The Legacy of Land Dispossession in South Africa

To what extent does the Constitution facilitate or limit redress?

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Introduction

The discussion on the Land Act of 1913 provides an opportunity to reflect on its legacies in the present. It provides an opportunity to reflect on the multiple meanings and implications of The Land Act of 1913 in constructing a society based on inequality and dispossession.

The centenary of the Land Act occurs 18 years after the South African constitution was enacted into law. Whilst the function of the constitution in any society is broader than redressing past injustices; there can be no question that such redress is central in laying foundations for a society based on justice, freedom and equality – in all meanings.

There is general acceptance that South Africa's land reform and redress has been frustratingly low. This is acknowledged by the leaders of the country as it is equally experienced by the communities who live with the legacy of that dispossession. Why is this so? To what extent have legislation and policies assisted in addressing this

challenge? To what extent, has the constitution been used to develop and interprete the land reform and redistribution programmes?

In trying to address these questions, I will use Section 25 of the Bill of Rights as the basis for examining obstacles, dilemmas and opportunities. In considering the constitution as the guiding law which frames our approach to land policies and land redistribution in South Africa, I will address issues on the reading and misreading of Section 25. I will also look at related legislation and the extent to which it affirms or contradicts the constitutional provisions.

It is important to recall here, that the South African constitution is a product of a negotiated process. So, it bears the hallmarks of our history and its legacies live in the present. Of course, discussions on the land question have always been part of South African political and economic debate.

" The first question was land'[i], according to Wilson Fanti, the return of the land was the first issue reaised by the people they consulted during the Freedom Charter compaugn the Stutterhein area In 1955. The call to address land dispossession resonated across the country as people envioned the future South Africa. (Fanti, 1986 p-35)

In the Freedom Charter, the clause sits with others which address common citizenship, equality and justice; as well as recognition of the importance to build a common South Africa in which all people shall be free. ` **The Land Shall be Shared Amongst Those who work it . Restrictions on land ownership on a racial basis shall be ended…'**

It is fair to assert that as far back as the 1950s, there was this pre-occupation with how one policy may affect another and how a combination of these, would move South Africa towards redress and promote a vialable agrarian reform.

Land Restituion and Rights in the Constitution.

Section 25 of the constitution seeks to strike a balance betwee competing interests, historical injustice of dispossession and the reality of the redress and importance in post- apartheid dispensation. As far back as 1988, Judge Dicott warned:

"…a Bill of Rights cannot afford… to protect private property which such zeal that in entrenches provilege. A major problem which any future South African government is bound to face will the problem of poverty, of its allevaition and the need for the country's wealth to be shared more equitably… Should a bill of rights obstruct governent of the day when that direction if taken, should it make the urgent task of social or economic reform impossible or difficult to understake, we shall have on our hands a crisis of the first order, endamgering the bill of rights as a whole and the survival of the constitutiional government itself…" (Chaskalson 1993).[ii]

The property clause did however make it to the Interim Constitution and to the final constitution in 1995. This probably reflects the extent to which the negotiations process necessitated compromise. However, reading of the Section 25, doesnot only also reveal the complexity and cntestation of the land question. It also shows the extent to which this was grappled with in the negotiations process, the compromises that were made. Considering the limitations placed by this section on the land redistribution origramme, it is important to recall the that this carefully section also seeks to balance the limitatons that may derive from the Proprty Clause.

In general discourse, Section 25 has been read to mean that the ` willing buyer, willing seller' model is the main determinant of the land reform and redress process. It is also considered to be the main prohibitive clause. Not withstanding what is dominant in the public discourse, it is important to emphasise this section does not in fact, limit the extent land redistribution. A closer reading of Section 25, in fact shows that the ` willing buyer, willling seller model' on the value determined by the market is not in the constitution.

Further, Section 25. 3 (e) makes explicit provision for expropriation. Under which circumstances can expropriation take place? Secition 25. 4 (a) defines "public interest to include the nation's commitment to land reform, and to reforms to bring about equaittable access to all South Africa's natural resources".

It further enjoins the:

"state to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equiattable basis"; (Section 25. (5));

" 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 extebt provied by an Act of Parliament, either to tenure which is legally secure or to comparable redrress. (Section 25 (6).

