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LAND BILLS CONFERENCE
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Port Elizabeth

Introduction

The vast majority of Blacks in the rural areas of South Africa are the poorest of the poor. To these millions the lack of basic necessities, the persistent deficiencies in nutrition and health, their constantly deteriorating material conditions and standards of living cannot be divorced from the issue of land. They have been victims of the system that excluded them on the basis of their skin colour in favour of the white minority.

In their minds therefore, any non-racial democratic change in this country should of necessity bring about a radical redistribution of land and resources. It should be radical in the sense that it should not only change power relations, but also root out the deprivation caused by landlessness. They have high expectations that any constitutional transformation must go hand in hand with economic strategies that will alleviate poverty and improve living standards. In such strategies focus on addressing the plight of the landless in both the urban and rural areas will be important. In the urban areas the need for affordable housing and services is a predominant element. For the rural areas land reform, agricultural policies, and rural development would be key, if not dominant components of the overall policy package.

Whilst the abolition of apartheid in the political sense of the word is undoubtedly a basic condition for removing the barriers to a more just, equitable and democratic social system, it is clearly not the sole condition. The road to democracy can only be achieved if it is accompanied by a genuine process to restructure and strengthen the economy. Restructuring will go a long way towards removing the major social and economic abnormalities of this society - the result of centuries of colonial rule, segregation and apartheid policies. To this end restructuring should be based on development, through redistribution and putting the economy on a growth path. Such restructuring however cannot be achieved without changing the power relationships in the rural areas and this means in essence the restructuring of agriculture and the implementation of a comprehensive democratic land reform, that will include a broad developmental programme.

The resolution of the land question in South Africa is a prerequisite for the attainment of stability, justice and prosperity.

The Historical Perspective

South Africa has a long and bitter history of wars and struggles, much of which are rooted in the land issue. Through wars of dispossession and other forms of colonial conquest, systematic segregation and apartheid legislation the majority of our people have been marginalised and excluded from the corridors of power. The enactment of the 1913 Natives Land Act introduced the

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cementing of racial divide into law. This Act shaped subsequent land policies in South Africa. It based ownership of land on race. Africans were allowed, in total, access to only seven per cent of the land mainly as reserves which existed so as to continue supporting migrants' families. The remaining ninety-three per cent of the land was for the Whites. Labour Tenancy replaced share cropping and rent-tenant contracts. Subsequent legislature like the 1936 Development Land Act - slightly increased the land set aside for the Black people but also made squatting on White farms illegal. The Group Areas Act provided for the proclamation of segregated areas; the Bantu Authorities Act of 1951 made provision for the establishment of Tribal based authorities which was the first step in formalising the policy of separate development and the Bantustan system. And so the list goes on.

The successive White minority governments have continuously churned out policies and laws which have had one continuous objective - to maintain political and economic control over the vast majority of the black people. We see that land robbery and dispossession have always been part and parcel of the institutionalisation of racism and apartheid. The ownership and control of land, the terms and rights attached to such ownership and the distribution of the income and products derived are key elements in the eradication of the apartheid system, and will be of crucial importance in building democracy. Land is not only a means of livelihood, but also a store of value and wealth, a status symbol and a source of political power. It is also a very scarce item and a source of strong emotions.

The land and agricultural policies of the South African governments to date have been disastrous and had short term economic effectiveness. We in the ANC seek to change the status quo and a fundamental question that needs to be addressed in a Land Reform programme for a future non-racial, non-sexist democratic South Africa remains that of sovereignty.

Current Government Positions

Even the Nationalist government has come to recognise that the system of racially determined property law is unworkable and illegitimate. The White Paper on Land Reform and the supporting bills which are new law announced the removal of racial factors in the legislation on land issues. This "de-racialisation" in the relations of land ownership does not meet the demand for the acknowledgement and redress of past wrongs let alone the redistribution of land. We feel the move was aimed at the international community particularly at the United States to induce the removal of sanctions against apartheid South Africa which is what happened. The White Paper was issued, the laws were tabled, discussed, withdrawn, re-tabled and passed and shortly following that, President Bush made his speech on the lifting of sanctions.

