of people in each other's areas was allowed only on certain conditions. Movement of Natives

¹ Jaichand, p. 1

² Worden, p. 6

³ Worden, p. 74

⁴ Worden, p. 86-90

⁵ Utrikespolitiska Institutet, *Sydafrika*, p. 14

from farm to farm was not permitted and people who chose to stay on white property had to work 90 days per annum for that privilege. Sharecropping was ended and people were offered the choice of returning to overcrowded reserves or seeking employment in the mining industry in the cities. Another choice was to remain on white property and become loyal labour supply for the whites.⁶ Natives who occupied land outside the “scheduled black areas” without permission were mere squatters and could be removed at any time. The Natives Urban Areas Act of 1923 set aside certain parts for occupation by Africans. The aim was to clear out Africans from mixed residential areas in the cities and replace them in the new locations.

The Native Trust and Land Act that was implemented in 1936 comprised a final allocation of land for incorporation into the homelands. The act obligated Parliament to acquiring the land on behalf of Africans rather than instituting freehold tenure. The Beaumont Commission had proposed 27 000 square miles but complaints from white farmers reduced the allocation by 3000 square miles.⁷ Some authors claim that the reason for the whites’ complaints was that they “had no intention of allowing their supply of labour to be cut off by giving the Natives in the reserves so much of land as to make them economically independent of employment outside”.⁸ The act also gave the Development Trust power to expropriate land, for the purposes of acquiring released land. Therefore the Trust could expropriate land owned by an African outside the areas in which he would be permitted to acquire land, provided that the Governor-General approved to do so, for reasons of public health, public welfare or public interest.

Compensation was to be given according to several statutes. These regulations were quite ineffective and scattered. To consolidate the South African expropriation law, the Expropriation Act, number 63 of 1975 was enforced.⁹ However, compensation was still seldom adequate or fair and there were many reasons for Native rural communities receiving no compensation at all when they were forcibly removed. One reason was that since the laws prohibited formal Native ownership the affected communities might not have had title deeds even though they had occupied the land in question for centuries. Sometimes communities

⁶ Jaichand, p. 5

⁷ Jaichand, p. 11

⁸ Jaichand, p. 5

⁹ Jaichand, p. 12

were awarded compensatory land but when they were removed to the resettlement area, they often discovered that it had been incorporated into a homeland.¹⁰

In 1946 the government passed the Coloured Persons Settlement Act, which provided for settlement areas in different parts of the country in which only the state or a coloured person (person of mixed race) could acquire land.¹¹

2.2 The Formation of African National Congress

As a reaction to the segregation policies, various African leaders gathered in 1912 to form the South African Native National Congress (which became the African National Congress, ANC, in 1923). This organization examined bills and acted as a lobby group in the absence of the Africans' direct voice and influence in the legislature. In 1925 Prime Minister Hertzog answered to ANC and made clear that the government would continue with their policy of racial segregation. He also stated that the right to vote would not be extended: "the European feels, quite rightly, that the right to vote is the fruit of centuries of civilized government, and that he is the result and the heir of a civilization in which the Native does not share."¹²

The ANC continued its strategy of negotiating with the government, without good result. Therefore it considered alternative methods to deliver social, economic and political freedom to its electorate. In 1943 ANC produced "African Claims" in which it listed the basic demand of the right to vote for all, regardless of race, representation on the basis of adult suffrage, admittance to land throughout the country and a list of other civil, political, economic and social rights.¹³

2.3 Apartheid

Apartheid was an important instrument by which political unity was achieved within the politically divided Afrikaner community in the 1940s. In 1948 the HNP (Hertzog's National

¹⁰ Jaichand, p. 18

¹¹ Jaichand, p. 6

¹² Jaichand, p. 3

¹³ Jaichand, p. 5

Party) won the parliamentary elections and apartheid was the means by which it drew voters. An Afrikaaner nationalist political movement emerged.¹⁴

2.3.1 Apartheid Policies and Legislation

Division of all South Africans by race was the core of apartheid. The system intended to safeguard the racial privileges of whites and control the employment, movement and residence of Natives and coloureds. Total white monopoly of parliamentary power was obtained; the constitution was constructed in order to assure this. Several new acts were implemented during late 1940s and 1950s; among them was an act from 1949 that prohibited “mixed marriages”. Another was the Immorality Act of 1950 that prohibited sex between whites and Africans (including Indians and coloureds) outside marriage. The Group Areas Act of 1950 expanded the principle of separate racial residential areas on a comprehensive and enforced basis. Each racial group was to be segregated in its own homeland. The implementation of this act was particularly apparent in the cities and the forced removals were often justified by policies of slum clearance and settled with theories of modern town planning that involved massive urban reconstructing. One example is the central District Six area in Cape Town, in which forced removals took place during the 1960s and 70s.¹⁵ Its coloured inhabitants were relocated in segregated areas on the outskirts of the city. It was a criminal offence to own or occupy land contrary to the provisions of the Group Areas Act or to allow such occupation. In 1954 the Natives Resettlement Act empowered the state to prevail local municipalities and forcibly remove Africans to separate townships. One of the first examples of forced removals to townships was in Johannesburg in 1955, where the African inhabitants in the western areas of the city were relocated to the new township Soweto.¹⁶ Pass laws were also introduced, that restricted Native and coloured people’s movement. In order to further restrict the increasing numbers of Natives entering the urban areas, the National Party government implemented a policy of “influx control”. This implied a network of legislation and regulations, which controlled Native access to the urban-industrial areas in what was claimed to be white South Africa.¹⁷

¹⁴ Worden, p. 99

¹⁵ Pistorius, p. 50

¹⁶ Worden, p. 107-108

¹⁷ Jaichand, p. 16

Social segregation in all public amenities (such as hospitals, transport, restaurants, cinemas and sports facilities) was enforced through the Reservation of Separate Amenities Act of 1953. Also educational apartheid was enforced during the same period of time. Political oppression was obtained by the Suppression of Communism Act of 1950, which gave the Minister of Justice the power to ban any person or organization he viewed as “communist”, in reality a wide definition that included more or less all opposition to apartheid. Further more, the Criminal Law Amendment Act of 1953 set heavy penalties for civil disobedience.¹⁸

2.4 Opposition and Political Turbulence

In 1952 the ANC joined the Congress Alliance (white congress of democrats), the South African Indian Congress, the Coloured People’s Organisation and the South African Congress of Trade Unions to launch a defiance campaign. In 1955 this alliance formed the Freedom Charter that advocated a common South Africa for all, without racial discrimination and with strong ideals of traditional liberalism. With regards to the issue of land the Charter stated that “South Africa belongs to all who live in it”. It also declared that the national wealth of the country should be returned and that all land should be redivided amongst those who work on it.¹⁹

In response to this, the government declared that the African people could secure their land requests and other political ambitions in their respective homelands. After the Republican Constitution came into effect in 1961 the National Party started to implement its homeland policy sincerely. Some of the homelands (Transkei, Bophuthatswana, Venda and Ciskei) were granted “independence” while homeland status was given to other areas (Gazankulu, KaNgwane, KwaZulu, KwaNdebele, Lebowa and QwaQwa). All Africans were citizens of one of the “independent” territories or homelands depending on which language they spoke. Indian and coloured people were placed under dispensation in the Constitution, in which each race group had its own legislative chamber.²⁰

The ANC tried to challenge the regime with peaceful demonstrations, but without good effect. The massacre in Sharpeville in 1960, where white police shot 69 peaceful demonstrators,

¹⁸ Worden, p. 109-110

¹⁹ Jaichand, p. 6-7

²⁰ Jaichand, p. 7

became a turning point for the ANC, which was now banned and persecuted. Nelson Mandela, one of the leaders of the ANC, was imprisoned in 1962. The organization now initiated violent actions against the regime. Two decades of severe violence and economic stagnation followed, which resulted in both internal and international critique of the apartheid regime. The new president, P.W. Botha, launched a few legislative changes; one was the permission of mixed marriages. However, the changes were not satisfactory, international reactions against apartheid increased and economic sanctions against South Africa became an acute threat to the national economy. Demands to negotiate with the African political leaders cultivated within the National Party, and after Frederik Willem de Klerk became president in 1989 the ban on ANC, PAC (Pan Africanist Congress) and SACP (South African Communist Party) was abolished. In the same time Nelson Mandela was released from prison.²¹

2.5 White Paper on Land Reform

In 1991 president de Klerk's government put forward the "*White paper on Land Reform*" (not to confuse with the *White Paper on South African Land Policy*, from 1997 that is referred to later on) in which land was described as "the most precious resource for the existence and survival of man". The White Paper envisaged new land laws that intended to exterminate the discriminatory measures of the past, assist people concerning land rights and ensure the economical and responsible use of land to the best advantage of all. The new land laws were: Abolition of Racially Based Land Measures Acts, which abolished the majority of the old discriminatory land laws, such as the Group Areas Act of 1936 and the Land Act of 1913. It permitted all persons to acquire property anywhere in South Africa. The Upgrading of Land Tenure Act of 1991 provided for the upgrading of certain statutory land-tenure rights to full ownership. It recognized the injustices and problems caused by the lack of development and lack of security, which characterized "Black" land rights. Finally, there was the Less Formal Township Establishment Act that provided for shorter and simpler procedures for the establishment of less formal settlements.²²

²¹ Utrikespolitiska Institutet, *Sydafrika*, p. 17-20

²² Van der Walt, p. 150-152

2.6 Negotiations About a New Constitution

Negotiations were initiated between the government, ANC and most of the other major parties concerning a new constitution, and more apartheid laws were abolished. The new constitution for a united, democratic, non-racial and non-sexist South Africa would be drawn up according to an agreed set of principles. In 1994 the first free elections were held in South Africa and the ANC, with Mandela as the party leader, won a substantial victory. Mandela was elected president by the parliament and the ANC, the National Party and the Inkatha formed a coalition government.²³ The same year, the new constitution, called the Interim Constitution, entered into force. It was replaced by a permanent one in 1996. The constitution was a negotiated agreement between the forces of colonialism and apartheid on the one hand and the liberation movement on the other. Wealth, property and land, that were considered to determine social power relations in society, were the most fiercely contested issues and now occupy the central place in the constitution.²⁴

²³ Utrikespolitiska Institutet, *Sydafrika*, p. 20-22

²⁴ Gutto, p. 55

3. THE CONSTITUTION OF 1996

3.1 Status of the Constitution

Section 2 of the Constitution declares supremacy of the Constitution over all other laws, and the principle that any law inconsistent with the Constitution shall be of no force and effect to the extent of the inconsistency.²⁵ Transitional Arrangements in Schedule 6: ‘Continuation of Existing Law’, on the other hand, specifically preserves the previous laws, unless and until such laws have been annulled or amended by the Constitution or the legislature of the Government of National Unity. Formally, this means that the effective laws of South Africa today are the same as of the old pre-constitutional South Africa, save those already changed or repealed. Also land rights are included in this. Of course most of the old laws are not applicable today due to the fact that they are inconsistent with the constitutional provisions, especially the Bill of Rights.²⁶

3.2 The Property Clause

The Property Clause is located in section 25 of the Final Constitution.²⁷ This clause was the last one to be agreed upon when shaping the Interim Constitution. In the international perspective, a constitutional property clause is not a self-evident part of a bill of rights or of a constitutional order. Many constitutional states, among them Sweden²⁸, have protected the right to private property in their constitutions, but some states have not.²⁹ There are many arguments for and against such inclusion: During the negotiations on the new South African Constitution, some critics felt that the inclusion of a property clause in the Constitution would continue to favour the existing title deed holders and therefore disturb the full implementation of land reform and restitution. Other critics considered that market price value provisions in the property clause would constrain the whole land restoration process.³⁰ On the other hand, those who spoke for the inclusion of a property clause felt that unless the Constitution directed reform, nothing would happen concerning land reform. However, as soon as the

²⁵ Devenish, p. 36

²⁶ www.concourt.gov.za/constitution/const20.html#2

²⁷ See Attachment B

²⁸ Regeringsformen 2:18

²⁹ Van der Walt, p.7

³⁰ Jaichand, p. 35-36

Interim Constitution was created in 1994, the debate focused more on the content and meaning of the of the property clause than on whether or not constitutional protection of property is desirable.³¹

The structure of the constitutional property clause explicitly provides for land reform. In other words, the drafters wanted to assure that the protection of existing property rights should not prevent land reform.³² However, there is undeniably a conflict between the right to restitution and the right to protection of property, which will be dealt with in chapter 12.

3.2.1 Purpose of the Constitutional Protection of Property

According to A.J. van der Walt, Professor of private law at the University of South Africa in Pretoria, the purpose of the property clause in constitutional law, is to “ensure that a just a equitable balance is struck between the interests of private property holders and the public interest in the control and regulation of the use of property.” This must be separated from traditional, private law protection of property, which aim to protect from any invasion or interference that is not based on the owner’s permission. The constitutional protection is not meant to guarantee and preserve the status quo and the existing position of the individual property holder against any interference; the intention is rather to establish the balance between private and public interests mentioned before. This often means that the individual’s interest will be affected by regulations, restrictions, levies, deprivations and changes that promote or protect the public/social interest, sometimes without compensation.³³

To find this balance between private and public interests, at least three goals must be achieved:³⁴

1. Protection of individuals against expropriation of property without compensation.
2. Protection of the institution of private property and the right to be a property holder or not to be prevented from becoming a property holder.
3. The goal of making property available and accessible so that people will have the opportunities to become property holders.

³¹ Miller, p. 282-283

³² See Attachment B, S 25(7)

³³ Van der Walt, p. 67- 68

³⁴ Miller, p. 284

The third goal implies that the state will have to ration or even reallocate property rights. In other words, the Constitution does not only guarantee existing property rights, it also places the state under a constitutional duty to take reasonable steps to make possible for citizens to gain fair access to land, to promote security of tenure and to provide for restitution.³⁵

3.2.2 Scope of the Property Clause

Section 8 in the Constitution states that the Bill of Rights applies to all law and binds all branches of government and organs of state, which means that it applies vertically in the relationship between individuals and the state. Horizontal application (the relationship between individuals) of the Bill of Rights is provided for in specific, appropriate circumstances. The extent of such application is unclear, but since it is only the state that can expropriate property or enforce lawful restrictions of the use of property, it is unlikely that horizontal application of the property rights will be a relevant topic.³⁶

The question of whether customary interests in land are covered by the Property Clause remains unclear since it is judicially untested.³⁷

3.2.3 Definition of Property

The constitutional meaning of the property concept is different from the private law meaning. The objects included in the constitutional guarantee are not restricted to corporeal things and the rights included are not restricted to ownership. Further more, it is assumed that the rights in question are not absolute or exclusive, because they can be limited by or in accordance with the terms of the property clause or the Bill of Rights itself. The content and range of the constitutional property concept may very well be answered in the context of finding a justifiable and equitable balance between individual and social interests. It must therefore be determined in every individual case, with reference to a general principle or guideline for the Bill of Rights as a whole.³⁸

³⁵ White Paper on South African Land Policy, p.15

³⁶ Miller, p. 290

³⁷ Bennett, p. 215

³⁸ Van der Walt, p. 53

It is indisputable, at least generally speaking, that the constitutional property concept should be much wider than land, although naturally land and land rights are included in it. Section 25(7) that concerns restitution refers to “property” and not to “land”. What makes this interesting is that this section is the only land reform section that refers to property and not specifically to land. The reason for this is probably to make sure that other rights in land are also included in the restitution process, not just “ownership of land”.³⁹

³⁹ Van der Walt, p. 59

4. THE HUMAN RIGHT TO PROPERTY

The right to property is also protected in the African Charter on Human and People's Rights. It is incorporated in Article 14:

“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

Article 14 raises several questions with regard to property rights in South Africa. One question is whether the Restitution of Land Rights Act is in accordance with article 14. The question will be answered in chapter 12. Other questions are connected to the issue of traditional African law. For example, in many African cultures, women are not entitled to inherit property.⁴⁰ Does Article 14 solve this inequality? There is no answer to this question yet, since there is too little practice by the African Commission to determine the extent covered by the article.⁴¹ The article does not clarify whether customary interests in land are included and protected or if the article merely concerns traditional ownership. This issue will be dealt with in chapter 11.

4.1 The African Charter on Human and People's Rights

The African Charter on Human and People's Rights entered into force in 1986. Today 53 African states are parties, among them South Africa.⁴² This charter is the newest, least developed and effective of the three established regional human rights regimes (European, Inter-American and African). It is also the most distinctive and controversial, since it focuses not only on the rights of the individual but also on the duties of the individual.⁴³ This duty/right conception is symbolic for traditional African values that are highly important in the restoration of the continent's cultural identity in the new, post-colonial era. Such values are commitment, solidarity, respect and responsibility. Above this, it also represents the acknowledgement of the African view concerning individual rights. Individual rights are regarded to be collective in their dimension. Their recognition, their mode of exercise and

⁴⁰ Interview with Sibongile Ndashe, March 26, 2003

⁴¹ Nmehielle, p. 120

⁴² www.law.wits.ac.za/humanrts/instreet/ratz1afchr.htm

⁴³ Alston & Steiner, p. 920

their means of protection' is a collective process requiring the intervention of other individuals, groups and communities.⁴⁴

In Article 30 of the charter an African Commission on Human and People's Rights, within the OAU (Organization of African Unity), is established in order to promote human and people's rights and ensure their protection in Africa. The commission consists of eleven members from different African states. Below, this commission is simply called the "African Commission".

⁴⁴ Alston & Steiner, p. 357

5. RESTITUTION IN THE INTERNATIONAL CONTEXT

Restitution can be defined as the return of goods or property and/or the monetary compensation for wrongs of one people against another. When considering restitution in the international context, it can be noted that land is only one example of an asset that may be returned through restitutionary remedies. For example, the United States had to return ancient art treasures from Greece, and there is also a hot debate concerning Swiss bank accounts holding the unaccounted wealth of Jews. Restitution for the loss of rights is thus a global topic.

The restitution of land most often appears as part of a broader land reform program. On one hand, restitution can be considered a part of land reform in as far as it is an interference in land ownership, and that it is undertaken for reasons of social justice or to improve the economic situation in a country. On the other hand, it differs from land reform in that it uses non-market mechanisms imposed by law to favour change.⁴⁵

5.1 Types of Restitution

Generally speaking, four broad categories of restitution can be identified. However, the categories should not be regarded to be exclusive, but rather a pattern formed by the restitution measures across the world during the last century. The four categories are Anglophone countries; Asia and Middle East; South America; and finally, Former Soviet States and Eastern Europe.⁴⁶

South Africa has a unique history and a diverse range of claims to deal with through restitution. “Restitution has never been done before under the conditions and in the way in which it is being attempted in this country.”⁴⁷ Therefore it is impossible to include the country into any of these groups. However, South Africa shares some characteristics with each of the types of restitution, and we will now look into the similarities as well as the dissimilarities. This is by no means a detailed study, but rather a general overview.

⁴⁵ Adams, M., ‘*Land Reform: New Seeds on Old Ground?*’ Natural Resource Perspectives (ODI), No 6, October 1995, p. 1

⁴⁶ Mashinini and Mayende, *International Precedents for Restitution*, p. 8

⁴⁷ Du Toit, *Draft Report*, p.1

5.1.1 Anglophone Countries

During the course of the last century, governments have started to recognize the rights of indigenous people who were displaced by colonial settlements. Restitution in countries with a colonial history can be divided into two sub-categories:

1. *Colonies of Settlement* (USA, Canada, Australia and New Zealand)
2. *Colonies of Exploitation* (African countries such as Zimbabwe, Kenya and Tanzania)

The first group is characterised by a history of assimilation of the indigenous population. Widely differing approaches to restitution are currently followed in these countries. However, the main focus is the same: to recognize Native title and acknowledge spiritual connection to land.⁴⁸

The second group has a distinct type of land reform, in which the focus is redistribution of white-owned land. Restitution serves as a correction of imbalances in agricultural land ownership.

