TITLE TO TERRITORY: ITS CONSTITUTIONAL IMPLICATIONS FOR CONTEMPORARY SOUTH AFRICA AND ZIMBABWE

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INTRODUCTION

The present essay is about sovereign title to territory and its constitutional implications for contemporary South Africa and Zimbabwe. It is a philosophical analysis of the history, politics and the constitutionality of the law underlying the democratic dispensation in the two countries. It does not purport to be a juridical analysis in the first place. Instead, it will focus upon the area of tension resulting from the inclusion of some "natural facts" and the exclusion of others from the universe of juristic facts. The purpose of this focus is to show that what people hold to be natural or fundamental justice does not always coincide with justice according to law. Legal justice will remain a contested area for as long as it does not coincide with the ordinary perceptions of natural or fundamental justice. Jurists invariably argue that moral considerations fall all outside the scope of law. Law is one thing and morality another, so the argument goes. If this is a plea for the independence of the juridical method then it is understandable. However, the plea for methodological purity is not tantamount to a denial that the order that law seeks to establish and maintain is ultimately the moral commonwealth. Accordingly, law cannot totally avoid being the expression of the moral convictions of a given society. Law therefore has a necessary minimum content of morality. For this reason both the necessity and the desirability of certain laws are not in the first place the exclusive initiatives of the legal order. On the contrary, the moral commonwealth is the inescapable source of the necessity or desirability of specific laws. Accordingly, the efficacy of these latter is judged not only according to juridical criteria but also on the basis of morality. This judgement from outside the legal framework speaks precisely to the exclusion of certain "natural facts" from the universe of "juristic facts" and the tension that results from such exclusion.

We shall focus specifically upon historic titles in law and state recognition in the context of international law. In this context we shall consider if and to what

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extent the fact of conquest, in the history of the voyages of "discovery" and colonisation has been included or excluded from the universe of juristic facts. To answer the question what the implications of either inclusion or exclusion are we shall analyse the political significance of sovereignty in relation to both the conquered indigenous peoples and their conquerors. The thesis we wish to defend is this: under whatever conception of law, the claim that the conquerors of the indigenous peoples of South Africa and Zimbabwe are the legal successors in title to wholesome and absolute sovereignty over these peoples is unsustainable either on the plea of Papal mandate, "discovery" or the "right of conquest". Therefore, justice demands the restoration of title to territory to the indigenous conquered peoples as well as restitution to them. We now turn to identify the conqueror and consider the context within which the urge to conquer was nurtured

UNIVERSAL SOVEREIGNTY WITHOUT TERRITORY

The "Donation of Constantine" is the highpoint of the struggle for power between Constantinople and Rome.[1] Having emerged the victor of this struggle Rome invoked the Petrine Commission[2] and on this basis asserted its sole and exclusive right to universal spiritual sovereignty. The universalist thrust of this spiritual sovereignty covered all the inhabitants of the earth. Since the sovereignty here is by definition spiritual - and, the spirit if any exists at all is by definition metaphysical - it was unnecessary for Rome, the universal spiritual power (*potestas*

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1 The "Donation of Constantine" is a vital ingredient in the papal struggle to extricate itself from the respublica Romana. Although the document is widely regarded as a forgery and a fraud, it played a significant role and perhaps even a decisive one in emancipating the papacy from the respublica Romana. It also assisted the papacy to lay claim to supreme authority in Latin Christendom. Since the detailed history relating to these questions is outside the scope of the present essay, we direct the interested reader to the following:

- W Ullman, **The growth of papal government in the Middle Ages** (Methuen & Co. Ltd., London, 1955), pp. 75-83.
- CH McIlwain, **The growth of political thought in the West** (The Macmillan Co. Ltd., New York, 1932), pp. 270-1.
- RE Carlyle and AJ Carlyle, **A history of medieval political theory in the West**, Volume I (William Blackwood and Sons Ltd., Edinburg & London MCMLXII), p. 158.
- H Spruyt, **The sovereign and its competitors** (Princeton University Press, Princeton, New Jersey, 1994), p. 45.

2 Here we refer specifically to Matthew 16: 18-9. Without any attempt at an exegetical exposition of this verse, we suggest that these words mean that Peter's authority to rule the Christian commonwealth is derived directly and immediately from Christ who is God. Therefore, Peter-pope may not be judged by anyone on earth (*papa a nemine judicetur*). This claim notwithstanding, the problem of succession to Peter arose. The core of the problem was the argument that since the very words of Christ were addressed directly and specifically to Peter, the Petrine Commission ceased with the death of Peter. Consequently, the successors of Peter were not entitled to the authority contained in the commission. Moreover, Peter himself had not provided for the transfer of his authority. The document known as the "*Epistola Colementis*" purports to answer this argument. For a detailed treatment of this see:

- W Ullman, **The church and the law in the Middle Ages** (Variorum Reprints, London, 1975), pp. 295-317.

spiritualis) to make any territorial claims. The inhabitants of the earth could, theoretically, retain sovereignty over their territory provided they submitted unconditionally their spirits to the extraterritorial metaphysical sovereignty of the Pope. One basic problem with all the successors of Peter was that even they were unable to submit their spirits unconditionally to the metaphysical sovereignty of the Pope. The reason was that their spirits could be found nowhere. Thus the only way to imagine this metaphysical sovereignty was to recognise that to be human is to be an embodied being. This meant that the spiritual sovereign had to deal with bodies located in space and time. Being fixed or located in a territory (territoriality) thus became a factor which the spiritual sovereign had to contend with in order to realise the mandate from Christ. This ultimately led to clashes between the papacy and earthly princes and kings. It is clear then that the idea of universal sovereignty without territory is imaginary and metaphysical. Its impact can still be felt from the manner and extent to which the voyages of discovery and colonisation affect, in the present case, contemporary South Africa and Zimbabwe.

THE PAPAL MANDATES: DISCOVERY AND COLONISATION

For as long as the authority of the papacy was recognised by the earthly rulers, it was the former who played an important role in legitimising the voyages of discovery. Intent upon honouring the mandate of Christ to go and teach all the world, the papacy authorised the voyages of discovery. The yet to be discovered had only one right, namely, to submit to Christianity or die.[3] Thus the bulls of Pope Nicholas V - *Dum Diversas* (1452) and *Romanus Pontifex* (1455) - gave the kings of Portugal the right to dispossess and enslave Mahometans and pagans. *Dum Diversas* clearly specifies the right to invade, conquer, expel and fight (*invadendi, conquirendi, expugnandi, debellandi*) Muslims, pagans and other enemies of Christ (*saracenos ac paganos, aliosque Christi inimicos*) wherever they may be. Christian kings could thus occupy pagan kingdoms, principalities, lordships, possessions (*regna, principatus, Dominia, possessiones*) and dispossess them of their personal property, land, and whatever they might have (*et mobilia et immobilia bona quaecumque per eos detenta ac possessa*). They also were given the right to put these peoples into perpetual slavery (*subjugandi illorumque personas in perpetuam servitutem*).[4] Following in the footsteps of his predecessor, Pope Alexander VI issued the bull *Inter caetera divinae* (May 4, 1494) authorising the overthrow of paganism and the establishment of the Christian faith in all pagan nations.[5] All

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3 RA Williams, **The American Indian in Western legal thought, the discourses of conquest** (Oxford University Press, Oxford, 1990), p. 67.

4 VI Mudimbe, "African gnosis, philosophy and the order of knowledge: an introduction", **African Studies Review**, Volume 28, Nos. 2/3, 1985, pp. 151-3.

