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MINISTERIE VAN JUSTISIE

REPUBLIEK VAN SUID-AFRIKA

MINISTRY OF JUSTICE

REPUBLIC OF SOUTH AFRICA

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Verwysing/Reference

To: Adv Gerard Grové

From: Deputy Minister
Sheila Camerer

22 September 1993

LAND CLAIMS / REPRESENTATIONS

As you can see from the attached note from Anne Bernstein of the Urban Foundation, she has asked me to make this report available to members of the Technical Committee. Please could you have copies made and distributed to Technical Committee members. Some of the points made by the UF are very interesting.

Sheila Camerer

SHEILA CAMERER, MP
DEPUTY MINISTER OF JUSTICE

P.S. This report has just arrived in my office.

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10 September 1993

Mrs Sheila Camerer
Deputy Minister of Justice
House of Assembly
Cape Town
8001

Dear Mrs Camerer

On Tuesday 14 September the Urban Foundation will release the attached document to the media. I am sending you these photostat copies in advance as I believe our work might be of relevance to the Ad Hoc Committee on Fundamental Human Rights and to the technical committee which I believe you chair.

We hope it is not presumptuous to ask you to distribute copies of this document to all the members of these two committees.

Thanking you in anticipation.

Kind regards,

Ann Bernstein
Executive Director
Development Strategy and Policy Unit

UFresearch

Summaries on Critical Issues

A LAND CLAIMS COURT FOR SOUTH AFRICA? EXPLORING THE ISSUES

AN EXECUTIVE SUMMARY

UFresearch

The Urban Foundation's UFresearch *series is a vehicle for the timely dissemination of research and opinion in the broad field of development and public policy. The* EXECUTIVE SUMMARIES *published in the series cover a variety of themes and reflect the work and opinions of many authors. Each of the* EXECUTIVE SUMMARIES *prepared by the Development Strategy and Policy Unit of the Urban Foundation is based on a detailed research report written by an expert in the field and published in a series under the title of* UF Research Report *which can be purchased from the Foundation.*

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A Land Claims Court for South Africa? Exploring the Issues

In this issue of UF*research the issues that are central to the debate around a land claims court for South Africa are outlined. They include the nature of potential claims, the implications of restitution versus reparation, the political and constitutional context of a land claims mechanism, the formulation of criteria for qualifying land claims, the institutional framework for a land claims court, and the nature and cost of awards. The detailed copy of the* **UF Research Report** *on which this summary is based is available from the Urban Foundation.*

INTRODUCTION

South Africa's history will ensure that the distribution and use of land will be a central and highly charged issue for a new non-racial government. It is widely recognized that programmes to deal with past discrimination and dispossession are important for future development. A broad body of opinion appears to be converging on the notion of a judicial process to adjudicate land claims (see box on p. 4). The possible nature and role of a land claims court is explored in this issue of **UF*research*.** The Urban Foundation has advocated judicial mechanisms to resolve both urban and rural land conflicts but has also argued that these should be set in a broader development context (box).

The concept of a land claims court has several dimensions. From a narrow perspective, it can be characterized as a mechanism to redress injustice and discrimination in respect of the occupation and ownership of land in South Africa. Many in our society are insistent upon the need for reparation, particularly against the background of apartheid-based removals and dispossession. However, it can also be argued that reparation (through a land court) is a developmental tool in that it re-establishes communities deprived of land. A further developmental perspective on the land court issue is that reparation is a way to legitimize ownership for all. The land claims court idea thus also deals with future land rights, and hence with questions of security, investment and economic growth.

With development in mind, the UF has actively promoted mechanisms to resolve land conflict in urban and rural areas. The fair settlement of land claims will be a foundation for progress, but reparation will not guarantee development. In the UF view, resolution of land claims must be part of a broader development agenda.

A Non-Racial Approach to Urban and Rural Development

Dealing with land claims is part of a broader development process. Past injustice must be tackled in a way that promotes future development. Key facets of a non-racial approach to urban and rural development are:

- Abolish all discriminatory legislation, and deal with discriminatory practices relating to tenure, access to land, technical support and finance.
- Stop the unilateral transfer of state-owned land.
- Face the challenge of the legacy of forced removals and discrimination in urban and rural areas through the introduction of a judicial conflict resolution mechanism.
- Promote widespread debate and consultation as a necessary foundation for the formulation of new non-racial urban and rural policies for South Africa.
- Implement bold large scale development initiatives in urban and rural areas. In the rural case, this should include expansion of support programmes, establishment of special areas for small-scale farming, opportunities for non-agricultural rural development, and more finance for rural development (with a focus on the poor). (For detailed proposals see *Rural Development, Policies for a New Urban Future*, 4, Urban Foundation, Johannesburg.)

The Challenge of Finding a Workable Solution to the Land Issue

Differing views of the land issue in South Africa are often strongly held. These views are sometimes mutually exclusive and hotly contested. The process of trying to find a workable solution will require a different approach, in which participants will have to ask and answer some difficult questions.

- Should registered individual title be opened to attack on the basis of illegitimacy? Can our economy function under such circumstances? Will it resolve the land issue?
- Conversely, is the best way to ensure future legitimacy of title the protection of all existing legal title, without the possibility of challenge?
- Will the potential for conflict subside if the issue of land claims is not addressed?
- Who must pay for giving the land back, if we decide to do so? If it is the state, how are priorities determined? Can we afford the morality we want?
- Is it correct to divide the debate between those seeking 'revenge' and others? Is there really such a division?
- Would the granting of historical land claims make developmental sense? Should we not forget the past and deal with future access to land in terms of a development strategy which emphasizes rural reconstruction, especially for the poor?

Despite an initial negative view on addressing historical wrongs, the government has shown some flexibility on the issue. For example, it established the Advisory Commission on Land Allocation (ACLA) in 1991. Reactions to ACLA have been mixed (see box). Nonetheless, there appears to be a broad appreciation among various stakeholders of the need and desirability of a more equitable distribution of land resources.

Outlined in this document are the nature and role of a possible land court mechanism. It is based on extensive research undertaken by the Urban Foundation, and upon a series of consultations with business, community, and political interests. It should become clear that there are benefits to be gained from going the land court route but there will also be costs. Many of the disadvantages can be ameliorated by being quite specific in the description of the court's functions and powers — but they must not be defined so narrowly that the land issue continues to haunt our society for years to come.

South Africa's history will ensure that the distribution and use of land will be a central and highly charged issue for a new non-racial government.

