MCH911-33-4-7

filename: C:\WK\BILPREF.DOC
title: bilpref
author:
operator:
keywords:
comments:
version number:
creation date: 06/29/90
revision date: 06/29/90
char count: 3254

PREFACE

If a constitution is the autobiography of a nation, then we are the privileged generation that will write that autobiography. It is something that involves us all. It is our country, our future, our rights, which are at stake.

No-one gives us rights. We win them in struggle. They exist in our hearts before they exist on paper. Intellectual struggle is ~~one of the most important areas of all. Concepts are the links between~~ our dreams ~~and~~ the acts of daily life.

We are not used to the idea of rights, certainly not of constitutional rights. Our debates are about power rather than rights. We speak about human rights only in terms of how they are violated, and not in terms of how they can affirm and legitimise a new society.

Without a clear and vigorous concept of rights, non-racial democracy is like a fountain without water, beautiful but stony. We have to give texture and flow to non-racial democracy. Much suffering and pain has gone into its achievement. It is the basis of unifying the nation, and the context for the expression of our political rights. Yet it does not solve the question of reconciling equality with cultural diversity. It does not ~~in itself~~ tell us how to harmonise rights of individual liberty with rights of social progress. It does not answer the question of what principles should govern the sharing of the land between different persons with strong claims. It does not address the question of gender rights, of workers' rights, of children's rights, of whether there should be limits to freedom of speech in order to avoid racial explosions, of what kind of legal system we should have in a new South Africa, of how we should look at the evolution of a national culture, of how simultaneously to guarantee the rights of the people as a whole while allaying the fears of those who regard themselves as a minority.

What follows is an attempt to apply the logic of a human rights approach to the building of non-racial democracy in South Africa. Some of the formulations ~~may be~~ mine, but the ideas have all emerged from struggle, and it is my hope that they ~~return to their source~~.

Rights can never be granted or ~~imposed~~, they are won by people in struggle, ~~they exist in our hearts before they are put on paper~~. If we can ~~get the principles right in terms of~~ establish the basic rights, freedoms and relationships we want in a new South Africa, then the question of precise governmental structures and electoral procedures will not be so difficult.

have no diff. in

Readers will ~~easily discern~~ the influence of decades of involvement with the ANC, ~~starting with participation in the Defiance of Unjust Laws Campaign in the early 1950's and~~ culminating in membership today of the ANC's Constitutional Committee. Those who know about these things will also immediately understand that what follows is not an official presentation of ANC views, nor even an unofficial one, but a small personal contribution to the great national debate which the ANC ~~wants~~. encourages.

I would like to dedicate this book to Oliver Tambo. One day the story will be told of the contribution he made to the creation of a new South Africa and the influence he had on all of us. If ever there was a democrat and a patriot and a lover of freedom it was he.

Albie Sachs.

London - Cape Town. June 1990

serve, as overwhelmingly they do today, to impose the domination of landed whites over landless blacks.

Abolishing racist statutes, equalising state supports, introducing principles of constitutional rights and applying the rule of law are the concrete ways of de-racialising land law and opening the way to a fair and widely accepted method of tackling the difficult problem of competing claims to land.

Only in this way can the question of sovereignty be taken out of the land question and the true societal values in relation to land common to all cultural groupings be uncovered. This is what Chief Albert Luthuli, President of the ANC, and member of a successful African sugar-farming co-operative, meant when he declared that.....

This is what the Freedom Charter proclaimed when it said that South Africa belonged to all who lived in it, and that the land should be shared amongst those who worked it. Once the principle of a common belonging is established, the basis of equitable sharing exists. Until the foundation of common belonging is laid, however, defence of private property means defence of white property, which means defence of white dominbation.

Non-racial does not mean technical but includes what is common to the values of all

Notwithstanding white history black, accept common belonging.

de-racialising land law is not just bringing the rule of law to all aspects of rural society in a non-racial way.
To de-racialise land law ie law of who has what rights to use & have actual pieces of land requires a process whereby the debased racial aspects of present property ~~law~~ law are undone. A process whereby the values of security, independence from arbitary interference, the right to contract, & the order of an abiding system are enshrined in a property law which does not in & of itself deny all these qualities by ~~being racially exclusive as the present law is~~ setting a the political decision that race over-rides all these other rights & who has them. Nominal removal of the racial restrictions is the present law is not enough to undo the legally of racially unequal access to land, the new law must be built up from the positive values which ~~so not~~ are resonant to so many S. Africans & which ~~the~~ the present law ~~upholds~~ expands just as it denies them

2 explosives: sovty

identific with land

Love of land - identific -

& richness - if sovty - quest settled

Econ: black - tenacity

white in fut - fred - residues

Farming is not just a job - it's life style.

exploit

White guy on stoep drinking coffee

represented in Parliament and able to influence legislation in their favour, down to such shameful details as compulsory flogging for stock-theft and the abolition of school meals for black kids.

