LAND, PROPERTY RIGHTS AND THE NEW CONSTITUTITON

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LAND AND PROPERTY RIGHTS: THE DECOLONISATION PROCESS AND DEMOCRACY IN AFRICA - LESSONS FROM ZIMBABWE AND KENYA

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MR Frederick Wilhelm de Klerk, the State President of the South African apartheid regime, was invited by Dictator-President Daniel Arap Moi for an official visit in June 1991. There he attended a church-service in Eldoret, Rift-Valley Province, at the Immanuel Reformed Church. Mr de Klerk was paying homage to the colonial home of his immediate ancestors.

Fewer black South Africans than white South Africans, (these terms may be used while the structures, relations, and ideology of racism remain dominant in South Africa), would claim immediate family, property, and business connections with Kenya. However, as the struggle against the apartheid regime and system intensified, the reverse may be true when considering the number of South Africans who have friends in Kenya, or who died and have been buried there in the last twenty years during the era of forced exiled.

This emphasises the contradictory and yet intimate recent and continuing historical connections between Kenya and South Africa.

The colonial designs for turning countries into *whiteman's lands*, for example South Africa, Zimbabwe and Kenya, gives the basis for comparing how the struggle of the African people to defeat such designs has been resolved: either in favour of greater democracy or of a continuation of colonial structural relations and dominant property (including land tenure) regimes.

The struggle by Kenyans for self-determination and independence in the 1950s had close resemblance to that of Zimbabwe in the 1960s and 1970s in many respects. This especially in the articulation of the land problem as the central motivation among the large peasantry for supporting the armed struggle (Ranger, 1985; Gutto, 1987, pp. 4349).

The demographic composition, the level of industrial development and the social-class structure in South Africa, led to a less overt articulation of the land question. Nonetheless, land, especially when considered within the broader category of struggle over property, is assuming greater prominence. Land, however, as an integral part of property, is not only a peasant issue in the de-colonisation and pro-democracy politics in Africa.

The introduction provides some key conceptual explanations that are considered important in the discussion of property and land relations and rights in the colonisation and de-colonisation processes in Africa. This is followed by an analysis of the struggle for property and land, as partly reflected in the constitutional processes and other legal forms in Zimbabwe (and briefly in Kenya).

The paper ends by drawing some broad conclusions to supplement or highlight those made in the main body, which may be pertinent to the constitution-making process and other policy considerations in the South African context.

Some conceptual and legal explanations are necessary in the discourse on property and land in the colonisation and decolonisation processes

It is imperative to define property in general and property rights, including land rights, in particular. Within the countries of Southern Africa, with Roman-Dutch legal systems mediated by English common law and elements of indigenous African legal traditions, it is customary to deal with the so-called "law of things".

A text book used in teaching property law and land-use relations towards the end of the 1980s in Zimbabwe was a South African book: C.G. Van Der Merwe's The Law of Things (Van Der Merwe, 1987). Like most *proper* legal textbooks from South Africa, it is noticeably silent on the question of the fundamental distortions apartheid has made to land and property law and concepts in South Africa.

For the present purpose, however, it is sufficient to point out how the author of the book distinguishes between "things" and "property":

> The law of things consists of a system of legal rules which regulates legal relationships between legal subjects with regard to a specific legal object, namely a thing....
>
> The word 'property' has high emotional overtones and such a variety of meanings that it is almost impossible to define accurately and exhaustively....
>
> In this sense the law of property comprises not only the law of things, but also the law of succession, the law of immaterial or industrial property and the law of obligations....
>
> For dogmatic and systematic reasons it is consequently preferable to use the expression 'law of things' to describe that branch of the law of property this title deals with'
> (Van Der Merwe, above, at p. 5).

Such a definition would most likely categorise land and land rights as constituting the central part of things and rights over things.

To put the discussion in a broader historical and social context it may be necessary to note that one of the irreversible transformations imperialist domination has done to property, including land, is the destruction or subordination of pre-capitalist property (including land rights) and its replacement with capitalist property, private or public.

This was true for South Africa (Hendricks, 1990, p. 5) as it was for what is today Tanzania (Sweet, 1982, pp. 61-89), Zimbabwe and Kenya (Gutto, 1992, pp. 285-307 and 1981, pp. 41-56), and for most of the former colonies that are today independent African countries.

