

MCH91-20-1-7

**Human Rights
in
the Post-Apartheid South African Constitution**

Paper # 14

Topic: Land Reform: South African Options

Author: Michael Robertson

This paper is for discussion purposes only and may not be quoted or reproduced without the author's permission.

CENTER FOR THE STUDY OF
**HUMAN
RIGHTS**

LAND REFORM : SOUTH AFRICAN OPTIONS

Legacy

South Africa's predicament in land affairs is frequently highlighted by two of apartheid's most infamous statistics : (1) the African people, constituting 74,7% of the population,¹ are prevented from possessing more than 13% of the land ; and (2) in pursuit of the goal of geographical segregation about three and a half million persons have been removed against their will.² The political party which has dominated white government for forty years and which has been primarily responsible for this fantastic scenario has just been returned to power. The only official indication that the land crisis demands attention appears in a recent report of the South African Law Commission.³ The Commission's flirtation with equality, reform and even affirmative action has evoked some interest in anti-apartheid circles, but the fate of the proposals, still in provisional form, is impossible to predict.

1 South African Institute of Race Relations Race Relations Survey 1987/88 (1988) 11

2 L Platzky and C Walker The Surplus People (1985) 9. Both these figures are now inaccurate. There have been further removals since 1983. Black land has increased to about 13,8% : Race Relations Survey 877

3 South African Law Commission, Working Paper 25 on Group and Human Rights (1989) 473

The land issue must rank very near the top of the list of "Most Difficult Problems". It might appear that a rather feeble disclaimer resides in this suggestion. In this, regrettably, there is some truth. The land issue is complex, and it is by no means clear that lawyers, who generally make poor social scientists, should presume to offer appraisals of options for the future. And to be sure, long after questions about a universal franchise have been settled, the national state of emergency has lapsed and the constitutional protection of human rights has been recognised, problems and dilemmas about access to land, its possession, role and use will be in abundance.

Historically, there are three major streams of white parliamentary activity which, from a legal perspective, account for the present predicament. The three streams are :

1. Laws concerned with the great rural divide between white and African, formally entrenched in 1913⁴ and culminating in today's national states with their pariah constitutional status.⁵
2. Laws aimed at controlling the entry and residence of

⁴ Black Land Act 27 of 1913

⁵ These entities have not been recognised by the international community

Africans in white controlled urban areas. The first Natives (Urban Areas) Act⁶ has an approximate descendant in a law of 1984.⁷ Controls and restrictions have been loosened in recent years in some important respects⁸ but the policy to develop discrete African urban and peri-urban enclaves persists.

3. The law, originating in concerns of sanitation in the 1880's, which now commands the group areas system.

For the sake of completeness one should add a fourth adjunct category, a host of removal laws sometimes inseparable from the ones above, which have all sought directly and indirectly to give effect to the grand apartheid scheme.⁹ These are not as much in evidence now as they were five years ago but subtler forms of forced relocation remain a necessary device in the making of the bantustans.¹⁰

Two of these legislative currents have manifested modern subdivisions. The present family tree reveals, for the purpose of

6 Act 21 of 1923 .

7 Black Communities Development Act 4 of 1984

8 Such as the dropping of formal influx control :
Abolition of Influx Control Act 68 of 1986

9 Such as s 5 Act 38 of 1927

10 For example, the incorporation laws such as Borders of Particular States Extension Act 2 of 1980

illustration, six distinct geographical offspring. A seventh, (g), is not fully a member of the family.

-
- | | |
|----------------|---|
| 1. Group areas | (a) the modern group areas system, with prospects for a little official mixing. ¹¹ |
|----------------|---|
-
- | | |
|-----------------------------------|---|
| 2. The black - white rural divide | (b) black (African) reserve areas outside the bantustans. ¹² |
| | (c) bantustans which are not "independent" (national states). ¹³ |
| | (d) bantustans which are "independent" (TBVC countries). ¹⁴ |
-
- | | |
|---|--|
| 3. Black enclaves in white controlled, (mainly) urban areas | (e) established black townships in white cities and towns. ¹⁵ |
| | (f) new black townships outside the bantustans. ¹⁶ |
-
- | | |
|--|--|
| | (g) informal settlements ; some legalized, others not. ¹⁷ |
|--|--|
-

