

Is Land a Human Rights Issue

APPROACHING LAND REFORM IN SOUTH AFRICA

By

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International human rights conventions referred to in the essay¹:

1. Universal Declaration of Human Rights, 1948 (UDHR)
2. International Covenant on Economic, Social and Cultural Rights, 1966 (ESCR)
3. International Covenant on Civil and Political Rights, 1966 (CPR)
4. The African Charter on Human and Peoples' Rights, no date (ACHPR)
5. International Convention on the Elimination of All Forms of Racial Discrimination, 1966
6. Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW)

¹ These have been ratified by South Africa, except the *ESCR, 1966* (UNDP, *Human Development Report 2000*, 2000: 51, Status as of 16 February 2000)

PREFACE

This essay is submitted to The *Ethics Program of the Norwegian Research Council* in partial fulfilment of the PhD Course in “*Human rights and conflict of norms*”, offered in co-operation with *The Norwegian Institute of Human Rights* and the *Department of Public and International Law, Faculty of Law, University of Oslo* (<http://www.uio.no/etikkprogrammet/>). I have written the essay as part of a three month “PhD planning project” carried out under a cooperation programme between the Agricultural University of Norway and the Programme for Land and Agrarian Studies (PLAAS), University of Western Cape, South Africa (*Human rights, governance and land reform in South Africa*).

The essay is related to a PhD research proposal, *Human rights and land tenure reform in South Africa: A study of policy, discourses and stakeholders*. It involves a study of rights and entitlement processes in governance and use of commons in Namaqualand District of Northern Cape Province.

The essay is a ‘first approach’ to land as a human rights issue. I make it by setting the scene in Chapter 1 (project area and South African policy); discussing the land and human rights interface including reviewing some international human rights instruments in Chapter 2; and discussing state-centric and context-oriented perspectives in Chapter 3. For the reader who would like to have a brief overview of the wider research project, and outside the essay, I provide an attachment with a project summary and some additional information.

Acknowledgements

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Thanks to Tor Arve Benjaminsen, my supervisor, and Hans Sevatdal for discussions, but due to travel and constraints on time they have not had a chance to give inputs to this essay. I am also grateful to Programme for Land and Agrarian Studies (PLAAS), University of Western Cape for the numerous ways in which it has facilitated my entering into the complex field of South African land reform. Again, there was no chance to discuss this essay. So, it rests on me.

I would like to thank The Ethics Program for an excellent course, Tore Lindholm for energetic and inspiring leadership and the lecturers for high quality contributions. I particularly liked the commitment and the plural perspectives on human rights. I wanted all my colleagues to attend this too, and hope we shall get more chances!?

Thanks to Anne Hellum for providing me with some central literature, and for accepting the task as reviewer in the midst of travel and other commitments.

I should also thank for the inspirational advice from a fellow course participant who reminded me that, *“Of course you must remember that land is not a human right, I just think it is important that you do not fall into that trap”*.

I'll try, but accept all responsibility, also for the mistakes and cloudy points of this essay.

Ås, November 2000

Poul Wisborg

ENTRY POINTS: QUOTES

“If a state is governed by the principles of reason, poverty and misery are subjects of shame; if a state is not governed by the principles of reason, riches and honours are the subjects of shame”.

Confucius

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in the spirit of brotherhood.”

1.1.1.1 Universal Declaration of Human Rights, 1948, Article 1

“Must a citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience, then? I think that we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have the right to assume, is to do at any time what I think is right. It is truly enough said that a corporation has no conscience; but a corporation of conscientious men is a corporation with a conscience.”

Henry David Thoreau, *Civil disobedience*, 1854

“For I know that the Namaqua are men, men of men, powerful, generous, blessed with great rulers. This morning’s unhappy events will be passed over, they are a dream, they have not happened, they are forgotten. Keep what you have taken. But let us resolve henceforth to behave like men, to respect each other’s property. What is mine is mine – my cattle, my wagon, my goods. What is yours is yours – your cattle, your women, your villages. We will respect what is yours and you will respect what is mine.”

The Narrative of Jacobus Coetzee, by J. M. Coetzee, in *Dusklands*, 1974

“I feel we are treating the Coloureds quite sensibly and wisely. That is to say, more or less as an appendix of the European population”.

Jan Smuts, 1947, Prime Minister of South Africa, drafter of the Preamble of the United Nations Charter.

