Introduction:

> *"Generally, lawyers are unwilling to devote the resources and time and to specialize in the manner required to deal with legal problems in the rural areas. The difficulty of overturning existing practices, language difficulties, the barrenness and inscrutability of the law and the remoteness of the areas, maintain an urban concentration of legal resources, and inhibit lawyers from "the venturing into the interior". Besides, professionals are removed from the problems and needs of rural poor and see the work is unglamorous"* [1]

Lawyers at the Legal Resources Centre decided from the days that the institution opens its doors to concentrate on legal issues relating to land, land tenure and in later years development in the rural areas. They hoped to advance the interests and where they could establish rights, protect the rights of the marginalized and poor rural community – and in this regard from the outset particularly resist the forced removals of apartheid. The LRC lawyers were amongst the only in South Africa doing this type of work. Come the 1990's and the negotiated settlement resisting large scale rural removals fortunately became part of history and the land lawyers at the Legal Resources Centre started to explore new avenues involving land restitution, land redistribution, tenure security and as such face up to the challenges of development in a post apartheid South Africa.

Now several years on we need to ask critically and seriously what we have done and how well have we done it. To help us do it we have debated internally and occasionally (far too occasionally) asked outsiders to critically look at our work.

Robin Palmer, Land Policy Advisor to Oxfam, Great Britain and much traveled in Southern Africa kindly agreed to review our work and "hold a mirror up to us". We entered this review nervously and uncertain as to where a review by a non South African based non lawyer would take us. We are particularly pleased to be able to publish Robin Palmer's review because it both recognizes some of our work and challenges us in respect of our future work. We also now believe that we should more often have our work critically reviewed by outsiders. We publish Robin Palmer's reflection in the hope that it will encourage readers to a new appreciation of our work.

During the course of our annual meetings and our project meetings, we have taken his criticisms, and in particularly his warnings on board in the hope that we can become even more strategic in the allocation of scarce legal resources and we would also welcome further comments from readers so that we too can continually improve our service to our clients.

Steve Kahanovitz

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[1] , Rural Land Struggles: Practising Law Democratically by Nicholas Haysom in No Place to Rest –Forced Removals and the Law in South Africa 1990 edited by Christine Murray and Catherine O'Regan

Legal Director
Legal Resources Centre
June, 2002

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LAWYERS AND LAND REFORM IN SOUTH AFRICA: A REVIEW OF THE LAND, HOUSING & DEVELOPMENT WORK OF THE LEGAL RESOURCES CENTRE (LRC)

Robin Palmer
Land Policy Adviser
Oxfam GB

September 2001

THE LRC'S MISSION STATEMENT (1998)

The Legal Resources Centre (LRC) is an independent, client-based, non-profit public interest law centre, which uses law as an instrument of justice. It works for the development of a fully democratic society, based on the principle of substantive equality, by providing legal services for the vulnerable and marginalised, including the poor, homeless and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or because of social, economic and historical circumstances.

Inspired by our history, the Constitution and international human rights standards, the Legal Resources Centre, both for itself and in its work, is committed to:

?? **Ensuring that the principles, rights and responsibilities enshrined in our national Constitution are respected, promoted and fulfilled;**

?? **Building respect for the rule of law and constitutional democracy;**

?? **Enabling the vulnerable and marginalised to assert and develop their rights;**

?? **Promoting gender and racial equality and opposing all forms of unfair discrimination;**

?? **Contributing to the development of a human rights jurisprudence;**

?? **Contributing to the social and economic transformation of society.**

To achieve its aims, the Legal Resources Centre seeks creative solutions by using a range of strategies, including impact litigation, law reform, participation in partnerships and development processes, education and networking within and outside South Africa.

1. MY CURIOUS BACKGROUND AND METHODOLOGY

I was approached by Henk Smith of the LRC's Cape Town office just before Christmas 2000 about the possibility of my undertaking this review of the LRC's land reform work in South Africa. I explained to Henk some of the major obstacles to my doing this.

First, I am not a lawyer and nor have I ever studied law seriously, either as an academic or a development worker.

Second, I knew much more about Southern than about South Africa, having lived for years in Zimbabwe, Zambia and Malawi, and travelled for Oxfam through parts of Mozambique and Angola. My most recent knowledge of South Africa was gained from a being part of a team reviewing donor support to the Department of Land Affairs (DLA) in 1999.

Third, I was employed by Oxfam GB full-time as its Land Policy Adviser. Although there were uncertainties surrounding the renewal of my current contract, if they were resolved (as they later were) I would certainly need to 'keep the day job' and would only be able to work on the LRC project when my normal schedule allowed.

Fourth, I explained to Henk that I had no serious history as a reviewer, certainly did not do them for a living, and was generally rather sceptical about their value.

None of these objections appeared to deter Henk. We want someone with experience of land reform outside South Africa, and 'we want someone to hold a mirror up to us' was the gist of his response. The intention being, I presume, to give people an opportunity to reflect on their past work and its implications for future work – as well as producing a review which would augment the LRC's institutional memory, which could also possibly be used to support publicity and fundraising work, and which would be of interest and use to others engaged in land reform in South Africa.

So, after consulting with colleagues and friends about whether this might be a worthwhile endeavour, I agreed to undertake it – subject to all the qualifications listed above. My motives were a combination of wanting to know more about a subject which certainly impinged on my own work as a Land Policy Adviser, working mostly in Eastern and Southern Africa, and about what lessons might be drawn for relevance in countries outside South Africa. In simple terms, a number of the NGOs I had worked with had said how difficult it was to find good lawyers you could trust at affordable rates to defend people whose land was threatened.

So, in February 2001 I attended two LRC workshops on Robben Island, Cape Town – a venue with very particular and very powerful associations. One was an internal event for the LRC's Land, Housing and Development Programme and the other was an open event, a regional workshop on land reform in Southern Africa. During the workshops and using an agreed, but fairly rough and ready, questionnaire (see Appendix I), I interviewed a number of the LRC's land reform lawyers and in subsequent days I interviewed the remainder and a number of other individuals and organisations in Cape Town, Johannesburg and Pretoria (see Appendix II). These interviews were transcribed, and people were given the opportunity to check them for accuracy and to add any second thoughts.

Later in the year at various times I interviewed a number of individuals in Britain, whose views on the LRC and its work might, I thought, be of interest. They included:

?? Martin Chanock, Professor of Public Law, La Trobe University, Melbourne, Australia. Martin is South African by birth, trained in the law, has written extensively about customary law in Africa and just published a book, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice*. We taught history together at the University of Malawi some 30 years ago. His sister, Loraine Gordon, worked for the LRC.

?? Joel Joffe, Chair of Oxfam GB, defence lawyer for Nelson Mandela in the Rivonia trial in the 1960s, and more recently a trustee of the LRC's UK offshoot, the Legal Assistance Trust.

?? Edward Lahiff, formerly of Nkuzi Development Association in the Northern Province, and now with PLAAS, the Programme for Land and Agrarian Studies at the University of the Western Cape. He has experience of working with the LRC both at Nkuzi and at PLAAS.

?? Jill Williamson, who has worked since 1988 for the Legal Assistance Trust, which was formed in Britain to raise funds for the LRC.

In addition, Gwendolyn Wellman, who has been conducting a separate, contemporaneous review of Community Property Associations (CPAs), has made available to me some of her interview notes and project reports.

In August I returned to South Africa to present a first draft of this review to another meeting of the LRC's Land, Housing and Development Programme. Various comments and suggestions were made at that meeting and subsequently, and I have tried to respond positively to as many of them as I could.

What follows is based very largely on these interviews, complemented by an assortment of LRC materials and publications, and by small range of secondary sources dealing particularly with the LRC's early years (see Appendix III).

This has been for me a fascinating voyage of discovery, and I am grateful to those who responded to an earlier draft, even if I have not been able to meet all their suggestions. I hope what follows will be both interesting and useful. This has always been my prime purpose.

2. THE CREATION OF THE LRC AND ITS 'GLORY DAYS'

'Glory days'[2] is a phrase used by Martin Chanock to describe the early years of the LRC and its struggle against apartheid. In its modest[3] submissions to the legal hearing of the Truth and Reconciliation Commission (TRC) in 1997, the LRC was at pains to play down the significance of its work against apartheid and the extent to which it, in contrast to others, had suffered at the hands of the apartheid state. I suspect that many neutral observers would however subscribe to Martin Chanock's assessment.

The Legal Resources Centre (LRC) is a public interest law centre founded in Johannesburg in January 1979 shortly after its governing body, the Legal Resources Trust (LRT) was created in November 1978. 'There was a real buzz around the formation of the LRC', Josette Cole remembers. The moving figures behind its creation, Felicia Kentridge and Arthur Chaskalson were both extremely distinguished legal figures in South Africa. The idea of forming the LRC was apparently Felicia Kentridge's. She approached Arthur Chaskalson, now a Judge of the Constitutional Court, at the time a leading QC with a very lucrative practice in Johannesburg. Joel Joffe says he was 'totally astonished' to learn that Arthur was leaving the bar to start the LRC 'to challenge the apartheid laws to the extent that was possible at the time.' In its 1987/8 Annual Report, the LRC said its aim 'was and always has been to encourage belief in the value of law as an instrument of justice.'[4] Some years later, in a Mission Statement, it expanded this to working 'for the development of a democratic society.'

The inspiration seems to have come from the work of civil rights lawyers in the United States in the 1960s. To the outsider, a slightly curious feature of apartheid South Africa was the extent to which it was quite self-consciously a legal order. As Martin Chanock points out, 'nothing was done without legal authorisation, from removals to detentions, everything. White politicians and the white community relied on the rule of law. It was a way of ensuring that government functioned as a single line of authority.' Yet this reliance also opened the way for the LRC to use the space available (hugely circumscribed though it was) to challenge the system in creative ways. And I was reminded of the ambiguities of law in South Africa by the fact that both Nelson Mandela and Oliver Tambo trained as lawyers.[5]

In persuading a range of top judges and others to be members of the Legal Resources Trust, the LRC was able to give itself a degree of protection from the apartheid state. Joel Joffe points out that, by virtue of his high reputation, Arthur Chaskalson was able to attract the support of both the Transvaal Law Society and the Bar Council to the formation of the LRT and the LRC, which was a remarkable achievement. Of course, it would have been quite

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[2] As one of the LRC lawyers pointed out with some force, the so-called glory days were in fact mad, base, harrowing times, when you were routinely harassed and your family and friends were detained and murdered.

[3] 'We would not have wished to talk about the Legal Resources Centre, but we do it because we have been requested to do so in order to assist this Commission.' Truth and Reconciliation Commission, The Legal Hearing, 28 October 1997, 153.

[4] *LRC Annual Report for 1987/8*, 1. An earlier version had 'to encourage belief in the value of law by providing legal and educational services in the public interest and without charge.' *LRC Annual Report for 1985/6*, 1.

[5] Martin Chanock points out that 'Parts of the legal profession were filled with an anxiety which became an important ingredient in legal discourses. One strand of this was expressed in concern for the legitimacy of 'Law' as an abstract entity in the eyes of black South Africa. In its worst form the nightmare (or the threat) was that 'They' would just cease to believe in it altogether and that a terrible harvest would consequently be reaped.' Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge: Cambridge University Press, 2001), 519.

impossible for a black lawyer to have done this under an apartheid system which barred black advocates from practising at the Pretoria Bar.

The LRC opened an office in Johannesburg in 1979, at perhaps an ideal time,[6] with Arthur Chaskalson as its first Director and Geoff Budlender, another exceptionally talented lawyer as his deputy. (Geoff took over from Arthur in 1993). Geoff recalls that virtually all the early annual reports of the LRC, written by Arthur, were 'very understated and did not say *why* the LRC was doing what it was trying to do. They simply said we are lawyers trying to help poor people and looking for test cases. The political motives were always suppressed. There was nothing about *why* we were doing this work.' Arthur always stressed that the LRC had to do its law work better than commercial law firms. It quickly established a reputation for being extremely efficient and professional. In time, other offices opened, in Cape Town, Pretoria, Durban, and Grahamstown.[7] By 1986, its major fields of work included 'problems of residence, influx control, citizenship, consumer abuses, housing, labour matters, abuse of powers by local officials and human rights violations.'[8] Its annual budget had grown rapidly.[9]

From its inception, the LRC sought to use the law strategically, not fighting individual cases (however deserving), but test cases whose consequences might affect the lives of thousands of people. This in a context in which the courts were, in Arthur's words, 'at one and the same time an instrument of justice and at another an instrument of oppression.'[10] The LRC sought

> to use the limited power of the courts to exploit spaces within the framework of apartheid where fundamental rights of the common law could be asserted and defended. While the LRC could not directly challenge the validity of apartheid laws that were sanctioned by parliament, it could confront and challenge these laws through litigation. The LRC primarily did this through exploiting the tension between common law principles and the apartheid regime. The courts were the only institutions of governmental power to which black South Africans had any access.
>
> The work of the LRC involved persuading courts that justice ought to prevail in those situations in which the common law gave courts the power to choose.
>
> What was novel and unprecedented about the modus operandi of the LRC was that it enabled ordinary people to use the courts in their favour.[11]

The focus in those days was generally on attempting to support those being persecuted for fighting apartheid, on helping people to build or defend community organisations which were challenging apartheid, and on finding spaces in the legal system which made the political

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[6] According to Richard Abel, 'South Africa in the 1980s was an ideal setting in which to explore how law could resist and constrain apartheid, offering opponents a protected space for their struggle and unique forms of leverage.' Richard Abel, *Politics by Other Means: Law and the Struggle against Apartheid, 1980-1994* (New York and London: Routledge, 1995), 523.

[7] From time to time other offices were opened, then closed. The work of each office naturally differs according to the local context.

[8] *LRC Annual Report for 1985/6*, 1.

[9] 'In 1979 the annual budget was R180,000. In 1989 the budgeted annual expenditure exceeds R5,000,000.' *LRC Annual Report for 1987/8*, 9.

[10] Cited in David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998), 15.

[11] Written Submission of the Legal Resources Centre to the Truth and Reconciliation Commission Hearing on the Legal System, 6 October 1997.

system vulnerable. This tended to mean an emphasis on resistance to forced evictions, and on trying to assert black people's housing and residence rights in the theoretically 'white' towns and cities of apartheid South Africa where the notorious pass laws had been rigidly enforced. A number of major victories were won, such as Driefontein[12], Oukasie, Komani and Rikhoto.[13] In Joel Joffe's words, 'the LRC had a real talent for finding the gaps in the law and using them as test cases.'

My interviews suggest that it did not prove difficult for the LRC to attract extremely able and committed lawyers, black and white. It was exciting and exhilarating work, tilting at the legal structures of apartheid. As LRC case successes grew, the brightest minds and the most politically committed queued to join. As Geoff Budlender put it, people got paid for doing something they really believed in! From all accounts the LRC served as a valuable training ground for a very wide variety of people who now hold prominent places in the new South Africa,[14] offering them a unique experience of human rights law.[15]

If the LRC attracted many of the country's best lawyers, it also attracted outside funding without great difficulty. When Felicia Kentridge and her husband Sydney moved from South Africa to London, Felicia saw this as an opportunity to raise funds for the LRC in Britain. So she set up the Legal Assistance Trust. In America, there was an equivalent body, the Southern Africa Legal Services and Legal Education Project (SALSLEP), also established in the mid-1980s which reached a very large range of small foundations, corporations and individuals. (The LRT was able to deal with Rockefeller and Ford direct from South Africa). Everyone agrees that as the LRC rapidly established an excellent international reputation, and with distinguished people on the boards of these overseas offshoots, it proved relatively easy to attract donors who were appalled by the horrors of apartheid. Both Felicia Kentridge and Arthur Chaskalson developed strong contacts in America and used them to attract significant resources.

