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**CONSTITUTIONAL
ASSEMBLY**

THEME COMMITTEE 6.3

SPECIALISED STRUCTURES OF GOVERNMENT

11 SEPTEMBER 1995

14:00

E305

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6.3

TRANSFORMATION, MONITORING AND EVALUATION

11 September 1995

Please note that the final meeting of the above Subtheme committee will be held as indicated below:

Date: 11 September 1995
Time: 14:00
Venue: E305, New Assembly

AGENDA

1. Opening and Welcome
 2. Adoption of minutes
 - 2.1 Minutes of the meeting of 4 September 1995
 3. Land Rights
 - 3.1 Input from Technical Committee final draft report
 - 3.3 Adoption of the Report
 4. Draft formulations on Commission for Gender Equality
 5. Any other business
 6. Closure
-

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CONSTITUTIONAL ASSEMBLY
SUBTHEME COMMITTEE THREE
TRANSFORMATION, MONITORING AND EVALUATION
OF
THEME COMMITTEE SIX
SPECIALISED STRUCTURES OF GOVERNMENT
4 SEPTEMBER 1995

PRESENT
Mbete - Kgositsile B (Chairperson)

Mokoena LM
Mompoti R
Netshimbupfe MA
Njobe M
Nqwemesha KW
Tshabalala ME
Turok M
Van Wyk A
Van Zyl ID

Apologies: Malan TJ and Moatshe P

Claasens A, Gildenhys A, Jaiyesim - Njobe F, Levy B and Nyoka N were in attendance.

1. Opening and Welcome

The Chairperson opened the meeting at 14:00 and welcomed members.

2. Adoption of minutes

The minutes of the meeting of 21 August 1995 were adopted.

3. Land Rights

Technical Committee report on the Workshop on Land Rights and the Constitution

The Technical Committee presented the amended report and accompanying draft formulations as per the instruction of the Subtheme meeting of 21 August 1995 (see Annexure 'A').

The following comments were made on the report:

3.1 The National Party raised the following concerns:

- i) The draft formulations as presented by the Technical Committee were a duplication of the work of Theme Committee 4.
- ii) The Committee should only consider the workshop report, it was not the role of the Committee to consider draft formulations.
- iii) The Committees role was to consider specialised structures of government and not whether there should be a property clause in the Constitution.

The Committee noted the National Party's concerns. However, the following points were raised in response to the said concerns:

- i) At a meeting of Theme Committee 6 held on the 14 February 1995, it was agreed that the Subtheme should approach its work from a broad land rights perspective as opposed to its original narrow brief which limited the work of the Committee to the Commission for the Restitution of Land Rights.
- ii) The matter of the property clause is incidental to the work of the Theme Committee and thus needs to be considered as part of the debate.
- iii) Political parties are entitled to make submissions on any areas that they feel are germane to the matter at hand.
- iv) The Theme Committee is a processing and not a negotiating forum. Any information processed by the six Theme Committees of the CA would ultimately be considered by the CC, which will decide on how best to deal with matters of

overlap.

- v) Theme Committees do consider draft formulations to ensure that the intention of the Committee is captured in such formulations before their transmission to the CC. The formulations are, however, negotiated and debated at the level of the CA, CC and the CC subcommittee.

In addition the Technical Committee was instructed by the meeting of 21 August to draft Constitutional provisions on the options presented for parties consideration.

3.2 AD para 4.3.2

With regard to possible formulations of **provisos** to be included in the property clause the report posited two options namely:

" This section shall not apply to measures aimed at bringing about land reform through the restitution of rights in land, redistribution of land, or land tenure reform for the benefit of persons previously disadvantaged by unfair discrimination."

or alternatively

" This section shall not impede measures aimed at bringing about land reform through the restitution of rights in land, redistribution of land, or land tenure reform for the benefit of persons previously disadvantaged by unfair discrimination."

The Technical Committee explained that the meaning and import of the above two formulations was not the same. The phrase shall not apply means that all land reform measures are exempt from the property clause. And the phrase shall not impede means that all land reform measures would be covered by the property clause unless a case can be made to prove that a particular land reform measure is impeded by the property clause.

The ANC argued that it was important to present a further alternative draft formulation that attempts to marry the intention and import of both formulations.

The meeting agreed to the following:

- i) The Technical Committee would incorporate party submissions into the report with regard to their preferences in terms of the*

draft formulations presented. This report would be made available to the Committee on the morning of the 11 September 1995. Parties should make time to discuss the document before the meeting at 14:00.

- ii) The meeting of the 11 September would be final meeting of the Subtheme Committee and would endeavour to adopt the report of the Committee on Land Rights so that it could be passed on to the CC.*
- iii) The report from the workshop on Land Rights and the Constitution should be sent to all the stakeholders that participated in the workshop. This should not contain draft formulations.*

4. Any other business

4.1 Draft formulations on the Commission for Gender Equality

The Secretariat reported that the formulations would be made available to the parties at the meeting of the 11 September 1995.

The meeting agreed that parties should submit written comments on the draft formulations. These comments would be incorporated into the footnotes and the draft formulations would be passed onto the CC where parties could make additional remarks.

5. Closure

The meeting rose at 16:00.

CONSTITUTIONAL ASSEMBLY**THEME COMMITTEE 6.3****SPECIALISED STRUCTURES OF THE GOVERNMENT
LAND RIGHTS AND THE CONSTITUTION WORKSHOP****1-2 AUGUST 1995****DRAFT REPORT BY THEME COMMITTEE 6.3****1 INTRODUCTION**

This report sets out issues raised in submissions to the Theme Committee and issues raised and debated at the Workshop on Land Rights and the Constitution held on 1 and 2 August 1995. It also incorporates submissions made by various political parties [these have not yet come to hand]. The issues fall into the following three categories :

- 1.1 What provisions should the Constitution contain so as to empower land reform;
- 1.2 A discussion of the desirability or non-desirability and contents of a property clause in the future Constitution in the light of the consensus concerning the necessity for land reform¹; and

¹ See, for example, the South African Agricultural Union : *"The admitted need to rectify past wrongs and to address the existing imbalances are of paramount importance but it should be done in a way without jeopardising the protection of private ownership."* The Land and Agriculture Policy Centre (LAPC) also supported this view in its report of the recently completed Land Reform Research submitted to the workshop saying that "the research agreed on the obligatory role of the state in facilitating and ensuring conditions conducive to land reform. The LAPC is concerned, however, that the property clause as it is inhibits land reform and that it could be reformed in three ways detailed in its second submission by its Legal Desk.

- 1.3 Alternative options in respect of the treatment of property in the Constitution.

2 **WHAT PROVISIONS SHOULD THE CONSTITUTION CONTAIN SO AS TO EMPOWER LAND REFORM?**

The need for land reform and the protection of land ownership and use was generally accepted². There was agreement at the Workshop that land reform includes the restitution of dispossessed land, tenure reform and land redistribution. These three subjects will be addressed separately.

2.1 **LAND RESTITUTION**

Three concerns were raised during the Workshop.

