Perspectives on Land, Law and Power

Making and Unmaking a Segregated Land Regime -Tenure, Market and Individual

Themes from South Africa Then and Now

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Outline

This paper will consider first, in broad terms, in the the context of British imperial expansion, the ways in which western ideas about rights in land affected land tenure regimes in large parts of the world. It will focus on the creation of bifurcated models of rights in land in which Europeans held land as individuals and 'others' held land in common. For European individuals land was seen as an alienable commodity, while for the 'others' it was said to be a non-commodified group asset held in trust for a community - past, present and future. The second part of this paper will consider how these models have operated in the South African context. It will consider the deployment of these models in the making of the segregated land regime in South African law in the first decades of the 20th century. Leaping over the intervening period it will then give an interim account of the undoing of the segregated regime taking place at present, and the attempts to transcend the bifurcated model and construct a legal regime for rights in land appropriate to a post-colonial world.

Part I. The Dual Model of Rights in Land

The assertion of individual right to own land was fundamental to the post-feudal development of English common law. Once the right of ownership (which derived from the sovereign power) was separated from the sovereign, it was considered to inhere in the individuals to whom it had passed. Locke's view was that the right to own property was an inalienable human right. An association was consciously made between the concept of liberty, the right to own property, the laws of England, and the notion of progress. The concept of ownership which was developed was one in which the sovereign could not inhibit dealings with property. As Blackstone observed 'property best answers the purposes of civil life...when its transfers are totally free and unfettered." (Embree, 1969:41) The ideas opposed to the free society with its right to own, and unfettered right to deal in, property were the organised despotism or an unorganised savage society. In both property rights said to be unprotected in law, and were subject to the whims of power. These dual and reversed images were to be worked over in a series of imperial contexts - in North America, India, Africa and Australia.

The view that indigenous ideas about land tenure, and therefore that the claim to title to land by indigenous peoples, were radically different, was an essential part of the justification of the seizing of the land of conquered peoples. It was the basis first of the legal structure of the colonisation of North America. Indigenous peoples were excluded from those who had an inalienable right to own property. In Lockean terms they were held to have failed to mix their labour with the land, and they were therefore unable to claim proprietary rights in it. The American jurisprudence of Indian land rights which emerged during the 19th century was reluctant to base the claims to Indian land on conquest alone, though the latter was a part of the legal justification. But added to conquest was the notion that Indians had a radically different (and lesser) association with the land. As the Georgia Supreme Court said in the seminal case of *Fletcher v Peek* in 1810, Indian title "...is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited." The American Bill of Rights forbade the taking by the state of private property without just compensation. Indian land could not, therefore, be privately owned land in the common law sense. In *Johnson v McIntosh* in 1823 Chief Justice Marshall ruled that Indian title amounted a t

most to a right of use, which could be extinguished at the sovereign's pleasure.

In British colonial Africa a dual regime of land tenure developed which produced, used and legitimised what came to be known as the customary law of land tenure. (Chanock, 1991) A particular form of land regime, in which land was vested in a tribal chief, who apportioned it amongst members of a tribe (each of whom had a 'right' to land to use) who did not own it in the ways in which British law allowed, and who could not sell it, was created. This regime was founded on African life prior to colonialism, yet in 20th century in Africa both crops and labour quickly became market commodities. But a market in African land was not allowed to develop partly because of resistance by those Africans who feared further loss of land to Europeans, and partly because of the colonial rulers' fears of the effects on social order (and therefore on colonial political control) of the envisaged development of a large class of landless Africans. Africans were therefore relegated to the lower part of a bifurcated hierarchy in land tenure. Parts of a colony where white agriculture or mining or urban areas had been developed came under a tenurial regime in which land was subject to market forces and in which secure tenure was protected by law. In the remaining lands, inhabited by Africans, a usufructuary title was held to small pieces of land, subject to the behest of the polity - headman, chief or district official. There was little legal security and there was a legal insulation from the market. This system was sanctified as being culturally appropriate to Africans. While in the 19th century the discourse of progressive evolution had considered non-market land systems to be backward, by the end of the colonial period a reverse judgement had taken hold, which reflected the disputation over the role of the market among Western intellectuals who produced the knowledge about the culture of Africans. While mainstream Western economists continued to espouse the market, other social scientists validated the particular virtues of non-market societies, which they thought were organised on communal and non-competitive principles. In a reversal of 19th century evolutionist narrative Africans could be seen as closer to the ultimate socialist human outcome than Europeans. Neither narrative contributed much to a real understanding of the conditions under which people used land, though both

contributed a lot to the policies which states brought to bear on peasant life.

During the colonial period analyses of the economic backwardness of Africans were linked to the land tenure question. It was one of the accepted truths that communal tenure inhibited progress because it meant that, lacking security of tenure, people would not invest in the improvement of their land. In the realm of economic theory promotion of individualism and of progress were linked. However, as I have said, colonial governments feared movement in this direction, and among the factors involved in their apprehension was the growing contention within African societies about land tenure. For many Africans, whose land had been taken, and who continued to be threatened by the growing demands of colonial governments and settlers, there was suspicion and opposition towards any changes which endangered the tenuous rights they had preserved. But for others, like the West African evolue, Casely Hayford, the protectionist stance of those who would preserve traditional ways of holding land was unwelcome. As he wrote of African rights campaigner, E. D. Morel, "he cannot brook...the assertion of individuality, on the part of the African." (Hayford, 1913(1969):3) He attacked the entire system of Crown ownership and chiefly control which, he wrote, prevented Africans from dealing freely with the land themselves. Those who had erected this system, Hayford scorned as "heaven born guardians of native interests, (who) would restrict the people from directly and freely dealing with lands by placing all business negotiations under Government control and management." (62)