At another level, Jill Williamson tells the story of how the LAT was able to raise money in Britain from lots of concerned individuals. They would send out the archetypal letter, saying if you know of one or two others who might be interested in the LRC's work, please send us their names and addresses. One day she received a cheque for £10,000 in a scruffy brown envelope! People who donated money asked few questions in those days, as a search of the Oxfam file on the LRC reveals. Oxfam GB funded the LRC for over a decade, in symbolic rather than significant amounts. The file comprises little more than the annual reports and a covering letter requesting support for the following year. Oxfam GB staff working in South Africa, who in those days were based in Oxford for security reasons, confirm that the LRC was doing outstandingly effective work and that it was a very obvious organisation for a donor like Oxfam to support.

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[12] See the classic ' Lucie E. White, 'To Learn and Teach: Lessons from Driefontein on Lawyering and Power', *Wisconsin Law Review,* 1988, 699-769.

[13] See Richard Abel, *Politics by Other Means: Law and the Struggle against Apartheid, 1980-1994* (New York and London: Routledge, 1995); for Oukasie 495-517, Komani 24-43, and Rikhoto 43-60.

[14] Shehnaz Meer said that 'So many LRC staff have gone elsewhere – about 8 to the bench, others to government, some to private practice. LRC people are in demand. There are lots of ex-LRC people in high places in almost every province and government department.'

[15] Lucie White provides an interesting analysis of Geoff's thinking at this time on the role of the lawyer, drawn from his published and unpublished work. Lucie E. White, 'To Learn and Teach: Lessons from Driefontein on Lawyering and Power', *Wisconsin Law Review,* 1988, 739-43.

Authors who have written about the LRC's work at this time tend to be highly complimentary. Lucie White says

> the LRC's work as an aggressive and persistent legal advocate for Blacks helped establish litigation as a significant source of leverage against the South African government.[16]

David Dyzenhaus notes that

> two of the most significant legal victories of the 1980s, significant because they are two of the few oases of fidelity to the rule of law in the desert created by the Appellate Division during that era, were won by the Legal Resources Centre, which was staffed by lawyers (advocates and attorneys) who were committed to using the law to end apartheid.[17]

And Richard Abel writes:

> These campaigns helped lay the foundation for a decade of cumulative, and ultimately victorious, challenge to the apartheid regime…
>
> The legal battles described in this book did not win the war by themselves. But they empowered the masses while offering some protection from state retaliation…
>
> The handful of lawyers who helped blacks overturn three centuries of white domination in South Africa should be proud of the role they played.[18]

[16] Lucie E. White, 'To Learn and Teach: Lessons from Driefontein on Lawyering and Power', *Wisconsin Law Review,* 1988, 739.
[17] David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998), 108.
[18] Richard Abel, *Politics by Other Means: Law and the Struggle against Apartheid, 1980-1994* (New York and London: Routledge, 1995), 65, 549.

THE LRC AND THE AMERICAN CONNECTIONS

Geoff Budlender confirms that 'there was a big influence from America on South Africa in the early days, from Jack Greenberg and the Ford Foundation.' Both Geoff and Arthur Chaskalson took sabbaticals at Columbia University, and Columbia law students regularly did placements at the LRC.

The human rights lawyer, George Bizos, believes 'Jack Greenberg, then dean of the faculty of law at Columbia University, [who] had a special interest in South Africa, inspired Arthur Chaskalson, Sydney Kentridge, and Geoff Budlender to form the Legal Resources Centre.'
George Bizos, *No One to Blame?: In Pursuit of Justice in South Africa* (Cape Town: David Philip and Mayibuye Books, 1998), 229.

Lucie White believes the LRC 'was founded on the model of the NAACP Legal Defense and Education Center and similar American public interest law firms.'
Lucie E. White, 'To Learn and Teach: Lessons from Driefontein on Lawyering and Power', *Wisconsin Law Review*, 1988, 738.

According to Richard Abel, American foundations which funded the LRC were 'seeking to export the test case strategy pioneered by the NAACP in civil rights and generalized by legal services and public interest lawyers.'
Richard Abel, *Politics by Other Means: Law and the Struggle against Apartheid, 1980-1994* (New York and London: Routledge, 1995), 62-3.

Abel cites Fred Ferreira of Ford (South Africa) as saying 'The Americans are certain to view an attempt [by the South African Government] to circumvent the [Rikhoto] judgment as an attempt to muzzle the courts. They are particularly sensitive to this sort of issue as their own Supreme Court played a key role in the desegregation initiatives of the 50s and 60s.'
Richard Abel, *Politics by Other Means: Law and the Struggle against Apartheid, 1980-1994* (New York and London: Routledge, 1995), 54.

THE LRC AND THE PASS LAWS

From the LRC's submissions to the Truth and Reconciliation (TRC), 6 and 28 October 1997

The LRC helped to find 'spaces' in the legal system which made the political system vulnerable. For example, the pass laws – one of the cornerstones of apartheid – were dealt a crippling blow by a series of cases which went to the highest court. Three of these cases were decided by the Appellate Division and ultimately contributed to the repeal of the pass laws. **(Written Submission, 6 October 1997).**

Oral Submission, 28 October 1997

MR MAJOLA [LRC Director]: Soon after its inception the LRC had dealt the apartheid system some major blows as far as some of the legislation of Blacks was concerned.

By the end of 1980, for instance, the LRC had obtained the landmark Appellate division decision in *Komani v Bantu Affairs Administration Board for the Peninsula area* which struck down regulations that purported to prohibit Black men who were lawfully living in urban areas from living there with their wives and children.

The legislation under which the regulations were framed as well as the legislation itself, were aimed at destroying the Black families among others. The result of this case was that thousands of Blacks acquired rights to live in urban areas with their families, a result which was contrary to the aims of the policy of separate development, which required that Blacks should have no rights in urban areas, but only in homelands.

The Komani decision was soon followed by another Appellate Division decision in *Rikhoto v Die Oos-Randse Administrasieraad*. That case was decided in 1983. In order to prevent Blacks working in urban areas from acquiring rights of permanent residence in those areas, that is urban areas, labour regulations governing Blacks required that these Blacks returned to their rural areas once per year on leave in order to renew their permits to work in urban areas.

Section 10 of the then Bantu Urban Areas Consolidation Act 25 of 1945, provided that a Black person would acquire rights of permanent residence in an urban area if he or she had worked in an urban area for a continuous period of ten years. Administration boards which implemented these regulations interpreted the period spent in the rural area on leave for purposes of renewing the work permit, as a break or an interruption in the period required to obtain the right of permanent residence.

The result was that Blacks who worked for one employer for more than ten years never acquired the right of permanent residence in urban areas. The court decided that the period of absence on leave did not affect the continuity of the required period. Once again tens of thousands of Blacks acquired rights of permanent residence in urban areas contrary to the policies of the Government.

As a result of these and other successes which the organisation scored against apartheid the Government felt very threatened. The Legal Resources Centre was accused of supplying negative information about the South African Government overseas and locally. The LRC was perceived as limiting the effectiveness of the state of emergency by supporting advice offices. For example, the Government was worried that although the state of emergency was curtailing the activities of advice officers these were actually increasing in number. That was around 1986/7. It therefore mounted measures to contain the threat posed by the LRC. One of those measures employed was to monitor the organisation even more closely and to place some of its activities under strict surveillance.

In the late 1980s and early 1990s the LRC did concentrated work in Wakkerstroom, Piet Retief and other areas in the Eastern Transvaal. The LRC initially became involved in those areas to assist communities fighting forced removals which were keyed to the fine tuning of the geographical apartheid as well as the establishment of the homeland government system.

In addition to representing clients the LRC conducted monthly legal clinics especially in Driefontein, advising members of the community of their rights and empowering them to use the law to protect their rights.

MR VALLY: Mr Majola, I think the cases you cited which had an impact in the influx control laws had an impact on the lives of millions and millions of people and certainly deserve praise, however why do you think that the Government did not close every loophole in terms of these judgements that were successfully brought or won by the LRC?

MR MAJOLA: Well, I wouldn't want to give credit to the LRC for that. I think that at the time these judgements were obtained already there was so much opposition to apartheid. There were other organisations that were fighting apartheid at a political level, but more than that I think that the world community had been enforced to take a greater interest in South Africa and was monitoring it.

South Africa had an image problem which it wanted to try and portray as being a clean image problem. It would have been difficult for it to maintain, to keep on maintaining that problem when it came back behind its judiciary and closing those gaps very overtly. Of course I think that it did in some instances, but I think that that may have been the problem, that it had to do that balancing act, but I don't think it was because of any action on the part of the LRC.

BRAM FISCHER AND THE LRC

Stephen Clingman takes care to note that lawyers who worked with [Bram] Fischer and who represented him, most notably Arthur Chaskalson, continued and even extended his work in the courts. Clingman points in particular to Chaskalson's co-founding of the Legal Resources Centre in 1978 and his recent appointment to the Presidency of South Africa's Constitutional Court. And he records that Ilse Fischer, Bram Fischer's daughter, was employed at the Centre as librarian, and 'had the pleasure of seeing, on a daily basis, her father's law library, housed at the Centre at a time when so little of Bram's life had any public legitimacy'. Clingman continues: 'Yet that aspect changed as well: in June 1995 Nelson Mandela gave the first Bram Fischer Memorial Lecture in Johannesburg, and one year later the Beam Fischer Memorial Library was formally opened at the Legal Resources Centre, again by President Mandela.
David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998), 135.

3. THE CHALLENGE OF THE ENDING OF APARTHEID – GOING FOR NEW LAWS, A NEW CONSTITUTION, AND SOCIAL AND ECONOMIC RIGHTS

Whatever Arthur Chaskalson may have neglected to mention in his early annual reports, the LRC had clearly been set up primarily to challenge the apartheid system through the courts. As Geoff Budlender and others willingly admit, this kind of work - resisting forced removals and the like. - was only effective to the extent that it was allied to the much broader political struggle of liberation movements and militant trade unions which ultimately defeated apartheid. Legal struggles both then and now, he emphasises, need to be tied in to other struggles. This is also very much the view of Richard Abel in his important study, *Politics by Other Means: Law and the Struggle against Apartheid, 1980-1994*.[19]

But by the early 1990s the apartheid system was crumbling and prolonged negotiations were taking place over the form of transition from the old to the new. This posed a serious challenge to all South African NGOs which had been involved in the struggle. What should be their role in the new order? The question was difficult to answer at the best of times, but was compounded by the (in certain respects positive) haemorrhage of NGO staff into the new government. This affected the LRC as well, for example when Geoff Budlender served as Director-General in the Department of Land Affairs from 1996-2000. I know from my Oxfam experience that many NGOs struggled to transform themselves to meet the new realities, while some failed to do so and foundered. The unanimous reaction of non-LRC individuals and institutions to whom I posed the question '*has the LRC successfully transformed itself since c.1992?*' was that it had, principally by being proactive on the new Constitution and new legislation, and then by thinking developmentally on social and economic rights.[20]

Nearly everyone you speak to is proud of the new South African Constitution. A great deal of the credit for its drafting is due to the tireless work of individual LRC lawyers. In a broader context, Martin Chanock points out that the South African Constitution is one of about 50 new constitutions with bills of rights produced in the last 20 years, as part of a global phenomenon, which Chinese lawyers call 'the struggle for law' going on there, in Eastern Europe, Latin America and elsewhere.

Henk Smith (LRC Cape Town) described the processes in which he and LRC colleagues engaged around the time of the change of government.

> The struggle lawyers and NGOs got together every quarter as a loose alliance to compare notes and the LRC played a prominent role in these meetings. As people got unbanned, they turned to the LRC. The ANC set up drafting processes and I worked on these. There was lots of early drafting of the Restitution Act, the first piece of Reconstruction and Development Plan (RDP) legislation. The ANC needed to get something through quickly. I saw at an early stage that the politicians were not really interested in this, but the LRC people were very well positioned. It took a lot of

[19] Richard Abel, *Politics by Other Means: Law and the Struggle against Apartheid, 1980-1994* (New York and London: Routledge, 1995), 61-5, 547-9.

[20] The LRC immediately recognised the challenges it would face. In his 1990/1 annual report, Charl Cilliers, Chair of the Legal Resources Trust, wrote that the LRC 'is engaged in serious planning for this new situation and the opportunities it offers…The next three to five years will be a crucial period during which the foundations for a rights culture and a new legal framework should be established. The LRC is equipped to take an active part, and is gearing itself up to do so. New rights flowing from a constitution and a Bill of Rights will flourish and have meaning only if ordinary people assert them.' *LRC Annual Report for 1990/1*, 1. See also Arthur Chaskalson's 'The LRC in the Future', in *LRC Annual Report for 1992/3*, 10-14.

> energy to get the new Department of Land Affairs established, and it needed compromises with the old guard. The LRC people were accessible to all, so we were often drawn into conflicts, sometimes without knowing it. We were often used, as well as sought after.
>
> The LRC was an important part of those debates and directions, of implementation and prioritisation in defining goals. There were difficult judgement calls. It was more than a debate; it was about power, a poverty focus and directing resources. We were not called in for technical advice and support only. It was exciting that it was a transparent process.

Henk's LRC Cape Town colleague, Kobus Pienaar, notes that the group mentioned above developed key insights which went into the Green and White Papers on Land Policy. Moreover, 'Henk and Geoff Budlender played a key role in getting values ensconced in the new Constitution. They were also involved in drafting the Restitution of Land Rights Act and the Communal Property Associations Act. Henk played a critical role on the Transformation of Certain Rural Areas Act (in the old 'Coloured' reserves).' A number of key NGO land activists, such as Sue Lund, moved directly into the new Department of Land Affairs, whose first (and unexpected) Minister, Derek Hanekom, had been chair of the ANC's land study group. As Kobus put it, they all grabbed the windows of opportunity available, and for the LRC moving towards reclaiming land and supporting developmental processes on the land was a logical and stimulating step from its previous work of resisting forced removals.

The key role played by the LRC at this time was also emphasised by a number of people from other organisations. One was Sue Power of the Surplus People Project (SPP), which works in the Western Cape and has had a long working relationship with the LRC. Sue said 'the only reason we have certain legislation is because of the LRC.[21] It lobbied DLA and Parliament, pushing it every step of the way. Not many people were involved, but it was an enormous volume of work.' Josette Cole, formerly of the SPP, believes that 'The LRC lawyers are close to the coal face grappling with what appeared to be small, but what were in fact large issues, making and interpreting new law.' She stressed that Geoff Budlender was very involved in the hard fight to include social and economic rights in the Bill of Rights.

