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Be-devilling Agrarian Reform:
the Impact of Present and Future Legal Framework
Heinz Klug

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the impact of present and future legal frameworks
(Summary)
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1 Introduction
1.1 History and role of legal processes in land holding and dispossession
The historic relationship in South Africa between legal process and dispossession makes it
imperative for any new legal dispensation to address these issues. Failure to do so will undermine
the legitimacy any new dispensation will most certainly be seeking. Recent studies of contract
farming, for example, indicate that the political, historical and social contexts often had more to
, do with the sustainability or nonsustainability of particular ventures than did
technological/commodity-based characteristich
2 Historical claims and land restoration
2.1 Restoration of land
Although they will be closely interrelated in practice there is a fundamental distinction
between land restoration and land redistribution. The restoration of land rights, by means of an
administrative or adjudicatory processes involving specific parcels of land, directly empowers the
successful claimants and guarantees their access to some resource. In this sence the primary focus
of the land claims process will be the equitable restoration of the status quo obtaining prior to a
predefined class of removals.
2.1.1 Defining eligible claimants
In order to facilitate the process of recognizing and identifying claimants it is possible to
dehne categories of removals which sought to further a particular part of apartheid ideology.
These qualifying acts may be identified through the differentiation of four types of legal rules
which characterized racial land law in the period since 1913.
The process of categorization must however not become a means of disempowerment
through which government officials engage in the prior identification of valid claimants but should
serve merely to validate or exclude claims -- subject to appeal -- in the initial phases of the ’
process.
212 The structure of a land claims forum
Although adopting an administrative process as opposed to a court process would facilitate
a claims process it does raise the issue of whether an administrative body exercising a quasi-
judicial function would violate the separation of powers clause of the constitution. However, even
in the unlikely event that such a strict separation of powers doctrine is adopted a solution may be
found in creating an investigative commissibn to make an initial determination, with an appeal to
a land claims court.
2.1.3 Questions of process
As most land claims are likely to be group or community claims it is necessary that a
suitable form of class action be recognised to facilitate the claims process. The existence of
multiple claimants - whether claiming jointly or with opposing claims - requires the
establishment of clear notice procedures. While certain formal evidentiary rules will need to be
relaxed for the land claims court to obtain information neccesary to make its decisions, it may
also be necessary to consider some form of sliding scale evidentiary burden. Closely related to
issues of evidence is the historical cut-off dates. Although it is suggested that 1913 be adopted as
the cut-off, it is important both as a matter of equity and to avoid discrediting the process that the
land claims" court have the power to relax this stipulation on good cause shown.

2.2 Historical land claims

There do exist cbmparative examples of attempts elsewhere in the world to effect restitution on the basis of historical land claims. Informed by the doctrine of "aboriginal title", .courts in Canada, the United States, New Zealand and Australia have shown themselves to be increasingly prepared to entertain the claims of descendants of indigenous communities who were deprived of their land during the course of colonial'eonquest and expansion.2 However if the Mabo decision was to be applied in the South African context it would only provide a remedy for those communities who have retained access to their historical lands to claim collectivey rights against the state or regional governments -- as would be the case in the bantustans.

2.2.1 A general constitutional claim to restitution

A more effective approach to this wider form of historical land claim may be through the inclusion of a general claim to restitution in the land clause of the constitution. Although providing no individual or direct remedy a general claim to restitution would provide a constitutional basis for a redistributory land reform process similar to the affirmative action clause in relation to the guarantee of equality and equal treatment. This could serve to insulate a land reform from effective constitutional challenge.-

An interesting example of a general restitutionary clause is subsection 54 of the Constitution of Papua New Guinea which exempts from the general property clause any law that provides for the recognition of claimed title to land where: (1) there is a genuine dispute whether it was acquired validly or at all from customary owners; and, (2) if the land were acquired compulsorily the acquisition would comply with the present constitutions protection from unjust deprivation of property.

2.3 Impact and consequences for agrarian reform

The role of a land claims process in changing existing patterns of land occupation and use ' in South Africa's rural areas will be paradoxically both limited and all-important. A land claims ' process will interact closely with the broader process of land reform. As a matter of empowerment, it will provide an alternate route for those previously dispossessed who wish to gain access to land. However, if the redistributive process is inadequate people are likely to frame their needs in terms of claims which, if in great enough volume, will threaten to swamp the claims process.

3 Constitutional provisions impacting on land reform

3.1 A Property provision

Although substantial state interference with property rights is a fact of 20th century life, it is also true that given the nature of the democratic transition in South Africa, a constitutionally protected property right is inevitable. The extent of interference will therefore be policed by judicial interpretation. The tendency of the courts in similar situations is to grant strong protection - to owners - often trumphing all other provisions in the constitution with severe implications for the upholding of the rule of law and the constitution itself. The ideal situation therefore would be to follow the recent examples of Canada and New Zealand by not including the protection of property in the constitution.

