THE QUESTION OF RIGHTS TO THE LAND: A QUESTION OF BELONGING AND SHARING

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The one thing that does not grow on land is land. However one looks at it, the surface area of South Africa is limited and not even the advent of non-racial democracy will make it larger. You cannot extend land rights in the way you can extend the vote, you cannot adopt the policy of taking land away from none and giving to all as you can with opening up the franchise. The land is not only finite, it is fixed; there is no way of physically redistributing and re-locating it the way you can with money or cattle or bags of maize. The land is the land. You can fly over it, tunnel under it, wash its surface away, put up buildings on it, degrade it, beautify it, live on it, abandon it, and in the end it is just as big or just as small as it was in the beginning.

At first sight the land question seems to be yet another of South Africa's many allegedly insoluble problems, perhaps the most difficult one of all. Either the original unjust dispossession of the land is condoned and recognised as a legal fact, or there is a new form of dispossession which, it is said, would unjustly deprive the present owners of what they have legally bought or inherited and developed with their money and their sweat. What would be transferred would not be land but resentment, and the only issue would be who should bear the anger: the original possessors, currently dispossessed, or the current possessors, about to be dispossessed.

In any event, quite independently of the justice argument there is the food argument. The whole country needs food - the reasoning goes- and any major re-allocation of access to land, particularly if it involved replacing skilled by unskilled farmers, would so undermine agricultural productivity as to ensure that the only equality that South Africa would get would be the equality of hunger; the whole process of consolidating democracy would be jeopardised, and black farmers would suffer like the rest. Experiments in new forms of land ownership, such as state farms, collectives or co-operatives, would simply add to the confusion and hasten the collapse. The problem can be mitigated, the argument continues, by a massive injection of money, and by looking for unused or abandoned land - but it cannot be solved. The corollary of this proposition is that iniquitous though the present division of 87/13 might be, it is better not to interfere too drastically: rather the disaster we know, and which we can blame on history, than the disaster we do not, which will be attributed to us.

South African land has not always been productive of food, but it has never lacked fertility in producing questions.

The terrible statistic 87 versus 13, created and endured by our ancestors and lived by ourselves, cannot be avoided. Our past weighs on us like a Drakensberg peak. The question is thus put as one of how to alter these proportions, so that the ownership ratios correspond directly and not inversely to the population figures. This means that just as land was taken from blacks because they were blacks, so in the future land must be taken from whites because they are whites. The issue is whether this should be done suddenly or in stages, with or without consent. The second question revolves around compensation: how, it is asked, are the whites to be recompensed for giving up their rights in land, who is to pay, if anyone, and with what? The third question is posed in the form of asking what type of economic and legal regime should be adopted in relation to the re-distributed land. Should large-scale farming be maintained in the form of state-owned or co-operative farms, or should the land be parcelled out to small-scale family farmers?

It is suggested that formulating the questions in these ways makes a solution more difficult than it needs be. They are cast in a generalised and abstract manner, whereas in reality land is very concrete, and people's claims to it are quite specific. They encourage searching around the world for models, whether of success or of failure, to fuel arguments rather than involving the people most directly affected in discovering answers. They overplay the commandist aspect of working out solutions and underplay the potential key to the whole issue, namely, the wishes and culture of the people already on the land.

Putting the questions as above runs the risk of appearing bold and in favour of the dispossessed, but ending up as timid and supportive of the status quo because in the end they seem to be insoluble. What follows is an attempt to lay the emphasis on principles and procedures rather than outcomes, and to situate the land question in the context of democracy, human rights and the rule of law rather than in the context of race.

THE SOVEREIGNTY DIMENSION

To this day, the fundamental question in relation to land is that of sovereignty and de-racialisation. As long as race is the determining factor in deciding ownership and control over land, every struggle over every square metre will be a struggle over race. Only if we truly de-racialise the terms of ownership, occupation and use, will the question really become a question of land and cease to be a question of domination and subjugation.

South Africa has been appropriated by a minority. At the political level this appropriation has been maintained by monopolisation of the franchise, at the level of living by control of the land. The fact is that by law whites own 87% of the surface area of South Africa. They can expel blacks from the land, demolish their homes, prevent them from crossing or remaining on the land. Control over land is not only control over a productive resource, it is control over the lives of people.

The racialisation of land ownership began with the first wars of conquest and continued with appropriation through treaties and direct occupation. The dispossessed African population tried to retrieve their land by purchase; they were forbidden by law, as 'natives', from doing so. They then sought to retain access to the land as lease-holders; they were prevented by law, because they were black, from doing so. They entered into agreements as share-croppers; these agreements were invalidated on grounds of race by law. They worked the land as labour tenants; this was made illegal in terms of so-called native policy. Those who had managed to cling to legal title were forced to vacate their land because they were said to be occupying black spots in white land. Millions of persons had their homes bulldozed, were carted away in lorries, were physically expelled if they ignored the legal notices that ordered them to remove themselves from so-called white areas. They moved back to the land. They were prosecuted as trespassers.

This is what Chief Albert Luthuli, President of the ANC, and member of a successful African sugar-farming co-operative, was referring to when he posed the fundamental question: who owns South Africa? and answered as follows: the overwhelming majority of whites, because they are "white", extend their possession to the ownership of [black] people, who are expected to regard themselves as fortunate to be allowed to live and breathe and work - in a white man's country.

Furthermore, everything in relation to land utilisation was organised on an explicitly racial basis: loans from the Land Bank, credit, marketing, the provision of services, subsidies, the extension of transport, the system of taxation and exemptions. White farmers benefited even in relation to other whites. The franchise was loaded by twenty per cent in their favour, they were grossly over-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 governed 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.

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 law does not presuppose either nationalising the land or 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 present, 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 content of the law must be South African, that is, it must derive its principles from the values held in relation to property rights by all South Africans, embodying and being enriched by different cultural and legal inputs. In its formulation and application, the law can take account of different local situations - whether land is urban or rural or park; it can allow for different patterns of farming, or even of forms of tenure; it can respond to different claims of the people on the land, for property rights in some cases, workers' rights in others, and citizens' rights in all.. What will go will be any reference to race, or any differential provision of services on the grounds of race, or any assumption that the whole of property law has

to be fitted into the principles of one major input, namely, Roman Dutch law..

Nationalising 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 of 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 subsequent affirmative action to support the racially underprivileged rather than the racially overprivileged will then be one that can be considered.

Yet something far more profound even than equal access to land and equal state support 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 territorial 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 the connection of black agriculturalists with the land might be, the law only has regard for the will and interests of the persons who own the title deed. The courts declare black farmers or householders to be 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 always feel free to

decide whom they might have as visitors, frequently to demand from them casual services as of right, often to enter their homes without invitation and sometimes to abuse them physically.

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

Conclusion

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.