Ben Cousins, Director of PLAAS (Programme of Land and Agrarian Studies) at the University of the Western Cape, endorses these views. He returned to South Africa in 1993 after nearly two decades in exile. He had heard about the LRC's successful court case in the late 1980s against privatisation in Namaqualand, in which it had got the High Court to quash the whole idea of 'economic units' in the 'Coloured' reserves. He was very impressed by the LRC's politically sophisticated lawyers thinking so creatively about land and law. The struggle against forced removals in the past had made law an important issue – in which you could defend some people and win some battles. The concept of land reform was born in those anti-apartheid struggles. The LRC helped to shape the Constitution in positive ways, Ben stresses, and was very effective in moving into that mode in the early and mid-1990s. It also began thinking about its role in a developmental context, of how law could help people to secure livelihoods.

[21] This is replicated by others. The anthropologist Conrad Steenkamp believes that lots of higher profile cases would simply not have happened without pressure from the LRC because there were strong vested interests at stake and the LRC helps to tilt the scales.

Martin Adams, who worked within DLA as an adviser for some years, and whose experience in the Philippines had given him an understanding of how important paralegal work could be in land reform, also stresses how vital and essential the LRC's input was at that stage, when in his view the NGOs in effect had ownership of the land reform programme, with Henk being particularly influential in the restitution area and in ESTA (the Extension of Security of Tenure Act).

All of this work, largely unwritten but of crucial importance to the future of the new South Africa, might usefully be researched and made public as an example of sensitive professional work in a generally positive, but rapidly changing and complex political environment.

4. DONORS, THE PROJECT APPROACH, AND ITS IMPACT ON THE LRC

The LRC's annual reports during the 1990s are full of concerns not just of how and in what ways to change and adapt its role to the new circumstances, but also about its ability to continue to attract donor funds.[22] With the change of government in 1994, there was a dramatic (but entirely predictable) switch of donor funding in South Africa from NGOs to the new government, and a number of international NGOs, including Oxfam GB, which had supported the LRC for many years, began reassessing their priorities.[23] A number of South African NGOs with good track records went under in these years. In fact, the LRC weathered these financial worries well enough, though not without difficulty. Its track record, its reputation inside and outside South Africa, and the effectiveness of its work were certainly key factors in this.[24]

But donor funding patterns changed, as well as directions of funding, something confirmed by Jill Williamson of the UK-based Legal Assistance Trust, effectively set up in January 1989 specifically to fundraise for the LRC.[25] She recalls that the Trust was initially able to secure core-funding for the LRC, but that donors were soon emphasising their interest in project funding - and this was to have a clear impact on the LRC. The Trust first secured project funding from Comic Relief for the LRC's candidate attorney programme, and later for its development work under Land, Housing and Development. This was to be an important, if perhaps unacknowledged, factor behind the creation of the Land, Housing and Development Unit in April 1995. Jill said she now has project funding from Comic Relief for Land, Housing and Development, for urban work, and for pastoralists, but that donors are now pressing for more funding to be generated from within South Africa (see Section 7) and that they have become much more sophisticated in their demands, wanting logframes, concept papers and the like.

Tom Winslow, who has been fundraising director for the LRC in South Africa for the past two years, admits that the LRC is now 'overly dependent upon foreign donor, project-specific funding.' He agrees that 'after the lengthy strategic planning process of 1997 they restructured their finances and reshaped the content of the work along thematic or project lines,' which 'required a new, different strategy for soliciting funds based on these projects.'

There was an interesting discussion on funding and donors at the LRC's Land, Housing and Development meeting I attended in February 2001. The lawyers confirmed that the LRC had moved from core to project funding and that things were very complex now. They have got funding for most of the 10 land lawyers' salaries, but this is divided between different projects and different donors, which makes it harder to do the accounting. New LRC members have little idea of the overall funding situation; they never see funding applications or final contracts. However, Geoff Budlender stresses that while the project approach was certainly donor driven, its impact has been to help the LRC become far more strategic.

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[22] In 1991, it was reported that 'the trustees are concerned about the reduction in the Trust's funding'. *LRC Annual Report for 1990/1*, 2.

[23] Oxfam GB supported the LRC between 1989 and 1997. Support ended because of cuts in the programme budget coupled with a strategic planning review, and a recognition that the LRC 'has many other funders and capacity to raise funds locally and internationally'. Oxfam GB project file RSA 543.

[24] Jill Williamson said that the LAT often took UK-based donors out to South Africa, where they were enormously impressed by the work of the LRC lawyers.

[25] Jill Williamson said that the LAT's stated purpose was wider than just fundraising for the LRC - to support research and raise money for people in poor countries outside the UK. But this was done to get it past the Charity Commissioners; in practice it has always worked just for the LRC, and this has never been contentious.

5. REVIEW OF THE LAND, HOUSING AND DEVELOPMENT PROGRAMME

Land reform in flux?

Writing anything about land reform in South Africa is to be aware that one is looking at a moving target. This was forcefully brought home to me in 1999 when, with Lionel Cliffe of the University of Leeds, I joined a South African team reviewing donor support to the land reform programme. We did our work immediately after the election and the change of minister from Derek Hanekom to Thoko Didiza, at a moment when all past policies seemed to be on hold and there was considerable disarray within the Department of Land Affairs (DLA). It seemed the worst possible moment to be conducting such a review.

Similarly, as I began writing this review in the immediate aftermath of the Bredell land invasion near Johannesburg,[26] everything again seems to be in flux. On the same day I received two contrasting emails, one telling me that the Governor of the Reserve Bank had intervened personally over Bredell, fearing that if it went ahead the South African economy would collapse, while a very experienced NGO person wrote 'I must confess this was one of the most horrifying moments of my time in the land sector.'

In the extensive media coverage of the impact of Bredell, Minister Didiza is reported as saying that means that 'we must go back to the drawing board' to address the slow pace of delivery, while DLA's Director-General Gillingwe Mayende referred to it as a 'wake-up call' to government amid talk of a 'pivotal shift' in redistribution policy, and, following a Cabinet meeting, President Mbeki said the delivery of houses and the processing of land claims were to be given Cabinet priority, and that new interventions were underway. The government is now preparing to table a bill which will outlaw land invasions, the Minister of Housing arguing that 'We regard land invasions as unacceptable. Government is not going to tolerate any unlawful act in the allocation of land and shelter and we are determined to stamp our authority to prevent that.' For Geoff Budlender, this has 'evoked memories of similar attempts by successive apartheid governments.'[27]

Meanwhile, a new Landless Peoples Movement, supported by the National Land Committee (NLC), is being formed and issued a press statement on 24 July, calling for the scrapping of the property clause in the Constitution, a speeding up of restitution and redistribution to the landless, the allocation of more support and funding to land reform, and a land summit by October, failing which it would organise a national march of landless people to the offices of all provincial premiers.

Geoff Budlender writing 'by invitation' in the *Financial Mail*, observed:

> Our country cannot simultaneously meet all the needs of all its people. We have to make difficult choices about priorities. The Bredell story illustrates that there has been a failure to give adequate priority to one of the most fundamental needs of human beings - a place where they can live safely and securely.
>
> If government laid out land in a manner that enabled proper services to be installed in due course, and made this land available to poor people, they would use their own

[26] South African readers will be very familiar with this land and housing invasion at Kempton Park, east of Johannesburg, in July 2001 fomented by the Pan Africanist Congress (PAC), which attracted considerable local and international media attention.

[27] *Business Day*, 15 September 2001.

energy and resources to build their homes. The cost would be much less than the cost of conventional housing programmes, so it could be done on a much larger scale. It could also be implemented much more quickly than conventional housing programmes. The result would not be pretty. But it would give hope to the desperate and homeless. As more funds became available, services could be installed.

We need a rethink of the focus of our housing and land redistribution programmes. Last year, in the Grootboom case, the Constitutional Court pointed to the need to give priority to homeless people who find themselves in a desperate situation. The Bredell case illustrates this yet again.[28]

The context of land reform

A great deal has been written about land reform in South Africa, and this is certainly not the place to replicate that. Suffice to say that there are useful overviews by Stephen Turner and Hilde Ibsen,[29] by Ruth Hall and Gavin Williams,[30] and by Martin Adams.[31] It might however be useful to include this short box outlining (as of March 2000) the main aims and progress of the policies.

LAND REFORM IN SOUTH AFRICA[32]
(source: Martin Adams, personal communication)

Prior to the elections in 1994, the African National Congress set out its proposals for land reform in the *Reconstruction and Development Programme: a policy framework,* (ANC, 1994). It stated that land reform was to be the central and driving force of a programme of rural development. Land reform was to redress the injustices of forced removals and the historical denial of access to land; to ensure security of tenure for rural dwellers, eliminate overcrowding and to supply residential and productive land to the poorest section of the rural population; to raise incomes and productivity; and, through the provision of support services, to build the economy by generating large-scale employment and increase rural incomes. As anticipated in the 1994 RDP policy framework, government's response has had three major elements:

Land Restitution covers cases of forced removals, which took place after 1913. They are dealt with by a Land Claims Court and Commission, established under the Restitution of Land Rights Act, 22 of 1994. By the cut-off date in March 1999, over 60,000 claims by groups and individuals had been lodged. By March 2000, some 1,450 property claims, mostly in urban areas, had been settled and about 300 been rejected. Amendments to the Act in 1999 provided for simpler administrative processes for the resolution of cases. A major outstanding issue is the level of compensation to which claimants should be entitled. The high cost of compensation is in danger of swamping the budget at the cost of other land reform components.

Land tenure reform has been addressed by laws, which aim to improve tenure security and to accommodate diverse forms of tenure, including communal tenure. The Communal Property Associations Act, 28 of 1996, enables a group of people to acquire, hold and manage property under a written constitution. The Land Reform (Labour Tenants) Act, 3 of 1996, provides for the purchase of land by labour tenants and the provision of a subsidy for that purpose. The Extension of Security of Tenure Act, 62 of 1997, helps people to obtain stronger rights to the land on which they are living or on land close by. It also lays down certain steps that owners and persons in charge of the land must follow before they can evict people. The Interim Protection of Informal Land Rights Act, 31 of 1996, protects those with insecure tenure, pending longer term reforms. The proposed Land Rights Bill, covering the rights of people living on state land in the former homelands, was to have finalised the programme of tenure reform, set out in the 1997 White Paper on South African Land Policy. However, the measure was overtaken by the elections in mid 1999.

[28] Geoff Budlender, 'Great Gaps in Land and Housing', *Financial Mail*, 13 July 2001.
[29] Stephen Turner and Hilde Ibsen, *Land and Agrarian Reform in South Africa: a Status Report* (Bellville: PLAAS Research Report **6**, 2000).
[30] Ruth Hall and Gavin Williams, 'Land Reform in South Africa: Problems and Prospects', June 2000. Available from the authors and on http://www.oxfam.org.uk/landrights/HallWill.doc
[31] Martin Adams, *Breaking Ground: Development Aid for Land Reform* (London: ODI Research Study, 2000). The author has written widely on South Africa in a series of published and unpublished papers.
[32] Robin Palmer, 'The Struggles Continue: Evolving Land Policy and Tenure Reforms in Africa - Recent Policy and Implementation Processes', March 2000, http://www.oxfam.org.uk/landrights/RPpolimp.rtf

Land Redistribution aims to provide the poor with residential and productive land. It started with a two-year pilot exercise to devise, test and demonstrate arrangements for a national programme, which began in 1997. The legal instrument to allocate a government subsidy to 'qualifying persons' for rural land, housing and infrastructure is the Provision of Certain Land for Settlement Act, 126 of 1993, previously introduced by the National Party. The Act, amended and renamed in 1998, had provided some 700,000 hectares to over 55,000 households by the end of 1999. Major outstanding issues are: who should qualify; the extent to which government should intervene in a 'market-based' and 'demand-led'' process; and the coordination of government agencies in the planning and implementation of land redistribution projects.

In terms of the RDP policy framework, South Africa's land reform programme has failed to meet expectations. It has faced serious fiscal constraints, receiving less than 0.4 per cent of the government budget, over the financial years 1994/5-1998/9. Under the Constitution, landowners are entitled to market-related compensation. The Constitution also sets out responsibilities for land reform, which are not easily coordinated. While the national government is responsible for land acquisition, the provincial and local spheres are meant to provide services for settlement and agriculture. Constraints have arisen from the weak organisation of rural people and the lack of capacity of governmental agencies, whose personnel lack experience and training.

Reviewing progress on South African land reform for the final chapter in a DFID book on evolving land policies in Africa,[33] I noted that among the many obstacles and difficulties confronting land reform in South Africa were the continued intransigence of 'organised agriculture' (predominantly white commercial farmers).

> But there were also deeper structural problems. As part of the 'historical compromises' made at the change of government, South Africa 'bought' the prevailing World Bank model of market-assisted land reform. It is now abundantly clear that in the South African context there are fundamental problems with such a demand-led, market-based approach to land reform. The scope that this approach provides for securing sustainable rural livelihoods for poor people has proved very limited. It clearly needs to be complemented by a supply side component involving acquisition of land by government when it becomes available at favourable prices for later redistribution to the rural poor. This is necessary because poor people in South Africa are simply not in a position to organise themselves to utilise funds for land acquisition, settlement and production on any significant scale. Contrary to expectations, South African NGOs did not take up that role, so a considerable government support system had to be put in place before poor people could move even to the point of land acquisition, let alone to settlement and production.

I concluded that the performance of South Africa's land reform programme also needed to be seen within the contexts of:

- ?? the huge constraints imposed by the inherited apartheid structures
- ?? the relative weakness of the new state structures
- ?? the absence of effective local government structures
- ?? the relative collapse of the land advocacy NGOs
- ?? the fickle and inconsistent political support for land reform which seems to be characteristic of new majority rule situations.

and that rushing to early judgement was not helpful and often downright misleading, as has been demonstrated by the findings of Bill Kinsey on Zimbabwe.[34]

[33] Camilla Toulmin and Julian Quan (Eds.), *Evolving Land Rights, Policy and Tenure in Africa* (London: DFID, IIED and NRI, 2000).

[34] In which he argues that negative assessments of Zimbabwe's land reform programme (before the current land invasions) are premature and have used inappropriate criteria. Any attempt at comprehensive evaluation of the benefits of resettlement in less than a generation is ill-advised. He shows that the programme has, after a lag, resulted in both higher incomes and more equally distributed incomes, that genuine poverty reduction through

Land, Housing and Development in the LRC

In April 1993, Arthur Chaskalson pondering 'The LRC in the future' at its AGM, thought that the fields in which its specialist capacity would be most needed and most effective in the future would be 'the land, housing and developmental work, the human rights issues and consumer protection' He added that 'we need to start preparing now for the future. In the field of human rights we need to have an understanding of constitutional litigation. In the field of land, housing and development we need to acquire a better understanding of development, and how lawyers can best work with communities for that purpose.'[35]

The LRC had a history of distinguished land and housing work under apartheid – but the possibility of development work had to await the coming of majority rule.

In the 1990/1 annual report, it was noted that the trustees had created an internal development fund in the light of changing circumstances, and that 'as a result of Geoff's research it has been decided that the initial *expansion* of the LRC's activities should be to issues concerned with land and housing [in] rural as well as urban areas.'[36] And in a 'Dear Friends' letter to supporters in June 1994, Geoff, as the new Director, stressed that 'The new constitution will mean little to ordinary people unless they see real changes in their lives. The issues of land, housing and development are crucial to the future stability of South Africa.'[37]

One gets a strong sense, reading successive LRC annual reports on land, housing and development (LHD) of the excitement of new challenges, of entry into unknown territory, outside the lawyer's normal domain, of people being involved in pathbreaking work, of some great success stories, but then of growing frustration at government's lack of capacity to deliver and that so few projects reached the implementation stage – though not yet a questioning of how slow the legal processes (which the LRC itself had of course helped to construct) were proving to be. This may now of course be changing in the light of Bredell and a growing number of urban land invasions.[38] Then later alarm at the change of direction, in favour of black commercial farmers, with the new Minister. In these reports, one can read a commentary in microcosm on the country's land reform history as a whole.