5 VI Mudimbe, "African gnosis, philosophy and the order of knowledge: an introduction", **African Studies Review**, Volume 28, Nos. 2/3, 1985, pp. 151-3.

these bulls sanctioned disseizing and killing, among others, if the prospective converts refused to become Christians.[6]

The voyage of discovery had philosophical underpinnings as well. In particular it was thought by the voyagers from Western Europe that Artistotle's definition of man as a "rational animal" excluded the African, the Amerindian, the Australasian[7] and women.[8] This supposed exclusion justified the conquest, enslavement and oppression of these groups precisely because they were not considered to be full and complete human beings.[9] At the same time it was claimed that this imagined exclusion conferred upon the voyagers the sole and supreme right to civilise everyone outside the sphere of Western Christendom. These claims became shaky when the philosophy underpinning them came to be questioned. This questioning also focused directly on the papal claim to universal spiritual sovereignty. The crux of this questioning was this: If the Christian God of "perfect" and "infinite" love had opened the door to heaven for all humankind and, humankind existed - according to the use of Aristotle's definition of man - only in the West then what would justify Christianisation and civilisation outside the boundries of Western Christendom? The urge to expand Christianity and civilisation beyond the boundaries of Western Christendom was contrary to the ideology that "some men are rational animals". Similarly, Christ's mandate to go and teach "all" nations did not have any meaning outside the geographic boundaries of Western Christendom. Thus philosophical consistency and fidelity to Christ's mandate required that Christianisation and civilisation be confined strictly within the boundaries of Western Christendom. So the papacy either had to withdraw its authorisation of the voyages of discovery or to retain it by providing justification for it. The debate between Sepulveda and Las Casas in Valladolid, Spain, in 1550 crystallised this problem. As a result the papacy acknowledged the contradiction between a restrictive interpretation of Aristotle's definition of man and the urge to Christianise and civilise beyond Western Europe. In resolving this contradiction Pope Paul III issued the bull, *Sublimis Deus*.[10] This bull expressly declared that "all

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6 It is important to note that in March 2000 Pope John-Paul II openly and publicly asked for forgiveness for such abuses by the Roman Catholic Church. The apology could certainly have been more specific. At the same time it is curious that in asking for forgiveness the Pope mentioned nothing about the Church's readiness to consider restitution and reparation. Yet, it is customary in the Catholic Church that at confession absolution is accompanied by some burden in the form of three "Hail Marys", for example, or "Our Father" once. Surely, redemption by Christ does not mean reconciliation and forgiveness eliminating freedom and, therefore, absolving all humans of the responsibility to choose either eternal bliss or condemnation.

7 L Hanke, **Aristotle and the American Indians** (Henry Regnery Company, Chicago, 1959), p. ix.

8 L Lange, "Woman is not a rational animal" in S Harding and MB Hintikka (ed.), **Discovering reality** (Reidel Publishers, Dordrecht, 1983), pp. 1-15.

9 L Hanke, **Aristotle and the American Indians**, p. 50.

10 L Hanke, "Pope Paul III and the American Indians", **Harvard Theological Review**, Volume XXX, 1937, pp. 71-2.

men are rational animals". In this way *Sublimis Deus* stood in sharp contrast to, contradicted and counterbalanced the irrationality and the inhumanity of the preceding bulls pertaining to Christianisation. But it neither obliterated nor overcame the claim to exclusive possession of reason and the supposedly corresponding "right" to civilise. Ironically, it gave added impetus to the will to conquer in the name of Christianisation and civilisation. It thus remains a very important declaration of principle in the sphere of valid reasoning in the abstract. This rendered it useless as a means to either prevent or curb the inhumanity that went together with the Christianisation and civilisation of the nations outside the boundaries of Western Europe. The will to conquer would thus pursue its aims without regard to the demands of natural or legal justice in respect of those outside the supposedly civilised Western Christendom.

A MERIDIAN LINE DECIDES THE TRUTH AND DEFINES JUSTICE

To draw lines in the literal and metaphorical senses can be a rather innocuous activity. However, as soon as this involves the construction of individual or collective identity then it may become a serious matter: a question of life and death. This was the case when geographical lines such as the *rayas* and amity lines were drawn. "Geographically, these amity lines ran along the equator or the Tropic of Cancer in the south, along a degree of longitude drawn in the Atlantic ocean through the Canary Islands or the Azores in the west, or a combination of both. It was forbidden, under any pretext, to shift the western meridian beyond the Azores. At this 'line' Europe ended and the 'New World' began. ... Beyond the line was an 'overseas' zone in which, for want of any legal limits to war, only the law of the stronger applied. The characteristic feature of amity lines consisted in that, different from the *rayas*, they defined a sphere of conflict between two contractual parties seeking to appropriate land precisely because they lacked any common presuppositions and authority ... the only matter that (the parties) could actually agree on was the *freedom* of the open spaces that began beyond the line. This freedom consisted in that the line set aside an area where force could be used freely and ruthlessly. ... The general concept was then necessarily that everything which occurred 'beyond the line' remained outside the legal, moral and political values recognized on this side of the line."[11] Thus reason, morality, civilisation, law and justice was the identity of those this side of the amity line, that is, the conqueror. Lawlessness, ruthlessness and injustice was the identity of the conqueror beyond the amity line since, in the view of the conqueror, that zone was characterised by unreason and barbarism. It follows that fraud, forgery and the use of brute force as a means of conquest were the recognised method of acquisition of title to the

[11] C Schmitt, "The land appropriation of a new world", **Thelos**, Number 109, Fall 1996, pp. 36-7.

territory of the indigenous conquered peoples. By virtue of this conquest the sovereignty of the indigenous conquered people was supplanted and their title to territory extinguished. Historically, this happened to both South Africa[12] and Zimbabwe.[13] The question then is: may lawlessness, utter disregard for morality, manifest injustice and the unprovoked use of armed force vest perpetually and irreversibly in the conqueror title to the territory of the conquered as well as absolute sovereignty over them. This is clearly a normative question, which may be considered either from a moral or a juridical perspective. We will pursue the latter perspective, though not exclusively. According to the law of the time the answer could be only in the affirmative. It was this: a meridian decides the truth and defines justice. At bottom this answer means that an injury inflicted malevolently may change into a right and transform the original injustice into justice (*ex injuria ius oritur*). Thus legality was conferred upon conquest. We now turn to consider this conferment under the rubric of historic titles in law.

HISTORIC TITLES IN LAW

Among the modes of acquisition of territory possession since time immemorial, conquest and effective occupation are recognised by international law. Conquest may be legal if it satisfies the requirements prescribed. We shall consider the legality of conquest in the light of a radical questioning of the legal maxim that *ex injuria ius oritur*. The questioning is in fact its opposite, namely, that malevolent injury may not change into a right nor may it transform an injustice into justice (*ex injuria ius non oritur*). The first maxim is a plea to deal with a factual situation as we find it without questioning in its historical, political and moral foundations.

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12 F Troup, **South Africa** (Penguin Books Ltd., Harmondsworth, Middlesex, England, 1975), pp. 33 and 35.

13 P Mason, **The Birth of a dilemma, the conquest and settlement of Rhodesia** (Oxford University Press, Oxford, 1958).

- C Palley, **The constitutional history and law of Southern Rhodesia 1888-1965** (Clarendon Press, Oxford, 1966). It is significant that the first chapter of this book deals primarily with the drawing of lines by and among the European powers with regard to the demarcation of their respective "spheres of influence". The latter was the exclusive zone of the particular European claimant. In the second place we read about "land purchase arrangements with local chiefs" as though the chiefs had put their land to sale out of goodwill. Almost nothing is said about why and how the conqueror finally had access to the chief. It is instructive though to compare the so called land purchase arrangements with local chiefs with what transpired in the acquisition from the indigenous Indians of the United States and Canadian territory by the conqueror from Europe. See in this connection:
- K Lysyk, "The Indian title question in Canada: an appraisal in the light of Calder", **La Revue du Bureau Canadian**, Volume LI 1973, pp. 450-80.
- Calder et al. V. **Attorney-General of British Columbia** 34 D.L.R. (3rd) 1973.
- GN Uzoigwe, **Britain and the conquest of Africa, the age of Salisbury** (The University of Michigan Press, Ann Arbor, 1974).
- DB Quinn, **England and the discovery of America 1481-1620** (Alfred A. Knopf, New York, 1974).