3.1.1 What kind of property clause

If a property clause is to be adopted it must be restricted in its scope and have a clear compensation clause. The property clause should make a clear distinction between the regulation of property Ed when the state uses its power to acquire an individuals property.

Another impdrtant distinction to be included in the provision is whether the state may

exercise its powers of eminent domain in the public interest or whether it may only take property,
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even when paying compensation, in furtherance of a public purpose. -
Compensationis a separate but specific aspect of a property provision in the constitution
.
While most jurisdictions have tended to use market value regardless of the specific descr
iption of
the standard of compensation in the constitution, it would be best to adopt an adequate
compensation formula specifying explicitly what factors must be considered by the court i
n
reaching its determination. Factors include: the use to which the property is being put;
the history
of its acquisition; its market value; the value of the owner’s investment in it; the inte
rests of those
effected; and the degree of past state investment in the form of subsidies and aid. t t
3.2 A separate land provision ,
, However, even if we accept the need for a property clause inthe constitution itr’is vit
ally
important for the potential success of any agrarian reform programme that land is given a
separate constitutional status. This may be justiiied in two principle ways. First, in te
rms of the
role the law has played in the dispossession and loss of land. Second, due to the fact th
at land is
a specific, limited resource tied to issues of nationhood and cultural identity in the So
uth African
context.
’ Taking precedence over the general property clause a specific land clause in the
constitution must provide a basis for restitution. This must include both the specific re
storation of
land through a land claims mechanism, am through a general claim of restitution arising o
ut of a
historic dispossession and denial of land rights. This general claim provides a basis for
a
redistributory or allocatory land reform whether through state initiated market reforms o
r state
programs of appropriation and redistribution. Together these provisions aim to effectivel
y insulate
- land reform from constitutional attack and allow for the adoption of a demand-led affir
mative
action based land reform.
3.2.1 Recognition of communal tenure
When confronted with the history of colonial interference and the consequent difficulty o
f
determining the exact content of a "legitimate" customary rule it is tempting to argue th
at it is
impossible to constitutionally recognise "tribal tenure." However, not only do millions o
f South
Africans continue to identify with and hold land under systems of communal tenure5 but as
an
historical legacy of African culture its constitutional protection may well be asserted i
n terms of
constitutionally guaranteed cultural rights. It is therefore essential to any agrarian re
form
programme that the recognition of communal "tribal" tenure be incorporated into the legal
framework and its position vis-a-vis other forms of tenure both private and common be cle
arly
determined .
3.2.2 Creating space for common property regimes
It is important to distinguish between tribal tenure and other common property regimes,
both in constitutional recognition and in the provision of a specific legal regime for ea
ch. For
example in Mexico the constitution recognizes ejidos (tn’bal tenure) and communal tenure,
where
communal tenure involves a voluntary framework of collective ownership or control over
common property.
3.3 The Constitutional structure of government
The major political players in South Africa have adopted "strong regionalism" as the form
of government structure to frame the geographic division of power in a new South African
constitution. Article 118 of the proposed Constitution of the Republic of South Africa (R
SA)
1993, adopted by the Negotiating Council on August 10, 1993 specifies areas in which the
regions shall have exclusive legislative competencies while granting the national governm
ent

