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WHO OWNS SOUTH AFRICA?

CAN THE REPEAL OF THE LAND ACTS DE-RACIALISE
LAND OWNERSHIP IN SOUTH AFRICA?

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session with Mr. Jacob de Villiers, Minister of Agriculture
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WHO OWNS SOUTH AFRICA?'**CAN THE REPEAL OF THE LAND ACTS DE-RACIALISE****LAND OWNERSHIP IN SOUTH AFRICA?****SOME STORIES****The Bakubung**

The Bakubung tribe is meant to live in Ledig near Sun City in Bophuthatswana. Some of the members of the tribe do live there, others refuse to. Those at Ledig live in a shack settlement and crime is rife. Thirty years ago they were prosperous farmers in the Boons district, living in stone houses surrounded by orchards, fields and cattle camps. The land belonged to them.

The tribe's land was expropriated as part of a forced removal which was effected between 1966 and 1969. The tribe was ordered to leave the area in 1965 but the majority refused to do so despite the fact that their churches and schools had been demolished. After the expropriation many members of the tribe (88 & 150) were convicted of occupying state land and spent periods in jail. Their cattle were impounded and sold and the people received no compensation. Still they refused to move. Then in 1969 ten leading members of the tribe were arrested and charged with terrorism. They spent 9 months in jail before the charges of terrorism were withdrawn. They left jail free men but men without homes. The prison authorities delivered them

¹ 'Who owns South Africa?' This question is posed by Albert Luthuli in his book Let My People Go (Collins 1962). He answers the question by saying : 'With the exception of a small number of voices crying in the wilderness, the overwhelming majority of whites reply that South Africa is owned exclusively by three million whites.' The concept of ownership is deeply disputed in South Africa. The imminent repeal of the Land Acts sets this dispute in sharp relief. Whites claim that legal title is the only valid reflection of legitimate ownership. Blacks claim legitimate ownership by other values such as birthright, belonging and occupation. This paper attempts to show that these opposing views of ownership can be reconciled in a stable unitary system. Thus the common English usage of the words 'to own' and 'ownership' is adopted throughout the paper. To have applied it as a strictly defined legal concept would have been to favour one side of the dispute.

to Ledig. At Ledig they discovered that while they were in jail 190 household heads had been arrested and their families transported to Ledig.

The land at Ledig is registered in the name of Lucas Mangope, the President of Bophuthatswana. The members of the tribe were allocated residential plots of a hundred square feet. They were forbidden to keep cattle. Other groups of people have moved into the same area. From 1969 the tribe fought for compensation so that they could re-establish their lives. Despite all their efforts they have never received title to compensatory land nor the sum of R410, 579, 00 for additional compensation which was offered for an expropriation never agreed to. In 1988 their former neighbours, Mathopestad were reprieved from forced removal. Their little farm lies productive and secure in the middle of the vacant, unused Bakubung land. Last year the Department of Agricultural Development decided to sell the Bakubung land to white farmers. When they discovered this, the Bakubung threatened court action if the advertisements were published. They were not. The Department of Agricultural Development announced that 'no agricultural land which had been expropriated at an earlier stage in accordance with a previous consolidation policy, will be sold henceforth'. The Bakubung have interpreted this undertaking and the reprieve of their neighbours as opening the way for them to regain ownership of their land.

They are much luckier than the Mfengu of the Tsitsikamma area whose farms were sold to white farmers at a quarter of their value with a hundred percent bonds. The Mfengu are scattered all over in the Eastern Cape; they could not survive in the terrible conditions in the resettlement camps in Keiskammahoek. The Bakubung are also much luckier than the people of Goedgevonden and Welgevonden near Ventersdorp who were moved to an area in Bophuthatswana which belongs to a chief Moshoea. Four other groups have also been moved onto the same piece of land. Because their land was not expropriated they are not covered by the governments undertaking not to sell it. The government held their land in trust for them and so did not need to expropriate the land to gain title to it.

The Goedgevonden and Welgevonden people like countless others have ceaselessly petitioned the government to address the terrible poverty in which they live and to keep the promises made at the time of the removal. Their appeals fall on deaf ears. In August 1990 their lawyer received a letter from the Ministry of Development Aid :

'In reply to your letter of 29 May 1990 I have to inform you that as your client lives in the independent country of Bophuthatswana it would be inappropriate and totally irregular for me to meet them for discussion'.

Saaihoek

On the farm Saaihoek in the district of Piet Retief a group of labour tenant families are living on borrowed time. They were recently ordered to leave the farm on which they

have lived for many generations, within three days. They refused to leave. The order is the culmination of protracted legal prosecutions in which they have been found guilty of both trespass and illegal squatting.

