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LAND REFORM: Legal issues in the development
of a Land Reform Programme
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Introduction
The legal issues to be addressed in the development of a Land reform programme may be, for the purpose of exposition, divided into four specific problem areas. These are:
1) The problem of land acquisition
2) Forms of land tenure
3) Forms of agricultural production
4) Rights of non-property holders on the land
Although they may be dealt with separately, they are obviously closely interrelated and proposals in any one of these areas will effect the options available in the others. This paper will however focus only on the problem of land acquisition.
The working premise of this paper is that the mere abolition of the existing apartheid legislation will not adequately address the problem of land reform. Abolition of the 1913 and 1936 Land Acts will have little impact on the present distribution of land ownership as the bulk of the land is now in private hands and under the rules of South African common law nobody may use or take land without the consent of the owner. The failure of this approach may be assessed by considering the failure of the abolition of the Rhodesian Land Apportionment Act in 1978.
However the statutory exception to the common law protection of property rights, embodied in the law of expropriation, allows the state to take land under certain conditions and for certain purposes.
I. Adopting a Land Reform Programme
A. Land Acquisition
In addressing the issue of land acquisition i will be considering two alternative means of acquisition available to the drafters of a future land reform programme in South Africa. First there is the possibility of acquiring access to land on the basis of existing histon'cal claims and second, there is the adoption of a proactive land reform programme through which the state actively acquires land for redistribution.
1. Historical claims
A programme of land reform based on historical claims may apply various legal mechanisms in order to establish a process for the recognition of claims and resolution of conflicting claims. These include applying theories of restitution, recognition of and compensation for lost rights and the recognition of pre-existing and culturally based rights as legal rights.
a. Restitution
Recognised in both civil and common law, restitution is the act of restoring anything to its righttul owner, of making good or giving equivalent for any loss, and requires a person who has been unjustly enriched at the expense of another to make restitution to the other.1 In Roman law a restitutio was based on injury to the applicant's proprietary interests resulting from a transaction or event and could be asserted on the basis of a good cause, including significantly, a persons inability to make a claim for a particular period of time.2 By analogy it may be argued that during South Africa's period of colonial domination the colonized have been unable to make a claim for the restitution of their dispossessed land rights but will, with the emergence of a democratic South
1 H. C. Black, Black's Law Dictionary 1180 (5th ed. 1979).
2 J. A. C. Thomas, Textbook of Roman Law 113 (1976).

Afn’ca, be in a position to assert their claims and have them recognized.
Although agrarian reform programmes are at times described as being comparable to attirmative action programmes in industrial countries and the property redistributed duri ng land reform is considered to be redress, "just as job preference in affirmative action is expl icitly given to minorities and women as recompense for years of maltreatment," only rarely have agrarian reform programmes been explicitly based on principles of restitution.3 One notable eXception how ever was the Mexican Revolution.
The restitution of dispossessed lands was institutionalized in the Zapatistas’ Basic Law of Agrarian Reform which in Article 1 decreed: "to communities and to individuals the fields , timber, and water of which they were despoiled are (hereby) restored, it being sufficient that th ey possess legal titles dated before the year 1856, in order that they enter immediately into posses sion of their properties."
The advantage of a land reform based on a theory of restitution is that it addresses dire ctly the three issues central to the problem of land acquisition:
1) It identifies the land to be taken in the reform;
2) It avoids payment to the present "owner" on the grounds that the property is being returned to the true owner;
3) and, it identifies the beneficiaries of the reform.
Restitution however proved ineffective as a means of land redistribution in Mexico. Altho ugh based on acknowledged claims of prior ownership it floundered on the requirement that claimants produce titles and other documents to prove ownershipf
Despite this difficulty, particularly with respect to the claims of communities who lost their land during the earlier stages of dispossession in South Africa, restitutioncould prove a powerful legal tool in addressing the claims of those communities who were forcibly removed from s o-called "black spots" in terms apartheid policy. In these cases the areas of) land are clearly id entifiable, the state remains in many cases the present "owner" of the land and the beneficiaries are ide ntifiable communities who suffered forced removal.
This process will be much more complex in the case of urban land taken in terms of the Group Areas Act, where although the land and the victims are clearly identifiable, owners hip has now been granted to new owners who did not take a direct part in the process of disposses sion and will thus have in turn to be compensated. However, as the beneficiaries of an unjust dist ribution it may be argued that the new owners should contribute to some form of compensation fund to the extent that they have been unjustly enriched. This contribution could take the form of a capital gains tax on the sale or transfer of such properties.
The Mexican agrarian law did acknowledge that restitution alone would not adequately address the problem of landlessness and in Article 4 recognized "the unquestionable right which belongs to every Mexican of possessing and cultivating an extension of land, the products of which permit him to cover his needs and those of his family."5 Consequently provision was made, in order to create small property, for the expropriation, "by reason of public utility and by mean s of the corresponding indemnization, all the lands of the country, with the sole exception of the fields belonging to pueblos, rancherias, and communities, and those farms which, because they do not exceed the maximum which this law fixes, must remain in the power of their present propri etors."6
The legal structure created by the Mexican agrarian law thus incorporated both notions of

