A LAND CLAIMS COURT FOR SOUTH AFRICA:

Report on Work in Progress

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INTRODUCTION

Over the past several months, a group of individuals from academic, legal and field work organisations around South Africa has been discussing the idea of a land claims court. The group came together in response to growing interest in the idea of a land claims court. The notion of establishing some land claims process was originally raised a few years ago as a way of giving legal recognition to the claims that black people had to land, which claims, by definition, have had to be outside the legal system. However, field work showed that, despite the fact that such claims could not be based in documents such as title deeds or lease agreements, they repeatedly referred to certain basic principles and values. These principles, including length of occupation, birthright and secure tenure preserved through due process and contractual obligations, were often closely related to established legal concepts, but were themselves trumped and restricted by apartheid land law. It was in this context that the concept was developed of a court which would give recognition to the terms of claims by black people. The court would apply non-racial criteria to determine the strength of the various claims to land, and, when appropriate, award restitution of land to people who had been forcibly removed as a result of apartheid policies.

When the government decided last year to abolish the racial land laws but not to take steps to redress the effects that those laws had had, new impetus was given to the idea of creating a land claims court. In that context, the group decided to investigate whether such a court would be feasible, and if so, what form it should take.

The purpose of this paper is to share some of the ideas that have come out of this group's work on the proposal for a land claims court and begins by explaining the model that the group has devised for handling land

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claims. It then discusses what the group believes some of the broader implications of establishing such a court might be. It is important to stress, however, that the work of this group is still very much in progress. The ideas presented here are intended to encourage debate around the issue of a land claims court, and not to outline a program of action for the establishment of the court.

LAND CLAIMS COURT MODEL

To explain the structure of the land claims court as the group has conceived it, I will describe, in roughly chronological order, the steps through which a land claim would be likely to go.

The land claims process would be initiated by people or groups who believe that they have a claim which should be heard before a land claims court. The party would go first to a land claims commission, a body separate from but closely linked to the court. The commission would make a preliminary review of the claim to determine whether it fell broadly within the parameters established for the land claims process — in other words, whether the party had standing to bring the claim.

To make the determination of standing, the commission would look at the claim to see if it met certain entry criteria. In the case of claimants who were asserting they had been forcibly removed, the commission would ask first whether the claimants had occupied the land they were claiming for a substantial period of time before they were removed. Second, the commission would determine whether they had been forcibly removed or ejected as a result of apartheid laws or policies. This would include not only removals carried out under explicit apartheid laws, but also evictions of people who were vulnerable because by law they could not obtain title. Finally, the commission would determine whether the claimant had suffered a loss as a result of the removal or eviction, or if instead there had been full, effective and appropriate compensation provided.

Claimants who had not been removed but who were trying to obtain secure tenure to their land could also have standing in certain situations. First, the commission would have to find that the claimants were currently on land that they had occupied for a substantial period of time but in which they did not have secure tenure. Second, the person or body that owned the land would have to be opposing the claimant's desire for an upgrade of tenure.

If, after going through this process, the commission found that a claimant did not have standing, the claimant would be allowed to appeal that decision immediately to the land claims court. Only when the court itself determined that a person's claim did not fall within the parameters of the land claims process would that claim be excluded. When the commission or court found that a claimant did have standing, the commission would take immediate steps to ensure that the condition of

the land being claimed was not dramatically altered as a result of being under claim.

Research by Roger Plant (as yet unpublished) into land reform programmes in Africa, Asia and Latin America has shown that one of the biggest threats to land claims programmes is unilateral action taken by farmers when their land comes under claim. To prevent the present possessors of land from selling the land, destroying or removing property, or evicting tenants on the land, the commission would need to take an immediate inventory of the conditions of the land. The more difficult question is what to do about pre-emptory actions taken by present possessors before a claim is lodged against their land, and the group is currently looking into legal precedents that might allow such actions to be reversed.

Once the property under question has been secured, the commission would attempt to notify all people who potentially could have a claim to that piece of land. Rigorous and comprehensive notice procedures would be essential. Since, in the interest of finality, all claims to a specific piece of land would have to be heard at the same time and no claims would be heard after a ruling is made, all potential claimants must be notified as soon as possible so that their claim is not lost. Effective notification procedures would also be important when dealing with group claims so that the commission and court could be certain that the parties they are dealing with are the bona fide representatives of the group's interests.