With particular reference to conquest this legalistic view holds that "if conquests by their nature form a legitimate right of possession to the conqueror, it is indifferent whether the war be undertaken on just or unjust grounds".[14] This concession of law to conquest regardless of the morality or justice thereof is challenged and opposed by the second maxim.[15]

Hall (as quoted in McMahon), defines conquest as the taking of property of one state by the conquering state. The same conquering state then proceeds to claim sovereignty over the property (territory) thus taken away and to impose its will upon the conquered inhabitants. Once this claim to newly acquired sovereignty is acknowledged and established without further challenge or opposition then title to territory as well as sovereign rights come to be vested in the conquering state.[16] McMahon is critical of this definition of conquest. He argues that its particular weakness lies in the fact that it omits to mention that usually appropriation with regard to conquest is either an act of the actual use of armed force or the threat to use such force. Consequently, he continues, violent seizure is an indispensable element in any definition of conquest. Even if the condition arising from conquest may be sustained for a long time, it does not necessarily follow that conquest then is perfected into a legal right. This latter is specifically an argument against acquiescence[17] prescribed by international law as one of the necessary elements to change conquest initially ungoverned by law into a right transforming an original injustice into justice. Accordingly, injustice may not supercede justice only because the injustice has prevailed for a long time.[18] Hall's argument here can therefore not hold because "the general principle of law is that a right cannot arise from a wrong. Hence all the cases of revival or survival of State sovereignty despite conquest and annexation can also be explained by the maxim *ex injuria ius non oritur*. A claim to territorial title which originates in an illegal act is invalid.[19] If one were to argue that at that time there was no law[20] and therefore no justice[21] beyond the meridian line, then the conclusion is not that territory acquired then may be retained by the

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14 MM McMahon, **Conquest and modern international law: the legal limitations on the acquisition of territory by conquest** (The Catholic University of America Press, Washington, 1940), pp. 44.

15 YZ Blum, **Historic titles in international law** (Martinus Nijhoff, The Hague, 165), p. 4.

16 McMahon, p. 8.

17 IC MacGibbon, "The scope of acquiescence in international law", **The British Year Book of International Law**, 1954, p. 143.

18 J Waldron, "Superseding historic injustice", **Ethics**, 103, October 1992, p. 15.

19 H Cattan, **Palestine and international law, the legal aspects of the Arab-Israeli conflict** (Longman Group Ltd., London, 1976), p. 110.

20 CC Hyde, "Conquest today", **American Journal of International Law**, Volume 30, 1936, p. 471.

21 G Schwarzenberger, "Title to territory: response to a challenge", **American Journal of International Law**, Volume 51, 1957, p. 314.

conqueror. Why should the reverse, namely, the return of territory to its original owners thereby restoring their sovereignty be necessarily precluded?

NEW LINES AND OLD TRUTHS BEYOND THE MERIDIAN LINE

The conquerors resolved their conflicts arising from appetite for more land[22] beyond the meridian by arbitrarily[23] drawing more lines dividing up the disputed[24] territories between themselves. This criss-cross of arbitrary lines was done without consultation[25] with no regard for the sovereignty[26] of the indigenous conquered people. It was simply assumed that the original lawlessness was changed into lawfulness conferring the so called right of conquest upon the conqueror. Similarly, it was taken for granted that the lapse of time had transformed the original injustice into justice. It was equally forgotten that international law this side of the meridian line recognised possession from time immemorial as legitimate ground for title to territory. But the memory of the indigenous conquered peoples was neither dimmed nor obliterated by decades and centuries of subjugation. They remembered that their title to territory - in this case South Africa and Zimbabwe - is deeply rooted in the unfathomable past in which their forebears occupied the territory and exercised absolute sovereignty over it. Accordingly, they were and remain by right of ancestry the rightful heirs to territory and they are the absolute sovereign over it. Therefore, under whatever conception of law, the claim that the conquerors of the indigenous peoples of South Africa and Zimbabwe are the legal successors in title to wholesome and absolute sovereignty over these peoples, is unsustainable either on the plea of Papal mandate, "discovery" or the "right of conquest". Memory evoked the old truth that the land and sovereignty over it belong to the indigenous conquered peoples.[27] On the basis of this truth these peoples recognised the injury

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22 J Fisch, "Africa as *terra nullius*: The Berlin conference and international law", in S Forster, WJ Mommsen and R Robinson (eds.), **Bismarck, Europe and Africa** (The German Historical Institute, London, Oxford University Press, 1988), pp. 347-75.
- HL Wesseling, "The Berlin conference and the expansion of Europe: a conclusion" in Forster et al., 1988, pp. 528-40.

23 R Robinson, "The conference in Berlin and the future in Africa, 1884-1885" in Forster et al., 1988, pp. 1-32.

24 G de Courcel, "The Berlin Act of 26 February 1885" in Forster et al., 1988, pp. 247-61.

25 LH Gann, "The Berlin conference and the humanitarian conscience" in Forster et al., 1988, pp. 321-31.

26 GN Uzoigwe, "The results of the Berlin West Africa conference: an assessment" in Forster et al., 1988, p. 542.

27 Memory is what urged the Jewish people to insist that historical justice demands that the state of Israel be established. This happened finally in May 1948. Similarly, after more than six hundred years the memory of the two main ethnic groups in Kosovo impels each group to claim sovereignty and title to Kosovar territory. This has led to several bloody struggles. One of them led to the bombardment of Belgrade by NATO. Despite the heavy heat and suffocating smoke of the bombs, the struggle for title to Kosovar territory continues as though NATO never dropped a single bomb. Memory also led to the war for the Falklands Islands (Malvinas) between Argentina and the United Kingdom. The latter, conceding China's memory and claim to historical justice,

and the injustice done to them through conquest: the use of armed force ungoverned by law, morality or humanity. Awareness of this truth impelled them to seek justice in the form of the reversion of title to territory to its rightful holders - the indigenous conquered peoples - the restoration of absolute sovereignty over the same territory and restitution. Implicit in this quest for justice is the assertion of the right to self-determination. "It need scarcely be added that the transition from colonial status to independence is not regarded as secession, whether or not it is achieved by force of arms, but rather as the 'restoration' of a rightful sovereignty of which the people have been illegitimately deprived by the colonial Power concerned."[28] On this basis effective occupation and the laps of time would not necessarily permanently eliminate this original right to territory and absolute sovereignty over it. "The use of the right of self-determination can be important as regards title. As a manifestation through international recognition of a legal rule it is important as a constituent of statehood. As such it may deny title in situations of effective control and it imposes a duty in particular circumstances to transfer

