
LAND, PROPERTY RIGHTS AND THE NEW CONSTITUTION

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PROPERTY AS A HUMAN RIGHT

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THERE is a group in our country that strongly favours private initiative, and finds itself in constant battle with attempts by the State to regulate their activities. No-one uses materials more sparingly than they do. Where others waste, they save. They are undoubtedly the most intrepid of all entrepreneurs in the land and number over seven million. They are the shack-dwellers, surviving as best they can on the outskirts of the cities, the so-called squatters.

In South Africa, the expropriated are becoming the expropriators. With extraordinary tenacity, landless and homeless families claim a little spot of earth as their own, by erecting a shack on it. They are bulldozed and confronted with court orders, yet they never cease to assert their rights of necessity. They are moved a dozen times and a dozen times they re-erect their lean-to's.

By their actions, the squatters set into contradiction two divergent aspects of property rights - the birthright of all human beings to a little piece of space to call home and the rights conferred by the State on holders of title not to be disturbed in their possession.

The property rights of the poor are even more significant than the property rights of the rich. They are more fragile, more easily overlooked, more ignored and more trampled upon.

In a power framework, property represents exclusivity and inequality. In a human rights context, however, property is something to which all can aspire equally, which deserves equal respect, independently of quantity or value.

This has special meaning in South Africa, where past property rights have been systematically violated by successive governments. Whether or not 'all property is theft', as Proudhon was supposed to have said, in South Africa all transactions in relation to land were

based on a type of robbery. The stealing was done not by thieves at night, but by the apartheid state during the day.

In the past few decades, three and a half million people were dispossessed of land rights because of their race. Before that millions more were deprived of land rights by discriminatory statutes and prior to that many more millions were dispossessed by invasion and occupation.

A human rights approach does not necessarily seek to punish the original despoliation, nor does it automatically guarantee legal expropriation of the expropriators. Yet, the human rights approach does take the consequences of apartheid dispossession into account, when seeking to construct a legitimate system of property rights for the future.

If property is seen as power then legal title is everything. The only role of the State is to defend that power. If property is theft, then dispossession is all and the only function of the State is to destroy title and restore a natural relation to things. If property is regarded as a human right then it is something that both the possessed and the dispossessed claim.

Everyone is entitled to a spot on this earth where he or she can feel safe and be inviolate, sheltered not only from the elements, but from unwanted intrusions of other people. Each person and every family has a right to secure a space within which to sleep, eat, read and dream - a place in which to live out the intimate side of life.

We are also all entitled to live in conditions of basic decency. In a country with the technological capacity of South Africa each and every person has a right to the clean water, electricity and waste disposal, that go with dignified and healthy habitation.

In South Africa we do not even attain ironical equality. Anatole France's famous declaration that

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the law in its majesty protects with equal rigour the right of the rich to sleep in their castles and the poor to lie under bridges, might have been true for this country a century ago.

It is not true of South Africa today. The poor family living under a bridge would be evicted as squatters. Their home would be called a shack and bulldozed or torched. They would have no claim to receive water or electricity or sewerage facilities, even if willing to pay.

Farmworkers, whose families have lived for centuries on a piece of land, whose parents were labour tenants or sharecroppers with legally registered rights and whose grandparents were frequently given title by the Presidents of the Boer Republics, can now be evicted by any person who happens to buy the land on which they are living. A kindly judge might insist that reasonable notice of three, six or nine months be given. A harsher one would offer them even less.

Any human rights-based system of property rights would intervene in a case like this to prevent eviction. It would require that, through a system of constitutional rights, and legislation and adjudication by a land claims tribunal, appropriate legal forms be created to ensure that the rights of the farmworkers, with their ancient occupation and close relationship to the land, be harmonised with the rights of the new owner with his or her title acquired by purchase.

In a country like South Africa where property ownership is based upon legal injustice, there is no question that there will have to be redistribution in relation to land rights. The issue is not if, but how redistribution should take place, according to what criteria, what procedures should be used and who should make the determination. These matters are dealt with in the section on Affirmative Action.

The human rights approach seeks to take account of all dimensions, involve all interested persons and establish principled means of solving problems.

The struggles of the shack-dwellers to find a spot they can call their own, raise the fundamental question of who South Africa belongs to, and how, in the new South Africa, property rights can be legitimised, so that the economy can advance and turbulent conflict over land avoided. As things stand at the moment, 87 per cent of the surface area of the country belongs to

whites, who form only 15 per cent of the total population. Any project for bringing democracy to the country cannot fail to address the question of opening up rights to the land.

In South Africa, the issue of land ownership is central and highly emotive. It simultaneously raises the question of sovereignty and the question of individual rights. It has an economic dimension, since we need food for the whole country and a rule of law dimension, because in today's conditions ownership of the land means in effect ownership of the people on the land.