2.1.1 Less detail

If the property clause remains in the Constitution in one form or other, it is necessary to give constitutional protection to the land reform process, of which restitution is a necessary component, to ensure that it is not overridden by the property clause. Because the restitution process is, by its very nature, a finite process; it is not necessary to include the existing level of detail in a future constitution, provided the legality of the restitution process remains protected³. The detailed mechanisms of the restitution process is

² See Prof Shadrack B O Gutto : *"Since public involvement remains important in ensuring balanced use of land in the interest of environment protection, management and use, the role of government and independent public bodies to oversee the ownership, control and use of land needs to be assured in any constitutional and/or other legal dispensation."*

³ See Derek Hanekom : *"However, it does not seem necessary to repeat in the new Constitution the detailed provisions which currently exist. It would be adequate to provide in broad terms for restitution."* The National Land Committee also supports this approach.

best contained in ordinary laws, which are easy to amend when circumstances so require ⁴.

2.1.2 Cut-off date

Many participants expressed great unhappiness about the cut-off date of 1913 for restitution claims. The arguments against a fixed date include the following :

2.1.2.1 the 1913 date has been arbitrarily selected with little historical significance; there should either be no date at all or the date should be moved back to include dispossessions through earlier laws⁵;

2.1.2.2 much land was lost by the indigenous population through conquest and/or unjust laws before 1913⁶; the right to the restitution of such land should be as strong as the right in respect of land dispossessed after 1913⁷.

⁴ Judge Durie and Prof Greshner stress the need for such flexibility in their inputs. They say that some institutions simply do not work well and must be changed. Judge Durie said that it is sufficient to entrench the principle and not the detail. He stressed the importance of being able to adapt when institutions do not work, are inappropriate or become inaccessible to their target group.

⁵ Luvo Dlamini puts it as follows : *"It is of this reason that I feel that the issue of land restitution should be revisited in the final constitution and not to have a final cut off date. This present land restitution Act is tantamount to codification of law which was proved to be not achieving justice in the western Democracy. As a result in the western democracy to which South Africa belongs there is no codified law. Every case is treated according to its evidence and that is the proper procedure that is used by courts, even here in South Africa."*

⁶ The Griqua National Conference of South Africa states : *"The cut-off date of the 19th June 1913, which limits claims to a certain date has bearing on Zululand, Ciskei and Transkei, as areas where aborigines still had reserved land. This cut-off date is thus prejudicial to those aborigine groups that were removed from their fertile land before 1913."*
Dr Njobe's contribution discusses various ways by which various groups lost their land by unfair and unjust means long before 1913. She maintains that this is how land poverty and the gap between the land poor and the land rich was constructed.
The House of Traditional Leaders of KwaZulu/Natal stated that : *"it would be erroneous to limit the frame of reference of land restitution to the status of land distribution as per 1913 at which time only 7% of our national territory was owned by Black people."*

⁷ The Griqua National Conference of South Africa pointed out that most of the Griqua people lost their land well before 1913.

The following arguments were presented to retain 1913 as a suitable cut-off date :

- 2.1.2.3 if restitution claims were allowed to go further back in time, there could be a large number of competing claims from different groups who occupied the same land at different points in time⁸;
- 2.1.2.4 if the claims are to go far back in history, the basis of the claims will have to be in terms of membership of a particular ethnic group who previously occupied that land. The fear was expressed that this could lead to an emergence of ethnically based conflicting land claims⁹;
- 2.1.2.5 the investigation of claims and the determination of compensation which relate to events far back in history will create enormous practical difficulties for a court process; it would be better to address the issues of land taken through

⁸ See Derek Hanekom : *"An earlier date than 1913 would have the result that there would often be two, three or even more groups of people who could rightly claim that they were dispossessed of the same land. I do not know how we could decide which of those dispossessed groups should now get that land."*

⁹ See Derek Hanekom : *"Most earlier claims would be based not on occupation of particular land by specific people within living memory, but on occupation by the ethnic group of which the claimant was a member. You would not be able to prove a claim by showing that you or your parents or grandparents lived on a particular farm or in a particular house - you could only do it by showing that you are a member of a particular ethnic group, which at a particular time occupied an area of the country. To promote ethnic mobilisation as the means of satisfying the need for land would be divisive and destructive."*

Dr Njobe suggests that ways can be found to compensate those who lost their land holdings before 1913; that compensation may not always take the form of restitution of land. What is important is that their right to compensation is realised. For example, redistribution using a voucher system, whereby the voucher is issued in lieu of a fixed value in land or other.

conquests and pre-1913 dispossessions through the political process of land redistribution¹⁰.

2.1.3 Wider ambit

Restitution claims are restricted to land dispossessed from people through racially based discriminatory laws. However, some participants raised the issue that the restriction is too limited : some dispossessions took place not through racially based discriminatory laws but through intimidation or as a result of corrupt land deals. Claims for the restitution should also be available in such instances.

2.2 **TENURE REFORM**

Although the need for tenure reform was generally accepted, a thorough analysis did not occur¹¹.

The objectives of tenure reform are the following :

¹⁰ See Derek Hanekom : *"Restitution in terms of the Constitution is therefore very important. However, it will go only a limited way towards providing equitable access to land. Most people in need do not fall inside the framework of the restitution process. They are generally the descendants of people who were dispossessed before 1913. However, I do not think the solution is to remove the cut-off date, or to have an earlier cut-off date. We do need to deal with the results of dispossession which fall outside the restitution process. The other parts of the government's programme are, I think, the most constructive way to approach this."*
Prof Gutto's uses comparative analysis to demonstrate that weak tenure in groups areas (Kenya), communal areas (Zimbabwe); and generally (Tanzania and New Zealand) is seen to be a recipe for political dispossessions and grabbing land and speculation to the detriment of people."

¹¹ The participants spoke in general terms only; see, for example, Mr Netshimbupfe (Transcript I, p 24) : *"On this question I think right now the government is having on its table a land reform programme and a system, a new system of land tenure. I know that some traditional leaders may say, maybe I am selling them out, but I feel the controller of all land and the owner of all the land shall be the government which must come up with a good tenure system be it in privately owned land and in communally owned land, the government should be the overall overseer on that."*

- 2.2.1 to provide security of tenure in areas where this is lacking¹²;
- 2.2.2 to ensure that the land rights and interests in land which people have in practice (if not yet in law) are legally recognised and in the registered title of the land¹³;
- 2.2.3 to accommodate a diversity of forms of tenure on the basis of local preference¹⁴;
- 2.2.4 to adjudicate between conflicting rights and interests in land in a way which will provide for alternate redress for those rights which cannot be accommodated in the same land base¹⁵;

¹² See Derek Hanekom : *"Security of tenure is essential for many reasons. It removes uncertainty. It enables people to invest their own energy and resources in the land. And it can enable them to borrow money to invest in their land. Very many people, and particularly in the former 'homelands', have very insecure tenure."*

¹³ See Derek Hanekom : *"Many people have occupied land for a very long time, and would today be the legal owners if it were not for legal barriers. We need to convert their occupation into ownership."*

¹⁴ Contralesa submits that the communal system of inalienable land rights must receive recognition, as must the basis of family rather than individual rights. The Royal Council of Kwa Zulu-Natal submits that diversity of tenure must be recognised and the concept of ownership must be extended to cover communal ownership. The East Cape Land Committee submits that tenure diversity must be respected and enabled to provide both security to the rural poor and the provision of services. Judge Durie said that it is unnecessary and inappropriate to talk of communal ownership as though it implied a lesser form of title. He described how, in New Zealand, communal titles are just as good as any other title and yet accommodate communal circumstances.

