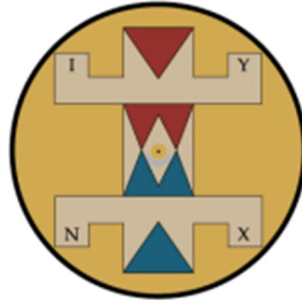


**Decolonisation of the Law for the African Renaissance**

**By**

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## 1. Introduction

Racism is the root cause of the social and economic relations which negates the creation of a socially cohesive and prosperous South Africa. The attempts which have been made to address the demon of racism address its effects, not causes.

To aid our understanding of racism and its impact on society this paper explores first and foremost the root causes of racism.

The demon of racism was rooted in:

- The Hamitic hypothesis
- The doctrine of subhuman races
- The Darwinian theory of evolution

These theories were used during different epochs in the history of humanity to justify racism.

The Bible says that Noah, the only survivor of the Biblical flood, had three children – namely Shem, Japhet and Ham. It says that descendants of Ham were cursed and condemned to be hewers of wood and drawers of water for European (descendants of Japhet) and Asians (descendants of Shem). Thus Africans (supposed descendants of Ham) were regarded as slaves and servants of European and Asian people. This interpretation of the Bible came to be known as the Hamitic hypothesis.

This hypothesis distorted the Ethiopian (i.e. indigenous African) philosophy of origins which says that at the beginning was the word (Cham/Ham) of God Ptah, in short, champtah or hamptah that came in flesh. The word of God (Champtah or Hamptah) was also called Kara or Charaoh) and was symbolised by the Solar (☩) monogram. In full the God of Light (Kara/Charaoh) was called IAO or JAH Abakara or Abaraka (Greek Abraxas).

In John 1:1 of the New Testament the Christ says: I am the Light that lights the hearts of men this was the divine spark (i.e. inner light) that emanated from the Divine Light (Kara/Charaoh), symbolised by the Solar (☩) monogram that is popularly known as God.

This Divine Light was also known as the Eternal God of Light (IAO or JAH Abakara). The Divine titles IAO and JAH are respectively the roots of the Divine names Iahveh (IHVH) and Jahweh pronounced Jehovah.

The God of Light (Jah Abakara), was also known as Ra Harakhte, Xpakhte or Har-em-akhte. The Sun God Xpakhte (Greek Xpictoc) and Har-em-akhte was symbolised by the sphinx statue and the Solar (☩) and the Piscean (IHS) monograms.

This sun God (Kara) was a spiritual or Light, not human being. The western Christian churches adopted the sun God, Ra Harakhte (Greek Xpictoc) also called Jah Abakara or in short Iahveh (**IHVH**) and Jahweh (Jehovah) and projected him as a white man, rather than a spiritual or light being.

Thus the sun God or God of Light (Christ/Jehovah) became a racial God. Judaism and Roman Imperial Christianity secularised religion and departed from the Khemetic (or Hermetic) humanism which says that God is a spiritual (or light) being, not a human being.

This Khemetic (or Hermetic) concept of God transcended race, class, gender, creed and religion. The Karaites (i.e. sun worshippers) which preached spiritual humanism conceived the material or physical body as a vehicle of the spiritual body. Thus the Karaites (i.e. Sun Worshippers) believed that all human beings, regardless of race, were substantially one and the same. The Karaites saw diverse racial features as products of the environment which did not derogate from the Oneness and sameness of the human family.

Thus Karaism (or Sun Worship) did not admit of racism, sexism and all forms of religious and cultural intolerances.

Conservative Protestant Christians, notably Martin Luther and John Calvin, did not accept the universality of the divine spark (i.e. inner light) and more specifically they rejected the notion that Africans, like Europeans and Asians, share the divine spark (i.e. inner light) that derived from the Divine Light (Kara/Charaoh), popularly known as God. The conservative Protestant Christians therefore maintained that Africans in particular and black people in general, have no divine sparks and were therefore inherently unable to develop a personal relationship with God. For this reason the conservative Protestant Christians regarded Africans and black people in general as subhuman and inferior to white people. Thus racism came to be rooted in conservative Protestantism which became a dominant Christian philosophy in the west.