“The unnecessary and untold suffering that apartheid inflicted on many of God’s children was not because a potentially good policy went awry, or that black family life was systematically undermined by the migratory labour system because of a ‘mistake’. They flowed from a basic premise that those at the receiving end of policy were not quite as human as those who made the laws for them, pushing them beyond their frontiers, into homelands or locations, into inferior schools and hospitals, unskilled jobs and segregated teams”

Desmond Tutu, Foreword, in: *South Africa. A modern history*, Davenport and Saunders, 2000.

Is Land a Human Rights Issue? Approaching Land Reform in South Africa

Poul Wisborg

Abstract

This essay briefly explores South African post-apartheid land reform as a human rights issue. It suggests that land reform has an ethically, politically and strategically important interface with international human rights. This refers both to the context-dependent livelihood role of land and to context-independent principles regarding land ownership and governance, involving several types of rights (allocation, protection, provision, procedure and development). It discusses the merit and limitation of a state-centric perspective on human rights and development. This places “human rights” in a social, contested process of rights- and land-based development. A state-centric human rights system has an important role in this process, but rights-based development requires a broader vision of how people realize rights in social dynamics. The work by Amartya Sen is mentioned as a source of guidance for policy and research on real-world entitlements and capabilities.

2. INTRODUCTION

1.1 Leliefontein, Namaqualand

Leliefontein is a “former coloured reserve” where some six thousand people live in ten villages, making a living from the land, but primarily from work and remittances from outside (Rohde, Benjaminsen and Hoffman, 2000). People consider five rights to land: *Residential, grazing, sowing, irrigation, and business rights* (Archer, 1993). The “old commonage” is about 192,000 ha, and recently four government purchased ‘white farms’ have added 29,000 ha “new commonage (Wisborg, Field notes, 2000). There are informal and practical limitations on the real entitlement, as when communities have taken over farms with no water infrastructure. Governance and management are contested. One farmer and local leader feared that people would continue using ‘the old system’ of ‘free access’. Another said that he and most people thought that, it “should be like in the past”, with equal access for all community members, grazing their goats on the pastures.

Namaqualand is one of six districts in Northern Cape Province. It covers an area of about 48,000 km² and has a population of about 77,000, of which a majority (81%) are ‘coloured’ people of mixed *Khoisan* descent. Six “*Coloured Rural Reserves*’ make up about twenty seven percent of the area, or 1.2 million hectares. About 400 commercial farmers, almost exclusively ‘white’, own about half the land at an average farm size of

11,650 ha, while more than four times as many ‘coloured’ households (about 1,750) use the communal land (ibid.). “*Women in Namaqualand are severely marginalized in terms of land tenure*” as they gain rights mainly through marriage, realising them through their husband or in widowhood (Archer, 1993, 20).

Text box 1: Land use in Namaqualand

Land use	Percent
Commercial farmland	53 %
Communal land	27 %
State land	8 %
Mining company land	7 %
Conservation areas	5 %
Total (48,000 km ²)	100 %

Source: Rohde, Benjaminsen and Hoffman, 2000

The Namaqualand reserves were created as per ‘*Tickets of Occupation*’ or ‘*Certificates of Reservation*’ issued in the 19th and 20th century, further defined in the *Mission Stations and Communal Reserves Act* in 1909, and made part of the legal apartheid structure through the *Coloured Rural Areas Act* of 1963, amended as per *Act 9*, 1987. Current legal reform is expressed in the *Transformation of Certain Rural Areas Act 94* of 1998 (implementation is pending local government elections on 5 December 2000).

2.2 South African policy change

During apartheid, racial and spatial divides were mutually reinforcing (ref. quote by Desmond Tutu, p. iii). Land and space were expressions and instruments of exclusive notions of human dignity. Being an ‘appendix of the European population’, in General Smuts’ words (iii), was an expression of bestowed honour. The *Constitution of the Republic of South Africa, 1996* enshrines international human rights principles, and moves beyond by being specific on rights to ‘environment’ and ‘land’. Major obligations (*Bill of Rights*, §25) are *land restitution* (to give back property to persons or communities disposed of property as a result of discriminatory laws or practices, or equivalent redress); *land redistribution* (to enable citizens to gain access to land on equitable basis) and *land tenure reform* (to provide legally secure tenure to people or communities whose tenure is insecure as a result of discriminatory laws and practices). The *White Paper on Land Policy 1997* laid down further principles by recognising underlying land-rights of individuals and groups living on land which is nominally state-owned; by holding that land-rights are

vested in people, rather than institutions such as tribal or other local authorities; and by insisting that individual rights of members must be respected, including democratic decision-making and non-discrimination. Linked to a number of factors, land reform has been delayed, and policy has changed after a new minister, Thoko Didiza, took office in mid-1999. The impact of land reform on real gender equality is poor (Ibsen, 2000; Hvidsten, 2000). The land reform process is widely debated in the press². It is subject to internal and external pressures, not least after violent farm occupations in Zimbabwe; violence is a part of the reality³.