These debates were reproduced in South Africa. Underlying the debates about land tenure, and the development of law in South Africa in the first decades of the State were the difficulties of reconciling an implicit market model of law with the colonial situation based on political inequality. Protectionists could argue in favour of a dual regime of law on the grounds that the workings of a market would eventually deprive Africans of land. The market had, therefore, to be limited in order to protect the holdings of those who were not yet mature enough to cope with it. This line of argument could be supported also by those who argued that Africans should have to pay a price for this protection and privilege, such as exclusion from the market

at large, or subjection to special forms of taxation designed to make them enter the labour force. The other major objection to the market was that it would lead, not to the dispossession of Africans, but to the inevitable increase of their land holdings. In this scenario not only would Africans acquire more land *in toto*, but they would also acquire it indiscriminately among white land holders and urban residents, creating by purchase the mixed society which the polity rejected. While protectionists and segregationists had deep and genuine differences about South African society and its future, neither side saw anything attractive in a free market in land. Both feared the outcome, and both expressed this fear in elaborated visions of the undermining of social stability, and political conflict to come.

Part 2. Making the Dual Regime in South Africa

It is clear that conquest and colonisation were the basis upon which white land ownership in South Africa was laid. But once the foundations had been laid, land could be bought and sold. These processes did not necessarily protect the interests of white settler farmers, nor did they provide for the wants of the entire white rural population. In the South African Republic, under Boer administration, the market led to a situation in which land companies and absentee landlords, whose interest was speculation on the possible value of mineral rights, owned nearly a fifth of the land. Large scale dispossession by foreign capital interested in mining, and local dispossession by local capital gathering pace in commercial farming, constantly threatened Boer farmers' occupation of the land. White landlessness became a problem which preoccupied white politicians. It is hardly surprising that there were constant cries for intervention in the land market. But in spite of the marked maldistribution of land between whites, and the mounting agony about the 'poor white problem', no legal measures were taken to intervene in the land market as between whites in order to distribute land from rich whites to poor whites. What the state would do was to intervene to prevent the development of a market in land between whites and blacks, and also between blacks themselves. Redistribution as between whites would have raised all sorts of dangerous issues about the nature of white society. By formulating the struggle for land in terms of racial conflict such difficulties were avoided.

The 1913 Land Act was a major intervention in the rural land market. It brought to an end the acquisition of farm land by Africans in some areas, and this, together with its outlawing of share cropping, reversed the development of an independent African farming population. In some areas of the country Africans had bought considerable land with freehold title, acting not as individual purchasers, but as tribal communities. But the market was not, in popular representations (both white and black), a neutral economic realm. It was an arena of conflict, conquest and defeat. This process of African purchase led to sharp white reaction in which it was represented that land conquered from Africans would be 'lost' through the unchecked operation of the market. (Wilson, 1971) Africans were constantly represented as having an unfair advantage in the market.

The purchase of lands by African communities on whose behalf title was held by the chief provided complex problems at the intersection of two different regimes of ownership. The issue of transformation of the supposed communal title, over which the Chief had the right to allocate land, to a private title, registered in the hands of the chief, had been faced elsewhere in British Colonial Africa where considerable wariness had developed over the expansion of Chiefs' property rights. (Chanock, 1991) In some cases Chiefs, as registered owners of land purchased by communities, managed to transform their position into private ownership. In others private owners found themselves treated by by their communities as trustees of a communal resource. However purchase in the private land market, utilising the mobilised resources of a group, was an important way by which, before 1913, African land holdings in South Africa were increased. The process also imposed continuing heavy indebtedness of many purchasing communities.

While some wealthy Africans had been able to buy farms as individuals before 1913, forms of purchase by combining resources had been more common. Farms bought on behalf of communities by chiefs would fall under their authority for allocation of sites as if they were communal lands. People on such land came under the administrative authority of the owner. "Political power was effectively fused with the role of landlord." (Beinart and Delius, 1986:282, 299.) On privately owned land owners, with some encouragement from the administrative authorities, might try to transform themselves into headmen.

Beinart writes that such African landowners tried to "change the basis of their authority so that they would become more akin to headmen in communal tenure locations." (1986:300) Land use and dealings, though nominally within the paradigm of the common law system of individual ownership and use and registered deeds, took little account of either its forms or its substance.

Property and Individual and Communal Tenure

It is plain that the actual pattern of land occupation in South Africa at this time was one in which numbers of people asserted different types of rights over the same pieces of land. But Roman-Dutch law concepts of ownership were developed by the courts in a way which placed emphasis on the total and exclusive rights of ownership. Roman-Dutch legal scholarship and the Courts developed a view of ownership which emphasised the absolute dominium of an owner. (Visser, 1985:39-40) This re-deployment of Roman law ideas of ownership took place within the social formation of early 20th century South Africa at a time in which property rights were fiercely disputed. In the Transvaal of the time title had been given by the Republican state to whites over huge areas entirely inhabited by Africans. In the urban areas Asians were trying to find ways to own property in areas in which it was forbidden by Republican law.