¹¹ Group Areas Act 36 of 1966 and Free Settlement Areas Act 102 of 1988

¹² These are areas under the control of the Department of Development Aid which have not been transferred to bantustan governments

¹³ Under the National States Constitution Act 21 of 1971

¹⁴ Transkei, Bophuthatswana, Venda and Ciskei which were granted "independence" under various Status Acts

¹⁵ Established under Acts 21 of 1923 and 25 of 1945

¹⁶ Black Communities Development Act 4 of 1984

¹⁷ Informal settlements can be recognised under s 6A Prevention of Illegal Squatting Act 52 of 1951

The land legacy, as at September 1989, reveals that the major avenues of racist law-making in land affairs have not changed in any fundamental respect. There are new categories, new terms, new methods and even perhaps new expectations, but residential apartheid in all its forms has changed little since the 1960's and 1970's. Only the rhetoric has shifted (Foreign Minister Botha asserts that it is no longer appropriate to call the system "apartheid"), while many critics have difficulty believing that the state as presently constituted is capable of breaking with the obsessions which translate into a vast patchwork of racially and unfairly allocated lands.

Problems 1 : inequality

The great national division between white and African lands was first formalised by the white colonial parliament of 1913.¹⁸ Provision to expand the size of the African reserves was made in 1936¹⁹ and during the last fifteen years or so these areas have been fashioned (most unconvincingly²⁰) into ethnic homelands. The process of consolidation has required some give and take, but in area the bantustans are only slightly larger now than the

18 Black Land Act 27 of 1913

19 Development Trust and Land Act 18 of 1936

20 The number of fragments which make up some of these "states" is well known

limits set in 1936.²¹ The following table summarizes the position :²²

Sizes of homelands as at 31 December 1986

	Ha
Bophuthatswana	4 187 796
Ciskei	747 000
Gazankulu	764 656
KaNgwane	438 221
KwaNdebele	235 263
KwaZulu	3 189 796
Lebowa	2 212 897
QwaQwa	62 000
Transkei	4 287 000
Venda	707 513
<hr/>	
Total	16 832 142
<hr/>	

The amount of land owned by Africans outside the bantustans is minimal. Figures valid for 1978 reveal that as against seventy seven million hectares owned or rented by whites, one hundred and fifty seven thousand were owned by Africans. "Coloureds" and

²¹ The Development Trust and Land Act 18 of 1936 set maximum quotas in each of the provinces

²² Race Relations Survey 877

Asians owned or rented five hundred and fifteen thousand.²³

Some consequences of these disparities can be summarized as follows :

1. There is extensive overcrowding and attendant landlessness in the bantustans. Acute land shortages were exacerbated by the removals policy when the percentage of African homeland dwellers rose from 39,1% in 1960 to 52,7 in 1980.²⁴ The number of farm workers made redundant in the process of white agricultural mechanisation constitute a proportion of this statistic.
2. Farming lands in the bantustans are generally acknowledged to be depleted. This has serious implications for agricultural output.
3. Falling agricultural productivity in the bantustans and the failure of the Pretoria government to arrest the decline, despite significant state expenditure, has resulted in

23 D Cooper "Ownership and Control of Agriculture in South Africa" in J Suckling and L White (eds) After Apartheid (1988) 47

24 H Giliomee "The Changing Political Functions of the Homelands" in H Giliomee and L Schlemmer (eds) Up Against the Fences (1985) 51

poverty and a breakdown of social norms.²⁵ The parlous state of these areas and the impact upon its inhabitants has been likened to a process of genocide.²⁶

In the urban areas different laws have been applied. The table on page 4 indicates that existing and developing African townships outside the bantustans are permanent features of the urban landscape.²⁷ And some of these townships are actually located within the bantustans themselves.²⁸ The Group Areas Act which has little or nothing to do with the accommodation of African residential demands, is the instrument in terms of which living space is separately provided for "white" and "coloured" communities, the latter including an "Asian" sub-division.²⁹

There are two major problems evident in the urban context. The first is the de facto settlement of racially defined communities together with manifestly inequitable allocation of residential sites. It is well known that white group areas occupy the prime

25 K Danaher "Bantustan Agriculture in South Africa: Obstacles to Development Under a Post-Apartheid Government" Conference Paper, University of York (1986) 13-16

26 Danaher 36

27 Until quite recently the state's attitude has been that black urban dwellers had only temporary connections with the urban environment

28 Durban's KwaMashu is an example of this

29 s 12 Act 36 of 1966

positions. It seems most unlikely that the repeal of the enabling legislation will do enough to break these patterns.