Christina Nkosi who was a young girl on the farm at the time of the Boer war and is now blind and very frail, was charged with trespass. She had to be carried into court. One of the household heads, Zabulon Nqoteni, laid charges against the owners of the farm for allegedly shooting his goats and the theft of some of his cattle. The prosecutor threatened that unless he withdrew these charges she would press charges that brought a suspended sentence against Nqoteni into operation. The families have occupied the farm since time immemorial. Since white farmers arrived there they have lived by the system of labour tenancy. They provided labour to the owner, either herding sheep on Saaihoek, or working for six months of the year at the owner's other farm in Amersfoort. They received no wages.

Instead they were allowed to plough fields and keep cattle. They are surplus producing farmers. They farm by traditional methods using their own seed and ploughing with oxen. They farm maize, beans, pumpkin and sorghum. Between them they also have 200 head of cattle and some goats. They sell their surplus to the African settlement on the Lutheran mission across the river from the farm. Their land and homesteads are separated from the rest of the farm by a rocky mountain.

In early 1989 Saaihoek and various other farms in the district were bought by a wealthy farmer from the Free State. His managers ordered the families to leave. The initial order was not valid as it did not provide for reasonable notice. But the Piet Retief court has now held that sufficient notice has been given. This led to findings that the families were guilty of both trespass and squatting. The families insist that they have always occupied the land on which they live. The only skills they have are agricultural. Their assets are all bound up the land they farm, their houses, cattle, trees and fields. They have had no option but to live a life which has equipped them for nothing else but farming. They do not accept that they can now be evicted from the farm. They expected the law to protect them. Instead it has made them criminals. It is the State not the farmer that has prosecuted them. Because their lawyer has explained to them that the situation is hopeless and there is nothing that can be done to secure their rights to stay on the farm, they will not speak to him any more.

Midrand

Ishmael Kgosana was born on a farm in the Free State. Because there was no high school there he went to Soweto to stay with relatives and finish his schooling. But he could not stay with them forever. So he got a job as a site clerk at a construction company. For years he moved around the country living on different sites. But he wanted to settle down. He chose to live in Midrand where the headquarters of the company that employed him are.

There is no township in Midrand, no place where he can legally live. He joined a group of families who hired out-buildings from a local farmer and lived there (in contravention of both the Group Areas Act and the Land Act). The farm was bought for redevelopment and they had to leave. They went to live at a seminary which gave them refuge because they were desperate. But they overstayed their welcome and had to leave there too.

Kgosana then set up a shack in a squatter community on land owned by the insurance giant Sanlam. Surveys of this camp showed that the majority of its occupants were employed people who simply had nowhere else to live. Within a six week period the Midrand Town Council demolished parts of the camp 11 times. The demolitions were justified by invoking the Illegal Squatting Act. During this time the camp grew from a settlement of 50 to 200 families. After the group of squatters managed to interdict the Town Council from further demolitions Sanlam did the final demolition with its own bulldozer. On that day leading residents were appearing in the Wynberg Magistrate's Court on charges of trespass.

In the end some of the families gave up and went to KwaNdebele, some 200 km away. They leave home at two o'clock every morning to get to work at Midrand. Others established another settlement on land owned by the House of Representative near the 'coloured' settlement of Rabie Ridge. The House of Representatives is loath to use the Illegal Squatting Act and have said it will apply for an eviction order in terms of its rights of ownership under civil law. The group is legally entirely insecure.

* * *

INTRODUCTION

Any reform or land policy which does not address situations such as these, and does not acknowledge the terms in which the communities express their needs and demands, will not be able to stabilise an inequitable and explosive status quo.

In this paper the government's proposed reforms are considered. It examines whether the reforms fulfil their stated intentions, and whether they can de-racialise and stabilise a situation created by historical injustice and inequitable access to land. An alternative approach embracing two processes for dealing with the problems of securing all existing interests in land, and addressing the widespread landlessness in our country is put forward. This implies a process of redistribution, which I argue can be achieved in a rational, pragmatic and constructive manner which will build a stable base for the new South Africa.

WHAT ARE THE GOVERNMENT'S PROPOSED REFORMS?

President de Klerk has made it clear that the Land Acts of 1913 and 1936 and the Group Areas Act will be repealed. This, together with a recently published Bill, will not only abolish legislative but also prohibit private racial restrictions on the right to buy or lease land.

