

A BLAST FROM THE PAST: A REFLECTION OF INDIGENOUS LAND OWNERS RIGHTS FROM A PROCEDURALIST PERSPECTIVE

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ABSTRACT

This article examines the legislation of the apartheid era. It illustrates the unlawful land dispossession suffered by indigenous people of South Africa. To remedy the injustices of the past, the courts have recognised indigenous laws to ensure that retribution and restoration of rights occur to address the atrocities and consequences of forceful land dispossession, prior to democracy. The methodology utilised is a desktop study. The results of the study illustrates the historical disadvantages of indigenous land owners and the role of legislation to address it. The discussion concerning land rights of indigenous land owners aims to illustrate the fact that although there is progression of the realisation of land rights, there are areas of improvement within a procedural policy and legislative framework. This article addresses the blast of the past apartheid laws and the progressive changes to the current laws to protect indigenous land owners rights from a proceduralist perspective.

Keywords: Eviction, indigenous, land rights, dispossession, proceduralist perspective.

INTRODUCTION

In the pre-colonial era of South Africa, there is evidence suggesting that there were various indigenous tribes that inhabited different territories of South Africa.¹ The indigenous people and their territories were governed by indigenous law, customs and practices.² During this period, law was communicated orally and not written.³ The possession and acquisition of territory resembled power for some tribes with some being more powerful than others. This resulted in conflict as tribes fought for the acquisition of land. The conflict that arose from the power struggles in the acquisition and possession of land was not only relevant to this period, but also during and after colonisation. It is necessary to briefly surmise these periods for an understanding of the present day status quo of the struggle for the land of indigenous people.

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- 1 Seroto, J. Indigenous Education During the Pre-Colonial Period in Southern Africa. *Indilinga: African Journal of Indigenous Knowledge Systems*, 10(1): 78.
 - 2 Buthelezi, N.N Indigenous Knowledge Systems and Agricultural Rural Development in South Africa: Past and Present Perspectives. *Indilinga: African Journal of Indigenous Knowledge Systems*, 13(2): 234-235.
 - 3 Seroto, J. Indigenous Education During the Pre-Colonial Period in Southern Africa. *Indilinga: African Journal of Indigenous Knowledge Systems*, 10(1): 77-78.

During the pre-colonial era there were tribal wars fighting for power. This occurrence was carried out by the Zulu tribe in their quest for dominance over territory and other tribes. For nomadic tribes such as the San and Khoe, land was a necessary resource that was respected for a transient period of time. These circumstances quickly changed when the colonisers reached the shores of South Africa. During colonisation, the British strategy to acquire territory, involved securing the co-operation of the tribal territories in exchange for manpower to assist the colonial administration.⁴ As a result of this strategy there was a growing dissatisfaction by the tribal communities.⁵ This tension and conflict intensified during the apartheid regime that reigned for approximately seventy years.⁶ This regime was influenced by white dominance and racial segregation⁷ and led to white and indigenous people living in designated areas.⁸ As a result of this policy which created “homelands” for indigenous people, the policies of this regime perpetuated the dispossession of land from indigenous people.⁹ In 1994, the first democratically elected President, Mr Nelson Mandela, aimed to address the previous dispossession of land by the redistribution of land to indigenous people through land compensation and appropriation.

In considering the policy of land appropriation, it is necessary to analyse the definition of indigenous groups to identify who is entitled to land appropriation. That being said, there is no clear definition of indigenous groups. In the past, indigenous groups were considered to be the Khoe-San¹⁰ tribe and ethnic nomadic tribes that originated from within South Africa. (Wachira, 2009) Currently, there is still no clarity regarding the definition, which has been argued to include indigenous groups whom are categorised as black people in South Africa. It is pertinent to reflect upon legislation, in surmising an indigenous definition. In accordance with the preamble and as contained in section 2 of the Traditional Leadership and Governance Framework Act 41 of 2003 a wide definition is provided as it is stated that “South African indigenous people consist of a diversity of cultural communities.” From the legislation it is the view that indigenous people consist of diverse cultural communities that are governed by customary