3. IS 'LAND' A HUMAN RIGHTS ISSUE?

3.1 No!

'Land' has an unclear status with respect to human rights. Article 17 of the UDHR provides a human rights basis for defending existing individual and collective property⁴. Property is not mentioned in the 1966 Covenants (ESCR/CPR), probably because of being ideologically contested at the time (Bugge, 1998). Ownership to land is perhaps ruled out by the universality criterion, which links human rights to inviolable human dignity irrespective of time and place (ref. Cranston, 1973: 36, quoted in Hellum, 1999). UDHR (§ 26) about the rights to a standard of living holds food as a 'universal' right. It is a necessary requirement for human survival and welfare. Land is only a means in certain contexts. For example in highly urbanised societies, it would be unreasonable to regard land as a basic right. I sum up some viewpoints in the text box below.

Text box 2: Land. Why not a 'human right'?

1. Not essentially linked to human dignity.
2. Not mentioned in human rights instruments
3. Not necessary means of individual welfare.
4. Not a freedom, but a means/asset, among many.
5. Not applicable to every socio-economic context.

² E.g. Ben Cousins: *Zim Crisis: Our wake up call*, Mail and Guardian, 05.05.2000. <http://www.mg.co.za/mg>

³ Beukes, Hans: "Apartheid – som støpt i betong" (*Apartheid – as if moulded in concrete*), *Aftenposten*, 23.11.2000, quotes the figures: 600 politically motivated attacks on farms, 288 injured and 88 farmers killed from January to August 2000.

⁴ "Everyone has the right to own property alone as well as in association with others" (§ 17,1); "No one shall be

3.2 Context-dependence discussed

Overlooking the land issue may, however be seen as an ideologically loaded position. The contextual assessment of the right may be turned around to justify that a ‘right to land’ is central, referring to the empirical role in rural people’s livelihood⁵. Studies of human rights and gender are concerned with the relationship between universal doctrines and local practices and values (Cook, 1994; Hellum, 1998). The values and norms of the human rights instruments are seen as generally valid, while the application and implementation must take the national or local situation into account. CEDAW (§14) requires state parties to “...take into account the particular problems faced by rural women”. A contextualised reading emphasizing rights to land-resources has increasing support in ‘soft law’ (*Agenda 21* and *Beijing Platform of Action*). The principle of non-discrimination applies to land and agricultural development and commits States Parties to ensure to rural women:

To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes (CEDAW, §14.2, g, emphasis added)

Thus, in addition to a context-based understanding of land as ‘human rights issue’, principles that apply to land ownership and governance are not context-dependent. I therefore, distinguish between context-dependent and non-context dependent rights, as a continuum rather than a dichotomy.

3.3 Evolution and types of rights

The ‘land’ – ‘human rights’ interface is dynamic and evolving. The international conventions represent ‘three generations of human rights’, from civil-political, to socio-economic and environmental-developmental (Hellum and Derman, 2000). Integrating human rights and development is particularly strong in ESCR⁶ and CEDAW. ESCR places an obligation on the State Parties to engage in "international assistance and cooperation, especially economic and technical"

arbitrarily deprived of his property” (§ 17,2).

⁵ Sally Falk Moore (1998): “As far as the logic of a rural agricultural population of smallholders is concerned, if you do not have a piece of productive land you do not have food and your family may die”.

⁶ Not ratified by South Africa, but the government emphasises integrating development and human rights: “The delivery of civil and political rights are not sufficient, and this is especially so in South Africa. Economic, social and cultural rights are equally enshrined as basic human rights principles in our bill of fundamental rights.” (Gillwald, 14.08.2000).

(§2.1). The ECSR confirms the rights of everybody to an adequate standard of living (§ 11) and to be free from hunger (§13.1), and places an obligation on States Parties to realize these by, “..developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources” (*ECSR, §13.2*).

