CHAPTER 12

THE JUDGE AND THE PEOPLE

DELIBERATING ON TRUE LAND CLAIMS

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ABSTRACT. Apartheid in both its discursive orientations and its facticity entailed the setting apart of people of different races. It also employed a series of mechanisms to regulate and control space, the rights of individuals and the scope of their movement. However, after the dismantling of apartheid, a policy of restitution came into existence in which land and space came to be regulated differently thereby contributing to the gradual dismemberment of the cartography of apartheid.

Introduction

Crucial recent developments in South Africa have included the advent of nation-wide democracy in South Africa, the development of public deliberation and the emergence of norms for a rhetorical culture. In the immediately preceding period, the South African state regulated, as is well-known, the usage, function and allocation of space within the "population groups" by controlling the verbalization of space.[1] The word *apartheid* is itself strictly coded: it denotes the act of literally setting people apart. Space, and state rhetoric,[2] were indeed codified, in the *apartheid* era, by the 1950 Group Areas Act,[3] that determined the location of people in accordance with their racial classification, following on the Native (Urban Areas) Acts of 1923 and 1945 and the Native Trust and Land Act of 1936. The Group Areas Act codified space in much the same way as the Population Registration Act codified "race". The Group Areas Act provided public deliberation about the built environment and human ecology in general with a formidable vocabulary. Here is, excerpted, the *apartheid* rhetoric concerning the non-communal sharing of civil space:

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[1] This chapter is a version, abbreviated and rewritten for the purpose of this volume, of chapter 8, sub-section 1 ("Space as Democratic Deliberation") of my book Salazar 2002. Further material and analyses will be found in: Salazar 2000, 2002a, b, 2003, a, b, in press (a), (b); also cf. the French-English version of the TRC Report (in press).

[2] By "state rhetoric", I mean: the argumentation carried by its agents to persuade the white minority that the *apartheid* policy was to its benefit.

[3] Act No. 41 of 1950. Group Areas.

> Be it enacted by the King's Most Excellent Majesty, the Senate and House of Assembly of the Union of South Africa, as follows: – 1. (Definitions) In this Act, unless the context otherwise indicates – (...) (v) "controlled area" means any area which is not a group area or a scheduled native area, location, native village, coloured persons settlement, mission station or communal reserve (...) (ix) "group" means either the white group, the coloured group or the native group (...) and includes (...) any group of persons who have (...) been declared to be a group (...) (xv) "marriage" includes a union, recognized as a marriage (whether or not of monogamous nature) in native law or custom or under the tenets of the religion of either of the parties of the union (...) 2. [restates the racial classification under Act No. 30 of 1950] 3. (1) (Establishment of group areas) The Governor-General may, whenever it is deemed expedient, by proclamation in the Gazette – (...) (b) declare that (...) the area defined in the proclamation shall be an area for ownership by members of the group specified therein (...) 4. [Occupation in group areas] (1) As from the date specified (...) no disqualified person shall occupy and no person shall allow any disqualified person to occupy any land or premises in any group area to which the proclamation relates, except under the authority of a permit (...) 6. [Governing body for certain group areas] (1) The Minister may by notice in the Gazette, establish for any group area (other than an area for the white group), a certain governing body to be constituted in accordance with regulation.[4]

For 40 years, deliberations on space were fed by such rhetoric, in this case the argued use of rhetorical commonplaces which fixed definitions of space, property, the transmission of rights, the rights to sojourn and the right to travel; and which set "the white group" apart as a spatial entity, autonomous, detached, removed, untouched. The main medium of this practice was the law and its operatives, embodied in the "permit".

In democratic South Africa, public rhetoric concerning space has been radically displaced. Remarkably little attention has been paid to the "rhetorical democracy" that is at work in the debates in and around the Land redistribution programme.[5] To begin with, the Group Areas Act has found in the Restitution of Land Rights Act of 1994 its rhetorical *katēgoria* (retort and accusation):

> Chapter I. (Introductory Provisions) (...) 3. [Claims against nominees] Subject to the provisions of this Act a person shall be entitled to claim title in land if such claimant or his, her or its antecedent ["its" refers to "community" as a "person"] – (a) was prevented from obtaining or retaining title to the claimed land because of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2) of the Constitution had that subsection been in operation at the relevant time.