4 Bennett, T.W. (1991). *A Sourcebook of African Customary Law for Southern Africa*. Juta & Co Ltd at 56.

5 Bennett, T.W. (1991). *A Sourcebook of African Customary Law for Southern Africa*. Juta & Co Ltd at 57.

6 Bennett, T.W. (1991). *A Sourcebook of African Customary Law for Southern Africa*. Juta & Co Ltd at 154.

7 Bennett, T.W. (1991). *A Sourcebook of African Customary Law for Southern Africa*. Juta & Co Ltd at 154.

8 Bennett, T.W. (1991). *A Sourcebook of African Customary Law for Southern Africa*. Juta & Co Ltd at 154.

9 Bennett, T.W. (1991). *A Sourcebook of African Customary Law for Southern Africa*. Juta & Co Ltd at 155.

10 The spelling varies of an indigenous tribe known as “Khoe-San” to “Khoi-San” in the National Traditional Affairs Bill, 2013.

law. It is noteworthy that this Act will be repealed and replaced by the National Traditional Affairs Bill once it is promulgated.

Currently, the National Traditional Affairs Bill of 2013¹¹ includes its main objectives as follows:

- To consolidate legislation governing traditional leadership;
- To make provision for the recognition of Khoi-San communities and leaders, as well as the establishment of Khoi-San structures.

In exploring the definition of indigenous people it is necessary to define a disadvantaged group as these terms are interrelated. Disadvantaged groups in terms of legislation are defined as person/s, whom have been discriminated against by past discrimination laws. In the consideration of Restitution of Land Rights Act 22 of 1994, the preamble defines disadvantaged groups as “categories of persons, disadvantaged by unfair discrimination may be taken to promote the achievement of equality.” This means that indigenous groups are also perceived as disadvantaged groups, with this definition clearly articulated, it is necessary to have insight into the demographic of the population of this group.

What is their share in general population?

The demographic population consists of the following racial groups:

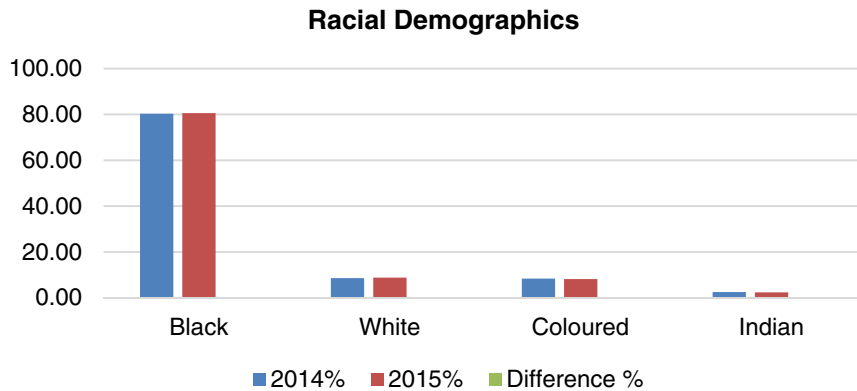
Demographic	Percentage 2014	Percentage 2015
Black	80.2%	80,6%
Coloured	8.8%	8.8%
White	8.4%	8,2%
Indian/Asian	2.5%	2.4%
Total Population	54 002 000 million	54 900 000 million

Statistics study in 2014 and 2015.

Figures obtained by Statistics SA study in 2014 and from IOL for 2015¹²

¹¹ Bill No 36856 Notice 947.

¹² Mudzuli, K. Available at: <http://www.iol.co.za/news/south-africa/sa-population-at-549m-1890433>.



The land share of the indigenous groups is approximately over one percent.¹³ As mentioned prior to South Africa becoming a constitutional democracy in 1994, there were policies of racial segregation of ethnic groups (also known as apartheid).¹⁴ These policies of racial segregation aimed to divide and conquer the indigenous people, which constituted a clear majority of the population, even during that period. It is apparent that this strategy would secure dominant leadership for over seventy years of apartheid rule until its demise.