Critics point at the danger of “watering down” human rights concerns by a broad, non-committing inclusion of all good intentions. Arguments⁷ are that, a) they are not clear and operational; b) state obligations are limited in an unclear way by the formulation “*to the maximum of its available resources*” (ESCR, §2.1); and c) they are costly. These points are relevant to the South Africa debate, but open to wide interpretations and professional or ideological biases. What is not ‘clear and operational’ in legal terms, could be so in terms of development objectives and public services. There are procedures for assessing government expenditure and benefit/costs comparable to legal consideration of “reasonability”. Human rights instruments have expanded both the scope (to development) and the means (beyond legislation). I suggest they now include several *types of rights*: Rights of *allocation, protection, procedure, provision, and development*.

3.4 Yes!

Reviewing Appendix 1:

Why and how ‘land’ is a human rights **ISSUE**, I conclude that land is a ‘human rights issue’. The formulation of land as a ‘human rights issue’, as opposed to a ‘human right,’ may even be too diplomatic, and biased against rural people. In important contexts and for large groups, land is a human right, in the sense that landlessness amounts to a violation of their welfare rights as per the UDHR and ESCR. The allocative rights and duties are contextual (apply if you depend on land-based resources for your livelihood). South Africa has sharpened its commitment to provide equitable access to natural resources as general allocative duty. Further, universal rights to non-discrimination and remedy for past injustice apply to governance and ownership. I remain with a distinction regarding ‘allocative rights’, between a universal right to redress for loss of land due to discrimination and a context-dependent right to land based on its role in welfare and livelihood.

Important 'land-human rights' issues are:

- i) The conflict between the protection of established property rights and the livelihood and development rights⁸
- ii) The tension between the demands for (rapid) change versus the respect for the procedural rights provided by human rights.
- iii) Principles of democratic participation and management versus local leadership, and their possible human rights protection (CPR, §27).
- iv) Non-discrimination and real equality of women (ref. Ibsen, 2000⁹; Hvidsten, 2000);
- v) Defining the rights and duties of public, civil sector, and international *provision*.

To expose the conclusion, I suggest *ten effective ways to violate human rights with respect to land and land governance* (Text box 3).

Text box 3: Ways to violate human rights regarding land and land governance

1. To not take appropriate steps to remedy past injustice and violation of human rights (UDHR §8)
2. To not take appropriate steps to ensure and enhance land-based livelihoods and welfare (UDHR §25; ESCR, §11.2)
3. To not implement agrarian and land reform where it can reasonably be assessed to lead to more efficient¹⁰ use of natural resources (ECSR, §13.2)
4. To perform, endorse, accept or refrain from prosecuting violation of private property other than by procedures laid down in law, including international human rights (UDHR, § 17.2; CRSA, §25.3)
5. To perform, endorse, accept or refrain from prosecuting violations of the rights of privacy, home and security (UDHR §3, UDHR §12, CPR §17).
6. To discriminate against women in land reform. (UDHR §2; CEDAW §1)
7. To refrain from taking active measures to combat discrimination against women and ensure real gender equality in access to, ownership, management and governance of land (CEDAW §§ 3, 5, 14, 14.2)
8. To disregard requirements for non-discriminatory and democratic participation in land governance (UDHR §2, UDHR §21.1), e.g. by letting the right of 'ethnic groups' to 'practice their own culture' prevail over those principles. (CPR, §27)
9. To refrain from clarifying, acknowledging and registering local individual, family and community use rights as a basis for present and future protection of property rights (UDHR §17.1)

⁷ All mentioned by Gro Nystuen, Oslo, 13.11.2000.

⁸ As stressed by Hellum and Derman (2000) regarding the Zimbabwean case.

⁹ "As long as women's access to land in their own rights is a question of negotiation among male tribal authorities who are devoted to Africanism" (Ibsen, 2000: 13)

¹⁰ In livelihood and human capability terms, I would argue.

¹¹ Recognizing, also, that the right to remedy for past injustice and the commitment to development place obligations at a higher level than the single national-state.

10. On the part of all States Parties¹¹, to refrain from engaging in international assistance and cooperation in support of welfare and livelihood objectives (ESCR, §2.1, §11).

