

# TOWARDS RESOLVING THE NEW CONFUSION ABOUT LAND TENURE

## 1. Background

Both Cross (*Reality*, March 1985) and Tapson (*Reality*, September 1984) oppose freehold land tenure in the 'homelands'. The Swart Commission recommended that decisions regarding land reform be devoluted to tribal authorities, who should, in their discretion, convert some or all of their land to freehold. Both aspects of this recommendation are now official Ciskei government policy. A similar policy has also been adopted in KwaNdebele.

This article attempts to put the record straight on certain aspects of the land tenure debate, and to reply to Cross and Tapson. Because of the limited space available and the short deadline set by the editor, I have departed from certain conventions. In particular much of the article is in point form and sources are not cited in the hope that most readers will be reasonably well-informed on these matters.

When Tapson prepared his article the Swart Report was not yet out. Tapson's article was initially prepared for the Carnegie Conference on Poverty. So what I criticise here is his **prior** position, bearing in mind that he apparently now endorses Swart.

Cross writes that she is anti-freehold and anti-leasehold **a la** Tapson, but as I argue below, this **may** be due to an inadequate understanding, widespread though it may be, of the real nature of different land tenure forms.

Swart is widely and erroneously interpreted, or rather presumed, to have recommended the summary conversion of tribal tenure to 'western' freehold. This ignores the fact that local option and the availability of a range of possible choices are key features of the recommendations. To crown it all, most of the standard literature that constitutes the background to this discourse is pervaded by ambiguous, erroneous and contradictory terminology.

In sum, there is a great deal of confusion.

## 2. The Myth of 'African Socialism'

The near-universal departure point (Cross excluded) is that African tribal law and custom is 'communal' or 'socialistic'. The opposite is true. Prior to various measures imposed by successive colonial and white regimes to increase and centralise power in and over tribal communities, tribal law and custom was, and largely still is, characterised by laissez-faire individualism.

As is well known:

- There were few centralised **coercive** powers.
  - Assets were privately owned, eg. stocks, crops, huts, handicrafts, weapons, and, in certain limited senses, wives and children.
  - Dwellings and arable land were privately allotted
- (the word in most African languages means 'own') and pasturage was either allotted or, more commonly, subject to privately held grazing rights – quite unlike the 'commonage' in European history.
- There were no coercive laws (interventions) against free contract and voluntary exchange, and no **legal** constraints upon wealth accumulation.
  - There was no coercive redistribution of wealth, and there were, typically, very wealthy owners of large livestock and land holdings, who might have many wives, children and huts.
  - There was a quasi-meritocracy, in which wealthy tribes-folk might have extra votes and other privileges.
  - Government was minarchical, i.e. it had very limited powers, with a high degree of devolution to village councils and no central planning structure.
  - Chiefs and headmen had few autocratic powers, usually needing to obtain full consensus for decisions by the chief/headman-in-council.
  - There were no taxes, and nothing resembling a welfare state. Welfare was, and largely remains, a voluntary familial or local community affair.
  - There were no powers of arbitrary expropriation. Land or huts could be dispossessed only under extreme conditions, such as a major crime against the tribe, and there would be a full public hearing. Such security of tenure is almost beyond the comprehension of the 'western' mind. Land allotments were in perpetuity.
- Given that there were many different tribal law systems, it has been necessary to simplify and generalise here but the Royal Commission of 1865 put it well when it said of the inhabitants of Kaffraria: 'Freedom from restraint (was) a ruling passion in them ...'
- A possible explanation for the emergence and persistence of the 'communalism' myth may be that Karl Marx, apparently without substantiation, called the first link in the imaginary dialectic chain 'primitive communism.' Ever since, it seems, regardless of the facts, the notion has stuck – in much the same way that we still talk of the sun rising when we have known for many generations that the horizon sets.
- The only sense in which land, but nothing else, could be regarded as communal, is the tradition that it 'belongs to the Chief in trust for the tribe'. This is similar to the western legal fiction that the land belongs to God, which is the origin of transfer duty, descriptively called 'God's rights' in some Germanic languages. (Afrikaans = 'Hereregte'). The true nature of substantive tribal law is however more puristically unfettered private ownership than western 'freehold', with the qualification that an effective

market for land transactions had apparently not emerged. This may be because there was no monetary system and, for the most part, land had not yet become a scarce resource. There was nevertheless a system for land transfers, and as Cross observes, since the introduction of money an 'informal freehold' system of **cash sales** has emerged. Simultaneously 'share cropping' (a form of barter lease) has been supplemented by cash rental leases.