The policy of restitution rights is the response to the policy of Group Areas. Restitution of land amounts to remixing spaces and erasing, step by step, the

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[4] Act No. 41 of 1950. Group Areas.

[5] The Commission on the Restitution of Land Rights had received 11,000 claims by March 1997. In the 1998/99 Budget, a stated objective was to have expenditure on land redistribution and land reform grow from $114 million to $162 million by 2000/1. The national Budget provided for the expenditure of $33.5 billion for 1998/99. (Budget Speech, March 11, 1998). Act No. 22 of 1994. Restitution of Land Rights Act.

discrete cartography of *apartheid*. The new constitution is fittingly combined with a process of restitution.

Public deliberation regarding claims for restitution is largely restricted to the Land Claims Court as most cases are complex judicial matters that involve individuals and communities. Two examples will illustrate this closed and complex process of popular deliberation, by which the deleterious effect of *apartheid* upon the human ecology of space is somewhat nullified. Space is powerfully argued in a rhetorical tension between judicial[6] and popular deliberation, whereby the Judiciary (here vested with a political mission of redress) and the Sovereign (the people who have been previously disenfranchized) are face to face – and try to establish the "truth" of claims and counter-claims.

The Cato Manor case, Durban, 1996-1997

One exemplary case pertains to an agreement reached between municipal agencies and private citizens. The latter had been forcibly removed, in the early 1960s, from the well-known African and Indian suburb of Cato Manor in Durban, after it had been declared a white area – until it was "de-proclaimed" a white area and proclaimed an Indian area in 1980.[7] The judgment offers an excellent insight into how judicial rhetoric and public deliberation intersect – albeit in the words of the judge who made the agreement an order of the court.

The first point is that, of the 511 respondents who opposed the municipal agencies' applying, in terms of the Act, for Cato Manor not to be restored to possible claimants (a pre-emptive action), 510 were represented by lawyers; the remaining one respondent was declared by the judge to have made "a good impression on the Court". In other words, before the judgment could enter into the details of the agreement (and just before the recounting of the history of the forced removal), the judge had to establish that the 511 citizens could, by proxy or directly, show their respect for forms and procedures; in other words, that their deliberations were forensically credible. This would later impact on the Court granting an order. The judge

[6] One should say "forensic" to follow normal rhetorical usage, but the adjective is somewhat confusing.

[7] Land Claims Court of South Africa, case number 15/96. The agreement made an order of court can be retrieved (like all judgments of the Court) from the website maintained by the University of the Witwatersrand, Johannesburg, at www.law.wits.ac.za. Quotations are taken from [5] to [25].

moved on, after the historical account of the forced removal, to affirm the ethos of the respondents, stating that to "return to their roots" is their "dream" – contrasting it, in the same section, with

> the establishment [by the municipality] of a virtual city in the area with a complete infrastructure.

The judge proceeded by adding and amplifying details, using both quantitative and qualitative commonplaces ("schools, hospitals, libraries"; "overseas" funding; "Reconstruction and Development"; "substantial employment opportunities"; "significant boost"; "upgrade" of "informal" settlements), as if an accumulation of details serves as ethical proof of the good faith of the municipal agencies, to the effect that somehow counterbalances "the dream". In other words, the judge summarized two equal but contrasted deliberative positions, carefully balancing with his choice of words two "virtualities" – that of a lost past ("roots", "dream"), and that of a future filled with the promise of "development" (a "virtual city"). The judge then recorded that the parties, having accepted oral evidence "to amplify the papers", heard only two of the three municipal witnesses before negotiating the agreement placed before the Court. The judge described and recast the act of reaching an agreement as "no mean feat".