limited concurrent powers in a separate list of functional areas.
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The impact of "regionalism" on agrarianureform will be that separate initiatives’will hav
e
to be launched in each region in order to contend with the regions exclusive legislative
competencies in the areas of: planning and development, town planning; traditional author
ities
and indigenous law; delivery of water, electricity and other essential services. In addit
ion, the
regiOns will share competencies with the national government -- which will have limited
concurrent powers - inia range of functional areas of significance to agrarian reform, in
cluding:
local government; agriculture; fish and game preservation; the environment; public works;
and
regional and local policing. Further, even when the national government is competent to p
ass
laws in terms of concurrent jurisdiction, implementation will be in the hands of the regi
onal
government. _
. With respect to the constitutional principles which will bind an elected constitution-m
aking
body, the August proposals retain the criteria previously designated in schedule 1 of the
"interim
constitution," butgo further than before in guaranteeing regional powers. Not only shall
the
powers and functions of national and regional governments be defined in the Constitution,
but
they may only be amended according to procedures dominated by the regions.
These developments in the negotiating process make it clear that any legal framework for
the creation and implementation of agrarian reform will have to contend with different re
gional
emphasis not only with respect to the implementation a reform program but also in relatio
n to
aspects of the legal framework. Although there is no specific mention of land law (we can
assume
that property issues, as such, will be accounted for by provisions in the national bill o
f rights) the
granting of exclusive powers in the constitution, will directly impact the design and
implementation of an agrarian reform program.
District level councils for the administration of land allocation and rural development
remain a possibility under the present constitutional proposals. As far as district land
committees
are concerned these may be established in terms of national land legislation and may be ’
responsible for the allocation of land and the mediation of local land disputes. Although
; accountable to national government they could be made up of local representatives of a
’ predetermined list of constituencies, with national government retaining oversight resp
onsibility.
However, due to the constitutional allocation of exclusive powers of regional development
to the regions, district development coucils -- whether democratically accountable or not
at the
local level -- cannot be constitutionally autonomous from regional government with respec
t to
regional development priorities. Regional governments may however be encouraged to
constitutionally enshrine district level administrations with relative autonomy into thei
r own .
regional constitutions. Alternatively, the regions may constitutionally implement their m
andate by
devolving power to district level structures, however, this will have to be consistent wi
th the local
government powers secured in the national constitution and in accordance with any powers
constitutionally exercised by the national government. In this regard, a national framewo
rk for
local government may provide a basis for district level administration of land redistribu
tion and
development.
4 Tenure issues
4.1 Land legislation and agrarian reform
4.1.1 The existing legal structure
Apart from the approximately 130 statutes affecting land in South Africa it is important
to
_ recognize that land law has been completely fragmented through the implementation of ap
artheid
policies. There will be an urgent need to adopt at least a single national legislative fr

amework in
order to prevent a complete fragmentation of land rights. This "nationalization" of land law will
however have to take into account not only the recognition of different forms of tenure but also
- the degree of local control over land use and development granted in the constitution to the
different levels of government. -

One possibility which will have the added benefit of enhancing certainty will be for district level land administration to be coupled with a registration of land rights which although initiated at the district level would be duplicated into a nationally contfolled system which would provide a backup to the land court and mediation processes. These three aspects -- registration, adjudication and mediation - could constitutionally be allocated to the national level, providing a structure in which a constitutional separation of powers secures local control and national oversight of land holding, but leaves the regions ’free to determine development priorities.

4.1.2 Acquisition and expropriation of land

Any restoration or land redistribution process will require mechanisms whereby the state can intervene to make land available to successful claimants who have either been granted a right to alternate land or where present occupiers are refusing to vacate land granted in adjudication to a particular claimant. This mechanism will also provide a credible threat in the event of market failure. ’

The adoption of a Land Acquisition Act is essential and must address the three central issues of a programme of expropriation and redistribution: (1) It must identify the land to be taken in the reform; (2) what compensation is due the current owners; and (3) 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.

4.1.3 Indigenous tenure

4.1.3.1 "renovating" indigenous tenure

The notion of "renovating" indigenous tenure involves the resolution of existing tenure problems through the adoption of relatively modest changes in tenure rules, reorganization of land administration machinery (sometimes altering its legal basis and legitimacy), and the creation of new, supportive linkages with national and regional institutions. A significant element of community control over land -- a "communal" element - is retained. This approach seeks to - adjust the tenure system. to changes in the economic and social environment in which it operates.

4.1.3.2 A framework of allocation

There is no conclusive or empirical evidence that suggests that a general sweeping away of customary land law and its replacement by a statutory regime has resulted in a marked increase in efficient allocation and use of land. Instead, the slipping away of customary land law has often resulted in the emergence of open access systems, conflict and increased social costs. Privatization can also cause great inequity, when those with knowledge or access to knowledge of a new legal regime and finance can rapidly acquire land at the expense of those who suddenly find that they no longer have legally recognised rights in the land.

In South Africa a number of community tenure models already exist and operate successfully in managing land access, production means’and envirbnmental demands. Communities on communal land have developed an informal land marketas their own approach to property rights.3 Cases exist where such institutionthave managed and successfully supervised tenure arrangements on a modified common property basis.

A recent study undertaken by the Transvaal Rural Action Committee of different forms of tenure amongst Transvaal rural communities has established that in numerous rural communities the communal system of acquisition and transmission of rights to land has in general terms been retained or will be retained.4 When re-establishing themselves these communities see communal land control over land allocation as being one of the mainstays of the new system. Access to land by women is one of the issues debated by these communities. -

4. 1.4 Informal tenure

Recent work5 has stressed the contested nature of change in land rights, emphasized the role of local power processes, and examined the possibility that forms of individual tenure recognizeable as ’private’ may not be the necessary outcome of the encounter between indigenous African tenure and the cash economy. Informal tenures then represent the sum at any given time of how these social tenures are managed by the uSers on the basis of the prevailing political economy together with their perceptions of what is legitimate, as opposed to what is prescribed in the official tenures. On this basis, they can be expected to reproduce themselves in relation to any program of reconstruction or land redistribution. It then becomes essential to provide in advance for the probable dynamics of informal practice for self-defmed and self-organized community groups settling redistributed land.