De-racialising land law is not just bringing the rule of law to all aspects of rural society in a non-racial way, though it includes that. There has to be a de-racialisation of land law as such, that is, of the law governing the control, occupation and use of actual pieces of land. The whole of property law has been debased by racism. It is more than just a question of who can and who cannot be owners. The very meaning of property rights has become increasingly degraded. The rights have come less and less to do with the actual relationship of people to the land, and more and more to do with white-ness. Property law has ceased to be an instrument for protecting true property values, and become a means of preventing competition from black farmers and

proletarianising all Africans on the land. We have a law dealing with property in South Africa, but not a true property law.

It is ironical that those who over decades and centuries have converted land law into an instrument of pure racist domination, should now be the strongest defenders of what they call a neutral property law, by which they mean a law which will defend the existing ownership patterns as ownership and not as white privilege. It is ironical that no-one has done more to undermine genuine national respect for property rights than the capitalists, whether on the farms or on the mines, and no-one has worked harder for recognition of the property rights of the people than those who have regarded themselves as anti-capitalist.

Whatever one's philosophical starting point might be, the notion of property connotes a degree of legally guaranteed security, independence from arbitrary interference, the right to contract freely, and the order of an abiding and objectively determinable system of principles and procedures. These values, shared by farmers from the most varied backgrounds, have to be disinterred from the rubble of apartheid law, which has targeted each one of them for destruction. The new law requires more than just the absence of the old. It needs the reconstruction of the values to which the old paid lip-service but which it systematically denied.

Non-racism, against the background of racism, necessitates more than the existence of technically neutral rules governing the future acquisition and use of land. It pre-supposes drawing on the experience of all South Africans in relation to the land, listening to them all, discovering common points of resonance, and involving all in the processes of transformation. Solutions found in this way are likely to be more concrete and enduring than those thought up by think-tanks, however enlightened or progressive the experts might be. At the very least, all those most directly connected with the land should be given the chance to participate actively in the processes, so that those who are seriously committed to maintaining good farming, whatever their background, have the chance to make their contribution.

Only if these democratic principles are followed 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 the Freedom Charter demanded 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 domination.

The generous and far-sighted statement which opens the Freedom Charter provides the foundation of a new land law in South Africa. Once it receives an echo from those present holders of property who are willing to see beyond race and acknowledge the commitment to the land of all those who work it and live by it, it becomes possible to build up a shared set of principles for the new land law and to agree on a new set of procedures for deciding on competing claims in relation to particular pieces of land.

THE VALUES DIMENSION

As far as the majority of South Africans are concerned, the present land law lacks legitimacy. The land was taken by force and deception. The structure of white domination which subsequently registered title deeds and created a market in land was itself illegitimate. To this day, race is the foundation of property rights, both substantively and technically. Any attorney's typist knows that the deeds must set out the race of the parties, otherwise they will be rejected by the Deeds Office. Racial compatibility is the foundation of legal efficacy.

To add to the sense of illegitimacy, blacks were forced by the pass laws and the system of what was called native taxation, to work on the white-owned farms. Illegitimacy tainted the use of the land as much as its acquisition.

Getting rid of the overt racism in the law and creating conditions where land is seen as land and not as power, is therefore the foundation of re-legitimising land law. Yet it does not in itself indicate what the sources of a new land law will be. Simply to rely upon the existing title deeds as the basis of property interests in a new South Africa would be to evade the issue of legitimacy altogether instead of confronting it. It might appear to have the advantages of convenience, but in fact it would prove totally inconvenient, since it would guarantee that the sovereignty debate would continue on a plot by plot basis, even if formally resolved at the national level. In many parts of the country, such as in the South Eastern Transvaal, Northern Natal and Northern Free State, black farmers are aware of dispossession not simply on a generalised historic basis but in relation to specific pieces of land farmed by themselves or by their ancestors. As far as they are

concerned, the title deeds possessed by the present white owners have no legitimacy whatsoever, since the original titles from which they purport to derive their effectiveness were themselves tainted with illegitimacy.

It is true that in all countries present-day property relations are based on ancient acts of conquest or forms of internal appropriation which in contemporary terms would not bear legal scrutiny. Noone in England would seriously seek to set aside present landholding arrangements because historically they emanated from a system of tenure introduced by William the Conqueror. In North America the land claims of native Americans are based on treaty rights in relation to specific areas of land rather than original possession of the whole continent. The difference in the case of South Africa is that blacks continue to occupy and till the soil everywhere; that the colonial character of the relationships between themselves and the whites who have legal title has been overtly maintained by the law and state practices; that a vast range of treaties, grants and contracts existed to cover large portions of the country before they were subsequently unilaterally reneged upon or repudiated by the whites; that the black peasantry never forgot their original rights and never ceased to struggle to restore them.

A close look at the demands of the dispossessed shows that in different parts of the country they take different forms. In the Bantustans and in the areas where black farmers have managed despite all the attacks on them to cling to their land, notably in the Eastern Cape and parts of Natal, the pressure is for rolling back the years of encroachment of neighbouring white farmers on their land. In the Western Cape, the Western Transvaal and the Natal Midlands, where proletarianisation of the farmers goes back further and has been more profound, the claims at this stage appear to relate to securing dignified conditions of work and pay rather than to getting direct access to land.

Whatever the position on the ground, two basic principles must be followed: the people must be consulted and involved in any process of change, and the new property law that emerges must be based on a shared patrimony of values.

Private property, whatever its precise legal form, is said to be based upon certain social values of an enduring kind. These are:

Security. The owner of the right has a stable and unbudgeable interest that will be recognised by the state and the whole world. It can only be interfered with in the limited circumstances where the law permits expropriation in the public interest subject to compensation. In the case of South Africa,

the whole intent and thrust of property law has been to deny stability of access to and use of land on the part of blacks. Even to this day, the limited property rights which blacks enjoy in the so-called black areas are simply ignored when black families are removed from other areas and dumped there as though on open land. What matters is blackness, not rights of possession.

Independence of the landowner from state interference. Private property implies an acknowledgement of domain. State functionaries need a judicially authorised warrant to enter a person's property, and once inside, are obliged to respect the physical integrity of the property. The state cannot tell the owner how he or she should use the property, save for imposing certain parameters of choice through planning and environmental controls. In the case of South Africa, the state has deliberately set out to undermine any notion of blacks having independence in relation to land. The state sends in its police and its bulldozers, its cattle-culling inspectors and its native affairs officials. It moves people from one area to the next, demolishes homes, forces reduction of cattle, decides who may or may not visit the land..

Freedom to contract in relation to the use of the property. In South Africa this right has been systematically denied. The principal objective of the Land Act was to prevent blacks from entering into contracts of sale or lease. Contracts which blacks have solemnly made with white landowners, such as share-cropping arrangements or agreements for labour tenancy - tenacious attempts under conditions of unequal bargaining power to establish continuing legal connection with the land - were later deliberately and directly undermined by successive apartheid statutes.

Stability irrespective of changes in government is currently being asserted as one of the hallmarks of private property. In South Africa, governments have come and gone specifically on programmes of subtracting from black property rights. Indeed, no question of black rights in land existed; all that Parliament recognised was what was called black policy and the administration of black people. Now that white-owned property appears to be under possible threat, the virtues of respecting vested property rights are being discovered. It is said that once the Land Act and the Group Areas Act are repealed, property law will have been de-racialised and it will then behove all true supporters of the system of free enterprise to defend existing property arrangements. Yet the reality is that enterprise has never been free in South Africa. For the majority of the people [black], it has been totally under [white] state control, totally regulated [by whites] and totally monopolised [by whites]. Defenders of free enterprise

should thus be the last persons to demand that present patterns of ownership be respected.