Heinz Klug (University of the Witwatersrand) proposes a separate land clause in the Constitution to accommodate this : *"The clause should create a framework for the adoption of diverse forms of tenure, including communal, group and individual tenures, on the basis of local preference. Holders of freehold, communal and group rights and residents of Trust land, should ultimately enjoy comparable status in law."*

¹⁵ Heinz Klug (University of the Witwatersrand) points out that tenure reform can include the removal of property rights, and supports that the Constitution should contain *"... a section recognizing preexisting tenure interests and providing that any reallocation of tenure rights be based on the provision of alternate land or compensation in cases where the transformation of preexisting tenure interests into secure tenure rights creates incompatible tenure rights in the same land."*

- 2.2.5 to ensure that the land rights of women are protected under communal or group systems¹⁶.

Changes to existing titles may be necessary to achieve the above. It must be ensured that the process is protected under the Constitution and that it will not be jeopardised by any property clause¹⁷.

2.3 LAND REDISTRIBUTION

2.3.1 Necessity for land redistribution

The necessity for redistribution of land to correct the currently skewed (in respect of race and gender) land holding in South Africa was (with very few exceptions) recognised by the participants at the Workshop.¹⁸ It is considered necessary to address the deprivation caused by conquest and the prohibition of black people and women in particular, from acquiring land¹⁹. The necessity that redistribution should complement the restitution process was emphasised on the basis that otherwise the restitution mechanisms would be flooded by claimants whose real need is redistribution.

¹⁶ Submission by East Cape Land Committee and MM Chueu who proposed equal land rights for women in terms of legislative reforms to group ownership systems, customary tenure and land administration.

¹⁷ The National Land Committee states that most land occupied by black people is 'nominally' owned by trustee type bodies. Such a nominal owner (for example a mission, a municipality, a province, a chief or an individual) may now use the property clause to assert its right at the expense of the people who are the long term occupiers of the land.

¹⁸ Note the individual submissions by Jivananda, Mbatha, Mokwena and Phokubye. See also W Mullins (on behalf of the South African Agricultural Union and the Agricultural Union of Natal), (Transcript I, p 76) : *'I speak on behalf of the SAAU, and the Natal Agricultural Union, we accept that changes will have to take place. We accept that a more equitable redistribution of land must take place. We accept that affirmative action as far as land redistribution must take place. All we are debating is how should it take place without disturbing the economic viability of commercial agriculture in this country who has to compete with an open market these days.'*

¹⁹ Refer to the submission by Dr F Njobe

If a property clause is included in the Constitution, care should be taken that such clause does not inhibit the redistribution process²⁰. As will appear hereunder, most of the concerns about land redistribution relate to the possibility of a conflict with a property clause in the Constitution²¹.

2.3.2 Positive right

Some participants proposed that the right to land²², and particularly the right to the redistribution of land, should be included

²⁰ See Gordon Hibbert (on behalf of SAPOA) (Transcript II, p 5) : *"The government clearly and unambiguously intends to initiate and promote land reform measures and programmes, largely under the umbrella of the RDP, and it is important to ensure that the Constitution allows the necessary room for the State to initiate and promote these programmes."*

A few participants submitted that expropriation should not be used as an instrument in the redistribution of land : See, for example, the Eastern Cape Agricultural Union : *"Expropriation should only be used when the land cannot be acquired on the open market and then only when the government needs the property for public purposes. EXPROPRIATION AS INSTRUMENT IN THE REDISTRIBUTION OF LAND ARE STRONGLY OPPOSED."*

²¹ Submissions by Royal Council of KwaZulu/Natal, the East Cape Land Committee and Khosi M A Nestshimbufe stated that access to land for redistribution purposes is limited by the fact that some people own extensive areas, and these areas, some of which were obtained by military conquest, are what would be protected by the entrenchment of property rights. The National Land Committee says that the biggest obstacle in the way of land reform is the property clause, because of the way in which the property clause entrenches the interests of the small minority of current land owners who, despite their privileged access to land in the past are now again being treated as people who are entitled to "special" protections. The

NLC submits that measures such as the expropriation of unutilized land, and land belonging to absentee landlords, foreclosure on indebted land and the implementation of a ceiling on land holdings are all valid land redistribution mechanisms, yet all will be constitutionally vulnerable if the property clause is retained. Some participants, however, argued that a property clause will actually assist the redistribution of land. See, for example, the KWV : *"In our view the broader issue of a citizen's rights to acquire and own land, not only tempers the emotional argument of undoing injustice, but also opens the door for Government to assist poor people to acquire land. Ideally the argument should then centre on poor people and not deprived people."*

²² See Ms P Yako (Transcript I, p 88) : *"The majority of the people still think they have got a right to land. Both in the past and present these expectations have not been addressed. People's access to land was and still is governed by legal and political parameters which favour existing landowners. For example the illegal squatting, entrenchment of the property clause in the Constitution and so on. Furthermore, many of the new land acquisition mechanisms, for example Act 126 are premised on people's financial ability to purchase land which by definition excludes the vast majority of the poor, marginalised and landless."*

in the Constitution as a positive right²³. Such a positive right should include :

2.3.2.1 *equitable access to suitable and affordable land to meet basic subsistence requirements²⁴; and*

2.3.2.2 *equitable access to resources necessary to develop the land*
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The exact formulation of such a positive right in the Constitution was not explored in detail.²⁶

Many participants suggested that the current specific provisions relating to rights in respect of land restitution should be extended to include rights to redistribution and tenure reform.

²³ Some participants warned that South Africa does not have sufficient land for everybody. See, for example, Prof Olivier (Transcript I, p 73) : *"But may I just say Madam Chair, all over the world the number of people who own property in their own land is a minimum number of people. It's by far the minority. Most people rent property in some way or another..... I think it's a foregone conclusion that some people will have to say that not all people can become owners of property, whether it's rural property, farm land, or whether it's urban property."*

²⁴ This is a very sensitive issue. Cf the warning by R Helslag (Transcript I, p 65) : *"I support some of the previous speakers where they said that you will never address the poor issue in South Africa in terms of a total redistribution of land. Surely one must redistribute, surely one must address the wrongs of the past, but I think one must clearly realise it's a very sensitive issue and one must address it the proper way otherwise we will create more problems."*

²⁵ This formulation was proposed by the National Land Committee

²⁶ Derek Hanekom gave the following exposition : *"Perhaps the way to approach this issue is to recognise that land is a limited resource. If I have a great deal of land, that may make it impossible for you to have any at all. The key is therefore to balance the right to property with the duty of the state to make it possible for all to have the property which meets their basic needs."*

What this means is that we should recognise that the protection of property rights is a social and economic right, as is the right to have the property which one needs to survive."

2.4 SEPARATE LAND CLAUSE

2.4.1 Several participants²⁷ suggested that the inclusion of a separate land clause in the Constitution would provide a constitutional framework and protection for all land reform measures, and not only for land restitution.²⁸ This would constitute a statement of a socio-economic right. The right can be used to balance other rights in the Constitution; to test the validity of legislation; as a guide in the interpretation of legislation; and as a criterion to test the justifiability of administrative action.