The commission would then begin to examine the claims that the parties had to the land. The commission staff would assist the parties in researching their claims, investigating their historical links to the land and the facts surrounding their removal and resettlement. It would also explore various options for resolving the dispute. Throughout this initial process, the commission would encourage the parties to reach a negotiated solution. Various incentives could be built into the process to encourage negotiation; for example, the court would cover any legal costs that either party had incurred if the parties were able to reach an agreement amongst themselves that the court could approve.

After the commission completes its review of the claims, it would prepare a report for the land claims court. The report would summarise the commission's findings and would include its recommendation of how the claim should be settled. On receiving the commission's report, the land claims court itself would take one of several steps. If the parties reach a negotiated settlement, the court could simply review the commission's report on that settlement and, if it is acceptable, issue a judgment ratifying the agreement. If there remains a dispute between the parties, the court could refer the matter to a body of mediators attached to the court for further negotiation. Alternatively, if the commission indicated that the parties had already engaged in a good deal of negotiations, the court could move directly into hearing the claim. If the claim has to be

adjudicated, the parties would present evidence either supplementing or contesting the commission's findings. When the evidence is complete, the court would then decide which party has the strongest claim to the land and what award should be made, if any.

The group has come up with five broad criteria for the court to consider in making its decision on a claim. In drawing up these criteria, the group looked at some of the basic principles underlying Western and African notions of property and attempted to select criteria that embodied values common to both systems. The intention was that by relying on such shared values, the court would be able to make decisions that resonated with both white and black people's conceptions of rights to land.

1 *Time*

One factor the court would consider would be the length of time of physical occupation. This criterion could work in favour of both a black community that had been on the land for generations before being forcibly removed and a white farmer who is currently on land that he or she has been living on for years. Absentee farmers or people who had been only transitory occupants of land would be disadvantaged.

2 *Birthright*

Another, related criterion would be birthright. This criterion would recognise that people who had been born on the land and used it as a permanent residence should be favoured in deciding who should now own the land. Again, this criterion could favour both black claimants and white occupiers.

3 *Investment*

Under the category of investment, broadly defined, a white farmer could introduce evidence concerning the amount of money he or she paid for a farm and the financial resources he or she had invested in the property. A black farmer could introduce similar evidence, or evidence of the physical labour invested in working on the property.

4 *Loss*

Loss could include the financial loss experienced by people who were removed from their land without adequate compensation. It could also include the loss experienced by a community that was given a sufficient amount of money to buy land, but was unable to purchase land because of racial land laws. Or similarly the loss experienced by a community that was given land of similar financial value, but which it could not use

because of the substantial capital investment that was necessary to farm that land. Loss could include the emotional pain and suffering experienced by people who were forcibly removed. And it would also, of course, include the loss that the present possessor of the land would experience if the court decided to award his or her land to the claimant. In determining the significance of the loss, the court would consider the impact that the loss had or would have on the quality of life of the party concerned. In other words, in determining whether to award a white farmer's land to a black community, the court would take into consideration whether this was the farmer's only land or if he or she owned several other farms as well.

5 *Social Benefit*

The final criterion, and the most sweeping of the lot, the group has called social benefit. While the other four criteria are concerned with the rights and experiences of the specific parties before the court, the 'social benefit' category brings into the court's decision-making the interests of the public as a whole. Under this criterion, a white farmer could argue that society would benefit most from his or her continued cultivation of a particularly fertile piece of land. Similarly, a black community could argue that the public's interest would best be served by giving the land to a larger number of people who would then have a place to live and land necessary to provide themselves with sustenance. 'Social benefit' would also be the category under which the environmental effects of the various possible outcomes of the dispute would have to be considered. In other words, all aspects of the decision that go beyond individualised justice and involve questions of policy and public interest would be raised under this category.

What is most notably lacking from this list is *title*, but that does not necessarily mean that title holders will be disadvantaged. The group chose criteria which represent elements of Western as well as African conceptions of property, and thus a title holder will have a claim that sounds in many of these categories. However, it is one of the underlying precepts of a land claims process that in some cases title is not the strongest claim to the land. Where title was obtained through theft, where title holders have neglected their property, where certain people were prohibited from obtaining title because of their race, there may be a claim to the land that is far more valid than legal title. In order to give such claims a chance to prevail, the group believes that, at the decision-making stage, the court must set title to one side and let the two claims compete on an equal footing to determine which is the stronger.

