



The Morality of Land Reform

1. Introduction

The question of land reform in South Africa is articulated in the Constitution in very clear terms. The Preamble talks of South Africa as “our land”. This simple assertion opens a sense of relationship with this land as one that includes all. Thus, all the sections that follow seek to express different ways of reforming the past’s divided, unequal, and unjust relationships with something new and equitable. Legislation that has since followed, and most of the policy discourse around land, has been mainly about articulating the constitutional mandates that point, first of all, to the need to foster equitable access to land in the public interest (section 25(4)(a)) and, secondly, to the realisation of tenure security (section 25(6)).

But what seems glaringly missing is the question of the moral demand or rightness of not only changing land access and relationships, but of repairing the hurt, misery, brokenness, and trauma of a people often violently ripped from their land for generations. In a country trying to repair a most odious crime against humanity – which was based largely on land dispossession – why is the question of land seemingly a pragmatic discourse and not a moral discourse?

2. The Moral Question

It has often been said that the question of morality and land is a question of churches, and other faith communities, and their historical complicity in the land question. However, the role of the churches and other faith communities in the land question is an important but very different discourse to the one about the moral questions surrounding land and reform. Over the years, various statements and policy positions have been put forward by faith communities that address the moral questions around land. In 1990, 85 churches met for the National Conference of Church Leaders in

South Africa, and produced what became known as the Rustenburg Declaration.¹ The main purpose was to express not just contrition for the wrongs and sins of the past, but to call for action to repair those wrongs.

“We know that without genuine repentance and practical restitution we cannot appropriate God’s forgiveness and that without justice true reconciliation is impossible.” (para 2.4. of the Declaration)

The gathering articulated its declaration in the language of faith, but the underlying acceptance was that the demand for restitution was not simply based on a legal demand for justice, but also an underlying moral demand to right a wrong.

“Those of us who have perpetuated and benefited from apartheid.....We have allowed the state institutions to do our sinning for us.” (para 2.6.)

The churches went on to state, in part 5 of the declaration, that:

“Confession and forgiveness necessarily require restitution. Without it, a confession of guilt is incomplete. As a first step towards restitution, we call on the Government to return all land expropriated from relocated communities to its original owners.”

“We ask the interim liaison committee to set up a task force on land issues with a view to making church property available for those without land and identifying land expropriated by the Government to be restored to its original owners.”²

Whether one agrees with the declaration or not, it is clear that at this point in history, there was a

clear recognition of the moral imperative not just to acknowledge what had happened, but also that repair and restitution would be an integral part of that acceptance of guilt.

In 2012, in a document entitled *Catholic Church Vision for Land Reform in South Africa*, the Catholic Church pointed out that the question of land had become a “bitter terrain of struggle” worldwide and in South Africa.

*If a way to just land distribution and efficient land productivity is not found, not only is there a great danger of violent conflict erupting in our midst, but the food security of our nation and our region is threatened.*³

What is striking about this and many other positions taken by both the faith communities and the government in the early 1990s, is how the response to the question of land has become much more pragmatic since then, and how much less is said nowadays about the clear demand for justice.⁴ The churches then were prophetic in calling for the need for land reform, but no one seems to be dealing with the moral question anymore.

3. Pragmatism

The choice by government to be pragmatic in dealing with the South African context is not in itself surprising since the whole project of the ‘New South Africa’ is based on the idea of trying to incorporate the excluded majority into the existing social, economic, and political framework. The project has never adopted a revolutionary approach where the previous social and economic structures would be overthrown and replaced by totally new ones; nor has it been about a Nuremberg approach, which would demand that all those who had been party to this crime would be punished and that what had been taken would be returned to the victims. In fact, the values of the Truth Commission seem to have been a major influence, not only about how the country would deal with (some) crimes committed under Apartheid, but also about how to direct the pragmatic approach to land that encourages co-operation between the state, claimants, and land occupiers.⁵

4. Justice Denied?

The principle of justice, be it moral or legal, always demands that where something was unjustly acquired or taken away, it be returned or given back. In simple terms, if you steal my car while I am sleeping, or you hijack it, or you simply take it because it was parked on the side of a motorway with no one in sight, when I come and lay claim to it, I deserve it back. I am not required to buy it back, nor am I required to share it with the one who took it in the first place. Is this basic principle being denied in the question of land in South Africa?

5. To the Victor the Spoils!

Some have argued that, since some of the land was acquired fairly in war during colonial times, and that most of the land was empty anyway, then not only to the victor the spoils, and so “finders-keepers”, then those who won have right of ownership and those who lost the war lost the right to claim that land.⁶ This is the basic principle that has determined the borders of countries and communities for millennia.

This raises two problems. The first is that this principle has also been the cause of many international conflicts that have lasted for centuries, with perpetual wars and conflict going on unendingly. The 1899 intergovernmental treaty saw the formation of the Permanent Court of Arbitration (PCA) at The Hague, created to resolve these conflicts through mediation and arbitration, and by seeking to determine who the actual legal, moral and historical owners should be. Thus the idea that ‘to the victor - the spoils’ is being challenged by a new sense of ‘to the victim - justice’.

