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LAND, PROPERTY RIGHTS AND THE NEW CONSTITUTION

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COMPENSATION FOR EXPROPRIATION: THE POLITICAL AND ECONOMIC PARAMETERS

Aninka Claassens

THERE is a concern in certain quarters, also expressed within the ANC, that compensation for expropriation should be at market value. The reasons given include the following:

- The necessity to create a stable environment for investment.
- The desirability of creating a secure system of property rights. In this context it is argued that the new government must be seen to be fair and make a clear break with the racially discriminatory land policies of the past. It is pointed out that many existing landowners bought land which is now highly contested under what were then the laws of the land. Should they individually bear the costs for a politically created legacy?

The problem with the above approach is that it is ahistorical. It begins from the present status quo and is directed to the future. Whereas the present status quo in land ownership is deeply unstable, contested and threatened because of the history of existing property relations.

Any intervention which is premised on fully compensating existing property rights favours the present winner in an ongoing battle. And by doing that it ignores and undermines the position of the current losers. No matter that the rules of the fight were explicitly designed to favour the current winner.

Black landowners' property rights were destroyed under the policy of forced removals. At the same time the rights of black people to own, lease, or even occupy land, were prohibited under the Land Acts.

These laws were accompanied by a massive process of physical force to evict and relocate more than 3,5 million people. As a result of this combination of

laws, policy and physical social engineering, white people now own over 80 per cent of South Africa's land, and vast numbers of black South Africans have no rights, whether of ownership or lease, to be anywhere at all.

The fact that the destruction and prohibition of black land rights took place in living memory, including within the last decade, combined with the fact that the massive scale of inequality means that literally millions of people have to break the law in order to have a place to live, means that land disputes constitute real, burning, ongoing survival struggles.

To confirm this status quo, either by legitimising and entrenching existing property rights, or by ending up with a system which makes expropriation of land so expensive as to be all but impossible would not be a neutral "rights-based" approach. It will do more to destroy the legitimacy of property rights in the long run than intervening to establish a more equitable, legitimate and thereby secure division of land and property rights for South Africa.

The main thrust of this paper is that it would be a mistake to establish a system which defines rights to compensation as finite individual claims against State resources. Rather, it is posited that compensation for loss should be *proportionate* to past and present interests in the land and, in particular, should take into account the historical circumstances of the acquisition of the land and the availability of State resources. The example of forced removals illustrates this point.

Forced Removals

Many removals took place in terms of section 5 of the *Black Administration Act* of 1927, which made no provision for compensation. However there were

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instances where land was expropriated and compensation was offered. These were relatively few because in many instances black groupings did not have title, but were beneficial owners, long-term tenants or traditional owners and thus expropriation was not legally necessary. However, even in instances where black groups did have title and expropriation took place, there are instances where no, or very little, compensation was paid.

For example, the Bakubung tribe lived on fertile land near Boons. When they were removed they were awarded compensatory land in the Pilanesberg. However that land was registered in the name of Lucas Mangope and a large portion of it became part of the Pilanesberg Game Reserve. Furthermore, an amount of R400 000 was specified in terms of the expropriation papers and this amount was never paid over to the tribe despite repeated interventions by their lawyers.

When the Bakubung took up these problems with the Pretoria officials who had removed them, they were told, like countless others, that they were now foreign citizens and should direct their claims to Bophuthatswana rather than Pretoria. The Bophuthatswana authorities ignored the claims on the basis that the promises had not been made by them.

It is a common sequence of events that after the initial resistance surrounding the process of forced removals, communities directed their efforts to actually obtaining the compensatory money or land which had been promised to them. Only when the communities failed to secure this compensation and thereby re-establish their lives did they, in general, resort to the strategy of re-occupying their original land.

Thus the Bakubung people, who previously were established farmers living in stone houses, now live in terrible poverty in tin shanties in the crime-ridden resettlement area of Ledig. For these people the question is not just one of the abrogation of their property rights but of their future survival, as they need their land back in order to be able to feed their children.

People who are forcibly removed insist that their land was simply stolen and say that they refuse to buy it back, for who pays for stolen goods? The people insist their land must be returned to them free of charge.