Comparison with South Africa

Anglophone countries base their restitution processes on the rights of indigenous groups, hence placing restitution in a rural context. Claims for restitution are in many respects similar to claims lodged by large communities in the rural areas of South Africa (e.g. the GaMawela community claim in Mpumalanga⁴⁹). Claims like these have a historic nature and the claimants often emphasize the importance of their spiritual and traditional links to the land.

Anglophone countries and South Africa share the same goals for restitution, such as economic development and redress. In colonies of settlement, such as Australia and Canada, restitution is seen as a remedy for past discrimination. South Africa follows the same approach, and restitution is considered a mechanism of healing. Colonies of exploitation, such as Zimbabwe, recognises the importance of reconciliation, but restitution is not acknowledged as a program apart from the land reform as such. Instead it is rather a mechanism of redistributing white-

⁴⁸ Christopher, p.29

⁴⁹ See Section 9.1, A Rural Case

owned land to promote economic development. Since South Africa and Zimbabwe share an African context, it can be argued that Zimbabwe is an applicable example that might offer insight to South Africa on how to deal with restitution. However, Zimbabwe has focused rather on redistribution than restitution in its approach to land reform and furthermore, Zimbabwe has a discouraging land reform situation caused by immense conflicts such as land-grabbing and violent dispossession of land holders.⁵⁰

5.1.2 Asia and the Middle East

The reason for land reform in countries in Asia and the Middle East has been to break up feudal estates in order to put a damper on the advance of communist ideology. This has been the case in Japan, Korea and Taiwan. Other countries, such as the Philippines, put a focus on the economic advantages of a land reform. There was a need for a more efficient agricultural sector because of extensive rural unemployment. Land reform programs were focused around property relationships such as ownership, leasehold, sharecropping and landlessness. Further reforms, specifically in East Asia, involved the transfer of land to peasants without actually changing the operation of agriculture. A small class of independent, property-owning peasants was created and the reform also served to alleviate poverty to some extent.⁵¹ Middle-East countries such as Iran, Iraq and Egypt followed the same route.⁵²

Comparison with South Africa

The goals of land reform programs in Asia and the Middle East are very different from the ones in South Africa. In the former, land reform was part of an economic agenda (the break-up of large feudal states), beside an ideological one (to prevent the spread of communism). South Africa shares the economic goal but not the ideological. The Philippines may be the country in this region that has most similarities with South Africa, due to the social- and economic context. However, land reform in the Philippines only concerns agricultural reforms and not urban restitution.⁵³

⁵⁰ Mashinini and Mayende, *International Precedents for Restitution*, p. 10-11

⁵¹ Makula, p. 52-54

⁵² Adams, M., 'Land Reform: New Seeds on Old Ground?' Natural Resource Perspectives (ODI), No 6, October 1995, p.2

⁵³ Mashinini and Mayende, *International Precedents for Restitution*, p. 11

5.1.3 South America

There is no historical tradition of small-farm ownership in South American countries. Monopolies on the ownership of land derive from a history of colonial dispossession, where indigenous people were forced to work as labourers on large, semi-feudal estates. The aim of land reform programs is to tackle the unequal ownership of land. Large pieces of land lie unproductive for speculative purposes, while the vast majority of the population live on small tracts of land.⁵⁴ The land reforms of South America are most often joined with labour reforms. For example, countries like Mexico, Bolivia and Chile have redistributed land by transforming estates that use peasant labour into capitalist estates that use wage labour.⁵⁵

Comparison with South Africa

Despite the fact that South American countries and South Africa have a history of colonial dispossession in common, their restitutionary methods differ a lot. In South America, restitution is used to redress colonial injustices, dealing with the inequalities of several centuries. In South Africa, on the other hand, the colonial past is excluded from the restitution process since only dispossessions that occurred after 1913 (in particular dispossessions during the apartheid years) are addressed.

The most significant motivation for restitution in South America is economic; there is a focus on the redistribution of wealth. South Africa shares this goal, although it is not the country's main goal. Furthermore, the reforms in South America are often closely connected with labour market issues, which is not the case in South Africa.

5.1.4 Former Soviet States and Eastern Europe

The main purpose of land reform in former communist states has been stated to be the restoration of legal rights, social justice and the improvement of economic efficiency.⁵⁶ Land is not only restored to tenants, farm labourers and the landless, but to any person who has lost a right in land. Large areas of land are owned by the state, which is a benefit since it reduces

⁵⁴ Världen Idag, *Sydamerika*, p. 64, 70

⁵⁵ Mashinini and Mayende, *International Precedents for Restitution*, p. 11

⁵⁶ Leatherdale, p. 4

the costs of obtaining land to be used for redistribution. Restitution programs cover a wide range of possessions, including urban properties.⁵⁷

Comparison with South Africa

Despite the fact that South Africa has a history far different from the communist history, the country's restitution program still shares some characteristics with the programs in former communist states. The goals are similar, such as rectifying past wrongs and improving economic efficiency. Countries dealing with dispossessions under communist rule restitute land not only to the marginalized population, but also to any person that has lost a right in land. South Africa also deals with claimants who are not necessarily poor, as long as they qualify as claimants according to the criteria in the Restitution Act.⁵⁸

In former communist countries, the majority of land claims are for urban land. The situation is similar in South Africa, where about 80% of the claims are urban claims.⁵⁹

Another similarity is based on the fact that former communist states, as well as South Africa, have huge supplies of state land, which can be used to compensate victims. In South Africa, about one million hectares of land is vested with the government.⁶⁰ In both cases, the state-owned land could be used (as alternative land) to compensate victims of dispossession, which reduces some of the cost of restitution.

⁵⁷ Adams, M., 'Land Reform: New Seeds on Old Ground?' Natural Resource Perspectives (ODI), No 6, October 1995, p.2

⁵⁸ See Section 5.3.2, Qualifying Criteria for Restitution

⁵⁹ <http://land.pwv.gov.za/restitution/BACKGROU.RES.htm>

⁶⁰ Mashinini and Mayende, *International Precedents for Restitution*, p. 12

6. LAND REFORM PROGRAMME

6.1 The Legal Basis of the Land Reform Programme

In the Bill of Rights of the South African Constitution, the basic guidelines and anti-discriminatory laws are stated. The Equality Clause, section 9, prevents legal discrimination against race and gender. There is also, as described in chapter 3.2, the Property Clause in the Constitution that guarantees property rights while giving the State the power to carry out land reform.⁶¹ This actually requires positive action by the government in providing strategies and procedures to make women and Natives participate fully in the implementation of land reform projects.⁶² Apart from the Constitution several Acts and Bills have been passed that form the legal context of the national land reform.

*The Restitution of Land Rights Act (Act 22 of 1994)*⁶³ gives right to restitution of land rights to people who has lost it due to racially based policies.

The Provision of Certain Land for Settlement Act (Act 126 of 1993) covers financial assistance for settlement.

The Development Facilitation Act (Act 67 of 1995) works towards a faster land development for low-income housing.

The Upgrading of Land Tenure Rights Act (Act 112 of 1993) upgrades certain forms of tenure into ownership. It also helps in identifying owners, mediating, surveying and transferring.

The Land Reform (Labour Tenants) Act (Act 3 of 1996) protects the rights of labour tenants.

The Interim Protection and Informal Rights Bill protects people with insecure tenure from losing their land.

⁶¹ See Attachment B

⁶² White Paper on South African Land Policy, p. VII

⁶³ See Attachment A

The Communal Property Associations Act (Act 28 of 1996) gives communities rights to acquire property.⁶⁴

These acts and bills are all relevant for the Land Reform Programme, but since this thesis deals mainly with the process of restitution, *The Restitution of Land Rights Act of 1994* (below called ‘the Act’) will be the most central here.

6.2 Tasks and Goals of the Government

To maintain South Africa’s peace, reconciliation and stability a sound and safe land policy is necessary. Without a well working land policy, economic growth and secure livelihoods cannot be achieved. If the land programme is successful it will also contribute to increasing production and poverty alleviation.⁶⁵

After the far reaching effects of the apartheid system the government of South Africa had to produce a new policy to reconstruct and develop the land in the interest of the entire population. A vast effort to identify the problems was made, and some official governmental plans were published. Firstly, the Department of Land Affairs Framework Document on Land Policy and the Draft statement of Land Policy and Principles were in print in 1995. Thereafter The Green Paper of South African Land Policy from 1996, and later The White Paper of South African Land Policy was released in 1997. The four main guidelines for the new policy were to:

1. Redress the injustices of apartheid
2. Build national reconciliation and stability
3. Support economic growth, and
4. Improve household welfare and reduce poverty.⁶⁶

In order to achieve this, the governmental plan had to cover numerous material demands. The concerned population must be compensated for land lost due to racial laws. A greater equality in the distribution of land ownership had to be promoted. Secure tenure for all people living

⁶⁴ A Guide to the Department of Land Affairs’ *Land Reform Programme*, p. 5

⁶⁵ White Paper on South African Land Policy, p. XVI

⁶⁶ A Guide to the Department of Land Affairs’ *Land Reform Programme*, p. 2

on the land must be provided. Environmental sustainability in the development of the land needed to be secured. Affordable housing and services on designated land was desperately in demand. In conclusion the administrative system must function with reliable registration of rights in property.

Working towards these goals, the government stresses four factors that affect the development in the desired direction. These are:

1. Local participation in decision making
2. Gender equity
3. Economic viability
4. Environmental sustainability.⁶⁷

The Government was aware that the budget for the Land Reform had to be raised already in 1997. The allocations for Land Reform were then less than half of 1% of the national budget, and there were large needs to increase both funding and staff capacity.⁶⁸

6.3 Land Restitution

6.3.1 Defining Restitution under the Act of 1994

Restitution is not necessarily only restoring the actual land itself to the rightful owner. It can also be the providing of alternative land or monetary compensation or a combination. In some cases it is impossible to restore the original land, for instance if the land has been urbanised or if it is occupied with a factory. Then a financial compensation solution has to be found.⁶⁹ There is also an option that gives the claimant right to preferential treatment when it comes to access to governmental housing.⁷⁰ The person who becomes affected by restitution, and accordingly must give his or her land up through expropriation, is entitled to compensation from the state. This matter will be examined below, in section 12.2.3.

⁶⁷ A Guide to the Department of Land Affairs' *Land Reform Programme*, p. 3

⁶⁸ White Paper on South African Land Policy, p. IX

⁶⁹ A Guide to the Department of Land Affairs' *Land Reform Programme*, p. 12

⁷⁰ White Paper on South African Land Policy, p. 56

6.3.2 Qualifying Criteria for Restitution

The qualifying criteria for restitution are introduced in chapter I, section 2 of the Act. Any person dispossessed of a right in land under a racially discriminatory law may qualify for restitution.⁷¹ This includes direct descendants, also meaning the spouse or partner in a customary law union, and furthermore communities holding land together.⁷² A 'right in land' can also include a customary law interest, i.e. not only traditional ownership to land, but also interest in using the land based on a historical tradition.⁷³

There is a time limit for qualifying for restitution under the Act. An individual, community or their descendants, who lost their land due to discriminatory laws passed on or after June 19, 1913, have a right to restitution. Some examples of these discriminatory laws are the Native Land Act of 1913, Native Administrations Act of 1927, Rural Coloured Areas Act of 1963 and the Community Development Act of 1966.

This rules out the opportunity to restitution if the land loss was caused by the actions of private individuals. Also, if it can be established that just and equitable compensation was paid for the land at the time, restitution is not possible.⁷⁴

If the land was lost before 1913 there is a chance to obtain some land via the Land Redistribution Programme.⁷⁵

The time limit is equally severe in the other end. The claim must have been lodged on December 31, 1998 at the latest.⁷⁶

6.4 Land Redistribution

The second form of land reform is redistribution of land to the poor part of the population who cannot afford to buy market value land without assistance. There is a large need to allocate land to people, but the Government must at the same time maintain public confidence

⁷¹ See Attachment A

⁷² Jaichand, p. 54

⁷³ See Section 11.3, Customary Land Rights within Restitution

⁷⁴ Restitution of Land Rights Act, Chapter I, S 2 (2)(a)

⁷⁵ See Section 5.4, Land Redistribution

⁷⁶ Fuphe, 'Cut-off date for land claims stands', The Sowetan 2003-02-10

in the land market. Therefore, this type of transaction of land is mainly dependant of willing buyers and sellers. In reality this means that individuals often must form communities and add their resources together to be able to afford the land in question. There are also opportunities for individuals to receive grants and access other types of government support services.⁷⁷

6.4.1 Qualifying Criteria and Priorities for Redistribution

The landless poor, farm workers, labour tenants, women and emergent farmers all have the right to apply for land under the redistribution programme, unless they fall under the land restitution programme.

Some groups are prioritised over others in the process of land redistribution. These include the marginalized, women and projects that have possibilities to implement quickly and effectively due to already existing institutional capacity. Further more, priority is agreed to projects where attention is given to economic and social viability, fiscal and environmental sustainability, proximity and access to markets and employment and availability of water and bulk infrastructure. There is also an effort to spread redistribution evenly across the country and diversity of land, to address the multiplicity of needs.⁷⁸

People or groups who participate in land invasions or threats of land invasion will not be given priority.⁷⁹

6.4.2 The Redistribution Process

Depending on the project the process can last from 6 up to 18 months. It can be divided into 5 phases.

Making an Application

The applicant, individual or group, must go to the provincial office of the Department of Land Affairs (DLA). There a DLA official will decide if they qualify for the redistribution

⁷⁷ A Guide to the Department Of Land Affairs' *Land Reform Programme*, p. 18

⁷⁸ A Guide to the Department Of Land Affairs' *Land Reform Programme*, p. 19

⁷⁹ White Paper on South African Land Policy, p. IX.

programme, and have them fill in a registration of need form. The DLA then decides on the priority of the application according to the presented criteria above.

Planning for Settlement

After an initial planning grant is awarded, professional services can be hired to prepare a project proposal. In this phase the land is identified and valued, infrastructure development and financial feasibility are planned, a legal entity is established and negotiations about the land purchase take place.

Approval and Land Transfer

When the plan has been approved the Minister of Land Affairs designates the land in question. Funding to purchase the land comes from the Settlement/Land Acquisition Grant. The land is then transferred and settlement can begin.⁸⁰

Detailed Planning and Implementation

This phase can also take place before the land transfer. It involves detailed plans for agricultural use depending on the intentions of the land use. There is also a second instalment of grant to cover the costs of producing a detailed settlement plan.

Aftercare

The local or provincial government has responsibility for the continuing sustainable development. Support is required for extension, marketing, enterprise development as well as help with the operation and maintenance of settlement infrastructure.⁸¹

There are indications that redistribution is having some success, but the process is not sufficient in providing the poor with land. The government is not satisfied with the results.⁸²

⁸⁰ A Guide to the Department Of Land Affairs' *Land Reform Programme*, p. 20

⁸¹ A Guide to the Department Of Land Affairs' *Land Reform Programme*, p. 21

⁸² Miller, p.576

6.5 Land Tenure Reform

“Land tenure describes the way in which people own or occupy land”.⁸³ Registered ownership is naturally the strongest form of holding land, but during the apartheid system Native people did not have the right to register ownership, or hold other types of land rights in most parts of South Africa. Therefore, an enormous lack of land was created for the Native population.

The purpose of the Land Tenure Reform is to collect all people occupying land under one system of landholding, the same legislation, and the same rights for everyone, regardless of colour. The changes that have to be installed include balancing systems of group rights with individual rights, resolving problems of insecurity, inequality and lawlessness, giving all rights holders adequate representation in decision making processes, providing law enforcement agencies and organising the administrative system.

6.5.1 The Legal Context for Land Tenure Reform

The Property Clause in the Constitution contains a provision that states:

“A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.”⁸⁴

Apart from the Constitution the government has stated three basic principles on tenure reform in the Green Paper on Land Reform:

Pro rights and anti permits – a transformation of inferior land rights into legally enforceable rights to land within a non-racial system.

Pro choice and anti imposition – giving people the right to choose their own tenure systems.

Embodiment of constitutional principles – human rights must be respected within all tenure systems. Gender equality and freedom from discrimination are prioritised.⁸⁵

⁸³ A guide to the Department of Land Affairs, *Land Reform Programme*, p. 24

⁸⁴ Constitutional Property Clause, S 25(6)

6.5.2 Qualifying Criteria for Tenure Reform

Anyone who holds land under forms of tenure that do not give them the same rights as registered ownership can qualify for tenure reform. In particular this concerns farm workers, labour tenants and people living in informal settlements.⁸⁶

6.6 Grants and Support of the Land Reform Programme

6.6.1 Financial Grants

There are grants to apply for within the three principal programmes. These are to help the people finance their land buy, or develop the land in the desired direction. The following categories of people can be eligible for these grants: Landless people, women in particular, farm workers and their families, labour tenants, residents who wish to secure or upgrade their conditions of tenure, beneficiaries of the Land Restitution Programme and some dispossession cases.

There are four different grants: *The settlement/Land Acquisition Grant* is maximum R15.000 (around SEK15.000) per beneficiary household, to be used for land acquisition, enhancement of tenure rights, investment in internal infrastructure and home improvements. The other three grants are *The Grant for the Acquisition of Land for Municipal Commonage*, *The Settlement Planning Grant* and *The Grant for Determining Land Development Objectives*.⁸⁷

6.6.2 Other Services Available

6.6.2.1 Information and Funding of NGOs

The communities need support and assistance in numerous areas, not only financially. There are facilitation services for the providing of information about the land reform programme to the people. This is in order to optimise their participation and enforce implementation of the plans. The people also need help organising their case information to get the most benefits out

⁸⁵ A Guide to the Department Of Land Affairs' *Land Reform Programme*, p. 25

⁸⁶ A Guide to the Department Of Land Affairs' *Land Reform Programme*, p. 26

⁸⁷ White Paper on South African Land Policy, p. XII-XIII

of the programme. For this matter the Non-Governmental Organisations (NGOs) take large responsibility, and are encouraged to do so by the Government. There is a special fund, the Community Facilitation Fund, which has been established to finance NGOs assisting communities.

6.6.2.2 Mediation

To prevent and in some cases resolve land conflicts the Department of Land Affairs has a Dispute Resolution Service. It is administered by the independent Mediation Service of South Africa and consists of a National Land Reform Mediation Panel composed of 67 selected mediators. The mediators are all high officials within the Land Reform Programme.

6.6.2.3 Training

Finally, the DLA finances training, to increase the understanding for the land reform processes and how they can be used. This training is available for NGOs, community structures, tribal authorities and participating local government officials.⁸⁸

⁸⁸ A Guide to the Department Of Land Affairs' *Land Reform Programme*, p. 27

7. THE RESTITUTION PROCESS

During the time period of four years, in which people could claim restitution, an estimated number of 67.500 claims were lodged. 80 percent of the claims were for rural land, which means that a large part of the claimants was communities consisting of very many people.⁸⁹ The number of settled claims, as of March 2003, was 36.489. Thus, more than half of the claims are solved. Approximately 457.000 persons are beneficiaries of the restitution programme so far.⁹⁰

7.1 Definitions

The fundamental concepts in the Restitution of Land Rights Act of 1994 are defined briefly in the first chapter of the Act⁹¹. However, some of the provisions are not entirely unambiguous and therefore need to be dealt with in depth.

‘Community’

‘Community’ is defined in the Act as “any group or persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of such group.” Apparently the group must hold the land in common and have rules binding upon the group that determine each person’s right of access to it. The word ‘held’ is not defined though, and it is suggested that it does not imply ownership alone.⁹²

‘Direct Descendant’

‘Direct descendant’ of a person includes, according to the Act, the spouse or partner in a customary union of such a person whether or not such customary union has been registered. In South African case law it has been held that the concept ‘direct descendant’ covers all blood relations in the descending line.⁹³ Thus, it should not make any difference whether the blood relations are legitimate or illegitimate, which in turn depends on the legal status of

⁸⁹ <http://land.pwv.gov.za/restitution/BACKGROU.RES.htm>

⁹⁰ <http://land.pwv.gov.za/restitution/updated%20stats.htm>

⁹¹ See Attachment A

⁹² Southwood, p. 234

certain marriages (such as customary unions and Muslim and Hindu marriages). The descendants must be 'direct'. This implies that brothers, sisters, nephews and nieces and their offspring are excluded.⁹⁴

'Equitable Redress'

The word redress is not defined in the Act and therefore it must be given its ordinary meaning in its context. Dictionaries give the meaning "compensation, amends or reparation for a wrong, injury, etc"⁹⁵ There is a strong undertone of equality between the loss and the reparation in the dictionary meanings. The addition of the word 'equitable' emphasises this since equity means fair, just and reasonable.