One reads also about the great success stories in which the LRC was instrumental in helping communities reclaim land lost under apartheid. One gets a sense of the exhilaration which

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resettlement is possible, and that broad based land reform lead to declining levels of inequality. Bill Kinsey, 'Land Reform, Growth and Equity: Emerging Evidence from Zimbabwe's Resettlement Programme', *Journal of Southern African Studies*, **25**, 2, 1999, 173-96.

Martin Chanock reflects that 'The lack of quick success (in spite of politically responsive and legally sophisticated efforts) in redefining communal tenure, in coping with the role of chiefs, in securing the tenure of farm workers, or altering the effects or urban segregation raise the spectre of a ship, reclaimed from a pirate crew, yet adrift on the same rocks.' Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge: Cambridge University Press, 2001), 525.

[35] Arthur Chaskalson, 'The LRC in the Future', in *LRC Annual Report for 1992/3*, 13-14.

[36] *LRC Annual Report for 1990/1*, 1-24

[37] Found in Oxfam GB's LRC project file, RSA 543.

[38] Durkje Gilfillan, LRC Johannesburg and former provincial Land Claims Commissioner, was reported as saying 'It takes time to put in place all the necessary support systems, such as service delivery and development plans.' She added that 'communities can easily get frustrated by the process because it is too centralised and not properly explained.' She said 'there are plans to have the LRC, which assists in preparing land claims, to send them directly to the Land Claims Court where the land owners agree on a settlement.' *Financial Mail*, 13 July 2001.

people who had toiled against apartheid must have felt at being able to move into positive gear. One of the most striking sentences to recur is the one that says 'communities which have been isolated by apartheid do not have a tradition of working with the law, or lawyers.'

One also gets a sense of the difficulties involved– exacerbated by a changing funding context – in trying to coordinate this work and, as it progressed, to share the wider lessons of individual cases. The changing structures adopted at different times, questions about the use of the data base and others reflect this.[39] But there is also a sense that these questions were taken very seriously. And the end results have clearly been very positive.

The current land lawyers very clearly feel themselves to be part of a team, sharing experiences and lessons,[40] with (at least some of) the newer lawyers happy to seek guidance from those with greater experience, and with a good deal of informal consultation taking place, despite the fact that they are scattered across five offices – Johannesburg, Cape Town, Pretoria, Durban and Grahamstown. It is also reflected in the views of people in a position to know, such as Geoff Budlender, who believe that the land lawyers of the LHDP have been the most integrated, efficient and productive team of lawyers in the LRC, with a track record to be extremely proud of. This was strongly endorsed by many of the people I interviewed. What follows is a short, but representative, sample,

SOME TESTIMONIES ABOUT THE LRC

Olivia von Rooyen, of the Development Action Group (DAG) which works on housing and urban development issues in the Western Cape, had her first contact with the LRC in 1988 in a case where workers were being dismissed. For a blissful three months she thought there might be no need for a LRC in the new South Africa! But it is a national public asset which needs to be defended and protected. Unlike many NGOs it has been able to redefine and focus its work in ways that are relevant. The LRC is often her first port of call. It does work on refugees, which is important, as no one else does. It is an important social institution and a safety net. It brings to people more than the law. On the Everad case, Ashraf Mahomed is an incredible resource who uses legal skills in a highly developmental way and is doing an enormous amount of work. She feels the LRC has a refreshing lawyers' style. 'It tells us you don't have to compromise here; this is a principle. If we had stuck just to the legal, we would have lost Everad.' On the Grootboom case, the LRC put in lots of effort in getting a pressure group going.

Tiny Mankge, of the Minerals and Energy Policy Centre (MEPC) which works on small scale mining in an environment in which many mines are closing, approached Moray Hathorn of the LRC's Johannesburg office about a land claim. She initially asked about compensation, but Moray persuaded her that the affected community had a valid land claim. She asks for advice on an ad hoc basis, sits down with Moray to work out what roles the MERC and LRC will play. She goes to Moray with specific questions, and they go through various options. She will have her own options and wants to know the likely legal impact of taking them. Sometimes she restrains the LRC from taking the legal route. The LRC strategies are great in some cases, less so in others, but it always has the good intention of giving communities a greater say.

Maureen Tong, who used to work for DLA and the Lands Claim Commission, said her main links with the LRC were over PELCRA, the major restitution case in Port Elizabeth (see box). This was a venture into the unknown with Henk Smith as litigator, and lots of important lessons were learned, for government and others. When she worked for government, there was no stepping on toes. The LRC took a very constructive role and would engage with you, particularly Henk and Kobus. It does some work with local government structures and does that very well. Henk would phone her informally when she was Deputy Director in the Lands Claim Commission, and she reciprocated on Richtersveld. They said things like 'hang on a minute, what about this?' before relations got damaged. The LRC has been effective in the Richtersveld case. On mining rights and on

[39] I have not thought it appropriate to delve into potentially sensitive management issues.

[40] Louise du Plessis (Pretoria) said that 'the quarterly meetings are important and hugely informative. The new structure is excellent.'

aboriginal title it has had the courage to go into new and difficult areas and take them on, and yet remain in constructive dialogue with government. and wants to know the likely legal impact of taking them. Sometimes she restrains the LRC from taking the legal route. She has had no problems, they keep in touch and keep each other informed. She has found the LRC a very objective organisation. People need land and the LRC is very good on land issues, unlike commercial lawyers who don't give a damn - one lawyer she met had not even read the restitution law.

Boeboe van Wyk, an ANC MP from Cape Town, mentioned that he had worked with the LRC since the late 1980s, when he considered it part of the resistance movement, and continued to have working relations with it. It was one of the few organisations to have an understanding of the complex land issues of the Northern and Western Cape, where land reform is relatively new. He believes that the LRC has the rare skill and capacity of being able to work with communities on the ground.

Culled from the annual reports

It is quite instructive, in tracing the LHD work, to look at some of the key comments made in the annual reports over the past decade.

The *objectives* came to be encapsulated by 1996/7 in these words:

- to assist homeless and landless people to gain secure access to land
- to promote restitution of land rights to people dispossessed by apartheid
- to promote effective delivery of land, housing and services
- to assist communities to manage and develop land and housing which they obtain
- to assist low-income communities to gain access to resources on a basis which is sustainable

Here are some extracts culled from the annual reports which give a sense of the issues, the problems, and the directions taken.

1992/3

The central aim is to help low income communities to access resources on a sustainable basis.

In working in response to client needs, lawyers are venturing into comparatively new ground, and learning from experience in the process. The work differs from litigation, is often non-adversarial and does not respond to an event or a once-off issue.

Land housing and development work is time and resource consuming.

1993/4

Though litigation may in some cases be necessary, the work involves broader non-adversarial support. The overall concept is that of support and empowerment of local communities.

As well as providing legal services, the LRC serves clients in an interpretative and advisory role. In a society emerging from the oppression of apartheid, this is an extremely important task, as communities which have been isolated by apartheid do not have a tradition of working with the law, or lawyers.

1994/5

The LRC has established a special Land and Development Unit, and at each of its offices lawyers are already involved in preparing submissions to the Land Claims Commission.

The Mfengu and Riemvasmaak awards are notable examples of initiatives negotiated on behalf of dispossessed communities, resulting in the return of vast tracks of land in the eastern and northern Cape.

These early awards have not only pioneered innovative legal and financial structures, but have also established benchmark processes and models for future restitution awards. It is both a teaching and learning process.

The LRC is at the cutting edge of these historic developments.

The LRC is playing an important role in promoting sustainable development, which is a vital component of land and housing delivery.

Over 20% of total LRC attorney time is spent on land, housing and development work, and demands are increasing.

The LRC is currently handling 56 rural land restitution claims in various parts of the country, involving an estimated 800,000 people. The trend in all regions is to take on test cases, while playing a part in efforts to coordinate and guide the majority of potential claimants.

The various LRC offices are currently handling 27 urban restitution claims.

1995/6

Development work differs is some fundamental respects from the work ordinarily undertaken by LRC lawyers: it is often not adversarial; it is seldom, if ever, clear when a case is closed; it is difficult to evaluate the outcome as there is seldom an unequivocal result; and the process itself is important and has a major influence on the outcome.

At the end of March 1996, the LRC was representing 123 communities (83 rural and 40 urban) in land restitution cases.

In all cases where group restitution claims are successful, the LRC helps to establish some kind of sustainable and democratic legal entity tailored to the needs of the community, to take transfer of the land awarded to the group. In most cases such an entity is likely to be a Communal Property Association (CPA).

Proactive land reform can obviate the need for costly and time-consuming litigation and produce more effective results.

To ensure that our work has the widest possible impact, we must concentrate on a limited number of cases, where the potential learning experiences are the greatest.

We cannot see all our cases through to implementation stage, but we should select a few priority cases where we together with our clients can learn more lessons about implementation. For the LRC to continue its involvement during the development implementation stage does not mean that we should become project managers or coordinators. We are lawyers, not developers or community organisers.

1997/8

The LRC's experience with these urban cases underlined the need to form alliances with other service providers.

Through the Land, Housing and Development Programme, the LRC has gained a national reputation for excellence in the provision of legal services to the poor on some of the most contentious issues in post-apartheid South Africa.

These cases [Makuleke, Mier, Mosita, Draaikraal] represent a unique commitment to public interest law in pursuit of poverty alleviation. Indeed, this is one of the central themes which characterises the LRC's work; using law in pursuit of the transformation of socio-economic conditions for the poorest of the poor, particularly in rural areas.

The LRC prioritises restitution cases that are the most complex – in other words claims in rural areas, claims on behalf of groups or communities, and claims where legal precedents can be established which will facilitate land restitution for thousands of other beneficiaries.

1998 AGM
Experience suggests that the LRC must form strategic alliances with other service providers to work effectively on urban restitution cases, which are multifaceted, complex and time consuming.

Targets are helpful because we do need to focus and prioritise our work much more. However, always urgent cases or urgent issues within cases arise which deserve attention and play havoc with planned targets.

1999-2000
We remain convinced that the law and lawyers can add value to the development and use of legal and institutional frameworks to bring about resource redistribution and social change.

The LRC gives a chance to do case work that cannot be done anywhere else in the world. The opportunity to help coordinate such work in the LRC means that impact can be spread wider and deeper. We have used some of these opportunities and squandered some.

Can lawyers be coordinated?

We believe that our efforts in terms of spreading our work over the 3 identified LRC activities, namely strategic case work, law reform and advocacy coordination with partners, is relatively well balanced. But not all lawyers and not all projects have managed to illustrate such a balance.

The LRC's redistribution cases are limited to the difficult ones. We are no longer acting as paper manager for community applications to the DLA.

We have said time and time again that access to the resource is only half the battle won. The effort and money to get the land is only 25% of what the total budget for successful resettlement and development should be.

The Land, Housing and Development Programme has an extensive clientele. We currently represent more than 189,000 families or approximately 950,000 people in cases related to land, development or housing.

The quo vadis provided an overview and an evaluation of the LHDP for the past 5 years and the way forward. Challenges ahead for the programme were also discussed in detail, i.e. the need to protect, promote and fulfil the rights in the Constitution. This involves multi-faceted advocacy, precedent setting, changing power relations, and equitable transformation of the LHDP with regards race, sex and cultural diversity.

2000-2001
There is no doubt that our lawyers are at the coal face of the housing issue in South Africa. The scale of the work being done is extraordinary. Our work is benefiting tens of thousands of people. More than that we are coming to grips with the most fundamental issues– in particular, gender discrimination and the continuing discrimination against the poor, not on a racial basis but on an economic basis.

The importance of civil society organisations providing support to vulnerable occupiers of rural land cannot be over-emphasised. The small number of NGOs actively providing such support have demonstrated that such collaboration not only benefits the organisations working together, but also magnifies the impact they can make collectively.

Riemvasmaak was one of the first successful restitution claims of the post transition period. Butthe effective exploitation of land resources by the community needs outside investment.

Conclusions

Among the reactions on presenting a first draft of this paper to the land lawyers, were that there was no chapter on cases and no in depth assessment of what the lawyers are doing now, of their planning and coordination, or of whether or not they met their various targets. I acknowledge these as valid criticisms and simply plead lack of time. Tom Winslow also suggested that it would be very useful to have an index of the various land reform interventions undertaken by the LRC over the past seven years, so as to have a record of what has taken place. It certainly would, but that work will have to be done by others.

I think it is very clear from what I *have* read, and what I have written here, that the land and development work of the LRC has been quite outstanding in its scope, its ambition, its intensity (meaning working so closely with communities) and its impact, as testified in the 'firsts' cases summarised below, of Elandskloof, PELCRA, and Richtersveld.

That work is now being brilliantly supported and complemented by the Constitutional Litigation Unit, which has recently won the spectacular the Grootboom and Nkuzi judgements, the first of which obliged the state to give priority to the homeless, while Nkuzi instructed the state to provide legal representation to those with rights under ESTA threatened with evictions who are too poor to afford their own lawyers. The LRC is now actively looking for cases to enforce this judgement and to build some protective measures around it.

But the housing work is more problematic, and the LHD lawyers were quick to distance themselves from the rhetoric of the 2000/1 annual report about being at the coal face of the housing issue. It is clear that difficult choices confront the LRC in the wake of the almost daily urban land invasions of the past three to four years happening right across the country, and brought into greater prominence by the Bredell case. There was certainly reflected in an interesting discussion at the LHD meeting I attended in August on what should be the main thrust of the housing work, with suggestions that it lacked focus and was in some disarray. **Should there now be a focus on urban land invasions, as Kobus Pienaar argued,[41] should the LRC really be at the cutting edge of rapid land release and be back in the squatter camps as it was in its 'glory days', or should it rather retain a broader focus, as Ashraf Mahomed suggested?** Given the huge diversity and complexity of South Africa's urban problems, it is clear that the LRC has to make difficult choices (as always) about what *not* to do – and I told them that they might be comforted to know that Oxfam GB probably also spends more time on that issue than on any other. In conclusion, one can but re-echo Geoff Budlender's call that the LRC, like the government, needs to 'rethink the focus of our housing and land redistribution programmes.'[42]

[41] He believes there is a desperate need for lawyers here, especially at policy level, informing policy and supporting and facilitating land invasions and rapid land release.

[42] Geoff Budlender, 'Great Gaps in Land and Housing', *Financial Mail*, 13 July 2001.

ELANDSKLOOF – THE FIRST COMMUNITY PROPERTY ASSOCIATION (CPA)
(source: Gwendolyn Wellman, with help from David Mayson of SPP)

The farm is situated on the West Coast (Western Cape) and was returned to the Elandskloof community in terms of the Restitution of Land Rights Act (Act 22 of 1994) at the end of 1996, with the initial handover on 16 December 1996. This was done with the help of SPP and LRC (Henk Smith initially, later Kobus Pienaar). SPP has been involved with Elandskloof since 1991, and is currently withdrawing its assistance. The land holding legal entity used here is a Community Property Association (CPA), it was also the first CPA to registered in South Africa.