The architects of the Union of South Africa, Cecil John Rhodes and Lord Milner, were Freemasons who believed in the Darwinian theory of Superior and inferior races and the right of the former to dispossess the land and natural resources of the latter and to rule or exterminate them. Thus Darwinism reinforced Western Protestant Christianity which regarded Africans and blacks in general as a subhuman and inferior race.

Both the Union of South Africa and the Apartheid Republic of South Africa were rooted in racism and more specifically the denial of the African humanity (Ubuntu/Botho) which is the fountainhead of the worth and dignity of the human personality and its inherent values of equality, freedom and justice for all. Racism negated all these fundamental human rights and the collective rights of African peoples.

## **2. Racism and Colonialism**

In his address to the consultation of the World Council of Churches in Holland (June 1980) President Oliver Reginald Tambo said that racism was the demon that was used to justify:

- The seizure of African land and its Natural resources
- The transformation of African people into instruments of labour for the enrichment of the white minority settlers

- The imposition of white minority rule on African people

During the expansion of the British Imperialist plan developed by Cecil John Rhodes and Lord Milner the colonial state accepted the philosophy of a civilising mission propagated by the church to justify colonialism.

O.R Tambo told the World Council of churches that this mission destroyed African culture in all its forms.

Last but not least OR Tambo said that Africans wanted a church which will not only liberate them from sin but also from racism and colonialism. In legal and constitutional terms racism and colonialism justified the South Africa Act, 1909, which institutionalised racism and deprived African people of the right to vote and participate in the administration of the country. The South Africa Act, 1909, also dismantled African Kingdoms and Queenships and appointed the governor-general (later state President) the supreme chief of all African people and dressed him with powers to depose and/or appoint chiefs regardless of African culture which based succession on royal (or blue) blood.

In 1913 the Union Parliament passed the Land Act which allocated only 7 percent of the total surface of South Africa to the African Majority.

In 1936 Parliament increased the percentage to 13 percentage of the total surface of South Africa. This meant that more than 80 percent of population was made to live and sustain itself on 13% of the Land. Thus Africans lost their land, livestock and means of production in general.

The forcible dispossession of African Land and its natural resources degraded and dehumanised African people and resulted in the triple challenge of poverty, unemployment and inequality as well as the deepening moral degeneration and social ills.

### **3. Ethiopian Christianity and Politics**

The African clergy rejected the conservative western protestant interpretation of the scriptures and broke away from missionary churches to form the Ethiopian church Movement. Our Icon, Nelson Mandela, observed us that the seeds of the governing party, the African National Congress (the "ANC") were planted in the Ethiopian Movement which had a spiritual and political dimension. He also observed that in its spiritual sense Ethiopianism rejected the Western interpretation of the Holy Scriptures and advanced Moral and ethical values of self-worth, self-help and self-reliance.

Rev. John Langalibalele, a self-confessed Ethiopian Christian became the first President of the ANC. The second President of the ANC, Sefako Mapogo Makgatho, was a student of Rev. Mangena Maake Mokone, founder of the Ethiopian Movement. In 1917 Makgatho called for the creation of a non-racial society in South Africa and negated the racist philosophy underlying the South Africa Act, 1909.

In 1921 Mahabane observed that racism and colonialism degraded and dehumanised African people and that the recovery of the African humanity (Ubuntu/Botho) was a prerequisite for the recovery of the humanity of all South Africans, both black and white. In 1927 Mahabane told the international

church conference in Brussels that Africans believe that Christianity came from God but do not agree with its western interpretation.

#### **4. Culture and Human Rights**

In 1923 Rev. Mahabane prevailed over the ANC conference, which elected him the third President, to adopt a bill of rights. The opening paragraph of the Bill reclaimed the African humanity (Ubuntu) and the right of African people to participate in the economic life of the country.

In 1914 Marcus Garvey founded the United Negro Improvement Association (UNIA) which preached radical Pan African Nationalism and the right of African people to self-determination and human rights. In the 1920s Garveyism catalysed the Negro (Harlem) Renaissance. Nelson Mandela said Mnandi Azikiwe (Nigeria), Kwame Nkrumah (Ghana) and himself were profoundly influenced by this renaissance movement.