Satisfying the international community should not be the purpose of a land reform programme in South Africa. As it is now, it is not.

problem of dispossession has not been resolved.

The laws passed do not address the real issues which South Africans and hungry people demand must be addressed in a much needed Land Reform. They seek to create a property owning elite, and hence co-opt a new black middle class, leaving the mass of the people as landless as they have been at any time in the last 80 plus years. Through the acquisition of property, a tiny number of black people will now have vested interests in maintaining the status quo at the cost of social differentiation within the struggling masses.

The manner in which the government addresses the land claims of the dispossessed, demonstrates scant understanding of the depth of the issues at hand and their feelings in this regard. Already people who have been moved from their land are claiming back that land. For as long as government does not hear the message, one despairs for the future. Those people cannot be brushed off with the statement that "it will be complicated to deal with their claims" or "they are purely illegal squatters". Those claims are going to have to be addressed, sooner rather than later. We have seen how land claims in other countries have continued to be carried forward generation after generation because they are not addressed.

This government clearly recognises the current state of ownership patterns of land and wants to consolidate the white interests in property. It supports primarily a land tenure reform, where the rights of white minority are being maintained, and a small access window is opened for some blacks. The need for redistribution of land is not addressed. restitution is ignored and customary as well as leasehold tenure are being undermined at the expense of freehold for a few. This move may consolidate and even broaden the support for apartheid in the white sector as well as the "non-white beneficiaries" of title, but does not serve the interests of the country and its people as a whole.

Whereas previously a protected racial land market was in place, now a free market is being prescribed as a means of giving "access" to the black dispossessed majority. Privatization of all national assets is speedily being carried out prior to negotiations so as to ensure that the sources of wealth in this country remain in the hands of a few.

So what is actually happening is that - whilst the Government talks of Land Reform - more people are being displaced in the interest of "standards". Financial means and access to finance will be the deciding factor in terms of owning and securing land. In this way, thousands of rural people are going to find themselves as tenants on their own land, in the same way as their forebears were when white settlers first carved up the land into freehold farms. The State is washing its hands of any further responsibility in terms of the distribution of land and wealth. By using the language of "standards" in terms of defining wh:

lives where, the state is actually re-introducing influx control based not on overt racial distinctions. but rather on economic (class) differentiation which will on the whole discriminate against the already dispossessed. to clear provisions are made it. farm workers and labour tenants. Their needs also must demand attention in any land reform. As a follow up or outcome of these new laws, we are seeing an increase in the measures to be taken where squatters and illegal occupations are concerned to impose control. The ongoing resistance to such controls by the various affected communities can therefore be expected to increase. We can recall the case of the Gqekegondwe community - which reflected the tensions and issues which are at stake and as there will also be an increase in stringent security measures one can expect cases of the same nature - all over the country. and particularly where once forcibly removed communities feel the threat of never being able to reclaim their land.

As necessary as the removal of race as a determinant for access to land is, the way that that is done, and the system of tenure which replaces the present system. needs to take into account the needs and desires of the entire population of the country. By imposing its own land policy without proper consultations, the government is failing to democratically resolve a national question.

Any new government is going to have to unravel the consequences of the laws passed. Such unravelling will not be without its trauma. The question remains - who will have to take responsibility for that trauma?

The need for Land Reform

The basic argument that there is a need for land reform seems to be undisputable. The tendency of late is for all the players in the transformation process is to sound the same when they speak of change. So one can no longer expect harsh resistance from the South African government to a call for Land Reform primarily because the interpretation is different. The objective of the Land Reform instituted by the government at the beginning of this year is irrelevant to the demand for land which is the cry of our people.

The question then remains Why do we, in the ANC call for land reform? What is it that we envisage as being of essence in a Land Policy for a future South Africa?