'Land'

The word land is not defined in the Act and must be given its ordinary meaning in its context. Normally, it includes all the rights of ownership attaching thereto including the air above it and the minerals therein and all immovable improvements.⁹⁶

'Rights in Land'

This concept is defined in the Act. It means both registered and unregistered rights. The Act gives five examples of rights that "may be included", which must indicate that the list is not exhaustive. The concept is intended to cover both real rights in land as well as personal rights in land whether or not registered.⁹⁷ A beneficiary's indirect right to inherit land from a deceased estate has been held to be a 'right in land'.⁹⁸

⁹³ Cross v Cross 1955 (4) SA 36 (N) 39; Ponmathie v Bangalee 1960 (4) SA 650 (D) 653; Dulabh and Another v Department of Land Affairs 1997 (4) SA 1108 (LCC) 1120D

⁹⁴ Southwood, p. 240

⁹⁵ The Collins English Dictionary 3rd ed, updated, p.1300, The Concise Oxford English Dictionary 9th ed, p. 1151

⁹⁶ Erasmus and Lategan v Union Government 1954 (3) SA 415 (O)

⁹⁷ Southwood, p. 230

⁹⁸ Dulabh and Another v Department of Land Affairs 1997 (4) SA 1108 (LCC) 1120D

Interest of a Labour Tenant

The first right in land that appears as an example in the list is the interest of a ‘labour tenant’. This means a person occupying land under an agreement that no rental is to be paid and that the occupier is to provide labour in return for the occupation.⁹⁹

Interest of a Sharecropper

The second example of a right in land specified in the Act is the interest of a ‘sharecropper’. There is no definition of this word and its usual meaning must therefore be given in its context. This means a *colonus partiaris* in South African law¹⁰⁰ and accords with the ordinary dictionary meaning: ‘a tenant farmer, who gives a part of each crop as rent’.¹⁰¹

Customary Law Interest

The third example of right in land is the ‘customary law interest’. There are many of this kind and they are all personal rights. We will examine this type of interest more profoundly in chapter 11.

Interest of a Trust Beneficiary

The fourth example is ‘the interest of a beneficiary under a trust arrangement’. It is suggested that you must interpret the concept in a narrow way. A trust exists when “the creator of the trust, the founder, has handed over or is bound to hand over to another the control of property which is to be administered or disposed of by the other (the trustee) for the benefit of some person other than the trustee as beneficiary, or for some impersonal object.”¹⁰²

Beneficial Occupation for Ten Years

The fifth example of interest in right in land is ‘beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.’ What is required is occupation

⁹⁹ Southwood, p. 231

¹⁰⁰ *Lubbe v Volkskas Bpk* 1992 (3) SA 868 (A) 874G-I

¹⁰¹ The Concise Oxford English Dictionary 9th ed, p. 1273

¹⁰² Southwood, p. 232

of land under a legal right to enjoy it for a continuous period of ten years. It does not have to be the same legal right for the whole period, as long as there is no break. On the other hand, a temporary absence from the land will not necessarily break the continuity.¹⁰³

‘Racially Discriminatory Laws’

The act states that ‘racially discriminatory laws’ include laws made by any sphere of government and subordinate legislation. The expression ‘subordinate legislation’ is not defined. According to Tom Southwood, writer and advocate of the High Court of South Africa, this category of legislation includes proclamations, regulations, by-laws, rules, town-planning schemes, industrial agreements etc. Subordinate legislation touches the area of department circulars and instructions, issued without clear statutory authority, to guide the conduct of officials in the exercise of their powers, and sometimes to inform the public about general policies. Sometimes these are given legal status, which would probably make them qualify as ‘subordinate legislation’. Consequently, the definition covers all legislation, passed after June 19th 1913, from the pre-1994 Constitution down to the most minor but enforceable circulars and instructions.¹⁰⁴

There is nothing in the definition ‘racially discriminatory laws’ that demand these laws to be unfair: if they treat unequally on the basis of race, they fall inside the definition. In other words, unequal treatment includes treating some persons more favourably on the basis of race, as well as less favourably.

‘Racially Discriminatory Practices’

‘Racially Discriminatory Practices’ may imply any practice, act or omission by government or functionary or institution exercising a public power or performing a public function that had the direct or indirect effect of treating persons unequally on the basis of their group physical characteristics or group ancestry.¹⁰⁵ Thus, the practice may not have been racially discriminatory as such, but, by its effects, have treated persons unequally on the basis of race.

¹⁰³ Southwood, p. 233

¹⁰⁴ Southwood, p. 235

¹⁰⁵ Southwood, p. 238

7.2 Department of Land Affairs

The fact that the state recognizes that it is the respondent in all restitution cases is an important aspect of the restitution process, also concerning claims lodged against land that has become privately owned.

The Minister of Land Affairs or the Department of Land Affairs (below called DLA) represents the state as the primary respondent in practically all restitution claims, as the Minister of Land Affairs is responsible to Parliament for the administration of the Restitution Act and the restitution of land rights. The Restitution Act also empowers the Minister of Land Affairs to make awards in the case of a settlement and to perform other functions relating to restitution; for instance to make regulations and to grant a loan or a subsidy for the development or management of, or to facilitate the settlement of persons on, land which is the subject of an order of the Court in terms of the Restitution Act or a settlement agreement.¹⁰⁶

The task of the DLA is to:

1. provide specialist services for the information systems relevant to the restitution of land rights,
2. develop a co-ordinate policy on restitution and management programmes to execute restitution orders,
3. investigate and advise on claims for restitution of land rights in the rural context, and
4. provide administrative and professional support and secretariat services to the Commission on national and regional level.¹⁰⁷

There is a tension between the DLA and the Commission concerning leadership. It is caused by the fact that leadership at the top of the DLA is heavily white. Although the top level managers have all been progressive, and are drawn from anti-apartheid background, and although a pro-active policy of affirmative action is in place in the department, the fact that key managers were white led to some suspicion at the Commission that the DLA was still being run by representatives of the “old regime”.¹⁰⁸

¹⁰⁶ <http://land.pwv.gov.za/restitution/BACKGROU.RES.htm>

¹⁰⁷ http://land.pwv.gov.za/about/chief_dirctr/restitution.htm

¹⁰⁸ Du Toit, *Draft Report*, p. 8

7.3 The Commission on Restitution of Land Rights

7.3.1 Structure of the Commission

Chapter II of the Restitution of Land Rights Act of 1994 establishes the Commission on Restitution of Land Rights. The most important functions of the Commission are contained in sections 10-15. The Commission is a pyramid structure with a central administration, lead by the Chief Land Claims Commissioner and his Deputy, both appointed by the Minister of Land Affairs. They are ultimately responsible for the Commission's work. The Chief Land Claims Commissioner has powers to delegate functions to lower-ranking officials, private individuals or organisations. Further more he/she can, after having consulted the Minister of Land Affairs, make rules concerning filing, publication and investigation of claims.

To manage to reach the people and help them near the areas in question there are five regional offices where the practical work takes place. They are spread across the country and deal with the claims from their respective areas.

1. Cape Town, for Western Cape and Northern Cape claims
2. East London, for Eastern Cape and Freestate claims
3. Pietermaritzburg, for KwaZulu-Natal claims
4. Pretoria, has two separate offices: for Gauteng and North West Province claims, and for Northern Province and Mpumalanga claims¹⁰⁹

The Commission has its own set of rules that direct how the work should be performed. These rules are national and apply to all the regions as well as the national office.

¹⁰⁹ See Attachment E, Map of South Africa

7.3.2 Duties of the Commission

Filing a Claim

The first responsibility of the Commission comes in already before the lodging of a claim. The Commission is responsible for informing about the land claims process according to section 6(1)(f) of the Act.¹¹⁰

The Commission has rules of how a claim can be filed. It must be filled out on the particular form provided by the Commission, and supporting documents must be submitted along with the claim or as soon as possible afterwards. The regional land claims commissioner has to acknowledge the receipt of the claim and inform the claimant that the claim is being considered.¹¹¹

After the claim is lodged, the existence of the claim is confirmed by the publishing in the *Government Gazette* to inform the surrounding area about the claim. The legal consequences of gazetting are set out in sections 11(7) and 11(8) of the Act. They are undoubtedly important and make a difference for the people living on the land. For instance (7)(c) states that, “no person shall in any manner whatsoever remove or cause to be removed, destroy or cause to be destroyed or damage or cause to be damaged, any improvements upon the land without the written authority of the Chief Land Claims Commissioner”.

Section (7)(8) is even more severe when it allows the regional land claims commissioner to make an inventory of all the land resources, the people working and living on it and its agricultural condition.¹¹² There have been court cases to challenge these provisions in the Constitutional Court, for instance *Transvaal Agricultural Union v Minister of Land Affairs and Another*, where the white landowners object to the absence of right to a hearing before gazetting among many other things. Since the publishing of claims brings such legal consequences, there could be a need for a hearing even before this initial step. The Constitutional Court then compromised in the new section 11 A in the Act. Affected persons

¹¹⁰ Budlender, p. 3A-25

¹¹¹ Jaichand, p. 54

¹¹² Budlender, p. 3A-30

may alert the regional land claims commissioner who has power to withdraw or amend the notice.¹¹³

Investigating the Claim

The proceeding functions of the Commission are to investigate and evaluate the claims for a possible future process. The Commission has powers to investigate, demand necessary documents and information and direct claimants to take all reasonable steps to have certain information available.¹¹⁴ To save the resources of the Commission, this is only done when the claimants are genuinely unable to provide the information themselves.¹¹⁵ The Commission even has powers to force necessary documents from private persons and state officials, except in cases where the persons might incriminate themselves.

In two stages of the process the Commission uses its powers, the preliminary investigation prior to the publication in the *Gazette*, section 11(1), and later in the in-depth investigation prior to its being referred to the Land Claims Court, section 14. The investigational powers of the regional land claims commissioners are stated in rule 5 of the Commission's Rules. In rule 5, 16 different tasks are listed for the regional land claims commissioners to perform when a claim is accepted for investigation. This includes establishing the right to file a claim, family relations and gathering of all important and relevant material that has been excluded thus far in the process. Also rule 6(a) contains three important powers for the Commission; the power to prioritise claims, the power to order simultaneous investigations of all claims for a certain piece of land and the power to direct the disputing parties to mediation and negotiation.¹¹⁶ Rule 6(2)(d) goes in further on the priority issues. It authorizes the Commission to choose to deal with claims that "affect a substantial number of persons" first.

When the main investigation is finished, the Chief Land Claims Commissioner is to be informed via a full report from the regional land claims commissioner.¹¹⁷

¹¹³ Budlender, p. 3A-33

¹¹⁴ Miller, p. 351

¹¹⁵ Budlender, p. 3A-34

¹¹⁶ Miller, p. 353-354

¹¹⁷ Budlender, p. 3A-37

Mediation and Negotiation

A settlement between the landowner and the claimants is the preferable outcome for a case. This is due to the fact that they will often have to coexist and use the land together after the process has taken place. Thus to avoid future disputes it is then best to solve the claim with an agreement. Another advantage with settlements is that if they are correctly made from the beginning there will be less work for the Land Claims Court.

The right for the Commission to mediate and settle disputes is constitutional.¹¹⁸ After the *TAU* case¹¹⁹ this right is not an obligation, but the Commission may outsource the work of mediation to experienced mediators with knowledge of the procedure. The negotiations are often better handled by experts than by the Commission staff.¹²⁰

Section 13(1) of the Act points out four scenarios in which the Commission may start negotiations to find a settlement:

1. Two or more claims are competing to a particular right in land. (a)
2. In the case of a community claim, there are competing groups within the claimant community. (b)
3. The claim is to privately owned land and the landowner or right holder is opposed to the claim. (c)
4. There is any other issue that might be solved through mediation and negotiation. (d)

The Chief Land Claims Commissioner decides when the parties should go into negotiations, but in practice the regional land claims commissioner discovers first when it is time, what issues should be settled and who should mediate. Therefore, the decision lies with the regional land claims commissioner who, at any stage, can submit a report to the Chief Land Claims Commissioner saying that there is a need for settlement.¹²¹

After a claim has been submitted there are only two possible directions for it. Either the Commission will dismiss it or it is referred to the Land Claims Court. Even when a settlement

¹¹⁸ Constitution of the Republic of South Africa, S 122(1)(b)

¹¹⁹ *Transvaal Agricultural Union v Minister of Land Affairs* 1996

¹²⁰ Budlender, p. 3A-40

¹²¹ Jaichand, p. 57

is reached, a court order is necessary to confirm the solution and make it undisputable. There are, however, no rules against out-of-court settlements. This means in practice that there would be a possibility to contest these settlements, but this has not been established. The Court might have a right to nullify these settlements, but there is still no clarity in this matter.¹²²

Referral to the Land Claims Court

The Act provides for four instances in which claims can be referred to the court in its section 14(1).

1. Settlement agreements have to be controlled by the Court so that they are appropriate, and they will then receive the status of Court orders.
2. The parties may agree in writing that it is impossible to settle the claim by mediation.
3. The regional land claims commissioner can certify that the dispute is unsolvable via mediation.
4. The regional land claims commissioner can decide that the claim is “otherwise ripe for hearing”.¹²³

Feasibility

Before 1997 there was a need for the Chief Land Claims Commissioner to request the Minister to certify that the land allocated was “feasible”. In the eventual case that the land was considered not feasible, alternative state owned land had to be found. This requirement has since been dropped, and there are opinions saying that this should not have been done. In order to deliver restitution results more expeditiously, a system of control has been sacrificed.¹²⁴

¹²² Budlender, p. 3A-42

¹²³ Budlender, p. 3A-43

¹²⁴ Miller, p. 361

7.4 Land Claims Court

7.4.1 Powers of the Court

The Land Claims Court (below also called ‘the Court’) was established in 1996 and it has jurisdiction throughout the Republic. It is a specialist court, which performs an independent and judicatory function. It hears disputes arising from those laws that support South Africa’s land reform initiative. These are the Restitution of Land Rights Act of 1994, the Land Reform (Labour Tenants) Act of 1996 and the Extension of Security of Tenure Act of 1997. The Land Claims Court enjoys the same status as the High Court of South Africa. An appeal from a judgement or order of the Land Claims Court will be heard by the Supreme Court of Appeal or, in appropriate cases, by the Constitutional Court.¹²⁵ Aspects of the Court’s jurisdiction and proceedings are unusual to the functions it performs. It may carry out any part of its proceedings on an informal or inquisitorial basis and it may organize hearings in any part of the country to make it more accessible and less expensive for the parties.¹²⁶

7.4.2 Time limit

The court is temporary, and originally it was supposed to last for five years: from 1995 until 2000. The government have extended the period several times, four years in all. There is uncertainty concerning how long the court will remain; according to the plan it will last till all the lodged claims are settled. The president has made an official statement that he expects a closure within three years. According to Seena Yacob, legal researcher at the Land Claims Court, the process of land restitution will most likely not end within three years unless the funding is improved. “Most of the claims have not even reached Land Claims Court today, but are still at the Commission. The Land Claims Court is temporary and far less ranging than an ordinary Court. The idea is that the Court will stay until all the land claims are settled, which is possible since the cut off date for putting in a claim was the end of 1998, and there are not going to be any new claims. However, in order to reach this goal, the necessary improvement would be to speed up the Commission’s work.”

¹²⁵ Restitution of Land Rights Act, S 37

¹²⁶ Interview with Seena Yacob, Land Claims Court, February 19, 2003

7.4.3 Functions of the Court

The functions of the Court are included in chapter III of the Restitution of Land Rights Act. The task of the Court concerning restitution is to decide which form of restitution is appropriate and fair in each case. This may imply *restoration* (returning the original piece of land that was taken), granting the claimant *alternative state owned land* or *monetary compensation*. Where a compensation is payable, either to a claimant or to a current owner who is being expropriated, it is also the task of the Court to decide on the amount of compensation. All restitution claims ultimately reach the Court, even successful settlement since the Court must scrutinise and approve them in order to finally give them status of court orders.

The court cannot give legal advice to the clients; it can only refer them to legal aid institutions, where people can receive legal help free of charge.

7.4.4 Structure of the Court

Judges

There is a President of the Court and additional Judges, who are appointed by the President of South Africa acting on the advice of the Judicial Service Commission, and who may be appointed for a fixed term. A Judge of the High Court may be assigned to serve as a Judge of the Land Claims Court.¹²⁷ In February 2003 there were four judges who worked at the Court. They had to be made Judges of the High Court to be able continue their work even if the Land Claims Court ran out of its time once again. Apparently it is too complicated to extend their contract every time the court's time limit runs out. This means that sometimes all four Judges have to work for the High Court, which gives them less time to work for the Land Claims Court. Some weeks the Court does not have any hearings and sometimes it is full.¹²⁸ This appears to be a disadvantage for the time aspect of the restitution process.

¹²⁷ Southwood, p. 287

¹²⁸ Interview with Seena Yacob, February 19, 2003

A person may qualify to be appointed President of the Court or a Judge of the Court if he or she is:

1. a South African citizen, and
2. a fit and proper person to be a judge and is a judge of the Supreme Court or is qualified and has practised as an attorney or advocate or law lecturer for a cumulative period of ten years, or has the necessary training and experience and expertise in the fields of law and land matters.¹²⁹

Assessors

The Minister of Land Affairs may compile a list of assessors, after inviting nominations from the general public and consultation with the President of the Court. The presiding Judge, in any given case before the Court, may appoint the assessors from the Minister's list. An assessor's task is to assist the Court in different matters. He or she must have skills and knowledge, but not necessarily legal qualifications, relevant to the work of the Court.¹³⁰

Seat

For a land claim there are normally two Judges or one Judge with one Assessor. For an appeal there are normally two Judges and one Assessor or three Judges. The Act states when there *must be* an assessor and when there *can be* one. This depends on what kind of case it is, the level of difficulty etc.¹³¹

7.4.5 Rules governing procedure

The President of the Court is authorized to make rules governing procedures, including rules for brief hearings, and may order under which circumstances oral evidence may be submitted to the Court. Further more, the Court can, at any stage, after a claim has been referred to it, refer it back to the Commission with directives on matters to be looked into and reported on.¹³²

¹²⁹ Restitution of Land Rights Act, S 23

¹³⁰ Jaichand, p. 74

¹³¹ Restitution of Land Rights Act, S 28

¹³² Restitution of Land Rights Act, S 32

The Court has inquisitorial powers, which means that the court can ask questions and conduct any part of any proceedings. Therefore the claimants, who normally have smaller means than the opposite party, are not disadvantaged during the hearing: “This prevents the claimant from losing out by having to use the LRC or other free judicial help when the opponent can afford a private attorney”.¹³³

7.4.6 Hearings

Hearings are public. However, it has happened that too many people have arrived for them all to fit in.