In sum, public deliberation was validated by judicial evaluation – as a rhetorical exercise between two equal parties, of equal strength, with equal claims.

Yet the remit of the Court is to measure this agreement against legal procedures and the Act. Does the settlement meet the requirements of the Act? It cannot be merely a "rhetorical" agreement (in the vulgar sense of "deceitful"), it must be a "true" argument. It has to speak to the Act. The problem becomes one of how to validate public deliberation (in this sense, truly rhetorical). The judge has to recast, for the second time, the process of public deliberation.

This time, he has to step outside the debate between parties to measure its outcome against the People's interest. He has to imagine a hidden debate between the parties in agreement and the People. This must take place in order to test whether the agreement is a false agreement, that is, an agreement that entrenches the status quo instead of addressing the question of what happens after a forced removal. It could be that the parties pretended to settle in order to share the spoils of the new investments in Cato Manor. In that case, the agreement would be not the outcome of democratic public deliberation, but a deal; rhetorically, an agreement in words, words that

pacify, obfuscate and deviate.

The judge therefore has to test whether the agreement is in the "public interest". Public interest is, in short, the rhetorical ethos of the People, which the parties must show proofs of having evinced in their negotiations. The agreement ought not to be an agreement in words and in form only; it must be the result of an imaginary debate between the two parties and their symbolic inner self, the People. The judge has a duty to perform this imaginary deliberation because, worryingly,

> no argument was placed before the Court on the concept of public interest because the matter was settled.

The judge then sets about defining "public interest"; this is because the Act does not define it, and because the two parties in the case do not argue for it. The judge literally has to seek arguments that should have been proposed during the negotiations. He thus fails, in a manner of speaking, the two parties by not acting in the "public interest", by eschewing a needed elaboration on precisely "public interest". A test is needed. References are sought ("gleaned") from a dictionary, cases (notably for liquor licences!), legal literature, and (at length) two Australian cases concerning aboriginal land rights. The judge then summarizes this review by affirming, tautologically, that a balance between private and public interest has been struck – "public interest" having been never defined as such, but considered rather as a result of factors. The inability of judicial rhetoric to extend beyond an extensive definition and to reach an intensive one is matched by the illogical conclusion that the settlement is in the "public interest".

What we witness is a remarkable failure to flesh out the Act. This is simply due to the fact that the judge is seeking guidance from records of public deliberation that are mute on this crucial aspect. It is also a sign of the fact that public deliberation was sought as a source for interpreting the Act. Had the negotiators addressed subsection (6) of section 34 of the Act, the judge would not have had to imagine and summon piecemeal interlocutors so odd that they could be described as "gleaned". The judge does not realize that in saying,

> against the advantages to the public interest of restoration (...) had to be weighed and balanced the advantages to the public interest of the development,

he has defined neither, but is merely re-iterating the positions of both parties. In the end, the test is no test at all, and the weighing of public deliberation by judicial review was a fiction that left, in fact, the last word to the public deliberators. The judge, literally, rubber stamped the deliberated agreement, and validated the truth held by the parties.

This entire case is exemplary of how popular deliberation, when it casts itself in terms of negotiations, agreement, balance and "good impressions" in Court – in short, when it appears to embody the spirit of democracy and to respect legal decorum – can "truly" argue for space and, literally, say what is the truth in terms of one case of space ecology.

The Kruger Park case

Another exemplary case concerns the claim lodged in 1995 by the Makulele Community and the authority controlling the world-famous Kruger National Park, and the ensuing judgment.[8]

The Makulele people settled in the area some two 200 years ago, but were removed in 1969 and forcibly settled on a farm, while their land was mostly incorporated into the Kruger Park. The judge sums up this brief history by stating that

> it is common cause that their removal was a result of racially discriminatory legislation and practices.