2.4.2 The Constitution should include the right to land as a positive right; such a positive right could include :

2.4.2.1 a general right of equitable access to land;

2.4.2.2 specific restitution provisions;

2.4.2.3 security of tenure in its entire diversity; and

2.4.2.4 protection against evictions unless the availability of alternative accommodation has been considered.

While there was strong motivation from many participants that such positive rights would improve the power imbalance between the landless and current land holders²⁹, others questioned the

²⁷ These include Heinz Klug (University of the Witwatersrand) and the Land and Agricultural Policy Centre and the National Land Committee.

²⁸ As contained in Sections 121 to 123 of the Interim Constitution.

²⁹ The National Land Committee submits that the property clause strengthens the position of those who are legally powerful against those who are currently legally vulnerable. It says that the proper role of the Constitution should be to provide equally for the rights of all, and particularly to protect the rights of the vulnerable.

practicality of such a proposal³⁰ and the manner in which it can be worded in the Constitution.

2.4.3 A separate land clause in the Constitution could read as follows :

Redistribution

draft formulation (1) *Every person shall be entitled to equitable access to land.*

or alternatively

draft formulation *Every person shall be entitled to equitable ownership.*

Restitution

draft formulation (2) *Every person and community dispossessed of rights in land after [insert decided date]³¹ as a result of any law or practice which would have been inconsistent with [the section of the Constitution which prohibits discrimination] had that section been in operation at the time of dispossession, shall be entitled to restitution of such rights or equitable redress, in the manner described by an Act or Parliament.*

Tenure Reform

draft formulation (3) *Every person and community whose existing rights or interests in land are legally vulnerable as a result of discriminatory laws and practices shall be entitled to legally secure rights to that land or comparable redress as prescribed by and Act of Parliament*

³⁰ The South African Agricultural Union referred to a lecture by Justice Sydney Kentridge delivered on the Freedom Charter to an audience in the United Kingdom, where he said the following : *"It is one thing to give a guaranteed right to personal property ... It is quite another to say that one should have a Constitutional right to own a gold mine or a farm of 1 000 000 hectares."*

³¹ The question of a cut-off date must be dealt with. In this report it was recorded that land reform includes restitution, redistribution and tenure reform. It has to be recognised that an unlimited restitution right will in practice encourage all those who need land to couch their claims in terms of restitution. This will blur the distinctions and lead to impossibly complicated processes, and often inappropriate results.

or alternatively

draft formulation

Any right or interest in land may be replaced on an equitable basis by an alternative right in terms of any law providing for tenure reform.³²

Protection from eviction

draft formulation

(4) *No person may be evicted from his or her home except in accordance with an order of a court of law or other independent and impartial tribunal which shall, before making any order for eviction, take into account the circumstances under which such person occupies the home, the duration of the accommodation and the availability of alternative accommodation³³.*

3 THE DESIRABILITY OR NOT OF A PROPERTY CLAUSE IN THE FUTURE CONSTITUTION

A major portion of the proceedings of the Workshop was devoted to arguments for and against the inclusion of a property clause in the future Constitution³⁴.

³² The technical advisers could not, amongst themselves, agree on a suitable wording. The objection against the first suggestion is that it is too vague and it is difficult to ascertain how and to what effect the positive rights granted thereby may be exercised. The objection against the alternative suggestion is that it is merely an authorising provision which gives no right to the affected persons and communities, and imposes no obligations on the government.

³³ This is an aspect to housing and if that right is to included in the Constitution it would be better dealt with there.

³⁴ Prof S Gutto pointed out that the first priority should be the achievement of a legitimate property regime (Transcript II, p 67) : *'So what one is looking for is a property regime that is legitimate broadly for people in urban and rural areas, for all racial groups and I daresay for all gender groups, for men and women. Once you are approaching a system of the legitimacy then you decide the second level. Should we write this into a constitution or should we leave the ordinary laws to deal with it.'*

3.1 Arguments in favour

The arguments in favour of the inclusion of a property clause are the following :

- 3.1.1 a property clause will provide security against arbitrary and/or inadequately compensated³⁵ land grabbing by Government³⁶;
- 3.1.2 investor confidence (particularly foreign investors) will be enhanced by a property clause in the Constitution³⁷; the removal of the property clause will send negative signals to investors;
- 3.1.3 a property clause is an essential component of a free market economy and will promote growth and stability³⁸;
- 3.1.4 the right to property is widely recognised as a human right which should be protected; the number of countries which include the

³⁵ The need for adequate compensation to expropriated land owners was emphasised by many participants. See Mr André Fourie (Transcript II, p 40) : *"I have not heard an argument as to why someone who happens to own land should be discriminated against as opposed to people in general. The person who happens to own land doesn't seem to me, if they have acquired it as the Sate President said, fairly in the market place, why pick on them. Why not go to the taxpayer, out of the general fiscus and purchase land in the market place. I want to suggest the opposite of removing the land clause, I want to suggest tightening it."*

³⁶ The South African Agricultural Union submitted : *" Only by entrenching property rights in the Constitution will all members of the community be assured of protection against unfair or unlawful expropriation of land and other property by the Government or by people who simply occupy the land."*

³⁷ The South African Agricultural Union submitted : *"Property rights form the basis of land ownership in a democratic country which strives fr free market principles. These rights are important for security and order and an absolute prerequisite to encourage investment both internally and from abroad. Investment and economic growth, in turn, are essential to alleviate structural problems in the national economy, such as employment and the provision of various social services including education, health and housing. such rights must be applicable to all property, e g house, car, furniture and other personal possessions. They should also cover all forms of land ownership, viz private land, communal land and even leased land."*

³⁸ The South African Chamber of Business puts it as follows : *"Property rights are widely recognised as an essential element for an effectively-operating economy. The Government of National Unity has committed itself to a market-driven economy - and property rights are a centrepiece of any such system. Without a guarantee on basic property rights, both economic growth, and the economic system, will be damaged."*

protection of property rights in their constitutions is much larger than the number of countries which give no such protection;³⁹

3.1.5 constitutional protection of property rights is necessary to curb squatting and to allay fears of uncontrolled illegal land invasions⁴⁰;

3.1.6 the omission of protection of property rights from the new Constitution will be in breach of the Constitutional Principles contained in Schedule 4 of the Interim Constitution⁴¹.

3.2 Arguments against

The arguments for omitting a property clause from the Constitution are the following :

3.2.1 to include constitutional protection of property rights at this stage would be to entrench the legacy of the systemic denial and prohibition of the rights to land of the majority of South Africans. This

³⁹ Judge Steenkamp said (Transcript, p 23) that out of 129 constitutions studied, only 22 do not protect private property.

⁴⁰ Cf the submission by the Southern Cape Agricultural Union : *"Due to the lack of safety & security, people are demanding rights on land and illegal grazing which is becoming unbearable. All possible measures to ensure that THE RIGHTS OF PRESENT AND FUTURE LANDOWNERS ARE RESPECTED AND PROTECTED, SHOULD IMMEDIATELY BE INTRODUCED."*

⁴¹ The South African Agricultural Union motivated this as follows : *"The property rights contained in section 28 form part of the Fundamental Rights and in terms of section 71(1) of our Constitution "a New Constitutional text shall (a) comply with the Constitutional Principles contained in Schedule 4; and (b) be passed by the Constitutional Assembly in accordance with this Chapter. The relevant clause in Schedule 4 provides as follows : 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.'"*
This interpretation given to the constitutional principles by the SAU was challenged by Prof Gutto on the basis that it was a far fetched interpretation and that the current constitution does not prohibit the departure from the current constitutional clause when writing the permanent constitution [check the oral proceedings].

legacy is expressed in the massive racial and gender imbalances in land holdings⁴². Much of the present violence and instability in South Africa is caused by land hunger on the part of deprived communities⁴³, and rectification of the existing imbalances is essential for achieving a legitimate and stable dispensation of property rights accessible to all.