In making its decision, the court would act as a court of equity. It would balance the various factors, not giving priority to any particular one, to determine what award would be the most just and reasonable. This

approach to judicial decision-making obviously leaves the court with a great deal of discretion. However, given the enormous range of claims that will come before the court and the infinite variety of factual situations it may encounter, the group decided that it would be unwise to define in advance precisely how the court would weigh a claim. Nevertheless, the group felt that there must be a commitment, built into the process, to restoring land to people who had been forcibly removed. Challenging title and taking land away from present possessors will be very difficult tasks, and unless there is a firm commitment to restitution of land wherever it is both just and practicable, the court may simply be engaged in a process of confirming the title of present possessors. Therefore, the court must be instructed to keep in mind when analysing the strengths of the various claims to land that its purpose and reason for being are to provide restitution to people removed or evicted as a result of apartheid laws or policies.

The court would have the power to make a broad range of awards to a claim. It could award the contested land, in whole or in part, to any of the claimants. It could award compensation from the state. It could provide funding to purchase neighbouring land from a willing seller if the parties reached a compromise that required the acquisition of such land. And it could provide compensation to people who were dispossessed as a result of an award made by the court. However, the group is still debating whether the court should have the power to order that certain land that is not part of the claim be expropriated to settle that claim.

After the court announces its decision, parties would be entitled to request a review. In cases where the land claims court has exceeded its jurisdiction or has acted with gross unreasonableness, the reviewing court — most likely an appellate division court — would have the power to reverse the court's decision. Expedited review would obviously be essential given the impact that disputed ownership of land will have on investment in that property.

Matters Incidental

Apart from the model or form that a land claims court should take and the procedures to be followed, there are other considerations that require investigation before the introduction of such a court. The group looked at the following issues.

The first is the question of funding. The group anticipates that claimants would have five years in which to file claims, and that the court would exist for at least another five years in order to address all the claims that come before it. Therefore, there will need to be at least ten years of funding to cover both the costs of running the court and the financial compensation that the court will be awarding. The group has discussed several mechanisms to raise the necessary funds, including state

budgeting and various forms of a land tax. However, much work still needs to be done in this area.

Another crucial matter is the question of an historical cut-off point. The government has opposed the creation of a land claims process on the grounds that it would lead to an unbounded process of historical regression and that every piece of land would be the subject of multiple and overlapping claims. The group acknowledges the government's concern about a land claims procedure that would hear claims dating back to the arrival of Jan van Riebeeck but feels that that is not a reason to abandon the land claims process altogether. Rather, it points out the need for some historical cut-off date before which claims of removal and dispossession will not be heard. Several possible dates have been discussed which would relate to the processes of forced removal and dispossession while at the same time placing a manageable limit on the number of claims, and discussions have focused increasingly on 1948 and 1913. The first would symbolise the beginning of the strategy of grand apartheid, the policy that the land claims court process is intended in some small measure to reverse. The year 1913 would be relevant as it was the year in which the Black Land Act was enacted, the act that created the black reserves and made black ownership outside the reserves illegal, and that laid the foundation for the removal and eviction policies which were to follow. Either date would be acceptable from a practical standpoint, as neither date is so distant as to raise insurmountable problems of proof of prior occupation or of overlapping claims to the same piece of property.

Finally, there is the crucial matter of who will sit on the commission and the court and how they will be appointed. The group believes that the commission should be made up of representatives from various interest groups involved in land issues, including people with expertise in environmental issues. They would be appointed by the state and would be people with an active interest in land and with sufficient skills to research and report on the claims that would come before the commission.

The members of the court would also be appointed by the state. The court would be chaired by a Supreme Court judge, as the court needs to have someone of stature who is familiar with legal proceedings. However, who the other members would be and how they would be selected is a matter for further discussion. One possibility would be to have four other members of the court who would have voting power equal to the chair; two of them being selected from a list put together by representatives of land claimants, and two from a list drawn up by groups representing the interests of current possessors. Whether one circuit court or several regional courts would be required is also a matter that requires investigation.