Secondly, if one were to insist that ‘to the victor - the spoils’, then those that lost the war have every incentive to go back to war and win back, violently, what was lost to them in war. Here again is a recipe for perpetual war and killings.

What has been clear in 20th century thinking, due to the immense destruction that followed the two great wars and many other conflicts, is that questions of justice, socio-economic conflicts, and moral disputes between peoples, should be resolved by other means besides war. Finally, what has also become the norm is that all peoples are deserving of justice, even if they themselves

are too weak, socially, economically or militarily, to demand justice, with the UN and other multilateral institutions taking what essentially is a moral position to protect the rights of all.⁷

6. Truth and Reconciliation

*"... a commission is a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation."*⁸

The late minister Dullah Omar made this statement reflecting the basic idea that the South African situation was not simply a legal or pragmatic one, but a moral question. The need was more than simply to change discriminatory laws; it was to respond morally to a crime.

However, some vital points were glaringly missing in the work of what subsequently became known as the Truth Commission, articulated by the Promotion of National Unity and Reconciliation Act 34 of 1995. Firstly, no attention seems to have been given to the need to repair the fracture that exists between the dispossessed African majority and the land and its history, its heritage, and its soul. Secondly, there was no reference to reconciling those who were dispossessed with their land. The Truth Commission seems to have focused mainly on the question of gross violations of human rights, especially as expressed through direct violence against the victims who appeared before the Commission.

While the Act provided for

*the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights;*⁹

it failed to look at land dispossession as an urgent and gross violation that needed the same kind of attention crimes such as death-squad murders, torture, and detention without trial. Thus, because the land question was not directly articulated as a gross violation, it has come to be treated as a historical event of moral neutrality that will eventually be reformed sometime in the distant future. But is this morally justifiable? Does the country's approach to the land question fulfil the demands of justice and, most crucially, the need for the restoration of the human and civil dignity of black South Africans?

7. The United Nations

The UN has taken the position that "land is not a mere commodity, but an essential element for the realization of many human rights."¹⁰ According to the UN High Commissioner for Human Rights' report, *Land and Human Rights: Standards and Applications*,

*While there is currently no explicit reference to a general human right to land under international human rights law, several international human rights instruments link land issues to the enjoyment of specific substantive human rights. References to land are made in relation to the right to food, equality between women and men, and the protection and assistance of internally displaced persons, as well as the rights of indigenous peoples and their relationship with their ancestral lands or territories.*¹¹

In other words, to deny people their land is to deny them their human rights. Though this discourse is articulated in the language of international law and human rights, it can be said to mean that the ability of a people to maintain their identity, their dignity, and their humanity, is closely tied to their land, and to deprive them of that land is to deprive them of that dignity, that identity, and that humanity.

In this country, when land dispossession took place, the relationship between the people and their ancestors, their sacred sites, and the spaces that defined who and what they are, was often brutally ripped apart. Thus, that dispossession was, and remains, an extreme violation of those rights that has lasted for decades, if not centuries. But, for some strange reason, South African legislation and policy articulation fails to speak of the land question in terms of the gross violation of people's rights.

8. Conclusion

During the 2013 centenary remembrance of the 1913 Natives Land Act, which heralded an extraordinary scale of land dispossession, many, including Parliament debating the matter, spoke in very moving ways about the viciousness of that Act and its subsequent impact on land ownership in South Africa. However, that talk has still not translated into a legislative and policy landscape that recognises the question of land reform as a

matter of moral concern, moral and legal justice, and which seeks to repair a situation of gross violation not just of the rights of a people, but of the people themselves. After the experience of the Truth and Reconciliation Commission and the recognition of the importance of truth in addressing the crimes of the past, why is that experience not being used to deal with the truth regarding issues around land?

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References

¹ http://kerkargief.co.za/doks/bely/DF_Rustenburg.pdf

² Ibid

³ <http://www.sacbc.org.za/wp-content/uploads/2012/01/Catholic-Church-Vision-for-Land-Reform-in-South-Africa-Text-for-printing.pdf>

⁴ Pg. 490-493 http://wiredspace.wits.ac.za/bitstream/handle/10539/275/11_appendix6.pdf

⁵ The Truth and reconciliation Commission has been criticised by some for what they see as a very narrow approach to the truth, and thus what came out was a “*compromised truth*”.

<http://www.sahistory.org.za/article/truth-and-reconciliation-commission-trc-1995>

⁶ <http://www.sahistory.org.za/article/empty-land-myth>

⁷ Note that this does not always happen and is an ongoing challenge; as the Palestinian conflict clearly shows, in some contexts ‘might is right’.

⁸ <http://www.justice.gov.za/Trc/>

⁹ <http://www.justice.gov.za/legislation/acts/1995-034.pdf>

¹⁰ http://www.ohchr.org/Documents/Publications/Land_HR-StandardsApplications.pdf

¹¹ Ibid. pg. 7

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