3.2.2 to justify entrenching property rights in South Africa by reference to "the free market system" is not justifiable as property rights entrench the results of a market which was never free because the majority of South Africans were prohibited by law from freely participating in the land market;

3.2.3 to compare the numbers of countries which do or do not have property clauses is misleading for two reasons : firstly, the specific circumstances in South Africa are different (particularly, given South Africa's history of colonialism) and secondly, the modern tendency is said to move away from entrenching property rights;

3.2.4 to commence from a constitutionally protected skewed base would inhibit the Government's capacity to introduce meaningful land reform; meaningful land reform is necessary in order to achieve equitable and racially representative land distribution and to create a stable and legitimate land and property dispensation in South

⁴² Contralesa submits that the property clause perpetuates the denial of rights to land by protecting the rights of those who have at the expense of those who do not. Mr C Makwethu supported this position. The National Land Committee network was supported by the Centre for Applied Legal Studies that "the Anglo American legal tradition has tended to grant protection to owners who claim that the state is interfering with their property : *"the absence of a property clause does not imply that there will be no protection for property rights"*.

⁴³ See Ms P Yako (Transcript I, p 90) : *"The property clause is a piece of paper and will not be able to stop the on-the-ground realities. All it will do is to give landowners a false sense of security, and because of this they will not continue with the pragmatics of negotiations which had started to emerge in different parts of the country. First the property clause will ultimately lead to the deepening of current instability and will inevitably threaten existing vested interests in property much more than if it did not exist."*

Africa; the absence of such dispensation is likely to lead to increased land invasions and violence⁴⁴, which will have a negative impact on foreign investors⁴⁵;

3.2.5 experience in other countries has shown that property clauses have been used to strike down or resist land reform legislation⁴⁶, often with disastrous results⁴⁷; it protects the rights of the privileged at the expense of those deprived and historically excluded from property⁴⁸;

⁴⁴ Submission by East Cape Land Committee and presentation by Pam Yako of the Border Rural Committee : *"The legacy of apartheid has left both urban and rural landless with no option but to operate outside the parameters of the law. They have been forced to take the law into their own hands and the only avenue open to them has been land invasions and other lower forms of resistance, such as fence cutting, rendering land unfarmable, forcing farmers out, stock and crop thefts and so on. People have not adopted these strategies because they are necessarily bad or evil in themselves, but because they have had no choice. Often people have adopted these strategies because they have or think they have some right to the land in question."*

⁴⁵ Both Greshner and Durie said the issue of investor confidence was more likely to be affected by general political instability and threats of violence than by constitutional provisions.

⁴⁶ Claassens gave the South African example of the Land Reform (Labour Tenant) Bill which the Government is currently trying to introduce and which the South African Agricultural Union has said it will challenge as "unconstitutional" in terms of the property clause. Greshner citing the Canadian experience says that there was widespread agreement across the political spectrum in Canada that property rights should not be entrenched in their Charter, because Provincial Premiers feared that such a provision could be used to strike down the many hundreds of legislative regulations of land and property rights that had been established through the democratic process over time. Many of these laws and regulations served to protect property rights. Their fear was of transferring power over these thousands of statutes to unelected judges.

⁴⁷ This point was made by Chaskalson, LAPC, Greshner, Gutto and Claassens. The Indian, United States, Zimbabwe and Chilean experience were cited in their respective papers.

⁴⁸ Pam Yako's presentation stressed that the property clause has inhibited local negotiations based on the principle of "sharing" and long term solutions. She described how in the early nineties local negotiations and arrangements were initiated to try and address the distribution of power and resources. A few examples would be Tsitsikamma, Gannahoek in KwaZulu/Natal and Guguga in the Border. The inclusion of the property clause in the Bill of Rights affected if not completely changed, the merging co-operation at a local level Land owners felt that the Constitution had guaranteed their property rights forever and therefore there is no need to compromise, to share resources or to negotiate at local level, because what they got under apartheid is now guaranteed for ever."

- 3.2.6 the interpretation of the property clause could give rise to a flood of litigation, with consequent expense and delays in the area of land reform⁴⁹;
- 3.2.7 entrenched property rights could interfere with the regulatory and other ordinary functions of the Government, such as the restructuring of the cities on a more integrated basis, rental control and environmental protection⁵⁰;
- 3.2.8 entrenched property rights could impede the Government's capacity to introduce "upgrading" measures to reform land tenure rights if such measures are challenged by the registered owners of the land⁵¹;
- 3.2.9 protected property rights could make it impossible for the Government to impose a ceiling on land holdings⁵²;

⁴⁹ Note Chaskalson and Greshner who raised the point that regardless of the outcome of constitutional challenge "in the meantime policies would be delayed, postponed and cost a great deal to defend".

⁵⁰ This was exemplified by the National Land Committee, Land & Agricultural Policy Centre, Durie, Chaskalson and Claassens. Derek Hanekom referred to the Diepsloot case and warned that it is necessary to ensure that a property clause "does not give constitutional force to the 'NIMBY' argument (not in my back yard) and therefore prevent the development of low cost housing or the provision of land to small scale farmers". The Diepsloot case was finally decided by the Court of Appeal in 1994, and was cited in Prof Gutto's paper. It decided that the property rights were balanced against the need for land reform in the interest of those who were previously dispossessed. Greshner cites the US experience in terms of which rent control laws, environmental protection laws, municipal zoning laws, minimum wage laws and maximum hours of work legislation were all struck down as inconsistent with property rights.

⁵¹ The National Land Committee raises as a specific problem with the property clause that whereas most black people were forced by law to be beneficiaries of trust and permit holders, the property clause strengthens the rights of the bodies and institutions which are the nominal owners of the land. These owners can then hold upgrading processes to ransom by demanding compensation for "their" property rights when the government attempts to transfer secure legal rights to the people who have lived on it for generations.

⁵² Judge Durie described that redistribution of land is a "way of life" in New Zealand and that it began in 1840 with their very first Ordinance which limited the amount of land which any one person could own. From time to time, the Government has introduced measures to ensure access to land for small owners and has always maintained measures to limit the "undue aggregation" of land. He says that one of the reasons that New Zealand decided against entrenching property rights in their Constitution is that this "way of life" would have become "unconstitutional". In New Zealand property is considered a relative right and not an absolute right and the role of the State in this context is to balance "competing equities".

3.2.10 protection of property rights in the Constitution is not really necessary and other countries have managed well without it. They found ordinary laws protecting land and property rights to be sufficient. There are provisions in the Constitution, such as the equality and due process clauses, which would make it unconstitutional for the Government to deal arbitrarily with property⁵³.