The purpose of publishing this research summary is to promote widespread public debate and discussion. Open debate is critical if the country is to deal successfully with the past and establish a sound base for future development.

SOME KEY ISSUES

The land reform and land claims court debate is fraught with apparently intractable issues. These include:

- Those who are deprived of land question the legitimacy of current title, and point to the manner in which land was acquired by whites from blacks — through conquest, theft, deception and the abuse of legislative and administrative power.
- There is a gross disparity between the races in relation to occupation and ownership of land in South Africa.
- Some blacks accuse whites of undue land profits over the years through the exploitation of racial preference and the subsequent transfer of responsibility to successors in title.
- It is argued that the removal of racially based legislation, without the provision of means to access land resources, is a manipulative device to maintain privileged class structures. A related point is that a market-based approach to the redistribution of land resources is insufficient.
- In a society where there are traditional approaches to land tenure, and where the acquisition of "legal" ownership is tainted, there are claims to a moral right to land which transcends a legal right to title, involving claims upon rural and urban land. It has been suggested that "rights which go beyond legal title" might include such concepts as birth rights, inheritance rights, and rights based on occupation and productive use of the land.
- These critics say, however, that it is wrong to view their critique of "legal" title as an irresponsible attempt to

THE ADVISORY COMMISSION ON LAND ALLOCATION (ACLA)

Limited Brief for ACLA

The Advisory Commission on Land Allocation (ACLA) was established in terms of the Abolition of Racially Based Land Measures Act of 1991. The decision to form ACLA was a significant shift by government, which earlier held that land restoration was not feasible because of practical complexity and the potential for conflict.

Under the founding legislation (amended recently), ACLA had a narrow, advisory brief. It was empowered to identify "unallocated" and "undeveloped" state land acquired in terms of repealed racial laws, and other rural land which could be acquired by the state for "agricultural settlement". It could then make recommendations to the State President on the allocation and development of the identified land.

Extended Powers

Despite finalizing some land claims, ACLA has had significant difficulties. It has been subject to widespread criticism (mainly by removal victims and their representatives — see below), and it has had to deal with its restrictive brief and conflicting interpretations of its terms of reference.

The powers and functions of ACLA (now the Commission on Land Allocation) were extended in amending legislation in June 1993. The Commission now has jurisdiction over a wider range of land categories (including urban land) and is empowered to make awards in respect of certain categories of land.

Under the blanket condition that identified land must not have been "alienated" or "developed or utilized for public purposes", the Commission can make an order in respect of:

- land acquired by the state or a "development body" in terms of repealed racial legislation. Under the same blanket condition, it can make recommendations on:
- state land acquired under the Community Development Act;
- land which might be acquired by the state for residential or agricultural purposes;
- land referred to it by the Minister of Regional and Land Affairs; and
- local authority land declared by the Minister to fall within the jurisdiction of the Commission.

Responses to ACLA

In May 1991, the Urban Foundation argued that the proposed Advisory Commission on Land Allocation was "an inadequate and partial response to a very important national issue". Since the establishment of ACLA, responses to the Commission have been mixed.

- On the positive side, ACLA has been greeted by some as an imperfect but worthwhile initiative. Settled claims (although relatively few) have been welcomed by community organizations and land-related service organizations.
- Criticisms have focussed on the narrow brief of the Commission, on its slow and limited delivery, on unilateral land sales and transfers by state departments (the government appointed Land Rights Advisory Forum called for an "immediate moratorium" in June 1993), and on the "unrepresentative" membership of the Commission.

It is too early to judge whether the newly extended powers and terms of reference will address some of these criticisms.

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destroy land title as such. They point out that the issue of land claims is linked directly to the future legitimacy of title.

- Some who question the market mechanism argue that structurally disadvantaged people are entitled to require those who were commensurately advantaged to give an account of undue profits and to compensate their vicarious victims.
- Those who acquired "legal" title to land in good faith argue that innocent persons who are today the owners of land from which people were removed are not the wrongdoers and should not be disadvantaged. Further they might hold that the descendants of those originally wronged are not the true victims.
- The government fears that a programme for the restoration of land has potential for conflict and has argued that it is

VIEWS ON A LAND CLAIMS COURT

"[redacted]d Claims resulting from the removal of people on the grounds of racially based legislation which applied in the past .... should be settled by means of a legal process.... The SAAU is opposed to the fact that land issues of this nature are handled by a politically appointed body such as the Advisory Commission on Land Allocation".

South African Agricultural Union, 1992

"We envisage the creation of an independent, non-sexist and representative land claims court to preside over and make the necessary adjudications with regard to claims to land".

ANC, May 1992

"Government rejects a land claims court as proposed by the ANC..... The Advisory Commission on Land Allocation on the other hand, does offer solutions for numerous claims".

J.H.L. Scheepers, Deputy Minister of Land Affairs, April 1993

(ACLA is) "merely an advisory commission under the State President. We would prefer a court of law because this is a matter where a claim is being made against someone else's property".

Dr K. le Clus, Head of Research and Development, NAMPO, October 1991

"Judicial approaches should be used to settle the claims to specific plots of land of groups evicted from their land during the apartheid regime."

World Bank, 1992

"The NAU considers that forced removals as a result of racially based legislation should be addressed via the judicial process and if necessary via a land claims court".

Natal Agricultural Union, 1992

"Within the framework of new, non-racial urban and rural policy, a land claims court needs to be established to deal with historic and discriminatory dispossession of communities and individuals".

Urban Foundation, August 1991

in the interests of peace and progress that the present position be accepted, and that the opportunities afforded by a new non-racial land policy should be exploited to bring about a more equitable dispensation.

- The business community fears that the land claims debate could open up a Pandora's box of land disputes or even a bizarre situation of infinite historical regression in attempts to restore land to descendants of individuals and groups displaced since colonial times.

- The business sector is concerned that a process of redress will render current title so uncertain that ownership of land will no longer provide the necessary certainty required for investment and development.

Despite the enormous complexity of the issue, South Africa faces the critical challenge of dealing fairly with established land interests and potential claims .

- The current government, a future government, and the business sector would probably wish to ensure that a process of redress would not commit the State's resources to an indefinite range of claims and costs and therefore to open-ended expenditure.

- The business sector and many development agencies are concerned that expenditure on redressing past wrongs on a purely moral basis will divert scarce state resources from the task of stimulating national-wide urban and rural development and reconstruction on a sound, sustainable and large scale for all South Africans, and especially the poor.