In some cases, this is relatively simple for the State because the land was never sold to white farmers and the Government departments that own it can cheaply return it to the original owners. This has happened, for example at Mogopa.

But what of places where the land was subsequently sold to white farmers? This is what happened to the fertile farms from which the X people were removed in 1977. The X were removed to the Ciskei but never received the promised compensatory agricultural land there. Instead the land was allocated to other people in the Ciskei area. As with the Bakubung it was only when their negotiations to secure this compensatory land failed that the community united behind the intention to regain their original farms.

In the meantime, their farms had been sold to selected white buyers at a third of the market value with 100 per cent Government bonds. This sale took place in terms of the *Agricultural Credit Act* which specified that the recipients of this subsidised land could not sell it for a 10 year period. Some of the farmers who bought the land were successful and established viable farms, others did not.

It was in the context of a bankrupt farmer's attempts to sell his farm before the expiry of the 10 year period that the X initiated legal action to challenge the validity of the sale of their land to white farmers.

The implications of market value compensation - a case study

In the context of this legal action, settlement negotiations are now taking place. The Government has stated its unwillingness to expropriate land from white farmers, but has offered to pay the X a compensatory amount to the value of what they lost. It is envisaged that the X will use this money to buy back the majority of their land from the existing white owners, most of whom are willing to sell.

The X estimate that the present market value of the land they lost is R28,000,000. Their claim for all the losses that they sustained at the time of the removal is R93,000,000. This is the amount necessary for them to be able to re-establish themselves as they would have been had they not been removed in 1977. The State has disputed these figures and the settlement negotiations now involve a figure of R43 million.

The cost of compensating forced removals

The X are just one of many *black spot* communities who were removed. The Surplus Peoples Project estimates that there were 614 000 people removed in the category of black landowners. It is estimated that about 4 000 X people were removed. Accordingly one can estimate that 153,5 *black spot* communities would attract compensation at the amount of R43 million. The amount necessary to compensate *black spot* removals is in the region of R6,600,500,000 if market value is taken into account.

Obviously this calculation is vague and can be challenged. For example there were many more than a total of 153 black spots. In Natal alone there are 363. However, the X were a relatively large community owning particularly valuable land. But if we settle on R6,5 billion as some kind of estimate for *black spot* removals it must be remembered that *black spot* constitute only one of the six categories that make up the three and a half million people who were affected by forced removals in general.

Of those six categories some, such as farms and informal settlements, are unlikely to have provable and quantifiable compensation claims. But one should expect substantial claims from the 730 000 people who were removed from urban townships and, in particular, vast claims from the 860 000 people who were removed under the *Group Areas Act*. It is in the nature of Group Areas Removals that the land in question has often become highly developed, extremely valuable Central Business District commercial properties.

Combining *black spot*, Group Areas and township removals the cost of restitution for forced removals alone can be expected to be somewhere in the region of R18 billion. Yet forced removals and restitution constitutes only a tiny part of the wider picture of the inequality of land ownership and the need for redistribution of agricultural land and urban housing.

Problems of market value

- (a) **Disproportionately costly**
Is a future government going to be able to set aside such a large sum of money for settling historical land claims, and would this be a proportionate and equitable use of State

resources given the education and health needs of the population? To quantify compensation in terms of market value makes the process of restitution exorbitantly expensive and thereby makes it extremely unlikely that the State will prioritise it over other pressing social needs.

- (b) **May over-compensate actual interests**
There are other considerations which make the payment of market value inappropriate under specific circumstances. Let us return to the removal of the X people. Neither the X nor the white farmers who currently have title to the land acquired it at market value. The X received it as a gift from the British for their services in the frontier wars. The farmers received it at a third of its market value with extremely subsidised credit. Nor is the market value of the X land going to remain stable.

Once the first purchases by the X people take place it can be expected that the prices of the surrounding farms will crash. The people who will profit from this are the first farmers to sell and subsequently the X who will be able to purchase their land much more cheaply than the previous market value. Their profit will be at the expense of the restoration issue in general, which will become so prohibitively expensive as to threaten its viability.

- (c) **Directs issue into adversarial dispute**
A further cause of concern arising out of this example is that this method of quantifying compensation directs disputes into a particularly adversarial, winner-takes-all modality and away from pragmatic compromises and economically viable balancing mechanisms.