Conclusions

That, then, is the model of a land claims process as the group has conceived it so far. As mentioned in the beginning, the model is put

forward to encourage discussion of a land claims court and not as a blueprint for action. Much more work will be required by this group and by others before these ideas can be put to the land claimants themselves and, later, to the wider political process.

Nevertheless, the group believes that the work that it has done so far points to two important conclusions. First, it has shown that it is possible to design a workable land claims court. Through its work on the subject, the group has been persuaded that the legal and practical obstacles to creating a land claims court can be overcome, and that the result would be a court that would be able to provide relief to some of this country's most urgent and burning land claims. There are still many questions to be answered about how this court would work — some quite specific questions that will require detailed legal research, other much broader questions that can only be answered through the political process. But it appears that with sufficient work and commitment answers can be found to both types of questions.

The second conclusion, however, is more ambiguous. As may have become clear through the preceding discussion of the land claims process, the model that has been developed focuses only on a fairly narrow band in the spectrum of claims to land. It was not the group's intention to create a court with such a narrow focus; in fact, when the group began this process, it attempted to take into account all groups that might have a claim to land. The categories of people considered included rural and urban people who were forcibly removed from their land as a result of apartheid laws and policies; labour tenants — including those who are still on the farms and those who have been recently evicted; landless people whose claims to land are based solely on need and not on any connection to a specific piece of property; people who currently occupy land to which they have no legal title; and people who have an historical claim to land that is based on occupation of the land by predecessors many decades or even centuries ago, in other words claims of original occupation.

In attempting to design a realistic land claims court, however, the group found itself repeatedly forced to limit the types of claims that could be heard before the court. Each step towards making the court more viable resulted in fewer claimants being able to bring claims. To explain how this dynamic worked, it is necessary to examine briefly what happened as the group attempted to fit the claims of various groups into the structure of the land claims court.

The first category of claimants that had to be excluded was those whose claims were based exclusively on need. The group found that the landless or land poor who do not have any claim to a specific piece of land — in other words the vast majority of those claiming land in South Africa — should have their claims heard in a forum other than the land claims court. First, their sheer numbers would soon overwhelm any judicial structure. To give each of the literally millions of claimants a meaningful hearing

would be logistically impossible. And second, this type of claim would simply not be appropriate for a judicial system. Courts work best when they are handling disputes between specific parties. They are much less well equipped to decide questions of national policy, especially questions involving how the government should spend its resources. The claims of the landless fall into this latter category. The claimants are not asking for a specific piece of land now held by someone else; rather, they are asking for redistribution of land on a national scale. That is a question that a court has neither the perspective nor the power to answer. Claims based solely on need, therefore, should be handled not by the land claims court but by the political process.

For related reasons, claimants who were already on land but whose occupation rights are insecure because they do not have some form of secure tenure would also not be appropriate for a land claims court. For the majority of these claimants, there is no conflict with another party; they are on government-owned land and simply need some way to upgrade their rights of occupation. Thus their needs would best be addressed by an administrative process rather than the more cumbersome judicial process, and so pragmatism dictated that these claimants too should be referred elsewhere. Of course, where there is conflict concerning the upgrading of tenure, the land claims court might in fact be an appropriate forum.

Finally, the group found that the claims of people removed under the Group Areas Act 36 of 1966 might also be problematic for the land claims court. It is important to note that most members of the group working on the land claims court are more familiar with rural African land claims than with disputes and claims arising out of Group Areas Act removals. Based on quite limited knowledge of the terms of those claims, however, it was suggested that, in most cases, people removed under Group Areas would not be claiming back the specific plot from which they had been removed, but would instead be looking for some form of compensation. And even for those who were seeking to reacquire their former plot, where there has been substantial subsequent development of the land, as would usually be the case in urban removals, the most they would be able to get would be financial compensation. Restitution of land, for rural and urban claimants alike, is unlikely to take place where there has been substantial investment in the property after the claimant was removed. Therefore, the group assumed Group Areas claims would usually not involve disputes between the person removed and the person currently on the land. Rather, they would be claims against the state for some form of compensation.

However, the group did not have sufficient familiarity with the terms of the claims of people removed under the Group Areas Act to put forward any solutions with confidence. Of course, those people who were claiming specific plots of land that had not been substantially developed

should be able to bring their claims before the land claims court. For the rest of the Group Areas Act claims, perhaps what is needed is not an adjudicative procedure, but either an administrative process, possibly as part of the land claims court itself, to which people could bring their claims for compensation or a political process to create some form of affirmative action remedy.