Mr de Klerk has stressed that this reform takes place in the context of the principles of a free market economy, and within a system of individual ownership. This means that land will change hands on the basis of willing buyer, willing seller. He has repeatedly assured farmers that their title deeds are secure and will not in any way be affected by the repeal of the Land Acts. Dr Gerrit Viljoen has stated regarding the proposed repeal of the Acts, that land cannot not be returned to communities who had been removed, because such a precedent would cause a revolution throughout the world.

WHAT ARE THE LIKELY EFFECTS OF THIS REFORM?

Very few black people have the money to purchase land at current market prices. This means that the repeal will have a minimal effect on the racial distribution of land. 'Private ownership' of land within a free market may have a devastating effect given the base on which it is imposed. Most land in the homelands is nominally registered in the name of the South African Development Trust or homeland governments. However, under the surface of this system which was imposed by successive white governments, millions of people live on, use, bequeath and transact individual pieces of land as the effective owners of the land.

A 'free market' would allow the title deed holders, as the nominal owners, to sell off this land and thereby dispossess the occupants. This has already occurred in the Ciskei where this type of privatisation legislation has been adopted. Even if the State recognises the occupants as the real owners, a 'free market' will mean that poor and indebted people will sell their remaining resources to the highest bidder. This will break the last tenuous survival networks that exist in our impoverished rural areas.

The right to buy land does not address the claims of communities who were forcibly removed. These people believe their land was stolen from them and must simply be returned, with reparation rather than a debit order. Events in the western Transvaal have already indicated how such communities respond when the state puts their ancestral homes on the market. They take the law into their own hands and re-occupy their land. This prevents their claims being thwarted by the State introducing third parties, and thereby creating more vested interests in what is already highly contested land.

To say that redistribution will take place by the operation of market forces on

existing title deeds is to pre-empt the resolution of historical claims. It will consolidate existing title where this may be highly contested because it does not reflect other claims to the land which may be stronger than those of the title deed holders. It marginalises the land claims of black groups by adopting the very terms from which they were excluded by law. With very few exceptions, black people were not allowed to have title deeds and black people are poor.

At the heart of this confusion is a dilemma which arises out of the nature of land. Land is finite and cannot be made bigger. One cannot extend the right to land to the whole population, in the same way as the right to vote can be extended. For land to be given to someone who doesn't have it, it has to be taken away from someone who does. Most land in South Africa is privately owned land. This issue of getting, by taking away, is at the centre of the land issue and explains its politically explosive nature. Mr de Klerk's guarantee that existing white title will remain secure, guarantees that South Africa remains in white hands.

ECONOMIC RATIONALE

The Government's decision to de-racialise by allowing blacks to participate in a 'free market' is firmly located within certain economic principles. President de Klerk has said that individual ownership, the right freely to enter into the transactional contracts of sale and lease, and the protection of private property, are hallmarks of the capitalist system. He has contrasted the failure of eastern bloc socialism with western capitalism. He has said that his reform secures the protection and continuation of free enterprise in South Africa.

But the existing distribution of land, which will be consolidated by the reform, has nothing whatsoever to do with the principles which he espouses. Existing white title deeds are the result of wars of conquest, land grants to white settlers, and a market which was never free because the majority of the population was prohibited from either buying or leasing land. Private property has been and still is a 'whites only' system in South Africa. Those title deeds which black people managed to get were destroyed. And the government imposed a system of effective land nationalisation in the 13 per cent of South Africa which it set aside for black people. The expropriation of black title deeds and the removal of over 3,5 million black people are not features of our distant past. They have continued until the present.

It was not the market but the State which established the present mal-distribution of land. The objective of the Land Act and the Group Areas Act was precisely to controvert the willing seller, willing buyer relationship, to ensure that blacks were dispossessed not just by poverty, but by law. Present-day title deeds are therefore based not on respect for property rights and freedom of contract, but on denial of property rights and disregard for the law of contract. If someone knocks me down and takes my wallet, to say that I can buy my wallet back is hardly to promote respect for the law of possession.

The system of white agriculture is built on subsidies, monopolies and price controls - hardly a 'free market' or rational economic system. Even now, Mr de Klerk has distanced himself from the Development Bank's finding that 4,5 million hectares would become available if the state were to sequester that portion of white agriculture which is endemically indebted.² Thus, rational economic principles are suspended for the white and powerful.

Given the fact that our system of property relations contradicts the principles it purports to enshrine, it is at best ahistorical, and at worst misleading, to uphold white title deeds as the result and bastion of free enterprise and the free market system.

President de Klerk's assurances that white title deeds will be secured and protected is an expression not of rational economic principles but of a political decision which supports the vested interests of white land owners, regardless of how these interests were acquired.