3.2.11 Because property is not a universally accepted fundamental right and because there is no reference in the Constitutional Principles to property, the Constitutional Principles do not require a property clause.

4 POSSIBLE OPTIONS IN RESPECT OF THE TREATMENT OF PROPERTY IN THE FUTURE CONSTITUTION

Options put forward during the Workshop in respect of property include the following :

4.1 No property clause

Many people put forward the view that there should be no property clause in the Constitution.

⁵³ Submissions cite the fact that countries such as Great Britain, Holland, Canada and New Zealand do not entrench property rights and yet have stable and secure systems of property rights. Chaskalson cites, apart from equality *"at least three fundamental rights in terms of which arbitrary confiscations could be struck down. These are the right to human dignity, the right to freedom and security of the person and the right to privacy."* Prof Greshner from Canada and Judge Durie from New Zealand also explained why their respective countries did not opt for a property clause in the Constitution.

4.2 Exclude land from property clause

4.2.1 It was suggested that land be excluded from the property clause, so that the clause will apply to other forms of property⁵⁴.

4.2.2 Such a clause can take the form on a proviso to the property clause, and can read as follows :

draft formulation *"For purposes of this section, 'property' shall not include land or any interest in land."*

4.2.3 This is the most far reaching of the land exclusion clauses. Its effect would be to exempt all land from the property clause. By specifically excluding land, it will send a signal to current owners that their land holdings do not enjoy any special constitutional protection. It creates an incentive for locally negotiated pragmatic solutions to land disputes involving current owners and land claimants.

4.3 Exclude land reform measures

4.3.1 Many participants suggested that land reform measures be excluded from the property clause⁵⁵; such land reform measures will comprise land restitution, tenure reform and land redistribution⁵⁶.

⁵⁴ Many participants made the point that an amendment to the property clause would be less likely to affect investor confidence, than if the clause were scrapped entirely. Greshner said that foreign interests were unlikely to be particularly concerned with land, as opposed to intellectual property.

⁵⁵ Such an extension could also eliminate the requirement of just and equitable compensation in the case of expropriation in the case of expropriation; this will not be acceptable for many participants.

⁵⁶ See Heinz Klug (University of the Witwatersrand) : *"One approach would be to trace the language of the affirmative action clause of the 1993 Constitution which provides that the equality clause 'shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups disadvantaged by unfair discrimination'. This could provide an exception to the general property clause as follows : 'The property clause shall not preclude measures taken in terms of this land rights clause which are designed to achieve the adequate protection and advancement of persons or groups who as a result of apartheid laws and policies have been denied equitable access to land.'"*

This could be done by means of a clause in the Constitution which would provide that measures designed to bring about land reform for the benefit of people disadvantaged by unfair discrimination would not be precluded by the provisions of the property clause. A precedent for this sort of clause is S33(4) which protects affirmative action legislation from scrutiny under the equality provisions of the Bill of Rights.

4.3.2 Possible formulations of *provisos* to be included in the property clause include the following :

draft formulation *"This section shall not apply to measures aimed at bringing about land reform through the restitution of rights in land, redistribution of land, or land tenure reform for the benefit of persons previously disadvantaged by unfair discrimination."*

or alternatively

draft formulation *"This section shall not impede⁵⁷ measures aimed at bringing about land reform through the restitution of rights in land, redistribution of land, or land tenure reform for the benefit of persons previously disadvantaged by unfair discrimination."*

The clause reflects the consensus reached at the workshop that : *"Land reform is vitally necessary and must not be impeded by Constitutional obstacles"*. It is suggested that this provision might allay the concerns of those proponents of the property clause who say that the property clause does not impede land reform. If it does not, then it will not be affected by this provision. It will address the major concern raised in the workshop, namely that the property clause does impede land reform.

⁵⁷ The technical advisers are not unanimous as to whether the word "impede" has a sufficiently clear legal meaning to give efficacy to the clause. A possible alternative approach would be to stipulate that nothing contained in the property clause shall make land reform measures invalid.

- 4.3.3 The above wordings constitute the simplest and most usual way of wording an exemption clause. The two possible wordings have very different results. To say that the property shall "not apply to" measures aimed at bringing about land reform creates a wide exemption for all land reform measures from the property clause. To say that property clause shall "not impede" land reform measures has a narrower meaning. It creates the onus of proving that the property clause would have "impeded" any particular land reform measure. Thus while the property clause would apply in general to land issues, it would be suspended only where it can be established that its operation impedes a particular land reform measure.
- 4.3.4 The major shortcoming of the above approach is that the exemption of land is only in respect of **land reform measures**⁵⁸.
- 4.3.5 A similar way of achieving this exemption would be to insulate land rights from the property clause. The difference here is that the contents of "land reform" would be spelled out in a land rights clause⁵⁹. This approach goes hand in hand with the separate land clause discussed under 2.4⁶⁰.

⁵⁸ The formulation suggested above, by referring to "land reform measures" does nothing to address the pre-emptive and powerful role that the property clause would continue to play in relation to land issues as they are disputed, negotiated and resolved in civil society. Given that the role of government and the effect of laws is inherently limited compared with the solutions that people find for themselves, this constitutes a fundamental weakness in the formulation.

⁵⁹ The Land and Agricultural Policy Centre motivates it as follows : *"An enhanced separate land clause in the constitution could provide that matters relating to land reform (or a broader range of land issues) would not be subject to the provisions of the property clause. A major attraction of this proposal is that it attempts to provide for rural restructuring without threatening commercial and industrial investors."*

⁶⁰ Donna Greshner's paper on Canada suggests three possible methods used in Canada which would protect land reform measures from the property clause. The first is an exception clause such as that provided for by S8(3) of the Interim Constitution. In terms of such a clause policies or measures necessary to achieve land reform could be exempted from the property clause. The second method is via an insulation clause, which would insulate a pre-existing right from challenge in terms of other constitutional rights. (These correspond to the proposals set out in 1 and 2 respectively). A third method is to have a trump clause in terms of which the right to land would take priority over the right to property. She says that this third option has been the least effective.

4.3.6 Land rights can also be insulated from the property clause by inserting the following clause in the land rights clause :

draft formulation

"The provisions of [the property clause] shall not apply to measures taken in order to realise the achievement of the right to land in terms of this section."

This clause insulates land rights from the property clause. The specific land rights described in the Constitution are then insulated from attack under the property clause. In this context its effectiveness is closely related to the proper description of land rights in the Constitution. Any type of land reform measures not adequately provided for in terms of these rights would not enjoy the same "insulation" or protection from the provisions of the property clause.

4.3.7 The property clause contains provisions which authorise expropriation, and provisions which require just and equitable compensation to be paid for expropriation. The draft wordings set out in 4.2 and 4.3 would have the effect of not only placing the validity of any deprivation or expropriation of property for land reform purposes beyond doubt, but it would also exempt the Government from the constitutional obligation to pay just and equitable compensation to the owners of property taken for land reform purposes. Those persons who hold the view that the Constitution should provide that expropriation must in all cases be subject to the payment of just and equitable compensation, made it clear that such a provision will not be acceptable to them. In such circumstances compensation (which will not need to be just and equitable) would be governed by the statute which authorises expropriation as was the case before the Interim Constitution came into effect.