restitution and affirmative action in order to address both issues of dispossession and landlessness.

3 Thiesenhusen, Introduction: Searching for Agrarian Reform in Latin America in Searching for Agrarian Reform in Latin America 1 & 6-7 (W. C. Thiesenhusen ed. 1989).

4 53, K. L. Karst and K. S. Rosenn, Law and Development in Latin America: a case book, 285 (1975).

5 Arts. 1 & 4 of the Agrarian Law, regrinted in J. Womak, Zapata and the Mexican Revolution 406-07 (1968).

6 Id.

The effect of a similar incorporation in the South African context will be to provide a b
asis not only
for the redistribution of resources to ensure equal participation in the context of the F
reedom
Charter's ideal that the land should be shared among those who work it, but also a basis
upon
which to resolve existing claims and to address issues of compensation in the context of
land
reform.

b. Recognition of and compensation for lost rights

Another means of addressing the issue of historical claims is to create a process through
which a claimants lost rights may be formally recognised, assessed and compensation deter
mined.
This could be achieved through the creation of a National Land Commission with the power
to hear
evidence of land claims, to mediate between rival claimants, and to determine appropriate
compensation. This quasi-judicial body may also be granted the power to arbitrate on issu
es of
conflicting rights and levels of compensation in cases where the parties are prepared to
submit
themselves to arbitration. In the advent of an irreconcilable dispute the parties would h
ave the right
of appeal to either an especially established land court or to the courts of general juri
sdiction.

0. Recognition of pre-existing and culturally based rights as legal

The recognition of historical claims to specific areas of land requires the incorporation
of
criteria of ownership presently unrecognized by South African common law. Acceptance of c
ertain
defined incidents of ownership based on criteria such as birth right and occupation right
s will
provide a whole new legal basis for the existing land claims made by dispossessed communi
ties,
tenant farmers and farm workers.

it has been suggested that the law of prescription may be evoked to give a legal basis to
the claims of tenants who claim an historical right to the land. This suggestion however
ignores the
requirements of the law of acquisitive prescription which are now statutorily defined in
the
Prescription Act 18 of 1943 and the Prescription Act 68 of 1969. Generally the Acts defin
e
acquisitive prescription as the acquiring of a real right regarding movables or immovable
s through
the open and undisturbed possession thereof or the exercise of limited real rights for an
uninterrupted period of thirty years.7

Although the possessor can add the time his predecessors possessed the thing to his or
her own period, most claims are likely to fail on the requirement that possession must no
t be in
accordance with the owner's wish or will. Thus, even a claim of an usufructuary right wou
ld be
subject to challenge on the ground that the owner either granted permission or co-operate
d in the
continuing occupation of the land by the claimant.

. 2. Establishing a proactive land reform programme

a. Distribution of existing state land

It is argued that much of the existing land hunger may be addressed by distributing the v
ast
tracts of land presently held by the state, particularly that land held in terms of the D
evelopment
Trust and Land Act of 1936.8 However, it must be recognised that this land is not on the
whole
unoccupied or unused and therefore its distribution will involve the resolution of the co
ntesting
claims of those people presently using the land and the proposed beneficiaries of a land
reform
programme.