The policy of the ANC on land and agriculture were initially outlined in the Freedom Charter of 1955 with the call for the redistribution of "land to those who work it". This was further developed in the 1988 Constitutional Guidelines which called "for the abolition of racial restrictions on ownership and use of land, and the implementation of land reform in conformity with the principle of affirmative action. taking into account the

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Victims of forced removals (Constitutional Guidelines -1988). The Draft Bill of Rights goes on to abolish "forced removals of communities or persons from their homes as land on the basis of colour. language. on gender or creed" (Bill of Rights for a New South Africa -1990).

Undoubtedly there are two fundamental aspects a comprehensive land policy must address - the question of dispossession and alienation of the Black majority on the one hand and that of economic restructuring of the Agricultural sector in South Africa as a whole. There clearly must be a process of land redistribution. Contained within this must be a restoration of land rights to those who have been victims of dispossession. This means changing the ownership patterns that currently exist. This is in effect a challenge to the nature of property rights held primarily by the white minority. a recognition of the fact that the black majority have rights to land and a re-definition of one's right to land. These rights once made clear will have to be protected to ensure that there is security in tenure which will allow for peaceful coexistence.

The Land Reform process however goes beyond a legal transformation. It needs to address the economic aspects of agriculture and rural development as a whole and at the same time it must take into consideration the social implications. It necessitates broad participation if it is to be reflective of the aspirations and needs of Africans' and hence the need for consultation. This clearly puts a challenge to the democratic structures which seek to transform South Africa into a non-racial society and for this forum such challenges are enormous. Some legal experts argue that there is a dynamic relationship between the legal system and the process of social change. In South Africa this relationship has in the past been determined by the white minority to perpetuate a system of oppression in the interest of whites over the majority. Clearly in a future dispensation, this relationship should reflect the interests of the nation as a whole. We move from the understanding that the legal institutional system is supposed to reflect the demands coming from the social structure and process them equally in terms of the components of the legal system, (these components include structural, substantive, procedural elements. legal action and legal culture) and in turn coming out with responses that will affect the social structures.

It is true to say that the structural components of the legal system will affect how the demands are reflected and therefore which demands are taken into account. In our case there has existed a majority whose voice has consistently been silenced by the various regimes. The challenge therefore is to make the system accessible to all. Legal systems have their origins rooted in the values of the colonizing power and have succeeded in eliminating the prevailing customary values and norms. As a result they don't reflect the values of the whole society, rather they are an expression of the values of the dominant power structure.

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The substantive elements of the legal system viz: a viz land tenure would be the conflict in the communal and individual ownership of land. In the South African context individual tenure has always existed at the expense of communal tenure. There is clearly still a call for the retention of the system of communal tenure of land in some part of the country and the challenge to us is how then does this become codified and be consistent with the broader legal framework and yet not conflict with the rights being upheld under individual tenure and other forms of tenure. A challenge for the legal experts and practitioners will be to devise and put into operation a fair and legitimate legal system in which the imbalances in land, resources and skill etc created in the past are addressed without frustrating or sacrificing the vision for a new society. The ANC's Land Manifesto calls for the recognition of the diversity of tenure forms which exist in our country and their protections. This is not in isolation of the fact that we see it as being imperative that a Land reform must redress the injustices caused by apartheid's policy of forced removals. by restoring Bantustans and where this is not possible by making reparations using a just legal process. and a need to address demands and grievances around land redistribution by the creation of a land court through which competing claims to land can be heard and resolved.

Our problem then is how do we in a new constitution ensure that we do not limit our ability to address past injustices which come out of our experience with apartheid. On the one hand we want to ensure the principle of secured rights is upheld. We also want to address land claims. We want to protect certain political and personal freedoms like movement, choice etc and also want to establish and protect common values of property. Yet we don't want the legacy of apartheid and the entrenchment of the system of racial discrimination extended into these rights.. We want an orderly legal system which will allow for the interpretation of the demands of the dispossessed and yet will not depend on political patronage. The broad interests of the society should be protected and everyone should have confidence in the system. The challenge is how to strike this balance. Time delays, complexities in the legal system, exclusion of the "person in the street" are not unknown to legal processes these factors can be exploited by any one, but usually and significantly by the powerful to thwart the significant changes in the status quo.