Difficult Choices Raised by Potential Claims

Tough choices will have to be made in classifying and evaluating claims, for example:

- Some people were deprived of registered land in the pursuit of racial segregation. Should they get the land back or be given compensation?
- Some people suffered real, material loss when they were deprived of their land. How are these losses quantified?
- Often loss can only be expressed in terms of hardship suffered by people removed from or precluded from settling on land. Should they be compensated and if so, by what measure?
- Through the passage of time, or because of dispossession, communities may no longer exist. Where descendants or remnants of the community can still be identified, how should compensation work, if at all?
- How far does one go back? Are we talking about title to land before European settlement?
- Some people were removed from 'white' agricultural areas after occupying land for generations. Should they return to the same land, even if production efficiency is adversely affected? What is the position of people without formal tenure who still occupy private agricultural land?
- How does one deal with these situations without causing: unreasonable expectations; land invasions contrary to the national interest; breakdown of investor confidence?

If such choices are to be made, they will benefit from an open debate among all of the major participants in the land policy terrain.

POTENTIAL TYPES OF CLAIMS

The foregoing issues are raised against the background of a large range of potential land claims. The potential claims relate not only to the rural or agricultural context but also to urban situations where individuals, communities, or even occupants of entire townships were dispossessed in the past (box).

It is difficult to predict the number of claims, but several hundred might be anticipated. The potential *bases* on which the claims rest could be classified in various ways. One way is to look only at the historical connection to the land. This approach is probably insufficient, because it ignores current interests in relation to the land. For example, a strong historical basis may exist for a land claim but a case of acute need might be more pressing.

Historically-based claims will take many forms, among which are:

- The claims of communities or their descendants who lost rights recognized in terms of the land registration system (such as land held in trust for them primarily in 'black spots') and who have suffered some form of measurable loss through inadequate equivalent land, income opportunity, or compensation.
- As above, save that the loss can be only be expressed in intangible terms, such as "undue hardship". This is, in law, not unlike the measurement by a court of the monetary compensation to be granted for pain and suffering.
- Cases where communities or their descendants did not have vested rights recognized in the land registration system but where their histories tend to substantiate claims that they were either the traditional owners of areas, or that they were specifically granted non-registered rights approximating ownership (for example by nineteenth century administrations). In other words, people may have been owners without registration, a possibility in terms of the South African land-registration system.
- Claims dealing with entire townships being moved, where people may or may not have had title or the necessary urban residence permits, where they were or were not given equivalent accommodation, and were or were not given adequate compensation. There is a distinction here

Potential claims relate not only to the rural or agricultural context, but also to urban situtions where individuals, communities or even occupants of entire townships were dispossessed in the past.

between cases where compensation or alternative accommodation was lawfully required of the Government and cases where there was no such provision in the technical sense but where there is a "moral" expectation that there should now be some redress.

- Claims from former labour tenants or their descendants who were the victims of the abolition of registered labour tenancy in 1979, who lost their tenancy in terms of individual cancellations of tenancy arrangements, or were removed from farms under laws authorizing forced removal. There appear to be two sub-categories:
  - cases based on "hardship" in the sense that the removals were quite lawfully done under the law as it stood at the time; and
  - cases where long term occupiers either lawfully acquired land, or were prevented from doing so by racial restrictions.

It seems more useful to define the debate as one about reparations or redress, rather than restitution.

- There may also be claims from communities relating to land originally belonging to the South African Development Trust which was subsequently transferred to a homeland government. There are cases where the homeland governments changed conditions of tenure, thereby displacing communities.

POTENTIAL LAND CLAIMS SITUATIONS

- There are cases (for example the Mfengu of the Tsitsikama area) where communities had registered title. The land may have been granted by a Colonial Government or they may have acquired it over time. Such communities were then deprived of their title and removed under legislation such as the Black Administration Act. Sometimes, it can be argued that the legislation was not validly employed at the time, and that the removal and dispossession could have been set aside. Further, the circumstances of the removal were often coercive in nature, as with the Mfengu in 1977. Sometimes, like the Mfengu, they were not compensated for their land and were paid nominal amounts for houses and livestock left behind. In several such situations, white farmers were given generous state assistance in acquiring the land. Land values may also have increased in the interim. Many will feel that such cases cry out for redress in one form or another, including the remedy of the land being returned to the people concerned.

- Some cases may be based on broken promises. In the case of the community at Thornhill in the Border area, it is claimed that resettlement was expressly a temporary measure and that the Government promised alternative land. Again, a clear case might be made for promises to be fulfilled, especially if it can be shown that land is available.

- Some difficult cases relate to labour tenants who have lived on privately owned agricultural land for generations, but who no longer have labour tenant status. In some cases it can be argued that the people concerned have won the right to occupy the land by acquisitive prescription (which normally takes 30 years). This position is often difficult to sustain because the lands were occupied by tenants, and the ownership of the private owners was not in doubt. In such cases, is it fair to take the view that their occupation will become unlawful upon the owner withdrawing his permission for occupation?

- There may be cases where removals were effected, however unfairly, for reasons unrelated to racial segregation. For example regional planning or legitimate projects such as the construction of irrigation dams could have given rise to resettlement. Nevertheless, the people may have suffered undue hardship. Is this the kind of case that one might draw into the ambit of land claims, and if so, what is the appropriate form of compensation?

- Entire townships or residential settlements may have been moved. In such cases the original land may have been entirely redeveloped and it may now be in the hands of private owners of residential stands. It is difficult in cases such as these to measure the hardship originally suffered by the removed communities against the potential hardship to be suffered by current owners who were not a party to the original removal.

- Where racial segregation was implemented in urban areas under the Group Areas Act, the owners of businesses were often moved. Some may not have recovered from the setback. Others may have received adequate compensation or alternative land, and some may have managed to prosper in new environments. In cases such as these, is it possible to untangle the threads of history?

As pointed out above, the historical relationship of people to the land is not necessarily the only measure of the strength of a claim. The claimants may be victims of forced removals and therefore their claim is related to particular, identifiable land. People may, however, have been deprived of or precluded from acquiring land historically, without being able to show a relationship with a particular piece of land. Others are still on particular pieces of land with which they have a long association but where they are without legal protection against the rights of the owner, such as a farmer.

Bearing in mind that the issue of land claims is as much about the future legitimacy of title and future survival of communities as it is about history, any evaluation of claims cannot merely rest on a classification of historical relationships to land. The current productive potential of the land, the current investment in the land, the current use of the land, the need of the communities concerned for land, and other factors must be relevant also.