A brief history:

The Dutch Reformed Church bought the farm in 1861 for the purpose of setting up a mission station. Although the Elandsklowers had been living on the farm prior to this, they continued living there under the new rules laid down by the Church. When the Church accessed some of the surrounding state-owned land, the community helped with the payment towards the surveying and transfer costs, adding to the notion that the community jointly owned the farm with the Church, even though it was registered in the latter's name.

As early as the 1940s neighbouring farmers were complaining about having a 'black spot' in their area and with the constant stream of racially biased laws being promulgated by the apartheid government, time was running out for the community who had lived there from time immemorial. In the early 1960s, the Church and the State jointly decided to scrap the clause in the farm's title deed that restricted the use of the land to missionary purposes, which would allow the Church to sell the land. The community was not allowed to bid for the land as the Group Areas Act had proclaimed the farm and its surroundings as a white group area. The land was sold to a neighbouring farmer. The community then left the farm and marched to Parliament in Cape Town to ask the government for assistance, but under the Groups Areas Act it was now illegal for them to return to the farm except as employees.

Some Elandsklowers were allowed to stay on a nearby farm at Allendale and the desire to return to Elandskloof was especially strong amongst this group. By the mid 1980s the Elandskloof community (200 families) started to actively struggle to get their land back. Although they were offered various alternative pieces of land, they refused them, insisting on Elandskloof, a farm of 2000 hectares.

By 1991 the community was assisted by the Surplus Peoples Project (SPP) and the LRC, which lodged an application to the Commission on Land Allocation and instituted proceedings in the Cape Supreme Court during 1992 and 1993. All parties agreed to restoration and the purchase of the farm from the private owner. Agreement of sale was signed on 22 June 1996.

The LRC was closely involved in assisting the community in effecting a viable return to their land through. amongst other things, preparing a draft report and submission on behalf of the Regional Land Claims Commissioner for submission to the Land Claims Court. It was the first report to be prepared by the Commission and was a carefully managed joint learning process with the Commission and the Department of Land Affairs. The hearing took place on 15 October 1996 in Citrusdal. The LRC prepared the amendments to the Constitution of the Community Property Association (CPA) to comply with the Communal Property Associations Act and the expected requirements of the Land Claims Court. As the group of approximately fifty Elandskloof families were faced with eviction from the neighbouring farm, Allandale, in January 1997 it was important to successfully complete the process before then. The Elandskloof community returned to their land on 16 December 1996. This was the first order of the Land Claims Court restoring land to the claimants and the first registered CPA in South Africa.

The elections of new trustees were held on 28 March 1997. Elandskloof's post restitution development implementation is moving slowly. Residential plots have now been allocated to individual households and the people who built shacks in the transit area are keen to move onto their allocated plots. The existing farming operations are continuing and expanding under the supervision of a joint venture between the Agricultural Committee and a white commercial farmer. LRC's participation is limited to legal comment on allocation procedures, tenure arrangements, the joint venture agreement and interpretation of provisions of the CPA constitution and the Communal Property Associations Act. Althoughthe LRC has on occasion been contacted directly by the Elandsklowers, the clients have been informed that the LRC could only assist in conjunction with SPP. Recently LRC has been asked by SPP to assist the community in adapting some clauses in the CPA's constitution to make the entity function better.

On a visit to the community on 04 April 2001, I found the following:

Problems identified:

i) During the struggle for the land, the community was scattered throughout the Western Cape, with the largest group living on the neighbouring farms, Allendale. Many of the older community leaders passed away in the early 1990s, and this combined with the scattered nature of the community, led to a lack of leadership.

In essence the Elandsklowers are not a community, as the community had been destroyed more than 30 years ago. There are different groups that have developed in different ways: those who left for urban areas have been influenced by urban life and have acquired formal education; while the majority of those who remained on Allandale and other Citrusdal farms and those who have moved to farms in the Kouebokkeveld remained without much formal education and often had no continuous employment.

Struggle for the return of Elandskloof had been driven by the leadership of the group who settled on Allandale, who perceived (some still do today) those from Cape Town and other places as 'outsiders' who tend to dominate the CPA due to higher education and skills level, even though they were not historically involved in the struggle for the return of the land. According to SPP (David Mayson and Elsbeth Engelbrecht) the people from the towns do have a somewhat condescending attitude towards the *plattelanders.*

In Elandskloof only approximately 50 families have settled to date. Currently a lot of conflict is evident primarily between those who have settled on Elandskloof and the 'outsiders'.

Other factors playing a role: Long standing family feuds between large and historically powerful families.

ii) The development planning process was problematic: at the time when the land had been handed over to the community no land allocation system was in place, resulting in a division between the community. This impacted on the effectiveness of the community and led to a general antagonism directed towards the planning team. People were also occupying land if no speedy permission for occupation came from the committee.

What people had to say:

Flippie George, acting CPA chairperson: 'Die verhouding met LRC is baie goed. Ons het eers met Henk gewerk in die begin dae en nou in die later jare met ou Kobus. Hulle is baie ordentlik. 'n Mens kan enigetyd bel, dis vir hulle geen moeite om ons te help nie.' [*'The relationship with the LRC is very good. We first worked with Henk (Smith) in the initial stages, but during the later years Kobus (Pienaar) took over from him. They are very decent. One can phone anytime, it is never trouble for them to assist us.'*]

He is aware that the LRC will only really act once an instruction would come via the SPP. The SPP is in the process of withdrawing from Elandskloof and Mr George anticipates that a different arrangement or agreement would have to be forged between Elandskloof CPA and the LRC.
'Ons sal nooit kan bekostig om na 'n privaat prokureur te gaan nie. En al sou ons kon, is daar nie nog prokureurs wat ons so goed ken nie, met wie ons so 'n persoonlike verhouding het nie. Hulle ken ons mense persoonlik en ons geskiedenis. En hulle diens is baie goed.' [*We would never be able to (financially) afford a private attorney. And even if we could, there are no attorneys whom we know so well, with whom we have such a personal relationship. They know our people and our history. And their service is excellent.'*]

Miss Sulita van Neel (back at Elandskloof for 2 years, previously lived in the Paarl area, seasonal worker): 'Behalwe vir die getwis so onder mekaar, bly ons lekker hier. Dis goed om 'n plek van ons eie te he.' [*'Apart from the quarreling, we live happily here. It is good to have our own place.'*]
With regards to the LRC she felt that she was not involved with the struggle for the land as she was still quite young then, but that she heard her parents and the other elders express their gratefulness towards the lawyers and SPP for what they have achieved.

Mr Cornelius van der Merwe (currently living in Cape Town, in the process of moving back to Elandskloof): 'Nee oor die prokureurs kan ons nie kla nie, vernaamlik Henk. Hy het goed so mooi verduidelik in die begin toe dit nodig was. Die CPA werk nie so goed nie, maar dit is nie die prokureurs of hulle werk se skuld nie, dis ons mense se skuld daai.' [*'We can't complain about the attorneys, especially Henk. He always explained things so*

clearly in the early days when it was necessary. The CPA does not functi on well, but that is not the fault of the attorneys and their work, but rather our people's fault.']

Mr Kapok Luskam, member of the CPA executive committee: 'Die CPA werk nie want ons het nie geld om die boerdery uit te brei nie.' [*'The CPA does not function because we do not have money to extend the farming.'*]

Mrs Caroline Dars: 'Sonder die prokureurs en Elsbeth goed het ons nou nog iewers in 'n krot in iemand se agterplaas gesit en krepeer. Hulle het 'n goeie job gedoen, nog altyd. Al gaan hier ook sulke duisdere goed aan weet ons darem hulle sal ook 'n ogie hou en ons help as dit moet.' [*'Without the attorneys and Elsbeth (SPP) we would still be wretchedly sitting somewhere in a shack in someone's backyard. They did a good job, still do it. Even when suspicious things are happening here, we know that they will at least keep an eye and assist us if necessary.'*]

Mrs Solita Smit, lived in Allandale, one of the first to move back in December 1996: 'Die prokureurs het ons te vinnig gelos. Nadat hulle hierweg is het hier probleme gekom wat hulle kon help opgelos het. Die nuwe kommitee hou nie by sy beloftes nie, het die beloftes wat die eerste kommittee gemaak het al daar in Allandale vergeet. Met Henk weg het ons net eenvoudig nie 'n kla plek gehad nie, het nog steeds nie. As Henk aangebly het en nie so skielik verdwyn het nie sou dit vir ons beter gewees het en sou daar nie nou so 'n gestruwel gewees het nie. Maar Henk het regtig goed vir ons gehelp en al ken ek nie vir die nuwe een in sy plek nie, moet hy seker ook goed wees. Dis net dat dit hier nou so sleg gaan.' [*'The attorneys left us too soon. After they left all the problems started which they could have helped to solve. The new committee doesn't keep its promises, they forgot the promises made by the first committee already in Allandale. With Henk gone we did not have a place to complain, still have no such place. If Henk stayed on and did not disappear so suddenly, it would have been better for us and we would not have so many struggles now. But Henk really helped us well and even though I don't know the new one in his place, he must be good as well. It's just that things are going so badly here now.'*]

THE PORT ELIZABETH LAND AND COMMUNITY RESTORATION ASSOCIATION (PELCRA) – THE FIRST GROUP RESTITUTION CASE
(source: Gwendolyn Wellman)

The Port Elizabeth Land and Community Restoration Association (PELCRA) was founded on 28 October 1993.

The LRC played a pivotal role in negotiating and drafting the multi-faceted agreement that included the formal establishment of an interim steering committee and commits the parties to performance in terms of a time frame. The LRC was closely assisted by the Urban Sector Group (USG) and the Delta Foundation provided the funding to produce information booklets, a video telling the story of PELCRA and retained the services of a commercial lawyer to assist in the finalisation of the agreement.

The agreement is a first for South African cities and continues to be the main example of how to deal with urban restitution cases. PELCRA is an example of how developmental restitution, as opposed to mere cash payments to claimants, can be effected. The added bonus will be the re-integration of a major city, which will change land distribution patterns and related power relations in South Africa.

The case also presents an example of how property valuations could be done on scale. The process involved sampling of values over a period of time and, on the basis of negotiation, establishing three standard valuation amounts for all claimants. This process in itself is a massive saving in costs. Unfortunately, cash settlement restitution still appears to be the favoured approach.

It is estimated that in 1951 the Port Elizabeth (PE) population amounted to some 200,000 inhabitants. Professor Anthony Christopher, a University of Port Elizabeth geography professor, estimates that 100% of all Asian PE inhabitants, 61% of all Coloured PE inhabitants and 49% of African PE inhabitants (about 70,400 people), were at the time earmarked to be removed, because they lived in the 'wrong' area. A mere 1.4% of the some 80,600 white inhabitants were earmarked for removal in pursuit of Apartheid policies. It is difficult to give precise estimates of how many people were actually moved. Professor Christopher's research found that racially linked removals started at the turn of the century in Port Elizabeth with at least 50,000 people moved prior to 1960. He estimates that from 1961 to 1984, 15,000 people were removed from an estimated 3,200 inner city properties.

An initial survey conducted by the USG found that the following numbers of erven (plots) were potentially subject to claims in the following allotment areas:

- 957 Erven in Fairview (an estimated 290 ha of prime residential land is still vacant);
- 259 Erven in Salisbury Park (Mount Pleasant) a rough estimate of 90 ha of prime residential land is still vacant and undeveloped;
- 1254 Erven in South End, about 80% has been redeveloped, mostly in the form of high-density cluster housing;
- The Korsten area had not been surveyed in this regard, but some 4 ha of prime inner city commercial property from which 218 families were removed is still vacant.

The success of a restitution process will to a large extent depend on being primarily driven by the people (or their direct descendants) who were dispossessed of their land rights.

Claimants in Port Elizabeth had basically two options - they could go it alone and institute individual claims for the return of their land, or they could pursue a group restitution initiative.

The LRC found that given that the Restitution of Land Rights Act is biased in favour of groups, who may also qualify for preferential treatment in the allocation of state assistance, and given the enormous resources that will be required if urban claims are to be dealt with on an individual basis, the only constructive and feasible option appears to pursue urban land claims on a group basis.

A development directed group claim initiative could achieve three objectives, namely:

1. Restore serviced land on a large scale;
2. Contribute to the alleviation of a massive housing shortage experienced in PE from an additional source of funding; and
3. Contribute tangibly towards the re-integration of PE.

It was also the then Minister of Land Affairs, Derek Hanekom's view that hundreds of individual claims will place unnecessary strain on, and clutter the restitution process, and that a locally devised group restitution option would be more feasible. Thousands of individual urban land claims would not only slow down economic development in Port Elizabeth, but may delay the restitution process and would heighten the existing pressure for the development of vacant state land at Salisbury Park and Fairview.

The LRC and USG could not assist individual claimants since it would be impossible to cope with the work, and assisting individual claimants would also be in direct conflict to the two NGOs' commitment to community development.

Thus on 28 October 1993 PELCRA was established. Its chief aim is to participate and work towards the fair, speedy and effective restoration of land and community life to its members within the provisions the Restitution of Land Rights Act. The membership of PELCRA is open to persons who would be entitled to claim in terms of the Act. In order to become a member a person had to complete a membership form and their name needed to be recorded in the PELCRA Membership Register. There were no costs involved.

The PELCRA constitution provides that it will not align itself to any political party or in any way promote the interests of one segment or sector of society; it will not be empowered to settle any claim on behalf of any of its members unless instructions to do so have been given by virtue of a power of attorney; and it provided that the executive sufficiently represents all sectors of the claimant community, including women. This assisted in the executive committee shedding its 'Coloureds only' profile.

During early 1994 the PE Municipality tried to sell some two hectares of prime vacant inner city land from which some 109 families were removed. PELCRA attempted to stop this. The sale of the land by public auction was halted at the last minute and the Municipality agreed to institute a moratorium on the sale, rezoning and subdivision of all land that it owns which is subject to restitution claims.

PELCRA then proposed that the key players in land affairs in Port Elizabeth create a mechanism for co-ordination, through which they could work towards a fair, speedy and effective restitution of land rights. The Port Elizabeth Land and Community Restoration Forum was established on 26 October 1994. The founding members are the PE Municipality; the PE chapter of the South African National Civic Organisation; PELCRA; and the Eastern Cape Provincial Government. The Forum's secretariat functions are supplied by the PE municipality and it tasked two officials to assist with the data base of PELCRA members and their claims. Apart from registering and verifying the claims, the officials, who were accountable to the Forum, also conducted a land audit and compiled a map of the claim areas.

By early 1995 it was necessary to establish what the PELCRA membership wanted. In conjunction with the PELCRA executive, the LRC and the USG prepared workshop materials and conducted two PELCRA workshops at Zwide (an African residential area) and in the Northern Areas (the Coloured residential area) on 28 and 29 March 1995. Approximately 550 claimants attended. The chief purpose of the workshops were for claimants to choose whether they wished to go it alone and institute individual claims for the return of their land, or whether they wished to pursue a group restitution initiative. The latter was chosen.

