

SECOND CARNEGIE INQUIRY INTO POVERTY
AND DEVELOPMENT IN SOUTHERN AFRICA

Land law and poverty

by

Fikile Bam

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LAND LAW AND POVERTY

Laws are made by those who can enforce them be it by consensus or by coercion. When they are enforced by Consensus they are reflective of an over-all need to define orderly relations within society, but when they are by coercion they are for the promotion of the interests of those who wield the power regardless of the rest.

The laws that have been enacted in regard to land holding in South Africa since Van Riebeeck have all emanated from those who wielded the power and there are none that have been enacted by consensus.

In the traditional indigenous societies in this region there existed rules and norms for regulating the holding and usage of land which were determined largely by the prevailing modes of production among the various groups. These norms and rules were by consensus within the groups and imposed minimal restrictions on access to land which was the basic and abundant resource of livelihood for all. Individual ownership of land was unknown and communal land tenure prevailed throughout.

The prevailing economies before the advent of white people ranged from those of the hunters and herders who inhabited the western Cape (the Khoikhoi and the San) to those of the pastoralists and cultivators - the Nguni, Sotho and Shona speaking peoples - who inhabited territory all along the eastern board up to Delegoa Bay and the entire territory north of the Orange and Vaal rivers across the Limpopo to Zimbabwe.

The hunters and herders required access to vast stretches of land in pursuit of quarry, and in search of wild roots, insects, honey, fish, grazing land and water holes.

"For production, space more than land itself was the key variable" ¹.

Access to territory and movement over it was, however, not unregulated as the various independent groups or bands had their regular beats each within a defined area over which prior rights were recognised through usage for the while. ²

The rules formulated and observed in this regard were of a pragmatic character ranging from such exclusively private property rights as in marked wild bee hives to the free for all right to pursue game throughout the country. ³

The Nguni, Sotho and other Bantu speaking groups were mainly pastoralists and cultivators. They kept large herds of cattle, sheep and goats and grew sorghum, pumpkins, beans, sweet melons and gourds and also hunted on a considerable scale for food and clothing. The domestication of animals and the cultivation rather than the gathering of plants bestowed a new value on land as it tended to promote the establishment of permanent settlements and claims upon it. This development might have been expected to lead to the formulation of internally restrictive land distribution laws and possibly the beginning of an economically stratified society. But the social structures of these groups in terms of which the right to individual use of land was second to the rights of the social group militated against the development of an individual form of land tenure. Conflicts such as frequently arose as a result of expansions of the size of cattle herds and consequent encroachment of neighbours' grazing land were between tribes rather than between individuals and fell outside the scope of internal regulation.

Agricultural production was at all times basically subsistence and, though practised extensively, was based on shifting cultivation giving respite to land left fallow to regain fertility and land supply remained abundant.

In the sum the rules, norms and practices in the traditional societies in respect of land ensured the preservation of the necessary equilibrium for continued productivity of the land. There was no way any individual could acquire ownership of land. Individual groups or families had rights of use-even exclusive rights of use - in communally shared land. If a group or family moved, the land reverted to the community.⁴ In these circumstances it is clear that within the traditional economies there was no notion of either perpetual title or of perpetual forfeiture of land until the traditional economies were superseded by a monetized economy and in a manner that did not allow for a natural spontaneous development or adjustment.

Process of Land Alienation

In 1488 Bartholomeu Dias, the Portuguese explorer, rounded the Cape. His landfall was Mossel Bay on the Cape's South Coast. There he saw men herding cattle. His response to this unexpected sight was to set the scene for centuries of bloody South African history - he took a crossbow and shot one of the herders dead.

It was to be another 170 years before the first permanent settlement at the Cape was established by Jan van Riebeeck but during these years little happened to reassure the Khoikhoi about the good intentions of the passing mariners and the bartering which occurred was generally marked by suspicion.

The Khoikhoi were pastoralists, and as such, were not equipped with a value system that could fully comprehend their impending doom, nor did they have the social and technical attributes needed for a successful defence of their independence.

Soon after the establishment of the Dutch Settlement at the Cape, the first direct challenge to their access and control over land was made.

The Dutch East India Company slowly extended its influence and by 1659 was seriously interfering with Khoikhoi pasturage. The first acts of land alienation were subtle but were resisted widely. In that same year the enormity of the threat now facing them dawned upon the Khoikhoi and they took up arms in the first of many struggles over land that were to be waged on Southern African soils.