ALTERNATIVE A

MOTIVATION : VESTED INTERESTS

Stripped of its disguise, this is a simple and predictable position for the National Party to take, and one which must be taken seriously as representing a powerful interest group. It is a political reality that there are white vested interests in land. However unfairly they were created, we cannot ignore them, just as we cannot wish away the terrible suffering and destruction they have caused.

But, if we accept that we must begin from a status quo of existing vested interests, then we must adopt terms which recognise the vested rights of all South Africans, not turn the exclusion of the past into the parameters of the future.

There are many different situations in which black people have vested interests in land, with or without title deeds. These interests are mostly reflected in the physical occupation of the land in question, with one major exception: the claims of people who have been forcibly removed from their land in living memory, and who are determined to get it back - communities who never put down roots in the resettlement area, and for whom survival depends on reclaiming what they have lost.

² 'The potential for black smallholder farmers participation in the South African agricultural economy' by N T Christodolou & N Vink. Paper presented at Newick Park Initiative, U.K., October 1990.

Victims of Forced Removal

Some removed communities base their claim to their original farms on the fact that they had title deeds which were simply confiscated. Others did not have title deeds. Their ownership was based on a grant by a white governor or a Boer general. Still others were beneficiaries of trusts which reserved the land for a particular tribe or community because they had lived on it since time immemorial, and it had never been alienated by whites. For all these people, the issue is that they owned the land. Whether that ownership was reflected on paper depended on the vagaries of changing white governors and native administrations, not on whether they had a right to it in the first place.

Homelands

The same considerations apply in the homelands. Successive white governments decreed that full title was inappropriate for blacks and applied various overlapping and chaotic systems of quit-rent, permission to occupy and trusts. None of these was consistently or efficiently administered, but people continued to build houses, bequeath their land to their children, farm it and transfer it as their own. The systems by which they did so combine tribal custom, white law and pure necessity.

Townships

A comparable situation exists in urban townships. Black people were prohibited from owning houses, but in many cases have lived in their homes for decades. The rent they have paid has more than paid off the initial building costs and interest as well. Now they claim these houses as their own, which they would have been, were it not for racial restrictions on ownership.³

Labour Tenants

A more complicated situation is that of the labour tenants who live and farm in certain

³ In Soweto, for example, there are 46 227 houses over 30 years old. In Diepmeadow there are 18 090 houses over 30 years old and in Dobsonville there are 1 502. Tenants in these houses have had to continue to pay rent well after the costs of the housing were paid off and for much longer than the average repayment period for a mortgage bond. (Information supplied by the Soweto, Diepmeadow and Dobsonville Councils to the Joint Technical Committee established in terms of the Soweto Accord.)

districts of South Africa. They are the descendants of families who have lived on particular farms for generations, often since before the first white 'owner' claimed it by virtue of a title deed granted by the Transvaal Republic or the Colony of Natal. Labour tenants continue to live on the farms. They do so under an exploitative and feudal contract. In exchange for the right to maintain a household, plough some fields and keep cattle, they have to provide one or more members of their family to work for the farmer. This is without benefit of any salary. Abuse, long hours, no leave, and assault are endemic. But labour tenants have endured these conditions, not just because the system has fitted them for nothing else, but because it has been the only way in which they can continue to live on the land they believe belongs to them.

Their claim is not based on title deeds or lease agreements, documents of which they have no experience. It is based on claims of original ownership, generations of occupation and an insistence that having lived within terms which denied them education, money and any experience of the wider world, they have a right to exist securely within what is familiar to them. Their claim is informed by a commitment to an agricultural way of life, particularly to keeping cattle, and a deep love of the land.

PROPOSAL A

In all these situations people have vested interests in land, and it is through no choice of their own that these are not reflected in title deeds. To 'level the playing fields' before we address the issue of redistribution, we must recognise the status quo in the various forms in which it presents itself.

In some cases it would be relatively easy to confirm the ownership which exists in practice, if not in documents. The state could simply confer ownership of their houses on township 'tenants'; and it could convert the occupancy rights of the people in the homelands to ownership. But there are cases of conflicting claims to the same piece of land.

A Land Claims Court

To stabilise the conflict we need to establish a fair procedure for evaluating and adjudicating conflicting claims. Critical to such a process is determining criteria by which the claims are weighed and considered. For the process to be fair, and to allow for de-racialisation of the conflict, the criteria should not favour one group only. For example, title deeds favour whites whereas original ownership favours blacks. But underlying both black and white claims to ownership are similar values, such as birthright, length of occupancy, productive usage, security of tenure, protection of investments whether by labour or money. These values would support the claims of both African labour tenants and many Afrikaner farmers. Since title and other documentary and verbal contracts are considered important by many South Africans,

these should also be taken into account, but not as the over-arching terms by which all other claims are judged.

