

The Constitution, the Land question, Citizenship and Redress



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“As with all determination about the reach of constitutionally protected rights, the starting and ending point of the analysis must be to affirm the values of human dignity, equality and freedom. One of the provisions of the Bill of Rights that has to be interpreted with these values in mind, is section 25.... The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and by private persons. Yet such rights have to be understood in the context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.”

Justice Albie Sachs in the Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

The unresolved land question lies at the heart of the social and economic relations that our country confronts today. The current generation of those who were dispossessed of their land swell the ranks of the underpaid, unemployed and poor. They are peripheral players in the economy. After all, it was the grabbing of the land of their forebears that precipitated their proletarianisation and denial of economic opportunities.

The Historical Background

Nineteen years into our freedom, we clamour for the evasive dream of equality. This year is the centenary of the Land Act 27 of 1913 which came into effect on 19 June of that year.

This legislation effectively reduced Africans' access to land. Over one-and-a-half million hectares of land was white owned and Africans rented from them. Half a million hectares was owned and occupied by Africans.

The enactment of this law was a culmination of over 3 centuries of the dispossession of Africans of their land. It all started back in 1652, when the first white settlers arrived at the Cape. In 1658, the Khoi communities were forcibly removed from their land, and were told by Jan van Riebeeck that they were no longer allowed to live west of the Salt and Liesbeek rivers.

This eviction was followed by a string of military conquests and colonial settlements, which stripped Africans of their land. Then numerous laws were passed to consolidate these colonial gains. The 1884 Native Location Act in the Cape Colony and the 1887 Squatter Laws in the Transvaal were passed.

The 1913 Land Act prohibited land purchases by Africans outside of the scheduled 'reserves', making these specified areas the only places where Africans could legally occupy land. This law also made sharecropping and 'squatting' illegal. White settlers expropriated more than 90 per cent of land under this Act.

In 1924, the Pact government came to power and decided to abolish independent African access to land, and created a uniform system of black administration throughout South Africa. In 1927, the Black Administration Act 38 of 1927 was enacted, and it became one of the methods used to effect forced removals.

The Native Trust and Land Act of 1936 expanded the total African reserve area to approximately 13% of the national land mass. The following year the Native Laws Amendment Act removed the surviving rights of Africans to acquire land in urban areas.

The implementation of the Land Acts of 1913 and 1936 respectively, gave only 8% and 13% of South Africa's territory to blacks, who at the time represented the overwhelming majority of the country's population.

The Group Areas Act 36 of 1950 allocated certain areas to specific race groups. Under this law, many black people were forcibly removed from their homes and resettled in underdeveloped and underserviced areas.

The Bantu Homelands Citizenship Act of 1970 barred Africans from being 'South African citizens', thereby forcing them to be the exclusive citizens of various tribal homelands.

Between 1960 and 1982 approximately 1 200 000 people, mainly Africans, were forcibly removed from farms, a further 600 000 through black spot and Bantustan consolidation policies, another 700 000 through urban relocation and some 900 000 under the Group Areas Act.

Should a bill of rights obstruct the government of the day when that direction is taken, should it make the urgent task of social or economic reform impossible or difficult to undertake, we shall have on our hands a crisis of the first order, endangering the bill of rights as a whole and the survival of the constitutional government itself...

The Constitutional Mandate

It should therefore surprise no one that in 1988, Judge Didcott warned thus:

"...a Bill of Rights cannot afford... to protect private property with such zeal that [it] entrenches privilege. A major problem which any future South African government is bound to face will be the problem of poverty, of its alleviation and the need for the country's wealth to be shared more equitably... Should a bill of rights obstruct the government of the day when that direction is taken, should it make the urgent task of social or economic reform impossible or difficult to undertake, we shall have on our hands a crisis of the first order, endangering the bill of rights as a whole and the survival of the constitutional government itself..."

It is common cause that South Africa's land reform and redress has been excruciatingly slow. This is despite the recognition of the fact that at the heart of the prevailing poverty and inequalities in our society today is the land question. This is acknowledged by the leaders of our country as it is equally experienced by the communities who live with the legacy of that dispossession. The Green Paper on Land Reform of 2011 captures the urgency to resolve this matter thus:

“[Forcible Land removals] are not a product of just any political choice and decision, or any administrative practice, process, procedure or institution. If there could be anything positive which comes from Apartheid, it is (a) the political courage and will to make hard choices and decisions; and, (b) the bureaucratic commitment, passion and aggression in pursuit of those political choices and decisions. We are in the mess we are in today because of these two sets of qualities – political courage and will to make hard choices and decisions, and bureaucratic commitment, passion and aggression in pursuit of those political choices and decisions. We need them now to pull the country out of the mess.”