The second problem is the insufficiency of land, infrastructure and housing resources to meet the demands of a rapidly urbanising population.³⁰ This particular crisis will outlast, if not be compounded by, the late apartheid phase.

A general problem which is part and parcel of the land possession and ownership paradigm is the greatly unequal distribution of wealth and income. The recently published results of the Carnegie Inquiry bear ample testimony to this.³¹ Along with land, wealth distribution has manifestly racial overtones. Through laws and other methods of social regulation, first colonial and then apartheid governments have been consistently adept at ensuring that the white bloc has retained overall control of the terms and pickings of economic productive relationships.

Problems 2 : agricultural inefficiency

Despite dominance in land allocation and therefore tight control over agricultural production white farmers are not generally

30 The pace of black urbanisation has speeded up since the repeal of influx control laws in 1986

31 F Wilson and M Ramphela Uprooting Poverty : The South African Challenge (1989) 16 - 22

regarded as efficient in capitalist terms.³² The extent of farming debt and the degree to which state assistance has been forthcoming raises serious questions about the future of agriculture. If productive land is perceived to be an essential item on the register of national assets, given the importance of the product it generates, then a case can be made out for thorough reform in the farmlands, even under apartheid. Rectification is urgently needed when a nation's critical food supply is dependent, to some extent, upon the services of bankrupt agrarian elites.

This paper cannot begin to raise satisfactorily the pertinent issues of contemporary white agricultural economics. And yet the significance and extent of the problem commands careful attention in postulating the possibilities of the future. As some might argue, if many white-owned farms yield more problems than products then - equity arguments aside - why should these lands not be repatriated to the common good ?

Serious problems are also evident in bantustan agriculture. That black farmers, operating under conditions³³ largely the converse

32 JF van der Merwe "the present crisis of organised farming in South Africa" in C Cross and R Haines (eds) Towards Freehold ? (1988) 214 to 222

33 These include land confinement, one person one lot allocation policy, and a lack of credit facilities and suitable markets

of white counterparts, have been unable in recent times³⁴ to produce food with much success is not in any doubt.³⁵ But debates about the potential contribution of peasant and small-holder farming systems have not been settled.³⁶ The ability of this agricultural activity to satisfy the credentials of "viability" (however they are pitched) is also an important consideration when looking to the policies and laws of the future.

Problems 3 : fragmentation of control

The relatively meagre lands segregated for Africans in 1913 and beyond have in more recent times been parcelled out as constitutional entities. Six of the ten await the final stage of the process : "independence". The other four "countries" collectively described as "TBVC" have acquired sovereign powers, as the South African legal system sees it. These are extensive³⁷ and include ownership and control over much of the land within

34 There are suggestions that peasant producers at the turn of this century responded efficiently to agricultural demand : C Bundy The Rise and Fall of the South African Peasantry (1979)

35 Cooper 62

36 See eg W Beinart "Agrarian Historiography and Agrarian Reconstruction" in J Lonsdale (ed) South Africa in Question (1988) 134 - 153

37 See eg First Schedule Transkei Constitution Act 48 of 1963

their borders.³⁸ The remaining entities which are described as self-governing³⁹ have also had their land transferred to them in ownership.⁴⁰ Some have begun to make their own land laws in accordance with the powers which have simultaneously become available.⁴¹ Precisely how these fragmented land policies, translated into local legislation, will alter the existing scenario remains to be seen. But whatever the outcome of these practices the question is whether internal legislative diversification will in any way frustrate attempts to tackle the land question on a national basis.⁴² Mature bantustans, whether independent or not, depend upon these land prerogatives for local credibility. Thus, the problems of the future of the bantustans themselves are intertwined with those of land.