Reviewing the claim and reflecting on the deliberative process that had been conducted before the Court entered the proceedings, the judge begins by setting the spatial conditions within which the claim itself is located. The land in question is deemed of importance for "conservation (...) and the promotion of biodiversity", "strategically" (it borders on Zimbabwe and Mozambique), "mineral deposits", and "access" by the "broader public" (as it is now in a national park). The argument underlining the importance of this specific space runs from Nature to Public, in ascending order. This space is "truly" public space throughout. The judge then notes that the claimants are asking for a right (ownership) which they did not enjoy prior to their removal, and notes the complexity of having eight parties involved (six ministries, one provincial government and the Makulele Community). This forms the backdrop to the written settlement that was finally entered into. Given a complex space, with a complex claim, between a complex of parties, agreement was reached with the help of two mediators. The judge merely endorses the "truth" of the processes so far engaged by public deliberation, noting that they "presumably" followed this route as a result of the direction, in the Act, that stipulates that "mediation and negotiation" must be attempted. The qualifying adverb "presumably" is already a critique (from the domain of judicial rhetoric) addressed to public deliberation.

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[8] Land Claims Court of South Africa, case number 90/98. Quotations from [8] to [12].

What is at stake now is whether, having received the referral, the settlement must be made an order of the Court. In the previous case of Cato Manor, the judge did not question the validity of the referral, but applied legal reasoning to establish whether the settlement was, in substance, respectful of the Act. By contrast, in the present case the judge asks, in his review, whether a Court order is at all necessary. Two rhetorics of agreement are at stake. The judge asserts the Court's role in careful terms:

> The above represents the background to this matter. What is the Court's function when a matter is referred to it in terms of section 14(3) of the Restitution Act? Section 14 (3) does not expressly or by implication oblige the Court to make any agreement referred to it an order of court, notwithstanding that the parties may request it to do so. Obviously the Court must treat such a request seriously and only refuse it for good reason. The Restitution Act is clearly geared to promote the resolution of restitution claims by negotiation, mediation, agreement. Where the parties succeed in achieving this, the Court should as far as possible give effect to the intention of the parties.

The basic argument is that there must be good reason for the settlement to receive Court validation, as public deliberation is then validated by a judiciary (imaginary) debate (as in the Cato Manor case), and the public admitted, as it were, to having acted as if in a court room. The Court order – the text that contains the judgment, its collocation of sentences and paragraphs – then represents the absent "oratory"; the arguments and exchanges of which the Court has been deprived by public deliberation itself.

The judgment is there to restore the dignity of legal rhetoric to the deliberative truth reached by the parties; or, as it is stated, to "give effect to the intention of parties". In giving "effect to intentions", the Court would show that it has been persuaded, just as the parties have been, and that, from settlement to court order, all rhetorical means (of which the oratory of the written judgment is a signal instance) have been exhausted. That the case has been – at the level of rhetorical expertise and not only at that of its factual contents – a "true" deliberation.

The judge then proceeds to make two "enquiries". The judge "enquires" into the validity of public deliberation. Firstly, is the Court persuaded that the agreement entitles the claimant to a restitution? With amendments, the Court agrees that, on the first ground, public deliberation has been forensically correct, inclusive of "public interest" being served. But as regards the second "enquiry", the judge hands down that the agreement itself cannot be made an order of the Court. Why?

Instead, the Court has prepared, in consultation with the parties, another court order. This new court order avoids legal confusion that may arise in

the future. Yet, rhetorically, it can also be read as the only manner in which the judge could assert the primacy of legal oratory and, fictitiously, reintroduce the parties into the courtroom and make them argue their case (albeit not on the substance of the claim but on incidentals of the case).

Conclusion

The Land Claims Court judgments may indeed be read, with regard to establishing the truth of land restitution claims, as deliberative sites for conflict, tension and resolution between two sorts of persuasion: public deliberation and judicial review, the latter positing itself as fulfilling the unfulfilled, ill-formed, misshapen words and thoughts of the former. They also signal that the Judiciary, when it probes into the People as a deliberative entity, enters itself into deliberation and helps shape a "rhetorical democracy".[9]

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[9] Further cf. Salazar 2003a and in press (a), also cf. (c).