These examples of possible criteria are to illuminate the issue. They are not suggested as necessary or final standards. Questions of how the claims are lodged, the nature of the court that hears them and the processes of appeal are also not discussed. All these details can be debated in other forums. The court should be able to award ownership, joint ownership where this is practical, and perhaps division of the land. A critical function will be to quantify compensation for parties who have an interest, but not necessarily the strongest interest. It may be that while one party's needs can be met only by a particular piece of land, the other party's interests could be compensated by an alternative piece of land, or money.

The great value of a Land Claims Court is that its decisions, being based on values that are determined by the wider society, would finally provide a legitimate form of ownership in situations which are unstable and contested. This entrenches common values such as the need for security of tenure, the acceptance of fair procedural transactions, and the recognition of the property rights of others because the values by which they are upheld apply reciprocally to everybody.

However, the question of a Land Claims Court goes no further than defining existing interests in land. While it affects vast numbers of people, it is a defensive mechanism to ensure that actual and tenaciously asserted rights to land are not ignored or destroyed. It provides for legal recognition of black property relations only as they exist in the various forms in which they have survived centuries of racial exclusion.

But a very small proportion of black land rights actually survived the wars of conquest and the subsequent prohibitions upon purchase and lease, sharecropping and labour tenancy. Most people did not manage to maintain their identity and keep their links with their original land. Millions of people in the homelands and in squatter camps are from families so dispersed and impoverished that they can no longer trace their history. Unlike the communities who were recently removed, or who are particularly well-organised, they cannot lay claim to specific pieces of land. A Land Claims Court by its nature goes no further than adjudicating existing claims. It does not address the problems of landlessness and the need for redistribution of land.

ALTERNATIVE B

MOTIVATION : LANDLESSNESS AND REDISTRIBUTION

The problem of landlessness in South Africa is a political issue, both because it is the result of overtly political decisions to prohibit and destroy black property rights, and because of its scale. A country in which less than 10 per cent of the population owns over 80 per cent of the land, and in which the majority of the population has no rights -

whether of lease or ownership - to be anywhere at all, is inherently unstable.

The Debate about Property

Central to this issue is a conflict between property and rights to land. In order to survive, people need a place to live. If they have no rights to land and all the land around them is privately owned, they are forced by necessity to break the law and occupy or squat on land which belongs to someone else.

The right to property is the only classical human right which deals with the material world, the others are all personal and political freedoms.⁴ Thus, the right to property is the only right which impinges directly on the material rights of other people. Basic human needs such as food and shelter can only be met by access to land. Yet private property restricts others' access to land, thus depriving them of the right to life.

This dilemma is not peculiar to South Africa and has been widely debated with reference to the constitutions and bills of rights of other countries.⁵ Is it more valuable to society to uphold the right of a person to own vast tracts of unused land, or to uphold the right of the population to have access to land to live on? Some countries have decided not to entrench property rights in their constitutions,⁶ others have decided to balance the right of property by including the opposing material rights of shelter, life and adequate nutrition for everybody.⁷

The central question is whether land can be dealt with in the same way as other forms of property. Most people believe that the protection of property is necessary so that we have a stable world in which we can all expect to enjoy the fruits of our labour and initiative. Yet land is not the result of anybody's labour. It is a finite natural resource which predates the theory of property. Winston Churchill said this about the nature of land and property:

⁴ For example, the right to freedom of speech and the right to freedom from torture.

⁵ See the following articles cited by G Budlender in 'Towards a Right to Housing', unpublished paper presented at a seminar on Land Law Reform and the Future of Landownership, UNISA, 2 November 1990: Michael MacNeil 'Property in the Welfare State' 1983 Dalhousie Law Journal 343-82, especially at 356-68; A Wayne MacKay & Margaret Holgate 'Fairness in the Allocation of Housing' 1983 Dalhousie Law Journal 383-446.

⁶ For example, Canada. Cf the European Convention on Human Rights.

⁷ Cf the Directives of State Policy in the Indian and Namibian Constitutions; see also the latest version of the Swedish Constitution.