KEY CONCEPTS AND TERMINOLOGY

To promote constructive debate around the land court issue, it is necessary to be clear on concepts and terminology. The comments in this section are not intended to be prescriptive in any way but will hopefully serve as a starting point. More useful distinctions and descriptions may well emerge in further discussion and debate.

Reparation and Restitution

At a fundamental level, it is important to distinguish "reparations" in respect of the removal of people from land and the "restitution" of land to such people. Interpreted narrowly, the concept of "restitution" seems to be the more restricted of the two, for example:

- The remedy is the granting of land, rather than something else of economic value, such as money;
- It must literally be the same land of which people were originally dispossessed;
- The individuals or the community dispossessed must be the claimant or must still exist as a cohesive group;
- The land must be given back by the agency that originally took it *i.e.*, the state must still be the owner of the land (or be able to re-acquire it) in order to give it back.

By contrast, the concept of "reparation" does not *necessarily* imply any of these restrictions:

- The remedy is not limited to the restitution of the same land — it seems appropriate to speak of "reparations" or "redress" in cases where remedies take the form of involvement in rural development programmes, sharing the use of land, the payment of money *etc*;
- The wrong or disadvantage deserving reparation could also have been suffered indirectly, for example, by the descendants of those originally dispossessed or by individual members of a community which no longer exists;
- Similarly, the call for reparations is not dependent upon the question as to whether or not the original wrongdoer (*e.g.* the state) still has the land in order to give it back.
- The concept of reparations is not confined to dealing with claims based solely on history — it can also denote a process that takes cognizance of current interests.

It can be argued that the emphasis of reparation lies in dealing with past wrongs, whilst 'affirmative action' seeks to level the playing field in terms of the ability of disadvantaged people to compete in social and economic processes related to the acquisition and use of land.

DO WE MEAN WHAT WE SAY?

- When we speak of "reparations" rather than "restitution" in relation to land, do we intend to make some distinction? Is the one good enough and the other not?
- Do we view "reparations" or "land claims" as instances of "justice"? Are we talking about the recognition of moral and other claims to land as a valid route to ownership, which may in some cases be stronger than the technical registration of land in someone's name?
- Is there a difference between "reparations" or "granting land claims" on the one hand, and "affirmative action" on the other? Do we need both?

The Limits of Judicial Innovation and the Limits of Politics

Judicial Limits

There is no relevant common law to guide a court in the formulation of equitable rules relating to land claims. For justice to be done, however, it is vital that such rules are created and applied even-handedly to all cases by a land claims court. It is unrealistic to expect even the wisest of judges to formulate the rules of the game from a 'clean slate' position.

A court that is required to formulate the substantive rules to be applied in land claims cases is likely to find itself politically compromised and it may become a highly controversial institution under pressure to represent a range of incompatible points of departure.

Hence, it is suggested that the substantive rules to be applied in land claims cases should be formulated politically. It is of the utmost importance that a legitimate political process involving all major interests leads to the adoption of legislation spelling out the procedures and broad guidelines dealing with the substance of the adjudication of land claims.

Political Limits

But there will be limits to politics as well. In the past, legislators were not compelled to consider higher, general principles. If South Africa acquires a bill of rights, the powers of politicians will cease to be unfettered. Where the political process leads to contraventions of the principles embodied in a justiciable bill of rights, the efforts of politicians may be set aside by a constitutional court as being incompatible with the content of a bill of rights.

The challenge is for the stakeholders in the land debate, to initiate a legitimate political process and to ensure that the measures discussed will live comfortably with an appropriate and widely accepted bill of rights.

Based on the above, the concept of restitution may be an instance of reparations but not *vice versa*. Reparation seems to allow many more options, and is more appropriate to the complexity of the land issue. Against this background, it seems more useful to define the debate as one about reparations or redress, rather than restitution.

Reparation and Justice

A second distinction that might be useful relates to the relationship between "reparation" and "justice". It is not uncommon to view reparation (or restitution) as an issue of justice. Some define "justice" narrowly and argue that redress for wrongs done can only take place between the wrongdoer and his/her victim. This has implications in terms of the philosophy of individual fault: where the original victim, in the legal sense, is no longer available to be before the court or where the current owner is not the wrongdoer, any decision about the land has nothing to do with justice.

Others view justice in its broader sense. They would argue that the truth recognized by the terms "reparations", "restitution", and "redress of wrongs" is that one section of the body politic abused its power *vis-a-vis* another, and that the latter is now seeking reparations in a general political rather than on an individual fault basis. However, the issue is still one of justice since reparations should not be as arbitrary as apartheid was.

The issue of land claims should be resolved through a politically inclusive process aimed at providing a set of legal rules specifying the rights of all concerned.

A further perspective on the issue of justice relates to balancing the interests of land claimants, owners, and investors. A key question is whether land or compensation will be granted through political largesse, or as a matter of right. If it is a right, then reparations or redress become an issue of justice. Where other interests are involved, however, it is not a case of implementing justice for specific historical wrongs but rather of doing justice now, in respect of all concerned.

Reparation and Targeted Development

A third useful distinction is that between "reparation" and targeted land reform and development (sometimes referred to as "affirmative action" — a complex term deserving clear definition in its own right). There is clear overlap but it can be argued that the emphasis of reparation lies in dealing with past wrongs, whilst 'affirmative action' seeks to level the playing field in terms of the ability of disadvantaged people to compete in social and economic processes related to the acquisition and use of land.

In the context of a broader policy of land reform and rural/urban development, reparations and 'affirmative action' are complementary and interlinked strategies. The distinction is made to illustrate that one does not necessarily substitute for the other.

THE CONTEXT OF A LAND CLAIMS COURT

Despite the enormous complexity of the issue, South Africa faces the critical challenge of dealing fairly with established land interests and potential claims. If the challenge is accepted, the issue is one of devising structures and strategies that are capable of doing justice to some without doing injustice to others.

Land claims are not based primarily on positive law. Rather, they are rooted in some sense of inherent human rights. The nature of human rights in relation to land is contested but it must be acknowledged that the human rights debate is central to the land claims court issue. This means that the land court discussion should not take place in isolation from the process leading to the introduction of a bill of rights for South Africa. Against this background, the following propositions are offered:

A future bill of rights should ensure that redress will not be necessary again.

- Redress, in the sense of undoing a past wrong and creating future, legitimate rights, should be clearly separated from the process of ongoing targeted development or 'affirmative action'. Support for either or both should be unambiguous, as should any view arguing that one or the other is sufficient.

- The land claims court idea should not be employed in respect of 'affirmative action', but should be confined only to the issue of redress.