It is important to note that although indigenous people hold a demographic dominance as the clear majority, this does not equate to dominant demographic ownership. However, the statistics are incomplete and one can only reflect on the province of KwaZulu-Natal, where there is nearly fifty percent of land ownership by indigenous people as follows:

The KwaZulu-Natal agricultural union's research shows that 46.29% of land in the province is fully black owned and 2.3% is partially black owned. According to their statistics, 15.6% of land is white owned and the ownership of about 35.8% of the province's land is unknown. These statistics include land in the former Bantustan of KwaZulu, which is 100% black owned.¹⁵

Statistics convey one aspect of the figures at the time, which is interconnected to the methodology and literature which is discussed below.

13 International Work Group for Indigenous Affairs (IWGIA) Indigenous Peoples in South Africa. Available at: http://www.iwgia.org/regions/africa/south-africa_of_the_South_African_population.

14 Kloppers, H.J. and Pienaar, G.J. (2014). The Historical Context of Land Reform in South Africa and Early Policies *PER* (17)2: 678. See also Hendricks, F., Helliker, K. and Ntsebeza, L. (eds) *The Promise of Land-Undoing a Century of Dispossession in South Africa* (2013). Publisher Jacana Education.

15 Groenewald, Y. (2015). Who Owns the Land. Available at: <http://citypress.news24.com/News/Who-owns-the-land-Ownership-by-numbers-20150503>. Accessed on: 26 July 2017.

METHODOLOGY

The methodology adopted in this article is a desktop study. This means that legislation and case law will be analysed and discussed to draw relevant deductions, arguments and conclusions stemming from current and past literature. This is in the pursuance of protecting and enforcing the indigenous land rights from the past deprivation of the indigenous people suffering an absence of land rights.

Background and Relevant Legal Framework

Legislation prevented black people from owning land in South Africa.¹⁶ This legislation governed segregation and facilitated the dispossession of land from indigenous people in densely populated areas. This created an uproar which resulted in worldwide sympathy for indigenous people who were forcefully evicted and dispossessed of their land. Africans were for example forcefully displaced from Sophiatown to Soweto in the former Transvaal Province (now known as Gauteng). In Cato Manor which is situated in the former Natal Province (now known as KwaZulu Natal) there were mostly indians who were forcefully dispossessed of their land. In the city of Cape Town mostly coloureds were dispossessed of their land in an area known as District 6 (now known as Bo-Kaap). The following legislation, which discriminated against non-white racial groups and instilled segregation of the races includes:

Group Areas Act No 41 of 1950, this Act ensured that the different races were segregated to live in different areas and communities on the basis of their race. When the government decided to change the physical parameters and boundaries races such as black, indian and coloured were dispossessed of their property and forced to live in demarcated racial areas.

Black Land Act 27 of 19 June 1913, this Act prevented black people from becoming the owners/tenants of land outside the reserves. The reserves were situated in rural areas that were only demarcated for black people.

The Durban Land Alienation Ordinance, No 14 of 1922, this Act allowed the Durban City Council to prohibit indians from ownership of property in the designated white areas.

The Natives (Urban Areas) Act 21 of 1923, this Act regulated the number of africans in urban areas, meaning that a certain number of african people were allowed at any given time in urban areas, that were reserved for white people.

The Development Trust and Land Act 18 of 1936, this Act expanded the reserves to a total of 13. At the time six per cent of the land in South Africa was authorised by the Department of Bantu Administration and Development for

¹⁶ Kloppers, H.J. and Pienaar, G.J. The Historical Context of Land Reform in South Africa and Early Policies, *PER* 2014 (17)2: 678 at 680.

allocation to the reserves to eliminate 'Black spots' (Black-owned land surrounded by White-owned land).

The Native Trust and Land Act of 1936, this Act formalised the segregation of white urban areas and black rural areas.