A court hearing can take from two days to three weeks. The restitution hearings are often split in two sections: First you need to prove that you are a legitimate claimant. Then you need to prove that your land was unlawfully taken without compensation awarded. A preliminary hearing determines *locus standi* and another hearing a couple of months later will determine if the land was taken on a racial basis. There might be a third trial to discuss whether there has been compensation.¹³⁴

Evidence

Since the Court has inquisitorial powers it may call for any person to appear and give evidence in the matter concerned. It can also decide on what evidence to accept and pay attention to. The Land Claims Court generally applies a less strict approach to submission of evidence compared to other courts in South Africa. “The rule of evidence concerning restitution has fortunately been relaxed so that you can for instance use hearsay as a proof”.¹³⁵

Interpreters

Interpreters are often used, since sometimes neither the judges nor the attorneys understand the language. The Court appoints only official court interpreters, quite often the same ones. “Normally, interpreters do not cause problems but sometimes the Judges may misunderstand

¹³³ Interview with Seena Yacob, February 19, 2003

¹³⁴ Ibid

¹³⁵ Interview with Durkje Gilfillan, February 12, 2003

when they think that they have understood the client without translation. The reason is that many African languages are similar; there are similar words but with different meanings. Therefore one must be careful and listen to the interpreter's explanation also."¹³⁶ In other words, it can be more hazardous when a judge has *some* understanding than when he or she does not understand at all.

7.4.7 Settlements

The court encourages settlements between the parties, which involves many pre-trial conferences before the parties bring the matter to a court hearing.¹³⁷ The pre-trial conferences aim to clarify the issues in dispute, make sure that everyone understands the different concerns and matters connected to the claim, identifying those issues on which evidence will be necessary and, in general, expediting a decision on the claim in question.¹³⁸ "The weaker side does not lose from settlements. They are well represented at the pre-trial conferences".¹³⁹

7.4.8 Judgements

The Court must pay attention to certain factors in considering its decision in any particular matter:

1. The desirability of providing for restitution of land because of dispossession based on racially laws or practices;
2. the desirability of remedying past violations of human rights;
3. the requirements of equity and justice;
4. if restoration of a right in land is claimed, the possibility of such restoration;
5. the desirability of avoiding major social disruption;
6. any already existing provisions concerning the land in question that may affect the decision;
7. the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;

¹³⁶ Interview with Seena Yacob, February 19, 2003

¹³⁷ Ibid

¹³⁸ Restitution of Land Rights Act, S 31(2)

¹³⁹ Interview with Seena Yacob, February 19, 2003

8. the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;
9. in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;
10. any other factor, which the Court may regard as relevant and consistent with the spirit and objects of the Constitution.¹⁴⁰

There is no time limit concerning decision taking. “The judges try to give the judgement out as soon as possible. Normally it takes one week, but the restitution cases take much longer. In one case the final hearings were in July and the judgement came out in September. There is a law that says that if the ruling is not done within a reasonable time the clients can bring an order against it”.¹⁴¹ The reason why restitution cases take longer time is that they are often considerable in terms of material. In particular the community claims are sizeable, which is often due to a large amount of evidence based on comprehensive interviews with community members etc.¹⁴² The rulings are public¹⁴³ and they can be found on the internet.¹⁴⁴

7.4.9 Direct Access to the Land Claims Court

An important amendment is that claimants may now, if they wish, come directly to the Court without first going to the Commission. The amendment was made in order to speed up the restitution process and it is now included in chapter IIIA of the Restitution of Land Rights Act. Chapter IIIA states that any person who is entitled to claim restitution of a right in land, and has lodged a claim not later than the end of 1998, may apply for restitution of such right.¹⁴⁵ If claimants choose to do this, they must do all the investigative and preparatory work on their claims themselves.¹⁴⁶ Mdu Shabangu, National Cluster Co-ordinator at the NCBPA in Johannesburg, claims that although the Restitution Act now provides for an individual to bring an application directly to court, in reality it is not possible. “Legal language is often used from the day of filing an application to the day of hearing it in the Court. And those affected are largely illiterate and poor communities without the necessary language skills.”¹⁴⁷

¹⁴⁰ Restitution of Land Rights Act, S 33

¹⁴¹ Interview with Seena Yacob, February 19, 2003

¹⁴² Interview with Durkje Gilfillan, February 12, 2003

¹⁴³ Restitution of Land Rights Act, S 38

¹⁴⁴ www.law.wits.ac.za

¹⁴⁵ Land Restitution and Reform Laws Amendment Act 63 of 1997

¹⁴⁶ Southwood, p. 283

¹⁴⁷ Interview with Mdu Shabangu, NCBPA, Johannesburg, February 10, 2003

The introduction of the direct access option has improved the rate at which claims are finalised.¹⁴⁸

¹⁴⁸ <http://land.pwv.gov.za/restitution/BACKGROU.RES.htm>

8. LEGAL AID

Access to legal aid for people who claim their right to restitution is a highly important matter in the process. The actors offering legal aid in the matter of restitution are Paralegal offices, directed by the National Community Based Paralegal Association (NCBPA), Legal Resources Centre (LRC) and University Law Clinics (ULC). There are networks of co-operation and development of access to justice for the marginalized and vulnerable population in South Africa, called Justice Centres and Clusters. Apart from the above-mentioned actors, the following organisations participate in the networks: Lawyers for Human Rights (LHR) and the Association of University Based Legal Aid Institutions (AULAI).

8.1 NCBPA and Paralegals

The NCBPA was established in 1996. It is a national network of provincial paralegal associations, which in turn embrace community based advice offices and paralegals. NCBPA's mission is to promote, develop and co-ordinate the work of the subordinated advice offices in order to ultimately work toward increasing access to justice in South Africa, with a focus on the poor population.

Today there are approximately 250 advice offices with about 750 paralegals in South Africa. The advice offices are located in each province and mostly in places that are otherwise inaccessible to the legal aid system.¹⁴⁹

8.1.2 The Paralegal Movement – History and Development

The paralegals have existed a long time, although the term "paralegal" came into being in 1990, when Nelson Mandela got released from imprisonment. In the 70s the paralegals were mostly working with legal advice and empowerment, but there were also politicians and guerrilla soldiers within the organisation. The paralegals had to cover many areas, such as law, politics, culture and art in order to fulfil the needs of the people. In 1994 there was a substantial political change in the paralegal movement. They managed to put pressure on the

¹⁴⁹ Half Year Narrative and Financial Report for Period January 1999-June 1999, National Community Based Paralegal Association, p.1

government within the issues of human rights, which resulted in the state having to accept the paralegals as part of the legal system.

Today the paralegals are general practitioners of law. Virtually this was the case even before the overthrow of apartheid but there are two important changes:

1. Today the government recognises the paralegals as an unofficial part of the legal system of South Africa.
2. Today paralegals are bound to use the law in their practice; before 1991 there used to be reluctance to using it since the law was part of the apartheid system.

Funding from different organisations finances NCBPA. The International Commission for Jurists in Sweden is the major financier. According to Mdu Shabangu, National Cluster Co-ordinator at the NCBPA, in Johannesburg, some of the funding comes from clients: “We do not charge the client formally, they pay us out of gratitude if they can afford it.”

8.1.3 Recruitment of Paralegals

Paralegals are more or less law practitioners without a degree. They have their own personal experiences that make them suitable to work as paralegals. “It is not a question of what is on paper.”¹⁵⁰

People interested in becoming paralegals come through the advice offices across the country. NCBPA then interview them to see if they are proper and fit. They will have to be prepared to volunteer, since NCBPA do not have much funding and there is no guarantee that the existing funding will continue to come in. “We do not want to raise expectations of payment. The main question we ask the applicants is whether they have a community heart. If so, they pass our demands.” The NCBPA gives new employees training and education. “We cannot afford to train people that will not stay with us, therefore we make sure of their intentions. They have to agree with our working conditions and so forth.”¹⁵¹

¹⁵⁰ Interview with Mdu Shabangu, NCBPA, Johannesburg, February 10, 2003

¹⁵¹ Ibid

8.1.4 Function of Paralegals

Paralegals play an important role in the townships and the rural areas since there are no or very few attorneys in such areas. Further more, the poor, illiterate and marginalized people are seldom able to afford an attorney and therefore they turn to paralegals that are free of charge. Also in the cities the paralegals are an important compliment to attorneys. “Paralegals will take time to get to know the client, whereas with an attorney, the client will have to be very prepared to be sure to leave the right information during the little and expensive time he has at the attorney’s office.”¹⁵²

The main characteristics of paralegals are:

1. Close to the communities
2. Offering their services free of charge
3. User-friendly (down to earth, speak Native languages, situated where attorneys are not available)
4. Spread across the country

NCBPA reaches out to the public through local offices in the provinces, using their own strategies. There are offices at the lowest level, with connections in the community. Such connections can be of all different kinds; lawyers, hospitals, journalists, churches, schools etc. Reaching out to the public is therefore easy, because they receive information about paralegals in all different parts of the communities. The information is always in English, but also in the people’s own languages in order to reach out to everyone. The paralegal offices are very accessible; always situated on the ground in order to make it possible for disabled people to enter. Although the paralegal offices enjoy simple conditions there is a focus on always being “user friendly”. This implies that the paralegals adjust to the regional cultures concerning language, clothing and personal conduct.

Paralegals work according to a non-discrimination policy. “Whites, Natives, Indians or anyone else that wants help from us is entitled to be listened to. Even if they are rich, we will start to help them. According to SIDA, only the poor should be helped, but we explain the

¹⁵² Interview with Mdu Shabangu, February 10, 2003

situation to the client and they will donate what they can. The client will start with filling out a form where they describe their education and income. If it appears that they are too rich for us, but too poor to pay an attorney, we will give them a referral letter that they can show to the attorney. The law firm will then charge less money for their service. We are able to do this because we cooperate with some law firms. We negotiate with attorneys in this matter, and we try to help everyone that seeks our assistance.”¹⁵³

The main legal issues that paralegals deal with are consumer rights, labour related problems and land property rights.

8.1.5 Future of Paralegals

In the future, the paralegals may become an official part of the South African legal system. If there is such future accreditation by the government, the paralegals will be regulated and treated as professional law practitioners. “Now there are people who classify us as revolutionaries, comrades, democrats, whatever.” If paralegals gain their own official status, the government will have to pay for some of the expenses. “Our work will be a responsibility of the government.”¹⁵⁴

8.2 Legal Resources Centre (LRC)

Legal Resources Centre, LRC, was established in 1979. It is a donor-funded organisation that receives no financial assistance from the government. LRC is an independent, client based, non-profit, public interest law centre. The organisation primarily looks at the immediate issues in terms of law reform in the country and it provides legal services for the vulnerable and marginalized in South Africa.

¹⁵³ Interview with Mdu Shabangu, February 10, 2003

¹⁵⁴ Ibid

8.2.1 The Structure and Function of LRC

LRC has 110 lawyers and paralegals in five cities and receives funding from the International Commission of Jurists in Sweden. It also participates in a network of 80 community advice centres across South Africa, concerning a program of access to justice.¹⁵⁵

LRC is a fully-fledged attorney's firm but there are also some paralegals within the organisation. Mrs Durkje Gilfillan at the LRC in Johannesburg explains the paralegals' role within LRC: "We are all attorneys except from a couple of persons that are paralegals who are needed because there is a huge need for people to get through the bureaucracy concerning non-legal matters such as pensions."

Clients find LRC through networking with other organisations. Also, people tend to find the institutions that are able to help them, by word of mouth. LRC would like to advertise more, but would need a lot more funding to do so. The service that LRC offers is free of charge. "People do not come in order to take advantage of us because they don't have to pay. They come because they have no place else to go."¹⁵⁶

LRC also co-operates with paralegal advice offices. They conduct training for them, and take cases from them concerning specific questions like orphans' rights. Paralegals can send clients to the LRC but the latter can only take clients under their mandate. LRC can refer clients to University Law Clinics.

8.2.2 The Work of LRC

In the 1990s the LRC became interested in land reform law. The organisation looked at the issues of forced removals and housing. At this time there was no provision made for people moving from rural areas to urban areas. Therefore people started to occupy land informally. After 1994 LRC became very involved with the restitution process. By then the Bill of Rights was passed with a heavy emphasis on socio- and economic rights, such as right to education, right to social welfare, right to access to housing and right to water. LRC has now taken a

¹⁵⁵ A proposed alternative model for the provision of legal aid in South Africa, p.151

¹⁵⁶ Interview with Durkje Gilfillan, LRC, Johannesburg, February 13, 2003

strategic decision, that apart from the land issues that it was already involved in, it will also try to enforce the social and economic rights, and look at the questions of equality (especially women's rights and the right to education).

Mostly, LRC works for communities or for NGOs backed up by communities. Moreover, the organisation tries to look at the cases that will make an impact on a larger scale than pure individual rights. "Therefore we wouldn't take on any case that comes across the floor, although it would fall within our mandate. The reason for this is our limited resources."¹⁵⁷

Land property rights form the bulk of the work of the LRC.

8.3 University Law Clinics (ULC)

University Law Clinics emerged in the 1970s as a means to actively engage students in legal activities promoting social change.

8.3.1 Purpose and Function

The purpose of University Law Clinics is "to supplement and complement other indigent legal services; to improve legal education by providing practical skills and experience; to encourage students to pursue public interest law careers, thereby enlarging and strengthening the public interest bar; and to increase the number and skills of black legal professionals."¹⁵⁸

The purpose with University Law Clinics is consequently twofold. Their main function is to teach students, servicing clients was incidental at first. Now, Law Clinics have become very important as part of the legal aid system. They are also one of the main actors in the land restitution and redistribution process.

The Universities are the most important financiers of the Law Clinics. The average client is generally poor and 99% of the clients are Native. Some come from rural areas and others from urban areas like Johannesburg, with claims in the suburbs. The Law Clinics do not charge any

¹⁵⁷ Interview with Durkje Gilfillan, February 13, 2003

¹⁵⁸ Golub, p. 38

fees but if clients are rich they do not assist them; they are not allowed to due to the purpose of the organisation.

8.3.2 Wits University Law Clinic

At the Wits University Law Clinic in Johannesburg, there are 9 qualified attorneys and 12 candidate attorneys (interns). There are also about 150 students involved, who work there as part of their final law degree.

Willem De Klerk, Attorney and Head of the Wits ULC, says that the students fulfil an important role within the ULC. “The students are not that capable, but more so than an average person since they have some knowledge about the law. The system is still good, because with the assistance of the more qualified staff, the clinic manages to help a lot of people. Without the students we would not be able to help as many clients. The students are under utilised in comparison with for example the United States of America where there is a student practice rule. Students can appear in certain lower courts. We need to look into that, because in the area of court appearance we do not even scratch the surface. The qualified attorneys do take the clients to court, however, but the clinic also refers clients to LRC, Legal Aid Board, other University Law Clinics and NGOs for preliminary investigative work before we can assist the client.”

8.3.3 University Law Clinics and Land Property Rights

Land issues are becoming a greater part of the cases that University Law Clinics deal with today. The matter of land property rights, however, and restitution specifically, is a very slow process. “The attorneys at ULCs are always ready to assist clients in arguing their claim before the court, but the main problem lies in getting to that point. The Commission should either expand or outsource in order to gather the information to assess the claims. The claims are not even being assessed today and as an attorney there is really nothing that I can do to force them to assess my claim. The commission gives me indications about some of my cases that are not prioritised and we must not expect anything within the next four years. There is a

lot of frustration, but I appreciate that it is a very complex process, especially dealing with large communities.”¹⁵⁹

According to Schalk Meyer, director at the Centre for Community Law and Development, Potchefstroom, a number of the country’s Law Clinics are involved with restitution cases, but he believes they are mostly involved with evictions. “Restitution is a very specialised field of law. We must choose to assist the lots and lots of people who really need legal help. The eviction cases are so many more. What we have done is to form specialised units, for example at the University of Natal in Durban and at the Potchefstroom University. These units work exclusively with land matters such as evictions and restitution.”

The specialised units take the cases all the way to court, but they will sometimes consult senior counsel. “What these units do is all the groundwork, the initial work, take it to court if necessary. If the matter is too technical we appoint these advocates who are specialised in this sort of thing, and we work together with them. The clinics drive their cases to the end. There is no stopping in the middle. We do not fight ‘loosing battles’, so we make sure of the merits of the cases. We do not discriminate, we take all the matters and investigate them, but we only take the good cases to court.”¹⁶⁰

8.4 Lawyers for Human Rights (LHR)

Lawyers for Human Rights was established in 1979. It is an independent, non-profit organisation whose aim is to work for the implementation and delivery of human rights and as a constitutional watchdog. It is also an international force in the development of human rights, primarily socio-economic rights, with specific focus on Africa. It does not offer legal aid.

LHR has eight offices from which it runs different projects, for instance a paralegal training and law clinic project. It offers certified courses for paralegals through a couple of universities.¹⁶¹

¹⁵⁹ Interview with Willem De Klerk, February 20, 2003

¹⁶⁰ Interview with Schalk Meyer, University of Natal, Durban, March 5, 2003

¹⁶¹ A proposed alternative model for the provision of legal aid in South Africa, p.151

8.5 Association of University Based Legal Aid Institutions (AULAI)

AULAI was established about 20 years ago, and today all South African law schools are members of the organisation. There are 21 members, also including law schools from other countries. AULAI operates outside the Law Clinics and does not render legal aid services; instead AULAI offers legal training and research. The main goal of AULAI is to advance the provision of free legal services to indigenous and marginalized people and to encourage the training of law students and graduates in the skills and values required to practice law.¹⁶²

8.6 Justice Centres and Clusters

There are partnerships between LRC, LHR, ULC, AULAI and paralegals called Justice Centres and Clusters. Paralegals form an integral part of the Clusters. Paralegals can for instance receive back-up legal services through the partnerships in case they need the services of a lawyer. Qualified attorneys then travel to paralegal advice offices to give advice and provide other legal services to clients and paralegals. According to Mdu Shabangu, the paralegals' role in these co-operative networks is very important since they are often the first instance to meet with the client. They must establish whether or not the person has a genuine legal problem, and whether professional lawyers must be contacted.

¹⁶² Interview with Schalk Meyer, March 5, 2003

9. CASE STUDIES

The claimants in restitution cases are not a homogenous group. They have very different backgrounds and possibilities, and can therefore not be regarded as one generalized community. We met with two claimants, very different from one another, and to illustrate how restitution can evolve practically, we will give a description of how they have managed to go through the stages of the restitution process.

9.1 A Rural Case

On February 20th 2003 we had the opportunity to meet Tiny Mankge at her home in Johannesburg. She is the representative of a group of claimants in a rural case concerning a piece of land in Mpumalanga in the North Eastern part of South Africa. Mankge's ancestors had populated the land in question since the 19th century, and her grandfather was the chief of the area. In order to lodge a substantial claim, Mankge reached out to possible neighbouring claimants via radio and public meetings. This resulted in a group claim¹⁶³, but if more people had joined in they could have lodged for more land. There is additional surrounding land that rightfully belongs to natives, but it is difficult to reach everyone and convince them of the importance and the possibilities of a restitution process. Mankge regrets that it was impossible to reach all possible members of the original community, but accepts the fact. "It cannot be expected that you reach everyone and that they are interested in doing this. It is expensive and takes a long time. Many think that it will not be worth the effort."

Research was done to establish the relevant historical events, and a timeline was set up.¹⁶⁴ There is now professional documentation of when the white man arrived at the area, what rights were lost and how the fields were allocated. The research takes a large part of the budget for the claim. It is expensive to hire a professional to gather the valid proofs, but the cost is necessary in order to regain the land. The question of proof is complicated and often problematic.¹⁶⁵

¹⁶³ See Attachment C, List of Claimants

¹⁶⁴ See Attachment D, Timeline

¹⁶⁵ See Section 10.3, Gathering of Proof

Compensation or other land than the dispossessed is not an option for Mankge and her fellow claimants. It is emotionally very important to regain the exact same land that they once had. The land is beautiful and there is no other land with the same value for these people.

Mankge and her group receive legal assistance from the Legal Resources Centre. Most of the members of the community are extremely poor and there is no way that they could afford paying for legal help. The help that they have received has been adequate and satisfactory. This community finds the legal aid system to work well.