- The introduction of a land claims court into the reparations debate should not mask the fact that the issue is not automatically one of justice. That is at issue only if the land claims court becomes a way of adjudicating rights promised by a legitimate political process.

- The definition of reparations should therefore be formulated politically, *i.e.* should be set out in legislation which is the result of a political process, rather than being left to the courts.

- Under a bill of rights, there would be a limit to what legislation can say and therefore a potential limit to the outcome of such a political process.

- The political process of formulating definitions for reparation must be informed by the limits of such a process, *i.e.* the nature of property, equality, and affirmative action clauses in a future bill of rights.

- The proper role of the courts in relation to the definitions is limited to enquiring into the validity or otherwise of the legislation by reference to the bill of rights.

- The specialist role of a land claims court is to apply *due process* in respect of reparation, once such reparation has been substantively and (by reference to a bill of rights) validly defined.

- A future bill of rights should ensure that redress will not be necessary again. The means employed to effect redress, if indeed it is to be made, cannot be commensurate with the means employed to commit the wrong in the first place. This would simply create new injustices.

So described, the issue of land claims should be resolved through a politically inclusive process aimed at providing a set of legal rules specifying the rights of all concerned in a systematic, coherent manner free from the interference of political power. In this context, a land claims court would have to be given rules of substance to apply even handedly in all cases: an institutional structure that is effective and legitimate; new procedural rules recognizing the *locus standi* of groups to bring land claims and a reasonable State resource framework within which to give binding orders with financial implications without committing the State to open-ended expenditure.

GETTING THE PROCESS RIGHT

A process of broad consultation and consensus in the formulation of new land claims legislation is of the utmost importance. A legitimate political process will lead to new legislation which lays a sound and viable base for dealing with land claims. The legislation should represent a definitive and broad-based solution. Only under these circumstances can a land claims court function effectively.

A process of broad consultation and consensus in the formulation of new land claims legislation is of the utmost importance.

It is premature to define the nature and content of new legislation but debate around this issue should not be delayed. To contribute to the process *illustrative* guidelines are offered below concerning:

- The manner in which new legislation could seek to deal with difficult issues relating to the substance of potential claims;

Key Questions about the Substance of Land Claims

How far Back?

How far does one go back into history? It is not as simple as choosing a cut-off date, such as 1948 or 1913. Is the conclusion that land injustice happened primarily under official apartheid policy? If so, then what about people who lost their land prior to the policy becoming official, or as a result of other factors?

Who can bring a Claim?

Who should be entitled to bring land claims? Must it only be persons who have a direct interest in the matter? Would we allow class actions to be fought by representative or service organizations? Can land claims be justified if there is no one left with a direct interest? What about the descendants of the communities who were originally wronged? How much support must there be for the action within a surviving community before they can make a claim? What if a section of the community is not interested in the claim?

Access for the Poor

It is easy to talk about a judicial process for land claims, but likely claimants will be among the poorest in society. A judicial process introduced into the land claims context will have to be accessible.

What are the Limits to Claims?

Will we weigh hardship suffered in the past against the hardship implied by available remedies? Do we deal only with forced removal cases or also with broken promises? Are we trying to remedy the spatial and segregation effects of apartheid while dealing with land claims? Is apartheid the only salient factor?

What are the Limits to Remedies?

Can we live with a situation where limited government resources in the future will render land claims awards ineffective, notwithstanding the merits of the case which were carefully considered by for example a land claims court?

- The procedural and institutional support structure for a land claims court; and
- The possible remedies that a land claims court may grant in the context of state budgets and expenditure.

The Substance of Land Claims

New legislation must define the criteria according to which land claims could be brought before a land claims court. The nature and scope of such criteria will of course depend on political and development priorities. For example, it might be seen to be politically expedient to ensure the speedy processing of certain cases. However, facilitating the passage of a limited body of claims has associated political risks emanating from those excluded from the process.

Difficult issues are raised by the fact that a land claims court would be called upon to make decisions about current private ownership, where the state or some other government body is not or no longer the owner of the land in question.

Two illustrative examples of land claims 'tests' are described below:

First example: a three level test

There could be three levels of qualification through which the potentially infinite range of land claims are passed:

- First, the range of land claims is narrowed down to reparation for racially motivated land dispossession.
- Second, the claims passing the first test are assigned weights according to a classification of the nature of the claim.
- Third, the weight assigned to the land claim is measured against factors relating to the current situation, possibly categorized and weighted in the legislation by reference to economic efficiency, potential hardship *etc.*

The first level qualification

If the principle is that there must be reparation for removals and land loss motivated by the policy of racial separation, the range of potential claims could be limited by

screening out all cases not arising from apartheid policy. The policy could be accurately described by reference to specific legal instruments such as the Group Areas Act, the Land Act the Black Administration Act, and other laws. Such a test could be legally precise and would be capable of dealing with the perceived problem of infinite historical regression. It would also focus the process upon issues of justice and human rights.

The second level test according to the nature of the claim

Several distinctions are possible here, each of which might have a bearing on the prioritization of the claim, or on the nature of the solution. Those listed below are simply examples.

A primary distinction might be that between legal cases and moral cases. Legal cases would be where the racial removals were not lawfully done under the laws as they stood at the time. These cases might be given a stronger weight in the claims procedure than moral cases, where lawful actions were taken at the time. This is of course a contentious suggestion; if the relevant legislation was wrong in the first place, is it fair to assign different weights?

Moral cases can, in turn, be divided into moral claims to the land and moral claims based on consequential hardship. Moral claims to the land can be limited to instances where, but for racial restrictions, the persons concerned would have been able to acquire ownership in respect of the land from which they were removed (*e.g.* they would have acquired the land through prescription had they been white, or their land rights would have been registered, had they not been black).

Moral claims based on consequential hardship could rest upon the adequacy of compensation and the remoteness of damage. Where the law at the time did not provide compensation, or where the compensation provided for or given was not adequate, such compensation should/could now be claimed. The hardship or damage may also be measured in terms of the directness of its relationship to, for example, a removal.

The third level test: considering the current situation

Finally, the weight of a land claim might be measured against the feasibility of redress, given national priorities in general and the current use and status of the land. What is the current land policy? To what extent has the land been developed? Is there alternative land available? Is an award of money an appropriate remedy? There will be clear cases but there will be many where it will be difficult to weigh a claim against the hardship brought about by its implementation.

The formulation of an appropriate test at this level will be difficult but new legislation must state in detail how the tests must be done by the adjudicator, whether a court or not. The judiciary qualifies to weigh things in this manner but land claims are a particularly complex and sensitive terrain.