One thus sees that, point by point, the claims made in respect of the virtues of the system of private property have been controverted, deliberately and one by one, by the very persons who allege that they are the true defenders of the system of private property. Conversely, and to complete the paradox, black farmers, who allegedly have no understanding of or interest in private property, have fought vigorously and against increasingly heavy odds, to retain respect for these true values of proprietorship. Their decade-long struggles to recover their rights to lands from which they have been expelled, prove the depths of their attachment to the soil, not to any piece of soil, but to this or that plot that they regard as theirs by birthright, occupation or contract. Any lawyer dealing with land claims becomes immediately aware of how deeply meaningful property rights are to black farmers, for whom the notion of property goes well beyond simply having a right that can be computed in money terms and becomes one of close relationship to and responsibility towards a particular piece of land. The land represents the link between the past and the future; ancestors lie buried there, children will be born there. Farming is more than just a productive activity, it is an act of culture, the centre of social existence and the place where personal identity is forged.

Re-legitimising the law accordingly requires that these values, proclaimed in theory but repudiated in practice by the whites, be restored to their proper place, which is right at the heart of the concept of property. Security, independence, the binding nature of contracts, and continuity of rights - this is what the black farmers are demanding. The issue they are raising is not whether to have cooperative farms or small family farms, but whether to acknowledge their concrete and usurped rights to property. Once that has been done, the people, in the exercise of their free choice, can decide whether to continue farming in family units or whether to merge their plots. The basic question on the agenda right now is one of legitimation, and not of parcelisation or socialisation.

Two important and interconnected consequences flow from placing the emphasis at this stage on values rather than on race and on legitimation rather than economic forms.

In the first place, such an approach avoids conceiving of redistribution simply as a racially quantitative procedure. If the whites say today: we own nearly nine tenths of the land because we are white, and not because of certain values, then they ought not to be surprised if blacks go on to answer that we want three quarters of the land back because we are black and constitute three quarters of the population. Not only would

a re- distribution conducted on such a mechanically mathematical basis keep the racial principle alive and guarantee sabotage by the present owners and total discontinuity in and disruption of the food supply, it would do nothing to establish criteria for preferring this or that new claimant to a particular farm. Thus, if two claimants satisfied the qualification of being black, the land would go either to the one who had the most money or to the one most favoured in terms of influence or else best placed in a bureaucratically organised queue; in either event, gross injustice could result, and persons with ancient connections to the land could be shut out. New property rights would flow from new title deeds and not title deeds flow from intrinsic property rights.

Secondly, the proposed values-based perspective provides scope for shared legally-protected interests between black and white claimants to the same piece of land. Where shared values exist and a shared commitment to and involvement with a particular piece of land exists, there is no reason in principle why the law should not be adapted so as to cater for and protect such shared interests. Share-cropping and labour tenancy in the past were examples of co-involvement between black and white in production on a single farm. The arrangements were based upon contracts acknowledging the fact that black and white families occupied and farmed the same piece of land, and defining the mutual rights and responsibilities between them. In the conditions of the time, the parties contracted on a grossly unequal basis, in terms of which the white farmer was accorded a dominant position and the black farmer a subordinate one. What will become possible in the period of democratic transformation in which the human rights of all are acknowledged by the constitution, is a re-negotiation of the terms of shared occupancy and use, but this time on the basis of objectively determinable criteria and in an atmosphere of equality. Negotiated contracts involving the people most directly concerned have the advantages of encouraging solutions which take into account concrete realities, including the preferences of the parties themselves, and as such, are far more likely to become operational than determinations imposed from outside.

Respect for shared values could be the foundation for solving many of the acute problems of reconciling competing claims to the land. Yet the question is not simply one of rights to the land, but of rights on the land. What all farmworkers are demanding, whether they are peasants seeking to get their land back, or rural workers trying to improve their conditions, is that their human rights as people be recognised. Without integrating the values dimension into a system of generalised respect for human rights, it has little chance of being meaningful in South African life.

THE HUMAN RIGHTS DIMENSION

The whole question of property as a human right has been turned inside out in South Africa. The issue is presented as though the one fundamental human right in relation to property is the right not to have your title deed impugned. All other aspects, your right to a home, to security, to independence, are ignored if you do not possess the title deed.

Your actual relationship with the land is totally irrelevant; you buy the land, you buy the labourers. You might be living on a Greek island, you might have bought the farm because you are making so much money from other activities that you need an investment which guarantees an income loss and a hefty tax rebate, you might have acquired the farm with taxpayers' money in the form of a massive low-interest loan from the Land Bank which you never pay back, you might be making a reasonable income not because you are a good farmer but because you are white and entitled to subsidies and guaranteed prices. Yet according to this approach, any intervention in respect of your relationship to the land would be a gross violation of your human rights.

Conversely, you might be descendant of generations of persons who have lived on and farmed the land in question. You might have been born there, regarded the land as intrinsically the land of your foreparents, invested your sweat and thought into the soil during years of drought and years of plenty, brought up your children there. It might have been your one and only home since birth, your one and only workplace, your one and only place of social life. Yet the argument would be that you are nothing more than a squatter infringing the rights of the true owner of the land.

The basic fact is that in South Africa, property law is completely out of tune with human rights principles. In fact, far from property law being one of the foundations of human rights, it is one of the bastions of rightlessness. In feudal society, the serfs went with the land and owed duties to the landowner, but the landowner also had certain responsibilities towards the serfs. In South Africa, the feudal-type dependence exists without any corresponding obligations. It is the worst of all worlds.

There was a time, after the Anglo-Boer War, when it was Afrikaner farmers who became rightless on the land of their birth. Farms had been destroyed by the British Imperial Army, and fields belonging to so-called rebels were confiscated. Hundreds of thousands of poorer Afrikaner farmers became bywoners dependent on the goodwill of the new legal owners of

what they had once considered their ancestral farms. Their status was not all that much higher than that of so-called squatters today. The Afrikaner struggle over the land was part and parcel of the struggle over sovereignty, just as the campaign against poor-whiteism was an integral part of the battle for national and human rights for the Afrikaners. The big difference was that votelessness did not go with landlessness. Possession of the vote enabled Afrikaners to restore their links to the land without having to question the principle of exclusive obedience to legal title.

Looked at from a true human rights perspective, four groups would have claims on land presently reserved for white ownership.

The first would be the black farmers of longstanding occupation who have never given up their insistence that they have rights to the land in question.

The second would be those white owners who have rights recognised both in Afrikaner and African culture - by virtue of birthright, inheritance, occupation, investment and work.

The third would be those owners from the wider economy who have bought land and invested in its productive potential. Since their interests are essentially economical rather than proprietorial, their rights can be acknowledged in an economic rather than proprietorial form. The human rights aspect does not relate to the land as such but to having fair procedures to deal with their interests.