While white owners in common law held with absolute dominium, which excluded the possibility of other real rights being held over the same land, Africans were seen to have different rights over land. The received white view of African tenure was that it was 'communal'. This meant that, in the formulation of South Africa's founding 'expert', Shepstone, "the land belongs to the tribe..." The right to use it derived from the hierarchical political structure. The chief, "has the right of giving occupation to it as between members of the tribe, and the headmen again have the right of subdividing... Land is, however, always spoken of as the property of the chief..." (Shepstone's evidence to the Cape Native Laws Commission, 1883. Quoted in Davenport and Hunt, 1974:34-35) As elsewhere in Africa the idea of communal tenure owed more to the need to oppose African and white concepts, than to description of actual

use. (Chanock, 1995). As it appeared in Shepstone's evidence, and that of the other 'experts' for the next half century, tribal land was in practice divided and used individually, and inheritable.
The Chiefs had the basic power of land allocation. As Sir William Beaumont observed,

> "Communal occupation has tended to preserve the tribal system and the powers of the Chiefs. These powers are considerable, and the Chiefs are prone to exercise the authority with self-interest and partiality. It is the Chiefs who, practically, allows or refuses permission to Natives to enter his location; it is he who allots garden lands and building sites..." (Beaumont, 1916:5)

The opposition between the ideas of communal and individual tenure allowed the tenure issue to become a part of the evolutionary narratives in which the pace, appropriateness and direction of the civilising mission were framed. Within the Cape story of assimilation it was logical that the goal of policy should be individualisation of title, but this was usually expressed in such a way which allowed emphasis on difference in concepts, and the consequent postponement of assimilation. The Native Laws Commission of 1883 found that land belonged to the tribe and that the chief held it in trust (a concept that the white state was able to utilise). People used the land "in subordination" to the Chief "on communistic principles". Africans had "a deep and ingrained prejudice" in favour of this system. (Cape Colony, 1883:40). Having described the radical difference, and the unreasonable attachment to it, the Commission was able to do two things. One was to recommend that "dividing native lands and securing rights of individuals by separate title deeds" should remain the goal (but a distant goal) of government policy. In the meantime the Government should insert itself into the system of trusteeship and allocation.

Shepstone and the Cape Commissioners also linked the idea of individualisation of land to detribalisation. While Shepstone admitted to the Commission that Africans in Natal readily adapted to the idea of exchange in land as was evidenced by their increasing purchases of land from white farmers, the development was portrayed as unnatural for Africans, common

among Christians "whose cupidity has been excited." "This individual tenure", the Commissioners prompted him, "is in the hands of men who have broken away from their tribes for the purposes of gain?" (Davenport and Hunt, 1974:38/9) And, it appeared, it was not even real individual title, as some purchasers had clubbed together to buy land in common. This latter feeling of disquiet was reflected in the recommendations of the Lagden Commission of 1903-5. Like the 1883 Native Laws Commission, it adhered to the idea that ultimately individual tenure should be the goal for Africans. But, in the meantime, the market should be segregated. Land purchase by Africans should be limited by legislation to particular areas. And there was to be no mixing of the two systems. The "purchase of land which may lead to tribal, communal or collective possession or occupation by Natives should not be permitted." (para 193) In 1916 Beaumont urged the re-affirmation of this principle. While he said that the words

> "'collective possession' are not to be considered a bar to joint ownership of a piece of land in the defined areas by a limited number of natives, the object of the Commission, which is unanimous in this respect, ...(is) to prevent large numbers of Natives eroding the spirit of the resolution by acquiring and holding land in undivided interests, and thereby, in effect, extending tribal or communal occupation." (1916:6)

While Beaumont payed lip service to the idea of individual tenure for Africans who were "growing out of" the tribal system, he observed that for many African purchasers it had not been a success. They bought more land than they could pay for, were heavily mortgaged, and many of the transactions were "hopelessly irredeemable." (8/9) To meet the purchase price it had, especially in Natal, become a common practice to form syndicates in which the members became owners of undivided shares. This, he wrote, "has led to the utmost confusion owing to the difficulty of ascertaining the rights of individual members or their lawful successors and the difficulties in effecting transfers." The effect was, he claimed, even where Africans had been buying in the private market nominally under individual tenure, the defeat of the objects aimed at by individual tenure. (9)

Beaumont also urged that there be other restrictions on market access even for those Africans allowed to participate as

purchasers in the market. It was essential, he urged, to prevent Africans buying speculatively, and to allow purchase only by those "who are really fitted" for individual tenure. (15)

However, as Solomon Plaatje had pointed out in his evidence to the Beaumont Commission, the "average pay of the native population would be a shilling a day, and at that rate it would take a lot of saving to buy even one area of ground". The tendency was, therefore, to combine to buy land. They could not do "otherwise with their small earnings than to buy on the communal system". It would, he thought, be better if they could buy smaller surveyed and sub-divided land, but such land was not available. Furthermore he could see disadvantages in such tenure. Individual sub-divisions could lead, as he had seen, in the Cape to shocking overcrowding. (1916:93)

Plaatje was correct in his linking of division of lots into individual tenure holdings and land shortage. In such settlements, once the sub-division had been made, there was no further room for outsiders, even though there was constant demand from the sons of plot holders. The Magistrate of the Glen Grey district observed to the Beaumont Commission that there were considerable numbers of squatters, who were sons and relatives of allotment holders. "All these men are waiting for land and there is no land at present to give them. It is, of course, from this class largely that the supply of native labour comes, and from this point of view it is very desirable that such a class should exist." (1916,Appendix Xl:11) From another such area the Magistrate reported that survey and the grant of allotments "has the effect of creating a surplus population..."(1916:29/30) Indeed one of the major limitations on the acceptability of individual tenure to Africans in rural areas was that it was appreciated that only very limited numbers of plots were available, while the experience of communal tenure was that space could be found. This rationality was nonetheless presented in governing discourses as irrational, as part of a culture too backward to appreciate the advantages of individual tenure. But to those in charge of actually administering the schemes the point, even if perceived from an reverse point of view, was obvious. In the words of the Herschel Magistrate,

> "...where you have got a surveyed location and want to put natives in it, it is extremely difficult to do so. I mean that

> land held under communal tenure will support more natives than land held under individual tenure. My point is...if your allotments are surveyed you cannot get hold of land to allot other applicants..."