Over the following years there were some delays by the Eastern Cape Regional Land Claims Commission (RLCC), mainly due to the RLCC not being well established, its processes still unrefined and struggling with a high turnover of staff. PELCRA intervened as far as possible to drive the process and by 12 December 1999 LCC put forward a draft settlement agreement. It did not meet PELCRA's expectations. Although LRC raised concerns on behalf of PELCRA, it was clear by 17 January 2000 that the Minister intended to sign the settlement agreement within a matter of two weeks. The Delta Foundation assisted by retaining the services of a commercial lawyer who assisted the LRC to prepare and finalise a substantially reworked agreement by 5 February 2000.

The PELCRA Framework Agreement was signed on Sunday 6 February 2000. This was a culmination of work done over a period of seven years. It was concluded between the Department of Land Affairs (DLA), the Land Claims Commission, the Eastern Cape Provincial Government (Housing and Local Government and the Housing Board), the Port Elizabeth Municipality and PELCRA on behalf of 840 families claiming restitution in respect of 1286 urban residential sites. In terms of the framework agreement, the State has transferred R42 million to a holding account of the PE Municipality. The amount constitutes the total combined monetary value of the 840 claimants' claims. PELCRA, the Municipality and the DLA will jointly establish a development entity that will take charge of developing 140 hectares of prime residential land for housing purposes. The

development entity is registered as a Section 21 (non-profit) company. This was done even though DLA pressured the claimants rather to form a trust, which would remove the responsibility from DLA for delivery and place it squarely on the shoulders of the claimants.

The piece of land in Fairview, from which some of the claimants were removed, has remained vacant and is owned by the Provincial Government who will make it available at R1.00 per hectare for housing development. The land includes high value commercialland, which will also be developed for the purposes of cross subsidising the development and community facilities. The agreement stipulates the principles in terms of which each claimant (in most cases representing a small group of direct descendants) willfinally settle their individual claim by taking transfer of a developed site.

By obliging the state in terms of the agreement at a national, provincial and local level to remain involved throughout the developmental process and by ensuring that the assets are effectively retained and controlled by the state up and to the point where transfer could be effected directly to beneficiaries, a distance has been created between the development body and the beneficiaries. This type of institutional approach is an attempt to avoid conflict and the temptation of financial and other mismanagement in an entity where the custodians of assets and managers of the developmental process, are also the beneficiaries, as is the case in most land reform projects.

Implementation is moving ahead and it is anticipated that people will eventually be able to move to Fairview by March 2003.

According to Mr Uren, PELCRA's chairperson, credit for the success so far must be given to LRC, in particular to Kobus Pienaar, for the meticulous work done. The idea to pair up a legal NGO with an urban development NGO (USG) worked extremely well. It would have been impossible for the individual claimants or even the group, to afford the services of commercial lawyers. Even if they did have thefunds for commercial lawyers, Mr Uren feels that no other legal firm in South Africa could deal effectively with a restitution claim the size and with the complexity of the PELCRA claim. 'The Legal Resources Centre is the only legal agency in the country with sufficient knowledge and expertise to deal with land issues in an innovative manner. They have worked with land issues since the 1980s, they are closely involved with drawing up land legislation, I just cannot possibly conceive of any other group of lawyers being able to deal effectively with land issues of this nature in this country.' (Mr Uren, interviewed on 26 April 2001)

According to Clive (USG) there is still a lot of trauma, anger and pain within the South African society caused by forced removals. A lot of this emerged at PELCRA public meetings. It was important to allow people to vent their anger and talk about it in order to unburden themselves. 'This process is perhaps more important than receiving a piece of land, it is more important thatthe people feel that there is redress, that their pain has been acknowledged.' (Interviewed on 26 April 2001). There is a strong indication that the PELCRA claimants have worked through this pain.

RICHTERSVELD – THE FIRST ABORIGINAL LAND RIGHTS CLAIM

The LRC represented the Richtersveld community of the Northern Cape in a claim for land rights before the Land Claims Court in March 2001. This was the first case in a South African court of law attempting to grapple with the question of aboriginal land title and land rights.

Questions about aboriginal title to land are particularly crucial in the context of South Africa's land reform programme. At the moment, restitution for indigenous people is rooted in the Restitution of Land Rights Act of 1994, under which a claim to restitution of land is only valid if dispossession occurred after 1913.

What the LRC is attempting to demonstrate in this case is that the legitimacy of their claim to land is rooted in the common law concept of aboriginal title, or traditional connections to the land. The LRC is trying to show that there are alternative bases for land law in South Africa, using case law developed in Australia and to a lesser extent in Canada. The Richtersveld case could have far-reaching implications forcommunities in South Africa seeking restitution of their land.

What makes the case particularly compelling is that the Richtersveld community is seeking restitution to land which includes property owned by Alexkor, the state-owned diamond mine. If successful, the claimants could have established a precedent for community equity in the state-owned diamond mine. Currently rights to mineral wealth are vested in the state, and not in citizens, communities or corporations. This case could establish a new legal standard for people to access mineral wealth.

As a public interest law centre, the LRC is seeking to use the law to bring justice to the impoverished people of Richtersveld for the dispossession of their land more than 70 years ago. In the process, the LRC is hoping to establish important new precedents that will open up new legal channels for communities to claim their aboriginal lands and the mineral wealth beneath those lands. This case is the culmination of work being done by the LRC and its partner, the Surplus People Project (SPP), in support of Namaqualand communities since the late 1980s.

The case was heard in March 2001, and the Land Claims Court dismissed the claim by the Richtersveld community for restitution against Alexcor, but ruled that its finding need not be the end of the matter and that alternative relief was provided for the Restitution of Land Rights Act. Judge Geldenhuys said it was uncertain whether the doctrine of aboriginal title formed part of South African law. He said the doctrine of aboriginal title fell outside the Land Claim Court's jurisdiction because it did not form part of the Restitution Act.

Following that decision, Judge Antonie Gildenhuys refused to grant leave to appeal. This forced the LRC's lawyers to seek leave to appeal from the Constitutional Court and the Supreme Court of Appeal simultaneously.

6. FUTURE ROLES AND POSSIBILITIES FOR THE LRC

A characteristic of the LRC has always been its capacity to move and change with the times. In Jill Williamson's view, this has always been its strength: 'it has been visionary, always ahead of its time and asking what is its role going to be in the future.' This has certainly been vindicated by my own (extremely brief) acquaintance with the LRC lawyers. It is useful, though, to set contemporary times in some historical context, as the legal scholar Martin Chanock does when comparing the present with the creation of the Union of South Africa in 1910. He writes:

> The premises on which the [South African] state is now being constructed are dramatically different [from 1910], yet the problems are hauntingly familiar. Establishing 'law and order' was a primary issue then, as it is now; the relationship between white and African common laws remain to be resolved; different land tenure regimes have not faded away; and now a new global context, as empire did then, profoundly shapes the constitutional framework and also restricts local solutions to the relationships of law and market. Perhaps above all the wide gap between the ambitions of the state and its capacities is still present [and this remains] the major threat to a rule of law.[43]

Relations with government

We may be at a difficult moment now in South Africa, when the full realisation of the government's failure to deliver on land reform and much else is coming home; when people's hugely unrealistic expectations of change are being succeeded by growing frustrations; when the government is perceived by many to be behaving in increasingly centralised and intolerant ways; and when, as a result, NGOs like the LRC are having to rethink their whole approach to government, which in the past had been largely supportive– even though the LRC has always been at pains, since 1994, to stress its independence from any government.[44] All this terrain, difficult enough in itself, is hugely complicated by the politics of race. Crudely put, many of the old left/radical NGO leaders who aligned themselves to the ANC were white,[45] and they now find themselves both ideologically and personally on the defensive in the face of the black empowerment policies which are currently being vigorously promoted.

I noticed an interesting reflection of this divide when interviewing the LRC land lawyers. On the whole it was the older (male, white) lawyers who seem most committed to maintaining a cordial dialogue with government, particularly the Department of Land Affairs, whilst the younger (female, black and white) ones were far less patient and far more ready (and perhaps eager) to take government to court. Perhaps the best expression of this came from Louise du Plessis (LRC Pretoria), who said

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[43] Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge: Cambridge University Press, 2001), 511, 538.

[44] 'Organisations such as the LRC now have to devise a new relationship with government. It is absolutely essential that we remain independent and critical, and that we are perceived as such.' This was taken from an address by Geoff Budlender on 'The LRC's Role in the New South Africa', published in *LRC Annual Report for 1993/4*, 12.

[45] Anthea Billy pointed out that in the progressive movement there was very limited black experience of land.

> the honeymoon with government is now over - it's back to the battleground. My clients' patience is exhausted. I can't keep going back to the communities with excuses from DLA. At least when you litigate things get moving. But there is no party line on this within the LRC.

It is entirely characteristic of the LRC that there should be no 'party line' on this; it is clearly an area that is regularly under review, and Louise stressed that while she enjoyed a good relationship with DLA in Mpumulanga, this was not the case in North-West Province.

Martin Adams remarked that 'when Geoff Budlender moved to DLA he told the LRC (which he had just left) that they wouldn't be doing their job if they weren't taking DLA to court. And when he left DLA to rejoin the LRC he told them the same thing - that he would be taking DLA to court when he came back to the LRC.'

People outside the LRC generally argue that there is a real need for the LRC to continue to act as a pressure group both to defend existing rights and to press government, in Ben Cousins' words, to 'make rights real'.

Ruth Hall emphasises that 'If there is to be a long-term responsible and constructive role for civil society in land reform, it must be by reconciling a radical politics with a clear and unified idea of the role of the law. The LRC provides a key role in defending this space.'

Martin Adams believes that 'at least the LRC is out there supporting capacity, looking after people in difficult days, so they can be there if and when good days return.'

People stressed the crucial importance of the work of the Constitutional Litigation Unit, where Geoff Budlender now works. As Edward Lahiff of PLAAS puts it, 'the Constitution is a process, still being written, and intervention at critical times through the courts can help put pressure on laws and perhaps stave off misguided government interpretations. It makes rights real and makes them harder to contest later.'

Edward Lahiff also has an interesting view of a possible future role and direction for the LRC. He argues that:

> The LRC needs to be careful it doesn't overexpose itself and be seen to be following a particular narrow sectional interest. It needs to watch its step politically on that, and have its political antennae well attuned. It could go wrong by demanding more than the state can deliver, e.g. the right to have a house *now*. There is always a delicate balance between rights and available resources - and politicians are keen to retain this in a conservative way. The lawyers and courts can't go too far in the other direction or they will be seen as 'anti-government'. They need to bring government with them and apply just the right amount of pressure to do this. If they expose government on too many fronts or are seen to make too many unreasonable demands, there will be a backlash. The tension is already there and it could become too great. Putting on this kind of pressure is a highly political activity; you're really taking on the role of an opposition and you've got to be prepared to take the heat that goes with that, especially if you're non-elected! You have to be prepared to take on some heavy contestation. NGOs in the land sector have already been accused by Ministers and senior government officials as having their own political agenda (which is a bit far-fetched) and of not being representative of the 'real' rural masses.

There is much to reflect on here.

It is also worth reflecting, as was done at a recent SARPN conference on *Land Reform and Poverty Alleviation in Southern Africa*, that relations between governments and civil society are 'invariably tense' in this area and that 'adversarial relations should be accepted, as such relations are inevitable.' However, the conference report urged, 'constructive consultation and interaction should be encouraged.'[46]

The Western Cape – working in alliance?

The issue of the diminishing space for critical comment is a real one and the reaction of NGOs in the Western Cape is an interesting example of one possible way forward. Here, perhaps influenced by the experiences of Nkuzi Development Association and others in the Northern Province Land Rights Coalition, a similar grouping has emerged, comprising the LRC, PLAAS (the Programme for Land and Agrarian Studies), CRLS (the Centre for Rural Legal Studies), SPP (the Surplus People Project) and a couple of small CBOs, with CRLS the driving force. In Edward Lahiff's words:

> They are trying to bring pressure on the provincial government and DLA (which is national). They want to join voices in order to have a wider impact. There is a feeling the land NGOs generally are being more and more sidelined. They don't have as sympathetic an ear of government as they had - or thought they had. Uncoordinated lobbying by NGOs is likely to be ineffective, and the kind of lobbying they did in the past is no longer useful.[47] They need to be more streamlined and co-ordinated. Over the last 6 months there has been lots of debate about its precise function, an alliance or a coalition, and about joint activities.
>
> There is mild tension within the group. The LRC is the most politically astute of the members, very much aware of need for intelligent and concerted pressure. The LRC comes with this and a desire to mobilise additional forces along those lines. It has a very well worked out idea of what actions need to be taken and who in government needs to be influenced. It spends a lot of time trying to sell that idea to the others.
>
> The LRC is least willing to put its name to joint positions and has made that very explicit. It says its own constitution doesn't allow others to speak for it. It wants the loosest possible organisation, and is adamant that it should not be an alliance. It wanted complete freedom of movement and had this more worked out in advance than the others, who made it up as they went along. But the LRC didn't rule joint positions on a case by case basis, and by its very presence the LRC clearly wants to work collectively. It is aware that there are groups like SPP which are more embedded in the communities and is instinctively aware it needs to work with such people.
>
> Members agree the need to think strategically to widen out the debate. Considerable time has been spent putting down the strengths of the various members. Ruth Hall at

[46] Scott Drimie and Sue Mbaya, *Land Reform and Poverty Alleviation in Southern Africa: Towards Greater Impact: Conference Report and Analysis*, June 2001.
Available on http://www.oxfam.org.uk/landrights/SARPNRep.doc

[47] This is in part because parliament is getting weaker and the executive stronger, which poses a challenge to the LRC and to others.

> CRLS is coordinating that. There is a desire to avoid duplication and draw on the strengths of the different organisations. As an example, the LRC frequently prepares responses to draft legislation or new policy proposals, and it wants people to lobby around those, and attend select committee hearings etc. It would like people to work more closely, informally, and share the load. The LRC is more single minded and more focussed on the policy issues, while the others are mostly involved in their routine core functions and just occasionally step out into policy issues - whereas Henk (Smith) and Kobus (Pienaar) think about these much more regularly. They are more up to date - they read the newspapers! They are actively looking for ways of taking things on. The LRC tends to put most of the items on the agenda others were not aware of, for example the issues in the Mining Rights Bill.

Ruth Hall stressed that within the group the 'LRC's input was very much one of backing up broad ideological arguments that other NGOs wanted to make, by referring back to constitutional imperatives and other legal frameworks.' There was a tension about whether the group should meet simply to share information, or to become a lobbying group and over time there was a shift towards campaigning, which the LRC and PLAAS were reluctant to commit themselves to.

Reacting to this at the LRC meeting in August, Kobus pointed out that that the LRC would only join a campaign if their clients instructed them to, or if an LRC lawyer felt it might serve their interests. (He notes that there can also be a tension between the public interest and the LRC clients' interests, as in the case of Riemvasmaak).[48] The LRC's interest in collaboration of this kind, he asserts, is chiefly to share notes and learn, so we can better do our work, including policy and law reform, and provide legal support (from behind the scenes) in campaign situations. 'Our emphasis is to work in ways in which our clients, and not our voices, are strengthened. We are not interested in creating a voice for a group of NGOs but to feed back information and assist clients.' This interestingly encapsulates the particular angle at which the LRC is coming from in such situations.

It will be interesting to see how this process develops and whether, if successful, it could to some degree be replicated - though my sense is that the Western Cape, with its very particular history,[49] offers the most potentially fertile ground.