The fourth, and numerically possibly the largest, would be those from the wider economy whose ancestors were driven off the land by conquest, taxation and hunger, and who wish to return to the land, but cannot point to any particular plot with which they have a special connection. Their claim is not to rights in relation to this or that plot, but to have access to land somewhere. Since the very system which expelled them from the land, also denied them the possibility to acquire sufficient capital to buy the land back, society as a whole would have some responsibility for providing the means to enable them to return to the land, and for establishing criteria of justice and technical capacity to guarantee that those most deserving get first place in the queues.

The human rights dimension in relation to questions of ownership cannot be pared away from the wider questions of human rights in respect of life in general in the rural areas, and in particular from the necessity to extend constitutional rights and the rule of law to all who live there.

THE LEGAL DIMENSION

In some ways the law in South Africa in relation to land is too strong, in others it is too weak. It is far too strong and inflexible in terms of the way it defends the rights of holders of title deeds. It is far too weak in respect of applying the rule of law and protecting basic human rights in the rural areas.

What is required in the countryside as in the towns, irrespective of which government is in power and what specific economic policies the electorate may opt for, what set of principles and procedures might be adopted for settling land claims and what systems of land tenure and social organisation might be adopted, is:

Protection of fundamental rights and liberties of all who live there;

Extension of the rule of law to prevent abuse of people's rights;

Legislation to guarantee a minimum platform of social, economic and cultural rights;

Guarantees of workers' rights;

Laws aimed at promoting gender rights and combating the oppression of women as well as provisions designed to give support to the family.

These are all areas where the law today is at best silent, at worst an instrument of discrimination and oppression.

Extending constitutional rights. In South Africa we are not used to the idea of having constitutional rights. We are accustomed to the notion of power and counter-power, of pressures and permissions, of the courts and the press exercising some degree of control in relation to high profile matters where various activist organisations are involved, but being rather marginal to the gross aspects of domination and abuse in daily life.. One fears at times that long after we have got rid of racism we will still have authoritarianism. Apartheid is dead. Long live authoritarian control. Government is authoritarian, local authorities are authoritarian, business is authoritarian. Nowhere is authoritarianism and arbitrary power over the lives of the people more evident than in the countryside. Nowhere is the sense of domination of certain people over others more powerful than in the rural areas. Nowhere are the destinies of the people so closely interwoven and yet so determinedly kept apart as on the farms. Children play together up to a certain age, then one becomes the baas and the other a 'boy', the one a missus the other a 'girl'.

The extension of constitutional rights to the farming areas is the foundation of all other legal transformations there. It is only through the constitution that true equality of rights and dignity can be achieved in a multi-cultural, multi-faith society. The constitution does not immediately and of itself eliminate the immense inequalities created by past racism, but it does establish a structure of equal political rights and equal protection create under the law which enables the injustices of the past to be tackled. At the same time, the constitution speaks to all and for all. It is the biggest single agent for promoting the practices and habits of non-racism. Equality means the same rights for those who are different. Non-racism is not a bland concept based on the idea of zombie-like prototype citizens who have no specific culture, history or personality of their own, that is, who are non-people. It is not one of those strange South African phenomena that have only an identity in terms of what they are not, like the non-Europeans, who, as one writer said, came from non-Europe. Non-racist means democratic, and implies taking people as the are and not attributing rights and duties to them on the basis of race. It is affirmative rather than negative, and acknowledging rather than dismissive of cultural variety.

The constitution is all-embracing precisely because it neither seeks to eliminate differences between people, nor pretends to eradicate social tensions and strife. On the contrary, the essence of the constitution is that it pre-supposes differences but states that they shall not be the basis for discrimination and inequality, and it acknowledges the inevitability and even virtue of social struggle, but provides a framework for such struggle to take place peacefully and democratically.

Just as the first great constitutions were elaborated to overcome feudal absolutism, so will a constitution be necessary to get beyond absolutism on the land. It will not be a case of substituting one kind of racist absolutism with another, but of getting rid of absolutism altogether, which will bring immense benefits to blacks on the land without stripping the whites of their basic constitutional rights. Equality within diversity, not forced assimilation or forced separation, is the key. People will at last begin to talk to each other as equals, not as master and servant, and within a framework of law rather than of arbitrariness. A common constitution is the basis of finding a common humanity and of establishing a shared interest in the land.

Application of the principles of the rule of law. This is part and parcel of the process of guaranteeing basic constitutional rights. In the first place, it means protection against arbitrariness and oppression. As has been said, whites do not only own land, they behave as though they own the people on the

land. They exercise a private kind of control over the lives of others on the land, ignoring or respecting basic rights at their pleasure. The law sanctions evictions of people without legal process from their homes, acknowledges controls over the movement and visits of occupants that amount to localised banning orders, and permits every kind of disrespect in relation to the sensitivities and self-respect of persons on the land. Although the law does not expressly permit the use of violence against farm-workers, the atmosphere of domination and disrespect in the countryside makes any attempt to bring perpetrators of white-on-black violence to book a hazardous enterprise likely to provoke further aggression.

The application of the rule of law to the rural areas therefore pre-supposes new legal rights, a new kind of policing, a new magistracy and new agencies for handling complaints.

Yet there is another way in which respect for the rule of law and legality can transform relationships in the countryside, and that is by upholding for the first time the binding and enduring nature of contracts freely entered into between different persons occupying and using the same piece of land. This is an aspect of legality that has great meaning to many black farmers, who to this day contest the validity of legislation purporting to override such contracts entered into by the parents and grandparents with local white farmers. The point they insist upon is that an agreement is an agreement until it is altered by mutual accord, and that accordingly its terms must be complied with even if they are inconvenient and even harsh. One of the great causes of the lack of legitimacy of the present-day system of land ownership is its failure to conform to contracts entered into by a previous generation of occupants of the land.

Acknowledging the legality and binding force of contracts has great relevance for correcting past injustices, since the existence or otherwise of local agreements would be one of the factors to be taken into account in determining who today have specific historic and moral claims to a share in the land. Yet equally important, the elaboration of contracts in conditions of equality, and according to objective criteria with due scope for subjective preferences, could permit an equitable sharing of the land that is non-disruptive of production and that enjoys the respect of the people.

Legislation to guarantee a minimum platform of social, economic and cultural rights. It should not be too difficult to work out a code of socio-economic rights for persons facing the specific problems of life in the rural areas. While voluntary activities will always be welcome and religious, cultural and social organisations will always have a role to play, they should act to supplement rather than replace guaranteed rights.

The code could deal with residential rights, treating farmworkers' kraals as homes rather than squatters' structures, and establishing appropriate protections similar to those given to protected tenants in the cities. In particular, this would protect the occupants against eviction except in very limited circumstances specified by law. It would also accord such homes all the rights of privacy and inviolability which normally attach to a person's domicile.