Unable to win the military action outright but always able to contain the Khoikhoi threat the Dutch East India Company and the settlers that came increasingly to the Cape gradually expanded towards the interior annexing Khoikhoi land as they did so.

The land that they took through a variety of land settlement schemes initiated by Simon van der Stel (1679 - 1699) and his son Willem Adriaan van der Stel (1699 - 1705) marked the beginning of a process whereby the sub-continent was carved up, transformed for the most part into private farms and successfully alienated from the people who had originally occupied it. As I have indicated the monopoly over fire-arms and the subtle and in some cases invisible ways in which land was taken were crucial to the process, but another force, law, was also added to the battery of forces aimed at those who resisted this process.

By the mid eighteenth century the expansion of the Cape Colony, initiated by land hungry settlers and consummated by Dutch law had reached the Gamtoos River and informal border of Xhosa country. For the first time settlers came face to face with cultivators who had a similar understanding of land, who valued it and who were prepared to die for it. In the contest that was about to take place however, the odds were firmly stacked on the side and later on would also be able to draw upon an organised professional military force.

They had a conviction, based on the Roman Dutch law of inheritance that they were entitled to 2x600 acre farms and to back this up, they had an administration which felt itself able to declare borders at will-borders that were in fact visible only to those who had rights dependent on them, namely Dutch and later British settlers.

Much of this force arrayed against the Xhosa was in fact incoprehensible to them - they never saw the pens that drew the lines on the maps, or the lawyers and landdrosts who preached the law and made it real. On the rare occasions they were consulted, the Dutch played on enmities within the Xhosa camp and claimed "agreements" which were no more than formal parleys conducted with minor chiefs or with chiefs who had no powers to negotiate those particular issues. Thus it was that Governor van Plettenberg established the Fish River as the boundary of the Cape in 1778. This "treaty" in theory alienated a vast track of land from the Xhosa (the area between the Gamtoos and Fish Rivers) but in reality the Xhosa held the balance of power for more than thirty years and the "treaty" could only lay the foundation for the real alienation in 1812 when regular British troops brutally executed with the gun the process initiated with the pen in 1778. The bitter lesson of how pen and gun worked together to effect a change in the ownership of land was to be learnt ^{may} more times before the independence of the Xhosa was finally ended and their land taken.

Before 1850 little if any attempt was made to convert African cultivators into peasants, the land was basically handed over to white settlers as the spoils of war or the products of treachery. There were however isolated instances which suggested how things might develop in the future.

As a result of the Mfecane, a group of Africans migrated into what is now Transkei and constituted themselves as the Mfengu. As landless people they attracted the sympathy of missionaries who not only gave them Christian beliefs but imbued them with a specific work ethic and through close co-operation with the government gained them land on which they were expected to become productive peasant cultivators.

Close by, on the Kat River, landless Khoikhoi people were also being settled, this time on an experimental basis. They were given land on an individual ownership basis to see whether such a system could be the basis for wide-scale crop cultivation. Further west, missionaries were involved

in a similar project amongst the Griqua whom they encouraged to farm.

As Colin Bundy has shown, many Africans responded to market opportunities and the bulk of agricultural goods in both the Cape and the Transvaal was produced by African peasants many of whom invested their profits in land. But few owned the land and most were uncertain of their tenure since the European laws made no provision for African individual holdings other than on a vague and loose tribal basis. Their precarious position was compounded by the avariciousness of white traders, farmers and politicians who were united in their quest for profit and who now launched an attack against the emergent African peasant class. The attack was most successful where the peasants were most vulnerable - it succeeded in undermining independent African landholdings and forced many of them to accept subordinate and landless positions within the colonies.

In Griqualand the discovery of diamonds and rising debt effectively destroyed Griqua power and forced a significant portion of their number to flee to Natal. In Natal itself Sir Theophilus Shepstone, "protector of the Natives" pioneered a so-called protectionist measure which bundled African in Reserves. In the Transvaal the pen and economic forces were not quite so effective in reducing African power, and here the gun once more led the way in "pacifying" the Pedi and destroying the Ndzundza-Ndebele while the mightiest of the African Kingdoms, the Zulu, took a determined but vain stand in Zululand itself. Though these wars were the last major and formal confrontations between pre-colonial kingdoms and imperial might a trail of isolated cases of resistance testified to the survival of a spirit of resistance.

In 1878 the Transkei and especially Pondoland once more broke into open rebellion, the Sotho took violent measures to resist the imperial might over the "gun ownership issue", the Kora staged a last ditch stand on the Orange River, the Tswana rose in the Langeberg and Shona and the Ndebele took Rhodesian settlers by surprise as they tried for a second time to throw off the shackles of European rule.