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eventually recognised Chinese title and sovereignty over Hong Kong. On the basis of these few examples, it surely cannot be seriously argued that the indigenous conquered peoples of South Africa and Zimbabwe are incapable of remembering their history. Accordingly, their memory urging them to insist that historical justice demands the return of the land to its rightful owners and the restoration of their sovereignty over it, may not be regarded as either irrational or exceptional. Yet, sustained efforts continue to be made to ensure that these demands of historical justice are eternally erased from the memory of the indigenous conquered peoples of Zimbabwe and South Africa. For this reason academic and by no means disinterested South African historiography remains committed to challenging the validity of the more than obvious veracity of the proposition that there are to this day identifiable original and, therefore, rightful owners of the territory on the one hand and those who are the beneficiaries of conquest on the other. This debate apart, conquest in the colonisation of South Africa finds memorable expression in the following: "The Khoikhoi sued for peace, and tried to regain rights to their pastures, 'standing upon it that we (the Dutch) had gradually been taking more and more of their land, which had been theirs since the beginning of time ... Asking also, whether if they came to Holland, they would be permitted to do the like.' The Commander argued that if their land were restored there would not be enough grazing for both nations. The Khoikhoi replied 'Have we then no cause to prevent you from getting more cattle? The more you have the more lands you will occupy. And to say the land is not big enough for both, who should give way, the rightful owner or the foreign invader?' Van Riebeeck made it clear 'that they bad now lost the land in war and therefore could only expect to be henceforth deprived of it ... The country had thus fallen to our lot, being justly won in defensive warfare and ... it was our intention to retain it." Quoted from Freda Troup, **South Africa** (Penguin Books Ltd., Harmondsworth, Middlesex, England, 1975), pp. 33 and 53. To date the beneficiaries of this conquest have reaffirmed the intention to retain the land and never return it to its rightful owners. The same beneficiaries persist in the argument that the Bantu-speaking peoples have no just title to the territory since they have taken it away from the Khoisan. This argument is based on a mistaken understanding of the meaning of "indigenous conquered peoples of South Africa". It is clearly the conqueror's one-sided and self-interested misrepresentation of the history of South Africa. Even if the Bantu-speaking peoples of South Africa might have taken the land from the Khoisan it does not follow that two wrongs make a right. If the Khoisan have been conquered in an unjust war, it is essential that they themselves should say so and declare their solution. Any other interested party purporting to act in their name must show why and what interest they have in the matter. They must also prove that they act on the express request of the Khoisan.

28 R Emerson, "Self-determination", **American Journal of International Law**, Volume 65, No. 3, July 1971, p. 465.

territorial sovereignty."[29] It is therefore submitted that despite the irrelevance[30] of population in the legal determination of statehood, the demand for title to territory and sovereignty over it by the indigenous conquered peoples of South Africa and Zimbabwe is vital and pertinent to the legal determination of statehood. It is an exigency of natural or fundamental justice. It is the foundation upon which the use of armed force against colonisation in its various formations and manifestations is built. Since this is a statement of principle, it remains to show how in practice the transition from Rhodesia to Zimbabwe and in South Africa to a "multiracial democracy" answered to these exigencies.

SOVEREIGNTY SINCE THE BEGINNING OF TIME: THE QUEST FOR HISTORICAL JUSTICE

It may well be worth our while to recognise as Van Kleffens reminds us, that "(t)he word 'sovereign' for the highest, supreme power in a given legal order may have been a product of the feudal age, but the notion it represents had forced itself upon the human mind ever since men began to establish independent political groups, and that goes back to the dawn of time. It cannot be emphasised enough that there was sovereignty and there were sovereigns long before these terms were coined ..."[31] The point of Van Kleffens' reminder is that we take note of both the notional status of sovereignty as a philosophical concept and its historical evolution. Philosophically, there was sovereignty and there were sovereigns before these terms were coined precisely because human beings have drawn many other lines apart from the meridian line. Lines were drawn and continue to be drawn because they are pivotal to the construction of identity, individual or collective. In order to determine the substance of this identity it is necessary to use lines again to indicate the boundaries of identity. Thus the construction of identity and the drawing of boundaries consist in the single, contemporaneous and simultaneous act of inclusion and exclusion. This is what we call bounded reasoning. Independent political groups could hardly claim their independence if they lacked substantive identity found within specific boundaries. Thus the notion of sovereignty predates the coinage of this term at a particular point of history. There was sovereignty and there were sovereigns since the beginning of time. Regardless of the historical coinage of the word "state" sovereignty is held by a people in perpetuity.[32] For us then there is a philosophical grounding for the quest for historical justice.

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29 M Shaw, **Title to territory in Africa** (Clarendon Press, Oxford, 1986), p. 23.

30 K Marek, **Identity and continuity of states in public international law** (Librairie Droz, Genève, 1968), pp. 127-8.

31 EN Van Kleffens, "Sovereignty and international law", **Recueil de Cours**, Volume 82(1), 1953), pp. 11-2.

32 J Thompson, "Land rights and Aboriginal sovereignty", **Australian Journal of Philosophy**, Volume 68, No. 3, 1990, p. 316.

In the beginning the indigenous conquered people of South Africa pursued the path of peace[33] in their quest for historical justice. After an assessment of the efficacy of this path it was decided to reinforce it by resort to the use of armed force.[34] In the face of this the conqueror persisted in perfecting the means of oppression and suppression. In this regard the conqueror's South Africa received extraordinary assistance from her Western allies.[35] The declaration policy of the latter censured oppression and suppression. This did not deter these allies from according the conqueror's South Africa full and complete status of international personality. On this basis South Africa enjoyed membership of international organisations such as the United Nations including a special relationship with NATO under he auspices of SACLANT (the Supreme Allied Command in the Atlantic).[36] The declaration policy of South Africa's Western allies was on the whole far from consistent with its action policy. Juridically, the conqueror's South Africa was considered in no way defective with particular reference to title to territory and sovereignty. Precisely because of this the Act of Union in 1910, the Republican status acquired in 1961 after the dismemberment of South Africa from the Commonwealth, Bantustanisation and the 1983 constitution were all regarded as evolutionary phases of South African constitutionalism. Criticism of any of these developments was more political than juridical. The reasoning underlying the juridical view appears to be this: Conquest does not necessarily and immediately vest title to territory in the conqueror. The latter may, however, exercise immediately absolute sovereignty over the territory. Either through acquiescence[37] or lapse of time title to territory may eventually vest in the conqueror. From this moment the superior claim to their territory by the indigenous conquered peoples becomes extinguished.[38] Thus extinctive prescription eliminates the superior claim of the conquered and renders it obsolete. Accordingly, a legal prohibition is imposed upon the conquered never ever to revive their claim to territorial title and

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33 T Karis and GM Carter, **From Protest to Challenge**, Volume 2 (Hoover Institution Press, Stanford University, Stanford, California, 1973).

34 M Benson, **The struggle for a birthright** (Penguin Books Limited, Harmondsworth, Middlesex, England, 1963).

35 Z Cervenka and B Robers, **The nuclear axis** (Julian Friedman, London, 1978), pp. 57-310.
- **The Star**, 20 Februry 1980, p. 21.
- F Barnaby, **Nuclear proliferation and the South African threat** (World Council of Churches, Geneva, 1977), p. 19.

36 P Wall (ed.), **The Indian Ocean and the threat to the West** (Stacey International, London, 1975), pp. 39-66.
- MA El-Khawas and B Cohen (ed.), **The Kissinger study of Southern Africa** (Lawrence Hill & Co., Westcort, Connecticut, 1976), pp. 39-40.
- C Crocker, "Western interests in Southern Africa", **Survival**, Volume XXIII, No. 6 (International Institute for Strategic Studies, London, 1981), p. 279.

37 MacGibbon, p. 143.

38 Blum, p. 6.

sovereignty over it.[39] At the same time this prohibition perfects the conqueror's acquisition of territory by conquest. In this way the universe of juristic facts excludes, discards and ignores a matter of natural and fundamental justice. Extinctive prescription or the statute of limitation created a specific and definite area of tension precisely by the exclusion of a matter which for the indigenous conquered peoples is a question of natural and fundamental justice. This tension is sharpened particularly by the fact that the conception of law of the indigenous conquered peoples does not recognise the statute of limitation. "Prescription is unknown in African law. The African believes that time cannot change the truth. Just as the truth must be taken into consideration each time it becomes known, so must no obstacle be placed in the way of the search for it and its discovery. It is for this reason that judicial decisions are not authoritative. They must be able to be called into question."[40] So it is that even at the juridical level there is a conceptual clash. This would certainly exacerbate the tension created by the exclusion of a matter of fundamental justice.