Pretoria's bantustans have also involved the utilization of tribal authorities as tentacles of control. Opponents of internal decolonization have often pointed out that the co-option of tribal elites under apartheid conditions has resulted in a

38 Not all land was held by the South African state ; some lands were privately held before "independence"

39 In terms of the National States Constitution Act 21 of 1971

40 Procs R228, R229, R230, R231, R232 and R233 of 24 December 1986, GG 10560

41 See eg KwaZulu Land Bill in KwaZulu GN 835 of 1988

42 PM Zulu "The inadequacy of reform : land and the Freedom Charter" in Cross and Haines 42 -49

corruption of the customary land system.⁴³ New laws from the local "capitals" are unlikely significantly to break with these distorted patterns⁴⁴ while the extent to which tribal chiefs are permitted or encouraged to exercise undemocratic authority over land may prove to be inimical to agricultural reform in the future, at least insofar as protagonists of central state planning are concerned.⁴⁵

Dilemmas

An understanding of apartheid's legacy in land affairs and the peculiar problems it presents has elicited a range of proposals for reform (with many more to come, no doubt). Not surprisingly, these differ markedly, in part because of underlying and varying perceptions of how best to secure economic interests for both individuals and the wider society. The South African Law Commission's recent unequivocal endorsement of an ownership right to property⁴⁶ contrasts with the Freedom Charter's enthusiastic vision of a not-so-capitalistic future.⁴⁷

43 EM Letsoalo Land Reform in South Africa (1987) 77

44 KwaZulu Land Bill in KwaZulu GN 835 of 1988

45 T Marcus "Property Relations and the Land Question" (unpublished paper) 38 to 41

46 Report 464

47 For example, "The people shall share in the country's wealth" and "The land shall be shared amongst those who work it"

Any serious appraisal of the best route ahead would recognise the existence of some compelling dilemmas. At their simplest, these involve famous questions like "socialism or capitalism in land affairs ?" ; and "freehold or leasehold ?". The following paragraphs are an attempt to harness and articulate some major quandaries.

1. In its most generalised format the first dilemma for the modest reformer is how to tackle, affirmatively, the inequalities of past racial land allocation while simultaneously (1) not disrupting existing agricultural production (which is almost exclusively in the hands of white farmers) ; and (2) preserving recognition of the rights of the white farming class.

Dealing with the equities problem need not necessarily be incompatible with acceptable agricultural yields if the replacing system (black capitalist farmers and / or smallholder peasant producers) maintain satisfactory levels of food production.

The more strident critics of agrarian class distinctions may not be inclined to agonise much over the legal and pecuniary interests of white farmers. Obviously the present players of capital are distinctly queasy about demands for selective

white farmland expropriation, especially in the absence of compensation. Prospects of wholesale nationalization evoke a less dignified response. Should, therefore, farm ownership ascend to the level of human right, commanding unreserved protection ? And should this be so if the original process of acquisition was carried out under the protective rules of whites-only, free-marketeting ? Is there a tension between the need not to interfere with or damage core farm units⁴⁸ for reasons of food supply, and social justice involving widespread reallocation of productive land ?

2. To what extent should future land policy seek to reverse the process of forced removals, to the extent that the status ante quo is restored ? If the victims of removals are to be placed back in possession of their lands, what is to happen to the beneficiaries of the apartheid process ?

The African National Congress is its "Constitutional Guidelines" published in 1988 emphasises the need for "taking into account the status of victims of forced removals" in the context of land reform based upon affirmative action.⁴⁹ It is not clear from this document

48 Beinart 147

49 African National Congress "Constitutional Guidelines" (1988) clause u

what implementation of the programme would involve. The Law Commission in its draft Report seems also to take cognizance of the need for land redistribution, but discloses no particular concerns about the forced removals saga.⁵⁰

3. Another central question is whether the allocation of farmlands to dispossessed or land-restricted peasant farmers squares with a need to ensure that "the entire economy serves the interests and well-being of the entire population".⁵¹ Would peasant repossession on a large scale be the choice of a democracy which defines the rights and obligations of those engaged in the productive process?⁵²

The extent of land demand from peasant farmers has yet to be determined but few commentators doubt its existence.⁵³ If the specific content of constitutional protection of land claims depends to some degree upon the results of a calculated assessment of what land policy would most fairly serve the nation's economy, then much hinges upon the viability of peasant production systems.