5 The transmission of rights in land

5.1 The formally encouraged system of title deeds

The South African system of deeds registration has functioned effectively for a very small percentage of the South African population. A major shortcoming of the registration system has been the fact that various forms of tenure have not been incorporated in the system, and a major challenge facing the registration system is the effective incorporation of these rights in the system.6 The costs of providing security of tenure is presently under debate. It would appear as if the reduction of levels of accuracy required for survey in itself is unlikely to bring about reduced costs in the light of the technology already available to surveyors.7

5.2 The system of customary transmission of land

Succession in African customary law has as its ration det’re the perpetuation of the family
.5 head’s name and the creau’on and maintenance of a permanent family fund. The customary law of a succession is that of primogeniture. Woman therefore are not allocated land nor are they eligible
. to succeed to any property. However, the percentage of female led households in South Africa is growing both in the rural and urban areas and both under customary law and under civil law.

Thus women living in rural areas under communal tenure systems are acutely disadvantaged. A more positive development is that some rural communities who are anticipating land reform are presently negotiating a process aimed at granting women access to rights to land and to sit in village councils as and when communities resettle.

5.3 Informal processes of transmission

Overall, the classical tenures represent social principles of landholding, which provide household and individual social rights with social oversight. This social oversight is provided mainly (l) by other right holders (2) at the neighborhood level. By comparison, peri-urban informal systems of property rights are more individualized tenures, and support less interventionary rights from other concerned parties. Control over entry of outsiders through kinship group and neighborhood institutions also declines as these structures weaken. However the rapid course of change is often viewed with unease and dismay by residents, who link loss of control over settlement and the entry of outsiders with the spread of violence.

6 The institutionalization of property rights

6.1 Methods of recording rights against property

The State has assumed a considerable burden on institutional resources in relation to the interim, upgrading of land titles outside the self-governing and TBVC territories. One of the dangers is that institutional resources will be deflected solely towards privatization with little recognition of the recording needs of other forms of tenure including forms of collective tenure

and indigenous rights. An interesting alternative is to distinguish territorially between areas where
"customary" land rights take precedence and areas where their registration does not indicate a

secured right.

6.2 The institutional requirements of certainty

The key institutional challenge in order to ensure future institutional capacity and certainty of title in rural areas is to unravel and rationalise the legacy of apartheid legislation and institutions on a uniform basis.

7 Specific legal regimes impacting on land holding

7.1 Zoning and Agricultural regulation

Direct zoning of agricultural land is presently aimed at achieving narrow objectives; more particularly to conserve natural resources and to control environmental pollution. Although zoning and the regulation of agricultural land use can be used as a narrow tool to maintain or to develop the agricultural potential of land it seeems unlikely that it will provide a powerful tool for social change.

7.2 Squatting, trespass, and nuisance

In deciding future legislation it must be recognized that squatting and trespass must be decriminalised. Despite decriminalization land owners would retain their civil remedies and if the state is politically unable to evict or enforce a valid court order, the landowner could claim an implicit "taking" and require compensation from the state.

Although the courts seemed prepared at one point to engage through the common law of nuisance in struggles between land owners and the state over the settlement of black communities,g more recent case law has veered away from such intervention. The courts have recently argued that if an administrator is able to prove that the infringement of private rights will result no matter how he exercises his power, then the administrator may rely on the fact that the intrinsic nature of the acts authorized by legislation are such that their execution necessarily and inevitably involves disturbing common law rights.9

8 Conflicting rights in land and environmental resources

8.1 Water rights

There will be conflict in the rural areas over access to scarce water resources in a future South Africa. Attempts to resolve these conflicts will be hampered by the existing, legally supported water rights system. These can only be circumvented by the declaration of Government Water Control Areas which appear to be unaffordable and require the removal of water’s present private right status.

8.2 Group and Individual Rights

The important point in regard to the construction of community constitutions and bylaws is adherence to the flexibility of the underlying informal systems while providing a democratic institutional framework for new communities to hold and deal in land rights. The interests of ’ women and of tenants are likely to be central in regard to equity.