4. DISCUSSING HUMAN RIGHTS PERSPECTIVES

4.1 State-centric: a formal system of legal rights and obligations

A state-centric perspective¹² defines human rights as a system of legal norms stating i) obligations and rights between states and ii) obligations and rights between states and people under their jurisdiction. It holds national states as the providers and violators of human rights. Adoption of human rights is based on autonomy of and equality between states, while ‘vertical’ development’ of rules as based on authority of the state and compliance of subjects, backed by centrally enforced sanctions. Implicit here is what Hellum refers to as Austin’s jurisprudence and a view of law as a “*more or less unified system of rules, which are enforced through the state-court machinery*” (Hellum, 2000: 44, referring to Aubert, 1989). A state-centric perspective may, but is not necessarily, linked with a focus on negative freedoms¹³. The attraction of the perspective appears to be its precision and clarity about state responsibility and accountability as elaborated by Cook (1994: 229).

Critical comments to a narrow state-centric perspective are that it leaves little room for moral responsibility; has a narrow conception of development; is unrealistic in assuming equality between states; and exaggerates the penetration and power of the state and state-backed enforcement through the legal system. In its Article 1, “*All human beings.. [...] should act towards one another in the spirit of brotherhood*”, UDHR places a moral obligation on every human being, opening a moral space for ‘human agency’ and an understanding that a range of individual and organisational actors realize human rights. Thoreau (iii) may neglect the social order that we produce together, but he is right that it is neither the state nor the communities that have a conscience, but the men and women who move them. We violate human rights, while some violations, in a more precise formulation, are “*imputable to a state party*” (Cook, 1994: 229, 232). The struggle against

¹² Gro Nystuen, Lecture, Oslo, 13.11.2000

¹³ The first part of the dual definition of the human rights idea that “*certain things ought not to be done to any human being and certain other things ought to be done for every human being*” (Perry, 1998: 13)

apartheid could be fought on moral grounds while the ruling party made an ethical-legal mess by accepting human rights obligations, but translating them into contradictory domestic law and practice (Black, 1999). There is a plural ground for defending human rights, as argued by An'naim (1990) when advocating a liberal, public law built on Islam, and by Lindholm (1999). This *places rather than replaces* the state-centric and legalist approach, namely within the wider perspective of human values and discourses. Human rights reject ethical relativism as a moral position (Lindholm, 1999: 7; discussed in Hellum, 1998) and emphasize *systematic public grounding* of values in codified texts. This helps us confront the moral freewheeling of individuals and states. The *voor-trekker* Jacobus Coetzee (iii), makes his defence of “rights” on the background of engaging in the practice and discourse of genocide of the *Khoisan*, and with a mere, outward instrumentality, to defend himself in a situation where the balance of power is shifting and he is threatened by violence. There was no, or only a poorly institutionalised, legal framework to challenge Jacobus Coetzee's sickening practice and reasoning. Similarly, when General Smuts contributed to codifying the view of humans as equal in dignity and rights in the UN Charter, he found it compatible with South Africa's “*policy of racial gradualism that respected local ways of life in different (biotic) communities*” (Anker, 1999: 175). However, Mahatma Gandhi later used the preamble to challenge discrimination of Asians in South Africa (ibid: 213). Human rights instruments also became useful for the anti-apartheid movement (Black, 1999: 80)¹⁴.

So, the issue is rather to perceive the role of the state, legislation and human rights within social change. James C. Scott (1998) has explored the importance of centralist readings of landscapes in *Seeing like a state. How certain schemes to improve the human condition have failed*. Analysing some of the grandest schemes and most tragic disasters, he provides evidence that centralized, radical land reform is exceedingly difficult and prone to backlash. In collectivisation in Soviet Union, Tanzania and Ethiopia he finds a common denominator: states construing and trying to impose simplified readings on “*exceptionally complex, illegible, and local social practices, such as land tenure customs*” (ibid: 2). The ‘great utopian social engineering schemes’ have in common four elements, “all...necessary

¹⁴ Conventions on the Elimination of All Forms of Racial Discrimination (1965) and The Suppression and Punishment of the Crime of Apartheid (1973).

for a full fledged disaster” (ibid: 4-6):

- 1) Administrative ordering and simplified readings,
- 2) High modernist ideology, an uncritical faith in simplifying science
- 3) Authoritarian states using coercive power to ‘bring... high modernist designs into being’, and
- 4) A prostrate civil society that lacks the capacity to resist centralist plans.