The exclusion made it relatively easy to urge, on political grounds, for the extension of democracy to the indigenous conquered people. This, so the argument continued, would be achieved through the abolition of the 1983[41] constitution and its replacement by a new constitution. It was thus predetermined in advance that the new constitution would exclude and ignore the question of the reversion of title to territory as well as the restoration of sovereignty over it. Thus the basis and parameters of transition to democracy in South Africa were laid down.[42] This was the case also with regard to the negotiations leading to the transition from Rhodesia to Zimbabwe.

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39 DHN Johnson, "Acquisitive prescription in international law", **The British Year Book of International Law**, 1951, p. 337.

40 M'Baye, "The African conception of law", **International Encyclopedia of Comparative Law**, Vol. II, 1974, p. 147.
M'Baye's understanding of African law with regard to prescription is a confirmation of a similar understanding forty years earlier. It was expressed in these terms: "A debt or a feud is never extinguished till the equilibrium has been restored, even if several generations elapse ... to the African there is nothing so incomprehensible or unjust in our system of law as the Statute of Limitations, and they always resent a refusal on our part to arbitrate in a suit on the grounds that it is too old." JH Driberg, "The African conception of law", **Journal of Comparative Legislation and International Law**, Volume XVI, 1934, p. 238.

41 H Booysen and D van Wyk, **Die '83 Grondwet** (Juta en Kie, Bpk., Johannesburg, 1984).

42 The ANC seems to have accepted these premises without question. See **African National Congress draft proposals for the transition to democracy, Transition to Democracy Act**, 5 RADIC 1993, pp. 208-24.
For an earlier discussion of the ANC constitutional proposals, see, for example:
- H Corder and D Davis, The constitutional guidelines of the African National Congress: A preliminary assessment, **The South African Law Journal**, Volume 106, 1989, pp. 633-47.

THE TRANSITION TO DEMOCRACY IN SOUTH AFRICA

In the light of the foregoing, it is submitted that there were only two major parties to the negotiations leading to a "new" South Africa. These were the conquered people on the one side and the conqueror on the other. The former term is preferred because it is historically appropriate and at the same time avoids an ethnic perspective to the problem. It includes expressly the indigenous peoples, the coloured people, the Indian people and all other peoples who though not vanquished at the onset of "discovery" and colonisation, were nevertheless subjugated by the conqueror. Accordingly, the characterisation of the parties as it is done here is deliberately neutral as to race; a term which continues to be almost at the center of contemporary South African and Zimbabwean politics. Another observation we wish to make is that the claim to title to territory and sovereignty over it is far from a demand to restore honour to an attenuated prestige. It may, however, not be denied that this is a secondary. The quest for justice in the form of restoration of title to territory and sovereignty over it is primarily predicated on the premise that land is the indispensable resource[43] for the sustenance of human life.[44] The right to life[45] is inseparable from the right to land. It is the most fundamental in the sense that it is the basis for and precedes all other human rights.[46] Therefore, talk about human rights must recognise that there were human beings and human rights long, long ago before the term "human rights" was coined.

In the "negotiations" leading to the new South Africa there are two contending paradigms, namely, the decolonisation and democratisation paradigms.[47] The former speaks to the restoration of title to territory and sovereignty over it. It includes the exigency of restitution. It would bring the conqueror to renounce in principle and expressly title to South African territory and sovereignty over it. In this way sovereignty would revert to its rightful heirs. The conqueror's South Africa would be dissolved. This would then lay the basis for state succession.[48] The legal

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43 U Jonsson, "The socio-economic causes of hunger" in A Eide, WB Eide, S Goonatilake, J Gussow and Omawale (eds), **Food as Human Right** (The United Nations University, Tokyo, 1984), p. 24.

44 F Fanon, **The wretched of the earth**, (trans. C Farrington), (Penguin Books Ltd., Harmondsworth, Middlesex, England, 1965), p. 34.

45 BG Ramcharan, "The right to life", **Netherlands International Law Review**, Volume XXX, 1983, pp. 297-329.

46 "Rerum Novarum", par. 10, in DJ O'Brien and TA Shannon (eds), **Catholic social thought** (Orbis Books, Maryknoll, New York, 1995), p. 18. See also in the same book, "Mater et Magistra" pars. 35 and 43, as well as "Pacem in Terris" pars. 9 and 11.

47 JM Rantete, **The African National Congress and the negotiated settlement in South Africa**, (JL van Schaik, Pretoria, 1998), pp. xv-xix.

48 JL Brierly, **The law of nations** (Clarendon Press, Oxford, 1963), p. 144.
- Marek, p. 5-6.

consequences flowing from total state succession[49] or the Nyerere doctrine[50] (the clean slate doctrine) would then follow. By its nature then the decolonisation paradigm is contrary to and inconsistent with the conqueror's claims pertaining to extinctive prescription. By contrast, the democratisation paradigm conforms to and is consistent with the conqueror's claims concerning extinctive prescription. It proceeds from the premise that given the evolutionary character of constitutionalism in South Africa, the major weakness of the 1983 constitution consists in the exclusion of the indigenous conquered peoples. Therefore, democracy will be achieved through the inclusion of the latter in the new constitution. In this way nonracialism would be one of the hallmarks of the new constitutional dispensation. In its determination to achieve victory over apartheid, the democratisation paradigm lost sight of the fact that the land question was a basic issue[51] long, long before apartheid was born. Despite this oversight, democratisation won the day and so the question of title to territory and sovereignty over it did not become an integral part of the "negotiations" agenda.

In these circumstances it was relatively easy for the conqueror to realise the resolve to defend and consolidate all the benefits resulting from extinctive prescription. To this end the conqueror argued for the abolition of the principle of the sovereignty of parliament. This was rather odd since the sovereignty of parliament was a basic constitutional principle[52] in South Africa for as long as the conqueror held sole and exclusive political power. This principle did not become suddenly inadequate. Instead, the conqueror feared that the indisputable numerical majority of the conquered people would probably abuse the principle. To avert this abuse abolition was considered the best solution. The conqueror's fear was based on the experience of its own abuse of this principle. It was pertinently observed in this connection that "(s)everal modern critics of the South African constitution have argued cogently that the foundation fathers of the Union created the wrong sort of constitution for this sort of country, urging that greater decentralization (...) plus the incorporation in the written constitution of a bill of rights enforceable by a more independent judiciary endowed with testing power, all established on a much broader basis of popular consent, would have made it a more acceptable and

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49 DP O'Connel, **State succession in municipal and international law**, Volume 1 (Cambridge University Press, Cambridge, 1967), p. 4.
- G Von Glahn, **Law among nations** (Macmillan Publishing Company, New York, 1986), pp. 111-3.

50 Y Makonnen, **International law and the new states of Africa** (UNESCO, Regional participation programme for Africa, Addis Abeba, 1983), p. 133.

51 LJ Sebidi, "The dynamics of the black struggle and its implictions for black theology", in IJ Mosala and B Tlhagale (eds), **The unquestionable right to be free** (Skotaville Publishers, Johannesburg, 1986), p. 26.