Furthermore, what is the extent of rural land demand amongst

50 Report 465

51 "Constitutional Guidelines" clause n

52 "Constitutional Guidelines" clause o

53 Beinart 135, Letsoalo 81

urban-based families ? Have migrant labourers lost their agricultural skills after a generation or more of supplementing pitiful rural incomes with relatively attractive urban wages ? Is there enough rural land to satisfy the demands of all the dispossessed and restricted ? And if widespread smallholder production is economically defensible, what place for customary land principles ? Do tribal chiefs have a part to play ?

Unavoidably, all these questions call for attention. In the main, they invite the energies of persons who are probably not lawyers. The debate continues.⁵⁴

4. If free enterprise in the agrarian economy is the desired route, account would need to be taken of the continued plight of the landless peasant class. Loans to black farmers and the removal of racially restrictive land laws would by themselves result in no amelioration of the conditions under which the majority of bantustan inhabitants find themselves. This would appear to be the flip-side of a land policy which fails to address the claims of those whose expectations display nostalgia for the no-market land systems of the previous century. For if a sizeable rural landless class remains, how realistic is it to assume that

⁵⁴ Much of the current debate is contained in Cross and Haines (see note 32)

its members would eventually migrate to the cities-employment or no employment ?

5. Another bundle of dilemmas awaiting the future's planners surrounds the question of forms of tenure. The essence of these choices is difficult to separate from the questions already posed. Depicted at its two extremes, the contest is between free-market ownership in its least attenuated form as against limited rights to possession (of state-owned land). The full spectrum reveals a range of in-betweens including the prospect of different forms of tenure for different kinds of land depending - for instance - upon whether it is productive or non-productive, and whether it is in the state's interest not to dislocate profitable core farming units. There are other considerations which might invite differential treatment of systems of tenure. Some of these emerge in the next and final section.

Prospectives 1 : repeal of discriminatory laws

So far this paper has laid emphasis upon two of the major issues which call for close attention when examining land options for the future. They are (1) the demands of equity and justice to reorganise land settlement patterns, and (2) the economic imperative of having a successful agricultural policy, which brings into focus the question of relations of production.

It would be futile to deny the intimate connection between choices made about the operation of the economy and the substance of constitutional protections. Until now patterns of production in the South African countryside for example have been intertwined with the form of political domination which has existed.⁵⁵ Rights to land in the future cannot avoid being touched by what might loosely be termed political considerations. And whether a bill of rights can truly be neutral as to matters of property rights seems unlikely. The South African Law Commission (hereafter SALC) somewhat naively overlooks this matter when it asserts that "a bill of rights is not the proper place for propagating a particular economic system"⁵⁶ and, in the next paragraph, concludes that the right to own property must be guaranteed.⁵⁷

The repeal of all discriminatory land laws is the first logical step in the post-apartheid era. The Freedom Charter and the African National Congress Guidelines (hereafter "Guidelines") require that "restriction of land ownership on a racial basis shall be ended"⁵⁸ and the "abolition of all racial restrictions

55 Beinart 134

56 Report par 14.120

57 Report par 14.121

58 "Constitutional Guidelines" clause u

on ownership and use of land"⁵⁹ respectively. Even the SALC speaks of the need to abolish all discriminatory impediments to the ownership of property⁶⁰ and the KwaZulu Natal constitutional proposals impliedly requires their abolition.⁶¹

The most offensive legislation is summarized above.⁶² The notorious Land Act is, ironically, not the force it used to be partly because of the powers and controls which now vest in the national states.⁶³ The Group Areas Act⁶⁴ is currently the measure which carries with it the most impediments.⁶⁵ It is noted in passing that the repeal of unwanted measures would, as matters now stand, need to address the problem of the fragmentation of legislative authority.⁶⁶ Furthermore, this repeal would not, by itself, make any impact upon the four "independent" states. Other legal and political strategies would

59 Under the paragraph entitled "The land shall be shared amongst those who work it"

60 Report par 14.121

61 KwaZulu Natal Indaba "Constitutional Proposals" (1986) Article 7

62 See p 4

63 s 3 and schedule 1 National States Constitution Act 21 of 1971

64 Act 36 of 1966

65 Exemplified in the restrictions which attach to a "disqualified person"

66 In terms of the National States Constitution Act 21 of 1971

be required to dismantle those structures before lands beyond their "border posts" can form part of a new national land policy.