With communal tenure "land may be allocated for cultivation as it becomes necessary." (1916:120) From an administrative point of view individual tenure obstructed the capacity to cram people into limited areas.

Apart from constantly opposing the ideas of communal and individual tenure, the official administrative, legal and political discourses, as was the case in the rest of colonial Africa, contained little in the way of interest in, or description of, how communal tenure really worked. But expressions of scepticism did surface. Much came from Natal where land was distributed by Chiefs without the supervision of Magistrates that the Cape had imposed. The Chiefs were stigmatised as "absolutely unfair", by one Senatorial witness. (1916:414/5) J.F.Herbst advised that communal tenure gave rise to many disputes, even with a sort of administrative oversight. Young married men had no suitable ground, while that of the older residents was seldom available for re-distribution. (32) While some thought that the remedy for chiefly maladministration was increasing the right to individual tenure within the reserves, the politicians' and administrators' clamour is better understood in relation to the desire to assert more control over the processes of communal allocation as a means of increasing the density of settlement in the reserves. Many witnesses told the Beaumont Commission that there was no scarcity of African land, simply an inefficient use of it. There was, said one Natal Senator, still room "for these natives provided they get closer together."(1916:419) But the lack of enthusiasm on the part of Africans for individual tenure had less to do with attachment to traditionalism than with an emerging understanding of the connections between such schemes and increased control, and landlessness. Landless people, as well as administrators, understood that it was easier to insert people into the reserves, than into surveyed areas, and that this flexibility would be diminished if survey was extended. The hardening of opposition to the extension of the areas in which Africans could acquire land through a (segregated) market led to the official abandoning of the 1905 Commission's view that individual

market based tenure was the ultimate goal of policy. The Prime Minister, it was reported "was impressed with the importance of providing for community occupation, which seemed to be better adapted than individual tenure to the needs of the native at his present stage of development." (ibid)

In 1922 M.C. Vos, a former Secretary for Native Affairs, submitted a report on the survey of African allotments for individual tenure which, in Davenport's words, "had considerable influence in undermining official confidence in the merits of individual tenure for Africans. " (Davenport and Hunt, 1974:49) It provided further impetus towards the abandonment of the goal of assimilating the systems of tenure. The experiments in individual tenure in the Glen Grey district, Vos reported "has not been such a success as must have been anticipated. "Initially this was because of the "deep seated aversion of the chiefs to individual tenure, as it would gradually and surely sap their control over the people"; to the dislike of people to being "tied down to definite and permanent sites" for houses and cultivation; to the high costs of survey and title; and to the consequent "unwillingness to take up title and to the large numbers which had to be cancelled owing to the lots being utterly unsuitable for tillage. . . (UG42, 1922:1) Vos recounted the confused history of attempts to survey individual lots in African Locations. Reports showed that in some cases titles were not taken up; in others boundaries were not respected and common land was cultivated; in others substantial proportions of the allotments were in the possession of the wrong persons. Schemes like the Glen Grey settlement were, in any case, not solutions to the broader problem. It designedly made "no provision for the natural increase of the population", who were expected to "find work elsewhere..." Even there it was found in 1919 that "40% of all allotments were in possession of the wrong people," that is neither the registered owners nor their caretakers. While one conclusion that could have been drawn was that the schemes, in which the lots could not support full time agriculture for families and on which lot holders were under enormous pressure from those excluded, required better administration and more land, Vos saw an evolutionary failure. In 1883, he pointed out, the Tembuland Commission report had said that "...as the natives see the advantages of individual tenure they will gradually fall into European ideas as to the

ownership of land..." But "After 40 years the natives are no further advanced in their views on land tenure." (10)
A meeting of the Prime Minister, the Minister for Native Affairs and senior Native Affairs officials took place in November 1922. (Davenport and Hunt, 1974:50/1) Vos's doubts were confirmed. The Transkei Chief Magistrate, Welsh, urged halting the survey of districts for individual tenure as it was "in advance of the people..." The Chief Native Commissioner for the Ciskei thought there should be "reversion to a system in conformity with native ideas..." But what were Native ideas? The Minister, F.S.Malan, in summing up the discussion, seemed to have progressed beyond the dichotomy between individual and communal title. There were at issue, he said,

> "four species of individual tenure. 1) With record of title on European lines; 2) With security of rights according to... (a) simpler system...; 3) On allotment after inspection and official demarcation; 4) On allotment by Chief and Council according to tribal usage."

Not unsurprisingly it was decided that emphasis should be not on either of the first two, but on the two alternatives which left African holdings without security and at the discretion of officials. Accordingly the meeting concluded that there was "no need to disturb the practice of allotment by Superintendents and Headmen or Chiefs and Councils."