### 3. What the Swart Commission did NOT say.

The Swart Commission did recommend a **true** free market land reform policy, which was accepted in full by the government. This does **not** mean:

- that **existing** land rights – held by either tribal authorities, or individuals – should be coercively removed and sold to the highest bidder.
- that rural people should be subjected to what Cross calls 'the agglomeration of landholdings, the concentration of land rights in the hands of a privileged few, or the emergence of a landless under-class.'
- that there will be no provision for the much vaunted 'community land ethic' and other customary phenomena.
- that tribal allotments, familial group rights, neighbourhood and village prerogatives **et al.** must end, and so on through the lexicon of free market mythology.

Incidentally, **every** white 'expert' who gave evidence to the Swart Commission, was emphatic that tribal blacks were anti-freehold and would never accept it, with which Cross implicitly concurs. **All** the black witnesses said that freehold was their everlasting aspiration, denied them by white rulers, and that it correctly reflected their land tradition. I personally was the 'cannon fodder' to present the freehold option to six tribal authorities, all of whom instantly, enthusiastically and unanimously accepted it.

The most dispiriting task for free marketeers is to distract attention from the diversions created by critics who set up and demolish straw men. There is a shameful degree of confusion amongst most social scientists, often liberally sprinkled with malice, regarding 'spontaneous order' schools of thought.

### 4. What the Swart Commission DID say:

- The de facto and de jure holder of all tribal land rights should not only retain those rights, but they should be enhanced by allowing (but not compelling) tribal authorities to remove restrictions on e.g. alienation, leasing, occupation, mortgaging, consolidation, subdivision, joint ownership, corporate ownership, succession, usufruct etc.
- Tribal authorities should be allowed (not compelled) to sell or lease unallotted land subjected to whatever conditions, if any, they like. Such conditions (of title) could retain full tribal authority, or none, or anything in between, on the same principle that the owner of freehold land in the western system may sell/lease subject to any mutually agreed condition. There could be conditions on e.g. land use, farming techniques, fencing, sub-letting or whatever.
- Existing allottees could, by agreement, convert allotments into long or short term leases, conditional or unconditional sales etc.
- 'Communal' pasturage could be kept as is (i.e. subject to grazing rights) or sold/leased to cooperatives, com-

panies or partnerships in which existing grazing right holders would get pro rata shares in return for their stock which would go into the new jointly owned juristic persona. That land could also be subdivided with each grazing right holder getting a pro rata portion, either initially or subsequently, if the shareholders so desire.

- The deeds registry and survey laws would either be repealed or streamlined so as to reduce formalities and costs to almost zero. Title deeds would be issued in respect of new and existing rights.
- The permutations that could occur within each tribal authority are endless.
- Land rights would be mortgagable so as to facilitate capital formation.
- The reforms would be situation-specific, and might take many years. Each tribal authority could have its own approach, or they could all adopt the guidelines recommended by the proposed Land Reform Commissioner whose job it will be to advise them, and who would encourage unfettered freehold.

Note that a true free market is not a static state but a **dynamic process**; not a top-down imposed order, but a bottom-up **spontaneous order**; not a diminution of rights, but an increase; not a zero or negative sum game, but a win-win situation; not centrally planned 'objective' profit-maximisation, but reverence for **subjective values**.

In adopting a new approach we don't need to be too concerned about the **initial** distribution of **new** rights since, provided there are competitive markets in the allocation of all rights, they will gravitate towards optimality, which, as we know from Hayek, cannot be predicted, defined or planned by central authority. (I strongly urge all serious scholars to read Hayek's seminal essay, 'The New Confusion About Planning,' whose title I have borrowed here.)

### 5. What Tapson Says.

Full justice cannot be done to a scholarly conference paper in a few paragraphs, but the essence of Tapson's case is that what is (in my view erroneously) called 'freehold' in Ciskei, has not produced positive results, and should therefore not be extended. (Swart agrees that non-freehold 'Deeds of Grant' and 'Quitrents' are no solution.) Tapson recommends 'collective leasehold' to be run on a tribal basis.