Responding to this at a meeting just ended in August 2001, the land lawyers from Grahamstown certainly felt that they lacked these kind of potential allies with whom to work, though in Durban there is now a small 'cluster group' looking at farmworker and other land issues in KwaZulu-Natal. Pushpa Naidu writes:

> It is called the Kwa-Zulu Land Cluster Project. It is made up of the Association for Rural Advancement (AFRA), the Community Law Rural Development Centre (CLRDC), the National Paralegal Movement (NPM), the Campus Law Clinic, and the LRC. The cluster has a project manager. The NGOs have identified areas that they will concentrate on. AFRA does the advocacy and lobbing work and some of the

[48] Where people want to take 4,000 ha out of the National Park to run 400 goats, thus pushing the border back across the Orange river and precluding the potential for joint eco-tourist and other ventures.

[49] Among other things, such as its particular history of struggle, the Western Cape is still governed by the National Party, which has just set up a 'rapid-response unit to reach and smash illegal land grabs. The unit boasts that it can reach any land invasion attempt in less than an hour and demolish land grabbers' shacks.' *Sunday Independent*, 5 August 2001.

> training of paralegals. They also have fieldworkers all over the region which are useful for the lawyers to get information. CLRDC and NPM train paralegals to identify land issues and initial steps to take. Campus Law Clinic and ourselves do the cases. We do the High court and test cases and they do they other matters. The cluster has also made connections to DLA offices in the province who feed work to the cluster. It seems to be working. The law components do not do lobbying, advocacy and training. The other important component is that we have a mobile clinic that will visit areas in the province to look at cases, interview clients etc. The network helps us use people on the ground and our time is not wasted travelling to areas to do consultations, interviewing clients on specific issues etc. We have also trained paralegals to look at court files to do the basics.

In this context, it is important to stress that both in the past and currently the LRC has often worked with other NGOs in much of its 'bread and butter' work, and most people I interviewed from outside the LRC were positive about such partnerships and the fact that, generally speaking, the respective roles and responsibilities were clear and that there was little overlap or duplication.

The focus issue

One of the constant (and probably unresolvable) tensions within the LRC is that of focus. As Geoff Budlender puts it

> There is a tension between the 'service' and 'activist NGO' roles. That tension has always been with the LRC, and is found in most similar organisations which I know. My experience when I had a leadership role here was that the most difficult thing to do was to try to get the organisation to become more focused, in the light of large numbers of potential clients arriving at the door. It would be much easier if there was an effective, functioning legal aid system. What made it difficult was precisely the sort of person who works at the LRC, who usually finds it difficult to say 'no' to someone in need.
>
> I have always thought that one of the strengths of the LRC has been that it has managed to do both. It has had an active front desk, which focuses it on real-life problems of ordinary people, and helps it to identify particularly pressing and common problems, through showing up patterns of abuse. At the same time, it has kept some focus and energy 'in reserve' to be able to take on really difficult 'systematic' issues, which sometimes means that you have to turn needy people away. The difficulty is keeping the balance. It tilts first one way and then the other, depending on the current staff and leadership. The dilemma will always be with people who do this sort of work, and no doubt should be.
>
> It is interesting that white lawyers tend to want to take the 'test' cases, while black lawyers are often much more willing to take on individual poor people's cases partly because they live with the community. People come banging on the door at night and it is difficult to turn them away.

Geoff has argued, apparently with success, that the LRC needs to adopt a poverty focus in its future work,[50] while acknowledging that 'there has always been a continuing struggle within the organisation about what to take on and what not; there have always been cases which have been such an outrage that you have to take them on.'

Edward Lahiff argues that:

> Legal expertise within the wider land reform community is invaluable. Most of the land NGOs don't have any legal training. The LRC brings a very important dimension. It would be good to spread that as widely as possible across the sector and across the country. The individual cases they take play an invaluable flagship role. There remains a real problem with access to legal services in the country. **The LRC should look in the long term to how it can strengthen access to, and the provision of, legal services in the country. It has unique experience and insights into this.** There was a legal aid system which is now in disarray, meaning that many poor rural cases must face court without legal representation, if their cases even get that far. Reform of the magistrates and court system, especially in the former white rural areas, urgently needs debating. There are enormous obstacles faced by rural poor because of this.

There is clearly no shortage of potential work for the LRC; but it needs to continue to listen closely to its allies and to support them. As Josette Cole (ex-SPP) suggests, 'the LRC could play a very practical role elsewhere in terms of working relationships between lawyers and non-lawyers and lessening the gap between them.' In a context in which there is likely to be a deepening divide among NGOs in the land sector in South Africa, this will require both sensitivity and good judgement.

[50] This is an issue which I think is still being debated within the LRC. Geoff Budlender, 'Concept Paper: A strategic focus for the LRC', December 2000, and Ashraf Mahomed, 'A Response to Concept Paper: A Strategic Focus for the LRC', 2001.

7. THE FUNDING QUESTION – INTERNAL OR EXTERNAL?

Recent tensions between the UK-based Legal Assistance Trust and the LRC (now apparently resolved) illustrate the dilemma of the LRC's continuing reliance on outside funding. As mentioned earlier (in section 2), it was both appropriate and relatively straightforward for the LRC to attract outside funding during the apartheid years. Subsequently, as the demands of donors have become tighter, this has proved more difficult and, in the view of some, problematic. The LRC's annual reports over the past several years regularly stress the difficulties of attracting funding for the ambitious programme of work which the LRC wishes to carry out. One response to this, following the strategic review, was to appoint Tom Winslow as a full-time fundraising director with the intention of putting that work on a more professional footing than hitherto. Tom has sought both to tailor funding proposals to the demands of different donors and to develop local fundraising in what is a difficult environment. Jill Williamson believes that South Africans (unlike the British) are not great givers, and Joel Joffe believes that the LRC's past success in fundraising may have mitigated against present success. When I met Tom in March he was preparing for a first – a fundraising dinner. He writes

> We hosted a fundraising banquet in Johannesburg on 16 March that was very successful. Nearly 400 people attended, paying R1,000 per seat and R10,000 per table. The Governor of the Reserve Bank, Tito Mboweni, spoke; the Soweto String Quartet performed; and the leaders of the legal profession turned out in force. We generated close to R380,000. Not bad for a first time effort!

He believes that

> I don't think we have been aggressive enough in the past in seeking funding, or allocating sufficient resources towards fundraising, in the same way that Oxfam or other charities do in places like the UK and the USA. **We need to professionalise and change our ways of seeking money, and approaching the people from whom we seek it.** We do no direct mail or telemarketing, for example. We still have a lot to learn and try here in South Africa. The skills shortage in fundraising is crippling however. **We still need to train people in how to raise money and make fundraising a quasi-profession here in the same way that it is in the US and UK.**

Jill Williamson believes that, even in the apparently easier fundraising climate in Britain, the LAT, which now provides about 20% of the LRC's overall budget, could have done more, and sought out more donors, but was frustrated by constraints of time and staff capacity and (recently) lack of information. 'There is a lot of money to be tapped in the UK,' she says. But she also believes that the LRC needs to get more local funding, and is still in the mindset of foreign funding, especially after the collapse of the rand in relation to foreign currencies.

There was an LAT board meeting on 5 July, attended by its American counterpart, SALSLEP, Bongani Majola, the LRC's National Director, and Tom Winslow, to discuss the way forward for the overseas organisations. SALSLEP has decided to use a professional fundraising consultant working closely with the LRC and it was agreed that the LAT Board would appoint a new Director to replace Jill (who is retiring) who will be an active fundraiser, writing proposals and reports and monitoring.

I raised the question of internal and external funding for the LRC with the legal scholar Martin Chanock, whose view is that

> The LRC had no difficulty attracting funding in the apartheid years and this did it no harm at all. It got money and used it in very constructive and terrific ways. My problem with donor funding is that if the LRC is to continue to carry on providing the role of a free legal service on a broad base, this is really a government function and should attract government funding or funding within the country - you can't have essential functions dependent on outside funds. If that is its role, it's particularly unfortunate that it should continue to look for support from outside the country, because if the state and the profession is used to that role being supported by others, when the funding dries up, it will just not pick it up - it will be seen as an unnecessary frill. If the LRC's function is much more to focus as a human rights law organisation, it should then seek funding from those who support that kind of politics inside South Africa. Success as a human rights pressure group depends on there being support for this within the country. It's artificial if it relies on outside support for what is a crucial internal political function.

I forwarded Martin's views to Tom Winslow, who responded in this way:

> Yes, Chanock is right that government does have a responsibility to pay for routine litigation and legal defence for the indigent and the poor. There is now a constitutional obligation to do so. On 11 July we won a landmark case in which the Land Claims Court has ordered the Legal Aid Board to pay for evictions cases. But government does not have a responsibility for the strategic, challenging, government-correcting kind of litigation that has become the hallmark of the LRC (and other public interest law centres around the world).
>
> Yes, we should be seeking more money from human rights minded people in South Africa - but the problem is that there are not the tax incentives to encourage them to give to a non-profit organisation. There is not a culture of giving in this country. And the tax base is really quite narrow - a small group of people whom we could hit for donations. It is not impossible, but not easy either. It will take us three to five years to build up that kind of base support.

These are questions the LRC will need to grapple with, as it had to back in 1991, when its chairman, noting that '67% of the Trust's funding came from outside the country,' pointed out that 'it is particularly important that the South African base be strengthened.'[51] A decade later, Tom says, 'we are overly and dangerously dependent upon foreign donor, project-specific funding and I don't think this will be easy to overcome, especially when the pound is so strong against the rand, it makes sense for us to chase foreign funding still.'

There is an interesting new initiative in which the LRC, together with its counterparts in Namibia and Zimbabwe, is seeking more aggressively to tap funding from international donors at a regional level. It is hoped to establish a Trust for Public Interest Law Centres in Southern Africa, but it is too early to assess the impact of this.

The table and graph below very clearly depict the continuing dependence on foreign income.

[51] *LRC Annual Report 1990/1*, 2.

TABLE ON FUNDING

Donations to the Legal Resources Trust (in Rand), 1988-89 – 2000-01

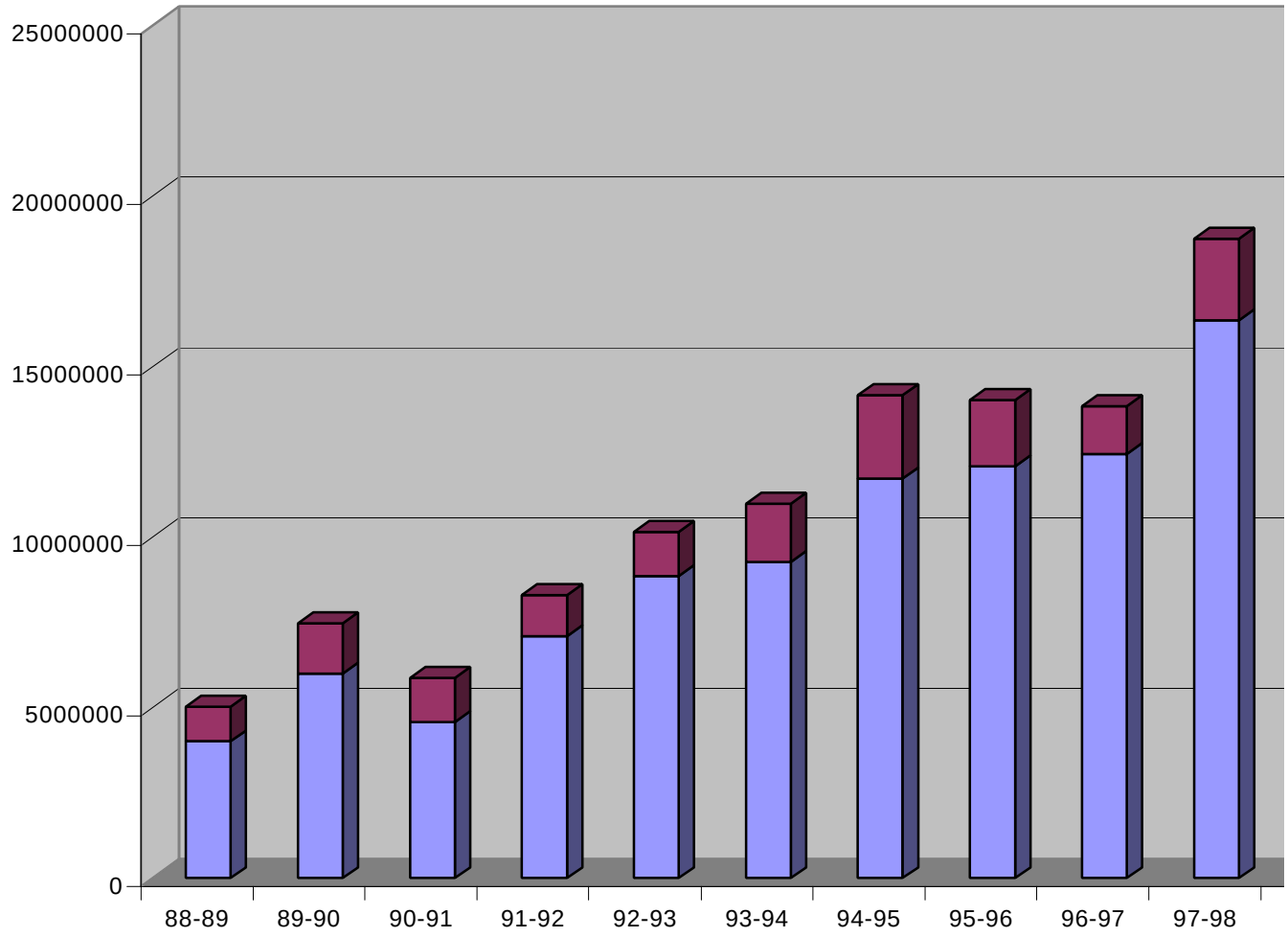
Financial year	Foreign income	Domestic income	Total income	% foreign income
1988-89	4,018,826	1,009,315	5,028,141	80%
1989-90	6,004,109	1,472,397	7,476,506	80%
1990-91	4,587,008	1,281,770	5,868,778	78%
1991-92	7,107,448	1,203,447	8,310,895	86%
1992-93	8,851,249	1,296,215	10,147,464	87%
1993-94	9,271,361	1,713,981	10,985,342	84%
Totals	**30,568,640**	**6,263,144**	**36,831,784**	**83%**

1994 CHANGE OF GOVERNMENT

1994-95	11,720,900	2,441,673	14,162,573	83%
1995-96	12,078,968	1,943,496	14,022,464	86%
1996-97	12,442,814	1,392,819	13,835,633	90%
1997-98	16,365,799	2,383,529	18,749,328	87%
1998-99	13,239,536	2,049,028	15,288,564	87%
1999-2000	14,824,232	825,681	15,649,913	95%
2000-01	19,260,981	1,693,260	20,954,241	92%
Totals	**99,933,230**	**12,729,486**	**112,662,716**	**89%**

Grand Totals	**130,501,870**	**18,992,630**	**149,494,500**	**87%**

History of LRT donations, 1989-2001



8. WHAT IMPACTS BEYOND THE BORDERS?

This is a question I raised with LRC staff and others, and it stems from my own interests and my work as a Land Policy Adviser for Oxfam GB. A great deal of what I do involves networking, exchanging ideas, information and best practice and trying to find ways of helping and supporting civil society organisations working on land conflicts. Most of my recent work has been in Eastern and Southern Africa and I have established a website to document some of this work and make it freely available. It is called *Land Rights in Africa*: http://www.oxfam.org.uk/landrights

On engaging with the LRC I was forcibly impressed by the emphasis people placed on law, the respect in which it was held, and the optimism that it could be used to noble ends. And as Sarah Sephton (LRC Grahamstown) put it, 'You can be a human rights lawyer and still be proud of being a lawyer.' And as Judge of the Constitutional Court Kate O'Regan stressed

> South Africa has a deep commitment to law. The rule of law was never tampered with. There is a deep community sense that people will win out in court - and that has survived to today. So government can be held to account, partly through the legal system. This is an important way of organising politically and the process is important as a mobiliser. Faith in law is a good first step.