52 Harris v Minister of the Interior 1952 (2) SA 428 (A);
Minister of the Interior v Harris 1952 (4) SA 769 (A).

enduring document. With these opinions we need not quarrel. The absence of safeguards of this sort resulted in the attribution of supremacy to a legislature which is not and never has been thoroughly representative, and which has since shown a disposition to use that supremacy with singular lack of restraint".[53]

In an effort to win the support of the numerical majority population in the country, the conqueror appealed to *ubuntu* (humanity)[54] and used it tactfully to remove the causes of its own fear. Here it is important to understand that the majority of the South African population continue to be nurtured and educated according to the basic tenets of *ubuntu*, notwithstanding the selective amnesia of a small segment of the indigenous elite. For example, *ubuntu* was included in the interim constitution to justify the necessity for the Truth and Reconciliation Commission.[55] It was excluded from the final one. Why? *Ubuntu* was again invoked by the Constitutional Court delivering the judgement that capital punishment is unconstitutional.[56] With respect, the invocation of *ubuntu* in this case was *obiter dictum* as the same conclusion could have been reached without resource to *ubuntu*. Knowing why and how the death sentence affected mainly the conquered people in the past, the conqueror once again was driven by fear in opting for the abolition of the death sentence. These transparent tactics apart, it is curious that the final Constitution should remain completely silent about *ubuntu*. If a constitution is at bottom the casting into legal language of the moral and political convictions of a people then the mere translation of Westminster and Roman Law legal paradigms into the vernacular languages of the indigenous conquered people is not equal to the constitutional embodiment of their moral and political convictions. There is no *a priori* reason why *ubuntu* should not be the basic philosophy for constitutional democracy in South Africa.

Contrary to its rejection of this in the past, the conqueror now urged for the Constitution as the basic law of the country. The essence of the argument here is that the Constitution as the basic and supreme law of the country shall be above the law-making power vested in parliament. The laws enacted by parliament shall, in principle, always be subject to their conformity and consistency with the Constitution. Parliament would therefore be the prisoner of the Constitution whose principles[57] possessed the character of essentiality[58] and immutability. What then is

53 TRH Davenport, "Civil rights in South Africa, 1910-1960", **Acta Juridica**, 1960, p. 13.
54 MB Ramose, **African philosophy through Ubuntu** (Mond Books Publishers, Harare, 1999).
55 The Promotion of National Unity and Reconciliation Act No. 34 of 1995, Case CCT 17/96.
56 S v Makwanyane and Another 1995 (3) SA 391 (CC) - 1995 (6) BCLR 665 (CC) at pars 224-7; 241-51; 263 and 307-13.
57 M Wiechers, "Namibia: the 1982 constitutional principles and their legal significance", **South African Yearbook of International Law, Volume 15, 1989/90**, p. 321.

the meaning of popular sovereignty in the form of representative parliamentary democracy? Without attempting to answer this question it is clear that the option for Constitutional supremacy by the conqueror was not simply a matter of juridical considerations. The cumulative result of the conqueror's arguments and tactics is that the democratisation paradigm carried the day. Its success was in fact the victory of extinctive prescription. Thus the injustice of conquest ungoverned by law, morality and humanity was constitutionalised. This constitutionalisation of injustice places the final Constitution on a precarious footing because of its failure to respond to the exigencies of natural and fundamental justice due to the indigenous conquered people. But the constitutionalisation of an injustice carries within itself the demand for justice. Accordingly, the reversion of title to territory and the restoration of sovereignty over it did not die at the birth of the new Constitution for South Africa.

FROM RHODESIA TO ZIMBABWE

Mason identified conquest as the basic problem in what is now known as Zimbabwe.[59] The conqueror in this case was the same as in South Africa. Thus the philosophical and ideological underpinnings of conquest remain the same. When the conquest was changed into a right and the injustice transformed into justice, the conqueror in Rhodesia was - prior to 11 November 1965 - recognised as an international personality[60] albeit in a limited way. However, the recognition became rather strained when Rhodesia unilaterally declared independence from the United Kingdom on 11 November 1965. The referendum of June 20, 1969 to turn Rhodesia into a republic thereby dissolving every connection with the British monarchy, was supported only by the Rhodesian conqueror. "In effect, the referendum result forced the British Government and others to concede that they held responsibility without power. ... Responsibility without power had been an apt description of the relationship with Rhodesia of successive British Governments since 1923."[61] The strain pertaining to the continued recognition of the conqueror's Rhodesia was more respect for the sovereignty of the United Kingdom[62] than for the fact that extinctive prescription meant injury and injustice to the indigenous

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58 Kesavananda v State of Kerala A.I.R. 1973 S.C. 1361. For an extensive discussion of this case, see DG Morgan, "The Indian 'essential features' case", **The International and Comparative Law Quarterly**, Volume 30, 1981, pp. 307-37.

59 Mason, pp. 209-10.

60 DJ Devine, "The status of Rhodesia in international law", **Acta Juridica**, 1974, p. 111.

61 WP Kirkman, "The Rhodesian referendum, The significance of 20 June 1969", **International Affairs**, Vol. 45, No. 4, October 1969, p. 648.

62 MS McDougal and WM Reisman, "Rhodesia and the United Nations: The lawfulness of international concern", **The American Journal of International Law**, Vol. 62, 1968, pp. 10-11.

conquered people of Zimbabwe.[63] The latter drew the conclusion to assert their right to historic title through both peaceful means and the use of armed force. This led to internal unsuccessful constitutional[64] engineering and ultimately to a series of peace negotiations culminating in the Lancaster House Agreement.

At Lancaster House the British government prescribed a settlement.[65] This consisted of (i) and entrenched "Declaration of Rights", and (ii) loans to the new government of Zimbabwe. The "willing seller/willing buyer" principle was established to defend the "property" rights of the conqueror in Rhodesia. Under pressure, not least from the heads of state of the Front Line States, the Patriotic Front reluctantly accepted this particular agreement. It was not the first time that the British government imposed this kind of agreement on African states.[66] In this way the latter were forced to accept extinctive prescription as an irreversible and immutable fact. Yet, the sense of an injured consciousness and the injustice of extinctive prescription did not become completely and permanently erased from the memory of the indigenous conquered people of Zimbabwe.

Accordingly, the government of Zimbabwe sought to correct this injustice within the limits prescribed by the Lancaster House Agreement. On this basis the government sought to acquire land by determining the manner and extent of compensation. This led to the Constitution of Zimbabwe Amendment Act no. 11 of 1990. Section 6 hereof contains an ouster of the jurisdiction of the courts in these terms: "(A)nd no such law shall be called into question by any court on the ground that the compensation provided by that law is not fair." The first challenge to the ouster occurred through the courts. It focused on sections 11 and 16 - the right to property and protection against compulsory acquisition of property, including the question whether designation of land without compensation amounts to acquisition of interest in property without payment of compensation. It also focused upon the constitutionality of Part IV of the Land Acquisition Act 3 of 1992 - of the 1980 Constitution of Zimbabwe.[67] The Court was not called upon to decide the issue directly at the level of historic titles in law. Rather it was called upon to determine

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63 It is significant that the Zimbabwean novelist, Vambe, in his novel, **An ill-fated people**, uses the expression "the conquered people" with reference to the indigenous Zimbabweans at least more than twenty times.

64 PB Harris, "The failure of a 'constitution': The Whaley report, Rhodesia 1968", **International Affairs**, Vol. 45, No. 2, April 1969, p. 235.

65 J Davidow, **A peace in Southern Africa: the Lancaster House conference on Rhodesia** (Harvard Law School, Cambridge, Massachusetts, 1990), p. 56.

66 Commenting on the imposition of a similar solution by the British government on Kenya, Makonnen argued appositely that "Kenya paid compensation for land reacquired from the 'alien' land holders ... the British Government provided Kenya with loans from its own sources and also from the World bank, in order to finance the compensation for the transferred alien property, which amounted in fact to outright repurchasing of Kenya by the Kenyans." Makonnen, pp. 363-4.