We must also ask ourselves whether the warning of Judge Didcott is ringing true. It is important to recall here that the South African constitution is a product of a negotiated settlement. So, it bears the hallmarks of our history, and its legacies live in the present.

Section 25 of the constitution seeks to strike a balance between competing interests, historical injustice of dispossession and the need for redress and the importance of respect for property ownership in a post-apartheid mixed market economic dispensation.

The historical context in which the property clause came into existence should be remembered. These provisions emphasise that under the Constitution the protection of property as an individual right is not absolute but subject to societal considerations.

In the general discourse, some have read Section 25 to mean that the ‘willing buyer, willing seller’ model is to the determinant of the land reform and redress process. Consequently Section 25 has also come under attack as the restrictive clause in the constitution that makes land reform impossible. However, a closer reading of Section 25 in fact shows that this may be a conservative interpretation of the constitution.

The constitutional court seems to affirm these sentiments in the *Haffejee NO and Another v Ethekwin Municipality*, when it held that:

“.....The interpretation of the section must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.....Protection for the holding of property is implicit in section 25. Section 25(1) must be construed in the context of the other provisions of section 25 and in the context of the Constitution as a whole. Sections 25(4) to (9) underline the need for the redress and transformation of the legacy of grossly unequal distribution of land in this country. The historical context in which the property clause came into existence should be remembered. These provisions emphasise that under the Constitution the protection of property as an individual right is not absolute but subject to societal considerations. The purpose of section 25 is to protect existing private property rights and to serve the public interest, mainly in the sphere of land reform but not limited thereto. Its purpose is also to strike “a proportionate balance between these two functions.”

Section 25.3(e) makes explicit provision for circumstances under which expropriation can take place. Section 25.4(a) defines “public interest to include the nation’s commitment to land reform and to reforms intended to bring about equitable access to all South Africa’s natural resources”. It further enjoins the state in Section 25. (5):

“to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis”;

And in Section 25.(6) “a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent

provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress”.

“A person or community dispossessed of property after 19 June 1913 as result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. (Section 25(7)).

No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the result of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1). Parliament must enact the legislation referred to in subsection (6)”.

Clearly, the difficulty that arises in relation to South Africa’s post-1994 land reform does not stem from the constitution. As Hall puts it:

“While protecting rights, the constitution also explicitly empowers the state to expropriate property and that property may be expropriated in the public interest, including commitment to land reform. (Hall, 2004:6)”¹

This approach is premised on reading of Section 25 of the Constitution as enabling government to make effective changes to advance land reform, redistribution and redress.

Apartheid Policy and Law

All three components of South Africa’s land reform programme - land restitution to those disposed in 1913, redistribution of land to redress ownership resulting from 1913, and the tenure reform system to provide security of tenure to those disadvantaged by discriminatory laws and practices – are severely limited by policy choices that found expression in laws passed by parliament rather than constitution.²

In all three areas the tendency has been to develop policies and programmes that advantage powerful interests, including Traditional Leaders, established farmers (especially white farmers) and the markets. Over- emphasis on each of these powerful interest groups and players has resulted in land reform programme that did not translate into effective benefits for dispossessed communities and individuals.

It is important to examine the extent to which the powers and remedies contained in the constitution may or may not be adequate. Our starting point must be to look at what we have, and test it against policy and legislative interpretation, and finally implementation.

From various attempts to develop coherent legislation and policies to address land reform, government seemed to adopt three key principles:

- Redistribution of Land to redress historic imbalances, including the support for the emergent large scale black commercial farming strata. The rationale behind this is the importance of addressing racially skewed patterns of land ownership which are the legacies of land dispossession. In addition to redress, there seemed to be an assumption that this approach would have a trickledown effect which would benefit previously disadvantaged communities and address unemployment;
- Land Restitution, which aims to compensate those dispossessed of land within a

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- framework determined by government and often paid out in compensation;
- Reform of the tenure system to provide security of tenure to particular communities who had been racially discriminated against, including those who live on land owned by white farmers. And the much contested communal and customary tenure system, which in essence has tended to favour those who hold or have claims of Chiefly power in rural communities in South Africa.