From this perspective, "capitalist private property is the first negation of individual private property, founded on the labour of the proprietor" (Marx, p. 715). The forcible expropriation of the indigenous African people of their land and the appropriation of their livestock by the colonialists, was the political and social expression of this historic transformation in property and social relations, followed by transformation in the legal expression of the same.

The revolution in social and political relations did not, however, end at the stage of capitalist primitive accumulation. Once realised, the new dominant property in colonial-capitalist Africa began to exert the determining force on production relations, with legal contractual forms of transfer of property taking over as the main mode of exchange and accumulation.

However, the forcible expropriation, the political domination and the racist restrictions on black Africans, of which apartheid is a special type, effectively prevented the legitimisation of this new property regime in the consciousness of the expropriated and colonised majority. This inherent contradiction of capitalism within the colonial context forms the basis upon which the de-colonisation process, including the dismantling of apartheid and the building of a future democratic South Africa, ought to be seen.

The failure to incorporate the indigenous black people as equal owners and controllers in the new capitalistic relations imposed by colonialism is one of the principal reasons underlying the ever-volatile issue of property in the former settler-colonies of Kenya and Zimbabwe, and present-day South Africa.

Among populations tied to peasant agrarian production, or those recently weaned from this reality, land occupies a central place. Kenya has had 30 and Zimbabwe 13 years of independence. Yet, the broad masses have refused to accept that property relations and modes of acquisition, that rely mainly on capitalistic free-market mechanisms, without adequately addressing the historical discrimination and exclusion, be legally prescribed as the solution to the lack of property, or to the marginalisation of the mass of the black people.

Colonialism and its racist extension embedded certain fundamental distortions in the transplanted capitalist property in Kenya and Zimbabwe. South Africa faces this dilemma, but in its magnified dimensions.

Globally, developments within capitalism in the 20th century have demonstrated further that "wealth representing property devoted to production" have not only transformed into capital, but that stock-and-security ownership or monopoly capital have tended to dominate (Berle, 1967, viii-xix).

The implication of these developments in production and property is that property rights include not only those areas suggested by Van Der Merwe above, but also rights relating to ownership, the occupation and use of water, housing, mines and minerals, roads, etc. and the technological and finance resources required in the production process.

It is the comprehensive manner in which modern property pervades the life of all social groups in society, for mutual and contradictory reasons, that creates the overwhelming urgency to have it dealt with squarely and equitably, within a constitutional framework. The main issues appear to be arrangements for ownership and legally-secured access and security of tenure.

Even those with very liberal, even conservative, perspectives have pointed this out, although in different contexts:

> But we must not think only in terms of land ownership if we are to keep land registration in perspective.
>
> We must remember that proper development depends on 'security of tenure' rather than on ownership which, as we have seen, can be 'empty' of the right to use land, and of the power to control that use....'(Simpson, 1976, p. 8).

It is also important to indicate that a general confusion exists between property or land which constitutes capital and that which is personal, valued mainly for its use-value. Both are central to facilitating production and satisfying the material and non-material necessities of life. But these should be distinguished and different strategies of dealing with the separate concepts have to be developed.

It may be necessary to emphasise in any policy position or legal text that only limited interference with personal property may be effected. Closely related to this, although on a different issue, is the necessity to determine, in concrete terms, who the 'white' owners and controllers of South Africa's national property and land are. Since individual capitalist white farmers are the most numerous and physically identifiable in the category of owners and controllers within the prevailing apartheid property regime, there could develop a tendency to ignore the corporate persons or capitalists - big monopoly firms or organisations in the agricultural, real estate, financial, mining, and other sectors of the economy.

Studies on Zimbabwe show that religious organisations and all manner of corporate persons, control substantial property and land and should be identified as such in any schemes of negotiated legal "expropriation" or "compulsory acquisition" that could create space and conditions for substantial redistribution and transformation (Gutto, 1992, pp. 285-306).

Because corporate owners and controllers of property and land tend to have stronger economic and political muscle than individual capitalist farmers, there is a tendency for those responsible for dealing with the land question to avoid targeting them - leading to discriminatory treatment against individual or small capitalists, and a minimal impact overall.