Note that Tapson's idea can be fully accommodated within the Swart (free market) approach **provided** that it is voluntary. It is presumably because of this that he now fully endorses Swart.

I would nonetheless advise all tribal authorities against a collective leasehold policy – but I will defend the right of the tribesfolk concerned to learn by their mistakes, and by those of neighbouring tribes with divergent policies. Tapson proposes a land rent that is reminiscent of the Henry George 'land tax' philosophy. Most free marketeers regard land tax as the 'least bad tax'. If Tapson condones free alienation of an individual's share in the co-operative leases, and if the leasehold is in perpetuity, on both of which questions he is silent, we actually have, in law, **joint ownership** (i.e. freehold) by another name, and we have a free market process of land right allocation which does not stand in fundamental opposition to Swart's preference for tribal authorities to convert to freehold title.

## 6. What Cross Says

The essence of Cross is that she agrees with Tapson's 'straw man' freehold critique, but condemns his alternative as too radical a departure from tribal tradition to be feasible, and does not agree that land policy should aim at maximum production. She wants other *in situ* values to be accommodated as well. Though she does not comment on Swart, she implicitly shares the error that this would not happen in a free market. On the contrary, the 'heart' of the free market philosophy is respect for subjective values.

Whilst what she is against is clear it is difficult to establish precisely what she is for. I often wonder whether much confusion would not be avoided if policy recommendations were accompanied by a lay version of the necessary enabling legislation.

For instance, Cross writes that holders of land rights should be allowed to exchange and lease and have access for formal sector financing. Does this imply a mortgagable title? May willing parties freely transact sales, leases and mortgages? Is the land right in perpetuity? If so, we are actually back with ordinary freehold as we are with Tapson if these conditions are satisfied. She calls traditional tenure 'informal freehold'. Why 'informal'? It is clearly formal and formalised.

Since the precise (legal) manner in which the land rights systems Tapson and Cross respectively espouse depart from free market freehold is not clear, let me say that I agree with what they clearly are for: provided that security of existing rights and freedom of contract (on both of which they are silent) are part of their respective visions. I disagree with their understanding of freehold, and endorse their critiques of this 'straw man' freehold.

I now proceed to respond to some other errors that I believe they make in concert with mainstream writers.

## 7. The Single Solution Fixation

It is a curious fact that people usually approach most questions with the tacit assumption that there is (a) one solution, and that (b) it must be chosen from one of two alternatives. Tapson and Cross have approached the matter in this vein.

More often than not, there are a variety of choices and a number of solutions. The Swart approach is unique in that it accommodates all conceivable **non-coercive** possibilities and is furthermore dynamic, so that ad hoc adjustments will occur as circumstances change for those affected.

## 8. The Meaning of 'Freehold' and 'Leasehold'

Freehold and leasehold are not absolute or unambiguous legal concepts. A leasehold often confers more rights than a freehold. Both may and usually do have 'conditions of title'. Both usually attract a payment (rates or rents) to the state. The essential difference is that a leasehold has a landlord.

## 9. The Romance of the Landed Peasant

There is a popular notion (amongst urbanites) that whoever happens to be on the land, should be kept there usually at great human and material cost. Tapson and Cross reveal a passion for preventing people becoming 'landless'. Yet 'landlessness' and development are almost synonymous. By contrast, Swart holds that urbanisation is desirable.

Tapson and Cross also describe those who would remain on the land as 'privileged'. This is not substantiated; merely axiomatically posited. It is a strange view indeed to regard

blacks in Southern Africa who are forced to stay in the homelands as 'privileged' and those allowed to urbanise as 'landless'. I expect that the people concerned see the matter differently.

It is the revealed preference of more than 90 percent of people in advanced societies to indulge in urban life, often as urban land owners. I would argue for an inalienable right for all people to vote with their land, rands and feet for what **they** prefer.

Under the freehold approach people will sell only if it is likely to optimise their own utility functions, as they see them. It is a paternalistic injustice to curtail such fundamental liberty.