" A person or community dispossesed of property after 19 June 1913 as result of past racially discrimanatory 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 measurers to achieve land, water and related reform, in order to redress the result of past racial discrimination, provided that any departure fro 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. If this is the case, where does the challenge come from? Why has the pace of land reform been so slow?

Legislative and Policy Choices since 1994

There are different explanations for the policy and choices that have been made since 1994. There is no doubt that these will be discussed in the course of this conference.

There are two, that I want to highlight for the purposes of my discussion here are a) policy contraints to address the land reform question and b) the intersection of political and economic power in South Africa's land redistibution and reform programme.

Policy contrsatints and political choices

> *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)

This approach is premised on reading of Section 25 of the Constitution as enabaling government to make effective changes on the land reform, redistribution and redress. The contradictions contained within Section 25 are evident in Proprty Clause and the commitment to address the legacy of the Land Act and other forms of dispossession.

All three components of South Africa's land reform programme: -land restitution to those dispossed in 1913, land redistribution of land to redress ownership resulting from 1913 and the tenure reform system to provide of security of tenure to those disadvantaged by discrimantory laws and practices – are severely limited by policy choices rather than constitutional contraints. [iii]

(Ben Cousins 2008: 3)

Each component of the land reform presents its own challenges and whilst progress has been made to some extent, controversies and limitations loom large on the South African political and economic landscape.

The first major challenge arises from what appears to be inability to use the powers of the constitution effectively and to translate these in a manner that informs public policy processes to drive a substantive land reform programme.

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 interests of the market economy. Over emphasis on each of these powerful interest groups and players, has resulted in land reform

programme that not translated into effective benefits for communities and dispossed individuals and groups. From this perspective, the South Africa has not effectively used the powers provided by the constitution. The question surely that must be asked is why this has been the case?

Constitutional experts and those work with different aspects of the land reform programme will offer different explanations and analyses of this weakness. Some have argued that the constitution places limitations and competing rights and therefore, the weakness arises from this.

From the point of view of CASAC, 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 is to look at what we have and test it against policy and legislative interpretation and finally implementation. It may well be that the tension in a negotiated constitution is a factor. However, the trend which favours powerful interest groups in three aspects of the land reform programme, suggests a policy and political bias which does not necessarily translate to a problem with the constitution. Rather, the contestations and competing interests which framed the South African negotiations process (some which obviously resulted in clauses that may appear to be contradictory in the constitution) are alive in the discourse and the policy making processes.

It is not possible to trace the different ways in which these are evident in policies and legislative processes in this paper. Suffice to point to three policies (pieces of legislation and policies) simply to provide evidence for the argument I want to make tonight.

The first, is the approach to land reform as evident in the different policy approaches of the Department of Land Affairs, in the mid to late 1990s. From various attempts to develop coherent legislation and policies to address land reform, the department seemed to adopt three key principles:

a) Redistribution of Land to redress historic imbalances; including the support for the emergent large scale black commerical farming strat. 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 trickle down effect which would benefit prevously disadvantaged communties and address unemployement;
b) Land Resitution which aims to compensate those dispossed of land within a framework determined by government and often paid out in compensation;
c) Reform of the tenure system to provide security of tenure in particular communities who have racially discriminated against, including those who live in 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 claim of Chiefly power in rural communities in South Africa.

These distinctions, as the legislative and policy making processes has shown are not as clear cut as it appears to be. In the first place, the intersection of competing and powerful interests in South Africa have been the background of al these policies. In short, governement on its own and with all the powers it

derives from the constitution, has simply not been able to address these issues through legilative and policy framework. The argument advanced in the mid to late 1990s, that the problem is not the constitution but rather political will does not adequately address the challenges of land distribution in South Africa.

Instead, it can be seen today that there has been lack appreciation of the inter-s ection between all these different aspects of land reform and their impact on the larger canvass of land dispossession and citizenship in South Africa.

It is also evident today, as witnessed in legislation such the Commununal Land Rights Act 2010 (which was struck by the Constitutional Court on precedural gorunds) 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. Whilst CLARA, 2010 was withdrawn by the constitutional court on precedural groundas, the substantive issues on different tenure systems and the hierarchies that are reinfomred by this, in particular the over extension of chiefly power to the extent to which Trditional Leaders would determine the very basis upon which people live in the areas designated as communites under the control of traditional leadership has had adverse effects on secuirty of tenure in those areas. It is instructive that the Department of Land and Rural Reform has yet to come up with a new legislative proposal to address the lacuna 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 consquences 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 access to financial

assistance for development, these have been severely undermined by the failure to address this.