In order to legitimise ownership and introduce true respect for property rights, a new foundation for rights to land has to be established. Our starting point has to be that South Africa belongs to all who live in it, and that all are entitled to equitable access to the land.

Appropriate law-governed procedures, based upon common values, have to be adopted, which attempt to balance in an equitable way the interests of those, who have been dispossessed with those, who presently hold title. Victims of forced removals have to be given their land back, and where this is impossible, some other form of restitution, reparation or acknowledgement of the injury done to them, has to be made. Persons, who historically have been dispossessed by discriminatory statutes, have to be given access to affordable land. Everyone should be guaranteed land or other space on which to have a home and enjoy personal privacy.

There are many who argue that it would be unjust to give compensation to those who benefited from unjust dispossession. Yet, from a pragmatic point of view, there can be little doubt that the concept of just compensation has major role to play in facilitating equitable adjustment of land right. We wish simultaneously to raise productivity on the land, to save the soil from degradation and to prevent more blood from being spilt over ownership and use. Here money helps.

We cannot construct a nation on past dispossession, nor can we build it by using race as the criterion for introducing new forms of forced removals. We need a rights-based system founded on common values to establish new criteria for recognising and enforcing rights to land.

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We also have to find appropriate forms of permitting shared interests in the same piece of land and of loosening up the rigid categories of absolute ownership in relation to agricultural land.

If concepts of time-sharing and sectional title, overturning centuries of tight property concepts, could be introduced at the behest of developers eager to make urban land more profitable, it should not be beyond the wit of a new non-racial Parliament to adopt legislation that provides for more equitable and flexible access to farming land.

The present Baas-Klaas (Boss-Boy) relationship, making each white-owned farm a little white-dominated colony, has to give way to a system where persons relate to each other as equals and as South Africans. In some cases, the whites will have had a long association with the farm, will have been born there, and invested their 'sweat equity' in the land, as will the blacks on the same piece of land.

In such cases, it should be possible to devise forms of title, which recognise the long connection of both to the land each retaining guaranteed inviolability of the home, yet sharing in the produce, according to equitable principles. What matters is to have clear criteria, based on common values, applied according to just procedures, with a revolving fund to assist in making equitable monetary compensation, when competing interests cannot be reconciled.

Land, of course, is only one type of property. It is the one in which the human rights factor appears at its most powerful and at its most poignant. The theme of property as a human right, however, goes further.

Many constitutions have a general provision, stating that no property shall be confiscated by the State, except in the public interest and subject to compensation. The human rights dimension in this case is weaker than in the case of so-called squatters, who literally have no place on earth where they may legally live. Nevertheless, combined with the economic aspects of the matter, the question of the taking of property is an important one.

The problem in South Africa is to reconcile two competing considerations:

1. Massive landlessness and rightlessness produced by apartheid.

2. No arbitrary deprivation of interest lawfully achieved.

Article 12 in the Draft Bill of Rights represents one attempt to achieve reconciliation between these two factors. Looked at more broadly, one can envisage in South Africa a three-pronged approach to property.

First, personal possessions, such as one's home, domestic belongings, motor-car and savings would receive a high degree of constitutional protection against any form of taking.

Second, commercial property would normally be immune from expropriation. Where the public interest demands, however, there could be government intervention in various forms subject to just compensation.

It would be an error to saddle controversial questions such as this one with constitutional prescriptions. It is not for the Constitution to close off choice in relation to policy questions. What the Constitution does is to insist on certain basic rules of fairness. It would be wise to protect the future against any form of arbitrariness or injustice and foolish to attempt to protect the future against stupidity - no-one has yet found the prescription.

Many constitutions, such as that of the Federal Republic of Germany, give a strong position to private ownership, but insist that it carry with it social responsibility. This theme would have special relevance to South Africa, where the trend in the past has been to allow owners to 'use and abuse' property at will. Considerations both of natural conservation and of human concern require that this absolute principle be softened.

Increasingly, the law recognises competing or multi-layered interest in the same thing. Questions of relationship and proportionality become ever more important. Equity and public policy take on an ever greater role, even in the most market-oriented societies. The dimension of taxation often has as much significance as the technical question of ownership.

In South Africa, we also have a variety of systems of ownership, some of which come from Roman-Dutch law as amended by statute, others from traditional

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African law. There might be advantages in containing as wide a range as possible within a single national framework of registration and administration.

Third, a comprehensive system of just and secure rights in land has to be established, which will take account of all the key dimensions of the problem:

1. the need to rectify the injustice of the past and give access to land to those, to whom it was previously denied;
2. appropriate acknowledgement of existing title and of the intimate relationship that many owners have to the land;
3. maintaining the food supply;
4. avoiding further bloodshed over the land;
5. seeing land as the country's primary resource that should be saved from abuse; and
6. having manifestly fair procedures to achieve all of the above.