## 10. Agglomeration or Subdivision?

A major flaw in Tapson and Cross is their assumption that freehold titles would be vended into 'agglomerations'. Why not make the same (false) assumption for leaseholds? Or would they not allow people to extricate themselves from their leases? That would be an Orwellian horror.

Cross says that her 'advanced system allows the **free exchange** of land rights, but discourages . . . concentration'. She does not substantiate the supposedly different outcomes from 'informal' and 'formal' freehold systems. I know of no evidence that there will be undue agglomeration or subdivision given freedom to:

- exchange land rights
- consolidate **and** subdivide
- lease, mortgage **and** foreclose
- use and enjoy
- transact with all willing parties regardless of race, nationality or citizenship.

In South Africa there is a law against sub-division, but not consolidation. The concern of most agriculturalists is that if people are left to their own devices they will endlessly subdivide until land holdings are too small to be viable. Free market phobia leads to bizarre contradictions. What is much more likely is that over long periods of time farm sizes will tend towards optimality. Whatever 'market failures' there might be, they are unlikely to rival the 'government failures' that are the only alternative.

## 11. Conclusion

Although **Cross** rages against 'laissez-faire freehold', she adopts major positions that are indistinguishable from that position. As we have seen she is for, inter alia:

- the 'free exchange' of land rights
- mortgagable rights in land
- the right to 'hold and deal in land'
- the landholder's right to 'lease out' land.

**Tapson**, it turns out, is not against freehold, but against various colonial titles created specifically to deny blacks access to freehold.

Having exposed the freehold straw man, there may be some hope that a scholarly consensus in favour of freehold, properly defined, may yet emerge.□

**Footnote:** Blacks in the Eastern Cape did enjoy proper freehold alongside whites during the 1800's. Records suggest that many were prosperous farmers, who won most of the prizes at e.g. the Peddie show. Some of them used the (then) most modern methods, lived in brick houses built by white contractors and displayed the same entrepreneurial appetite that other races and cultures manifest under such conditions. If they took to freehold then, they should do so all the more readily after a century of proximity to western commerce and agriculture.



# REVIEW

William Plomer : **Cecil Rhodes**; David Philip  
Africa South Paperbacks, 1984

This biography, first published in 1933, was no doubt controversial at the time it was written, and is likely to remain so. Plomer's attitude towards Rhodes is unequivocal and unforgiving – he portrays the man as a childish megalomaniac who abused his uncanny power over people to “develop” Africa and her people. Plomer's attack does not remain only against Rhodes, but against all the dreamers of Victorian Britain, who dreamt of colonising Africa and other underdeveloped countries of the world. Although Plomer is careful to distinguish between the colonising British, and the British as a race, his attack is nevertheless vehement and uncompromising, almost to the extent of sentimentalising the Dutch of Kruger's Transvaal as a consequence.

Plomer's style, however, is immensely readable and lucid. He carefully selects episodes in Rhodes's life which suit his critical purpose, especially events such as the Jameson Raid, and Rhodes's relationship with the Mashona and Matabele.

Thus it would seem that Plomer's biography of Cecil Rhodes is to be read nowadays by the student of literature rather than the student of history – the historian may find his selectivity and partiality annoying and disturbing. The student of literature, however, will find reading **Cecil Rhodes** an interesting exercise in how an author might blend, however subjectively, by means of skilful prose, fact, ideology and social criticism. □  
K.I.B.

## Sand

Arriving in Cape Town  
I step down  
into hot dry air,  
into the blue Combi.

Let me take you  
along the sea road  
to Muizenberg  
he says.

Hot seat  
against my back  
as I strap myself in  
ready to absorb white dunes,  
scrub,  
and the promises of sea air on my face.

We speed down a narrowing road.  
Trees grow over us,  
wheels bump down into pot-holes,  
roar out again.

Black-stacked  
playing card houses  
on either side.  
Corrugated stuff  
and sacks.

Blank eyes see darkly at me  
from the still photograph.  
Sand all around –  
but not beach.

They keep them nice inside,  
he says.  
Yes,  
I say.

What is this place?  
He tells  
and pushes the Combi  
into a U-turn,  
crunching sand  
at the feet of the children.

Let's get out of here,  
he says.

We do,  
travelling fast  
down the sea road to Muizenburg,  
air from the sea in my hair,  
grain of sand in my eye.

Floss M. Jay.