Furthermore, it must be recognised that not all of the land presently held by the state i
s
suitable for agricultural production and that there is a need for the state to retain cer
tain land

7 See, N. J. J. Olivier, G. J. Pienaar and A. J. Van der Walt, Law of Property: Studentts

Handbook, 116-127 (1989).
8 Formally the Native Trust and Land Act No. 18 of 1936.
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holdings for purposes of environmental protection and other legitimate governmental purposes.

b. . Expropriation of land for redistribution

Although the most controversial means of land acquisition a land reform policy based in part on a process of expropriation remains the most effective way to ensure a relatively timely and thorough process of redistribution. Such a policy will require the establishment of a legal framework and governmental structure through which to implement a land reform programme. Central to this would be the adoption of a Land Acquisition Act which would have to address the three central issues of a programme of expropriation and redistribution:

- It must identify the land to be taken in the reform;
- what compensation is due the current owners; and
- who shall be the beneficiaries.

Expropriation in terms of a Land Acquisition Act must be conducted on the basis of established criteria which when applied will adequately address these issues.

1) What land would be subject to expropriation

Farms could be subject to expropriation according to a number of criteria including their size, under-utilization, abandonment, unauthorized subdivision, corporate ownership, failure to comply with labour laws, the criminal conviction of the owner and location. _

a) excess land holdings

The excess-size provision of the Frei Agrarian Reform Law9 in Chile "established that mral properties larger than 80 basic irrigated hectares were subject to expropriation regardless of their productivity."10 Although it is possible to establish similar criteria according to the size of a viable farm for each of the different agricultural zones in South Africa, it may also be possible to limit this provision to the requirement that no individual own more than one viable farm.

b) Under-utilized land

Under-utilization often proves to be a difficult criteria to assert as it is subject to a difficult factual enquiry as to the capacity and correct usage of a particular area of land. In Chile expropriations on the basis of low productivity "were not only subject to judicial review but also required an elaborate verification process involving technical, economic, and social criteria for establishing whether the law applied."11 Although the burden of proof was on the landowner to show that the land was in fact productively used, government lawyers had to be prepared to rebut the landowner’s evidence.

Zimbabwe provides an instructive history of legal mechanisms aimed at encouraging land utilization and later used in the process of land reform. As early as 1925 an attempt was made to impose a tax on "unoccupied land" as a means of putting pressure on owners to put the land to beneficial use.12 The Rhodesian government adopted an Integrated Plan for Rural Development in 1978 which identified five categories of under-utilized land, however the 1979 Muzorewa Constitution defined land subject to compulsory taking due to under-utilization as "a piece of land

9 Law 16.640 of 1967. E Thome, Law, Conflict, and Change: Frei’s Law and Allendels Agrarian Reform in Searching for Agrarian Reform in Latin America (ed. W. C. Thiesenhusen, 1989) at 188.