Failure stems from the fact that planned social order always ignores essential features of real, functioning social order, illustrated by the *work-to-rule strike* showing

“...that any production process depends on a host of informal practices and improvisations that could never be codified. The formal scheme was parasitic on informal processes that, alone, it could not create or maintain. To the degree that the formal scheme made no allowance for these processes or actually suppressed them, it failed both its intended beneficiaries and ultimately its designers as well” (ibid: 6).

To what extent do the human rights discourse, ‘rights-based development’ and land reform in (South) Africa amount to grand schemes in Scott’s sense? And do they contain the ingredients of disaster? I think they often suffer from simplified readings of reality and perceptions of progress. Sally Falk Moore (1998: 44) challenges the top-down and abstract human rights approach to land tenure and makes a plea for better local grounding. Her life stories from Tanzania and the Sahel, show how people in practice, guided by local knowledge, practical needs and specific settings, transform the meanings and intentions of legislation, property rights etc. Without approaching political mobilisation or organised resistance, *“they undo the plans of government as effectively as if they had been”* (ibid: 37). She draws on anthropological common sense that practice, meanings and rules evolve together (ref. Peters, 2000). Moore contrasts the right of what ‘should be’ with the rights of ‘what is’. Strangers may have been granted land and kept it over time, but are they rights? *“Was there ever such a right in the rule minded, legal, human rights sense of today?”* Similarly, Cousins (2000) discusses whether it is possible to legislate land rights and design administrative systems for the “complex, variable and fluid” land holding systems of many African communities. Land tenure reform has perhaps had limited impact in the past exactly because control and access is the outcome of other processes.

Human rights political philosophy confronts the authoritarian state. Only with a state centric perspective combined with all-encompassing ‘multi-generation’ human rights and a neglect of civil society actors, are we approaching the totalitarian. A ‘state-centric’ perspective is consistent with ‘first generation’ civil and political rights, scope and objectives: then it does not imply an over-ambitious state, but conforms to the classical sources of human rights¹⁵. From a state-centric and legalist perspective, the expanded second generation scope and objectives can be either i) rejected as imprecise and not possible to operationalize in legislation, or ii) adopted, but revised in terms of the role of the state. That means seeing it as one actor among many in a broader process of change. If we both accepted the broader scope of second and third generation human rights, and retained the idea of the state as the sole violator and deliverer of human rights, we would construe and legitimise an expansionist state that is not supported by development experience (Scott, 1998; Sen, 1999). The historic irony could be that *what started as individuals and groups protecting their freedoms and integrity against arbitrary government became the ideology of an interventionist and self-centred state with totalitarian commitments adopted or placed upon it*. Land reform, as social change in the micro-relations between individuals and resources, is a good example of the problems states face. A state-centric and legalist definition of the *reality*, the *process of change* and the *ends* will be self-defeating (e.g. Ibsen, 2000, on gender equality in the face of patriarchal social relations). The state must be conceived in a way that acknowledges the plural nature of the process - with many actors, many values, many knowledges, many strategies and many outputs. Yet, it does not need to bring all those under its wings; in Namaqualand a civil organisation (*Surplus People Project*, SPP) is a major actor in creating awareness about, advocating and researching people’s rights in land reform.

4.2 Context-oriented: Discourses and informal processes

Seeing like a state, one may overlook people’s engagement in discourses about human rights and the motivation in *having talked about and understood*. It may also loose touch with untenable interpretations (such as farm invaders referring to *past* human rights violations, but forgetting human rights-based procedure *today*). In land reform, a state-

¹⁵ French and American declarations of independence, and the early nineteenth century European constitutions, including the Norwegian of 1814.

centric perspective may usefully be complemented by a conception of discourses across normative divides (Lindholm, 1999). Land reform *requires* discourse because,

- a) The constitutional and other ‘rights’ are contested between levels and actors (e.g. conflict with traditional leaders)
- b) Because the moral and political grounding is often vague or represents incompatible or non-prioritised goals (e.g., ‘social reconciliation’ and ‘economic development’)
- c) ‘Rights’ are insufficiently translated into development strategy (linked to a and b).