It could also provide mechanisms for the progressive opening up of educational facilities, guaranteeing to black children the same rights and responsibilities in relation to schooling that white children have, and making provision for adult education and literacy programmes. Until such time as free, compulsory and universal education becomes the order of the day, there could be provisions catering for mixed contributions, that is, payment by parents, employers and the state.

Similarly, the code could establish a framework of rights and institutions in relation to access to health services, also funded by mixed contributions pending the introduction of a national health system.

Another area the code could deal with is provision for opening the doors of learning and culture in the countryside where more often than not they have been locked and barred. This could be done while at the same time steps were taken to record, conserve and develop local culture. In principle there is no reason why guaranteed access to television, radio, the cinema, newspapers and libraries should in any way lead to the wiping out of local culture. On the contrary, the stronger people are in their community culture, the more easily can they contribute towards and benefit from the culture of the nation as a whole and both enrich and draw on the cultural patrimony of the world.

Guarantees of workers' rights. Agricultural workers tend to be the poorest paid and most abused section of workers in the country. For those workers in different parts of the country, such as those employed on fruit or wine farms, whose aim is not so much access to land as better conditions of life for themselves and their families, the question of trade union rights, rights of collective bargaining and the right to strike are fundamental. The law can provide for mechanisms for registering agreements and settling disputes in the same way that it would for any economic activity, but give special attention to the specific problems related to agricultural work, such as the intimate relationship between employer and employees living on the same land, the seasonal character of work and the fact that the workers live in homes tied to the land.

There is also a great need for a system of responsibilities and control in relation to safety, workers' clothing, and protection from the elements, as well as for guarantees of annual leave and sickness leave.

It would not be the function of the law to spell out in detail the terms and conditions of each and every contract of employment, but rather to guarantee certain minimum conditions, ensure that bargaining over contracts takes place in circumstances of fairness and that all contracts of employment are reduced to writing, understood by both parties, and registered at some accessible place.

Recognition of women's rights and rights to a family and within a family. Patriarchy, racism and feudal-type domination are all stronger in the rural areas than in the towns. Women thus face all the problems that their sisters have in the rest of the country, plus special ones related to their particular situation . They find themselves trapped within traps, subordinated within subordination.

The law has an important role to play in diminishing the isolation, silence and abuse to which women in the countryside are subjected. Their rights in relation to landholding and inheritance have to be respected, and they should also be protected against eviction by selfish husbands or companions from the family home. Equal access of women to schooling, health facilities and such social services as exist, will be fundamental, and should be guaranteed by law. There should also be legislative attention given to dealing with the problems of sexual abuse and harassment faced by women who are specially vulnerable because of their isolation on the land.

Yet perhaps the most important right of all for women in the countryside, the exercise of which will give them the confidence and authority to tackle all their other problems, is the right to participate in decision-making, whether in the home, in relation to contracts affecting their welfare, and at public meetings.

The above are all areas where the law at the moment is woefully weak if present at all. There is one field in which far from being too pallid the law is too robust, and that is in connection with the concept of ownership. This is the area where rigid Roman Dutch law principles of property rights stand in the way of flexible property arrangements based upon shared cultural values.

Interesting work has been done recently by lawyers at Afrikaans Universities with a view to distinguishing between ownership as imperium and ownership as dominium. Imperium is a feudal type

of ownership which gives the title-holder control not only of the land but of the people on it. Roman Dutch law as taken over and developed in the colonial type conditions of South Africa, emphasised ownership as imperium, with the result that by owning 87 per cent of the land, the whites gave themselves the right not only to control the country's natural resources, but also to control the lives, activities and movements of the millions of blacks living on their land. The suggestion has been made that the law be developed so as to separate out the two aspects: imperium would then belong to the constitution and the organs created in terms of the constitution, while dominium would stay with the landowner in the form of proprietary rights and nothing more. The white farmer would continue to be the owner, but cease to be the baas.

This is a good beginning, even if expressed in Latin terms which few people understand, least of all those most directly affected by them. It opens the way to recognising the fundamental human rights of occupants of land and ending the practice of regarding them as trespassers or squatters with no rights at all except the right to hope that the baas is in a good mood.

Yet it is only a beginning. The very concept of dominium or ownership is far too rigid to cater for the complex lattice-work of ownership rights required when the land is one day shared in an equitable and pragmatic way. Re-legitimising property law to take into account competing claims will require new concepts of ownership and new modalities of proof and registration.

The concept of ownership at present tends to be intolerant of shared or mixed control of the same property. The owner may be a company, or a partnership made up of many persons, or even a collective of persons possessing undivided shares, but ownership itself is single and undivided. Ownership has been described as the total cluster of rights which the proprietor has in respect of the use and disposition of the property concerned. In the case of land, the owner is the person whose title is registered at the Deeds Office. In the case of movable property, other forms of proof are required. In the exercise of his or her rights of ownership, the proprietor of land may sell it, give it away, rent it out, use it as security for a loan and bequeath it to someone in a will. He or she may also grant a usufruct, that is, a right to benefit from the use of the land, which is a personal right lasting for the lifetime of the usufructuary. Another possibility is to burden the land with a servitude, such as a right of way, in favour of owners or occupants of neighbouring land. The categories are rather limited, arising out of the specific social and family needs of mediaeval Holland identified and fitted into Roman law categories by such great jurists as Grotius and Voet.

It is possible that the principles of lease and usufruct could be adapted, that irrevocable forms of trust could be developed, so as to reflect new arrangements relating to concurrent interests in land. Principles of company law or partnership law could be brought in. Yet the law would become strained. The categories would not fit neatly, since their purpose was to deal with different situations and they have given birth to a whole series of rules which would chafe against the objectives sought to be realised. What seems to be indicated is an opening up of land law and an adaptation of its principles so as to ensure, firstly, that property rights are congruent with and supportive of human rights, rather than in conflict with them, and, secondly, that they correspond to the real situation on the ground and not to mythological or metaphysical notions connected to race [or, for that matter, to the market or the bureaucratic command]..

The principles of Roman Dutch law in relation to ownership have in fact been regarded as immutable when applied against blacks, and as capable of infinite flexibility when responding to the interests of whites.

Thus, the courts have had no difficulty in upholding the right of a white farmer to expel black occupants from his or her land, no matter that they and their families have farmed that land for generations, no matter that all kinds of arrangements intended to be binding were entered into between their grandparents and those of the present owner, no matter that they have nowhere else to go and no right to or means of acquiring land or shelter elsewhere, no matter that no public authority is under any duty to help them. At most, the more sensitive judges have insisted on a reasonable notice period ranging from some months up to a year [what is reasonable, one wonders, after several lifetimes of occupation?]. If one day the law were turned around and the ancient claims of whites were wiped out by statute, and the present owners referred to as squatters or unlawful occupiers, what indignation there would be at the violation of elementary property rights.

Far from Parliament attempting over the years to adapt the principles of ownership to reality on the land, it has striven to compel reality to conform to the rigid principles of ownership. Thus the objective of statutes designed to prevent blacks from owning or leasing land, or from entering into share-cropping or labour-tenant relationships, was precisely to combat the tenacious struggle of black farmers to retain guaranteed property rights, and to prevent any kind of sharing of interests in the land. Ownership, whiteness and absolute control became synonymous, as did rightlessness, blackness and subordination.