4.4 Suspension of implementation

4.4.1 The implementation of the property clause (either in general, or in relation to land reform only) could be suspended for a given period to allow the Government to achieve a meaningful scale of land reform and thereby to level the playing fields in relation to representative land ownership before the property clause kicks in; this proposal is sometimes referred to as a "sunrise clause".

4.4.2 A formulation to be inserted in the property clause would read a follows :

draft formulation *"This section shall come into effect on"*.

This is one of the formulations suggested by Leon Louw of the Free market Foundation⁶¹.

4.5 State control of land

A few participants referred to precedents where control of land was put into the hands of chiefs and/or the State. This suggestion received little support⁶².

⁶¹ Two other possible formulations put forward by Leon Louw were as follows:
*"The provisions of subsection (3) shall not, for a period of years, be interpreted so as to preclude bone fide actions by the state aimed at bringing about socio-economic reform and the empowerment of persons or groups or categories of persons disadvantaged by unfair discrimination.
The provisions of section 28 shall not, for a period of years, protect the property rights of persons or groups or categories of persons who benefited from unfair discrimination prior to this Constitution."*

⁶² See the discussion of this option in the submissions by Prof Gutto and Dr Njobe. The reasons are that it leads to tenure insecurity for the people concerned and may impede development given the prevailing economic realities and the prevailing principles for profitable farming.

4.6 Changing the existing property clause

It was suggested that the property clause can be changed to address many of the concerns expressed by some of the participants⁶³. The following amendments have been suggested :

4.6.1 Section 28(1)

4.6.1.1 It was proposed that Section 28(1) be excised from the rest of the property clause⁶⁴

4.6.1.2 If Section 28(1) is retained, consideration could be given to recording in Section 28(1) that property ownership imposes rights as well as duties, and that its use should serve the common good. Furthermore, the right of Government to limit the ambit of property rights by legislation can be explicitly stated. A well-known precedent in this regard is the Constitution of the Federal Republic of Germany.

4.6.1.3 Many participants called for the existing phrase "rights to property" to be substituted by the word "property"⁶⁵. Protection was originally given to "rights to property" with the intention to include people without formal rights. The effect

⁶³ The University of Natal (Centre for Socio-legal Studies) gives the following warning : *"It is submitted, however, that as was demonstrated by post independence India constitutional history, the drafters of the South African Constitution cannot afford to repeat the mistake of assuming that future courts will place a benevolent construction on the rights to property. South Africa cannot afford a confrontation between parliament and the constitutional court over land reform since land disputes have become very serious lately, and the sooner it is dealt with property, the better it will be."*

⁶⁴ Chaskalson submitted that Section 28(1) *"is either a rhetorical flourish with no meaning or it is a statement of the constitutional sovereignty of absolute property rights. If it is the former, we lose nothing by deleting it. If it is the latter, it is incompatible with the reality of late twentieth century society and should not be contained in our Bill of Rights."*

⁶⁵ See Derek Hanekom : *"It would be better to what most constitutions protecting property do, and that is to refer simply to 'property'."*

could, however, be the opposite of what was intended in the sense that the wide phrasing "rights to property" could capture more property rights than was originally intended and thereby make it difficult for Government to regulate the use of property.

4.6.1.4

Section 28(1) now reads as follows :

"(1) Every person shall have the right to acquire and hold rights in property; and, to the extent that the nature of the rights permits, to dispose of such rights"

It is suggested that Section 28(1) could be replaced by the following :

draft formulation

"(1) Property rights and the right of inheritance is guaranteed. The content and limits of property rights may be determined by laws. Property imposes duties. It should also serve the common good."⁶⁶

The amendments :

- remove the term "rights in property" and replace it with "property rights";
- include as a property right, the right of inheritance;
- substitute the positive right "to acquire and hold rights in property" by a guarantee of property;⁶⁷

⁶⁶ This formulation is based on the Constitution of the Federal Republic of Germany, which provides [Article 14(1) and (2)] : *"Property and the right of inheritance is guaranteed. Their content and limits shall be determined by the laws. Property imposes duties. Its use should also serve the common weal"*.

As an alternative, the Japanese model could be considered. Article 29 of the Japanese Constitution provides : *"The right to own and hold property is inviolable"*.

⁶⁷ This wording is also used in the Organisation of African Unity's Charter of Rights (1981). Article 14 provides : *"The right to property shall be guaranteed."*

- insert a provision that the content and limit of rights in property may be determined by laws, that property imposes duties and should also serve the common good.

4.6.2 Section 28(2)

4.6.2.1 Deprivation of property can take the form of Governmental regulation of the use of property (the exercise of regulatory or so-called "police power") or of expropriation of property. In the case of regulation all that is affected is how the property may be used. In the case of expropriation property rights are taken away from the owner and transferred to the Government or to another owner. Both should [as is provided in Section 28(2)] be done in terms of a law, but only the expropriation of property should carry a right to compensation. The distinction is very important and should be contained in clear language in Section 28(2) and/or Section 28(3).

4.6.2.2 Although some participants argued that Section 28(2), as presently worded, could place unnecessary restrictions on the Government's regulatory powers, others argued that it does no more than provide the necessary legislative foundation for such power.⁶⁸

⁶⁸ The Association of Law Societies puts it as follows "It is accepted by the Association of Law Societies that the right to property carries with it the responsibility to conform with social needs. The provision in the Interim Constitution that 'no deprivation of any rights in property shall be permitted otherwise than in accordance with the law', will not restrict the development of the country or the ability of government to regulate the use of land. On the contrary, it will establish a legislative foundation upon which the Government can build principles and social values to harmonise collective and individual interests in property."

4.6.2.3 Section 28(2) now reads as follows :

"(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law."

It is suggested that Section 28(2) could be replaced by the following :

draft formulation

"(2) No deprivation of property shall be permitted otherwise than in accordance with a law."

The amendment removes the term "rights in property" and replaces it with "property".

4.6.3 Section 28(3)

4.6.3.1 Many participants⁶⁹ expressed the concern that the requirement that all expropriations must be for "public purposes" places too narrow a restriction on the Government's power to expropriate⁷⁰, and that "public purposes" should be replaced

⁶⁹ The National Land Committee stated in its submission *"expropriation of land (which is going to be a critical tool) will probably no be legal if it is done for the purposes of land reform, because of the narrow interpretation of 'public purposes' to exclude land reform. This leaves the Government at the mercy of land owners and market forces to determine the pace and extent of land redistribution."*

⁷⁰ Many participants do not share this concern. See, for example, the South African Property Owners' Association : *"Existing South African case law, i t o the old expropriation law, deals with 'public purposes' issue quite extensively. The main issue would be whether expropriations of private property are valid 'for public purposes' if the land is then used to settle new owners, for example in small-scale farming settlements i t o the RDP. Sapo's view is that there is enough existing case-law to back up the view that these expropriations would be valid as long as the settlements are necessary as part of the government's social programme, and not just to benefit a few individuals. The same was always true for expropriations for new residential settlements, and it should remain the same."*

by "public interest"⁷¹. There is a specific fear that the "public purposes" requirement may exclude expropriation for land reform purposes, as happened in India. It was argued that this concern can be addressed by providing, in so many words, that Government will be entitled to expropriate land for land reform and social interest purposes.