Another fundamental issue connected to the question of creating legally-secured access and security of tenure regime within the context of substantial land and property reform and distribution, taking into account the centuries of historical exclusion of black citizens, is that of means and methods.

Closely tied to this, in the de-colonisation and pro-democratisation struggles in Kenya and Zimbabwe, is the form, manner and degree of 'expropriation', or 'compulsory acquisition', or simply 'measures for creating conditions for blacks and enabling them to access ownership and control through market mechanisms'.

Those who acquired property, including land, unjustly (even though perfectly legally under apartheid) will naturally be in the forefront of trying to prevent any substantial change in property relations. It is important, however, to point out that

redistribution and transformation need not necessarily mean a revolutionary transformation of property from one mode of production to another.

It is theoretically possible to undertake redistribution and far-reaching changes, within the capitalistic mode of production. Expropriation or compulsory acquisition and redistribution of some property and land could be effected without interfering with the overall production relations. This point has been made by others from the liberal perspective as a general possibility and is not necessarily tied to the decolonisation process alone:

> ... it is possible to expropriate some existing property-owners without attacking the idea of private property itself or the idea that everyone is a potential owner.
>
> (A programme of redistribution, based on the view that the existing rich did not morally deserve their wealth would have exactly that effect)
> (Waldron, 1988 & 1990, p. 22).

Recognising these possibilities does not mean that one abdicates the revolutionary responsibility of mobilising for socialism, if and when the conditions are suitable.

The Zimbabwean and (marginally) Kenyan experiences

Because of the history of the struggle and previous colonial constitutional arrangements, South Africans are negotiating their constitutional arrangements, including policies and legal framework for property and land, among themselves. This, of course, will not guarantee that the oppressed black people of South Africa will exact better deals than their brothers and sisters in Kenya and Zimbabwe were able to secure, but it may make a difference. Kenya's and Zimbabwe's property and land policies and legal arrangements were, despite formal 'negotiations' in London and other imperialist centres, imposed by the British and their allies.

An attempt to isolate certain key constitutional provisions, relating to property and land, shared by Kenya and Zimbabwe at independence, will be followed by a discussion on the Zimbabwean experience in some detail.

Within the framework of the imposed independence constitutions, the protection of property and land rights acquired during colonial era were given the highest priority in the order of all the fundamental rights contained in the 'bills of rights'. This was designed to ensure not only the protection of property, but also to secure conditions for the reproduction of racially-divided capitalism, thus the continued marginalisation of the black masses within legal arrangements that were discriminatory in fact, but neutral in their theoretical expression on paper.

The Kenya Independence Order in Council 1963 provided in the Schedule, which was the Constitution, for the protection of privacy of the home and other property, and from compulsory acquisition of property without compensation (Section 14). This was reinforced more specifically and elaborately by Section 19, which required that in the event of compulsory acquisition there must be:

(a) payment of prompt and full compensation;

(b) the right of the expropriated to have direct access to the Supreme Court to challenge the legality of the order for compulsory acquisition and/or the amount of compensation offered and the speed of securing the payment; and,

(c) brazenly, that, "No person, who is entitled to compensation .... shall be prevented from remitting, within a reasonable time after he has received any payment of that compensation, the whole or part of that payment (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his choice outside Kenya".

When Kenya became a republic free from the fetters of sovereign ties with Britain in 1964, these provisions were specifically secured under Sections 20-27 of the Constitution of Kenya (Amendment) No. 28/64. All these and other elaborate provisions on property and land protection today form what are Sections 70 and 75 of the Kenya Constitution.

The only small change, at least on paper, is the removal of the right of remission of compensation

moneys to any country outside of Kenya which was effected by *Constitution of Kenya (Amendment) Act No. 13* of 1977.

The Kenyan constitutional arrangement as regards property and land seemed to have been considered a suitable prototype for Zimbabwe, as the Constitution imposed on Zimbabwe in 1979, which became effective at independence in 1980, followed the Kenyan one almost word for word - Sections 11 and 16 were the Sections 14 and 19 of the 1963 Kenyan Constitution, with few modifications.