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 secutity of tenure or citizenship, as guaranteed in the constitution. The emphasis and bias towards Traditional Leaders, interet and power base has resulted in failure to provide basic rights such the right to free hold titles for people who reside in those communities. The Traditional Courts Bill provides a good case study of how bolstering of Chiefly power actually strips people of citizenship and right to self determination. Whilst it is hard to understand how a Bill like this could even make it to South African parliament in this time, it is also not surprising. Communal Tenure is contested through out 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; recognition of 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 that recognition means. At the heart of this, is very undertnding of 'customary law' which seems to be read and interpreted as meaning there can be no customary law wuthout traditional leadership. Equally, there can be no community in the communal sense without traditional leadership. Is this the case in reality? Is this the experience of living customary law? How close is this reading and meaning of ' customary law' is to the experience of those who may choose to live according to custom? In this conference, there are academic experts as well as experienced activists and residents in rural communites. This should make for an

interesting and rich conversation on how the understanding which permeates to law and policy choices in South Africa are in fact consistent with the lived experience and living customary law.

So far, one of the major power blocks who represent powerful interest on the land reform process in South Africa, has not surfaced in my discussion. That is the interest of established white farmers and capital. It would be a mistake to leave this powerful sector out of this conversation.

After all, it is reasonabe to conclude that part of the reluctance of the government to use the best and maximum interpretation of the Section 25 has to do with established interests in the agri-economy in South Africa. Coupling this with the understanding that land is not about agriculture but also mineral resources which are in the centre of our economy in South Africa, it is clear that these are powerful economic drivers. What is the contribution of established farmers and capital interest of mining conglomerates to commit themselves to redress the legacy of the Land Act? What role is played by this key sector to reproduce and entrench different aspects of the Land Act and dispossession in different guises?

This is not an unfair or unreasonable question. After all, it is my argument that the constitution that provide framework and power to redress the legacy of the 1913 Land Act. So, clearly, the limitation and the problem is not constitutional. CASAC's view is that failure to use the constitution to create a just and free society does not only entrench in equality of the past; it reproduces news forms of inequality and dispossession. This is seen across the South African landscape in

South Africa. Whether we are looking at police brutality, the multiple crises we face on civil liberities and socio-economic rights today it is clear that there is ambivalence towards the constitution. There is deeper ambiguity to the common vision enshrined in the constituton – the creation of a society found of human dignity, inalineable 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 to South Africans, especially those who privileged and have numerous resources are prepared to use that influence and power stabilising force in the country. To what extent, are the established powerful centres of influence, including capital are prepared to use their agency in pursuit of common citizneship in all its meanings?

What zones of influence and collaboration exist do undo the legacies of the 1913 Land Act? Some of the laws before parliament today (TCB) and others show the interwoven nature of different interests. One may not see the interests of mining companies in reading the much contested Traditional Courts Bill. But it is there in practice. It is there in the experience of people who live in these communities. It is there because as far back as the 1980s and creation of Bantustans, some of the mining companies established relationships with Bantustand Leaders approved of, which is same as saying the ` aparheid government sancitoned' Traditional Leaders.

The legacies of the Land Act of 1913 are multi- facted. This conference will hopefully grapple with these. Most importantly, it will help us examine the past in the present and how this may shape the future. It will, I expect provide fresh and imaginative ideas of how mitigate against the past shaping the present and

future in negative ways and ways that minimise the possibility of the constitution to redress the imalances that have resulted in this legacy.

[i] Raymond Suttner and Jeremy Cronin, *50 Years of the Freedom Charter*. UNISA Press, Pretoria, 2006 at p.35

[ii] Chaskalson, M. 1993. " Should there be a property clause: Implications of the constitutional protection of propoerty in the United States and the Commonwelth". In Venter, Minnie, and Anderson, Minna (eds). *Land, Property Rights and the New Constitution*. University of the Western Cape.

[iii] Cousins, B. 2008. "Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa." In Claasens & Cousins (eds).*Land, Power & Custom ,* Univerity of Cape Town

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