The enabling state needs to reach out to actors in development in more ways than through its authority-based legal system, in order to stimulate and learn from the stepwise and grounded realisation of human rights. Studies of different legal systems (Hellum, 1998, 2000; Thomsen, 2000) show to what considerable extent decentralised court practice is in itself part of a discourse of debating and gradually incorporating or undermining new perspectives. In *‘The power of human rights – international norms and domestic change’*, the authors analyse a broad spectrum of actors realising human rights (Risse, Ropp and Sikkink, 1999). They distinguish between:

“..three types of socialization processes which are necessary for enduring change in the human rights area:

- 1. processes of adaptation and strategic bargaining*
- 2. processes of moral consciousness raising, “shaming”, argumentation, dialogue and persuasion;*
- 3. processes of institutionalisation and habitualization” (ibid:11)*

Discourses contribute to forming “coalitions” through “argumentative consensus” (ibid. 13, 14). Interests, powered arguments, stages of denial, tactical concessions, “talking the talk” and making real commitments are part of the game. Having analysed people’s discourses on land rights, one may return to the list of *human rights – land* issues discussed in Chapter 2 and assess the fit.

5. CONCLUDING REMARKS

The main points of this essay are:

1. Land is a human rights issue, particularly in the context of racially based and extremely skewed distribution. States have, inter alia, committed themselves to
 - i) remedying past injustice
 - ii) securing welfare and livelihood objectives that, within certain contexts, can only be met access to land
 - iii) protecting existing property rights
 - iv) ensuring real quality of women
 - v) respecting human rights based procedures in redistribution and land tenure reform.
2. The South African government has accepted and sharpened such obligations in its *Constitution* and carries wide obligations of *allocation, protection, provision, procedure and development*.
3. Land reform outcomes are determined by interaction with highly complex and varied local settings, and occur though, among others, discursive practices such as public debate, advocacy, court practice, research and extension.

David Black has interpreted South Africa's constitution as more concerned with civil-political than economic rights¹⁶, reducing the state's means of dealing with the socio-economic legacy of apartheid (Black, in Risse, Ropp and Sikkink, 1999: 103-105). I think there has been a shift of emphasis from civil-political to economic-livelihood oriented rights. The pressure from below for economic benefits is growing, and linked to the Zimbabwean crisis, some of the international emphasis has shifted from political to economic development (e.g. World Bank/IMF visit 6.11.00, Daily Mail and Guardian). The new Minister of Agriculture emphasizes economic impact through nurturing the "emergent black commercial farmer". In Namaqualand, too, there are black farmers who would like to 'emerge', and who are re-interpreting their rights from communal to individual. But there are also leaders who say, "*we would all like to be commercial farmers, it is just not possible*". National controversy is not about the importance of 'second generation' rights, but about target group and strategy. Who is the right-holder, the emerging farmer or the average smallholder? And how to assist him and her? 'Human rights' are a way of thinking about who should be the focal point in land reform, but they

¹⁶ "The ANC compromised on the principles that would guide the writing of a new constitution (including the exclusion of most 'second generation' social and economic rights)"

leave room for a political choice and practical strategies, without which they are not very useful in Sally Falk Moore's words (1998: 33).

The *'Fast Track'* approach to land reform in Zimbabwe exemplifies the integrated violation of civil-political and economic-livelihoods human rights (Hellum and Derman, 2000). It is land reform as a political project, isolated from human rights, legal concerns and socio-economic consequences. Disregarding procedural requirements, groups resorting to violence and *go-grab-it*-policies violate the rights and livelihoods of farm workers, women and children. While it is difficult to *'balance individual and social justice within an integrated human rights framework'* (Hellum and Derman, 2000), it is quite feasible to forego both outside the human rights framework. In an interpretation of Amartya Sen, Shanmugaratnam (2000) concludes that,

The paradigmatic significance of the capability approach greatly lies in the linkages it establishes between freedoms as both means and ends of development Expansion of the economy is not accorded a more privileged position at the expense of political rights or the entitlements of the poor. The existence of political freedoms can contribute positively to economic growth and the latter does not make sense without the widest possible participation of the people. (6)

Sen's interpretation of *Development as Freedom* (1999) insists on the unity of political and economic goals. South Africans have many *small negotiated revolutions* yet to carry out on the ground. 'Human rights' provide ideas, norms and rules that are not the least important by their emphasis on procedure. Rights to land are constructed in discursive practices and *work* by shaping local entitlements and capabilities. In land reform, the criterion for assessing 'human rights' is whether they help people shaping legislation, discourses and practice to make entitlement processes more effective. They do so if the rights and issues raised are relevant to what people at the local level, say, do and think. That, then, is the question. Or one of them.