The case was lodged in 1998 and is now at a pre-trial stage. A settlement has not been reached. The farmers that now own the land seem co-operative, but their lawyers have given a sense of hostility, according to Mankge. If a settlement is reached there is still no hope of receiving the land within the next year, and if the case is taken to the Land Claims Court the process will be longer.¹⁶⁶ There is frustration among the community about the fact that the process takes so long to complete. The main critique that they have is pointed towards the Commission.¹⁶⁷ The Mpumalanga area is slower than most other areas in solving claims. In March 31, 2003 they had only settled 632 claims. Only the Northern Cape has resolved fewer claims.¹⁶⁸

9.2 An Urban Case

District Six in Cape Town is a well-known example of forced removals during the apartheid regime. The area is centrally located and was a rich mixture of people with Native, coloured, white and Indian descent. It is described to have been a “thriving, if poor, working class neighbourhood” on the 1920s.¹⁶⁹ In the mid 1940s a “slum clearance” project started, and people had to settle squatter areas and alternative shelter to have somewhere to live. During the 1960s most of the properties were demolished, so that the area could be developed according to modern town planning lines. The land was then declared a “White group area” and forced removals began.¹⁷⁰ In 1979, the then whites-only university Cape Technikon decided to relocate to the area, and in spite of the community protests over 2500 people were

¹⁶⁶ Interview with Tiny Mankge, Johannesburg, February 20, 2003

¹⁶⁷ See Section 10.6, Critique of the Commission

¹⁶⁸ <http://land.pwv.gov.za/restitution/updated%20stats.htm>

¹⁶⁹ Pistorius, p. 40

¹⁷⁰ Pistorius, p. 50

evicted to give space for the new development. The governmental plan was to make the area, now given the Afrikaan name Zonnebloem, a centre of development and new, modern technology. Due to a successful campaign by the former inhabitants of District Six “Hands off District Six”, private developers avoided to invest in the area and the original plans were a fiasco.¹⁷¹

Today, there is a redevelopment process in District Six and plans are to rebuild and “develop an intensely urban, non-racial environment, mixed in terms of uses and income groups, with an emphasis on providing affordable housing for people of moderate means”¹⁷²

Around 2500 restitution claims were lodged for the area, 1700 by tenants and 800 by former landowners. Tenants have been prioritised, and also elderly are being prioritised. The process is considered extremely slow and lengthy.¹⁷³

After a visit to the District Six Museum in Cape Town, we met with Linda Fortune, the education officer of the museum who has also lodged a restitution claim in the area 1996. Fortune grew up in District Six and she has written a book, “*Living in Tyne Street*”, about the area, how she saw it. Until the age of 22 she lived in the area with her parents and siblings. Their right to the land came from renting their home. The family had rented that same land for 60 years.

Fortune had been informed via newspapers about the opportunity to get land back, but it was above all her position at the museum that gave her information about how to proceed to lodge a claim.

Legal assistance has not been necessary. The process so far has been very standardised and the correct forms have been available to fill in. In case of problems, the District Six community has its own NGO working for their benefit, The District Six Beneficiary Trust.

¹⁷¹ Pistorius, p. 58

¹⁷² The District Six Planning Working Group’s “*Concepts for the Redevelopment of District Six*”

¹⁷³ Pistorius, p. 61

There have been difficulties with the gathering of proof also in this case. After several different alternatives, Fortune and her family managed to find a valid type of proof that could be used for their benefit.¹⁷⁴

Fortune is very determined to get land from the restitution process. She realizes that the exact same land might not be possible to receive, but as long as it is comparable land in the district she will accept it. "Compensation is however out of the question. It is not equivalent to the land value. For people that rented their homes it is R17.500 (around the equivalent of SEK17.500), which does not amount to anything after you divide it between the siblings. If you own a property it becomes an investment, plus, you get back a piece of your heritage." She lives in a suburb far outside Cape Town today and would like to return to live with her family in District Six. A site of land has been identified for the purpose of resettlement, and she hopes that she will be able to move back during 2004.¹⁷⁵

What Fortune believes is lacking for the resettlement to go faster is quicker co-operation from the local authorities as well as more funding.

It is important to point out that the District Six situation is fairly special and not representative of the ordinary urban claims. Thanks to an unusually active community and the location of the area (in the centre of Cape Town) these cases have been paid a lot of attention to in the media, and the process has therefore been somewhat smoother than in other areas.

The District Six museum is now a tourist attraction in Cape Town. It provides information and knowledge about the history and the development of the area, and co-operates with Swedish museums for instance.

¹⁷⁴ See Section 10.3, Gathering of Proof

¹⁷⁵ Interview with Linda Fortune, Cape Town, March 24, 2003

10. PROBLEMS AND DIFFICULTIES

Unfortunately, the restitution process is today associated with plenty of problems instead of being just a symbol of a better South African society. It cannot be expected that a change this vast can come into place without any friction, but many of the involved are very unsatisfied with the results so far.

10.1 Slowness of Delivery

10.1.1 Risks with Slowness

The first critique that usually comes to mind of the involved parties is that the restitution process takes too long. Also the legislations take too long to pass. Cases can take up to 5 years.¹⁷⁶ For people that have been waiting long already this is hard. There was an expectancy of immediate improvement after Nelson Mandela's coming into power in 1994, and the population is now anxious to see the material changes. There is not enough patience among the ones who have been treated the worst, and this has already resulted in violence and crimes.¹⁷⁷

Another risk with the lengthy processes is that claimants will surrender and not pursue their claims if there is no progress. For a large group, for instance District Six claimants in Cape Town who would have to pay for legal assistance, it would just not be worth the risk of loosing all the money that they own.¹⁷⁸

10.1.2 Reasons for Slowness

It is important to understand that one cannot expect the same progress according to the models of the industrialised world. Westerners tend to say: "Yes, let's go", according to their own institutions. It would be a faster process for them. However, South Africa is different. It takes

¹⁷⁶ Interview with Schalk Meyer, March 5, 2003

¹⁷⁷ Sampson, p. 417, 522

¹⁷⁸ Interview with Linda Fortune, March 24, 2003

longer going through meetings with Chiefs, tribal structures etc. and it must take a long time.¹⁷⁹

Restitution will always be a slow, complex and difficult process even if some of the shortcomings are resolved and the delivery is speeded up somewhat. It requires an investment of time and significant resources, and this is important to understand and accept.¹⁸⁰ Otherwise there is a risk of sloppy work, missing details and most importantly not addressing the core of the process; acknowledging that the land laws during apartheid were cruel and unfair and that it is time to set them right.¹⁸¹

10.2 Time Limits

It is always difficult to draw the line, and it has to be done somewhere. The time limits set up in the restitution process, however, are heavily criticised, and could possibly have been somewhat more generous.

10.2.1 Limits of Dispossession

Many consider the limited time that is available for claiming restitution not long enough. To be able to claim restitution, land must have been taken from the claimant or his/her ancestors after June 19th, 1913 due to past racially discriminatory laws or practices, according to the Act section 2(1)(b).¹⁸² The limit of June 19th, 1913 is due to the Native Land Act that was passed the same year and meant a significant difference in the land development for the indigenous people. There were of course cases of unlawful evictions before 1913, but the line had to be drawn somewhere. People who lost land before 1913 have an option to go via the land redistribution programme to receive new land for farming and housing. It is naturally more difficult for them to prove their rights since more time have passed.

¹⁷⁹ Interview with Schalk Meyer, March 5, 2003

¹⁸⁰ Du Toit, *Draft Report*, p. 2

¹⁸¹ Interview with Gary Howard, University of KwaZulu- Natal Law Clinic, March 5, 2003

¹⁸² Southwood, p. 246

10.2.2 Limits of Lodging Claims

The core of the time limit critique concerns the dates for lodging claims. It must have been done before December 31st, 1998. People think that the period for filing a claim (four years) was too short. It is not in fair relation to the long period during which people lost their land.¹⁸³

In spite of campaigns performed to inform the natives about their right to claim restitution it is estimated that a large part of the concerned population has missed the application date, and there is no chance for them to win back land that they could have had the right to. People were not informed, and not aware of their rights before the time ran out.¹⁸⁴ An estimation of 3.5 million people have been dispossessed of land, but only a fraction of them have lodged claims.¹⁸⁵ There have been debates whether the cut-off date should be extended and in eager over this hundreds of people prepared applications. However, the date of December 31st, 1998 remains unchanged.¹⁸⁶

To defend the system there are those who claim that the limit of 1998 is perfectly reasonable. There must be security in the property market. People will not buy land if there is a risk that they might lose it to a restitution claimant later on. The process of restitution also needs to be an affair that will end, in order to have closure for the involved parties and be able to go on towards a new South Africa.¹⁸⁷

10.3 Gathering of Proof

Since many of the restitution cases origin in wrongdoings a long time ago it can be hard to find the evidence to prove that the land in question is the land that was taken. There can also be difficulties proving family relations and right to the land of an ancestor. In some cases there are still documents such as certificates of marriage and birth, but not always.¹⁸⁸ To find proof in the land can be even more difficult. Old gravestones and cemeteries are valid evidence for instance. The history is looked at, photographs are used, and mapping and oral proof are also valid. People do for instance remember big events and they can relate in time to

¹⁸³ Interview with Sibongile Ndashe, Women's Legal Centre, Cape Town, March 26, 2003

¹⁸⁴ Interview with Mdu Shabangu, February 10, 2003

¹⁸⁵ Du Toit, Draft Report, p. 4

¹⁸⁶ Fuphe, Dan 'Cut-off date for land claims stands' The Sowetan, February 10, 2003

¹⁸⁷ Interview with Durkje Gilfillan, February 12, 2003

¹⁸⁸ Interview with Linda Fortune, March 24, 2003

for example the world wars. Then the happenings can be compared with the time when a law was passed in order to see the impact the legislation had. All of these different proofs are put into a legal argument.¹⁸⁹ The research to find evidence is often time consuming and expensive. It is rare that the Native people can afford the costs of the necessary research.

For the claimant Linda Fortune, former resident of District Six, Cape Town, the question of proof demanded some extra effort, although it turned out not to be a problem. Linda tried to use her book as evidence. The book that she published, *"Living in Tyne Street"*, contains her life story. The book was not enough evidence, so she submitted photographs of her family in the streets of District Six. That was not enough either, but a copy of one baptism certificate worked well because it had their home address in it. She also submitted all identity documents of her siblings and parents, birth, marriage, death etc. Since the family did not own the land this was enough evidence. They used to rent their home. This form of usage of the land also gives right to restitution.¹⁹⁰ If they had owned the land originally, they would have needed to present the details of the "sale".¹⁹¹

People that do not live in South Africa own large parts of the land in the country. Concerning some parts, the owner is not even known. If someone claims such land they will have to show evidence, which is hard to find after several decades. It is up to the claimant to present the evidence to support his/her case. The problem that occurs when one claims land owned by someone abroad is that the owner has to be allocated at the claimant's expense. The court has no responsibility to track down owners. Also the claimant has to know about the registration number of the land. In other words it was hard for poor (Native) people to find all this information (they cannot use internet etc.) before the time limit had expended.¹⁹²

10.4 Social Inequalities

The Native population is poor in comparison with the white former settlers. To conduct a costly process is therefore a lot harder for them. A big problem today is that property prices rise constantly. It is more common that foreigners can afford to buy land than South Africans.

¹⁸⁹ Interview with Durkje Gilfillan, February 12, 2003

¹⁹⁰ See Section 7.1, Definitions

¹⁹¹ Interview with Linda Fortune, March 24, 2003

¹⁹² Interview with Mdu Shabangu, February 10, 2003

This develops inequality between the Natives and a new foreign elite that comes into South Africa today.¹⁹³

There are also inequalities in education that prevents the native population to find out about their rights and go through with a process once the right is established.

According to Mdu Shabangu there was calculated awareness among white lawyers and in the education of native lawyers. "In our (the Native) legal education, they do not teach land property rights, it is not in the curriculum, so we have bad competence in it. Black lawyers tend to specialise in criminal law. Land law touches politics, and is therefore avoided. The whites foresaw this conflict and avoided teaching this subject. If you appoint a black lawyer in this matter you might get a bad service. They might commit an error in court and have the complaint nullified. White attorneys within the paralegal organisation do a great job in this matter."

10.5 Lack of Resources

There has been heavy critique against the Government for not allocating the proper resources to the restitution process. How can the goals be reached if there is a lack of means to achieve them?

10.5.1 Competence and Coordination Between Departments

Due to low salaries and poor management, the recruitment of staff for the governmental institutions has not been successful. The most competent staff tend to leave early and this affects the results of the process. There is also a lack of communication and coordination between the different departments and institutions. The needs for overall leadership and directives are eminent. According to Durkje Gilfillan at the LRC: "The intention was always there, but the skills and the capacity are not satisfactory. This also concerns education, labour rights and housing. There is no real plan about what to do about the appalling conditions that people live in. Sometimes they get there; human rights are being respected, through trial and error and so forth. However, especially on the local governmental level, the skill and capacity

¹⁹³ Interview with Sibongile Ndashe, March 26, 2003

is just not there. It is hard to get skilled people to move out there to those areas (the north east of South Africa), with malaria and death."

More people to do the job would help the process. More public interest lawyers out there would make a difference. In the area of Kwazulu-Natal, for instance, there is only one university clinic unit specialising in land questions, one attorney, two candidate attorneys and paralegal students. There are lawyers too, but they will charge lots of money. Within legal aid, there is only this unit and it is not enough. Now NGOs, clusters and paralegal offices are doing this job. If more public lawyers would work with this, it would be so much better, but the involved lawyers have to work more than they can manage now.¹⁹⁴

10.5.2 Financing

The question of financial means is always present and urgent. Most of the parties in the process have an obvious need for more funding.

For the Institutions

The budgetary allocations are nowhere near the necessary level to reach the goals of restitution. There are financial needs for the Commission, the Court, the legal aid institutions, the NGOs working out plans for the land and the people that have received restitution, in order to make the most of the land. The state cannot just give land away; expropriation with due compensation is necessary. However, there is not enough money to do this.¹⁹⁵ It will take much more capacity than the government now has. The budgetary commitments by the government are peaking now, so it will start declining towards 2005. To solve the situation there is a need for increasing budgets.¹⁹⁶

This is not an easy task though. According to Schalk Meyer, AULAI, South Africa does not have the freedom to carry out all the wanted reforms: "When it comes to funding there is always the availability of funds or not. We are in the receiving part of the world. We cannot choose."

¹⁹⁴ Interview with Schalk Meyer, March 5, 2003

¹⁹⁵ Interview with Sibongile Ndashe, March 26, 2003

¹⁹⁶ Interview with Gary Howard, March 5, 2003

For the NGOs

Both Durkje Gilfillan at the LRC and Schalk Meyer at AULAI, point out that there is a system of screening the cases that clients present, in order to only prioritise the good and potentially successful claims. Moreover, LRC looks primarily at the cases that will make an impact on a larger scale than pure individual rights. Durkje Gilfillan explains: “we wouldn’t take on any case that comes across the floor, although it would fall within our mandate. The reason for this is our limited resources.”¹⁹⁷ Consequently, several clients with restitution claims will not pass the screening and receive legal assistance. Either they have potentially “loosing” claims, or cases that will not be of any impact on a larger scale. This situation of harsh screening would most likely improve if the organisations received more funding in order to increase their resources.

The fact that in rural cases, the possible claimants live far apart and are hard to track down and gather, constitutes a major difficulty, since the process of contacting and involving them is very expensive. The main problem is reaching all the clients. They live spread out and it takes months to get them all together.¹⁹⁸

Willem De Klerk, head of Wits Law Clinic, says: "There is a lack of resources. The big restitution cases are in rural areas, far in Mpumalanga and Kwazulu-Natal, so simply getting in touch with the clients for proper consultation is difficult. Secondly you have got to deal with an immense amount of research that needs to be done, dig through archives etc. We do not have the resources to do this properly."

For the Claimants

For the claimants, lack of financial means is also an evident problem in spite of the good intentions that all should be able to claim for restitution, no matter their financial status. Tiny Mankge is fortunate to have the connections she does for her claim: "Communities are hard cases, even our case although it is a small community. The most difficult thing is to get everyone involved. Also, most of them are really poor and could never have the capacity to file a claim without the expertise that we have. In other words, if we didn’t have the

¹⁹⁷ Interview with Durkje Gilfillan, February 13, 2003

¹⁹⁸ Interview with Schalk Meyer, March 5, 2003

knowledge of land restitution and good connections with top legal counsellors (such as Durkje Gilfillan at the LRC) we wouldn't be able to do this."

10.5.3 Awareness and Education

If an equal South African society will ever be reached, the Native population must fight for their rights. To begin with, they must be aware that they do have rights. For many, this is something new, abstract and unbelievable. The necessary step towards awareness is of course education. A holistic view is crucial to address this problem. The client must first realise that he/she has rights, not only concerning restitution. People need education and training to realise their rights and needs. If not, they will be happy with what they have got.¹⁹⁹

There has been critique against the way that the information concerning restitution has been distributed. The information on for example radio talk shows was on at a time when people were already asleep.²⁰⁰

10.6 Critique of the Commission

The Commission seems to be an institution heavily criticised by many parties in the process, both claimants and professionals.

Already before the Commission started its work, it received critique. In the end of 1998 (the cut-off date for lodging claims) the commission should have decided what constitutes valid questions, and communicated it to all involved. It should have been done in a couple of months, but it is still not completed. This is due to the change of ministers, and a too sudden cutback in skill. It seems like the Commission has a problem keeping qualified staff.²⁰¹

Tony Harding, a former employee at the Commission says: "The process of the Commission takes a lot of time. They could speed up the process if they worked more strategically and reviewed the cases. Within the Commission there is a lack of capacity and skills. The ones who received the education concerning restitution are now gone since they get much better

¹⁹⁹ Interview with Schalk Meyer, March 5, 2003

²⁰⁰ Interview with Mdu Shabangu, February 10, 2003

²⁰¹ Interview with Durkje Gilfillan, LRC, February 12, 2003

offers elsewhere. They are often unsatisfied with the low salaries, but also with the lack of good leadership and structure. There has been relocation of offices, which has also been a source of frustration among the people that work for the Commission. More funding is not the solution. There must be better competence and understanding of the process."

Seena Yacob, legal researcher at the Land Claims Court, confirms that the president's expectation of a closure within three years will not be fulfilled unless the funding is improved. "Most of the claims have not even reached the Land Claims Court today, but are still at the Commission. The Commission works very slowly, they would need to speed up. The Commission is a much bigger organisation and receives more funding than the court. They have a lot more staff. Therefore it is fair to have expectations of faster expedience from that institution."

There are fears of what might happen if the Commission does not speed up its work. The land property rights matter, restitution specifically, started out very slowly. Around half of the claims are completed today.²⁰² "The commission indicates about some cases that these claims are not prioritised and one must not expect anything within the next four years. There is a lot of frustration, but the process is of course very complex, especially dealing with large communities. Hopefully it will be done within five years, because if it is not, people will be very discontent and might start invading land, taking the law in their own hands. There have already been certain social movements, encouraging people in invading land and disregarding the law. That sort of thing can become more of a problem the longer it takes to complete the process. The Commission should either expand or outsource in order to gather the information to assess the claims."²⁰³

Tiny Mankge, a claimant, is not satisfied with the way she has been treated: "First time that we met with the commission it was a disaster. They treated us as if it was a criminal law case. For instance they asked us questions in an accusing way. Now the claim is at a pre-trial stage. The work of the commission is very slow and much work needs to be done to solve this problem."

²⁰² See Chapter 7, The Restitution Process, p. 39

²⁰³ Interview with Willem De Klerk, Wits University Law Clinic, February 20, 2003

There are, however, also voices that point in another direction. Gary Howard, a lawyer at the Law Clinic at the University of Natal in Durban, also gives critique to the Commission, but from an opposite point of view: "We have gone from a process that everyone found too slow and too bureaucratic, to a shift to the opposite. The government goal to finish with the matter is too soon. There is a rush to settle claims; everyone is being judged on how many claims they settle. The whole purpose of restitution is being lost in this scenario. The Commission is rushing to settle or refuse as many claims as possible when restitution is partly a social process as well. The people want to have what happened to them in the past recognised. They want to feel that they have been compensated, not just through money or land, but that it has been recognised. The people want the state, other societies and countries to recognise what happened and be treated with dignity. Things are being rushed nowadays and the research is neglected as a result from it. To find a median between the two extremes would be the best solution."