'Land, which is a necessity of human existence, which is the original source of all wealth, which is strictly limited in extent, which is fixed in geographical position - land, I say, differs from all other forms of property, and the immemorial customs of nearly every modern state have placed the tenure, transfer and obligations of land, in a wholly different category from other classes of property. Nothing is more amusing than to watch the efforts of [the land] monopolists to prove that other forms of property and increment are similar in all respects to land and the unearned increment on land.'⁸

Churchill's view that land ownership and use of land cannot be equated with the ownership of other forms of property is not the product of some aberrant socialist period in his youth. It is a view expressed in the Bible, by Plato, Shakespeare, Spinoza, John Locke, Adam Smith, Thomas Jefferson, John Stuart Mill, Abraham Lincoln and Herbert Spencer, to name but a few.⁹

All these theorists uphold the right of individuals or groups to land. They also stress that security of tenure, which provides the owner of the land with the confidence to develop and improve the land, is vital to both economic growth and political stability. But this right, the right to a fair and secure share of humanity's greatest natural asset, should not degenerate into an assertion of the absolute right of an individual to own vast areas of land because of wealth alone.

There is no economic principle, other than the principle of simple power, which justifies this. At most times, and in most societies, the right to land has been considered a relative right - a right which is upheld and exercised relative to the rights of the wider society.¹⁰

Land, like air and water, is different from forms of manufactured property. In South Africa it originally belonged to indigenous people, not by claims of absolute control, but by use, occupation and birthright. When white settlers took the land from those who then controlled it, they clearly placed no reliance upon the inviolability of the principle of private property. Now their descendants assert that their ownership of the land can be justified by a conveniently abstract and avowedly sacred principle.

⁸ From a speech in the House of Commons 1909, quoted in A Domanski 'Land Ownership and Natural Law' (1989) 52 THRHR433.

⁹ A Domanski op cit note 8.

¹⁰ See Andre van der Walt 'Towards the development of post-apartheid land law : an explanatory survey' 1990 *De Jure* 1-45. See, also, A M Honore 'Ownership' in A G Guest (ed) *Oxford Essays in Jurisprudence* (1961) 107-47.

PROPOSAL B : REGULATED LAND OWNERSHIP

The expediency of this claim obscures the potential for stable common values inherent in the fact that there is no dispute about the value of secure ownership. All that needs to be determined are the parameters within which such ownership exists. Societal values for land distribution may include the value of housing the population, maintaining and improving the production of food, security of tenure for all, the provision of a climate which encourages investment in improvements, and the advantage arising from all South Africans sharing a sense of belonging in their land.

Diverse criteria for ownership which uphold these values have been put forward from various quarters. These include:

- * ownership of land be limited to areas which are occupied and productively used
- * the amount of land owned by one person be limited relative to the regional productive capacity of the land
- * speculative holding of land be prohibited
- * ownership be subject to proper care of the soil and acceptable treatment of the people living on the land
- * home ownership be limited to one residence

Within such parameters rights to ownership would be secure and guaranteed. Conversely the state would be entitled to acquire land held in defiance of these criteria. Such a system is not merely a mechanism for freeing land for redistribution to the landless. It provides stable rules and principles to govern land ownership. These would safeguard it as an abiding and equitable institution.

The State's duty to acquire land held contrary to these criteria would be based on a right of access to land for life's necessities. This does not entail the right to a handout of land, but to state protection of the citizen's right of access to land. This would provide a protection against eviction, in terms of which the citizen can claim that he or she has the right to remain unless access to alternative land is available within a defined area.

Such a system provides for redistribution, not by largesse, decree or bureaucratic favour, but within a regulated legal system under which all parties can invoke protection of their rights.

THE ALTERNATIVE PROPOSALS

Two systems have been proposed in this paper :

- * The first is a Land Claims Court to secure existing vested interests in land, operating on and giving effect to values which do not marginalise black claims
- * The second is a regulated system of land ownership which provides for secure

ownership within parameters which reflect societal values of equity and productivity, based on the premise that land is a national asset

UNPRECEDENTED AND REVOLUTIONARY?

There is nothing unprecedented about these proposals. Land claims procedures exist in various countries where the original inhabitants were conquered by a settler group which seized control of the land. Examples of these can be found in New Zealand, Australia and Canada. They signify an attempt to integrate and normalise common values within societies which acknowledge different initial concepts of land rights, as well as violent and unequal beginnings.

Similarly, there is nothing new in the concept of a regulated system of land ownership. Everywhere in the world land ownership is regulated. Thus :

- * South Africa has zoning regulations which limit the purposes for which land may be used, and there is provision for expropriation of land for public purposes.
- * Norwegian society considers it important that the national character of family farming is retained. Thus, companies are not allowed to buy farming land, and controls ensure that farmland can be owned only by those who use it.

What is at issue is not whether there should be limitations, but what the limitations should be.

Just as there is nothing new in these procedures, equally there is nothing revolutionary about them. In fact, they are more likely to realise the principles upheld by Mr de Klerk in his reform proposals, than is the pretence that our present system of land ownership and government support for agriculture reflects equal contractual relations, free competition and market forces.