Unfair Removal: The Offending Laws

The following legislation may have been used to remove black people from land "unfairly":

- Transvaal — Law 21 of 1895
- Natal — Ordinance 2 of 1855
- Orange Free State Squatter's Law
- Cape — Vagrancy and Squatting Act of 1879
- Black Administration Act 38 of 1927
- Development Trust and Land Act 18 of 1936
- War Measure No 31 of 1944
- Black (Urban Areas) Consolidation Act 25 of 1945
- Group Areas Act 77 of 1950
- Blacks Resettlement Act 19 of 1954
- Group Areas Act 36 of 1966
- Black Communities Development Act 4 of 1984

Less overtly racial laws may also have led to "unfair" removal; e.g. the Prevention of Illegal Squatting Act 52 of 1951.

Second example: An "Unfair Removal" test

The first level qualification described above is not without flaws: the list of apartheid laws under which removals were effected is at risk of omitting other laws that were historically used to this end; removals may not have been carried out under any specific statute; some removals were done by agencies other than the State; and some in terms of laws which had no overt racial objective (for example squatting laws).

New legislation must define the criteria according to which land claims could be brought before a land claims court.

The simple "first level qualification" described in the first example could be replaced by a flexible test, such as a test for an "unfair removal". Such a test might have two dimensions:

- Removals done under specified sections of specific statutes are regarded as unfair *per se*; and

- Where it cannot be shown that a proven removal was done under any of the defined provisions, the state could be asked to meet a *prima facie* case of an unfair removal. In other words, the removing agency could be required to sh[redacted] that the removal was not done in the service of racial segregation.

Difficult issues are raised by the fact that a land claims court would be called upon to make decisions about current private ownership, where the state or some other government body is not or no longer the owner of the land in question. In cases involving land in private ownership, the Land claims court would act as an organ of the state making a decision about whether or not to take away current ownership. Obviously the current owner would have a direct interest in this decision and should be allowed to be a party to the court proceedings.

The weight of a land claim might be measured against the feasibility of redress, given national priorities in general and the current use and status of the land.

If there is to be a property clause in a future bill of rights, it will protect all kinds of ownership, including current ownership of the land in dispute. In the context of such a property clause, any decision to disturb existing ownership carries with it the implication that market-based compensation would have to be paid by the state, for example as part of an expropriation. Issues relating to costs are examined later.

Institutional Framework for a Land Claims Court

Two complementary institutions might be established: a *standing commission on land claims* and a *land claims court*.

Standing commission on land claims

The Commission could enquire into removals and resettlements and do research on land claims (for example to assess whether they qualify in terms of the criteria laid out in legislation). It could also serve the critical function of allowing the poor access to the land claims mechanism. Since the proposed Commission is an investigative body it should be representative of interested parties and could, for example, be made up of:

- An Appeal or Supreme Court Judge as chairperson;
- Representatives of development organizations and organizations working with communities;
- Lay people drawn from affected communities (as long as they do not have a personal interest in a claim being considered);

WHAT SHOULD AN OWNER DO?

An owner of land may be faced with a land claim. He should be entitled to put his case during the investigation into the matter before a standing commission on land claims, as suggested below.

Thereafter, he should be entitled to take the recommendations of the investigation to the land claims court if he is dissatisfied with the outcome. If he disagrees with the land commission, he will in fact join issue with the commission itself in the proceedings before the court. So may others, such as the state, neighbours or other interested parties. If there is an institutional framework created for dealing with land claims, it should serve also as an important incentive for land owners and potential claimants to settle the issue without recourse to land claims proceedures. New legislation should set out the circumstances in which land claims may be brought and considered and the criteria by which they will be granted or declined. This will provide guidance to owners who are vulnerable to land claims, and who might seek to reach a voluntary accommodation with potential claimants. Owners who have been successful in achieving this should have the opportunity of acquiring legal certainty through a confirmatory order issued by the commission or the land claims court. In this manner certainty can be reached in potential cases of dispute, and agreements made an order of court. Provided that such an order is adhered to, it would not be possible for the issue to be reopened.

A Standing Commission on Land Claims as a Resource for the Poor

The majority of land claims applicants are likely to have limited access to legal and other resources. The suggested standing commission on land claims should constitute such a resource. Individuals or a community should be entitled to lodge their claim with the land commission and to require it to employ its own resources in investigating the merits of the matter. Consideration could also be given to providing communities with independent counsel at state expense, if other parties before the Commission are also represented.

If, at the end of its investigation, the commission makes unfavourable recommendations in respect of the land claim, the right of the claimants to take the matter on review to the land claims court should be given substance. If a claimant is opposing the commission before the court, consideration should be given to legal or other representation being provided at State expense, if there is no alternative.

Conversely, if the commission makes a favourable finding, and publishes such findings, there may be other interested parties who wish to take the commission on review to the court. In such cases, it would be appropriate for the standing commission to put the claimants' case, in the sense of being their representative before the court. In this way, the resources of the commission can be used to the best advantage of the poor.

It can also be argued that the proceedings of the land claims court should not be adversarial. The land claims court could rather follow an interrogatory procedure aimed at seeking solutions, rather than merely adjudicating the cases put before it. Such an interrogatory process would go some way towards ameliorating the disadvantaged position of parties who have to put their cases without legal or other assistance.

- A representatitive of property owners:
- A government representative; and
- Knowledgeable experts in land and rural development matters, representing different perspectives.

The standing commission would probably require a permanent secretariat to:

- Initiate research:
- Advise the standing commission on the acceptability of claims;
- Advise and assist claimants in the preparation and completion of their claims;
- Offer financial and legal as well as research assistance to claimants.

In addition to the above mentioned functions, the standing commission on land claims could

- Consider land claims:
- Publish its findings on particular claims;
- Advise the land claims court as to the applicability of a series of tests to the claims and the *locus standi* of claimants;
- Have powers of investigation into government documents;
- Have the same powers as a statutory commission of inquiry:
- Recommend suitable awards.

Land Claims Court

A court to consider land claims might, for example, consist of:

- An Appeal Court judge (chairperson);
- Two other Appeal Court judges:
- Three assessors, not necessarily lawyers, chosen through appropriate and acceptable mechanisms.