These distinctions, as the legislative and policy making processes have shown, are not as clear cut as portrayed. In the first place, the intersections of competing and powerful interests in South Africa have been playing themselves out against the backdrop of all these policies. In short, government on its own and with all the powers it derives from the constitution, has simply not been able to address these issues through legislative and policy frameworks. Clearly there has been a lack of appreciation of the intersection between all these different aspects of land reform and their impact on the larger canvass of land dispossession and citizenship in South Africa.

This gap in law has concrete and dire consequences for those who reside in the affected areas. Whatever gains may have been made by creating different levels of and forms of tenure, including remedies through the creation of Community Property Associations (CPA), which at least gave people some form of access to financial assistance for development, have been severely undermined by the failure to address this.

It is also evident today, as witnessed in legislation such as the Communal Land Rights Act 2010 (which was struck by the Constitutional Court on procedural grounds) that the complex tenure system that affects the majority of South Africans who live in rural areas has not been fully grasped by the law and policy making processes. CLARA 2010 was withdrawn by the Constitutional Court on procedural grounds. However, the substantive issues on different tenure systems and the hierarchies that are reinforced by this have had adverse effects on security of tenure in those areas. In particular, the over-extension of chiefly power and the extent to which traditional leaders would determine the very basis upon which people live in the areas designated as communities under the control of traditional leadership.

It is instructive that the Department of Land and Rural Development has yet to come up with a new legislative proposal to address the void created by the withdrawal of CLARA in 2010. This is despite the undertaking by the representative of the Minister in the Constitutional Court in 2010. This gap in law has concrete and dire consequences for those who reside in the affected areas. Whatever gains may have been made by creating different levels of and forms of tenure, including remedies through the creation of Community Property Associations (CPA), which at least gave people some form of access to financial assistance for development, have been severely undermined by the failure to address this.

Citizenship and Traditional Leadership

Ironically, the centenary of the Land Act occurs at a time when the majority of South Africans who live in rural communities are forced to contemplate a life without security of tenure or full citizenship, as guaranteed in the constitution. The emphasis and bias towards traditional leaders' interests and power base has resulted in the failure to provide basic rights such the right to freehold titles for people who reside in those communities.

The Traditional Courts Bill provides a good case study of how the bolstering of chiefly power actually strips people of citizenship and their right to self-determination. While it is hard to understand how a bill like this could even make it to a post-apartheid South African parliament, and pioneered by an ANC government, is not only surprising but embarrassing.

Communal Tenure is contested throughout the African continent. Its meanings are not always the same. However, there is an obligation that the South African government sought to make (as enjoined by the constitution), namely to recognise the institution of traditional leadership. So, the problem here is not the principle of recognition of traditional leadership; rather, it is with the understanding of what that recognition means.

At the heart of this, is the very understanding of 'customary law' which seems to be read and interpreted as meaning there can be no customary law without traditional leadership. Equally, there can be no community in the communal sense without traditional leadership. This must prompt the question: is this the case in reality? Is this the experience of living customary law? How close is this reading and meaning of 'customary law' to the experience of those who may choose to live according to custom?

Conclusion

Is it reasonable to conclude that part of the reluctance of the government to use a more liberal interpretation of the Section 25 has to do with established interests in agri-business? In reflecting on this we must also remember that land is not just about agriculture but also mineral resources and capital accumulation which are at the centre of South Africa's economy. What is the contribution of established farmers and capital, including mining conglomerates, in promoting a commitment to redressing the legacy of the Land Act?

Our view is that failure to use the constitution to create a just and free society does not only entrench inequality of the past - it reproduces new forms of inequality, poverty dispossession and economic marginalisation. This is seen across the South African landscape.

There is deeper ambiguity to the common vision enshrined in the constitution – the creation of a society founded on human dignity and the inalienable rights in the Bill of Rights. These are not questions to be posed to government alone. We have to ask difficult questions of government and of ourselves – to what extent are South Africans, especially those who are privileged and have resources, prepared to use that influence and power as a stabilising force in the country? To what extent are the established power centres of influence, including capital, prepared to use their agency in pursuit of common citizenship in all its meanings?

NOTES

- 1 Hall, Ruth. 2004. "Land Restitution in South Africa: Rights, Development and the Restrained State." *Canadian Journal of African Studies*; Special Issue: A Decade of Democracy in Southern Africa 1994 - 2004. Vol 38, No 3; pp 654-671.
- 2 Cousins, B. 2008. "Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa." In Claasens & Cousins (eds) *Land, Power & Custom*, University of Cape Town