These opinions brought forward, constitute a severe critique of the Commission's work. Perhaps the flaws of the Commission are one of the main sources of the general discontent concerning the restitution process.

10.7 Governmental Shortcomings

There is an overall lack of leadership and direction from the Government when it comes to land issues. The three institutions, Department of Land Affairs, Commission on Restitution of Land Rights and Land Claims Court do not have an internal hierarchy and co-ordinated plan between them. There is an absence of leadership produced by the structural incoherence. This gives effects in the work, making it less successful, structured and effective.²⁰⁴

10.7.2 After Restitution has Taken Place

There must be greater co-ordination between the departments to ensure that the settlement takes place and that the people have livelihood and a strategy to farm and make a living after the restitution has taken place. There has to be a greater commitment from the Department of Land Affairs, and the Department of Agriculture, with respect to ensuring that there is

²⁰⁴ Du Toit, *Draft Report*, p. 6

progress, that delivery is taking place, that people can be resettled and relocated and that the resettlement is going to be a sustainable one. It is the government's responsibility to create an environment for communities to relocate and for them to sustain their livelihood. There are difficulties after restitution has been implemented in the cases where the claimants have no knowledge in farming or other proper use of the land. Fortunately NGOs exist that develop plans for future land use. These NGOs perform a substantial amount of work that should have been the government's responsibility.²⁰⁵ According to the Chief Land Claims Commissioner Wallace A. Mgoqi, "the Achilles heel of any land reform program is whether or not the people who receive the land are capable of utilising the land productively and profitably for themselves".²⁰⁶

10.7.3 Lack of Secure Information

There is no reliable database, which creates insecurity when it comes to knowing how many claims that are in the system, how much land and people they represent and how to part them in different categories. Obviously, this means that the necessary planning and structural design will suffer from the lack of accurate information of facts.²⁰⁷

10.7.4 Possible Corruption

The level of corruption is hard to measure, and there are few scientifically proved facts that show the amount of corruption in South Africa. However, there have been indications in interviews that there is a big corruption problem among politicians and judges.²⁰⁸

10.8 Legal Shortcomings

10.8.1 Deficiencies of the Act

Officials struggle to find grounds for many of the key decisions they have to make in order to reach the social- and policy requirements for successful restitution. This is due to the legal and judicial framework of the Act.²⁰⁹

²⁰⁵ Interview with Lali Naidoo, ECARP, Grahamstown March 7, 2003

²⁰⁶ <http://land.pwv.gov.za/restitution>

²⁰⁷ Du Toit, *Draft Report*, p. 3

²⁰⁸ Interview with Mdu Shabangu, February 10, 2003

The Act can say one thing, but then other outside factors can come into place and play a deciding part. It creates unpredictability and uncertainty concerning the rules. Some people have claimed parts of Johannesburg, but the only thing the government can give them is compensation, due to the obvious difficulties in reorganising an urban area. In the rural areas there is a problem of farming. If you claim land on farming land, the government will force you to prove that you have the knowledge of farming and the ability to develop the land. So the process of the claims is not at all clear: What are the requirements?²¹⁰

10.8.2 The Settlement Option

To find a solution to the problem that the process takes too long, a settlement option was implemented. By many, it is considered an improvement, and there is no doubt that the process has speeded up considerably since this change. In spite of the fact that the Land Claims Court still must review all settlements, there is critique against this option. According to Mdu Shabangu, National Cluster Co-ordinator at the NCBPA: "The settlement option, implemented to speed up the process in the Land Claims Court also robs the black population. The people will go for fast money because they are desperate. The laws are not strong enough. Some of this money used to compensate people is development aid from other countries, NGOs etc. It would be better if the government provided help in farming skills, setting up schools etc."

10.9 Gender Related Problems

The status of African women is problematic. Due to customary law women cannot acquire nor own property. The Rule of Primogeniture states that the oldest male relative inherits the property.²¹¹

The Immorality Act of 1949 made it difficult for people to get married across racial borders. Further more, if a Native woman owned a house but her spouse's name was put on the contract (to avoid problems with the former racial laws) the woman cannot claim her right to

²⁰⁹ Du Toit, *Draft Report*, p. 5

²¹⁰ Interview with Mdu Shabangu, February 10, 2003

²¹¹ See Section 11.2.2, The Gender Issue

the house when her spouse dies. Even today, after apartheid laws have been banned, the state cannot solve this problem, since it is pure contractual law, although the state created the problem in the first place. The problem does not arise when the woman is white and her husband is Native, only when the woman is Native or coloured and the man is white.²¹²

Different religions have their issues here. One problem is that a Muslim marriage is not recognised by law, it is seen as a contract and therefore many “automatic” rights due to marriage cannot be claimed. In these cases it is the women who lose out from the situation, since she is often the weaker part and her name is never on the contract.

²¹² Interview with Sibongile Ndashe, March 26, 2003

11. CUSTOMARY LAW AND LAND RIGHTS

There are many opinions dealing with the relationship between traditional, “indigenous” law (called customary law) and modern, “Westernised” law, especially the Bill of Rights introduced in the Constitution. The following chapter presents the problems and opinions related to this issue. In order to understand the relationship between the two different traditions a brief presentation of traditional customary law and African perspectives on land is required.

11.1 Traditional African Perspectives on Land

To group the entire Africa into one is naturally to generalize, but there are still a few trades that are common and said to be traditionally African when it comes to perspectives on land. Land and farming form the centre of life for a large part of the population.

“The land represents the link between the past and the future; ancestors lie buried there, children will be born there. Farming is more than just a productive activity, it is an act of culture, the centre of social existence, and the place where personal identity is forged.”²¹³

Before Africa was colonized land was considered a “God-given resource”²¹⁴ impossible to own for any one person. To a certain extent this reasoning still lives. Man cannot possess something that from the beginning does not belong to anyone, it is there for everyone to share and enjoy, not to keep for oneself.²¹⁵ The philosophical question of whether it is possible to own land is apparent, and very different from traditional western values. In our culture this is not an issue, it is a validated fact and something that is taken for granted.

African laws are different from western legal systems in that it is not so much rights of persons over things, as obligations between persons in respect of things. The actual owning is less important in comparison. To describe the African law, the customary traditional one, a different vocabulary is needed. For example words like ‘interests’, ‘rights’ and ‘powers’ can be used instead of ‘ownership’, ‘possession’ or ‘trust’. It is noticeable that the Constitution

²¹³ Sachs, p. 115

²¹⁴ Elias, p. 147

²¹⁵ Interview with Mdu Shabangu, February 10, 2003

uses the phrase “rights in property”²¹⁶ instead of the usual ‘ownership’ or ‘possession’. The proper language to use is less absolute than what is normally used in written law.²¹⁷

11.1.1 Traditional Leaders

Traditional leaders or chieftainship existed in South Africa long before the European colonization. The system of traditional leaders was based on authoritarian patriarchy and even though the powers of the leaders were not precisely defined they were often all-inclusive.²¹⁸ As fathers of their people they were obliged to care for their people, both morally and socially. Furthermore, the traditional leaders had to judge disputes and bring about wise government.

The powers of the traditional leaders can be grouped into three: allotment, regulating common resources and removal. Obviously these powers are regulated with customary law.

Power of Allotment

The leader of a community has the power and obligation of dividing the land between his members of the group. Allottees then acquire the right to benefit from and exploit this land. There are no set rules for the procedure of allotment. Individuals wanting land will approach the leader with an application. If the applicant is not a natural member of the community by birth or by family connection, a naturalization fee will often have to be paid. A fee of gratuity might be paid even if the applicant is a member from the start. These “gifts” can actually be perceived as outright bribery.²¹⁹

Power to Regulate Common Resources

This power is used to protect the environment and preserve the common assets in case of risking a shortage or destruction of limited resources. Usually, every head of family can decide for themselves over the allotted land, but there have been cases where the leaders have

²¹⁶ Constitution of the Republic of South Africa, S 25, The Property Clause

²¹⁷ Bennett, p. 132

²¹⁸ Bennett, p. 67

²¹⁹ Bennett, p. 133

stepped in for the sake of the community, even when members have invested their own money in improving the dividends of their land.²²⁰

Power of Removal

Two possible reasons are the cause of the power of removal. The first one is exercised for general public purposes, to redistribute the land in a more fair way or let exhausted soil rest for instance. The second reason for removal is to penalize landholders who committed offences. This gives room for both good and bad features in a ruler.

“While a fair ruler can deprive landholders of their rights in order to discourage absenteeism or to ensure an equal distribution of land, the corrupt or unpopular ruler can threaten loss of land as a method for suppressing criticism.”²²¹

According to Ge Devenish there is no doubt that traditional leaders are an important institution in South Africa. Their role and status today is an unclear matter though.²²²

11.2 Traditionalism contra Modernization

If customary law stands for traditionalism, then modernization is human rights or what is known as the Bill of Rights in the Constitution. There is not necessarily a conflict between the two, but there are differences that could lead to divergence, and they have done so. Customary law emphasises the group or community and duties when human rights stress the individual and rights. Further more, customary law is built from a system of patriarchy, traditional leaders, chiefs, and a systematic advantageous position for men over women.²²³

It is important, however, to keep in mind that the customary law represents the popular acceptance and values. It is what time has created naturally and what people are used to. According to Tom Bennett at the Community Law Centre, University of Western Cape,

²²⁰ Bennett, p. 134

²²¹ Bennett, p. 135

²²² Devenish, p. 291

²²³ Bennett, p. 67

Africans have traditionally been less perceptive to changes and more eager to keep their habits than people in other continents.²²⁴

Section 211 in the 1996 Constitution requires an approval of the role and status of traditional leaders together with the application of customary law subject to the fundamental rights contained in the Constitution.

However, section 211 in the Constitution is a matter of dispute. There is a conflict between traditionalism on the one hand and modernization on the other, which causes a major controversy between the political parties in South Africa concerning the role of traditional leaders and the issue of customary or indigenous law. Some scholars claim that the latter is a mere fabrication or “invented tradition” designed to serve colonialism and apartheid. Others point out the problems concerning the gross gender inequalities inherent in customary law. The modernists request merely a ceremonial and advisory role for the traditional leaders while on the other hand the traditionalists represent the opinion that traditional leaders should be included in the Senate and participate in law-making.²²⁵ So far little respect has been shown for customary law since it has never been considered to be a right. “The state has always assumed that it has complete discretion in deciding whether, and to what extent, customary law should be recognised.”²²⁶

The relation between customary law and the Bill of Rights in the Constitution has an impact on gender and women, children, marriage, succession and property rights. We will focus on land and property rights but also on the gender issue since it is often crucial in relation to land related matters.

11.2.1 Land Rights

Customary land tenure is seen as old, primitive and obstructive of progressive economic development.²²⁷ However, the social effects of abolishing indigenous tenures may be

²²⁴ Bennett, p. 2

²²⁵ Devenish, p. 293-295

²²⁶ Bennett, p. 19

²²⁷ Devenish, p. 303

unpredictable and indeed unwanted. In addition, research has shown that giving people individual and registered titles does not necessarily result in a fairer pattern of landholding.²²⁸

Customary law is today seen in a more positive light as supportive of important values in the community, especially in relation to the preservation of the integrity of the extended family and the social benefits that follows. Today there is a vast agricultural land shortage, and the resources have become scarce. This used to be due to segregation, but is now more an effect of the population growth, soil erosion and changes in agricultural technology. It has effects on the population in that it restricts freedom of choice as well as of mobility.²²⁹ The shortage can tempt people to sell their land to make some fast money. Luckily, there are customary laws to prevent this, in order to protect the impoverished families. All members of a community must have enough land to support themselves. This creates a customary bar on alienation that stops people from selling their most valuable asset, the land, to make some fast money in a short-sight perspective. Customary law is adjusted according to the African people and offers protection for the weaker part.²³⁰ It is also part of the cultural identity of rural African people and is not able to be disentangled from the authority of the traditional leaders.

There is a misconception, however, that customary land tenure is communal. Traditionally, the African societies were built around collectivist principles, but it does not go as far as making all customary land tenure communal.²³¹ Still, customary law facilitates the construction of multiple interests over land.

There is definitely a trend to individualize the traditional African customary rights.²³² Individual rights are considered in the allotment of land. Ordinarily, land is divided and distributed to the heads of the households. There is then a right strong enough to contest both local rulers and private trespassers. In most systems of customary law, land is not an inheritance, due to the initial question of whether land can be owned at all. Nowadays, because of the scarcity in land, families will not give up land when the right-holder dies. It is not always clear who will inherit the land. The principle of primogeniture gives the oldest son

²²⁸ Bennett, p. 151-152

²²⁹ Bennett, p. 129

²³⁰ Bennett, p. 152

²³¹ Bennett, p. 131

²³² Bennett, p. 141

the right²³³, but there have been cases when widows inherit when there are still children to support. Also the youngest son may inherit when there is an aged parent to look after.²³⁴

According to Devenish, the effect of an individualization of customary tenure would be devastating for the traditional leaders, since their main and most cherished function is allotment and control of land. A change of customary land law would deprive these leaders their positions, which must be contrary to the letter and the spirit of guarantee connected to the recognition of the “institution, status and role of traditional leadership” in section 211 of the Constitution. Therefore, any land reform program affecting customary tenure of land must be introduced very carefully.²³⁵

11.2.2 The Gender Issue

Women’s rights in land within customary law are determined by their marital status, by the laws on inheritance and divorce and by institutions that are created by local perceptions of the role that women should play in society. Hence, women’s rights in land are generally gained through their husbands or male kinsfolk and may be considered ‘secondary’ rights. The limitations that women face with respect to their access to, and control over land resources, are similar to those faced by migrants and young men. This type of ‘secondary rights’ is often of uncertain duration, seldom well defined and usually subject to change. Moreover, it is often dependent on the good relations between the parties involved.²³⁶

Without any doubt, the gender issue is the most sensitive and crucial one that is being debated right now. The issue concerns the role of customary law in the South African society on the one hand and the role of human rights in the Constitutional Bill of Rights (the Equality Clause²³⁷) on the other.

As stated above, the institution, status and role of traditional leaders and customary law is recognized in section 211 of the Constitution, subject to the other provisions of the Constitution. A traditional authority that follows customary law may operate subject to any

²³³ Interview with Sibongile Ndashe, March 26, 2003

²³⁴ Bennett, p. 140

²³⁵ Devenish, p. 303

²³⁶ Toulmin and Quan, p. 181-182

²³⁷ The Constitution of the Republic of South Africa, Chapter 2, S 9

applicable legislation and customs. The courts are bound to apply customary law when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law.²³⁸

However, section 8 of the Constitution states that the Bill of Rights “applies to all law, and binds the executive, the judiciary and all organs of state”. Accordingly, the Bill of Rights functions horizontally as well as vertically, which must impact on those parts of customary law that violate both the letter and the spirit of the Bill of Rights, in particular those concerning gender.²³⁹

11.3 Customary Land Rights within Restitution

It is interesting to see whether the Restitution Act of 1994 has managed to incorporate the traditional African customary laws or not, working towards a society of equality and peace. The particularity of African customary property law deals with tenure rights. They are not ordinary ownership rights, but instead a form of leasing contract or a right to work the land, live on it and benefit from its revenues.

11.3.1 An Adjustment to African Customary Tenure

The right to restitution, according to the Act of 1994, is not only for people with ownership rights in the land that they are claiming. Thus, the Act does consider customary rights and treats them equally with the written law.²⁴⁰ Customary laws are not mentioned in either the African Charter of Human Rights or in the Constitution of South Africa, and it is judicially untested whether they are included or not. Therefore, it has been difficult to include customary interests in new legislation. However, the Restitution of Land Rights Act makes an exception and defines ‘right in land’ to include ‘a customary law interest’.²⁴¹

In reality a tenure right is often harder to prove. It has also been more difficult to gather people with tenure rights to lodge claims. Their rights are not as apparent as the former owners’ rights. Therefore it has been less fruitful, reaching out with the information to these

²³⁸ Constitution of the Republic of South Africa of 1996, S 211(2) and S 211(3)

²³⁹ Devenish, p. 297

²⁴⁰ Restitution of Land Rights Act, S 1

²⁴¹ Bennett, p. 215

people. The tenure right holders also tend to have a lower degree of education and a weaker financial situation, which contribute to keeping them from lodging claims.²⁴²

The case of District Six in Cape Town illustrates that tenure holders are as much in titled to restitution as owners. District Six cases have even been prioritised over other cases due to the location and the active community members.

Estimating compensation for a tenure right is problematical. Compensation is low and claimants are being advised not to accept it instead of the land right that it usually represents very poorly. In District Six, the financial compensation is R17500. In comparison with a home and a place to stay, that is really not adequate.²⁴³

11.3.2 Ignoring the Gender Issue

Customary law seems to have been taken in great consideration when constructing the Restitution of Land Rights Act of 1994. With tenure rights, this is a positive thing that maintains social stability and shows respect to the ancient rules and customs, as it should.

However, when given the opportunity to create new laws, it is important to make the improvements that are needed. In customary law, the female position has been weak. The rule of primogeniture gives the heritage rights to the oldest son. There are tribes within which women are not allowed any ownership at all.²⁴⁴ The African customs and African values traditionally stresses points of solidarity, communal rights, common assets and offering assistance to the people within the group. In this beautiful theoretic scenario, women are left aside. The idea that they could be given the same ownership/tenure rights as the men via the legislation in the Act was not taken in consideration. Instituting laws is a most potent way of altering norms and values among a population.

In order to escape the customary laws and their bias in favour of men and traditional authorities when it comes to land tenure rights, there is a Communal Property Associations Act 28 of 1996. This Act is directed at communities receiving land from redistribution and

²⁴² Interviews with Durkje Gilfillan, February 12, 2003 and Tiny Mangke, February 20, 2003

²⁴³ Interview with Linda Fortune, March 24, 2003

²⁴⁴ Interview with Sibongile Ndashe, March 26, 2003

restitution, to ensure that the land is managed in accordance with the Bill of Rights.²⁴⁵ A communal property association consists of representatives from the receiving community and should be managed democratically in deciding and dividing the land amongst the group. Equality, transparency, accountability and fair access to land are the main principles of this Act.²⁴⁶

²⁴⁵ Bennett, p. 215

²⁴⁶ Communal Property Associations Act 28 of 1996, S 9

12. RIGHT VERSUS RIGHT

Obviously there are and will be conflicts between rights when it comes to restitution. On the one hand there is the claimant who demands restitution of his/her or the community's piece of land, on the other hand there is the current owner of the same piece of land, who most likely wants to keep it. The current owner's right in land is protected by the Constitution²⁴⁷, whereas a legitimate claimant has a right to restitution of the land provided by the Restitution of Land Rights Act. Consequently, there are two competing rights in land and the question arises concerning which right to prioritise.

12.1 The Right to Land (Property) is not an Absolute Right

The right to property is given a constitutional protection in South Africa. However, the property clause in the South African Constitution does not include an absolute guarantee of property. Nor is the protection of "the human right to property" in article 14 in the African Charter on Human and People's Rights absolute. Both documents declare that the right to property may be limited subject to certain requirements.

Section 25(2) of the Constitutional Property Clause contains an expropriation provision that assumes that property rights may be limited, and lays down the requirements for limitations to be valid and legitimate:

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 and the time and manner of payment of which have either been agreed to by those affected or decided or approved by court.*

The function of this expropriation provision is twofold. First of all, it ensures that the property clause does not render property absolute or inviolate, and it establishes the constitutional principle that at least some (state) interferences with and limitations of property are inevitable

²⁴⁷ See Section 3.2, the Constitutional Property Clause

and necessary (in the public interest) and therefore legitimate. Secondly, the provision makes clear that the inevitable and necessary limitations of property are not imposed unfairly, but in line with the constitutional guarantee of due process. Section 25(2) should most likely be interpreted and applied in terms of a balance, which has to be struck between the protection of individual rights and the promotion and protection of social or public responsibilities and duties.²⁴⁸ Accordingly, a limitation of a property right, such as a right in land, has to comply with the requirements stated in section 25(1) of the Constitution, because it can only be justified subject to compliance with those requirements.