The Bantu Authorities Act 68 of 1951, this Act prohibited blacks from residing in urban white areas permanently and maintained the segregation laws.

Prevention of Illegal Squatting Act 52 of 1951, this Act forcefully removed races that were considered to be squatting communities.

Natives Resettlement Act 19 of 1954, this Act facilitated the removal of africans from any area within and next to the magisterial district of Johannesburg, as the area was reserved for whites.

Bantu Homelands Citizens Act 26 of 1970, this Act provided that black people could not qualify to obtain South African nationality and will remain as aliens.

Black (Urban Areas) Amendment Act 97 of 1978, this Act introduced a 99-year lease for black people in urban areas. This meant that full ownership could not be acquired up until 1986.

The abovementioned legislation has all been abolished and there are no limitations on South Africans from owning property, irrespective of race, colour or creed. With the advent of democracy and the promulgation of the Constitution of the Republic of South Africa, 1996 it facilitated the ownership of land for all people. As a result, in terms of section 25 of the Constitution it is an important provision because it provided the primary source that gives life to subsidiary legislation. This section provided redress to indigenous people and the races that were unlawfully dispossessed of their property during the apartheid regime. Section 25 provides to address the previous land injustices as follows:

25. Property—(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application—
 - a) for a public purpose or in the public interest; and
 - b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
 - a) the current use of the property;
 - b) the history of the acquisition and use of the property;
 - c) the market value of the property;

- d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - e) the purpose of the expropriation.
- (4) For the purposes of this section—
- a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).
- (9) Parliament must enact the legislation referred to in subsection (6)."

The aim of this section was to address the historical discrimination of land dispossession to indigenous land owners. There are no specialised tribunals that deal with land disputes in South Africa. The Land Claims Commission and the Land Claims Court deals with claims of land dispossession and displacement. (The Land Claims Court possesses the same status as the high court) It is apparent that the Constitution provides for compensatory relief in regard to the expropriation of property.

National Legal Procedures and Case Law

It is necessary to discuss the national legal procedures, legislation and case law to illustrate the changes in the law to protect indigenous land rights. Currently the following legislation governs different types of land disputes or land issues that may arise:

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (also known as PIE). This In terms of the PIE Act, the applicant will approach the court to first obtain a service direction order to serve the eviction application on the respondent, before the application can be served on the

respondent by the sheriff. This service direction order departs from the normal procedural rules regarding service of applications. The *locus standi* to institute an application in terms of PIE lies with the owner or alternatively a person that has been authorised to act on behalf of the owner, such as a rental agent.

Extension of Security Tenure Act 62 of 1997 (ESTA): This Act governs the eviction of farmworkers from their residential homes in instances where they work and live on farmlands. A person can launch an application in terms of ESTA, whom is the farm owner. Act governs the eviction of land of natural persons from residential property.

Expropriation Act 63 of 1975: This Act governs the right of the State to expropriate land from natural persons and juristic entities. It is apparent that this Act is aged and the use of the Act was targeted against indigenous people. Now this Act is used as a restorative justice mechanism in redressing the injustices of the past. The legislature is aware of the aged Act and its outdatedness and are working on the Expropriation Bill to replace and repeal this Act.

Expropriation Bill aims are “To provide for the expropriation of property for a public purpose or in the public interest, subject to just and equitable compensation; and to provide for matters connected therewith.” The Bill is published in the Government Gazette No 38418 of 26 January 2015). Note that the National Assembly approved the Bill and the Bill must be approved by the National Council of Provinces before the Bill can be signed by the President into law. In terms of the Expropriation Bill the Government and the requisite minister acts in their capacity has sufficient *locus standi* to expropriate land and offer monetary compensation for the land. Alternatively any person that is authorised to act in the representative capacity of the owner.

Restitution of Land Rights Act 22 of 1994: This Act allows the government to compensate natural persons and communities for the injustices when dispossessed of land by discriminatory apartheid laws and this Act affords monetary compensation, alternatively restored occupation of the land.