Any compulsory acquisition of property or interest or right therein could only be done constitutionally under a law (already in existence at the time - the *Land Acquisition Act No.15* of 1979) that provided for, among other things:

(a) reasonable notice to the potential owner to be expropriated,

(b) necessity test, including the utilisation of that or any other property "for purposes beneficial to the public generally or to any section thereof or, in the case of land that is under-utilised, the settlement of land for agricultural purposes";

(c) "pay promptly adequate compensation for the acquisition";

(d) right of direct access to court to contest the legality of the order of the intended acquisition and/or the amount of compensation;

(e) the right, limited to Zimbabwean natural or corporate citizens, to remit the whole or any part of that amount "to any country of his choice outside Zimbabwe free from any deduction, tax or charge, other than ordinary bank charges, made or levied in respect of its remission". The usual exceptions to these requirements, such as acquisition of property to satisfy court judgements and orders, for planning, etc, were included in both the Kenyan and the Zimbabwean constitutions.

Of special relevance to South Africa is the provision in the Zimbabwean property protection provision, regarding the right of compulsory acquisition with minimal restrictions or conditions, where the property is "belonging to or (is) used by or on behalf of an enemy or an organisation which is, in the interests of defence, public safety, or public order, proscribed or declared by a written law to be an unlawful organisation".

The last aspect emphasises the experience in Zimbabwe, where the judiciary, composed largely of ex-colonial judges, interpreted the provision in such a way that they virtually negated the letter of the provision and sanctioned the use of some large properties for illegal activities against the members of the South African liberation movements (Gutto & Makamure, 1985, pp. 167-183).

Given the militarisation of the white community in South Africa and the ideological fundamentalism of their right-wing elements, some of the large properties they own could easily be used for internal subversive purposes in the future.

The clearly unjust property protection sections in the Zimbabwean independence constitutional arrangements were not only secured via the 'bill of rights' section of the Constitution. Of even greater legal weight were the provisions regulating the legislative activities of the independence Government. Compromises were forced on the national liberation forces, effectively making it impossible for legislations to be enacted, that could have strengthened any far-reaching measures of land redistribution, by the independence Parliament the liberation forces nominally 'controlled.'

The Zimbabwean whites constituted a smaller proportion of the national population than whites do in South Africa. Despite this the Zimbabwean whites had the constitutional mandate, secured by 20 per cent racially-reserved seats in the national assembly, to block any constitutional amendments, that could have affected the 'bill of rights' (Sections 38 and 52 of the Zimbabwean independence Constitution).

One conclusion (Gutto, 1992, pp. 285-307) is that, despite the unjust constitutional restrictions on the exercise of legislative power, which were repealed in 1990, after ten years as required in the Constitution, some significant measure of land redistribution could have been carried out in Zimbabwe. It was both a question of legal constitutional limitation and the social class orientation of the political leadership at

play in explaining why so little land reform was achieved in Zimbabwe by the beginning of 1992.

The ten-year period of constitutional restrictions on legislation to effect changes in the rights and freedoms enshrined in the 'bill of rights' (Section 52 of the independence Constitution) seems to have provided the excuse for the national leaders not to embark on meaningful reform. Furthermore it provided space to enable a sufficient number of the nationalists to be co-opted into the middle-class club of owners, thus guaranteeing that even after the restriction had expired (by 1990) and the reserved white legislative muscle having been removed (by 1987), it would not be in the class interest of the leaders to mobilise the masses in the cause of major property and land reforms.

Thus an economic strategy was built into the constitutional framework to ensure that the capitalist road of development, as opposed to the socialistic rhetorics preached by the populist political leadership, would prevail in the long run. From this we can draw a sociological conclusion that law and legal forms are very important as they play either facilitative or restrictive roles in economic and other social processes, while they are not the sole explanation of social action.

In 1985 the Zimbabwean Government enacted the *Land Acquisition Act No.21* of 1985. Although it repealed the pre-independence *Land Acquisition Act* of 1979, it essentially retained the same substantive provisions.

The new Act provided more clearly for the identification of derelict land, that could be expropriated with little constitutional restrictions (Parts V & VI of the 1985 Act). The Act also provided the machinery and guidelines for assessment of "adequate compensation" that is "fair and reasonable", as well as the criteria for the establishment of special courts and arbitrators to solve disputes arising over payments for compulsorily acquired property and land.