Both procedures are based on a pragmatic acceptance that reform must start with the status quo. They provide for the establishment of fair and equal criteria. They address past and present inequalities. These criteria, unlike existing title deeds, do not favour one race or group over another, but open the way for future transformation based on terms that apply to all South Africans.

In May last year representatives from over forty Transvaal communities affected by removals and land disputes made this pragmatism quite clear. They said that their first priority was that African people regain the land that was stolen from them by expropriation, encroachment by neighbouring farmers and forced removals. Once disputed land is returned there should be discussion about the terms of sharing. Delegates said that they accepted that white farmers had also acquired a right to the land and that they had a place, so long as they are reasonable and treat black people with respect.

It is instructive to consider Churchill's proposal for rectifying the situation where absolute control over people and vast amounts of land is justified by appeals to

'private property'.

'It is not the man who is blameworthy for doing what the law allows and what other men do; it is the State which would be blameworthy were it not to endeavour to reform the law and correct the practice. We do not want to punish the landlord. We want to change the law.'¹¹

It is not denied that the changes to the law which would be created by a Land Claims Court, and the regulation of land ownership, would limit existing white land ownership. But any form of redistribution of land requires that some land be taken from those who have it now. The new legal regime would ensure that the process provides for clear procedures and parameters and that land held within these parameters would be not only legally protected but legitimately owned.

THE POLITICAL CHOICE: WHETHER TO ADDRESS THE PAST

The difference between the proposals in this paper and those of the government is not to be found in economic principles, but in a political choice : whether to acknowledge the past and develop terms which address it or to pretend the past can be wished away.

ZIMBABWE

The Zimbabwe Lancaster House Agreement reflects this second choice - the view that land ownership can be de-racialised by removing the prohibitions on black ownership and leaving the rest to the operation of the market through the willing buyer - willing seller mechanism.

In the decade since Lancaster House very little land in Zimbabwe has been transferred from white to black ownership, particularly to the peasants who fought a long, hard war about access to land. The demand for land has become the major political grievance in Zimbabwe. President Mugabe has responded by introducing legislation which enables the government to purchase half the white-owned land at prices to be decided by the government. Last month 4 000 white farmers met the Minister of Lands to plead for certain compromises. They requested that joint boards

¹¹ Speech in the House of Commons, 1909, quoted in A Domanski, op cit note 8 at 442.

be established to determine what land should be purchased, and that the government authorise a court to arbitrate prices. The Minister's response was that time for discussion of these kinds of procedures had run out - an attitude that has been expressed in angry scenes in Parliament which have erupted in revolutionary songs. Sabina Mugabe proposed that since Rhodesia, after World War II, had given land to its white soldiers and bicycles to its black soldiers, white-owned land should now be swapped for bicycles.

While there is a certain poetic justice in these developments they are unlikely to ensure that landless peasants are allocated land this time round either. The power which the Zimbabwe government has given itself is too open to abuse and corruption.

Zimbabwe provides a closer precedent for South Africa than any other country, but there are important differences. In Zimbabwe the land was divided 50/50 between black and white; here the division is 20/80. Furthermore, South Africa has the additional legacy of the forced removal within living memory of 3,5 million people.¹²

If this reality is not addressed by a policy which provides for meaningful redistribution to realise the claims of black people, we can expect a much more polarised result than in Zimbabwe. To delay dealing with the legacy of the past is to exacerbate it.

SOUTH AFRICA

At this point, there are positive factors upon which to build a new land policy in South Africa. The very tenacity with which labour tenants and black farmers have clung to their land bears testimony to a deep commitment to an agricultural way of life. There are large numbers of people, both in homelands and on white farms, whose life experience is agricultural and who have chosen the hard life of the farmer.

Most importantly, these people have shown themselves willing, over and over again, to seek pragmatic solutions to the problems caused by our racial history. They demand, determinedly and against all odds, that contracts and agreements be honoured, and disputes settled by equal and fair procedures and that the law apply equally and fairly to everybody. Their claims are for fair and secure ownership and for freedom from arbitrary interference by the State or other parties. They do not restrict this demand to one race only. Even the often-repeated demand for nationalisation of land falls within this general conception. The demand has been expressed in innumerable meetings and conferences of rural people. It is always explained in the same terms:

'Our land has been stolen from us and is alienated from us by the title deeds of white people. We need to bring the land back to the nation so

¹² L Platzky & C Walker The Surplus People. Forced Removals in South Africa (1985) 10.

that it can be fairly shared among all South Africans.'