The first breakthroughs in challenging forced removals were made on the basis of pragmatic solutions in terms of which communities accepted pieces of adjacent land to compensate for land to be flooded by government dams or used for other schemes. Because it was necessary to prove to the Government that viable and relatively cheap alternatives to removal existed, communities

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directed their attention to identifying State land and liaising with local white farmers who were willing to sell their land. By a process of ingenuity and pragmatic compromise solutions were arrived at which balanced the needs and interests of all various parties in the local area. However, if the alternative of claiming full market value from the State exists, why should land claimants, black or white, bother with such endeavours?

The work on developing a model for a Land Claims Court for the ANC has illustrated the dangers of an adversarial winner-takes-all type of procedure. In adjudicating disputes between black claimants and present white owners it was discussed that in some cases both groups would have some degree of rights and interests to the property in question.

The Court would decide which party had the stronger claim in terms of its laid down criteria, but this could not result in one party getting the land and the other nothing. Rather, it was proposed that the award reflect the degree of interest of the different parties. Thus it may be appropriate in some instances to divide the land in question, to register lesser rights against the title deed or to award compensatory land for the losing party. It is important to direct the parties' attention to such solutions rather than to absolute claims against the State for finite amounts irrespective of whether those amounts are affordable. If the model is adopted whereby any party has an absolute right for a finite amount of compensation from the State then the most critical criterion for success in approaching the Land Claims Court would be to get to the top of the queue.

Relatively few Group Areas claims could cost billions of rands if assessed at market value. It can only be presumed that the court would be working against a budgetary allocation and thus must make it a proviso that awards be *proportionate* to that budgetary allocation, as well as to the other parties' interests.

Exorbitant costs support the maintenance of the status quo

The budget for the restoration process will run out in a very short space of time and the immediate beneficiaries of this bankruptcy will be the current

owners if the status quo should remain unchallenged.

The principle of proportionality ensures that whatever losses are to be suffered or have been suffered in relation to that piece of land must be shared by all the parties who have an interest, with the State necessarily contributing resources where this is appropriate.

Without that principle of proportionality the loss inevitably falls on one party alone. Initially that party will be the people historically dispossessed because they will be locked out when the budget is finished. However, this will be a short-term result.

One example is Zimbabwe 10 years after the Lancaster House Agreement. The Government has come under pressure due to the lack of land reform and failure to redress historical injustice. This pressure will not be simply because of the past abrogation of human rights but will be constantly fuelled by the fact that people are locked into a bitter struggle for survival and need land in order to fulfil their basic needs.

Any measures which make the realisation of their land claims impossible will be seen as illegitimate. Land will be claimed by occupation and transacted by force. People have already had to resort to such tactics. In the last two years, the Government has met historical land re-occupations with force and mass arrests.

Will the future government have the will and the capacity to act in this way on the scale that will be required unless there is meaningful redistribution and restitution? The principle of compensating current owners, which is already viewed with much suspicion by people who are dispossessed, will become entirely discredited.

Land redistribution as opposed to historical restitution

The question of historical land rights and restitution is only a small part of the wider issue of land reform. It involves a much smaller number of people than the question of land redistribution. Many South Africans were removed so often that they lost touch with their history and can no longer lay claim to specific pieces of land. These are the people who have ended up

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landless around the cities and squeezed into the bantustan areas with no hope of being able to be viable farmers on the small pieces of land available to them.

In 1990 Nick Christadoulou and Nick Vink of the DBSA estimated that to transfer 25 per cent of the land at market prices would cost between R11 and R25 billion. It can be disputed that 25 per cent would be adequate to take the edge off the pressure for redistribution of land.

In relation to this wider issue of the generalised need for land redistribution the compensation issue must again be one of proportionality, specifically whether the costs are affordable in terms of State resources. South Africa faces the possibility of a few major programmes bankrupting the entire budget for land redistribution and of the process losing impetus.

Proportional compensation within stable or defined parameters

To make the case for some kind of proportional formula for compensation does not disregard the importance of the concern for fairness. Neither does it disregard the concern that a stable climate be established which encourages investment nor the concern for the future security of a system of property rights. Obviously these are real issues and it is critical that people have a measure of security in their property and are able to plan for the future.