My experience of other African countries (most South Africans appear to believe that they do not live in Africa at all!) is that people simply do not have that optimism about using law in this way. This was so even before the current legal chaos in Zimbabwe. Many local NGOs stress how difficult it is to find supportive lawyers at affordable prices - and this even before you reach the point of trying to enforce laws. I discussed my reaction with Martin Chanock who reminded me forcibly that I would not be asking that kind of question in Western countries, where it is completely taken for granted that a rule of law exists.

It struck me, as I learned more about the LRC and its work, that there could be valuable linkages across the border which apartheid so effectively sealed in so many ways between South Africa and its neighbours. And so I tried to probe this. I learned of the existence of the Southern African Legal Assistance Network (SALAN), which was established in 1994 as a loose network of public interest law centres and human rights organisations, which aimed to strengthen each other through shared experiences and provide opportunities for members to work on issues with a regional impact. The countries involved are Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Tanzania, Zambia, and Zimbabwe.

The LRC's annual report for 1999-2000 documents the process of trying to strengthen this network and 'find ways of getting members to work together on meaningful regional projects.' The duties of the secretariat were shared among four different member organisations 'in order to achieve more inclusive management and the transfer of skills.' In addition, 'a number of interns from SALAN member organisations were housed in the

various LRC offices, and an investigation into the information technology needs of SALAN members was begun.'

I suspect this caution very much reflects the view of Shehnaz Meer, formerly of the LRC, now Judge of the Land Claims Court, who visited human rights organisations in the region when she was still with the LRC, and found that it was head and shoulders above the others. The LRC was structured and disciplined, she said, and the others just did not have that discipline.

I was interested in exploring the extent to which the LRC model has any lessons which either have been or could be exported elsewhere, especially given the proud boast that 'beyond South Africa's borders, the LRC is considered a role model in several emergent African nations.'[52] I asked some of the other organisations in SALAN whether they had in the past or do now in the present draw upon the experiences of the LRC - or whether they felt that the South African context was just so different that this was not feasible. And I asked for reports on the impressions and experiences of some of the interns visiting the LRC from other countries. But I had very limited responses. I also asked the LRC land lawyers whether there were lessons that other countries might learn from the work of the LRC as an institution. It was a difficult question which people struggled with.

My own impression is that despite the best of intentions - and many people (Anthea Billy and Geoff Budlender included) expressed a willingness in principle both to teach and to learn and to increase contacts with neighbours in a spirit of exchange rather than of arrogance - the fact that LRC lawyers are so desperately pressed for time and so committed to their cases means that anything of this kind will always be regarded as a luxury.

The moves towards joint strategizing on regional funding (mentioned in section 7) might have other benefits. Tom Winslow certainly hopes so

> There are other potential spin-offs besides funding for regional cooperation - skills and resource sharing, learning from best practices and cases, etc. I think there is great potential for cooperation in the region - despite our differences in practice, legal environment, and degree of democratisation.

There was an interesting attempt to bridge that gap, in the form of a workshop in February (which I attended) for Southern African land reform lawyers. It brought people from Namibia, Tanzania, Mozambique and Zimbabwe. I found myself chairing the regional session which looked at a number of themes, including inheritance. It was an interesting event, but to me it served to illustrate just how wide the divide is and how little regular contact across borders there seems to be among like-minded individuals and institutions - despite the oft-stated desire that things be otherwise. Shehnaz Meer believes the LRC could go and teach in other places and that there are lots of skills and strategies on land which could be transported. I am not so sure. I fear that the LRC's experience is a unique one, embedded in the particularities of South African history and struggle, and

[52] *LRC Annual Report for 1994/5*, 2.

that the international reputation it enjoys, and which help it to attract the kind of funding support that enables it to do its work, is not something one can replicate at will, however strong the need might be.

9. SOME FINAL THOUGHTS

I was asked to make some 'recommendations' at the end of this review. It is the kind of thing people seem to expect. I do so with not a little trepidation.

RECOMMENDATIONS

1. **The LRC clearly does need to think seriously about its position on land invasions post-Bredell.**

2. **Is there now need for a major re-think of approach, comparable to that of the early 1990s?**

3. **Edward Lahiff's challenge: in the long term, how can you strengthen access to, and the provision of, legal services to the poor?**

4. **Despite the obstacles stated, it does seem worth given serious attention to seeking imaginative ways of working more collaboratively with others. The Western Cape is clearly not a 'model', but it will be important to monitor that experience and to share lessons drawn from it.**

5. **It would be very good – and in my view quite important - to write up the history of the experience of working on new land laws and the Constitution, the lessons learned from that, and reflections on it in the light of the current context. In practical terms, this might best be done by deploying a bright student to interview key actors, armed with a tape recorder and adequate time.**

6. **The LRC clearly needs to focus on attracting a higher degree of internal funding and to do its best to support the emergence of a culture of fundraising.**

7. **It should be made a firm condition of ever allowing Geoff Budlender to retire that he be mandated to write his memoirs.**

As I have written earlier, it was striking to be writing about land reform in South Africa in a context of land invasions in a region in which they have gained such huge prominence because of events in Zimbabwe I learned that Bredell was only one of numerous and regular urban land invasions which have taken place across the country. This situation does forcefully make you wonder whether there may have been an over-emphasis on law and an over-complicated programme of land reform initiated.

There is the contrary view that the complexity of the new laws reflects complex social realities and that to go for 'fast track' solutions may simply store up more problems for the future. But there is now an admission that the financial implications of implementing the 20+ new land laws passed since 1994 were underestimated. A similar recognition

occurred recently in both Uganda and Tanzania. The shadow of Zimbabwe hangs over South African politicians, concentrating their minds usefully on issues they might otherwise be inclined to neglect. The issue of farmworkers, notorious for their invisibility and vulnerability, remains difficult in South Africa, as it does in Zimbabwe and throughout Southern Africa.[53]

I came across a few prophets of the LRC's doom during my enquiries – people who said that things weren't what they used to be (were they ever?), that standards had fallen, that the LRC was still living in the past, that it will be difficult to sustain in the future, because it has always relied on a few key individuals, or that it might well founder on political or financial rocks. There were also strong internal critics of the fact that the LRC remains very male and old guard-dominated, has a very male managerial style, and that it has not sufficiently transformed itself in terms of race, gender or age.

These prophets of doom may turn out to be correct, but I doubt it. The LRC has a proud history, some of which I have tried to document here. It continues to attract a very high quality of staff, though there are obvious concerns that it is difficult, in a highly competitive market to both attract and retain black lawyers, who more naturally gravitate towards commercial firms.

The Land, Housing and Development group is clearly highly motivated, it works well as a team, acknowledging and dealing with tensions and differences of opinion. People sometimes behave badly in meetings, but are forgiven. It regularly asks itself tough questions about focus and direction. It recognises that certain issues defy final resolution, but ebb and flow as time and circumstances change. All this is not of course to suggest that it will not face the most severe challenges in the future, but it has the capacity to respond to these positively and creatively and to find imaginative ways of fundraising and of publicising its work, which implies demystifying legal language and writing with non-lawyers in mind. Crucially, senior managers will need to listen to staff more effectively than they have done in the past.

[53] Robin Palmer, 'Off the Map - Farmworkers in Southern Africa - some partly Historical Thoughts on their Invisibility and Vulnerability', Southern Africa Regional Conference on Farm Workers' Human Rights and Security, Harare, 10-14 September 2001. Available on http://www.oxfam.org.uk/landrights/PRsaFW.rtf

10. APPENDICES

APPENDIX I

QUESTIONNAIRE AND RESPONSES

Below is the list of questions I used when interviewing the LRC land lawyers in February and March, with a summary of their responses (**in bold**), taken as a whole.

Q.1. Describe your involvement/relationship with the LRC.
What attracted you to work with the LRC?
What were your jobs before joining/since leaving the LRC?
This varied, obviously. Almost always a strong degree of idealism. Lots of job mobility. A frequent background in political activism and/or student politics.

Q2. What in your view were the LRC's major successes and failures before and after 1992?
How would you account for these successes and failures?
A varied list, as one would expect - but being strategic comes up frequently.

Q3. Has the LRC successfully transformed its role since c.1992? If so, in what ways?
Unanimous view that it has, by being proactive on the Constitution, then began thinking developmentally on social and economic rights.

Q4. Is there still a need for the LRC? If so, what are those needs?
Unanimous view that there is, and the needs are tied in with the closing down of critical space and the continuing urgency to assert and defend rights, and to spread awareness of people's rights. The LRC's key contribution is litigation, which is what most other NGOs in the land sector don't and can't do. This is not a need which is dwindling.

Q5. What are the major constraints facing the LRC's Land, Housing, and Development Programme (LHDP) which hinder it from meeting those needs?
Finance, resources, time, working with government bureaucracies - others too, but those were probably the main ones.

Q6. Is the LRC's LHDP's *programme* really a programme, or just a construct devised for donors?
Unanimous view that it really is a programme and is better integrated than the others.

Q7. What has been the LRC's impact on land reform?
This a question which I didn't always press, but some answers covered it - drafting legislation, work on the Constitution, and the famous case victories.

Q8. Has the LRC's LHDP's *programme* developed over the years? If so, in what ways?
What are the main problems in planning for the future?
More coherent team work and support were generally cited. The demands of donors.

Q9. In networking with other organisations, to what extent has the LRC's influence made a difference? Are you stepping on each others' toes? How are those relationships working now?
A general response from other organisations that the LRC's influence was often critical, that the distinctions were clear, and that relationships were generally working well, but a great deal hinged on individual relationships.

Q10. Who besides the LRC is doing legal land work in your area? If none/few, why is this?
This varied, but includes institutions like Lawyers for Human Rights, SPP, CRLS, CALS, Nkuzi.

Q11. Why do so few black lawyers seem to take up poverty -related legal land and housing work?

Essentially financial and the need to repay family and other debts - but also because there are many more options now open.

Q12. Are there lessons that other countries (particularly elsewhere in Africa) might learn from the work of the LRC as an institution? If so, what are they?
A difficult question that people, not unreasonably, struggled with. The LRC's low profile outside South Africa is an obstacle.

Q13. Is there particular expertise which the LRC's LHDP members can offer in this area? If so what are these?
The internship programme seems a good idea, but there appears to be no centralised learning from it on the LRC's part.

Q14. To what extent, and in what ways, have the politics of race affected the work of the LRC?
They certainly have, though not perhaps to quite the same degree as many other organisations. perhaps because of 'professionalism'. There are also issues around gender and age.

SPECIFICALLY LEGAL
Q15. How effective have the LRC's legal strategies been?
Most replied that they had been effective.

Q16. Is the LRC being sufficiently proactive, or is it just going for plum issues?
If it is not, why not?
Varied answers on this, with the balance answering positively.

Q17. Can land litigation strengthen social and economic rights? If so how?
Yes it can was the standard reply. Not much on the how, except that the contestation of relative legal priorities is key and that the LRC is probably the prime institution which can effectively use the law as a tool to challenge the idea that entrenching the status quo equals the rule of law.

Q18. [FOR JUDGES] What is your perception of the LRC as a litigator?
How does it perform compared to non -LRC lawyers?
Very high and very well said the two judges I spoke to.

APPENDIX II

LIST OF PEOPLE INTERVIEWED

LRC Cape Town
Anthea Billy
Steve Kahanovitz
Ashraf Mahomed
Kobus Pienaar
Henk Smith

LRC Johannesburg
Geoff Budlender
Durkje Gilfillan
Moray Hathorn
Tom Winslow

LRC Pretoria
Louise du Plessis
Asmita Thakor

LRC Grahamstown
Mark Euijen
Sarah Sephton

LRC Durban
Pushpa Naidu

Others interviewed in South Africa
Martin Adams
Josette Cole
Andrew Corbett
Ben Cousins
Ruth Hall
Tony Harding
Sam Hargreaves
Zakes Hlatshwayo
Tiny Mankge
Shehnaz Meer
Kate O'Regan
Nick Ndebele
Sue Power
Theunis Roux
Lala Steyn
Conrad Steenkamp
Maureen Tong
Olivia von Rooyen
Boeboe van Wyk

Interviewed in England
Martin Chanock
Joel Joffe
Edward Lahiff
Jill Williamson

APPENDIX III

SHORT LIST OF SOURCES

LRC materials
A wide variety consulted, including:

Annual Reports
Strategy Papers
Practice Reports
Funding requests
Submissions to the Truth and Reconciliation Commission
Conference Papers etc by LRC staff

Secondary sources

(1) The LRC's early years
Richard Abel, *Politics by Other Means: Law and the Struggle against Apartheid, 1980 -1994* (New York and London: Routledge, 1995).

George Bizos, *No One to Blame?: In Pursuit of Justice in South Africa* (Cape Town: David Philip and Mayibuye Books, 1998).

David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998).

Lucie E. White, 'To Learn and Teach: Lessons from Driefontein on Lawyering and Power', *Wisconsin Law Review*, 1988, 699-769.

(2) Land reform in South(ern) Africa
Martin Adams, *Breaking Ground: Development Aid for Land Reform* (London: ODI Research Study, 2000). The author has also written many other articles and papers on the subject.

Martin Chanock. *The Making of South African Legal Culture 1902 -1936: Fear, Favour and Prejudice* (Cambridge: Cambridge University Press, 2001).

Scott Drimie and Sue Mbaya, *Land Reform and Poverty Alleviation in Southern Africa: Towards Greater Impact: Conference Report and Analysis* , June 2001.
Available on http://www.oxfam.org.uk/landrights/SARPNRep.doc

Ruth Hall and Gavin Williams, 'Land Reform in South Africa: Problems and Prospects', June 2000. Available from the authors and on http://www.oxfam.org.uk/landrights/HallWill.doc

Robin Palmer, 'The Struggles Continue: Evolving Land Policy and Tenure Reforms in Africa - Recent Policy and Implementation Processes', March 2000 http://www.oxfam.org.uk/landrights/RPpolimp.rtf

Robin Palmer, 'Off the Map - Farmworkers in Southern Africa - some partly Historical Thoughts on their Invisibility and Vulnerability', Southern Africa Regional Conference on Farm Workers' Human Rights and Security, Harare, 10-14 September 2001 http://www.oxfam.org.uk/landrights/PRsaFW.rtf

Camilla Toulmin and Julian Quan (Eds.), *Evolving Land Rights, Policy and Tenure in Africa* (London: DFID, IIED and NRI, 2000).

Stephen Turner and Hilde Ibsen, *Land and Agrarian Reform in South Africa: a Status Report* (Bellville: PLAAS Research Report **6**, 2000).