One of the major strands in the tenure discourse had been that communal tenure was 'backward' in the economic sense as it gave little incentive for the land user to invest in land, and individual tenure was economically 'progressive' and led to increased agricultural production. In order for the official move away from individual tenure for Africans to prevail finally this package of ideas would have to be confronted. The Native Economic Commission in 1932 drew from prevailing discourses the necessary analysis of the reasons for African backwardness, providing further reasons for separating Africans from market participation. African culture, pre-eminently the attachment to cattle, and their "social communism", provided major "anti-economic inheritances." (UG 22, 1932:50/34) An African area, they admitted, "can be distinguished at sight by its bareness", but this was because Africans were insufficiently conservationist, not because the areas were too small for their

populations. The weaknesses in the "attitude towards their environment" and an absence of the use of fertiliser was "connected with the universal cry of Natives for more land." (54, 61) Because the Commissioners were anxious to slow the flow to the urban areas they were committed to the idea of developing the reserves. But how? One way to give more scope in them to "Advanced Natives." The present system of one man, one lot, they pointed out, meant that all were considered to be peasants, and this hindered development. Some should get more, and some less. Land was being allocated under communal tenure to families who did not farm it, and others could not work it. But simple individual tenure under something like the Glen Grey system was not the answer. The Commission found, after "careful inquiries" about individual tenure, that "while the possession of a title gives the Native a large measure of personal satisfaction, there is very little difference to be noticed in the way in which land is worked...There is no magic in individual title to overcome the inertia of custom" (UG22, 1932:23). They noted that all title was insecure. Under communal tenure while some had "a reasonably secure right to the arable plots allocated" others "may be at the mercy of a grasping Chief or Headman." They found "numerous instances" in which "enlightened Natives" had had plots seized. Even Glen Grey type title had its weaknesses. In the first place it was subject to alteration by Proclamation. And, under the 1927 Native Administration Act, customary law now governed succession. This, the Commission claimed, "...has the same effect as an insecure title in the mind of Native owners", as if they had no sons, the improved land would pass on their death to a male heir who "may be a 'red' Native or a total stranger." (140/159)

The Commission astutely pointed out that the problem was not with deficiencies in title, but with the size of the holdings which "were not big enough to make agriculture a full time job..." But the conclusions that were drawn were not that holdings should be made bigger. The transition from pastoralism to agriculture should be intensified, and more land ploughed. Credit could be made easier for some. They observed that "the principle of segregation in land holding excludes European private capital." The prohibition against mortgages on Glen Grey type titles, "excludes what little Native capital there is." The problem was not solvable in terms of giving Africans more land, more secure titles, or more credit. It lay in intensified

development of what land there was. This in turn would allow the absorption of the 'surplus' Africans currently finding their way to the towns . (166/70)

Tenure in Urban Areas

The ownership of land in urban areas posed a different set of problems. The conceptual differentiation between individual and communal ownership which was applied to rural lands could not apply to urban lots which were to be occupied on a 'non-traditional' basis. All of the major urban areas were, of course, in 'white areas', that is outside of the African reserves. But there was a fundamental problem. As policy discourses increasingly focussed around the concept of segregation, of both political rights and institutions, and land, "there must and will remain", as the Department of Native Affairs put it in 1919, "many points at which race contact will be maintained, and it is in the towns and industrial centres, if the economic advantage of cheap labour is not to be foregone, that the contact will continue to present its most important and disquieting features..."(UG 7, 1919. Quoted in Davenport and Hunt, 1974:70). If Africans were to be in the towns, what were the legal implications? How could this be achieved without endangering political segregation. Could African urban land ownership be reconciled with the maintenance of separate 'traditional' institutions? In giving evidence to the 1903-5 Native Affairs Commission, a Fingo witness, the Rev. Mdolomba, envisaged the sale of surveyed freehold plots in African townships. A Commissioner said to him

> "You are agreed in desiring individual tenure...at the same time retaining Chiefs. Do you think one is inconsistent with the other; or do you think it is possible to retain Chiefs and at the same time to own the land ind ividually?" (Davenport and Hunt, 1974:70/71)

The issue of urban freehold for Africans came to a head in 1923 when the comprehensive Natives (Urban Areas) Bill was introduced. As introduced the Bill gave to local authorities the discretion to set aside areas in locations in which Africans could buy land and build houses. The National Party objected and the provision for freehold was removed. Free State Municipalities objected on the basis that the right to own land would be "the thin end of the wedge and might result in Natives becoming

owners of property not only in towns but throughout the country." They also raised the possibility that "if natives are given a right to own property they will also have the right to vote." Transvaal Municipalities raised the objections that the owners of urban property would let it and become absentee landlords, and also that a right of freehold would make urban settlement attractive and towns would be "swamped". If there were African vested interests in the towns the municipalities would lose their control over ingress and egress. (SC3A-23:100) C.M. van Coller, the representative of the Eastern Cape Municipalities, observed: "The native is more amenable to discipline if he is merely a leasehold proprietor...Once he has a title deed there is no shifting him without trouble." The manager of the Durban non-European Affairs Department agreed that if freehold lots were established "the natives will cease to recognise that they are in the urban area primarily for employment, and once they become owners in freehold the stimulus to good behaviour which is maintained by the possibility of their leasehold tenure being forfeited will cease to operate, either upon the owners or their descendants... " A. R. Ngcayica pointed out the problems as Africans saw them. In townships land was owned by the municipalities and stands leased to African residents. People built houses on the land at their own expense. If they could not keep up with the lease payments to the Municipality, that body took possession of the plot, and the house, for a nominal sum. African house builders, he said, "suffered much" from this state of affairs. "If the land were sold to the native outright it would belong to him and his house could not again be bought by the municipality." (32) Section 4 of the Urban Affairs Act prohibited the acquisition by whites of any interest in lots or buildings in the African areas. This exclusion of white private capital was, according to the Department of Native Affairs, "designed to prevent non-native landlordism in locations." (UG22 1932, Annexure 5) It also insulated the areas from the operation of the rest of the market, and Africans from access to capital.