67 1994 (2) ZLR 294 (H).

the legality[68] of the government action basing itself on a constitution which was founded on the dubious assumption that extinctive prescription was legally and equally valid for all parties to the conflict. It was held, however, on the basis of the doctrine of eminent domain, that the state was entitled to acquire land in terms of the disputed provisions. This decision did not dispose of the matter definitively. Nor did it vitiate the resolve of the indigenous conquered people to discover their land. As the presiding judge noted on a somewhat different basis: "But the fact of the matter is that the facts that make land acquisition for resettlement a matter of public interest in Zimbabwe are so obvious that even the blind can see them. ... Once upon a time all the land in Zimbabwe belonged to the African people of this country. By some means foul or fair, depending on who you are in Zimbabwe, about half that land ended in the hands of a very small minority of Zimbabweans of European descent. The other half remained in the hands of the large majority, who were Africans. The perception of the majority of Africans was that the one half in the hands of the minority was by far the better and more fertile land, while the other half, which they occupied, was poor and semi-arable. It is common knowledge that, when the Africans lost half their land to the Europeans, they were paid nothing by way of compensation. ... The majority of Africans who are still crowded in the communal areas are more anxious to be resettled on land they see as their own taken from them wrongly in the first instance. They see no merit in having to pay for land that was taken from them without compensation in the first place.[69] This in a way closes the first phase of struggle for historical justice within the parameters defined by the Lancaster Agreement.

Our problem with this phase is that it focuses on the recovery of land in the limited sense of a conflict of rights in the sphere of private property. By so doing it reduces a matter of collective historical justice to a question of individual justice. As such it is not an express and explicit demand for the restoration of title to territory and the reversion of sovereignty to the indigenous conquered peoples. Through their political representatives, the indigenous conquered peoples of both South Africa and Zimbabwe appear to have tacitly concurred with the conqueror that extinctive prescription foreclosed any attempt to raise the question of historic title in law at the negotiations for democratisation and independence respectively. This apparent concurrence led to discussion focused on "property rights" and their protection under the constitution.[70] The questionable assumption here is that the

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68 I Maposa, **Land reform in Zimbabwe** (Catholic Commission for Justice and Peace in Zimbabwe, Harare, 1995, pp. 42-58.

69 1994 (2) ZLR 307-308 (H).

70 Unsurprisingly, the "Declaration of Rights" in the Zimbabwean constitution and the "Bill of Rights" in the South African are terminologically and substantively similar. Also the property clause in the South African constitution is the longest. Much ink has been spilled on paper to prove only the legality but not the justice of the property clause. See, for example:

transfer of property from one generation to the other was based upon a just acquisition thereof in the first place.[71] A perfectly legal transfer of property need not be just at the same time. Therefore, the legal transfer of property must also be above reproach as far as natural and fundamental justice is concerned. The jurist might dismiss this as a purely moral consideration. By so doing, yet another material fact - a people's perception of justice according to their understanding of history - is excluded from the universe of juristic facts. It is precisely this exclusion which led to the second phase of the challenge to extinctive prescription.

MOLATO GA O BOLE: CHALLENGING EXTINCTIVE PRESCRIPTION

The paradox of democratisation and independence in both South Africa and Zimbabwe is that the compromises that the political representatives of the conquered peoples made are philosophically and materially inconsistent with their peoples' understanding of historical justice. Philosophically, the peoples hold that *molato ga o bole*, that is, extinctive prescription is untenable in the African understanding of law. Until and unless equilibrium is restored through the restoration of title to territory and the reversion of sovereignty over it even the best constitution would be fragile for lack of homegrown credentials.[72] Landlessness resulting from the arbitrary definition of truth and justice according to the meridian line is the immediate material effect of this clash at the philosophical level. In terms of immediacy therefore it is understandable to urge for the redefinition of property and land reform.[73] But these are manifestations of the fundamental problem of the restoration of title to territory and the reversion of absolute sovereignty over it. That "in general the doctrine of reversion of sovereignty does not apply to sub-Saharan Africa" is an untenable thesis.[74] The authority upon which the learned author relies for this thesis is burdened with an unmistakably cursory and superficial knowledge of African history. Nonetheless, he proceeds from such knowledge to draw sweeping conclusions about unspecified "African Rulers" and "African Chieftains". It is also crystal clear that the authority is committed to the untenable view that

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- A van der Walt, "Comparative notes on the constitutional protection of property rights", **Recht en Kritiek**, 19, No. 3, 1993, pp. 281-94.
- G van Maanen, "Ownership as a constitutional right in South Africa", **Recht en Kritiek**, 19, No. 3, 1993, pp. 298-319.
- C Lewis, "The right to private property in a new political dispensation in South Africa", **South African Journal on Human Rights**, 8, 1992, p. 391.

71 J Waldron, **The right to private property** (Clarendon Press, Oxford, 1990), pp. 256-66.

72 A van Horn, "Redefining 'property': the constitutional battle over land redistribution in Zimbabwe", **Journal of African Law**, Vol. 38, No. 2, 1994, p. 160.

73 B MacGarry, **Land: for which people** (Mambo Press, Gweru, 1994).
- R Riddell, **From Rhodesia to Zimbabwe: the land question** (Mambo Press, Gwelo, 1978).
- S Moyo, **The land question in Zimbabwe** (SAPES Books, SAPPHO (Pty.) Ltd., Harare, 1995).

74 Devine, p. 403.

because Western Europe had a supposedly superior civilisation it therefore had the right to colonise.[75] The thesis that the reversion to sovereignty is neither relevant nor applicable to sub-Saharan Africa is philosophically untenable and historically empty. It is therefore submitted that the restoration of title to territory and the reversion of sovereignty over it is the basic problem.

It is still problematical that even in this second phase the government of Zimbabwe continues to deal with this problem as a matter of conflict of rights in the sphere of private property rights. This has led the government to enact a new law permitting land acquisition without compensation. Critics of this law argue that the legislature decided on this enactment contrary to the result of the referendum. What the critics omit to mention is that according to the law of the land, a referendum has got no legal force. Whatever the result it is not legally binding on the government. And the government is not necessarily the legislature. In addition, the critics fail to appreciate the fact that the majority of the indigenous conquered people in Zimbabwe are illiterate especially with their lack of understanding of the dominant epistemological paradigm of the conqueror. Against this background, it is not difficult to see that the very idea of a referendum was essentially a tactical blunder since its import could not be properly appreciated. Another blunder was at the scientific level. It was inappropriate to seek a vote on the referendum as a whole without at the same time determining that the counting will be on each issue separately. Alternatively, the people should have been asked to cast multiple votes by way of giving an answer to each item on the referendum. Since neither of these was pursued, it is fair to conclude that scientifically the referendum contained fatal flaws. No wonder then that the people went ahead and occupied land as though there never was a referendum. The critics of the government argue that such occupation is in violation of the human rights of the land "owners". It is important to determine if the critics belong historically to the category of the conquered or the conqueror. On the basis of such a determination it is worth reminding the critics that long before the coinage of the term "human rights" there were human beings and these were surely not without rights. Did the conqueror show respect for any of these rights when lawlessness, lack of morality and inhumanity were the main features of the original conquest leading to the acquisition of territory beyond the meridian line? The British government has not made matters easy by announcing the existence of an emergency plan to receive about twenty thousand Rhodesians back into the United Kingdom. No doubt this announcement is tantamount to the British government's admission that there are Rhodesians in Zimbabwe who have a claim to British nationality by right of ancestry. Ironically, it is precisely the right of ancestry upon which the indigenous conquered peoples of Zimbabwe rely to

[75] CH Alexandrowicz, New and original states, the issue of reversion to sovereignty, **International Affairs**, Vol. 45, No. 3, July 1969, pp. 471-3.

urge for the exigencies of historical justice. Both the Zimbabwean government's approach and the British government's reaction to it exacerbate the conflict. But even without this it is clear, at least for those like the present writer who took time to be in the midst of the so called ordinary people in both Zimbabwe and South Africa, that people have finally decided to go their own way to solve the problem. Following their conversations in public transport, under the tree talk, in amusement centers and private homes, there is no doubt that people argue for title to territory and sovereignty over it. This boils down to nothing less than reversion to unencumbered and unmodified sovereignty to the same quantum and degree lost at conquest ungoverned by law, morality and humanity. It must be stated in fairness to the Patriotic Front that on this point it was long, long ago at one with the peoples. "The Patriotic Front relinquished under pressure many of its fundamental tenets during the conference ... As the government of Zimbabwe, it must operate under a constitution not entirely of its own choosing."[76] There is evidence that both the Pan Africanist Congress and the Azanian peoples Organisation of South Africa concur with the peoples on this point. Unlike the patriotic Front, the Pan Africanist Congress did not pursue this point at the "negotiations". Despite its non-participation in the "negotiations", the Azanian Peoples Organisation did not - even in its campaign at the last general elections - present title to territory in its election manifesto. As the political leadership in both countries continues to pursue the resolution of this conflict within the narrow and untenable epistemological paradigm of the conqueror, their peoples chartered their own route through the *matyotyombe* phenomenon which is common to both South Africa and Zimbabwe. The option for *matyotyombe* is a radical questioning of the juridical epistemology of the conqueror. It is a rejection of a situation of basic injustice protected by a constitution without home-grown credentials. It is the refusal to grant such a constitution the power to pre-empt, proscribe and nullify the exigencies of justice due to the conquered people.