The aim expressed here is not state ownership and control of land, but a process whereby people and groups are able to own land by fair and non-racial means. There are two aspects to the demand for nationalisation. One is the demand for fair, non-racial criteria for allocating land. The other is for a new beginning, a clean slate. If the State de-racialises and thereby nationalises the terms by which all South Africans have access to land, it will have fulfilled one aspect of this demand. But to do this it has to address the thorny issue that South Africa is presently owned by one race. Either the state will accept that existing ownership must be examined and upheld where it is fair and just, and challenged where it is not; or it throws the blanket justification of 'private property' over the whole issue.

INSTABILITY

Irrespective of the outcome of debates about property, economic functionality, morality, and even justice, we are faced with the immediate issue of inherent instability. If the state insists that existing title deeds and the 'free market' are the basis of future land policy, then the homeless and landless will have to continue to break the law in order to survive. People whose farms were expropriated by forced removals will have no other recourse than to defy the law and re-occupy their land. Labour tenants will continue to ignore prosecutions for squatting and trespass and repeatedly return to the farms where their families have lived for generations. Township residents will continue to insist that they own the houses they have rented for decades and refuse to pay rent, and people in the homelands will physically resist the attempts by the authorities who nominally own their land to sell it from beneath them.

UNDERMINING THE LAW AND ECONOMIC PRINCIPLES

The State's policy will further undermine the legal and economic principles it purports to uphold. This seriously, and perhaps irrevocably, undermines the rule of law and erodes the legitimacy of simple economic responsibilities.

The law must suffer when people experience it as making survival a criminal offence. When land law does not reflect the larger community's values and practices, a dangerous disjuncture occurs. Land is not only the source of life's necessities. It is a source of power over people, an instrument of patronage and physical control. When it is no longer transacted by legitimate practices which accurately reflect society's values, and cement the relationships between people, it can become the flashpoint for violence. This is particularly true in black areas, both because the legal structure is inappropriate and unevenly applied, and because of the terrible land hunger created by apartheid.

The State has already damaged the legitimacy of the principle that tenants have

a duty to pay rent. Urban rent boycotts were sparked off all around the country because of deep dissatisfaction with a system which required people to pay rent indefinitely and long beyond the 20 year period of an average mortgage bond. Settlements have now been concluded which cancel rent payments and provide for payment of service charges only. But it took years of boycotting to win this solution. For ordinary people the hardships, risks and insecurity of these years were informed by traditions and ethics which will not now simply disappear.

We can expect the same problems with the monthly mortgage payments on agricultural land. It is widely accepted that poor people will be unable to establish themselves as viable farmers while paying off monthly instalments on land at current prices.¹³ In situations where people believe they have a prior claim to the land in question, bond repayments will be not only financially impossible to bear but will be perceived as illegitimate.

The evictions and resistance which will follow widespread bond defaulting will further confuse and undermine the validity of the concept 'you get what you pay for'. This concept is strong in rural areas, especially with regard to the fact that one has the right to protect what one has paid for. But it is unlikely to survive in an environment where the costs are impossibly high, especially in these instances where the seller's title to the land, and therefore the validity of the selling price, is disputed.

CONCLUSION

The principles which President de Klerk proposes for land reform will not work by anybody's standards. The South African Agricultural Union will say it is unacceptable that the land is still full of squatters. The banks will inherit the role of evictor as they repossess the newly acquired property of those unable to repay the instalments. White businessmen will say that blacks simply cannot understand basic economic principles. In the meantime black people will continue to defy the law, whether out of conviction or necessity, in ever-increasing numbers.

The government has relied on physical eviction and laws such as the Illegal Squatting Act to contain the situation. Will a new majority government have the will to use the levels of force necessary to contain the escalating levels of homelessness and landlessness in our country?

The present distribution of land is a major national political grievance. White

¹³ See Urban Foundation 'Policies for a New Urban Future : Rural Development' Urban Debate 4, September 1990, and various South African Development Bank papers, including T I Feynes, C J van Rooyen & N Vink 'Budgetary Implications of Affirmative Action in South African Agriculture' (1990). This fact is underscored by the present practice of State subsidies to white farmers.

conquest of land has become symbolic of black subjugation. The only way to defuse this grievance is to de-racialise the terms of land ownership. To do this we must put the hard facts of dispossession and the debased form of property relations on the table and reject these as the parameters from which to proceed.

This paper suggests that it is possible to establish terms of reference and a legal framework which opens the way for all South Africans to realise their claims and needs. But if President de Klerk opts for the final imperialism of making the very terms which have been the means and the measure of black dispossession the parameters for the future, there can be no hope of breaking out of the racial straightjacket of our history.

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