10 Id. at 194.

11 Id. at 196

12 Seidman, Land Reform Legislation in Zimbabwe, unpublished paper

registered as a separate entity in the Deeds Registry." This blunted the effectiveness of the power
of expropriation for even if a farmer used only a relatively small portion of the land for agricultural
production the government could not expropriate any part of it.
The Muzorewa Constitution was even more restrictive in its definition of under-utilization
then the Rhodesian governments 1978 Integrated Plan for Rural development. Instead of the five
categories of under-utilized land defined in the Integrated Plan, the 1979 Constitution required that
the owner had failed to put the farm to "substantial use," that is, had not engaged in substantial
agricultural production for five years. This limited the government’s power of compulsory acquisition
to those farms that had been practically abandoned.
The Lancaster House Constitution however gave the government the power to take any
land that was under-utilized, even a portion of a farm, but failed to define what was meant by under-
utilized. in attempting to interpret the Lancaster House Constitution’s reference to under-utilized land
the Zimbabwean government will have to adopt criteria based on the production capacity of the
land. For this purpose it may rely on criteria, including such variables as slope, size of soil fractions
and their relative frequency in the topsoil, wetness, permeability of the upper topsoil, erosion,
surface characteristics, and ecological zone, used by government agriculturalists to classify land in
Zimbabwe into eight land capability classes.
Adoption of under-utilization as a criteria for expropriation in South Africa may have the
effect of increasing production among farmers fearing compulsory acquisition of their land but it will
also lead to complex litigation over the definition of under-utilization and its application to particular
areas and types of agricultural production.
c) Abandonment
Although it should not be difficult to create criteria for identifying derelict or abandoned land,
for example land for which rates have remained unpaid for a period of years, the process of
expropriation in these cases will require a period of notification and public advertizing to ensure that
the owners have a fair chance to respond.
d) unauthorized subdivision
This criteria does not refer as it would seem to the Subdivision of Agricultural Land Act No.
70 of 1970 but rather is designed to prevent the circumvention of the excess-size provisions through
the division of large landholdings among family members or straw men.
e) Corporate Ownership
ln legislating against company ownership of agricultural land it may be argued that
companies, having different financial and investment basisto the family farmer, constitute unfair
competition to the family farm and therefore should not be allowed to own arable land. In fact in
Sweden company and foreign ownership of arable land has been prohibited since 1906. Exceptions
to the prohibition on corporate or other legal forms of business association holding arable land may
be made in the case of producer cooperatives.
f) Failure to comply with labour laws and criminal conviction
Inclusion of these criteria as basis for expropriation will have a profound effect on the
implementation of labour laws on the farms and the abatement of assaults and other illegal behavior
inflicted upon farm workers and other farm inhabitants. Under the present property laws land
owners can expel black people from the land, demolish their homes, prevent black people from
entering, crossing or remaining on "their" land. The result is that control over land is

not only control
over a productive resource, but is control over the lives of people.
9) Location
Finally, there is the criteria of location which will enable the government to obtain lan
d for

the implement agricultural programmes involving the creation of specific development areas without being thwarted by an unwilling seller. Application of this criteria will need to be closely scrutinized to ensure that it is not used for individual gain or with political motivation.

2) What compensation is due?

Under the doctrine of parliamentary sovereignty the South African parliament is supreme and has the power to expropriate without compensation or without adequate compensation. In fact there is no common-law principle in South Africa requiring compensation to be paid for the loss of property or of a right in respect of property.13 The only limitation on this power is the rule of interpretation stating that a legislative intention to authorize expropriation without compensation will not be imputed in the absence of express words or plain intention.14

The introduction of a justiciable Bill of Rights in South Africa will however dramatically change this scenario. Even the ANC Constitutional Guidelines provide for the protection of property. Despite the restrictive wording of the clause, guaranteeing protection only to property for personal use and consumption, this will provide a right of compensation to landowners, particularly in the case of individual farmers.

There exist three conceivable standards of compensation. The first, expropriation without compensation would, even in terms of the ANC Constitutional Guidelines be limited to a few exceptional circumstances, for example, in the case of abandoned land, as a penalty for a criminal conviction arising out of a pattern and practice of either physical abuse of people living on the landowners property, or the gross violation of labour laws designed to protect and empower farmworkers. ’

The second standard would reimburse the investor for his or her unrecovered investment, not to exceed the current market value. This in most cases would require the payment of book value for the property.

Finally, there is the standard of compensation which "would pay back the investor for his loss of future profits, usually measured by current market value."l5

Placed in a constitutional context it is necessary to distinguish between different clauses used to define the standard of compensation required under the constitution or Bill of Rights. The Lancaster House Constitution required a future Zimbabwe government to pay "adequate compensation" for land taken by compulsory acquisition and limited the government’s right to expropriate land for agricultural resettlement to "under-utilised land." In effect this imposed a constitutional standard of "willing buyer-willing seller" on the land reform process.