Market value is not necessarily always an inappropriate quantum for compensation. In some instances it would be the only desirable and fair quantum. The thrust of the argument is for a flexible formulation which allows both for market value and for less than market value in the context where the interests of the parties affected have to be balanced against available State resources. Flexibility can be provided within a stable system which is neither arbitrary nor malicious.

One possible model for land reform entails that laws, mechanisms and institutions be put in place to direct the State to balance the land rights of all South Africans. These are, first, the rights that presently exist and, second, the rights which black people were systematically denied and which they lay claim to on the basis both of historical right and pressing

necessity.

In this context an explicit hierarchy of property rights could be established which would specify the rights deserving of lesser or greater protection. Concerning the compensation debate these would be property rights which attract lesser or greater amounts of compensation. In broad terms the hierarchy would differentiate between peoples' homes and productively used land (whether agricultural or industrial) in contrast to vacant and speculatively held land.

The starkest form of South Africa's vast inequalities in land ownership is familiar to us all. It lies in the under-utilisation of large tracts of white-owned land and the terrible over-crowding and the high population density in black areas. That land is vacant and unused indicates its unimportance to its owner or that the owner is holding it only for speculative purposes.

White investors bought land in a 'whites-only' market and now hold on to it because it will inevitably become more valuable as the shortages created by that same 'whites-only' market intensify over time. Is it more valuable to society to uphold the rights of mining houses to own vast areas of unused land around the cities in the situation of severe housing crisis, or is it more valuable to uphold the rights of homeless people to acquire access to affordable places to live? There is a tension between these two rights and it is necessary that the State should mediate this tension.

It is always vacant land that is first targeted by homeless people as 'squatter' areas. This is precisely because it is the least 'owned' land in the sense of land which is used, controlled and cared for. The only basis for the ownership of such land is the possession of title deeds - and until 1991 title deeds existed in a 'whites-only' system of property rights.

A suggestion then would be that this unused urban or rural land be targeted for redistribution at less than market value whilst homes and productively used land be protected from expropriation, except at market value.

The first step would be to put the owners on terms; so that they know that unused land is vulnerable to expropriation at less than market value and to provide them with a time limit in which this mechanism

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would come into place. Thus they would have an opportunity to plan accordingly, either to bring the land into productive use or to sell it.

The regulation and the time limit involved would bring the price of land down and thus reduce some of the substantial pressure for redistribution. However, if this decrease in prices is not sufficient to address the problems of homelessness and landlessness, then landowners would know that they were vulnerable to expropriation at less than market value.

Such a measure is not aimed at undermining property, but rather at equalising access to property by intervening where existing property rights are most dysfunctional. It is only if this dysfunctional disparity is addressed that any property is likely to be secure. Ironically, there is some support for this view from white farmers who say that the vast scale of speculatively held and unused land, whether Government-owned or owned by companies, is what is putting pressure on their farms to become the locus for the dispute around redistribution.

The model is vague and in any case is only one proposal for land reform. It is not a solution *per se* but will give an example of the kinds of proposals and solutions which would be pre-empted were the compensation formula to be fixed at market value or any other quantum.

Conclusion

Nothing in these proposals attacks market value as such. If the World Bank can arrange for South Africa to be provided with enough money to guarantee all landless black families vouchers that enable them to buy land on the open market, this would be positive. The more money, the less dislocation, which will result in fewer losses, and a less contentious land reform.

A further positive step would be to establish a wealth tax or a land tax which can finance land reform on a scale where market value compensation is payable on sufficiently significant scale to redress forced removals and the scale of black landlessness in South Africa. It is of some concern is that these possibilities are not guaranteed. And indeed are unlikely, given the legitimate demands and needs against the budget, to deal with the similarly created racial inequalities

and backlogs in health, education and housing.

Unless massive fiscal allocations for land reform are guaranteed (and indeed realistic) to posit them constitutes dangerous and misleading wishful thinking. To rely on them in concluding a constitutional principle which guarantees market value compensation would not be an abstract intervention to uphold human rights. It would be a historically specific intervention to condemn those who were systematically dispossessed of their land under apartheid to remain so by making meaningful land reform prohibitively expensive.