When it came to responding to the social, cultural and commercial needs of the whites in the cities, however, the law showed itself capable of infinite variety. A fundamental principle of Roman Dutch law had been that ownership of land and ownership of buildings could not be separated. From an ownership point of view, permanent structures were regarded as extensions of the land to which they were attached - one plot, one ownership. This made it impossible for persons to buy apartments, so the law was changed and sectional title permitted, that is, ownership rights could be registered in relation to parts of buildings separate from ownership of the land on which the building stood. For all practical and legal purposes, there was no longer any difference between ownership of a flat and ownership of a house. A fundamental principle of property law was violated to achieve this result, and found not to be so fundamental after all.

This was a question of dividing up the physical structure of property for the purposes of profitability and convenience. Then developers of holiday properties sought to find ways of dividing up time. On the principle that anyone can be rich for a week, they sought and succeeded in getting an alteration to the law so as to enable various persons to own the same property but at different times, the so-called time-sharing form of ownership.

At the more humble level, the law relating to landlord and tenant was moved away from absolute concepts of ownership and contract towards acknowledgement of principles of fairness and of accommodation rights. The contract between landlord and tenant, in terms of which the landlord could fix any rent he or she chose to do, was subordinated in specified cases to the principle of a fair rent determinable by the Rent Board in terms of objective economic criteria. The basic right of the owner to evict the tenant after the lapse of the period of lease, was subjected to the notion of protected tenancy, by virtue of which the tenant could stay on as long as he or she paid the rent.

What all these cases show is that property law is really what the white voters, and especially the rich ones, say it is. Now we are reaching the stage where we can start to envisage property law being what the voters, all the voters, rich and poor, black and white, say it should be. The search should accordingly be on to discover what the notions of property and property rights are that all the voters, or at least, the widest cross-section of them, would share in common. Sharing values is the first step towards sharing land and sharing the country. The question of involving the people in this enquiry thus becomes vital. The key to evolving a new land law is to discover what system of property rights would best correspond to the wishes and notions of the people. As the people change

and their lives change so do their ideas change. Our task is to draw on the past, capture the present and build in a capacity for development in the future.

With a view to enriching the debate, some ideas are offered in relation to the procedural dimension of the problem. If we can get the values, criteria and procedures right, and if we can get them agreed to, the task of actually drafting the laws will not be so difficult.

As a contribution towards this debate, some tentative ideas will be advanced as to the kinds of procedures which could be adopted. This is an area where the remedies are as important as the rights. If we can talk to each other, if we follow democratic principles, if we search for solutions that are functional and manifestly fair in the circumstances, we will have taken major steps to solving not only the land question but the people question. From being the major source of conflict and oppression, the land could over time become the foundation of establishing a shared belonging and the basis for a common patriotism.

THE PROCEDURAL DIMENSION

Principles are interesting and procedures are boring, until your own interests are involved, when principles seem less important and what matters are the procedures. Clearly it would be foolish to attempt at this stage to lay down what processes should be followed in re-distributing land, or, rather, re-distributing rights to use of land. We do not know how political change will be accomplished, what role negotiations will play, what shifts of population might occur, what the degree of physical confrontation there might be.

Change brought about by an insurrectionary overthrow of apartheid could have very different implications from change resulting from negotiations. Even if the principles of non-racial democracy would be applicable whatever means were used, the procedures whereby the effects of apartheid were dealt with could be strongly influenced by the manner in which apartheid is brought to an end. The emphasis placed in the following outline on the role of negotiated settlements on a farm by farm basis according to nationally agreed upon criteria,, clearly pre-supposes a relatively peaceful transition in terms of which the spatial distribution of people will not be greatly affected. On the other hand, if white farmers prefer to die on the land or abandon it rather than share it, the proposals made below would have to be re-thought.

True sharing of the land, as in the case of true sharing of the country or of power, is not essentially a spatial or

quantitative matter, an issue of quotas, but a question of values and interests. At the heart of phase three, the most complicated one because it is the one in which real re-distribution takes place, is the search for objectively determinable criteria and manifestly fair and democratic procedures.

When one speaks of the land, one speaks of the whole country, and not just of the farming areas. There has to be a comprehensive policy which takes account of all land, both rural and urban. The basic approach will be that the land belongs to all who live in it. There will be no racial hegemony over land, no concept that the land belongs to whites as such or to blacks as such. Many distinctions will have to be made in relation to different purposes to which the land will be put, and different procedures could be necessary in each case. One fundamental distinction is whether the rights under consideration are rights of necessity [living or survival rights] or rights of ownership [property rights].

Satisfying the rights of necessity involves finding land for homes, schools, hospitals and recreational facilities. Appropriate procedures involving enquiry, public interest, expropriation and compensation already exist and can be built upon and adapted bearing in mind the scale and urgency of the problem. The whole question of land rights in large and small towns requires separate and precise treatment, and will not be dealt with here.

The focus of this presentation is on ownership, more specifically on ownership of agricultural land.
The fundamental question will be to establish criteria based on shared values and capable of being applied according to specified procedures. To be effective, both the criteria and the procedures will have to have been evolved after a process of active consultation with farmers, both black and white. Clearly, all parties will look to the criteria that serve their own interests best. Nevertheless, it is not impossible to conceive of farmers agreeing to a kind of compact which corresponds to the realities of a country in transition, seeks to minimise unnecessary disruption, gives everybody something and is consistent with widely accepted values in relation to property.

One can thus envisage a list of factors, each to be suitably weighted, based upon:

birthright

occupation

productive use

inheritance

title, both ancient and current.

The process of establishing these criteria will be of special importance, since it will in itself accustom people to sharing ideas and encourage the habit of looking for practical solutions based upon mutual advantage [even if only the limited advantage of preventing strife and mutual disadvantage]. The idea would be to involve farmers throughout the country in a national debate with a view to thrashing out precise formulations. On the basis of this agreed-upon set of criteria, suitable legislation could be adopted. The same process would be adopted in relation to legislation on the procedures to be followed in applying the criteria on a case by case basis.

The first phase.

Symbolical and publicised return of recently expropriated land. The amounts of land are relatively small, many of the areas concerned are still under government control, proof is easy, and the expelled communities can identify themselves without problems. The procedural and economic problems are relatively slight. At the same time, the emotional significance of such a restoration of rights would be enormous. Forced removals were the most vivid recent symbols of the subordination of property law to racist principles. They were amongst the most cruel representations of how the land question was tied up with the sovereignty question. They had no economic, social or farming rationale other than to conform to the schemes of apartheid. They were strongly contested and highly publicised, with the whole nation involved in one way or another.

Facilitating the return of victims of forced removals in the countryside and creating conditions whereby they can live and farm in dignity would both acknowledge past injustice and indicate the beginnings of democratic solutions.

This rapid and unconditional restoration of rights would extend to all persons who had documentary proof of ownership or other real rights in land but whose interests were expropriated. Thus they might have had title deeds as individual owners of land, or held undivided shares, or enjoyed usufructuary rights, or had certificates of occupation, or been beneficiaries of trust deeds. Although the non-racial principle would apply, in effect all the persons benefiting during this phase would be black.

