

ANC NATIONAL CONFERENCE JULY 1991 DURBAN

PROPOSAL FOR A NEW CLAUSE ON LAND RIGHTS TO BE PUT INTO THE DRAFT BILL OF RIGHTS

Arising out of recommendations made at the Salt Rock Workshop on the Draft Bill of Rights, members of the Constitutional Committee have prepared the following draft to be considered by the Land Commission and to be discussed at conference. It is proposed that something on the lines of this draft be included in the final revised version of the Bill of Rights, the exact text yet to be finalised.

ARTICLE 11 – LAND AND THE ENVIRONMENT

- (1) The land, the waters and the sky and all the natural assets which they contain, are the common heritage of the people of South Africa who are equally entitled to their enjoyment and responsible for their conservation.
- (2) The system of property rights in relation to land shall take into account that it is the country's primary asset, the basis of life's necessities, and a finite resource.

Rights to Land

- (3) South Africa belongs to all who live in it.
- (4) Access to land or other living space is the birthright of all South Africans.
- (5) No one shall be removed from his or her home except by order of a court, which shall take into account the existence of reasonable alternative accommodation.
- (6) Legislation shall provide that the system of administration, ownership, occupation, use and transfer of land is equitable, directed at the provision of adequate housing for the whole population, promotes productive use of land and provides for stable and secure tenure.
- (7) Legislation shall provide for the establishment of a tribunal for land claims which shall have the power to adjudicate upon land claims made on legal or equitable grounds, and in particular shall have:
 - (a) the power to order the restoration of land to people dispossessed by forced removals, or where appropriate to direct that compensation be paid, or other suitable acknowledgement be made, for injury done to them.
 - (b) the power to award particular portions of land, or rights to land, to such claimants, where there are special circumstances arising out of use, occupation or other similar grounds, which make it equitable for such an award to be made.
- (8) Legislation shall also make provision for access to affordable land to be given as far as possible, and with due regard to financial and other resources available to the state, to those historically deprived of land and land rights, or deprived of access to land by past

statutory discrimination.

- (9) All such legislation shall guarantee fair procedures and be based on the principle of achieving an equitable balance between the public interest, including the above objectives, and the interests of those whose existing titles might be affected.
- (10) Any redistribution of land or interest in land required to achieve the above objectives shall be subject to just compensation which shall be determined according to the principle of equitable balance between public interest and the interest of those whose existing titles might be affected.
- (11) In the case of a dispute regarding the amount of the compensation or its mode of payment, provision shall be made for recourse to the courts or an independent tribunal, with an appeal to the courts.
- (12) All natural resources below and above the surface area of the land, including the air, and all forms of potential energy or minerals in the territorial waters, the continental shelf and the exclusive economic zone of South Africa, which are not otherwise owned at the time of coming into force of this Constitution, shall be vested in the state acting as trustee for all South Africans.
- (13) The state shall have the right to regulate the exploitation of such natural resources, grant franchises and determine royalties subject to payment of appropriate compensation in the event of interference with any existing title, mining or fishing right, concession or other vested interest.

Border ANC Land Commission Report to Plenary Session of Regional Policy Conference, East London, May 17 1992

The Border Land commission endorses the policy guidelines with the following proposed amendments.

1 Fundamental issues

Negotiating tactics. We must enter negotiations with policy documents that contain our maximum demands and be prepared for some compromises from there on. If we do not adopt a tactical approach to our policy we are certain to find ourselves locked into negotiations where we have to compromise far beyond what we have been fighting for. Our starting point or maximum demand is for the redistribution of land to the landless and homeless.

A Property Clause in the Bill of Rights. While we accept the principal of a Bill of Rights to guarantee fundamental freedoms and rights such as the right to housing, shelter and security, we believe that the Bill of Rights should enable rather than prescribe legislation. We fear that Articles 11 and 12 as they stand, particularly paragraphs 8, 9 and 10 of Article 11 and paragraphs 1, 4, 5 and 6 of Article 12, may be used by landed and propertied classes to frustrate or completely block our attempts to address the land question including the redistribution of land.

Many countries do not have property clauses in their constitutions or Bills of Rights. Instead they prefer to guarantee social rights to housing, shelter, a share in the country's wealth etc. We believe that this is the preferred approach where we place such social rights above the right of an individual to have unfettered use and control of private property including immovable property and capital. Therefore we should not include land and property clauses in our Bill of Rights.

If we find ourselves obliged in negotiations (as is likely and probably also wise in terms of the fears of propertied classes) to include a property clause then it should emphasise the social aspects of land and property as the remaining paragraphs of Articles 11 and 12 tend to do. See especially Article 11 paragraphs 1 - 6 and Article 12 paragraph 3. A Bill of Rights which guarantees the right to hold property (other than mere personal affects, in other words capital, land etc) so long as the holding of property fulfills a social function should not pose a threat to land redistribution and expropriation. After all land held purely for speculation or which is being excessively degraded, or excessive land holdings etc is not in the broad social interest and therefore such a clause in the Bill of Rights would enable rather than prevent land redistribution.