Until its recent abolition, a further constitutional restriction on Zimbabwe’s ability to institute a land reform programme was the requirement that compensation be paid in a convertible currency thus tying land reform to the availability of foreign exchange. This provision is not unlike the constitutional clauses requiring prompt payment of full compensation with guaranteed repatriation of compensation, free of taxes or other deductions, to any country of choice, which were entrenched in the protection from deprivation of property clause of the Kenya Constitution of 1963 and reproduced as a standard constitutional constraint in many post-colonial constitutions. Although later deleted from the constitutions of several countries on the grounds that it is "difficult to justify retention of the repatriation provision in an independent country concerned with localization of property ownership as well as problems of financial viability,"16 it is retained in the Constitution of Botswana.

13 See, Cape Town Municipality v. Abdulla 1976 (2) SA 370 (C) at 376 A, quoted in M. Jacobs,
The Law of Expropriation in South Africa, 20 (1982).
’t Holmes JA in Belinco(Pty) Ltd v. Bellville Municipality & Another 1970 (4) SA 589 (AD) at 597
B-G, quoted in Jacobs at 21.
15 Seidman, Land Reform Legislation in Zimbabwe (unpublished).
16 Ng’ong’ola, Reform of Land Expropriation Laws in the Post-Colonial Era: Some experiences
from Central and Southern Africa, at 6 (unpublished paper).

The Namibian Constitution provides an interesting example of clauses guaranteeing the protection of property17 while at the same time providing, in the context of a programme of affirmative action, for a limited derogation of this right for the explicit purpose of addressing the inequalities arising out of a history of colonialism and apartheid.18 With respect to expropriation and compensation the Namibian constitution places only the broadest constraints on the state's power of expropriation, that it be in the public interest, and refers to "just" rather than "adequate" as the standard of compensation to be applied.19

Although it may be argued that the concept of just compensation refers to that standard of compensation which would reimburse the investor for his or her unrecovered investment, rather than market value, this is not made explicit in the Namibian Constitution and thus its exact meaning is left to be determined by the Courts.

Valuation of the land under the concept of just compensation may be done by adopting the assessed value used for tax purposes by the landowners themselves, or alternatively, in South Africa it may be possible to use the Land Bank's productivity assessment valuation of land. This could be justified on the grounds that to value agricultural land above its productive value is to cripple future producers. particularly newly emergent farmers, who would find it difficult to even pay the interest on the loan from the net production income on the farming activity.20

3. Who will be the beneficiaries?

Although the concept of affirmative action has entered the discourse of such institutions as the Development Bank of Southern Africa and the Urban Foundation with respect to the issue of land reform, it remains relatively undefined.

No reference is made to those claimants who have specific historical claims, who would surely have first priority as beneficiaries of a land reform programme. Rather the idea of affirmative action is employed as a means of limiting small-farmer development schemes to black beneficiaries.

The issue of beneficiaries must however be preceded by considering what form of compensation will be available to those individuals and communities with historical claims. In some cases the communities may wish to return to farming while in other cases they may accept monetary compensation, or shares in an ongoing concern.

An important limitation however may be the requirement that those granted land be willing and able to engage in agricultural production. In Sweden for example the government passed legislation in the 19305 requiring that anyone buying agricultural land should have both a certain educational level and a proven farming ability in order to secure better land use, higher yield levels and therefore higher farm income levels?1

In the South African context this may require the recognition of informally acquired farming knowledge, and the establishment of adequate support services to the newly emergent farmers.

. Conclusion

Although this paper focuses only on the different ways of acquiring property for the purpose of redistribution it must not be forgotten that any land reform legislation must also address the other three chief aspects of land reform. Addressing these different aspects of the programme requires a legislative approach which recognises the different forms of tenure applicable to the situation; provides encouragment to preferred forms of agricultural production; and protects the rights of non-

17 Namibian Constitution, Article 16 (1).

15 Namibian Constitution Art. 23 (2).

19 Namibian Constitution Art. 16 (2).

20 Dolny, Land reform: Constitutional, valuation and compensation issues, at 17 (unpublis
hed).
21 Dolny, at 18.

property holders on the land.
Only if all four factors are considered in relation to one another will a proposed agrarian
reform programme achieve a coherence which will enable it to address the different aspects of land
reform.