Section 25 of the Constitution, provides for the protection for all people and their land rights, and provides for subsidiary legislation to protect the different facets of land rights.

There are a few Non-Governmental Organisations that deal with land disputes. A few examples are, Lawyers for Human Rights, Human Rights Watch, AFRA (Association for Rural Advancement), legal aid clinics and pro bono law firms. The interim relief that can be requested where a person has been illegally locked out of their residential home or when the locks have been changed and their access to the property taken away. As a result, an urgent application may be instituted at court in terms of a *mandament van spolie* application to restore the possession of the use and enjoyment of the property. Alternatively a *rei vindicatio* application may be instituted if the lawful owner was dispossessed of the use and enjoyment of the property to restore the ownership.

The following cases discussed are important as it illustrates instances where the court has recognised indigenous law and protected the indigenous right to own land. In *Alexkor Ltd and Another v Richtersveld Community and Others*, 2003 (12) BCLR 1301 (CC), (CC stands for the Constitutional Court, which is the highest court in the country) the facts related to the disputed ownership of land of the Richtersveld Community and the use of the natural resources in terms of indigenous law. (paragraph 50) Alexkor Ltd disputed the indigenous right to the land, as a result of this dispute there were multiple issues, which arose in this case:

The following questions were argued in this appeal: (paragraph 18)

- a) The identification of the issues that fall within the jurisdiction of this Court;
- b) The law to be applied to relevant events that antedate the interim Constitution;
- c) The nature of the rights in land of the Richtersveld Community prior to annexation;
- d) The legal consequences of annexation of the subject land;
- e) The nature of the rights in the subject land held by the Richtersveld Community after 19 June 1913;
- f) The steps taken by the State in respect of the subject land after 19 June 1913;
- g) Whether the dispossession was the result of racially discriminatory laws or practices.

The judge remarked that: “[i]t is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, make it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law” (paragraph 51).

In view of this case, the Constitutional Court recognised customary law being as any other legislation. As a result, indigenous law was given the same standing as any other law in South Africa. This meant that the indigenous people were protected by indigenous law and the court would enforce this protection. This judgment therefore emphasised that indigenous law is integrated in the South African legal system. The court provided a definition of indigenous law of sorts: “[i]n applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practiced and passed on from generation to generation. It is a

system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution” (paragraph 54).

It is important that the court recognised the adaptive characteristics of indigenous law because of its progressive aspect of the law. It was concluded by the court that the Richtersveld Community had a right to communal ownership of the minerals and precious stones, in terms of indigenous law (paragraph 64). The annexation of the law by the British colony did not extinguish the Richtersveld communal rights in the land in terms of indigenous law (paragraph 67-69, 72). The court ordered that the Richtersveld community were entitled to restitution because of past discriminatory laws, because of their “right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof” (paragraph 103). This is a landmark decision because it recognised the indigenous land rights of a community that was both dispossessed of ownership and use and enjoyment of land because of past discriminatory laws.

Once again the court protected the indigenous rights to own land. In the case *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* (2007) JOL 20031 (CC) it was held “that while it was clear that the forebears of the applicants were deprived of their indigenous rights to the land in the 1800s, the Constitution does not provide for restitution of or equitable redress for property dispossessed prior to 19 June 1913. This, even if the applicants were to establish dispossession of indigenous communal ownership that occurred before the constitutional cut-off date of 19 June 1913, they would not be entitled to exact restitution or redress. A claim for restitution of a right in land under section 2 of the Restitution Act may succeed only if (a) the claimant is a person or community or part of a community; (b) that had a right in land; (c) which was dispossessed; (d) after 19 June 1913; (e) as a result of past discriminatory laws or practices; (f) where the claim for restitution was lodged not later than 31 December 1998; and (g) no just and equitable compensation was received for the dispossession. Finding that the applicants had satisfied the above requirements, the court issued a declaratory order to that effect.” This case stressed that there are time restrictions regarding the redress of the past discrimination laws and its applications and that the court must adhere to those limitations.