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APPENDIX 1:

WHY AND HOW ‘LAND’ IS A HUMAN RIGHTS ISSUE

Rights^{2, 3}	Context independent¹	Context-dependent
<i>Rights of allocation (to ‘own land’, ‘get land’)</i>	<p>Remedy for acts violating fundamental rights; (UDHR, §8, CPR, §2.3, a); tenure security, redistribution and reconstitution or comparable redress (CRSA, §25.5, 6, 7)</p>	<ul style="list-style-type: none"> • A ‘derivative’, context-dependent right following from the rights to life, liberty and security of person” (UDHR, §3) “just and favourable remuneration” for work (UDHR, §23.3), and the right to welfare, food, health etc. (UDHR §25); the “fundamental right of everyone to be free from hunger” (ESCR, §11.2) • Conditions which enable citizens to gain access to land on an equitable basis (CRSA, §25.5)
<i>Rights of protection</i>	<p>Property</p> <ul style="list-style-type: none"> • Right to own property individually or in association with others (UDHR, § 17.1) • Existing property patterns protected against arbitrary violation (UDHR, § 17.2; CRSA, §25.3) • Equal rights of women (CEDAW, §16.1, h) <p>Against unlawful attacks on family, home, integrity (UDHR § 12; CPR §17)</p> <p>Non-discrimination</p> <ul style="list-style-type: none"> • Principle of non-discrimination on the basis of race, colour, sex, religion etc (UDHR, §2; CEDAW, §1) • Principle of non-discrimination of women, including <u>equal treatment in land and agrarian reform</u> as well as in land resettlement schemes (CEDAW, §14.1) • Equal rights during marriage and its dissolution (inheritance) (CEDAW, § 16); • Rights to a social order protecting rights and freedoms (UDHR, §28) <p>Movement Right to freedom of movement and residence (UDHR, §13.1; CEDAW §15.4)</p> <p>Freedom of minorities: freedom of ethnic, religious or linguistic groups to practice their own culture (CPR, §27)</p>	<ul style="list-style-type: none"> • Rights to recognition of local property and use rights in so far as consistent with human rights and constitutional principles, with the basis in (UDHR, § 17.2; CRSA, §25.3, CPR, §27)

Rights²	Context independent¹	Context-dependent
<i>Rights of procedure</i>	<ul style="list-style-type: none"> • Equality before the law (UDHR, §7; CEDAW §15)) • Remedy for acts violating fundamental rights (UDHR, §8, CPR, §2.3, a) • Fair trial (UDHR, §10) • Participation in governance (UDHR §21.1) • The rights to information (UDHR, § 19; CPR § 19) 	<ul style="list-style-type: none"> • Recognition of local practices, customary law in so far as consistent with human rights and constitutional principles (CPR, §27)
<i>Rights of provision</i>	<ul style="list-style-type: none"> • Technical and professional education (UDHR, § 26.1); equal rights to vocational training (CEDAW, §10, a) • Equal access to public service (CPR, §25, c; CEDAW, §) 	<ul style="list-style-type: none"> • To positive steps to combat real inequality, particular emphasis on women in rural areas (CEDAW, §§3, 5, 14, 14.2) • Access to agricultural credit and loans, marketing facilities, appropriate technology (CEDAW §14.2), other credit (§13.1) • Permitted positive discrimination of women or other groups where they are in a weaker position (CEDAW, §4.1)
<i>Rights of development</i>	<p>People's rights</p> <ul style="list-style-type: none"> • Rights to self-determination, free disposal of natural wealth and resources, and protection against deprivation of the means of subsistence (ESCR and CPR, § 1.2) 	<p>State parties commitment to:</p> <ul style="list-style-type: none"> • International assistance and cooperation (ECSR, §2.1, §11) • Agrarian reform for efficient utilization of natural resources (ECSR, §13.2)

1. Note that the difference is relative and represents a continuum rather than a dichotomy
2. Note that I do not try to be exhaustive in terms of the conventions mentioned here or on page vi) (UDHR: Universal Declaration. CEDAW: Women's Convention. CPR: Covenant of Civil and Political Rights. ESCR: Covenant of Economic, Social and Cultural Rights. CRSA: Constitution of the Republic of South Africa)
3. Although I approach issues through international human rights instruments and debate, I do not assume, *a priori*, that they do or should define the human rights agenda in South Africa. They are rather a basis for asking questions and assessing the dynamic interpretation and use of 'human rights' claims in social struggle.