A fundamental issue underlying these differing forms of violent response was that of land. As is wellknown, the desire to reduce African land holdings was mainly tied up with the question of labour and after the discovery of diamonds and gold, this question was uppermost in the minds of legislators.

By the turn of the century, land companies, mining companies, white farmers and land speculators dominated the land. After the initial breach had been made in traditional African land holdings and customs using a combination of force, tact and treachery, the law was brought in to consolidate white settler supremacy. Where Africans in some areas managed to hold on to their land with either tribal or individual forms of tenure, they still faced the State which was intent on remodelling the system of land tenure to meet its own needs as was the case with the 1894 Glen Grey Act.

This Act clearly reflected the new economic balance of power which presaged the new future for the Reserves: African labour was to be mobilised at the expense of an African peasantry but not become fully proletarianised. Subsistence was defined in terms of individual tenure and was to be controlled and prescribed in such a way as to underpin a stable rural population and drive the "surplus" landless people to the labour market.

For those Africans who were unfortunate enough to have been ousted from the land altogether other pieces of legislation were enacted. The 1895 Squatters law in both the Free State and the Transvaal undermined the position of sharecroppers and paved the way for undisputed white dominance in agriculture which was cemented by the notorious 1913 Natives Land Act.

Law and the Exploitation of the Dispossessed

"By the time of Union two problems were dominating the thinking of whites with regard to Blacks on the farms. First was the perennial problem of labour shortage. Second was fear lest the land gained by conquest should be lost through the market, for, except in the Free State where such a thing had long been forbidden, Africans were buying farms. The Land Act of 1913 was passed in an attempt to solve both these problems at once" ⁵

The land alienation process brought about congestion in the communally held land in the Reserves and by the end of the nineteenth century in many places land could no longer be divided further. Consequently many people and their families were forced to establish themselves on land outside the Reserves - mainly on land rented from the sparsely populated white farms under squatting contracts and in some cases even on land bought individually and collectively on the market as there was at first no legal bar to such acquisitions.

Many of these people (perhaps too many) pursued independent farming and trading operations and gave every indication of their determination to compete in the new economy in capacities other than as labourers in the mines or on the mining and the farming sectors among the Whites. The self-sufficiency might in due course lead not only to stiff competition but also to political insubordination; the partial withholding of labour which it engendered would certainly make labour an expensive commodity and with similar political implications. As for allowing the uncontrolled occupation and acquisition of land by Blacks, when it was increasing in value from increased food demands from the mines, that would be sheer folly.

Accordingly a spate of divergent land and labour policies emanated from the various territories prior to Union in 1910 until the need for uniform legislation to eliminate or limit the acquisition and lease of land by Blacks and thereby ensure the maximum supply of labour from them was a generally accepted priority. ⁶

Fundamental differences of policy still persisted and decision had to be made on the question whether or not the Cape reserve policy should be adopted and retained for the sake of establishing depots of a self-maintaining and stable labour supply ideal for the mining interests, or whether it should be eliminated root and branch for the sake of amassing through out a more completely trapped, dependent and subserviant supply ideal for farming.⁷ In the end the choice was in favour of adopting and extending the reserve policy and the result was the Natives Land Act No 27 of 1913.

It was the first of a series of laws to decree separate and un-equal areas for the exclusive occupation of land in the Union of South Africa on racial lines: "... stripped of varnish, its effect was to deprive the Natives of their unrestricted right to lease or purchase land pending the demarcation of special areas to be made available for the purpose."⁸

And there was indeed a considerable amount of varnish to strip because the head-note to the Act, like in many other repressive laws afterwards, deceptively stated the over-all intention of the Act as being, " ... to make further provisions as to the purchase and leasing of land by Natives and other persons ... and for other purposes in connection with the ownership and occupation of land by Natives and other persons." ⁹ Sol Plaatjie was not impressed with this nonsense. In a speech on the Act he stated that the Bill reminded him of a jackal trap- a nice piece of meat with poison inside."

Everywhere (except in the Cape where the Supreme Court granted a temporary respite)¹⁰ the provisions of the Act aimed at dispossession of occupational rights were immediately implemented. Evictions and consequent uncompensated losses of property and stock rendered many families homeless and destitute especially in the Free State.