Any effort to establish specific legal rules regulating land transfer in detail will be ill concieyed. Rather, two principles can be suggested. First, certihcation of land ownership in a common property framework should be prOvided by community managed structures through clear procedures, which recognize the rights of women in the land. Second, classes of transfer can be given recognition in a broad framework, and dispute resolution procedures laid ,down which allow for rights of appeal within the community as well. as outside it, and which provide ample access to mediation. No detailed attempt should be made to legislate which transfers are accepted or forbidden, or how they should be conducted. However, the group as a whole has the right of approval over any transfers involving outsiders.

9 The implications of rural restructuring for gender issues
All women in South Africa, but African women in particular, have been legally discriminated against in regard to access to title in land, inheritance of such title, and their ability to bequeath such access.
If customary law and its practices become subject to constitutionally protected rights the legal status of African women, from that of a minor under the perpetual tutelage of her male relatives will be transformed and African women will be accorded equal status. This change will increase considerably the number of persons eligible for allocation of land.
4 , Despite this possibility it must be recognised that a key institution determining women's social rights is "the family". Therefore, our understanding of what constitutes a family or a household, in constructing land reform policies should not bypass female headed households.
Although women -- who comprise over 80 percent of the rural adult population - are by customary practice debarred from participation in decision making structures, such as Imbizo or Kgotla,lo women in rural areas hold the key to development. Their emancipation through a policy aimed at empowering their participation in local government structures would ensure apparent and perceived democracy.
10 The implementation of land laws in furtherance of agrarian reform
The diversity of experience is considerable, but some themes appear fairly consistently. The experience with redistributive land reform in Asia and Latin America is being repeated in Africa.
10.1 Issues raised by comparative experiences
Finally it is important to consider what factors may impact on the implementation of agrarian reform including: (1) the accessibility of the legal system; (2) the prevailing legal culture; (3) what values or interests guide the actions of the actors involved in the legal process or its implementation; and (4) what groups are affected by or interested in the reform process, as 'well as their political and social allies who may include foreign officials.
. All these factors will impact on the chances of implementing an agrarian reform however there are also material considersions, for example, the implementing agency may be completely starved of funds or be frustrated by the problem of corruption or informal extra-legal practices in the bureaucracy. However even well-meaning public officials may become guilty of imposing a top-down process which has little relevance to the actual conditions and needs of the intended beneficiaries eg. the Miskito Indians in Nicaragua.
Finally, the whole process of implementation will hinge on the participation by the intended beneficiaries in the formulation of specific policies and programmes. However, the experience of officially sanctioned or organised participation rarely goes beyond token representation in advisory bodies, with often dire consequences for the future of agrarian reform.
Endnotes:
1. ' See, Peasants Under Contract: Contract Farming and Agrarian Transformation in Sub-Saharan Africa (Peter D. Little and Michael Watts, eds), manuscript p15. (published 1992)
2. See, in general, on the legal position in these countries, Brian Slattery "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727-83; PG McHugh "The Legal Basis for Maori Claims Against the Crown" (1988) 18 VUWLR 1-20; RD Lumb "Aboriginal Land Rights: Judicial Approaches in Perspective" (1988) 62 Australian U 273-284; Garth Nettheim "Indigenous Rights, HumanRights and Australia" (1987) 61 Australian Ll 291-300.
3. Catherine Cross 1988 and 1992. .

4. Trac: Botho Sechabeng (1993)
5. See, Sara Berry (1984, 1988).
6. Particularly the righm in Schedule 2 to the Upgrading of Land Tenure Rights Act, 1991 (Act No. 113
of 1991) and the occupation and site permits refeqed to in the conversion of Certain Rights into Leasehold or
Ownership Act, 1988 (Act No. 81 of 1988).
7. The average surveying fee in four IDT- capital subsidy upgrading projects represents a mere 2. 6%
of the total costs of the projects. Section 7 of the Land Survey Act, 1927 provides that regulations may be made
prescribing the fees which a land surveyor shall charge for the survey of land. Regulation 67 of the Land
Survey Regulations (mademder GN R1814 of 1962) provides that the tariff for services shall be in accordance
with the tariff prescribed in Annexure A to the Regulations. Provision is made charges to be agreed at a higher
rate. Although the contrary is not stated, it is understood that surveys are also undertaken at rates lower than
the tariff.
8. East London Western Districts Farmers' Association and others v Minister of Education and
Development Aid and others,1989 (2) SA 63 (AD)
9. Diepsloot Residents and Landowners Association and others v Administrator, Transvaal, and others,
1993 (3) SA 49 (TPD).
10. See, Lydia Kompe and Janet Smali, Demanding a Place under the 1Kgotla Tree: Rural women's access
to land and power, TRAC 1993 ,