As to the effects of discriminatory land law repeal, there are two matters which invite speculation. The first is that the segregated African (mainly rural) lands would become available for purchase and sale on the ordinary market. To a large degree this process could be thwarted by the state and bantustan governments because most of this land vests in them. A pressing concern must be the consequences for impoverished rural communities if, in the absence of any protection from the market, corporate or other farming interests acquire these lands through purchase. Evictions and even removals on a large scale could result. This suggests that whatever macro choices are made in the era of genuine reform, and in the absence of massive rural de-population, there will remain the need to provide a refuge for persons whose circumstances and prospects prohibit them from being serious participants in the land market.

Secondly, intending black large-scale farmers cannot be expected to respond with great enthusiasm to the de-restrictions unless huge loans are available to make farm purchase possible. Given the uncertainty and risk attached to much farming enterprise, black newcomers would be hard-pressed to free themselves of these substantial debts.

It is difficult to predict precisely the effect in urban areas of the repeal of racial controls such as the Group Areas Act. There would no doubt be significant activity in the affluent residential property market. But the lot of the inhabitants of impoverished townships would, like their rural counterparts, not be improved. Years of apartheid have established patterns of land and wealth accumulation. Without the demise of these economic barriers the equalization process will not be taken very far. For the majority of South Africans post-apartheid will need to offer more than the freedom to purchase at a premium.⁶⁷

Prospectives 2 : affirmative action

The following paragraphs summarize some of the possibilities and implications of an affirmative action programme. None of these suggestions is new or unusual, and require far more attention than is offered here.

The Guidelines, noting the effects of racial domination, claim the need for "constitutional provisions for corrective action which guarantees a rapid and irreversible redistribution of wealth"⁶⁸ and recommends the implementation of a land reform

67 The repeal of discriminatory land laws would however usher in a new era of tenancy relationships, likely to be of financial benefit to idle landlords

68 "Constitutional Guidelines" preamble

policy based on affirmative action, and taking into account the status of victims of forced removals.⁶⁹ The SALC has provisionally recommended that the state be entitled to expropriate property and means of production against fair compensation, and that this process take into account the objects of affirmative action.⁷⁰

Although there may be a special moral claim from victims of forced removals the process by which their grievances are addressed need be no different from a general state right to expropriate private land to meet other land demands. In this scenario a constitution or bill might protect the right to property but also permit derogation in the national interest (where equalizing affirmative action is identified as in the national interest) and perhaps in the particular interest of groups or communities victimised under apartheid.

On the basis of these principles previously cleared "black spots", fallow, underutilized or debt-ridden lands could be the targets of expropriation. The first priority would be to the victims of removals. Next, attention could be given to the claims of black farmers. (Whether this is desirable in the absence of strategies to modernise production is an issue which

69 "Constitutional Guidelines" clause u

70 Report par 14.121

can be taken no further here.⁷¹ Possibilities also exist for experimentation with collective farming, but similar reservations apply⁷²).

From the legal vantage, discussion about expropriation includes consideration of the question of compensation. In the South African context this threatens to be an emotive issue of some intensity. Arguments against payment include the claim that centuries of racial discrimination have dispossessed persons who remain the land's rightful heirs. Also, the financial drain which large-scale expropriation would necessitate would be prohibitive. In all probability the obligation to pay out large sums would slow the pace of redistribution.