Part 3. Unmaking the Dual Regime in South Africa

The apartheid years were marked by the division of all of South African land, urban and rural, into racially discrete areas of occupation; and by the consequent need to move people by force

into their 'own' areas. Massive removals of non-whites took place. In addition the 'white' cities were particularly strictly defended by pass and influx control laws which were premised on the denial of the development of a permanently urbanised black population. In the opposition to the injustice of these processes, the alternatives (which required a political revolution) were often imagined and symbolic, and there was much radical intellectual investment in an idealised notion of a revolutionary and socialist African 'peasantry'. But where and how people would choose to live, what the real demand for rural land would be, (and for what purposes), under a different system, could not be known.

One of the features of 20th century South African economic history was that the land had not supported small scale agriculturalists. By the end of the 1980's agricultural production had been increasingly corporatised and 6% of farms (white owned) produced 40% of output. Both whites (who could move freely) and Africans, (who could not) looked increasingly to the cities. Opponents of apartheid considered the lessons from post-colonial Africa. Could agricultural production be sustained, and increased, if there was to be interference with existing patterns of land holding? If the answer to this was 'no', could this be reconciled with the overwhelming demand for restitution? Nationalisation of large holdings; co-operative villages; the breaking up of farms into individual peasant-producer units, were all in the inventory of models. As late as 1989 one of the models on the table of the Director of the ANC's Legal and Constitutional Department was "swift expropriation" of white farms without reduction in farm sizes which would "accelerate the process to socialism...based on the land reform carried out by the socialist countries of Eastern Europe." (Skweyiya, 1989:26) As apartheid was abandoned the politics of land included a number of claims. There was a demand for restitution, both on a long term historical time span to undo the original white seizing of South African land, and related more immediately to the accelerated removals processes of the previous decades of high apartheid. From white landowners there was a demand for constitutional protection of existing property rights. Sporadic land invasions, squatting, and occupation of buildings became a feature of the transition years.

Prior to the transition South African legal scholars had begun to address the intellectual problems caused by both the absolutist conception of common law ownership of land in South Africa, and the bifurcation of land regimes which I described above, and to develop concepts based around land use. (v.d. Walt, 1991:2/3) In place of the existing radical bifurcation of systems, concepts and titles, van der Walt envisaged "convergence" (6) of common law and customary law concepts in a "land-use ethic". 19th century property lawyers, van der Walt noted, had been against diverse regimes of land rights and preferred reducing rights in land to "the smallest possible number." (24) This had inhibited the development of a diverse regime of land rights in South Africa.

The initial land strategy of the de Klerk government, after his announcement of the end of apartheid and the start of a new era, was a series of measures designed to de-racialise the law relating to land. In 1991 the Land Act of 1913 and the Group Areas Act of 1950 were repealed by the Abolition of Racially Based Land Measures Act. Two further Acts provided for the upgrading of traditional land tenure (the Upgrading of Land Tenures Act, 1991) and for the provision of greater security of tenure for the large number of people moving into urban areas following the abolition of the pass laws. The basis of the Government's policy was twofold: land purchase and occupation would henceforth be governed by principles of free market access; and all those holding land under tenures other than full common law ownership would have the opportunity to upgrade their titles. But the obvious objection to the free market strategy, that it would neither restore nor recompense those who had lost land (even the recently removed) and that it would serve to protect the interests of those already holding land, and the economically strong against the weak, were quickly and forcibly made. The attempt to escape from apartheid in land by involcing the free market alone was politically doomed as South Africa moved towards majority rule. A set of counter strategies emerged. One focussed around the creation of a process by which to recontest the very large number of existing and recent disputes over land resulting from the only just halted removals process. A land claims court was envisaged which would judge existing claims by a new set of criteria such as security of tenure; the nature of the use of the land; and the value of the investment (both in labour and money). Underlying

this was the idea that a common set of values for tenure could be evolved which would provide a new legitimacy (upon which security of tenure ultimately rested) in place of the rejected system of state seizures. But this did not address the much larger issue of the historically created pattern of land holding, created by force and conquest, and the political necessity of moving towards some form of larger restitutionary and redistributionary process. It will be immediately apparent that this was a fraught agenda. It raised the whole question of property right, and nationalisation, and it pitted the contesting versions of the shape of South Africa's economic and political future against each other. The question of land could easily be subsumed into the larger issue of whether the future was going to be the one envisioned in the Freedom Charter of 1954, or one acceptable to the World Bank and the new world order. And even while it soon became clear that this contest had already been decided outside South Africa, the issue of land redistribution had the potential to go to the emotional core of South African politics where both white and black had for decades symbolised land holding as the essence of group power, self esteem, and economic and cultural survival.