THE REVERSION TO UNENCUMBERED AND UNMODIFIED SOVEREIGNTY

For the conquered people "democratisation" or independence would be incomplete and meaningless if it excluded the reversion to unencumbered and unmodified sovereignty to the same quantum and degree as was lost at conquest ungoverned by law, morality and humanity. *Matyotyombe* is the peoples' expression of this; a guide to the political leadership. It is a Xhosa word designating conditions of squalor. It is descriptive of a situation of extreme poverty, dirt and moral degradation. It signifies conditions unbefitting to human habitation and derogatory of human dignity. Concretely, this refers to houses, shacks built of ordinary plastic

[76] Davidow, p. 98.

wood, corrugated iron, mud or even bricks. The size and structure of these edifices reflect anything but a home. Safety for the dwellers is, to say the least, lowest.

The problem with *matyotyombe* is that they proliferate relentlessly in all directions. They penetrate any area and freely fix themselves. They even fix themselves on no man's land which subsequently turns out to be another's "private property". The latter then defines *matyotyombe* dwellers as squatters. Both the legality and the justice of the claimant's right to "private property" are assumed to be valid even for the so called squatters. The injured party then seeks a remedy through the courts. The latter invariably hand down eviction orders. These evoke defiance instead of obedience from the dwellers. The reason for this may be found in the Sotho term for the same *matyotyombe*, namely, *baipei*. The latter is descriptive of people who have fixed and settled themselves into a particular place. The idea of being fixed to a place in the sense of belonging to it as of right underlies the meaning of *moipei* being the singular of *baipei*. *Baipei* does not fix themselves at any place as though they are in search of any space: a void without any history. *Baipei* assert their right to a place and not a space and the whole of South Africa is this place because it is "space which has historical meaning, where some things have happened which are now remembered and which provide continuity and identity across generations. Place is space in which important words have been spoken and which have established identity, defined vocation and envisioned destiny ... a yearning for a place is a decision to enter history with an identifiable people in an identifiable pilgrimage."[77] The pilgrimage for the restoration of title to territory and the reversion of unencumbered and unmodified sovereignty over it is spearheaded by the *bapei*. Slowly the government of Zimbabwe has joined this pilgrimage of the people. It needs, however, to rid itself of the burden of dominance by the juridical paradigm of the conqueror especially with regard to the putative eternity and immutability of "property rights".[78] With particular reference to both rural and urban land both the governments and the courts of Zimbabwe and South Africa must, at the very minimum, recognise and accept together with the Catholic Bishops' Conference of Brazil that "(t)he right to make use of urban land to guarantee adequate housing is one of the primary conditions for creating a life that is authentically human. Therefore when land occupations - or even land invasions - occur, legal judgments on property titles must begin with the right of all to adequate housing. All claims to private ownership must take second place to this basic need ... We conclude that the natural right to housing has priority over the law that governs land appropriation. A legal title to property can hardly be an absolute in the face of the human need of people who have nowhere to make their home.[79]

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77 W Brueggemann, **The land** (Fortress Press, Philadelphia, 1977), p. 5.
78 RH May, **The poor of the land** (Orbis Books, Maryknoll, New York, 1991), p. 122.
79 **Ibid.**

CONCLUSION: TOWARDS A POST-CONQUEST SOUTH AFRICA AND ZIMBABWE

We have shown that conquest ungoverned by law, morality or humanity is the original basis for the conqueror's claim to title to territory by appeal to extinctive prescription. Such a claim is, from the point of view of the conquered, untenable even if one were to appeal to Papal mandate, discovery or the mission to civilise. The posterity of the original conqueror is therefore not the legal successor in title to absolute sovereignty. Extinctive prescription is inconsistent with the legal philosophy of the indigenous conquered people. It is also contrary to natural and fundamental justice. Accordingly, the restoration of title to territory and the reversion of unencumbered and unmodified sovereignty to the same quantum and degree as at conquest remains the basic demand of justice due to the indigenous conquered people. This includes the exigencies of restitution and reparations. The restoration of title to territory and the reversion of sovereignty as already indicated constitute the inescapable basis for a post-conquest South Africa and Zimbabwe.

Primarily for the convenience of the conqueror apartheid was presented as the main problem in South Africa. by the time apartheid appeared in 1948 title to territory and sovereignty over it had established itself as the main problem in the country at least two and a half centuries back. The elimination of apartheid solved the problem only by conferring limping sovereignty over the indigenous conquered peoples. The elimination of apartheid is not an answer to the question of the reversion of unencumbered and unmodified sovereignty to the same quantum and degree of sovereignty as was lost at conquest ungoverned by law, morality or humanity. The transition to Zimbabwe also conferred limping sovereignty to the indigenous conquered people of the country in the same way as in South Africa. Thus a post-conquest South Africa and Zimbabwe is yet to be born in the form of a veritable state succession rather than government succession as it is at present the case in both countries. To argue otherwise is to condone the questionable maxim that *ex injuria ius oritur*. State succession must ensue with the express and unequivocal declaration by the conqueror renouncing sovereignty over territory. This is inescapably necessary in order to dissolve the categories of conquered and conqueror. But the dissolution does not create automatically equality of condition in material terms. For this reason restitution and reparation arise as distinct necessities of historical justice. If this is a novelty in international law. there surely is nothing to suggest that the corpus of this law is comprehensive, exhaustive and definitive. The ordinary consequences of state succession must follow thereby delivering the conquered of the burdeus which they neither created nor benefited from. This would create space to work out a homegrown post-conquest constitution. Restitu-

tion and reparation must be counted among the basic pillars of the post-conquest constitution. Instead of taking up the offer to return to Britain or other ancestral homelands, the former conqueror under the guise of a citizen second to none could be part of this constitution-making. A post-conquest constitution for South Africa and Zimbabwe - indeed for the rest of formerly colonised and enslaved Africa - would be predicated on the necessity to rectify the injustice of the past. Justice as equilibrium would, on this basis, appear to be an acceptable premise of constitution-making. Remove the element of responsibility, then justice as experience and concept becomes totally devoid of meaning. Therefore, "reparations,..., as a structure of memory and critique, may be regarded as a necessity for the credibility of Eurocentric historicism, and a corrective for its exclusionist worldview ... what really would be preposterous or ethically inadmissible in imposing a general levy on South Africa's white population?" This measure of restitution surely applies to Zimbabwe and seems a better option to the current land acquisition process. It is salutary to note that many academics from within the ranks of the conqueror have already raised the possibility of a wealth tax. Prominent among them is the Stellenbosch University academic Professor Sampie Terblanche whose testimony to the Truth and Reconciliation Commission on the question of wealth tax deserves much more than a cursory study. [80]

[80] W Soyinka, **The burden of memory, the muse of forgiveness** (Oxford University Press, New York, 1999), pp. 39 and 25.