Under international law it is not clear that compensation is due except where the expropriation of property of foreign nationals is concerned.⁷³ If the right to expect compensation is constitutionally protected, there remain uncertainties as to what a fair price would be. (According to the SALC fair compensation is to be determined in the last resort by the Supreme Court. Would the court take into account the state's own financial predicament in determining what is "fair" ?). Whether or not

71 See eg Marcus 41 to 48

72 Beinart 149

73 P Siehgart The International Law of Human Rights (1985) 154

compensation is payable, the trend in international law is to insist upon due process. This emerges from the Universal Declaration of Human Rights and other instruments including the African Charter.⁷⁴

The affirmative action option, along the lines here suggested, permits the executive a wide discretion within the parameters set in the constitution or bill. This obviously includes not interfering for reasons of agriculture and food production. The core farming sector would, as in the case of Zimbabwe, be left in the hands of white and corporate capital.

It follows that as far as tenure is concerned, a variety of forms would be necessary, ranging from ownership of rural, productive land in some instances to forms of leasehold where the state retains rights of ownership. There appears to be no reason why all forms could not be justiciable under the rubric of "right to property".

Urban residential property is by definition non-productive in nature and therefore would escape some of the dilemmas surrounding farmland. There is no compelling reason why property for personal use and consumption should not be held according to the Roman-Dutch common law principles of ownership. The extent to which affirmative expropriation is feasible in urban areas is

74 Sieghart 252 - 253

unclear. In this regard a distinction needs to be drawn between urban productive land - industrial and commercial - and residential property.

Prospectives : nationalization

One of the more enigmatic declarations of the Freedom Charter is that "The land shall be shared amongst those who work it". Agrarian conditions of the 1950's were such that a great many more people had working relationships with the land then than at the present time. Therefore the implementation of this demand under prevailing conditions would not result in the extent of redistribution which was probably intended by the Charter's framers. Because there is a measure of uncertainty about the precise meaning of this portion of the document, some speculation is required. One plausible interpretation is that the sharing of land presupposes wholesale nationalization. (This term is used here to denote the process by which the state unilaterally transfers a national asset - in this case land - to itself on behalf of the nation, with or without compensation).

South African writings have given less attention to the nationalization option. But in a recent paper⁷⁵ it is suggested that nationalization is essential if the land issue is to be

75 See note 45

resolved to the satisfaction of the majority of South Africans.⁷⁶ Although in the author's view the process raises questions whose answers cannot be predetermined, there are obvious positive consequences. These include giving actual support to those who have been dispossessed while the abolition of the land market would present farming possibilities for many black South Africans "who would be freed from the severely inhibitive constraints of [needing] large sums of capital to sink into the purchase or private hire of agricultural land."⁷⁷

It is also suggested that nationalization would not necessarily have deleterious effects upon agricultural production. In the case of both commercial agricultural enterprises and the industrial sector the productive pursuit could remain in the hands of individuals and companies. But the state as landholder would gain revenue from its tenants and this could be used for the support of the weakest members of society.⁷⁸

Despite these remarks the author does not appear to advocate nationalization across the board, conceding that there is room for privately owned commercial farms. At the same time a clearly discernible unease is expressed regarding the future of monopoly interests, especially as these require the continuation of

76 Marcus 39

77 Marcus 40

78 Marcus 40

exploitative relations of production.⁷⁹

Conclusion

The purpose of this paper has been to raise some of the pertinent issues in and around the question of meaningful land reform in a future South Africa. Much of the discussion contains an assumption that the specific content of property clauses in a constitution or bill of rights cannot be settled without recourse to the history and manifestly particular problems of the South African land question.

Perhaps, in concluding with a first principle, the challenge is to devise a system which comes close to the ethos of Article 23 of the American Declaration of the Rights and Duties of Man. It reads :

"Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and his home."

Some reservations attach to the use of the word "own". Although the SALC is probably wrong when it proclaims that "ownership is one of the most basic aspirations of all South Africans

⁷⁹ Marcus 42 to 43

regardless of the group or class to which they belong"⁸⁰ the vast majority of South Africans probably do want rights to property, including security of tenure. Certainly, no future leader will want to echo the remarks of a senior white cabinet minister made at the height of removals in 1969⁸¹:

"We get their co-operation in all cases voluntarily. As a matter of fact, sometimes it is necessary to do quite a lot of persuasion, but we do get them away."

MICHAEL ROBERTSON

University of Natal, Durban

September 1989

80 Report par 14.120

81 MC Botha quoted in Platzky and Walker 128