The larger and more political question of restitution was dealt with in the Interim Constitution under which the transition to majority rule took place. The Constitution signalled the passing of restitution legislation and the creation of a land claims court which would address claims going back to the Land Act of 1913. These issues are not my subject here. What is relevant to this account is that the new majority government also changed the policy direction which had underlain the Upgrading of Land Tenure Act. In 1995 the Government said that the de Klerk Government's Act had been premised on the policy that

> "individual ownership should take precedence over all other forms of tenure, and should be actively promoted by the State. Amendments to the Act in 1993 had enabled the Government to upgrade the tenures of those living in settlements on non-tribal land without the request of the community involved. Since that time the policy of the State has changed so that ownership is only one of a variety of tenure forms in which security is to be protected." (Department of Land Affairs, 1995)

The Department noted that

> "Access to land in these areas is generally determined by shared rules with a strong communal emphasis and a community recognition of informal rights to land. The arbitrary individualisation and upgrading of tenure rights in such areas will effectively dispossess the holders of informal rights. It would also in certain circumstances formalise and entrench the land holding patterns so closely related to subsistence farming which is prevalent in many rural areas." (ibid)

In the new policy upgrading may continue to be appropriate to allow for the formalisation of townships, but in the case of arable or grazing land there is to be a far more cautious approach based both on community sentiment and economic use. Upgrading would not be approved unless the applicant has considered all the options and where "the land once upgraded will be economically viable for the holder..." There were also pragmatic reasons for the change in policy which alert us to the administrative problems involved in tenure reform, and the ways in which the actual processes of upgrading had not been protective of existing rights. (The difficulties encountered in individualisation of tenure may remind us of the observations made about the Glen Grey process 50 years before.) The Department of Land Affairs noted in 1995 (Cabinet memorandum, 14/6/95) that "Through its dealings with the upgrading of land tenure rights in the rural areas, the full extent of the chaos in land rights administration has become clear..." In "many cases" people had not bothered to obtain the documentation describing the "lower order rights in land" which were to be upgraded into ownership. In others documentation and land had been "fraudulently acquired".

The new policy, therefore, urges the exercise of caution in relation to the possible effects of upgrading where there are many claims to the same land.

> "Where the application relates to land where joint rights exist in the property... the upgrading should not detrimentally affect the rights or interests of any holders of rights or informal rights in that property. Upgrading should also not pre-empt the outcome of as yet unresolved historical disputes regarding the rights in that land."

This policy revision was specifically placed within the broader context of the three and a half million South Africans who lost their land and property rights through forced removals and the uncounted millions in both urban and rural areas who were denied the opportunity to gain access to land because of racial laws. Land reform is identified as essential to the process of "national reconciliation and stability." (4) The document defines the "central goal of land policy" as the creation of "a just land dispensation which will result in an equitable distribution of land, secure tenure, and sustainable land use." (ibid) Just and equitable distribution, the document says, must be informed by a "demand driven" process underpinned by the participation of communities. (ibid) "With limited state resources the priority of land reform is to address the needs of the poor." (5) Financing arrangements "need to be structured so as to ensure access to people with little or no equity." (ibid)

Finally the overall strategy of land policy is defined as follows:

> "a) to address past injustices through restitution;
> b) to create opportunities for those in need to obtain land through a state programme to assist individuals, groups and communities *to acquire land through the market* or where available state land; and to create *an enabling environment to allow the maximum use of the market to transfer land* and
> c) to provide *secure land tenure* for all occupants while accommodating *the diverse forms of land tenure* in the country." (my italics throughout) (6)

Two features need to be noted here. The first is that in the story I have told so far the exclusion of the market as an overall mechanism had been the common core of both those who would reduce, and those who would protect, African land holding. For the protectionists, as we have seen, the market was seen as the inevitable way to a landless African peasantry. For those who would preserve the dominance of whites and white land holdings the market was seen as a road to increased African holdings, race mixture, and other political problems. It is a startling sign of the dominance of the liberal dispensation that the market (modified to assist the weaker players) is now embraced as the mechanism under which a just and equitable redistribution will take place. As we have seen, in the early years of the white state after Union, the land market was structured by state intervention to favour some players and

exclude others, and that the beneficiaries had been rich white men. In laying stress on the market, the 1995 policy realises that the market will have to be re-structured in various ways. "State resources to be invested in Land Reform must aim at supplying the poorest sections of the population...especially poor women, with the resources and capacity to acquire and develop land for residential and production purposes..." These resources would give support to "individuals, groups and communities" to acquire "land in the market". The document notes (9).

> "The importance of the land market as a mechanism to be used in land redistribution has been stressed. Historically, black people have been prevented from accumulating both land and capital and are therefore ill equipped to enter a market that presumes existing wealth as the key entry criterion."

Before a "market based re-distribution" can take place "a number of impediments that restrict access to the property market" need to be eliminated. Credit and financial services are not, it observes, adequate. "It is clear that the present mortgage basis of credit is a major barrier to the poor entering the land market." (9)

The second point I want to draw attention to is the concession that secure tenure is not derived only from ownership as defined by the various forms of European common law imported into Africa. In all of colonial Africa land policies accepted a basic dichotomy between western freehold, which was 'secure' and customary tenure, which was not. The idea that both could be secure is a departure as startling, in terms of the parameters of the historical debate, as the acceptance of the market. In place of the dual system of tenure so long dominant, differing concepts are to be brought together in a single system.