As the black farmers say: First give us back what we held until recently in terms of the white man's law itself and of which we have been robbed, then we can start talking about sharing the land as a whole with the whites.

Phase two.

This would be the phase of stabilisation and the creation of defensive rights in relation to land, as well as of preparing the way for the next phase. It would involve legislation protecting occupants against eviction except on very limited grounds. It would create conditions of freedom of speech and organisation on the land, guarantee basic trade union rights for agricultural workers, and create conditions for eliminating physical and human rights abuses.

Above all, it would be a period during which the criteria for evaluating claims to land could be hammered out, in which everyone on the land could begin to assert his or her dignity, and in which the confidence could be established for moving on to the next phase.

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Phase three.

The process of actually applying the criteria can begin. The first step would be to convene explanatory meetings on an area by area basis, starting with the zones where people were best organised with the clearest ideas and the greatest confidence. Assessors, black and white, would set out the objectives of the law and explain the criteria to be used in making concrete determinations.

Land would be identified on a farm by farm basis, and advertisements used to ensure that all potential claimants had notice and an opportunity to put their claim in.

The claimants would then be given an opportunity to see if they can achieve agreement on the application of the criteria to the piece of land in dispute. Where local consensual arrangements can be made, these can be registered with appropriate legal effect, subject to proof that they have been arrived at freely and provided that, in the eyes of the assessors, they are not manifestly unfair or oppressive.

Where no agreement can be reached, the assessors investigate the matter and make a recommendation to the parties. If the parties accept the recommendation, then it will be registered. If any of the claimants do not agree with it, then they will have the right to have the matter heard by a Land Court which will give the final determination.

Provision would have to be made for relatively rapid and simplified proceedings, and for the issuing by the assessors of

temporary orders to prevent transactions aimed at frustrating the purpose of the process.

Prototype agreements could be given to the parties indicating the range of options available to them. In some cases, the claimants could farm side by side on demarcated pieces of land; in others they could work together, live separately, and share the proceeds in an agreed proportion; in appropriate situations, one claimant or group of claimants could pay the other or others out according to an agreed formula. Time scales, usufructuary rights and habitation rights could be built in. The claimants would be given every opportunity to arrive at a voluntary consensus on how best to apply the objective criteria and to find the precise formula which meets the case.

There is no simple solution to the land question, but the more active the role of the farmers themselves - both black and white - the better the chances of success.

POSTSCRIPT: THE ECONOMIC DIMENSION.

The argument:

The moral arguments for a human rights approach to the question of land ownership might be convincing, but economically any interference with existing patterns of ownership would be disastrous, especially if it meant dividing up large modern farms and converting them into small plots for subsistence farming.

The response:

While it is true that most of the land is owned by whites, it is equally true that most of the actual farming is done by blacks. This central fact is frequently ignored when economic factors are placed in opposition to human rights considerations.

Those who have always talked and never listened must now begin to listen; those who have had forever to remain silent must now find their voices; creating conditions to enable farm-workers themselves to say what they want is fundamental, both to human rights and to production. The people living and working on the farms have the right to state themselves what their demands are and how they would like to see them realised.

In the meantime, the experience of the incipient trade union movement on the land suggests that what farm-workers are

looking towards in many parts of the country is not so much ownership of the land as recognition of their rights as workers and as citizens.

If this is so, then the effect of transforming relationships on the land will in these parts of the country be more to undermine patterns of baasskap [domination] than patterns of ownership. The legal and psychological barriers to blacks acquiring rather than merely working on, say, Western Cape wine farms, would be removed, and attempts would be made to secure finance on favourable terms to ensure that no good farmer is prevented by race or other background factor from becoming an active part of the farming community.

Yet the main thrust of change in this sector of the rural economy, particularly in the earlier period, will be towards guaranteeing decent wages, household security, freedom from abuse and access to education, health and social amenities, rather than towards providing for new proprietary rights. What will be different will be the replacement of unequal relations of master and servant by new relations based on freely negotiated contracts between employer and employee set in a context of guaranteed constitutional and statutory rights. The kind and scale of the farming operations will remain largely untouched, but the rights of the workers will be greatly strengthened

From another point of view, it could be argued that through judicious use of a land tax, land at present underutilised or badly utilised through lack of interest on the part of the owner could be made available for farming, thus increasing the amount of land available for re-distribution.

Yet the big question remains as to whether the recognition of actual land claims by black farmers in respect of land presently monopolised by whites would lead to a parcelling up of large productive farms producing for the internal market and for export, and their replacement by small unproductive units dedicated to subsistence farming. Would social justice result in economic ruin?

It is difficult not to respond in emotional terms, whatever one's point of view. Yet it is precisely the questions that most arouse our passions that require the most sober appraisal and the greatest freedom from pre-conceptions, stereotypes and mythology. Even if we all agree to base our analyses on objective reality, we have grave difficulty in achieving a common description of that reality. All the more reason for trying, bearing in mind that we should never re-shape or select facts simply to justify an already determined result, but rather aim to develop an analysis in which there is a logical and organic congruence between facts and proposals.

Some questions are so big that they break under their own weight, and a series of little questions burst through. In the case of what the impact on the rural economy would be of humanising and legitimising relations on the land, the little questions are: Is white farming economic? Is it white? Is black farming uneconomical, and if so, is that a result of inherent incapacity brought about by tradition, or does it flow from other factors associated with inequality and susceptible to rapid corrective intervention?

Is white farming economic?

If recent Department of Agriculture research is to be believed, only between twenty and thirty per cent of white-owned farms are really productive in terms of yield potential. If the remainder give a reasonable income to the owners, it is because of direct or hidden subsidies. In the first place, there is the enormous and continuing debt that is sustained more for political than economic purposes. It has been stated that any government that wished to nationalise the land could do so without legislation and without compensation, by simply calling in the debt. One estimate is that in economic terms something like 80 per cent of the farms belong to the Land Bank, even if in legal terms they are registered in the name of white proprietors.

Then there is the question of subsidies. Prices are subsidised, particularly for export crops such as maize, which are not necessarily the most economic in particular areas where it still pays to grow them. It is one thing to subsidise agricultural production, it is another to subsidise life style. It is one thing to encourage farmers to stay on and develop the land, it is another to facilitate absentee farming.

Productivity is indeed one of the factors which would be taken into account in determining the share that a farmer would get in relation to disputed land. It enters into the scheme of values that could be accepted by all as underlying the proposed new land law. Productivity is indicative of commitment to farming, application of sweat and intelligence to getting the best out of the soil and proof of having a relationship with the land. It is a factor acknowledged by black farmers, even in relation to white landowners with a record of bad treatment of workers. Where high productivity is coupled with birthright, the claims of the white farmer would be strong.

Similarly, there is land which is less fertile or less well-watered, and accordingly less productive, to which many white farmers have a genuine and active commitment. Such farmers would also have a strong claim, and would not find themselves penalised by a tax on unproductive use of land..