The land claims court should be independent and function as a court of law (on the basis of legislation providing it with the substantive framework within which to adjudicate claims). It could be given the power to:

- Entertain all claims referred to it by the standing commission on land claims;
- Consider all other representations;
- Afford claimants the opportunity to state their case;

Possible Steps for Processing a Land Claim

1. A community asks the standing commission on land claims to investigate its claim.
2. The commission researches the matter and identifies other interested parties.
3. The commission hears evidence from interested parties including the community and provides legal and socio-economic research to be done by its staff or by consultants.
4. The commission on land claims publishes a written report and recommendations. If there are no objections to the published recommendations the report is handed to the land claims court for confirmation.
5. If there is no dispute, the land claims court confirms the recommendations of the commission.
6. If there is a dispute, the matter is referred to the land claims court for review.
7. The court will not necessarily have two parties facing each other in an adversarial dispute, but may have a number of different interests represented before it, with a range of different issues they wish to be taken on review. The court should therefore hear such additional evidence as may be required in order to amplify the standing commission's report, and then make a binding order.
8. An appeal against the decision of the land claims court may be made to the Appellate Division of the Supreme Court. Such an appeal would be limited to points of law only.

While a claim is being processed there are opportunities for the interested parties to reach an accommodation with each other. For example, an owner may take the initiative to preempt a land claim by seeking an agreement with the potential claimants. Even after the claim has been brought, the parties may be able to work out a solution before the standing commission or the land claims court.

- Hear evidence;
- Award compensation or make an appropriate order; and
- Order the standing commission on land claims to enquire into and report on any land claim.

Claims could be made or initiated before the land claims court by any or all of:

- Affected persons or communities or their descendants;
- Any third party without a direct interest;
- The standing commission on land claims;
- The land claims court itself.

All proceedings of the standing commission on land claims could be reviewable by the land claims court. If deemed necessary, any matter may be referred back to the standing commission on land claims for further research and advice.

Proceedings relating to land evictions before the ordinary courts of the land should be stayed while the same issue serves before the standing commission on land claims or the land claims court. A decision by the land claims court should also preclude further proceedings before the ordinary courts.

Decisions of the land claims court could be subject to appeal to the Appellate Division of the South African Supreme Court. In the light of the proposed high status of the members of the land claims court and the need to obtain certainty as soon as possible, it may be justifiable to limit the scope of such an appeal. For example, it may not be appropriate for a full hearing to take place again. Appeals may be limited to points of law only.

In the debate about a land claims court, various methods must be investigated concerning the manner in which the state can be protected against open-ended expenditure.

Remedies and state expenditure

The land claims court could be given the power to grant a number of executable awards, for example:

- The payment by the state or any party of monetary compensation;
- The restoration of ownership and/or limited rights of use and occupation;
- The transfer of property, with or without payment of compensation;

Is a Land Court Affordable?

A land court approach to land reparations raises the critical questions of judicial capacity and costs. In principle the process

- must not be swamped by the volume of business; and
- must be congruent with political decisions regarding the allocation of resources to land reparation.

It is difficult to quantify the likely costs of the proposed standing commission and land claims court. Judicial mechanisms of this nature are notoriously time consuming and expensive in themselves, apart from the cost of giving effect to awards.

Issues that Influence Costs

Several fundamental questions underpin the cost issue:

- Does the moral or human right principle of recognizing past injustices take precedence over all else, whatever the cost?
- Will we protect private ownership in a bill of rights? If so, then the costs of awarding land claims will include compensation for current land owners. Where would expenditure on land claims rank in a list of State responsibilities?
- If it is decided that resources are simply too limited to guarantee compensation do we simply award land claims by ignoring the "rights" of those who are owners, or who have other vested interests in land? Such action would clearly also carry enormous costs, although they may not be directly measurable in money or resources.

How Limited are the Resources?

It is not necessarily correct to assume that there is a limited pool of money and that the State will be the main party incurring costs:.

- Costs may be borne or shared by others through awards amounting to the sharing of land between owners and occupiers; the imposition of land tax; the issuing of Government stock. The last two have untested macro-economic implications.
- The standing commission on land claims could also screen out potential court cases, by finding acceptable compromise solutions. Where court proceedings are necessary, the work of the Commission will hopefully have served to limit the issues in dispute.
- A land claims process should not exist in isolation from urban and rural development programmes. Such programmes may serve to reduce the volume of land claims. Access to development programmes might also be awarded in respect of some land claims.

Getting the Numbers Right

The cost issue requires very serious and detailed attention, because it has the potential to shape the ultimate reparation mechanism. Tough resource realities may force a reassessment of the land court model, and of the nature of awards. Under different scenarios the court may have a central or a "last resort" role, and awards may vary from full reparation to compromise solutions.

- The determination of administrative and cadastral boundaries, the zoning and permitted usage of property affected by an order of the court;
- The granting of preferential status to claimants in terms of development programmes run by the State;
- The issuing of annuities or government bonds;
- Imposing land taxes to finance rehabilitation of communities;
- An award amounting to the sharing of land.

Remedies such as those listed above do, of course, have potentially enormous macro-economic and financial implications. In the debate about a land claims court, various methods must be investigated concerning the manner in which the state can be protected against open-ended expenditure. Details are not considered here, but some implications should be noted:

On what basis will land reparation be balanced against other demands on national resources?

- Remedies might be made subject to the appropriation of the necessary funds in the next national budget. If it is felt that the Parliament must judge the overall affordability of reparations, it could retrospectively appropriate the necessary funds (or a percentage thereof), to be employed in meeting the awards of the land claims court during the preceding year. For example, claims might be allocated in the light of the overall percentage of the required reparation budget appropriated by the Government. It has been pointed out, however, that the limiting of awards amounts to bad faith and is inconsistent with awarding claims as a matter of right.
- Further limitations on expenditure could be made by allowing for, say, a five-year period during which all claims must be lodged and a further five-year period during which all claims must have been finally adjudicated. Limitations could also be set by restricting the jurisdiction of a land claims court in other ways, for instance by reference to the types of claims it can entertain.

Bearing in mind that the issue of land claims is as much about the future legitimacy of title and future survival of communities as it is about history, any evaluation of claims cannot merely rest on a classication of historical relationships to land.