4.6.3.2

Many participants expressed the concern that any compensation formula which results in compensation at market value will make land reform prohibitively expensive⁷². This position is based on international precedents in terms of which just and equitable compensation has been interpreted as market value payable up front. In this context there were proposals that it should specifically be provided in the Constitution that compensation might take other forms than cash (such as

⁷¹ The concern was expressed that substituting "public purposes" with "public interest" could have negative implications in the sense that it might open the door for an expropriatee to attack the validity of an expropriation on the basis that it is against the public interest, for example, expropriation for an airport because it is environmentally destructive or expropriation for an irrigation dam because it is too expensive. Such decisions (whether or not to expropriate) are administrative decisions to be taken by the Government of the day and should not be open to attack by expropriatees.

⁷² The Land and Agricultural Policy Centre and Chaskalson raised the issue that the payment of market based compensation will constrain the State's capacity to enter into meaningful levels of redistribution of land. Claassens stated a *general problem with the way in which the restitution process intersects with the property clause is that restitution can take place only on payment of compensation to current owners. In other words, if the State does not have enough funds for this purpose, the present holders will retain the land, and those who were dispossessed will remain dispossessed.*
During the Workshop Mr L Louw pointed out that insufficient Governmental resources is no reason to give inadequate compensation to an expropriated landowner " *Then the question of there won't be enough land, there's a lot of other land that can be made available. The big question then, the moral question is should it be made available at the expense of the existing white landowner or at the expense of the taxpayer in general? I would like to suggest that the fair thing is to be at the expense of the taxpayer in general. In other words a white person who happens to own land shouldn't be discriminated against on account of owning land. What should happen is the land should be bought up by the State with taxes and made available as we are doing with housing to black South Africans.*"

Government bonds), and that payment thereof may be deferred⁷³. Other participants pointed out that the present wording of Section 28(3) does not necessarily rule out non-monetary or deferred compensation, provided the form of compensation and the payment date remain just and equitable. A large number of participants emphasised that compensation for expropriated rights must always be just and equitable.⁷⁴

4.6.3.3 Some participants expressed the view that whatever compensation formula is adopted to compensate present owners, should apply equally to compensate past dispossessions.

4.6.3.4 Some of the factors to be taken into account in the determination of just and equitable compensation were put into doubt. The requirement that the "interests of those affected" should be considered, was questioned on the basis that it is difficult, if not impossible, to interpretate. One participant expressed difficulty in interpreting the requirement that account

⁷³ Heinz Klug (University of the Witwatersrand) advises that *"it is advisable to include specific reference to an expansive interpretation of compensation, including as examples such acceptable forms of compensation as the issuing of government bonds, tax breaks, interest or other comparable benefits. It would then be up to an aggrieved party to contend that compensation in the statutorily specified nature is unconstitutional on the ground that it does not satisfy the 'just and equitable' standard mandated by the Constitution."*

⁷⁴ See, for example, Gordon Hibbert (SAPOA) (Transcript, p 53) : *"What we believe is that people should be fairly compensated for any rights that they have in fact invested and purchased in the past."*

[Experience in other jurisdictions where compensation is awarded on a "just and equitable" or "fair" basis, has shown that in the overwhelming majority of cases such compensation was determined on the basis of market value].

Prof Gutto cited his book recently published in South African that under public international law there is a controversy between capital exporting countries and capital importing countries over what adequate or appropriate compensation should mean. The former tends to insist on market formulas while the latter countries are strongly opposed to linking compensation to so-called 'just and equitable'.

must be taken of the "history of the acquisition"⁷⁵. However, this provision was not generally controversial.

4.6.3.5

Section 28(3) now reads as follows :

"(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected."

It is suggested that Section 28(3) could be replaced by the following :

draft formulation

"(3) Where property is expropriated, such expropriation shall be permissible for public purposes or for social interests only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such

⁷⁵ The South African Agricultural Union quoted from comments by the Chief Justice of South Africa on the existing Section 28, as follows : *"But how does one calculate, in terms of monetary compensation, the history of the acquisition of the property? How does one calculate, in terms of money, the interests of those affected? In any event, what is meant by the history of its acquisition? Is it intended that one should have regard to all previous transactions relating to the acquisition of the property or the history of the legal regimes under which the property was acquired? If either of the two was intended, what is the relevance of that history - and how can it affect the present market value?"* Claassens on the other hand, exemplified the relevance of the "history of the acquisition" with reference to the example of the Mfengu. The Mfengu of the Tsitsikamma were forcibly removed in the late seventies. During and after 1983 their land was sold to nineteen white farmers. It was sold at R229,00 per hectare whereas its market value at that time was between R750,00 and R1 000,00 per hectare. The farmers got soft loans to buy the land and soft loans to develop the land. Ten years later when their land was bought back from them to restore it to the Mfengu, they were paid R5 833,00 per hectare, that was the market value. That one restoration cost the Government R35 million. The farmers who had had to be "poor" to qualify for their initial subsidy emerged as millionaires.

period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected.

The amendments :

- remove the term "rights in property" and replace it with "property";
- add "social interests" as an additional purpose for which expropriation shall be permissible⁷⁶; and
- remove "the interests of those affected" as a factor to be taken into account in the determination of compensation, because it is out of place and difficult (if not impossible) to interpret and to apply⁷⁷.

4.7 Many participants support the property clause in its present form, and argue that it will not obstruct land reform measures.⁷⁸

⁷⁶ This is in line with the American Convention on Human Rights (1969), which provides (Article 21.2) : *"No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law"*. The Organisation of African Unity's African Charter on Human and People's Rights (1981) provides (Article 14) : *"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."*

⁷⁷ The provision probably comes from the Constitution of the Federal Republic of Germany, which provides [Article 14(3)] that "compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected". Provided the new Constitution contains a provision that compensation must be "just and equitable", the further qualification does not seem to be necessary.

⁷⁸ See G Hibbert (on behalf of SAPOA) (Transcript II, p 6) : *"In fact the section provides the government with three main powers to promote land reform. Firstly, it can expropriate properties urgently needed for public reform programme. Secondly, the State can regulate existing and future land uses to accommodate reform programmes. Thirdly, it provides a powerful tool for the provision, improvement and upliftment of property rights held by millions of disadvantaged people who were unable to acquire property in the past but are now*
(continued...)

5 CONCLUSION

- 5.1 The consensus at the workshop was that land reform is vitally necessary and must not be impeded by Constitutional obstacles. Land reform is generally considered to go beyond the issue of restitution and include redistribution and tenure reform. Many participants held the opinion that all the above aspects of land rights should be addressed in the Constitution.
- 5.2 With regard to the property clause, various options were put forward :
- 5.2.1 omit the property clause in its entirety and provide property protection through ordinary legislation (see 3);
- 5.2.2 amend the property clause as contained in the Interim Constitution to address the concerns about its effect on land reform (see 4.6);
- 5.2.3 exclude measures designed to bring about land reform from the provisions of the property clause but provide for land reform separately (see 4.2 and 4.3);
- 5.2.4 suspend the implementation of the property clause for a sufficient period to allow for land reform and equity to be achieved. ("sunrise clause") (see 4.7);
- 5.2.5 retain the property clause (Section 28) contained in the Interim Constitution in its present form (see 4.8).

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⁷⁸(...continued)

*provided with access to security and protection. These are clearly powerful reason for its retention.**