Article 14 in the African Charter on Human and People's Rights clearly states that the right to property "*...may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.*"

A discussion of the meaning of the specific limitation provisions is necessary to determine how to solve the problem explained above concerning colliding rights in land. In other words: Does restitution of land rights fall within the requirements for legitimate limitation of land rights? Hence, does restitution of land right take precedence over other rights in land?

12.2 Requirements for Limitation

12.2.1 'Law of General Application'

This term basically means that the law has to apply generally and not to just one person or group of people. It also has to be non-arbitrary, accessible, specific and clear.²⁴⁹ Moreover, it means that the expropriation is only valid to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including the nature of the right, the importance of the purpose of the expropriation, the relation between the expropriation and its purpose, and less restrictive means to achieve the same purpose.²⁵⁰ Thus, there is a requirement of the means being in proportion to the end.

²⁴⁸ Van der Walt, p. 19

²⁴⁹ Van der Walt, p. 81

²⁵⁰ Constitution of the Republic of South Africa, S 36(1)

Restitution of Land Rights Act applies generally and it ought to be considered non-arbitrary, accessible, specific and clear. There is nothing that indicates that the Act does not fulfil these requirements. Restitution must also be considered justifiable in an open and democratic society based on human dignity, equality and freedom, since the whole purpose of restitution is to support and strengthen these values. The general purpose of restitution is to support the vital process of reconciliation, reconstruction and development in South Africa.²⁵¹ The specific purpose in each case of restitution is to redress injustices caused by past racially discriminatory laws or practices.

The main question is whether expropriation because of restitution is necessary to achieve the purpose of restitution, or if less restrictive means to achieve the same purpose are available. According to the claimants we have interviewed, and other persons involved in the restitution process, restitution of land rights is the only way to make justice and repair the social injuries caused by apartheid.²⁵² Although less restrictive means are available according to the Restitution Act, such as redress in terms of monetary compensation or alternative state-owned land, there is a certain value obtained by restoring the actual piece of land that was lost that cannot be obtained with other means. In particular this applies to rural claims. Tiny Mankge, representative of a rural community claim, tells, “Emotionally it is very important to get the land back. Money is not an option.” Linda Fortune, District Six claimant, would settle for another piece of land than the one that she actually lived on. However, “Compensation is out of the question. It is not equivalent to the land value.”

Thus, restitution of land rights is a means that is justifiable to achieve the purpose.

12.2.2 ‘Public Purpose or Public Interest’

The Constitutional Property Clause, section 25(2)(a), states that property may only be expropriated for a public purpose or in the public interest. There are many options on how to interpret this ‘public purpose’ requirement. It can be interpreted narrowly as actual public use, or slightly wider to a broader range of public benefits apart from actual public use, or very wide to include more or less any purpose, which could be considered to be in the public interest. The traditional, narrow view is that expropriation only serves the public interest if

²⁵¹ <http://land.pwv.gov.za/restitution/BACKGROU.RES.htm>

²⁵² Interview with Mdu Shabangu, February 10, 2003 and Schalk Meyer, March 5, 2003

the property is transferred to the state for use by the state or the public. The fact that the provision is doubled up or repeated ('public purpose *or* public interest') may answer the question on how to interpret it. According to A.J. Van der Walt, it seems possible that the main purpose of the drafters choice of phrasing was to ensure that expropriations for the purpose of land reform initiatives would not be condemned for not being for public purposes, simply because the property was expropriated with a view to eventually transferring it to private beneficiaries (such as claimants for restitution) of the land reform programme.²⁵³ This argument indicates that a wide interpretation of the requirement 'public purpose or public interest' is applicable, rather than the traditional, narrow one.

Section 25(4)(a) clearly states that the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources, is included in the requirement 'public interest'. The public purpose or public interest concerning land reform, including restitution, is mainly to redress the injustices of apartheid and build national reconciliation. Land reform also aims to promote social stability, economic growth and equality in the distribution of land ownership amongst the people of South Africa. In addition, the land reform aims to improve household welfare and reduce poverty.²⁵⁴

Thus, the constitutional property clause provides for the implementation of land reform measures, such as restitution, that will interfere with other rights in land, such as ownership. However, even though land reform is clearly a legitimate state function in the public interest, expropriations for public purposes or in the public interest should not be taken frivolously. Such expropriations should still be exceptional and proportional, i.e. reduced to what is really necessary. This complies with the requirements in section 36(1) of the Constitution, which points out that expropriations have to be reasonable, and that less restrictive means must be considered.²⁵⁵

The Restitution of Land Rights Act provides for less restrictive means, such as monetary compensation or alternative state-owned land, which accordingly gives the claimants in restitution cases the possibility to avoid expropriation.

²⁵³ Van der Walt, p. 135-136

²⁵⁴ Land Reform Programme, *a Guide to the Department of Land Affairs*, p. 2

²⁵⁵ Van der Walt, p. 138

In the *African Charter on Human and People's Rights* the recognition of the right to property is followed by the power of the State to encroach upon private property for public need or community interest. The Charter falls short in defining what constitutes 'public need or community interest' but the discussion above concerning the constitutional meaning of public purpose or public interest is most likely applicable to the Charter as well. Land reform is not only an issue in South Africa, but in many (if not all) former African colonies. Therefore land reform measures are probably included in the concept 'public need or community interest' in the Charter as well as in the South African Constitution.

12.2.3 'Compensation'

12.2.3.1 Duty to Compensate

The Constitutional Property Clause includes a second requirement for legitimate expropriations of property, which is compensation. Section 25(2)(b) and (3) form the provisions regarding compensation for expropriated property.

The African Charter on Human and People's Rights does not include an express provision for the payment of compensation in such situations where property is encroached upon by the state. In comparison with Article 21 in the American Convention on Human Rights, Article 14 in the African Charter is a lot narrower in context. Article 21(2) in the American Convention states that "no one shall be deprived of their property except upon payment of just compensation, for reasons of public utility or social interest..." The Inter-American Commission has stated, in reviewing these provisions, that the right to own property must be regarded as a fundamental and inalienable right and that no state may undertake or conduct activities to suppress the right upheld in those provisions. In addition, the international instruments protecting the right to property establish universal and regional rules that are today rules of international customary law, and therefore considered obligatory in the doctrine and practice of international law.²⁵⁶ Also the European Court of Human Rights has, since the 1980s, developed jurisprudence in terms of which compensation for expropriation is required on the basis of the proportionality principle.²⁵⁷

²⁵⁶ Nmehielle, p. 119-120

²⁵⁷ Van der Walt, p. 143

According to Vincent O. Orlu Nmehielle at the University of Witwatersrand, the African Commission can ensure that the power of the state to encroach upon private property is not abused, by requiring states to adhere to the international customary law principle of payment of just and adequate compensation.²⁵⁸ Thus, it seems convincing that the international customary law, by which all states are bound, requires compensation for expropriation of property.

12.2.3.2 Calculation of Compensation

Section 25(3) of the Constitutional Property Clause reads:

The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances, including –

- (a) the current use of the property;*
- (b) the history of the acquisition and 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.*

For purposes of the calculation of the amount of compensation, and in deciding what would be an equitable balance between the interests of those affected and the public interest, this provision should also be read together with section 25(4)(a) that clearly include land reform in the public interest.

In reviewing section 25(2) and 25(3) it is obvious that the required amount of compensation is not full or market value, but a just and equitable compensation that reflects the balance between interests, taking into account all the relevant circumstances. The practical effect is that compensation will hardly ever be equal to market value; it will often be lower. Van der Walt is of the opinion that “in exceptional cases, where state funding or political inequities played a large role in the acquisition, capital development and use of the land, it is possible

²⁵⁸ Nmehielle, p. 119-120

that compensation may be extremely low or even that there is no compensation at all, because that is what is just and equitable in the circumstances.”²⁵⁹

In the Restitution of Land Rights Act there is no express provision for the payment of compensation to those who are affected by expropriation of their property. However, compensation is paid according to the requirements of the Constitutional Property Clause. The practice to date is to pay market-related compensation.²⁶⁰ This obviously involves high costs for the state, which may put the budget in danger, at the cost of other land reform measures.²⁶¹

12.3 Conclusion

The solution to the conflict between land rights presented in the beginning of this section would seem to be that restitution always takes precedence over other rights in land. This is often the case, subject to the certain requirements provided in the Constitutional Property Clause and the African Charter on Human and People’s Rights. However, according to Van der Walt, neither land reform nor individual property interest can be given absolute preference, because a just and equitable balance has to be established between them.²⁶² This implies that even though restitution and the constitutional and “human” protection of property rights are in conflict, it does not mean that any of the two can only be promoted at the cost of the other. The solution, and challenge, is rather to establish the balance between private and public interests.

²⁵⁹ Van der Walt, p. 148

²⁶⁰ Gary Howard, e-mail, May 19, 2003

²⁶¹ Toulmin and Quan, p. 282

²⁶² Van der Walt, p. 149

13. CONCLUSIONS

13.1 Political Sensibility

Clearly, the issue of restitution is a very sensitive matter, especially in a country like South Africa. The abolition of apartheid was a hard struggle for liberation, and there is still resistance among the white population. The question is not easy to solve. Even if land was wrongfully taken, it has now been years and generations since. The people living and working on the land today are usually not the ones responsible for taking it from the Native population. For someone who has been in charge of a piece of land during their whole life it can be very offensive that it can be taken from them because of a fault committed many decades ago.

Denying the Natives the right to own land can be perceived as one of the cornerstones of apartheid. Restoring this right is therefore of enormous symbolic value. Via land restitution the state of South Africa admits its wrongdoing and tries to set things in order in the best possible way. The victims get a public apology by this process in addition to the actual opportunity to conduct farming and build a home on a piece of land that they rightfully own.

When travelling in South Africa one can appreciate the sensibility of the subject, but it is not spoken widely of, apart from in private groups. It is of course difficult to draw the line. Sooner or later the matter has to fall under the statute of limitations, and there are those who think that it already should have. One cannot change history or make up for all the evil that has occurred during time, but in this case there is an opportunity to at least try to set things right. In this case it is not a matter of ancient history. The apartheid regime was only starting to fall a little more than a decade ago. The pressure from the rest of the world then made white South African leaders cave in to the demands of the Natives. The wrongly treated people are still alive, and many of them have a desperate need for land, housing and a way to provide for themselves and their families. Therefore, land restitution, in theory, possesses the ability to solve two important matters; apologizing and admitting the faults committed, and providing land to the people in need.

13.2 Evaluation of the Restitution Process

The functioning of South Africa's land reform programme as a whole, must be seen within the context of the huge constraints inflicted by the inherited apartheid structures, and lack of experience of the new state structures, compounded by the absence of effective local government structures.²⁶³

The idea of land restitution is admirable. It is the decent way to go after a period of oppression like the apartheid era in South Africa. Trying to set things right again is the obvious step towards a healed society. As we could observe in the international comparison²⁶⁴ there are two objects for land reform that most of the different countries have in common: to fight social inequalities and improve economic efficiency. South Africa is not an exception. A more complex question to deal with is whether restitution is the most effective way to go and how well it has actually worked.

In a comparison with other parts of the world, the South African restitution still has a chance to end successfully. The country that is most comparable to South Africa, both geographically and historically, Zimbabwe, has set a monstrous example of what South Africa needs to avoid. The situation is better controlled in South Africa, despite the similarities between the two countries. In Asia and South America, the goals of restitution have not been comparable to the ones in South Africa. Political ideology and centuries of colonization have been the deciding factors of how to deal with restitution. Also in Eastern Europe, political ideology has played an important role, but there are other factors that can be taken in consideration when it comes to these countries. The large amounts of state-owned land, available as compensation, could be an answer to the needs of the masses. This option is available also in South Africa.

What happened during apartheid must not be diminished. However, the bitter reality, according to Du Toit in the Draft Report, is "that the injustices of the past can never be completely healed".²⁶⁵ At the time of dispossession, the loss suffered by the claimants is much more than only material. It becomes an assault of the identity of the claimant. Therefore, the hope that rises with the opportunity to regain land often makes the claimants overestimate the

²⁶³ Toulmin and Quan, p. 283

²⁶⁴ See Chapter 6, Restitution in the International Context

²⁶⁵ Du Toit, *Draft Report*, p. 2

actual effect that restitution can have. Disappointment is not unusual, since there are limits to what restitution can do. Some land is not possible to give back, for example urban areas or land that contains natural resources, energy plants, national parks etc. In addition it is seldom enough to just offer land. After having been assaulted, the claimants need public apologies and acknowledgement.

Everyone involved with the process seem to agree that it is taking too long. So far, only half of the claims are solved. Thus, the time predictions from the government were outrageously misjudged. The president of South Africa, Thabo Mbeki said as late as last year that the government predicts the entire process to be finished in 2005. No one involved with the process seem to agree with this ridiculously positive outlook. It would have been better to present a more realistic time schedule from the start.

On the other hand, there is now an opposite critique against the forced speeding up of the process, which automatically brings negligence and carelessness because of the stress and the pressure of solving numerous cases. The risk lies in that one of the points of the restitution will get lost in the frenzy of finishing cases. What many claimants want is recognition of their rights. If the matter is rushed and not given proper attention they will not feel that their right has been restored, and the frustration about the continuing inequalities will carry on growing. Since everyone agrees that the governmental prediction is totally unrealistic, it would give better results if the cases were thoroughly handled.²⁶⁶

In order to perform what had been promised, there was a large need for financial funding and competent staff. The government has not been able to provide either of these to a satisfactory extent. A considerable amount of the funding has come from donating countries and independent NGOs. Practically all our interviewees wish for more resources at a better standard.

In our research we have observed a lot of critique against “the government” as an abstract whole, and the involved have not been able to specify exactly where the source of the faults lies. Perhaps this is due to indistinctness from the government about who is in charge of what, the administrative hierarchy and so forth.

²⁶⁶ Interview with Gary Howard, March 5, 2003

13.3 Possible Solutions

We are aware that in our brief research from a Swedish perspective we cannot add solution proposals of significant value to these problems. Land restitution possesses such historical- and cultural complexity. We will, however, contribute what we can after the work that we have performed. Some of the people that we have met have opinions that are quite valid, and also in literature we have found proposals for improvement.

The government can solve more problems if they structure their approach and functions better. The lack of a clear hierarchy between the institutions restrains the activities from running smoothly. It seems as if the first thing that needs to be done by the government is structuring the organisation once and for all. Until such a change the system cannot start working in the desired direction.²⁶⁷

One idea that we have encountered is to change focus of the Land Reform Programme. Restitution is slow, and for the large masses of landless people the urgent need is just to have access to a piece of land to live on and to use to provide for themselves. Landlessness obviously aggravates the social and political situation in South Africa: it causes social inequality, political instability, and in the long run economic stagnation and poverty. Some of the landless do not have the right to restitution. Others, who claimed restitution, do not care if they receive the exact land that their ancestors once lost or if it is another piece of land that they are being offered. Therefore, focus should be set on land redistribution instead. The state owns enough land to start portioning it out to the landless squatters and avoid the acute danger of them not having anywhere to live. This would resolve the situation for a large proportion of the people in need.²⁶⁸

Furthermore, the State could start using their constitutional right to expropriate land for a wider public purpose, namely for relocation of landless people. Large areas of privately owned suitable land are not utilized. If the land is not utilised at all, and the owner has no intention of changing that, we believe the state would have a right to expropriate it for the public interest (or even 'public need') of relocating people. Willem de Klerk at the Wits University Law Clinic supports this opinion, although the state has never used the right to

²⁶⁷ Du Toit, *Draft Report*, p. 6

²⁶⁸ Interview with Willem de Klerk, February 20, 2003

expropriation for such purpose.²⁶⁹ Again, we have a conflict between the interest of private ownership and the interest of the public, and as we concluded in section 12.3, it is crucial to find a balance between the two.

As we have seen, redistribution or restitution of any piece of land would not do for everyone. The claimants that we have met with would not settle for a result like this. Tiny Mankge and her community find an emotional value in returning the exact land that was lost. However, redistribution could be a smooth way for many others.

Better resources is what most of the interviewees ask for. More funding would help the NGOs providing legal assistance; it would, for instance, reduce the harsh screening of the “less interesting cases”. Perhaps more funding would also result in faster activity at the Commission. Financial help is not the answer to everything though. In some areas there is a desperate need for well-trained staff. Educated professionals that are willing to work with this type of law are not that common.

13.4 Future Potential Scenarios for Restitution in South Africa

There are a few possibilities of what might happen in South Africa over the next few years when it comes to restitution. According to Thabo Mbeki and the government, the restitution process is a success and will be finished during 2005. It would be very good for the property market to finish the process as soon as possible, so that land prices can stabilize. They tend to fluctuate immensely when one cannot be sure of who is the rightful owner of the property. Also for the involved claimants, closure is urgent. They have already waited for a long time, and there is a need to move on, get settled on the land and start living in the democratic South Africa.

Very few believe that this prediction will come true. People working in the process cannot see an end to it in the near future. The large bulk of cases still lie with the Commission and there is a lot of research work to do. In the mean time people are getting frustrated and tired of waiting. There are also large groups of people who have no place to go. They choose to squat on someone’s land, get evicted, squat somewhere else and risk their life and health in doing

²⁶⁹ Interview with Willem de Klerk, February 20, 2003

this. Popular movements and NGOs have formed, such as Landless Peoples Movement, which encourage people to squat and take actions in order to achieve what they need. These trends constitute a real threat to the national peace and security, and could in the worst possible scenario break out in an internal conflict.

Hopefully, the future lies somewhere between these two extremes. Realistically it is also the most likely to happen. The budgetary allocations are not satisfactory. Neither are they well planned, since they are now at their expected peak; the financial grants will lessen over the next few years. However, the amount of cases outstanding is still considerable. The governmental time estimation is not proportional to the real development.²⁷⁰

With a few improvements the restitution process could speed up a little, without ignoring the needs of the claimants. Mostly, it is a question of funding, but also of educated staff. The University Law Clinics are a good source for this. Using student capacity is an underestimated resource according to Willem de Klerk at the Wits Law Clinic.

Due to limited resources and time we must leave the question of funding and other ways of improving the process. It will be interesting to follow the development in land reform in South Africa during the next few years and see how the society will evolve.

²⁷⁰ Interview with Gary Howard, March 5, 2003

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ATTACHMENT A

RESTITUTION OF LAND RIGHTS ACT, CHAPTER I

RESTITUTION OF LAND RIGHTS ACT

[ASSENTED TO 17 NOVEMBER 1994] [DATE OF COMMENCEMENT: 2 DECEMBER
1994]

(Afrikaans text signed by the President)

as amended by

Restitution of Land Rights Amendment Act 84 of 1995
Land Restitution and Reform Laws Amendment Act 78 of 1996
Land Restitution and Reform Laws Amendment Act 63 of 1997
Land Affairs General Amendment Act 61 of 1998
Land Restitution and Reform Laws Amendment Act 18 of 1999

ACT

To provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith.

[Long title substituted by s. 31 of Act 63 of 1997.]

WHEREAS the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), provides for restitution of property or equitable redress to a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices;

AND WHEREAS legislative measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken to promote the achievement of equality;

[Preamble substituted by s. 1 of Act 63 of 1997.]

NOW THEREFORE BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

CHAPTER I
INTRODUCTORY PROVISIONS (ss 1-3)

[a22y1994s1]1 Definitions

In this Act, unless the context indicates otherwise-

'claim' means-

(a) any claim for restitution of a right in land lodged with the Commission in terms of this Act; or

(b) any application lodged with the registrar of the Court in terms of Chapter IIIA for the purpose of claiming restitution of a right in land;

[Definition of 'claim' substituted by s. 2 (a) of Act 63 of 1997.]