The Act's novelty was the legal requirement that no land in the rural areas could be sold or transferred in the market, before the state was given the first option to decide on whether or not to purchase it (Section 6). In other words, willing sellers had to make the first offer to the Government, as the potential buyer of any intended sale of rural land, so that the Government could either buy the property or land offered for sale, or decline and offer a "certificate of no present interest" to the potential seller.

The "right of first refusal", as the legislation calls it, was apparently meant to prevent the dominant landed property owners from using the cover of the 'free market' to continue transferring wealth among themselves and thus defeating the stated national policy of land redistribution.

The legislation created conditions for seller-initiated compulsory acquisition by the Government in cases where the Government accepted the offer to buy, but the parties failed to agree on the price. In such cases, from the moment of such disagreement over the price, the ordinary process of compulsory acquisition would be invoked.

Since the 1985 legislation was in force as one of the amplifying legislations of the constitutional provisions relating to compulsory acquisition of property and land up to 1992 - its impact has already been established and discussed above. It may be pointed out, however, that the *Land Acquisition Act* did not apply to all property and land in the country. For example, mines and minerals had and still have their separate legislations: *Mines and Minerals Act*, Chapter 165; *Minerals Marketing Corporation of Zimbabwe Act No.2* of 1982; and the *Zimbabwe Mining Development Corporation Act No.31* of 1982.

The impoverished communal lands, the former native reserves - equivalent to the South African apartheid bantustans and the so-called homelands - covering about forty per cent of mostly marginal land in the country and carrying more than fifty five per cent of the national population, may be acquired compulsorily only under the *Communal Lands Act No.20* of 1982.

Elsewhere, it was argued that property relations in Zimbabwe are dominated by the dominant patriarchal relations and that they, therefore, reflect and reinforce gender inequality. Nowhere is this more apparent than in the peasant communal lands (Gutto, 1992, 283-307, at p. 291).

Since the historical exclusion of black people from effective and equitable ownership and control of property and land is equal, and related to that of the

exclusion of people of the female sex, gender equality in property ownership and control ought to be pursued as vigorously in any progressive constitution-making process that as is undertaken with respect to class and race.

Kenya (Gutto, 1976) and Zimbabwe did not seriously attempt to tackle the problem of gender inequality in property relations at independence. The problem seems to plague virtually all countries in Africa, including Uganda, as findings in a recent study showed, which is a country dominated by peasant agrarian production relations and property (Hydén & Gutto, 1993, Section Six).

The division of property and land into "communal" and "others" - apparently those formerly for 'whites'- has also had serious and unintended consequences in promoting ethnic and tribal division among the citizens.

In Kenya, the situation has reached explosive proportions, similar to what South Africa has been facing.

Reactionary leaders and dictators use uneven regional development (for which they are responsible), linguistic diversity and other factors to prevent the consolidation of national pro-democracy movements (Kenya, Republic of, 1992).

Zimbabwe has had a civil war, that was partly promoted by primitive "communalist" ideologues, taking advantage of the underlying divisive property regimes. Besides, in Zimbabwe, "communalism" in property regimes has been used by those who run financial capital to discriminate against communal lands, in favour of capitalist farmers and other forms of property. Little capital is invested in the communal lands, be they under family-holdings or co-operatives.

Within the urban property and land regimes, the problems that face Zimbabwe are just as intractable as those facing the mass of its citizens in the rural areas. Racially-motivated discriminatory practices by estate agents, unequal endowment and/or allocation of resources and services by municipalities and similar open or camouflaged social and civic behaviour in the urban centres, keep the distance between the races wide in Zimbabwe, even after 13 years of independence.

On paper at least, a legislative initiative was adopted in 1982 to deal with some aspects of the problem: the *Immovable Property (Prevention of Discrimination) Act No.19*. Its impact, however, remains limited. This is not surprising, since historically embedded social behaviour and practices require adjustments in the balance of social power relations to encourage any meaningful change. Moralising and law alone cannot do much in such a situation, which is why it has been easier for the black upper-middle-classes to integrate with the non-black races, than it has been for the poor and oppressed majority of black citizens.