The promised special areas in the meantime were not made available and still to be subject of enquiry by a Natives' Land Commission to be appointed. By the time the recommendations of the Commission (Beaumont) were made, governmental policy had changed in favour of the farming interests and the areas recommended for exclusive Black occupation were offered to white buyers and black purchasers were thwarted through various subterfuges such as being denied credit facilities or the formation of associations for the purchase of land.¹¹ This trend of events culminated in Hertzog's controversial Amendment Bills in 1927 and 1929 the effect of which was to freeze the provisions for the release of further land for Africans displaced from "white areas."

Large numbers of the people displaced from land in the "white" areas were thus forced to move back to the Reserves while outward movement from these areas had been restricted by the Land Act of 1913. Within the reserves poverty had been increasing at an alarming rate from since the end of the nineteenth century and the effects of the segregation policy was to compound and accelerate this trend to an extent that prompted the Government to have another look into the question of land distribution.

The "scheduled" areas had been congested even before the law was passed and the additional areas recommended by the Beaumont Commission were not accepted. Another problem which needed attention was that many squatters and tenants simply went back to the farms and many farmers were only too glad to receive them.

More land was needed and "Local Committees" were appointed in the various Provinces and their recommendations were accepted and incorporated in the Native Trust and Land Act of 1936. In terms of this law the areas recommended by the Local Committees were called "Released Areas." Provision was further made for the establishment of the South African Native Trust with funds to buy land in the Released Areas "to advance the interests of natives in scheduled and released areas for development of their holdings."¹²

Other provisions of the Act sought to ensure the complete removal of Africans still on the white farms by prescribing the number of labour tenants, providing for their registration and applying the debasing provisions of the Master and Servants laws to land owners and their labour tenants.

The introduction of Trust land tenure throughout the Reserves was the distinctive feature of the 1936 Land Act. It had the effect of introducing yet another form of land tenure in addition to freehold, quitrent and communal holdings and in fact tended to eclipse the acquisition of any more land on a free-hold basis. The expectation was that land would be administered by the government and that its utilization would be made more efficient. Studies carried out some thirteen years after the passage of the Act by Monica Wilson and M. Elton in Keiskamahoek, where all the forms of land tenure were operative, showed no improvement to have been brought about in production and linked up the failure with the lack of security Trust tenure gave to the farmer.¹³

Conditions continued to deteriorate rapidly in the Reserves and accordingly the emphasis of regulations passed in regard to land in the Reserves was the enforcement of betterment or rehabilitation measures by various proclamations.

The development, implementation and consequent country-wide resistance to these measures is set out by Joane Yawitch¹⁴ who singles out the Government's rejection of the more fundamental recommendations of the Tomlison Commission as indicative, of what the peasants always claimed, that betterment means control over people and not the development of the Reserves :

" ... the government was rather seeking the most convenient way in which to organise the reserves so that they could ultimately feed themselves, govern themselves and still provide the labour basic to the functioning of the central South African economy."

In terms of that economy, the reserves could not become thriving centres of agriculture and industry, since that would threaten the existence of the migrant labour force as well as the existence of the unemployed mass who could be drawn on when necessary.

Bearing in mind that these groups have been a direct factor in the low wages paid in the unskilled labour market in South Africa, it is easy to see why their continued existence was vital." 15

Since the passing of the Bantu Authorities Act in 1956 (at the height of the resistance to Rehabilitation) up till the setting up of self-governing homelands and independent (home-land) states - names under which the Reserves are currently known - the control aspects of land administration have predominated in proportion as the living conditions have further deteriorated. An important difference is that the agents enforcing these measures are not the tribal Authorities - chiefs, headmen and their councillors - in the place of white magistrates and commissioners. The immediate effect has been to compromise local solidarity and neutralise the impact of the resistance to these measures. Another effect has been to make the allocation of land subject more to corrupt practices, petty local tyranny and other considerations unrelated to development.

In the homelands and "independent states" the land issue has been raised frequently on political platforms at ruling party conferences, in the National Assemblies and parliaments and (notably in the Transkei) in negotiations with Pretoria. The theme has been claims for additional land from white South Africa. In 1968 Chief Kaiser Matanzima, the Transkei President bargained for the inclusion as part of the Transkei, first, of all the land between the Fish River and the Natal border, and later, for only the adjoining white areas of Maclear, Mount Currie and Matatiele as a pre-condition to his acceptance of independence. He stated that it would be political suicide to call for independence that excluded these districts.