'claimant' means any person who has lodged a claim;

[Definition of 'claimant' substituted by s. 2 (b) of Act 63 of 1997.]

'Commission' means the Commission on Restitution of Land Rights established by section 4;

'community' means any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group;

'Court' means the Land Claims Court established by section 22;

'day', in the computation of any period of time expressed in days, means any day which is not a Saturday, Sunday or public holiday and which does not fall within the period 24 December to 2 January;

[Definition of 'day' inserted by s. 1 (a) of Act 78 of 1996.]

'direct descendant' of a person includes the spouse or partner in a customary union of such person whether or not such customary union has been registered;

'equitable redress' means any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, including-

(a) the granting of an appropriate right in alternative state-owned land;

(b) the payment of compensation;

[Definition of 'equitable redress' inserted by s. 2 (c) of Act 63 of 1997.]

'High Court' means any High Court referred to in section 166 (c) of the Constitution, excluding a high court of appeal;

[Definition of 'High Court' inserted by s. 2 (c) of Act 63 of 1997.]

'Minister' means the Minister of Land Affairs or an officer in his or her department designated by him or her;

'organisation' means any association of persons, incorporated or unincorporated, registered in terms of a law or unregistered and also any branch, section or committee of such association or any local, regional or subsidiary body which forms part of such association;

[Definition of 'organisation' inserted by s. 1 (b) of Act 78 of 1996.]

'organ of state' means an organ of state as defined in section 239 of the Constitution;

[Definition of 'organ of state' inserted by s. 2 (d) of Act 63 of 1997.]

'person' includes a community or part thereof;

'prescribed' means prescribed by or under this Act;

'presiding judge', in relation to a hearing before more than one judge, means the judge designated as such by the President of the Court;

[Definition of 'presiding judge' inserted by s. 1 (c) of Act 78 of 1996.]

'public land' means all land owned by any organ of state, and includes land owned by the Land Bank and any institution in which the State is the majority or controlling shareholder;

[Definition of 'public land' substituted by s. 2 (e) of Act 63 of 1997.]

'racially discriminatory laws' include laws made by any sphere of government and subordinate legislation;

[Definition of 'racially discriminatory laws' inserted by s. 2 (f) of Act 63 of 1997.]

'racially discriminatory practices' means racially discriminatory practices, acts or omissions, direct or indirect, by-

(a) any department of state or administration in the national, provincial or local sphere of government;

(b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation;

[Definition of 'racially discriminatory practices' inserted by s. 2 (f) of Act 63 of 1997.]

'restitution of a right in land' means-

(a) the restoration of a right in land; or

(b) equitable redress;

[Definition of 'restitution of a right in land' inserted by s. 2 (f) of Act 63 of 1997.]

'restoration of a right in land' means the return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices;

[Definition of 'restoration of a right in land' inserted by s. 2 (f) of Act 63 of 1997 and substituted by s. 1 of Act 18 of 1999.]

'right in land' means any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question;

[Definition of 'right in land' inserted by s. 2 (f) of Act 63 of 1997.]

'the Constitution' means the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996);

[Definition of 'the Constitution' inserted by s. 2 (g) of Act 63 of 1997.]

'Supreme Court'

[Definition of 'Supreme Court' deleted by s. 2 (h) of Act 63 of 1997.]

'the rules' means the rules made under sections 16 and 32;

'this Act' includes the rules and the regulations made under section 40.

[a22y1994s2]2 Entitlement to restitution

(1) A person shall be entitled to restitution of a right in land if-

(a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or

(b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or

(c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who-

(i) is a direct descendant of a person referred to in paragraph (a); and

(ii) has lodged a claim for the restitution of a right in land; or

(d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and

(e) the claim for such restitution is lodged not later than 31 December 1998.

(2) No person shall be entitled to restitution of a right in land if-

(a) just and equitable compensation as contemplated in section 25 (3) of the Constitution; or

(b) any other consideration which is just and equitable,

calculated at the time of any dispossession of such right, was received in respect of such dispossession.

(3) If a natural person dies after lodging a claim but before the claim is finalised and-

(a) leaves a will by which the right or equitable redress claimed has been disposed of, the executor of the deceased estate, in his or her capacity as the representative of the estate, alone or, failing the executor, the heirs of the deceased alone; or

(b) does not leave a will contemplated in paragraph (a), the direct descendants alone,

may be substituted as claimant or claimants.

(4) If there is more than one direct descendant who have lodged claims for and are entitled to restitution, the right or equitable redress in question shall be divided not according to the number of individuals but by lines of succession.

[S. 2 amended by s. 2 (1) of Act 78 of 1996 and substituted by s. 3 (1) of Act 63 of 1997 and by s. 2 of Act 18 of 1999.]

[a22y1994s3]3 Claims against nominees

Subject to the provisions of this Act a person shall be entitled to claim title in land if such claimant or his, her or its antecedent-

(a) was prevented from obtaining or retaining title to the claimed land because of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 9 (3) of the Constitution had that subsection been in operation at the relevant time; and

[Para. (a) substituted by s. 4 of Act 63 of 1997.]

(b) proves that the registered owner of the land holds title as a result of a transaction between such registered owner or his, her or its antecedents and the claimant or his, her or its antecedents, in terms of which such registered owner or his, her or its antecedents held the land on behalf of the claimant or his, her or its antecedents.

ATTACHMENT B CONSTITUTIONAL PROPERTY CLAUSE

Property

25. (1) 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; and
- b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the 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 the acquisition and 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 purposes of this section

- 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 which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 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.

(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).

(9) Parliament must enact the legislation referred to in subsection (6).

ATTACHMENT C LIST OF CLAIMANTS

Claimants Registration: GA Mawela Land Claim, St George 2JT

N U M B E R	SURNAME	FIRST NAMES	ID NO	MALE/FEMALE
1.	Choma	Katishi Solomon	5401245640086	M
2.	Choma	Tagishi William	6506155767080	M
3.	Choma	Mputi Ben	2803165196085	M
4.	Leshaba	Latishi Elias	7009115703088	M
5.	Leshaba	Phodisa Andries	5201135408085	M
6.	Leshaba	Sekutulwane Lucas	5806115717089	M
7.	Leshaba	Tabudi Philistas	6306240328083	F
8.	Leshaba	Maruman Klaas	4603115428085	M
9.	Leshaba	Kunutu Speelman	4107265300086	M
10.	Leshaba	Talashane Lucas	3403045131086	M
11.	Leshaba	Adam	57301015685089	M
12.	Leshaba	January	7601135278081	F
13.	Leshaba	Lebakang Frans	5304025430084	M
14.	Leshaba	Philemon Ntowa	5803025881089	M
15.	Leshaba	Efina Eva	7301021094086	F
16.	Leshaba	Thomas	7101025754085	M
17.	Leshaba	Kgekolo Maria	7105050464080	F
18.	Maboi	Jim	4407175419087	M
19.	Magane	Madebejane Debora	5702050710082	F
20.	Magane	Mochabeng Phenias	5406235632084	M
21.	Magane	Almolana Robert	680510320	M
22.	Magane	Mantshadi Rebeca	7812030662085	F
23.	Magakwe	Rangwato Esther	5112300351085	F
24.	Maganwe	Rasane Selina	6601020406087	F
25.	Maganwe	Seloma Frans	57102155545087	F
26.	Makgwale	Mokoana Lesbeta	7004070858084	F
27.	Makua	Seabi Maria	7208290602087	F
28.	Mamonyane	Mogoere Sarah	4904100420081	F
29.	Mankge	Serunya Simon	7408095477087	M
30.	Mankge	Necieus	6803015505085	M
31.	Mankge	Jan	3009045192083	M
32.	Mankge	Sebedi David	5902045564087	M
33.	Mankge	Serane Johannes	5611015468084	M
34.	Mankge	Tetisa Lucas	6703035467086	M
35.	Mankge	Kalaba Jacob	1801085105088	M

36	Mankge	Spoe Isaac	4103245319080	M	
37	Mankge	Judas	6102105714081	M	
38	Mankge	Nkeko Dorothy	7705150574082	F	
39	Mankge	Jan	3009415192083	M	
40	Mankge	Johanes	8101045678081	M	
41	Mankge	Moses Madibane	3004145234083	M	
42	Mankge	Makua Betty	1802010124087	F	
43	Mankge	Mogole Eskiya	7005215361082	M	
44	Mankge	Njanja Piet	5011305203087	M	
45	Mankge	Mampare Eva	2507280113087	F	
46	Mankge	Rajaji Sapina	6406190399082	F	
47	Mankge	Mahlako Ester	6312251054089	F	
48	Mankge	Legope Sarah	5610260335089	F	
49	Mankge	Makotoko Maggy	6512010434080	F	
50	Mankge	Mpedi Piet	4701295155080	M	
51	Mankge	Makua Johannes	6207105437086	M	
52	Mankge	Magauwane Katjie	2304050101082	F	
53	Mankge	Mabutjwa Lazarus	5801105691089	M	
54	Mankge	Winkana Lucas	7211205824085	M	
55	Mankge	Dilepe Elias	7909255452083	M	
56	Mankge	Jany Chrestinah	5607080711085	F	
57	Mankge	Lehope Sarah	5610260335089	F	
58	Mankge	Tatesolong Erusmus	7710095342082	M	
59	Mankge	Kunyamane Tiny	6808010604080	F	
60	Mankge	Maruping Isaac	4507275283083	M	
61	Mankge	Matshidiso Pascalina	6707230771085	F	
62	Mankge	Nkabi Stephen	4012255522489	M	
63	Mankge	Tlaleng Kortman	3508105297088	M	
64	Mankge	Tsabuke Joseph	6003065487802	M	
65	Mankge	Setsoko Sophy	1704060078082	F	
66	Mankge	Lucas Thomas	6510205416086	M	
67	Mankge	Andries	7206156240083	M	
68	Mankge	Manthata David	6103026012084	M	
69	Mankge	Mashikana William	660612544083	M	
70	Masha	Ieng Greis	6801011194086	F	
71	Mashilangwako	Mpjenyana Lucas	5609145668086	M	
72	Mashilangwako	Mirika Petrus	6204925946088	M	
73	Mashilangwako	Mosis	4502135211085	M	
74	Mashilangwako	Mohoeledi	3404110111086	M	
75	Mashilangwako	Magosebo Anna	6004120630088	F	
76	Mashilangwako	January	4703135426085	F	
77	Mashilangwako	Pelekgolo Samuel	6510085236083	M	
78	Mashilangwako	Rangwato	4304250149087	F	
79	Mashilangwako	Burwane Jan	7611025857084	M	
80	Mashilangwako	Tsapudi Abram	7406205818083	M	
81	Mashilangwako	Lepono Solomon	5012125415083	M	
82	Mashilangwako	Mankhedi Dinah	5303310487080	F	
83	Mashilangwako	Rangwato Lettie	4304250149087	F	

84	Mogaswa	Kgabo Simon	?	F	
85	Mogaswa	Rebotile Ragosebo	6801260812083	F	
86	Motloun	Lydia Mpini	4802050384085		
87	Mokubjane	Mmajwale Stephina	6402190356081	F	
88	Mothupi	Ragosebo Maria	5401100238086	F	
89	Thokwane	Thakgodu David	5207265428082	M	
90	Tsia	Mmadipoti Leah	5506070358081		

ATTACHMENT D TIMELINE

Date	Event	Laws or policy related to event
1830s	<p>The ancestors of the claimant group occupied the area known as GaMawela, a part of which is now known as the farm St George 2JT, formerly 223 (according to some correspondence in the national archives, known as Sint George 1160 or 1166), in the district of Swartdenburg, in extent 2640 Morgen 234 Square Roods.</p> <p>The names of rivers, mountains and places in the locality refer to ancestors of the Mankge group. For example, a stream on the property now known as the remaining extent of the farm is still called Mapaalspruit, after the ancestor Mapale.</p> <p>The Mankge group were known as rainmakers and also were involved in the ritual initiation of Pedi chiefs in the practice of rain making. According to an account of the history of the group, Sekwati was initiated by the group.</p>	<p>The group was allocated the land by paramount of the Pedi polity in terms of the indigenous or customary laws in operation at the time.</p>
1871	<p>The Zuid Afrikaanse Republiek issued a Grondbrief in favour of HJG Korf. Korf sold the farm within a year.</p>	<p>See Deeds Register</p> <p>The practice of the former ZAR was to grant farms to officials in lieu of salaries cf. Delius, P, 1983, p 126ff</p>
1871-1912	<p>The farm as a whole was transferred between 10 successive registered owners until it became the property of JJ Smith in 1912.</p>	<p>See Deeds Register</p>
1916-1922	<p>The farm as a whole was transferred to FA Booyse and in 1917 to AW Booyse.</p>	<p>See Deeds Register</p>
About 1925	<p>The first white person arrived on the farm and informed the heads of the families comprising the Mankge group that he was the registered owner of the farm and that he wanted 3 months free labour (without pay). The Mankge group agreed to this condition under the circumstances. The labour tenancy system was established on the farm. Under this regime, the Mankge group were able to maintain their fields and cattle, largely without restriction.</p>	<p>The Native Land Act 1913 began a process leading to the elimination of more independent forms of tenure such as rental tenancy and sharecropping, in favour of more dependant forms of tenure such as labour tenancy. Black persons resident on white-owned land, who were regarded as “squatters” by law, increasingly begin to feel the effects of the so-called Transvaal Law 21 of 1895, the so-called <i>plakkerwet</i>, particularly if they refused the mandatory requirement of 3 months free labour in lieu of wages in return for the right to stay on the land (labour tenancy).</p>

1922-1955	<p>The farm as a whole is transferred to JJ Smith (again) and is later subdivided into Portion A “Erfdeel” and a Remaining Extent. In the course of the next 33 years the two portions of the farm were divided into one-third shares resulting from the deceased estates of the various members of the Smith family.</p>	<p>See Deeds Register</p> <p>The Masters and Servants Law (Transvaal and Natal) Amendment Act, 1926, bound labour tenants to a particular farmer and extended free labour requirements in terms of labour tenancy contracts from three to six months.</p>
1945	<p>At this time there are 11 households living on the farm, which have homesteads, fields and cattle.</p> <p>The Mankge group was required to render 6 months free labour without pay, as was the wide-spread practice in the Lydenburg district (see Schirmer, 1994: p121).</p> <p>Some members of the Mankge group refuse to work under these conditions and were evicted. These were:</p> <p>Nkwapeng William Mankge Jacob Nkgolwane Mankge</p>	<p>The Native Service Contract Act, 1932, extended labour tenancy contracts to the entire family for a 6 month period. The Act contains a whipping clause.</p> <p>Chapter IV of the Native Trust and Land Act, 1936, was proclaimed in the Lydenburg district in 1937. Chapter IV repealed the <i>plakkerwet</i>, but enacted new eviction procedures. Section 38 of the Act gave all Black families evicted as a result of its provisions a claim on land in the so-called Native Trust area i.e. farms acquired by former SA Development Trust. Labour tenants had to be registered at a Native Commissioner’s office, and in terms of the state-regulated contracts, labour tenants had to provide at least 4 months free labour. In terms of the practice of the time, an average farm was said to require five labour tenants working for six months a year. Labour Tenant Control Boards could order farmers to evict surplus labour tenants. A “native” unlawfully residing on the land could, after an enquiry by a local native commissioner, be ejected from the land summarily by the police. In 1938, the Native Affairs Department agreed, as a result of pressure from white farmers in the Lydenburg district, to increase the required period of free labour from four months to 6 months (see Schirmer, 1994: p 123)</p>
1955	<p>The various shares in the two portions of the farm were consolidated (Certificate of Consolidated Title T31480/5) and the farm was divided into three portions, 1,2 and a Remaining Extent.</p> <p>These portions were divided among three members of the Smith family: Willem Abraham Smith (Portion 1), Jacomina Hendrina Ackerman (Portion 2) and Elsie Margaretha Susanna Claasen (Remaining Extent)</p>	<p>See Deeds Register</p>
1956	<p>EMS Claasen sold the Remaining Extent to JH Ackerman, owner of Portion 2.</p>	<p>See Deeds Register</p>

1945-59	<p>The farm was visited regularly by police from Lydenburg who conducted pass inspections.</p> <p>In 1957 pass arrests were made, and people not working on the farm were jailed for 3-4 months. Some people refuse to provide labour under these stricter conditions. They were evicted with their households. These included:</p> <p>Buti Mankge Mohlogoane Mankge Tšhubelela Mankge Lekgema Mankge</p>	
1958	<p>Portion 1 was divided into shares among the heirs of WA Smith.</p>	See Deeds Register
1959	<p>JH Ackerman sold Portion 2 and the Remaining Extent of the farm to George Edgar Barnes. The Mankge group gave Barnes the name “Tang”, alluding to his cruelty.</p> <p>Families were required to work 12 months without cash wages, although they did receive some payment in kind e.g., bags of maize. They were also required to reduce the number of cattle grazing on the farm. As a result of the restrictions imposed, they did not have enough time to grow crops independently.</p>	<p>See Deeds Register</p> <p>The Native Trust and Land Act, 1936, was amended by the Native Trust and Land Amendment Act, 1954, particularly to ensure strict enforcement by Labour Tenant Control Boards of provisions on labour tenancy, particularly to encourage farmers to employ Blacks as full-time labourers. The amendment required farmers to register labour tenants annually, and the registration fee for labour tenants was increased progressively. The number of labour tenant families was restricted to five.</p> <p>The amendment removed the provision in the 1936 Act placing a binding provision on the Native Affairs Department to find alternative land for Blacks evicted as a result of the law.</p>
1963	<p>GE Barnes sells Portion 2 and the Remaining Extent of the farm to Jan Christiaan Nel. Families are still required to work 12 months without cash wages. Families manage to grow crops on their fields.</p>	Native Trust and Land Act, 1936, as amended
1967	<p>The last remaining member of the Mankge group living on Portion 1 (on the border of the neighbouring farm Richmond) is evicted. He is:</p> <p>Shere “Boy” Mankge</p>	
1969	<p>JC Nel sells Portion 2 and the Remaining Extent of the farm to Johannes Hermanus van den Berg. Van den Berg, known as “Mogatiane”, started to pay people cash wages (10c/day for adults, 5c/ day for children).</p>	<p>The Bantu Laws Amendment Act, 1964, repealed the Native Service Contract Act, 1932, and further amended Chapter IV of the Native Trust and Land Act, 1936, effectively setting the scene for the final abolition of labour tenancy in most parts of the country by the mid-1970s.</p>

1959-1986

By 1959, after persistent pass arrests, only five of the original eleven households living on Portion 2 and the Remaining Extent of the farm remained.

Members of these families are subjected to increasingly harsh conditions over time until in 1986 families were not allowed any fields for ploughing, and families left the farm gradually under the circumstances. They were:

Gantshe Mankge
Tsibiši Leshaba
Lepono Mankge
Mpurana Mankge

In 1986, only the household of Burwana Mankge remained.

1987

After Burwana Mankge died in 1986, his widow remained on the property until she was arrested and evicted, together with the members of the household i.e. children and daughter-in-law, from her home in 1987. The reasons given for the eviction was that she was old and her children were working elsewhere. She did not have time to harvest her crops.

Those who stay on the farm today have become ordinary farmworkers.

The Native Trust and Land Act, 1936, was amended by the Native Trust and Land Amendment Act, 1954, particularly to ensure strict enforcement by Labour Tenant Control Boards of provisions on labour tenancy, particularly to encourage farmers to employ Blacks as full-time labourers. The amendment required farmers to register labour tenants annually, and the registration fee for labour tenants was increased progressively. The number of labour tenant families was restricted to five.

The eviction was probably done in terms of the Prevention of Illegal Squatting Act, 1951, alternatively the Trespass Act, 1959.

ATTACHMENT E MAP OF THE REPUBLIC OF SOUTH AFRICA