> "Until recently black South Africans were prohibited from registering ownership rights. Their rights were informal and not subject to legal recognition...Applying the term 'ownership' only to individual tenure obscures the fact that persons holding land under communal and other systems can enjoy high levels of tenure security. A variety of land rights will be described and registered under a unified registry system. While ownership is a perpetual right, its content and

> the contents of rights of land holders may vary. For instance owners of communal land may face community level restrictions on their ability to alienate land without community approval. The content of rights, including multiple and overlapping rights to specific parcels of land, should also be subject to definition and appropriate forms of registration." (11)

The document proclaims that the goal of policy is to achieve security of tenure for "all South Africans under diverse forms of tenure." (ibid) Objectives specified are the ensuring of "equal protection in law for different forms of tenure"; improvements to tenancy laws to increase the security of tenants; moves to "specify and strengthen the tenure rights of people holding land under customary tenure in the former homeland areas, and to review and upgrade the administration of customary land rights"; establishing "an accessible legal instrument to enable land reform beneficiaries to hold land in common" and the elimination of gender bias in all land holding systems. The customary law of tenure, through which women only have access to land through a male relative, is to be subject to the constitutional prohibition of gender discrimination. "To end discrimination against women, many laws and customs relating to property rights, marriage and inheritance must be reviewed, amended or repealed". Equality in relation to land tenure cannot be achieved without impinging on customary family law. "The development of innovative forms of family ownership may be required."

While the new policy has the goal of preserving a form of 'customary' tenure, its proposed reforms to that tenure will make it something very different from the 'customary' tenure of the colonial and apartheid years. There will be aggressive interference not only in the area of gender discrimination but also in the modes of allocation of land. So far as tenure security under customary law went, the document attributed to the apartheid regime the disruption of "systems of accountability exercised by local people over traditional authorities, who are responsible for administering customary land rights. This has resulted in arbitrary actions by some traditional leaders..." responsible for the administering of land allocation. (11/12) In my account of the development of the 'customary' system of tenure in South Africa I showed how its appeal to former Governments was its

very uncertainty, and the fact that for chiefs and white officials administrative control of tenure could be used to manage populations and to increase the number of people areas of land could hold. The new policy insists that customary tenure is compatible with security as long as there was "clear definition of legal rights and obligations, and adequate administrative and judicial support." (12) Customary tenure, it insists, can offer high levels of security and "clear social and economic benefits...Importantly, customary tenure sys-tems can ensure access by the rural poor to land at low cost and as a social right..." (12) A reformed customary tenure would offer both access as of right, and security. "Improving tenure security" the document states, "will require clear and positive restate-ment in law of the rights of land holders, and the reform and strengthening of the institutions responsible for administering and protecting tenure rights."

Furthermore control of land will no longer be in the hands of chiefs and officials. A new framework for the regulation of rights in customary systems, it is envisaged, will be provided by the new Communal Property Associations law.

> "Many African people hold land through communal systems, whether in the urban or rural context. Many people choose group ownership ...because of the key social and economic function it fulfils. For example it has always been easier for people to raise the cash necessary to acquire land through group contribution schemes. However the law has never provided for simple and appropriate forms of group ownership and many group ownership systems have come to exist informally outside the law." (ibid)

The extra-legal way in which communal ownership had operated under 'customary' law had made it very difficult to enforce group rules and had led to unregulated processes of sale without formal documentation and the introduction of outsiders. This meant that it was often not possible for communal owners to enforce group rights and rules, or to ensure equitable and productive use of the group's land. The new law will wholly remake the ways in which 'customary' systems are supposed to work, effectively depriving the traditional authorities of their former powers. It creates a legal entity to be known as a communal property association "through which members of

disadvantaged and poor communities may collectively acquire, hold and manage property in terms of a written constitution."

The separate systems of tenure now seem to converge in many ways. Security, clear legal procedures, and registration are to be features of both. The policy envisages a wide extension of the benefits of registration. The Department points out that in the past individual ownership had received administrative support, and had been adapted to new forms such as time-share and sectional titles. "The system can be extended to accommodate other tenure arrangements for the benefit of black, rural and poor people." The very wide definition of a right in land contained, for example, in the Restitution of Land Rights Act of 1994 is "any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and a beneficial occupation for a continuous period of not less than ten years...".

In addition to the processes of convergence, and the increasing of security and equality under 'customary' tenure, the new policy aims at providing for security for tenants, both urban and rural. One of the prime aims of the 1913 Land Act had been to undermine the rights of labour tenants on white farms and these were in the subsequent years the most oppressed of groups. Among the planned reforms is a Land Reform (Labour Tenants) law which will provide for their security against removal (which has accelerated in recent years) and for their right to apply for the right to purchase land occupied (at market prices). The problems of urban restitution following the devastations of the removals and relocations following the Group Areas Act after 1950 pose problems different from those which are to be remedied in the rural areas by the grand reversion to and reversal of the 1913 Land Act. One of the difficulties is whether urban land restitution claims can be framed in community and collective, rather than individual terms. A second problem is that urban land lost has usually been redeveloped and greatly enhanced in value. Relating the restitution of urban land to particular pieces of land transformed in this way, in a manner which takes into account their new market value, would involve payments in compensation well beyond those envisaged in any government's imagination. In addition the development of an

urban market in land will continue to be hampered by unpaid rents and mortgages.

Conclusion

One of the features of so many of the colonial discussions was that they tended to slide into a focus on the long term, rather than on needs for a place to live and use in the present. Much of the current South African discourse seems, by contrast, to be markedly pragmatic. The positive lesson which may emerge from this is, that shorn of punitive or utopian fantasies and concentrating on facilitating peoples' coping with real problems, legal creativity can transcend the grooves in which conceptual and doctrinal thinking is easily stuck. On a less optimistic note it seems that this very legal creativity creates not just expectations but a plethora of administrative structures and procedures which are often beyond the capacity of the State to make effective. The outcome, given the apparently diminishing administrative capacity of the South African state, may be a conviction at the top that the problems have been solved, and an increasing anarchy and cynicism among those who have to work, as before, outside of the law.

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