The South African government, however, refused the granting of any land additional to the released areas of the 1936 Land Act and Chief Kaiser Matanzima and other homeland leaders after him were obliged to accept independence on those terms. It is true that a couple of farms were given to him and that Port St Johns and later Glen Grey and Herschel districts became part of the Transkei.

the couple of farms were allocated to a few individuals on free-hold tenure and the excissions and the inclusion of pieces of land to independent states have been part of Pretoria's plan to consolidate their territories and not to giving them more land. Consequently in none of them has any new legislation or significant amendments to land distribution laws been passed there being no land to distribute or re-distribute within their borders.

On the other hand the current and presistent campaign in the removal of "black spots" , squatters and the unemployed from white South Africa to the rural homelands,¹⁶ has aggravated conditions of poverty in these areas even worse than before and worse than Bundy was aware of when he wrote :

"There exists a vast and depressing body of evidence as to the nature and extent of underdevelopment in the Reserves (and particularly the Ciskei and Transkei) in the forty years that followed the 1913 Act: the details abound of infant mortality, malnutrition, disease and debility, of social dislocation and falling fertility of the soil, and of the ubiquity of indebtedness and material insufficiency of the meanest kind." ¹⁷

The Urban Areas

One of the immediate and direct effects of the deterioration of living conditions and congestion in the rural areas was to compel people both white and black into the towns as from the second half of the ninenteenth century. Many of these were poor people and though by far the greater number were black it was only the poverty of the "poor whites" that was accorded serious attention and concern over the years from respective governments.

It was only in respect of them that, after an initial period of bungling with "back to the land" solutions, the recommendations of the 1932 Carnegie Commission to bring about their economic rehabilitation through greater involvement (suitably protected) in the industrialization process were adopted.

For the rest of the black population groups not only were no such measures contemplated but many of the prospective measures taken to safeguard the poor whites worsened their plight. The doctrine of segregation as applied in the towns was throughout to regard Africans as "temporary sojourners" to be tolerated while they were willing to minister to the needs of the white man that as soon as they became idle, vagabond, dissolute, disorderly and, at a later stage, subversive they should be driven back to the Reserves. There were of course soft volumed voices (notably in the Cape where Africans had in places been enjoying freehold rights since the middle of the nineteenth century) who said this was impracticable and impossible and that a permanent black population was inevitable. They were not heeded when it came to the passing of the various segregationist laws. Then slums began to develop in the larger centres and only the urgency created by this health hazard led to the establishment at least of location settlements in which some yielding to a degree of the permanence of an urban black population was discernible.

A sector of the black population which was to receive special attention in the laws relating to urban occupation of land were the Indian people in South Africa.

The Orange Free State has completely denied this group any form of access to land be it rural or urban and be it for residence, trading or even transit since 1886 and has, with minor concessions, persisted in this notwithstanding new dispensations and Constitutions.

Since 1943 restrictions were further placed upon Indian occupation and trading in urban areas in Transvaal and Natal through the so-called "Pegging Act" which was intended to protect Whites losing land to Indians through "penetration" into white residential areas.

In 1946 the Smuts Government passed the Asiatic Land Tenure and Indian Representation Act to tighten control over further acquisition and occupation of land by Asiatics in Natal and the Transvaal.

It was left to the notorious Group Areas Act of 1950 to take the principle of segregation to its logical conclusion and to impose restrictions and take away vested rights from Indian and coloured people in urban areas. Under this law whole stretches of urban land were proclaimed and set aside for the exclusive occupation by a particular colour group - in practice the darker the pigmentation the further way from the city centre. Though compensation was legally provided for those forced to relinquish property, great hardships were experienced as people were up-rooted from homes and businesses and the Act affected Blacks to a much greater extent than Whites. Within their segregated areas the Coloureds and Indians could still have unqualified individual ownership tenure whereas the Africans lost this right under the Native (Urban Areas) Act of 1923 and its amendments. This Act was the counterpart in the urban areas and together with its own in-built influx control measures and the more stringent outright influx legislation introduced since the passing of the Natives (Abolition of Passes and Co-ordination of Documents) Act in 1952 have made it increasingly difficult for Africans to remain legally in urban areas.

In the area concerned with real and meaningful reforms in the laws governing the holding and utilization of land there has been no improvement but a rapid worsening in both the rural and urban areas as far as Blacks are concerned.

It is clear that the entire South African state machinery has its foundations firmly based on keeping things essentially as they are rather than abdicate its control and power in favour of ^{an} entirely new order. The indications appear to be that government has opted for a strengthening rather than a changing of the status quo.

FIKILE BAM
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