During the 1930s many young people went to Fort Hare University, founded in 1916, to study where they were profoundly influenced by the prevailing Pan Africanism which was reinforced by the Indian Invasion and occupation of Ethiopia in 1935.

In 1937 Mnandi Azikiwe published a book titled *Reascent Africa* which condemned the suppression of African heritage and its contribution to world civilisation and maintained that Africa would not be blighted forever and that it would be reborn and renewed.

In the same year (1937) William Nkomo told a women's conference that Africans are not a subhuman race and that they too are entitled to the right of self-determination.

During World War II (1939 – 1945) Africans fought on the side of the Allied Forces hoping that in the event of victory they would regain their right to self-determination and human rights.

But even before the end of the War, President Theodor Roosevelt of the United States and Winston Churchill of the United Kingdom issued the Atlantic Charter which extended the right of self-determination to Eastern Europe and left out Africa. African leaders were so disappointed that Kwame Nkrumah, for instance, proclaimed in 1942 that after the war Africans will demand nothing less than their right to self-determination. The following year (1943) the African National Congress (the "ANC") published the African claims which reclaimed the right of African people to self-determination and human rights.

The African claims were reinforced by the resolutions of the fifth Pan African Congress which called on the African masses to use all means at their disposal to free themselves.

The determination of African people to liberate themselves from colonial rule was strengthened by the United Nations charter (1945) and the universal declaration of human rights (1948).

However in the same year the nationalist party came to power on the platform Apartheid and enacted a host of racially discriminatory laws to enforce its policy. In response the ANC National conference adopted the programme of action (1949) which reaffirmed the right of African people to self-determination and human rights and demanded the restitution of the Land and its Natural resources to its rightful owners. This programme laid the basics for the defiance campaigns of the 1950s.

The campaigns culminated in the adoption of the women's charter (1954) and Freedom Charter (1955).

## **5. The Evolution of South Africa's Constitutionalism**

The Harlem Renaissance movement catalysed the birth of the human rights movement in Africa and the diaspora.

In South Africa the human rights movement dates back to 1921 when Rev. Zacchaeus Richard Mahabane observed that African people had been degraded and dehumanised and that the recovery of the African humanity (Ubuntu/Botho) is a prerequisite for the recovery of the humanity of all South Africans, both black and white.

The freedom Charter contained a constitutional blueprint for a post-apartheid constitutional vision. It provided for the destruction of the apartheid system, establishment of a democratic dispensation, restitution of Land and the cultural heritage of all the people.

The popular movement of the 1950s was retarded by the Treason Trial (1956 – 1961) and the banning of the ANC and PAC in 1960. The early 1970s saw the rebirth of the popular movement which reached its peak in the 1976 student's unrest. The period also witnessed the mushrooming of progressive community and media organisations which were banned in 1977. In the same year Steve Bantu Biko was murdered by the Apartheid security forces.

In 1980 O.R. Tambo started the mobilisation of the religious sector and mass democratic organisations against the apartheid system. The internal and international pressure against apartheid mounted forcing President P.W. Botha to initiate constitutional reforms which the ANC and the mass democratic movement (The "MDM") rejected. The internal pressure against apartheid reached its peak with the formation of the United Democratic Front (the "UDF") in 1983 and the congress of South African Trade Unions (COSATU) in 1985. The formation of these organisations strengthened the anti-apartheid movement both at home and abroad.

At the consultative conference of the ANC held at Kabwe in Zambia in 1985, President O.R called on the mass democratic movement to render South Africa ungovernable. The positive response to the call forced President P.W. Botha to declare the state of emergency in 1985 and renewed it 1986.

At the same time international pressure for change forced the 1985 commonwealth to send a mission to South Africa to engage the regime on the desirability of constitutional change. Thus 1986 became a turning point in the constitutional dialogue in South Africa.

Meanwhile the university of Cape Town convened a human rights conference (1985) which afforded academics an opportunity to reflect on the desirability or otherwise of a Bill of Rights for South Africa.

The following year (1986) the ANC established the Department of Legal and constitutional Affairs (the "DLCA") and invited Adv. Mathole Motshekga, senior lecturer in the Faculty of Law, University of South Africa, to serve in the Department. Dr. Zola Skweyiya was appointed the head of the Department. Dr. Zola Skweyiya worked with Adv. Mathole Motshekga and others including the late

chief justice Pius Langa and Minister of Justice Dullar Omar to facilitate the establishment of the National Association of Democratic Lawyers (Nadel) and to participate in the policy making process called Post-Apartheid South Africa (PASA) project.