This is a lesson we can learn from countries where there was an attempt to put in place a radical redistributive land reform through reformist measures. There was a call for the expropriation of farms over a particular size so as to redistribute the land to the landless. Short of changing the constitution itself which demanded the support of a two thirds majority, in the interest of democracy, the legal process necessary for expropriation was time and resource consuming. Whilst there is a need to operate within a legal system, there is a time factor involved in the transitional phase which should

hot jeoroooise the intended outcome of the reform process. we are also talking about tenure systems as a whole and in that worker's rights. women's rights. It is important to recognise that rights will be very important in the new South Africa for :gasons which go beyond morality but also include the livelihood of people. The de Klerk government now insists on the importance of production. individual title and the free market as determinants of land rights. Clearly this cannot transform our society. What is of essence is an articulation of the expressions of the majority of the people at large, in terms of their understanding of land rights and a protection of these rights as a whole.

Coming back to the other components of a legal system to be taken into cognisance as listed previously. The structural elements of the system - mainly the institutions which inherit a conservative implementing personnel from the previous power and have very little or no interest in carrying out the reform. The legal actors - the lawyers. the judges etc - they are the interpreters of the law and it is important to take into cognisance of where they come from and what their social values are. This greatly influences - in our case who will win a claim in the event we have a land claims court. How long will it take for a decision to be made on a case - we have seen how the recent cases are continuously postponed and adjourned - in other countries the experience is of cases which were adjourned well over 10 years - what happens in the mean time is people live and die, opportunities to derive a means of livelihood from the land are lost and the cost of keeping the case going increase. The last element is the legal culture - whose values are represented? In a country like South Africa where land has always been an instrument of power - to what extent will our new legal system be able to adjudicate the land related cases which will inevitably appear in the courts. Will there be a reluctance or acceptance to handle them in separate land courts because of the tense history and the issues involved ?

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Before concluding it is important to point out that these and many more are the questions we should pose for ourselves in looking towards the future. We have to be able to interpret the demands of the people into policies and those policies be interpreted into legal and other constitutional structures which will act in the interest of society at large. The challenge remains ours.

Constitutional matters are not synonymous to party political programmes. They are separate and different entities altogether. Within the given democratic constitution, political parties should be able to pursue their programme when in power or as an opposition in a democratic parliament.

While constitutional reforms should ensure individuals and

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organisations utmost possible rights. no specific economic system in agriculture should be guaranteed any position in the constitution as an economic system. Equally. no Specific land tenure should be guaranteed a place in the constitution. Any equitable and democratic land reform in South Africa will require the introduction of constitutional legislative and practical means of implementation which would:

(a) Protect the fundamental rights and liberties of all who live on the land:

(b) Extend judicial practices of law to prevent abuse of people's rights;

(c) Guarantee a minimum platform of social economic and cultural rights:

(d) Provide guarantees of workers rights and

(e) Produce laws promoting gender and combating the oppression of women as well as provisions design to give support to the family.

Achievement of a commitment to extend these universal human rights to all of our people living in the countryside would serve as a basis for addressing the need for land redistribution and development.

Therefore the process of constitutional development should be closely associated with the whole process of economic development and the enjoyment of basic human rights. A genuine democratic land - reform seems to be the first step towards equitable growth in agriculture and the economy in general, and seems to have no substitute.

Land-reform accompanied by adequate allocation of resources to research, infrastructure and other investments, together With effective administration of those resources, would probably assure a growth rate of agricultural output that would exceed population growth rate.

It is the heroic struggles of the oppressed, led by the ANC, that has opught the present phase where a peaceful negotiated settlement is possible. It will also be these struggles that will bring fundamental changes and lead South Africa towards peace, democracy stability and prosperity.

The challenge remains ours.

Thank You

23 August 1991