Two completely different and unequal systems of land law emerged, one for whites and another for blacks. Land law for whites was based on private property, registration of transactions in relation to land, ownership proved by certificate of title and demarcated plots. Land could be leased or used as security for loans by means of mortgages. The owner as property-owner was sovereign, a little king or queen over such land as was registered in his or her name. He or she could dispose of it at will, sell it, lease it, give it away, even control its destiny after death by means of a last will and testament. Subject only to planning permission, the owner could do what he or she wished with the land, use it, abuse it, dig holes in it, or do nothing with it, just own it.

Black land, on the other hand, was state-owned and controlled. Access to such land was goverened by a system of grants, rigid laws of succession and supervision by government-appointed or recognised chiefs. Occupiers could grow food there, erect houses, and, subject to controls, keep livestock on it.

expand or delete

The double paradox is that white land was in reality black, and, secondly, that state-owned land was de facto subject to private interests. In both cases the legal regime had a mythological character, out of keeping with the reality, but enforced by the courts.

Whether or not deracialisation of the land requires nationalisation of the land is an issue which will be touched on later. What is clearly needed, if the issue of sovereignty is to be got out of the way and the real question of how the land should be owned and worked reached, is nationalisation of land law. For those who quake and shake merely at seeing the word nationalisation, let it be stated firmly that nationalising the land land law does not presuppose either nationalising the land nor nationalising the legal profession, but simply ensuring that South Africa has a single, or national, law governing the question of land rights, so that issues are looked at not in terms of race, as at prsent, but in terms of interests and values of importance to the country as a whole.

This obviously requires the immediate abolition of the Land Act and the Group Areas Act which explicitly divide the surface area of South Africa on racial grounds, as well as the repeal of laws which permit forced removals and banishment of blacks. Yet it necessitates far more than that. Nationalisation of land law means establishing in positive form an integrated, nation-wide legal framework in respect of interests in land. It pre-supposes south Africanising the law, that is, having a law for South African citizens, whether they be farmers, or householders, or visitors, or builders. The law can take account of different local situations - whether land is urban or rural or park, or even of the forms of tenure to which people are accustomed in a particular area. What will go will be any reference to race, or any differential provision of services on the grounds of race.

Nationalising the land law will have immense implications for the relationship between the state and farmers. Instead of seeing white farmers and black farmers, the former to be helped, the latter to be controlled, state institutions will simply look at South African farmers, all of whom will have equal claims and entitlements in their capacity as farmers and not as whites or blacks. At the moment, there is no area of activity in which the unequal

provision of services is more pronounced than in the case in agriculture. One can say that there is massive affirmative action - in favour of the whites. The first thing to do will be to end the vast privileges attached to race as such, and to ensure that what the state supports is farming and not white-ness. The question of affirmative action to support the racially underprivileged rather than the racially overprivileged will then be on the agenda.

Yet something far more profound even than the equalisation of rights in relation to the legal regime for land and with regard to state benefits and services in relation to land will be necessary. The whole way in which racially-based land law today undermines what should be fundamental human rights of the citizen, will have to be dealt with. At the moment, land law, instead of being a bastion of personal freedom and independence, serves as the basis for the most blatant denial of basic rights. Because control of land presently means control of people, white landowners exercise a double sovereignty in relation to land: they are kings and queens both in relation to what the law says is their domain, and in respect of the people who are born within or enter that domain.

The only security that blacks on white-owned land have is the precarious goodwill of the landowner. However ancient their connection with the land might be, the law only has regard for the will and interests of the person who owns the title deed. The courts declare them squatters or trespassers. At best they have a right to a short notice period before being expelled. At worst, they can be imprisoned for being on the land against the owner's wishes. One is not referring here to casual passers-by or escaped criminals. One is thinking of people whose parents were born on the land, and their parents before them; people who have no right to be on any other land, who have no other home than the one they constructed themselves on the land from which they are being thrown out; people whose only wish is to have security and be able to earn a decent living.

In this setting of legal domination, there are few restraints on physical domination. White farmers sometimes feel free to enter their houses, often to command casual services from them beyond what might be agreed to in contract, frequently to abuse them physically, always to decide whom they might have as visitors.

De-racialising the law and giving it a truly national character accordingly requires that the rights of persons in relation to land be integrated into and harmonised with a system of constitutional rights and subjected to the principles of the rule of law. The hard legalism of the English common law to which Max Weber made reference, has to give way to humane concepts of rights as enshrined in a Bill of Rights. There has to be respect for the person, for the home, for freedom of movement, for secure family life, down on the farm as anywhere else. A person should be no less free because his or her home happens to be on spot B rather than spot A, or because Sir or Madam thinks he or she is well-behaved or cheeky. Equally, his or her rights to education or medical attention should not be qualified by whether a particular landowner is enlightened or backward.

Finally, nationalising the law in the sense of making its rules cover the whole nation and not stop at the boundaries of this or that farm, presupposes the extension of the principles of legality or the rule of law over every square centimetre of the country. The police force and the courts should be there to defend equally the rights of everybody, and not