In 1986 Advocate Motshekga facilitated consultations between the ANC and Prof Van der Vyver, Head of the Centre of Human Rights, University of Pretoria. The consultations were followed by a symposium on Human Rights held on the 1<sup>st</sup> May 1986 at the University of Pretoria.

The symposium was addressed by eminent jurists including Prof. John Dugard and former Deputy Chief Justice Dikgang Moseneke. At the symposium the contestation between human and group rights featured prominently. A group of lawyers led by the Democratic Lawyers Congress (the "DLC") and the South African Law Students Council formed the Anti-Bill of Rights Committee led by Advocate Motshekga and Jacky Malatji a UNISA Law student. The committee rejected the doctrine of group rights and advocated human and people's rights. They felt that group rights would justify the Bantustan policy and Land dispossession.

The human and group rights debate that ensued at the symposium profoundly influenced the constitutional discourse in both the ANC and government circles. In 1987 the ANC issued a statement on negotiations which endorsed the doctrine of human rights and rejected the group rights ideology. The statement also rejected any constitutional negotiations behind the backs of black people. In the same year (1987) the ANC invited progressive Lawyers and leaders of Mass Democratic Movement inside South Africa to a conference called the World United against Apartheid held at Arusha in Tanzania.

The conference resolved inter-alia, that the South African government was both illegal and illegitimate. In the same year (1987) progressive Lawyers formed Nadel which strengthened and reinforced the ANC.

The following year (1988) the ANC published Constitutional guidelines for a Democratic South Africa. The South African government also published its constitutional proposals and set the scene for constitutional negotiations.

In 1989 the ANC published the Harare Declaration which provided a road map for a negotiated constitutional negotiation. During the negotiations the contestation between human and group rights continued in a subtle form. The focus shifted to confidence building mechanisms to allay minority fears and the adoption of a Bill of Rights. Consensus was reached on both matters.

For the white minority the major issue was the protection and entrenchment of property rights. This was guaranteed by section 25 of the South African Constitution (Act 108, 1996) which was signed into Law in 1997.

## **6. The Bill of Rights and Land Reform**

Section 25 prohibits arbitrary expropriation of Land and property in general and laid down stringent requirement for Land redistribution and restitution. These requirements include payment of just and equitable compensation.

The enabling legislation passed to give effect to section 25 of the constitution, notably, the Land Restitution Act and the community property association created a bureaucracy and further requirements which slowed down the process of Land Redistribution and restitution. Thus President Jacob Zuma and the some ministers called for the amendment of section 25 of the constitution to provide for expropriation of Land without compensation.

The government has not fully exploited legal and constitutional avenues to speed up land redistribution and restitution. But it appears that it seeks to use section 25 of the constitution to justify the slow process of Land reform. There is much more to this slow process than section 25.

## **7. Conclusion**

Expropriation without compensation though subject to stringent requirements, already exist. The government has not invoked and exhausted the available remedies. It would seem government wants to blame its Land Reform failures on section 25 of the constitution.

The government calls for the amendment of section 25 of the constitution knowing full well that this could not be achieved overnight and that it could lead to other unintended consequences. No one can gainsay the urgent need for Land Reform to deracialise the economy and combat the triple challenge of poverty, unemployment and inequality. But the proposed constitutional amendment is not the magic wand that will achieve the desired results.

The ANC policy discussion documents do not inspire any hope that the policy conference will provide a viable solution either. It is suggested therefore that a broadly based symposium be held to identify legal and constitutional impediments to speedy land redistribution and restitution.

Such a symposium must bring together Land owners, land claimants; Land claims commission, government as well as lawyers acting for all sides. The symposium would assist to remove bureaucratic and legal constraints to Land reform and make constitutional amendment the Last resort.

South Africa is a constitutional state that requires National dialogue and public participation in the legislative and other governmental processes.

Hasty and ill-considered constitutional amendments are likely to produce unintended consequences that would be too ghastly to contemplate.