CONCLUSION

The national debate on a land court should not take place in isolation. The establishment of such a court will have diverse implications for development and democracy in South Africa, and these must be clearly understood. In this edition of UF*research* we have not sought to explore contextual issues in detail but the following themes require further attention:

- The national economic, political, and development objectives underpinning a land court initiative. On what basis will land reparation be balanced against other demands on national resources? What is the policy basis for land claims prioritization? There are several politically sensitive choices to be made here: will the victims of forced removals be first in line, or rural people, or will the uncomplicated (and inexpensive) claims be processed first? What are the implications, for example, of favouring rural claims over those of urban Group Areas relocatees?
- A bill of rights and the future constitution. Which clauses in the draft bill of rights curently being debated will help or hinder a land claims court? Similarly, how will a new constitution impact upon the operation of a land claims court? Which bodies, for example, will have jurisdiction over state land? Will land affairs fall under the jurisdiction of central government, or regions? If the latter, how will a land claims court function – nationally or regionally?
- The role of the land court in urban and rural development. Land reparation can be seen as a contribution to development (for example, through the legitimization of title and the broadening of the land economy), and development initiatives in urban and rural areas can provide alternative sources of reparation. These interactions have implications for the way we think about land reform, rural and urban development, and the institutions managing these.
- A land claims court and democracy. There is some evidence of community support for the land claims court idea, and some major stakeholders have offered models and expressed their views. However we have yet to carefully

consider the conditions under which a land claims court initiative might undermine or build democracy. Will all claimants have access to the mechanism, even if proceedings are complex and costly? Will the court be able to retain legitimacy when it cannot deliver on all claims, or where its actions can be characterized as the victimization of certain groups of landowners?

The important point is that the issue of a land claims court should not be ignored. Open public debate is essential.

The Urban Foundation sees land claims court as one possible mechanism to deal with a history of injustice. There may be variations on the suggestions outlined here or even alternative institutions. The important point is that this issue should not be ignored. Open public debate is an essential precondition for a sound political decision that will lay the basis for effective rural and urban development in the future.

The Urban Foundation's research on a land claims court is presented to stimulate a wide public debate, not to end it. As a further contribution to debate on the land issue, the Foundation has conducted research into the international experience. Two forthcoming reports in the UF Research series will deal with the German experience of land claims, and the land reform track records of post-colonial Kenya, Zimbabwe and Namibia. A further UF Research will review the international experience of land invasions.

QUESTIONS AND ANSWERS ON A LAND CLAIMS COURT

Question:

Why debate a land claims court? Surely an affirmative action policy, supported by a future bill of rights, is the appropriate method to redress discrimination with reference to land?

Answer:

There are two issues here. Firstly, so called affirmative action is not primarily about undoing past wrongs, but seeks to give everyone a fair opportunity of competing in society and the economy, now and in the future. A land claims court would deal with the issue of reparations for wrongs done in the past.

Secondly, it is difficult to judge whether affirmative action is sufficient without a full debate including all interests. It is clear, however, that the issue of past wrongs in relation to land will not disappear without having being properly aired, as has been illustrated in Zimbabwe.

Question:

Put like this, what is the difference between "reparations" and "revenge"?

Answer:

Many of those calling for reparation view it constructively as a means to ensure the future legitimacy of title for all, and as a way to address current land-related needs. The juxtaposition of "revenge" and "economic sanity" is unfortunate. It clashes with a view of a future society in which laws are made within the confines of a bill of rights which promises equal justice to all.

It is critical that the reparation process (if needed) is not arbitrary or dependent upon political allegiance or race. A land claims court, sitting independently as a court of justice, is a mechanism to ensure that the process of reparations is not used as or perceived to be political revenge.

Question:

But what will the rules be? The courts cannot be expected to make new laws.

Answer:

A land claims court would fail to fulfil its role of doing justice to some without doing injustice to others if it were to formulate tests on the basis of which land claims will succeed or not. The courts must be given legislation to be applied in all cases. Such legislation could define the ambit of qualifying claims, set out the remedies, and protect the State against open-ended expenditure. New legislation must be the outcome of a legitimate political process.

Question:

How can we be certain that new laws will not have socially and economically disastrous consequences, even if they are the result of a legitimate process?

Answer:

This is a valid concern, if one assumes a legislature that can make any law under the sun. Parliament had such unbridled powers when it made apartheid laws. If Parliament's role remains unfettered, there is no guarantee that future laws made will not also be unjust. This is why the land claims court and land reparations debate should be linked to that concerning a future bill of rights for South Africa. The property, affirmative action, equality and equal justice clauses of the bill of rights will define the limits of laws about reparation.

Question:

Does this mean that we must wait for a new Constitution and a bill of rights before we start addressing the reparations issue?

Answer:

No. The fact that the issue of reparations relates to fundamental constitutional questions in our society does not preclude the possibility of feasible solutions, hammered out in inclusive and constructive debate. This process should begin now.

Question:

Assuming there should be a land claims court, is it possible to unravel our history? The issue is complicated by conflicting claims to land. How far does one go back?

Answer:

Legislation will have to place some limits on the potentially vast range of land claims. Technically, it is possible to do so, but the nature of these limits lies at the heart of the debate we should be having.

Question:

Even if technically possible, you cannot expect current land owners (many of whom were not party to removals) to meekly give up their land, even if a court is involved. There is so much conflict already, why not close the book on history and look to the future?

Answer:

Land is as emotional an issue for likely land claims applicants as it is for owners. Conflict and lingering unhappiness will not be removed by failing to tackle the land question. A legitimate and inclusive political process, however, must produce the necessary rules.

Question:

In South Africa there are divergent views of ownership. One could ask two questions from opposite points of view: On the one hand, what is the value of land ownership if it can be overturned on "moral" grounds? Alternatively, why should title deeds be sanctified now, when they were not sacred historically?

Answer:

There is one answer to both questions. It is not the nature of ownership that is at issue. It is neither necessary to strengthen the notion of individual ownership to resist all moral claims, nor is it necessary to abandon the notion of individual ownership. The real question is who should be the owners? Once there has been redress, such ownership should also be worthy of protection.

Question:

Assuming the State will bear the cost of reparation, will scarce state resources needed for rural and urban land development not be diverted into expensive court procedures, unproductive land acquisitions and compensation?

Answer:

This is an important question. Four points can be made. First, Parliament should devise ways to control the amount spent on reparation. Second, land claims awards might take the form of participation in existing settlement schemes or preferential access to development projects. Third, agreed criteria for land claims would reduce the potential number, and hence the cost. Finally, more work must be done on alternative awards which spread the costs of land claims.

Dealing with land claims is part of a broader development process. Past injustice must be tackled in a way that promotes future development.

A future bill of rights should ensure that redress will not be necessary again. The means employed to effect redress cannot be commensurate with the means employed to commit the wrong in the first place. This would simply create new injustices.

The Urban Foundation sees a land claims court as one possible mechanism to deal with a history of injustice. There may be variations on the suggestions made or even alternative institutions. This research is presented to stimulate a wide public debate, not to end it.

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