Despite the wide ambit of claims initially considered, the group finally narrowed its focus to people who had been removed from land in rural areas as a result of apartheid policies. These people would be claiming land now held by someone else — either a private party, the state, or a farmer leasing the land from the state — who would not want to relinquish rights to that land. There would, therefore, be a dispute between identified parties, which is precisely the type of situation the court should be handling. Furthermore, these people are often claiming land that is still being used for agriculture and that has not been substantially transformed by capital investment. It would thus be possible in many situations to restore land that is in much the same condition as when they were removed from it, without either depriving the current possessor of his investments in the property or unjustly enriching the claimants by giving them the use of those investments.

Additionally, the number of claims would presumably be not so large as to overwhelm a land claims court. It is, of course, impossible to predict how many people and groups who had been forcibly removed from rural areas would bring claims. However, based on the group's knowledge of the situation of rural forced removals, it appears that, even if labour tenants were included, the number would not be so large as to render the court unworkable.

The result of the group's discussions, therefore, was a highly particularised land claims court which would respond to the needs of only a small segment of the total population claiming land. There are obvious advantages to this process — the court could function as a court and not a policy-making body, and in so doing could provide meaningful restitution to people who were unjustly removed from their land.

There are equally obvious dangers. Unless other processes are developed simultaneously to address the needs of the landless, of those with insecure tenure, of Group Areas Act claimants and others, the land claims court process would soon collapse. Without any other avenue for relief, claimants of all kinds would come to the land claims court. The court would then have two options. It could either hear all the claims, with the inevitable result that the court would be so overwhelmed that it could provide relief to no one. Or it could refuse to hear claims from anyone but victims of rural forced removals. If the rejected claimants had nowhere else to turn, the land claims process would soon be seen, quite accurately, as illegitimate. By providing land or compensation to a select group of claimants while the claims of millions of others were ignored, the court

would essentially be providing arbitrary and incomplete justice. It is hard to imagine that such a court would last very long.

There are other dangers with creating a court that will hear only the claims of people forcibly removed from rural areas. These claims are the vanguard of the land claims movement. Not only are the claimants well-organised and highly visible, but the issue of 'black spot' removals has become a symbol of the worst abuses of apartheid land law. If the only land claims process that was developed was one that addressed these claims alone, the result would be to separate the vanguard from the rest of the land claims movement. The effect could be not just to deprive the movement of its most eloquent and widely-recognised members, it could also give rise to the perception that, because the 'black spot' issue was being addressed, the real question of land claims was being handled. If this were the case, and the impetus for dealing with the vast majority of people with claims was lost, creating the land claims court could actually result in doing far more harm than good.

Therefore, the group has concluded that if a land claims court process as described in this paper is to survive, it must be introduced simultaneously with or subsequent to processes which will address the other claims. There must be an administrative procedure for handling the claims of people who need greater security of tenure. There must be a procedure to provide compensation, either on an individual or a community basis, to people removed under the Group Areas Act. And most importantly, there must be a meaningful land reform programme in place to address the needs of the landless, for unless the issue of land distribution is tackled by the political process, the land claims court will most certainly fail.

Before closing, it is instructive to consider the effect that a constitutionally entrenched right to property might have on the land laims court process described in this paper. As several commentators have pointed out, the constitutional protection of the right to property could mean that full compensation would have to be paid for any land expropriated in a land reform programme. This would obviously place a significant financial obstacle in the way of a land claims court whose primary remedy would be the restitution of land. More importantly, it would limit the effectiveness of a land redistribution programme, and as was discussed above, the success of such a programme is vital to the success of the land claims court.

The constitutional protection of property would give constitutional strength to existing title. The purpose of the land claims court is to determine property rights, which in some cases will mean rejecting rights based simply on title. This corrective mechanism could be severely undermined if current occupants of land could resort to the Constitution in defending their title. A property clause could also give new legitimacy to existing title, and the argument that title in many cases represents the

legacy of apartheid could be rebutted by the argument that title and the right to continued ownership of property constitute a basic human right. Whether the inclusion of the right to property in a bill of rights would in fact have these effects is a matter of debate, but the group feels that this debate should take place before property is entrenched in the Constitution.