The farmers whose claims would be weaker would be those who absented themselves from the farm or those who simply sat on the stoep drinking coffee while waiting to collect their subsidies, leaving all the real effort to black farmworkers who invested their sweat and intelligence into keeping the farm going.

In all cases, what is contemplated is not so much an outright taking and re-division, as a computation of interests expressed in a legally protected form acknowledging the new kind of shared access to and interest in the land. Far from being disruptive of the present productive reality, the new patterns of ownership would correspond more directly to it. There have already been far too many forced removals in South Africa, far too many expulsions from land, far too many refugees, to countenance a new trek of the dispossessed. What is envisaged is ending the system where such removals are possible, stabilising the rights of all who are on the land, and adjusting the terms of ownership and use to productive and cultural reality. The law of farms would thus come closer to the practice of farming, not move further away from it.

There would be nationalisation of land law, not nationalisation of the land. An interesting suggestion has been made by an expert on mineral rights that rights in the sub-soil could be regarded as vesting in the state, just as rights to the sea-bed do, and rights to control the airspace. Surface boundaries make no sense in relation to underground mining. The supervision of the utilisation of mineral resources could be equated with the responsibility of the state to support conservation of the land. It does not pre-empt the debate on ownership and control in relation to mining actvity as such, but would facilitate acknowledgement of royalty rights for black farmers dispossessed of land on which mining later took place..

Is white farming white? There is no way of testing the whiteness of farming activity as there is of washing with a certain powder or brushing one's teeth with a certain brand of paste. Yet the phrase white farms gives the impression that they are farms owned and worked by whites, either using family labour or else employing white farmhands. The actual situation is that there are invariably more blacks on the farms than whites, and there are many of these farms on which no whites live at all, leaving all farming to black managers and workers.

Blacks do the ploughing, the planting, the reaping and the storing. They look after the animals, take on-the-spot decisions on how to respond to climatic changes and disasters. They are not just agricultural labourers, they are farmers, involved in the tradition and psychology [and, in some cases, in the practical bureaucratic aspects] of farming, but

prevented by law from functioning as farmers on their own account.

One of the sad facts of South African history is that when African farmers proved their capacity and in fact began to produce better and sell better than the white farmers - as was the case when they marketed their produce in the newly opened diamond and gold fields - legislative and administrative means were deliberately introduced to destroy them as competitors. Recent studies by officials from the Development Bank and by researchers from Pretoria University have shown that in spite of all the legal and practical impediments placed in their way today there are black farmers in parts of the country who are achieving more sustainable farming results than their white neighbours.

The approach suggested here is almost the exact opposite of searching the world for positive and negative models and then dragging them in to South Africa to prove or disprove a thesis. We prefer rather to look to other countries not for models but for options and experiences which might be useful to us in building up towards our own solutions. Amongst the experiences in neighbouring countries which are relevant are the successes achieved by cattle ranchers in Botswana and maize-growers in the formerly destitute so-called tribal trust lands in Zimbabwe, who, in conditions of political independence made good use of state aid to produce vast surpluses of meat and grain for the market and for export.

These experiences need to be studied closely; whatever they prove might be debated, but what they refute is clear, namely the assertion that there is something in black social organisation or culture that inhibits the production of large farming surpluses.

Low productivity in the Bantustans would accordingly seem to be the product of destitution, oppression and overcrowding rather than farming incapacity. While the pressure on the land is immeasurably greater than it was in Zimbabwe, precluding the possibility of a similar type of productivity breakthrough, there could be significant increases in production if the land were really de-racialised.

What is needed in South Africa is for the state to get off the backs of the blacks and give them some of the supports until now reserved for the whites. Then we will see who can farm and who cannot.

CONCLUSION TO THE POSTSCRIPT

No future constitution can ignore the land question. South Africa was not given either by Providence or by conquest to any group. It belongs to all who live in it. The function of the constitution is to acknowledge this fundamental reality, not only by resonant preambular references, but by precise Bill of Rights formulations aimed at healing the tension between possession and dispossession. The Bill of Rights would thus have to deal with ownership of land and with fundamental rights and freedoms of those living on the land.

It is not necessary or even advisable for the constitution to remain silent on the question of private property. Property rights have been so violated and the results so unfair, that a failure to attend to them would be a failure of the constitution. It is not the function of the constitution to resolve each and every conflict, not even major ones. That is what Parliament and the courts are for. Yet the constitution must provide the framework within which disputes can be settled in a law-governed and fair way. This requires fair criteria and fair procedures against a background of common values.

Protecting rights to property therefore should be based on recognising fundamental property values and not on preserving unjustly acquired property privileges.

A simplistic freezing of present patterns of ownership would war against the general system of protected rights and freedoms contemplated for the rest of the Bill of Rights, and serve as a reminder that the sovereignty debate was far from over. There would be no agreed set of criteria for establishing rights to the land, simply assertion and counter-assertion. The whites would use their present position to build in opportunistic safeguards disguised as principles, the blacks would use their future legislative strength to rectify the position. If no rapid solutions were found, peasants would simply seize property and ignore the constitution altogether.

If a constitution is anything, it is the expression of agreed values. What is urgently required now is the involvement of farmers and farm workers on a nationwide scale in determining what these agreed values should be, or at least, what principles should guide the arriving at a consensus on them. The economic question is not the central one at this stage and should not, it is suggested, be allowed to dominate the constitutional debate. The crucial issue on the agenda right now is that of de-racialising and legitimising land ownership and use, which, as has been explained, starts with scrapping the Land Act and the Group Areas Act, but goes well beyond that. The question of compensation itself becomes integrated into the process of objective criteria and fair procedures. The term just compensation as used in Namibia requires precisely such a position.

Then, once farming becomes just farming, not black farming or white farming, and once ownership becomes just that, not control of people but control of land use, those who own and work the land will decide freely for themselves how they wish to be organised and what economic forms they choose to adopt.

The constitutional rights are accordingly, first, the right to get legal acknowledgement of just claims to land according to objective criteria and fair procedures, and secondly, once the terms of ownership and use have been settled, the right of the farmers to determine for themselves what to do with the land. . The state neither insists upon nor excludes any specific economic form, but through its policies of supports and taxation encourages the production of food and gives special attention to assisting those deprived of opportunities in the past to overcome the disadvantages imposed upon them. At the same time, attention should be paid to involving people on the land, farmworkers and farmers alike, in developing the outlines of a Charter of Rural Rights, which, in association with the constitution and the general law of the land, would ensure that the special problems relating to human rights, workers' rights, gender rights and due process of law on the platteland, would be dealt with.

Such an approach would be consistent with the broad sweep of the Freedom Charter, as well as with the Charter's specific provisions on land. It would carry the ANC Constitutional Guidelines a step forward, both in a substantive and a procedural way. What matters is not so much who authored the Charter or the Guidelines, as the principles they contain. One of the basic principles is that the people shall decide; this means all the people, not just this section or that. Another is that they shall decide in conditions of freedom.

The solution to the land question depends more than anything else on the involvement of the people in the process.