Another major social problem that Zimbabwe and Kenya share, which must be even more serious in South Africa, is the squatting phenomenon. It constitutes a major property and land problem of gigantic proportions. Lack of property, land, housing and opportunities for gainful employment with living wages or income, have forced about one million Zimbabweans to squat in rural areas and urban slums (Dahlin, 1992, p.55). Kenya's estimated squatter population is between four and five million. The proportions constitute about one in every nine or ten persons in the population of both countries. South Africa has about seven million rural and urban squatters and these are governed by police arsonists and bulldozers (Sachs, 1992, p. 68).

In Kenya and Zimbabwe the greatest and most concentrated violations of civil and political human rights have been against this growing social group, that lacks any enjoyment of economic, social or cultural human rights. The denial of one cluster of rights seems to attract the suspension of practically all the other clusters.

The dominant policy of the two governments in dealing with the social and legal disease of squatting is the use of guns and bulldozers. A judge of the Zimbabwean High Court was moved to question the policy of punishing the victims of social marginalisation in a case where the Harare City Council was ordered "from above" to terrorise squatters out of one of their camps so as to make Harare appear "clean" to the visiting Queen of England:

> One cannot help wondering whether Her Majesty would not be more interested in seeing Mbare as it is rather than as it isn't. In any case, perhaps the Applicant and others

> who are so anxious to sweep the Respondents under the red carpet to be rolled out for Her Majesty's visit to Mbare need to be reminded that the liberation war in Zimbabwe was fought over the issue of land primarily, combined with the goal of justice for all (an obiter dictum of Judge Dennis Robinson in *City of Harare vs T. Mudzingwa & 193 Others* (unreported), HC-H-200-91; HC 3177/91, p. 1 1.)

Ask any ordinary Kenyan about Muoroto, Kabagare, Kamukunji, and similar slums and squatter camps and they will tell stories of the brutal and frequent police-and-askari-raids that render tens of thousands injured and homeless. Scores among these victims of social deprivation and State terror get killed routinely in such raids, but their cases hardly ever get mentioned by elitist human rights advocates.

In the rural areas in Kenya, particularly in the coastal region and in the Rift-Valley, squatting has become so institutionalised that it hardly pricks the conscience of Kenya's political and economic leaders. But one day the anger of those who are oppressed and marginalised is likely to explode and when it does the country will bear the cost.

To conclude, some remarks follow concerning the latest land acquisition legislation in Zimbabwe, the *Land Acquisition Act No.3* of 1992, and the subsidiary legislation made under it - the Land Acquisition (Right of First Refusal for Rural Land) Regulations 1992.

The new legislation repealed and replaced the 1985 *Land Acquisition Act*, which has been discussed above. The legislative process leading to the enactment of the new law generated political heat in Zimbabwe and abroad (see for example, Makamure, 1992, pp. 3-9; Feltoe, 1992, pp. 9-11; Commercial Farmers Union, 1992, pp. 11-12; and Zimbabwe Farmers Union, 1992, pp. 13-14).

In reality the new legislation, at least in its final version, essentially reproduces the 1985 one, which in turn, borrowed many concepts from the 1979 pre-independence legislation. What the legislation attempts to do (which rekindled the emotions of the propertied-class and the un-propertied-classes and their supporters, although for contradictory reasons) is:

(a) to limit, not ouster, the role of ordinary courts in settlement of disputes arising from cases of compulsory acquisition;

(b) to strengthen State administrative power in determining the identification of land to be acquired for resettlement and the price to be paid as compensation to those expropriated, and;

(c) to make it clear that no compensation is payable for the acquisition of derelict land (Section 44 of the new Act).

As far as the first apparent objective is concerned, it establishes the Compensation Committee and the Derelict Land Board, the decisions of which may be reviewed by the Administrative Court.

The latter has the same status as the High Court and its decisions are ultimately subject to normal review by the Supreme Court (Part VI and Section 23 of the Act). This obviously could not have been satisfactory to the propertied-class, who prefer the ordinary judicial processes, trusting that the generally conservative ideology of the judges, coupled with support by expensive legal experts, be more inclined to rule in favour of private owners and against the "encroachments into the sanctity of private property". That the Committee and the Board are to be staffed by mostly bureaucratic ministerial appointments (Section 17) further scared the propertied-class.