2 General issues

Land claims. Our maximum position is for all land to be restored to those who lost it in the wars of conquest and under colonial and then apartheid rule. Historical claims to land must be made. However the legal and economic implications of such a demand raises many difficulties such that the demand cannot be fully satisfied literally. Therefore we are proposing 2 different processes to redress the wrongs of the past:

- a) A judicial process for dealing with land claims. This judicial process will address historical wrongs such as dispossession and forced removals. The process will be the responsibility of a specially constituted Land Tribunal or Claims Court. Here historical claims to land will succeed or fail on the basis of the evidence brought before such a judicial body, whether oral or documentary. Therefore the question of a cut off date

before which claims will not be considered does not apply. What does apply is whether a claimant or group of claimants can produce the necessary evidence.

A Land Claims Tribunal will be politically very important - its decisions will give an important symbolic and real effect to redressing our grievances. However the majority of people will not be able to prove claims to land through such a process.

- b) A programme of development and redistribution. The state is responsible for the needs of the nation within an overall development and land redistribution programme. Therefore the state has to ensure that the need for housing and/or land and security of the majority of people who are homeless and landless is met. This must be done within a national development framework and programme.

Such a programme must be the focus of attempts to redress the legacy of apartheid as it will address the needs of a far greater proportion of homeless and landless people than the Land Claims Tribunal.

Land Court must be accessible and affordable. Our experience of the courts is that they are very inaccessible, costly and time consuming. A Land Court must be both accessible and affordable to the most marginalised people.

Compensation. A future ANC government has to ensure the maintenance of food production. Threats of random or large scale confiscation of agricultural land is likely to lead to the disruption of the food supply with frightening political and economic consequences. About 70% of the food supply of our country is produced by 30% of the white commercial farmers. Our policy must assure this minority of white commercial farmers who are productive that the ANC will not expropriate their land without compensation. Moreover in the short to medium term their land will not be targeted for redistribution at all.

The first source of land for redistribution, both in the towns and in the countryside, including in the bantustans, should be land which falls into one or more of the following categories: land from which people were forcibly removed; land held for speculation; under utilised or unused land with a productive potential; hopelessly indebted land; land which is being degraded; land on which human rights abuses are occurring at the hand of the present owner; land acquired through corruption or nepotism; and excessive land above a certain limit held by individuals and families. Such land ceilings would vary according to geographic area, productive potential and type of farming such as cultivation or pastoralism. Large agro-industrial holdings may be dealt with separately as issues of collective bargaining.

The state must have the right to expropriate all land falling into the categories in the paragraph above without compensation because land is a fundamental social resource, the abuse of which leads to forfeiture to the state and through the state to those in the most need of such resources.

If as a compromise we have to agree to some compensation for this land for redistribution, such compensation should not necessarily be based on market values which are generally inflated due to apartheid which for example provided cheap credit to white farmers. Compensation should be at a lower value such as the value of municipal ratings or productive or use value.

If we have to compromise on the issue of compensation for some of these categories of land holders then it should be the wealthy people as a whole who contribute towards this compensation. Therefore a once off wealth tax may be

considered. Other ideas raised in the present draft should also be considered.

Right of review of decisions of land tribunals/claims courts. There is ample warning from around the world of the danger of appeals and review procedures being used to completely frustrate attempts at land reform/redistribution. We cannot deny the right of review which is guaranteed in the Bill of Rights. If there has to be a right of review then it is essential that we develop objective criteria for expropriating land and that we define any compensation very tightly.

Economic empires. We have already stated that excessive land holdings should be a basis for expropriation. But our policy must also enable us to break up the hidden monopolies and controls that exist in agriculture by virtue of the control linkages between agricultural credit, marketing, commercial co-operatives, the Land Bank, the SAAU etc. Unless we break these hidden monopolies and controls within white commercial farming we can probably forget the development of a small farming sector. The same considerations which apply to the rest of the economy must apply here.

Annexure - Sections of the present draft affected by the above amendments

Under the heading Bill of Rights, the text headed "Property Rights" should be deleted in its entirety. Such a section, re-constructed, may be included under the Economy or Land headings. However under the heading Bill of Rights one could instead spell out the belief that land and property rights are dealt with in policy documents because socio-economic rights such as to food, shelter and security are more fundamental than property rights.

Under the heading The Land there are many and substantial amendments. It may be best to redraft the entire section with the above points in mind or to add the above points where appropriate and make other changes where necessary. Such other changes to the present text would include:

Under the heading "Land and Agricultural Policy", remove the last sentence of the first paragraph, "Compensation will have a big role to play in dealing with competing claims.", and replace with the gist of the first paragraph under "Compensation" above. Also add the gist of the paragraph headed "Economic Empires" above.

Under the heading "Land Reform and Redistribution", add to the point on the land court that such a court should be both accessible and affordable to the most marginalised of our people.

Under the heading "Redistribution of Agricultural Land", the second paragraph must be re-written to exclude the terms "public interest" and "just compensation". The gist of the second and third paragraphs under "Compensation" above must be incorporated.

Under the heading "Access to land and ownership", the words "and ownership" should be taken out of the heading. In the first paragraph the word equitable should be removed in both instances of its use. The word "owners" in the second paragraph should be replaced by "land holders including lessees of land".

The paragraph headed "Compensation" should be removed as the issue has been covered above. The issue of financing the restructuring of society should be dealt with under the Economy section as this is an issue which affects education, housing, health services, water and electricity etc, and land.

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