Eviction applications, this is a formal application of compelling the persons/people living on the property to vacate. This deprivation to property is set out in terms of PIE. The court is cautious in granting these applications against vulnerable groups. In the case *eThekweni Municipality v Cebekhulu* (2015) JOL 33420 (KZD) (KwaZulu-Natal Division, this is a High Court in Durban) the court ensured that this group was not homeless. Furthermore, in this case “[t]he eviction order was granted, subject to the proviso that the applicant would provide alternative accommodation to the respondent’s wife and her children pursuant to their eviction from the said property.” Women and children are still considered to be a vulnerable group and especially children. It is of

paramount importance that their rights should not be infringed. Accordingly the court recognised that the mother and her children should not be homeless because of the eviction application.

However this cautionary approach was given some reflection in the case of *Sarrahwitz v Maritz NO* and another 2015 (8) BCLR 925 (CC). The court held that “In a separate judgment Cameron and Froneman JJ concurred in the order made but expressed reservations, inter alia, in respect of the majority’s reliance on the right to equality. In effect the approach of the main judgment risked an interpretation that the Constitutional Court was holding that any beneficial legislative distinction the Legislature drew extending consumer protections might be struck down as irrational if the protection did not extend to all persons. The Constitution did not protect against homelessness in absolute terms, but afforded protection by providing that no one could be evicted from their home without an order of court made after considering all relevant circumstances. The Constitution also provided that legislation could not permit arbitrary evictions. In their view the Prevention of Illegal Eviction from and Unlawful Occupation” The eviction legislation prevents arbitrary evictions and is not against homelessness in absolute terms which is an important observation.

INTERNATIONAL LEGAL FRAMEWORK AND APPROACH

The international legal framework and approach is significant because when domestic laws do not provide for the protection of rights then international law may be considered in the interpretation of issues of dispute. Upon reflection, South Africa has not ratified the UN Declaration so it cannot be stated to have influenced the legislation.¹⁷ However, the Constitution does provide that courts may look to international law to influence their decision if there is no binding South African law. Hence, international law may persuade the courts if there is no domestic legislation. However, South Africa is a member of the ILO (International Labour Organisation), (South Africa – Member from 1919 to 1966 and since 26 June 1994) and the policies are influential, but are not binding on member states. The SADC (Southern African Development Community Tribunal) “is an intergovernmental organisation composed of fifteen Southern African states.”¹⁸ These countries “fought to gain independence from colonial rule.”¹⁹ The aim of this tribunal is important because colonial rule triggered land dispossession of

17 Section 39(1) and (2) of the Constitution of the Republic of South Africa, 1996.

18 Saurombe, A. (2011). An Analysis and Exposition of Dispute Settlement Forum Shopping for SADC Member States in the Light of the Suspension of the SADC Tribunal. *SAMERCLJ*, 392 at 393. See also Phooko, M.R. No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal. *PER* 18(3): 531.

19 Saurombe, A. (2011). An Analysis and Exposition of Dispute Settlement Forum Shopping for SADC Member States in the Light of the Suspension of the SADC Tribunal. *SAMERCLJ*, 392 at 393.

indigenous claims and ownership. South Africa must still play catch up to the trends and international practices.

RESULTS

This passage discusses the past position of the absence of land rights and the progression of realising and protecting indigenous land rights post democracy.

Position of Former and Current Landowners

The indigenous and disadvantaged groups did not have land rights and therefore did not have any remedies as the laws discriminated against them. Land was acquired by white people using discriminatory legislation as a tool that allowed the government to forcefully evict indigenous people of land.²⁰ The current legal status allows for the protection and addressing land right injustices as contained in the Constitution. Landowners feel aggrieved, when farmlands are expropriated to award it to the rightful owner, as the landowners may had resided on the property for over 20 years and the property is a place that they call home. This means that in their older years they would have to purchase new property and, with the passing of time, property is more expensive. So, under these circumstances, they feel that it is unfair for them. They know and understand that someone was treated with injustice in relation to the land but for all purposes it was acquired by them in a fair manner and they had to pay the bank for the mortgage bond and associated costs. To reform the land issues of the past and future in South Africa is a mammoth task, which is an ongoing project and conversation as evident from the below mentioned passage:

“1. Nearly twenty years after the end of apartheid, the 1913 Natives’ Land Act continues to haunt the South African countryside. The land question, which was central to the struggle against apartheid, remains unsolved. Millions of South Africans continue to be dispossessed of their lands, and the rural geography of apartheid (bantusutans and white South Africa) continues to exist. Urban areas also reflect the spatial geography of apartheid. The massive social and economic inequalities under apartheid have deepened since 1994 and remain racialized” (Civil society declaration)

As illustrated by civil society, South Africa has a long way to go to move beyond the injustices of the past. This is the sad reality, as one begs the question of whether South Africa will ever be in a position of strength to move forward from the ghosts of the past, as urban areas are growing and changes are continuously taking place.

20 Kloppers, H.J. and Pienaar, G.J. (2014).The Historical Context of Land Reform in South Africa and Early Policies. *PER*, (17)2: 678.

DISCUSSION

In order to assess a process and system it is necessary to engage with the cost implications, time, impartiality of the officers and the fairness and effectiveness of the procedures.

Fairness and Effectiveness of the Procedures

Some of the challenges that the indigent and poor face are language barriers because they do not understand English and only speak their native tongue, and a translator may not be available to translate or interpret. Another challenge is that transport is expensive for them to get to the nearest court within their jurisdiction. Furthermore in most cases, the poor and indigent are not educated regarding their legal remedies and options. Moreover, a drawback of restitution is the shorter time periods to find alternative accommodation, which is not ideal. Another challenge is that compensation for unlawful displacement would be a municipal value, which is lower than the market related price, but this may be negotiated dependent on the funds available to the State, and usually the owners engage in legal disputes regarding the fair and reasonable value of the property.

Impartiality of the Proceedings

The magistrates, judges and commissioners exercise impartiality and due process is adhered to and there are no issues, as the current case law reflects the upholding of this principle.

Length of Proceedings

There is no average time as it takes years,. The range could be anything from one to five years and there are certain cases that have exceeded the time period of five years.

Enforcement of Decisions

Decisions are respected and are effective as the sheriff of the court will evict the people as a general. There are certain exceptions for example when foreigners do not respect the law and threaten and physically abuse the sheriffs, who then require the assistance of the police.

CONCLUSION

Case law has illustrated that the Constitution protects and upholds indigenous land rights. This is also addressed in policy and legislation as land expropriation has its place in South Africa to rectify the evils of the past so that the government expropriates property to restore the original lawful possession. The underprivileged groups that are forcefully evicted is a sad reality. However, the lawful possessor cannot be deprived of his/her constitutional right to full enjoyment, use and possession of his/her property. The underprivileged must be provided with

alternative accommodation, which the law provides for this difficult onus, as it is not an easy task, because some people are hampered by severe financial constraints. The balance between landlord and tenant must be struck to always ensure that one is not deprived by the others actions. Currently, the existing legal remedies and procedures are satisfactory and may be improved for South Africa. The weaknesses of the legal system are the indigent and poor, who live far away and are unaware of court procedures to protect their land rights. A lasting solution would be education for the poor and indigent and for government to provide subsidies for the poor and indigent. Furthermore, another remedy is for the State to provide travel costs in order to travel to legal counsel, legal aid and/or the legal clinics in the area. The government would also need to build more low cost houses, to solve the housing shortage issue in South Africa. Moreover, satellite education clinics and government initiatives would be the ideal platforms for educating the youth. Another recommendation would be to encourage international funders to fund disbursements and expenses for the poor so that they can access legal advice to enable them to protect their land. It is evident that changes are on the horizon and as they say 'Rome was not built in a day' and similarly rectifying the consequences of the past is a long journey of recovery that is slow and frustrating but changes are always present and transforming the legal system.

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