The second apparent objective of strengthening political power in determining the land to be compulsorily acquired for resettlement and the amount of compensation to be paid, is partly expressed in Sections 2, 3 and 16 of the Act. If the objections to the Act by the Commercial Farmers Union (Commercial Farmers Union, 1992, 11-12) while in its drafting stages is an indication, then the provisions empowering the Minister to issue guidelines as to what may be considered "fair compensation" was also central to the controversy. Those who initially acquired their wealth through non-free market conditions tend to be the people who expound on the wisdom of letting the 'free market' decide on everything - except where they do not stand to gain some interest.

The requirement that the Government retains the legislative right to be the first offeree (the so-called

right of first refusal) in all intended sale of rural land, has also been opposed by the propertied-class.

In summary, what the 1992 land acquisition legislation in Zimbabwe attempts to achieve is to increase the legal power of the State to intervene in the market, as far as rural agricultural land is concerned, excluding mines and communal lands. The object is ensure that more land is made available, that could be used, presumably, for resettlement of the landless masses. The intention appears to be to create more room to manoeuvre within the regime of capitalism, which has been distorted by the history and social structures of colonial and neo-colonial racism.

However, as with the critique of the historical developments up to 1992 (Gutto, 1992, pp. 285-307), no fundamental break through in transforming property and land relations in Zimbabwe can be expected merely because of the new legislation. At least some form of mass democratic action is required to breathe life into the law and make it achieve the modest advantages that can be expected under the dominant capitalistic order.

Concluding Observations

The object of this paper has not been, and could not have been, to tell South Africans what they must do or not do. It is for them to decide what is useful and appropriate, what could be emulated, and what is negative and inappropriate.

In the arena of legal battles for social and political change, as part of the broader struggles in society, it is necessary to be aware that law and legal form may have certain universal attributes, but essentially they are historically and culturally conditioned. In their universal attributes, as well as in their historical and cultural specific aspects, law and legal forms sometimes act as cause and at other times as the effect of some other underlying social and economic conditions and forces.

Similarly, law and legal form could act as a resource for progress or as a tool for reaction and stagnation, or even degeneration. The challenge is not limited to making a constitution within a stable property regime. One has to deal with both - the creation of a viable, just and sustainable property regime, that must enhance productivity and equitable distribution, and an appropriate constitution, that provides the overall principles.

It may be appropriate, though, to suggest that provisions, such as those in the independence constitution of Zimbabwe, which gave the white minority a dominating role in the legislative process affecting fundamental rights, especially those dealing with property, are hardly democratic and fair. The same could be said for provisions in the constitutions and other legislations of Kenya and Zimbabwe which, for a long time, gave the minority propertied-class the privilege to either siphon the national wealth outside the country, when compensated for expropriated property or land, or to whitemail the people with threats - that if expropriated, they could resort to the remission of the moneys.

Modern progressive capitalism, welfare-state capitalism, does not rely on the free market without State intervention for the social good and stability. Those who continue extolling the virtues of the absolute free market and the unfettered right to own and use their private property will need to be reminded of how the State has been subsidising them and of the historic right of those, who have been excluded because of race and gender, to lay claim to their just share as citizens of the country.

The real insurance for social stability, necessary for economic productivity and national progress, lies in measures at the property and land levels that would begin to seriously address the historical injustices and exclusion that the majority have suffered in the past. Such measures will create legitimacy and strengthen legality within the law and society.

The greatest challenge to South Africa, at least from the point of view of an external observer, is to transform and rebuild the society in such a way that apartheid in all its forms and manifestations is dismantled and not simply moved from the status of *de jure* to that of *de facto* existence. As the experiences in the USA demonstrate, mere repeal of racist legislations does not lead to the undoing of unequal and racist relations in society (Gutto, 1980, pp. 23-37).

Many preferential corrective measures in the economic, social and cultural areas - backed by appropriate legal measures - are needed. This is the

price the whole society has to pay to ameliorate the effects of its dirty past and pave the way for a better and clean future.

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