

Addressing Historical Land Claims: a comparative study of legal strategies for resolving community land claims with specific application to South Africa

Research Proposal  
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Although historical land claims may include, at an abstract level, the general claim of the people for the return of their land -- the country -- I intend to focus more specifically on the historical claims of communities to land for agricultural use.

The concept of historical claims is used here as a label for all those claims based on an assertion of original occupation or use rights in particular areas of land. In the South African context this would include not only cases of original dispossession but also more recent forced removals and individual expulsions resulting from the mechanization of agricultural production in the white commercial farming sector.

The aim of this project will be to propose alternative constitutional, legislative and judicial means of addressing these historical claims in South Africa.

I intend however to base these proposals on a three part analysis. First, I will attempt to develop a conceptual framework within which to understand both the historical role and function of law -- common and statutory -- in the development of South African agriculture, based as it is on the uneven development of capitalism in South Africa. This in turn will be applied to develop an analysis of the changing content of legal rights in land, particularly as manifested in the transformation over time

of particular forms of land tenure.

Second, I intend to make a comparative analysis of legal strategies and mechanisms used to address the issue of historical land claims in cases where they have arisen. This will involve an analysis of both the political/legal form of the strategy -- nationalization, resettlement programmes etc -- and the social impact or effectiveness of the strategy in addressing particular claims. Although the primary focus of this branch of the analysis will be on African and other Third World examples, I intend also to consider the legal strategies -- making use of oral history as a source of proof and asserting original colonial treaties -- applied in the courts in Canada and the USA.

Third, in developing alternative legal strategies I will consider the context in which they may be adopted and the particular problems -- including social and economic impact -- which may result from their implementation. This branch of the analysis will focus on the problem of addressing historical claims in a mixed-economy setting. Specific problems which will need to be addressed include: mechanisms for recognizing claims; methods of asserting claims; issues of compensation, based on past and present claims; and issues affecting the productive use of such land, including existing mortgages and future credit facilities.

Finally, specific applications, involving particular geographic regions and conflicting social interests may be explored as a means of assessing the economic and political

impact of any particular strategy. With the possibility that this research may be conducted in South Africa, I would hope to linkup with existing rural community organizations and community law projects in order to conduct primary research on existing land claims by the communities with which they are in contact.