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# **CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 6.3**

**SPECIALISED STRUCTURES OF GOVERNMENT**

**4 SEPTEMBER 1995**

**14:00**

**E305**

***DOCUMENTATION***

Entire document embargoed until 14:00 on 4/9/95

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# CONSTITUTIONAL ASSEMBLY

## THEME COMMITTEE 6.3

### TRANSFORMATION, MONITORING AND EVALUATION

21 August 1995

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

Date: 4 September 1995  
Time: 14:00  
Venue: E305, New Assembly

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#### AGENDA

1. Opening and Welcome
  2. Adoption of minutes
    - 2.1 Minutes of the meeting of 21 August 1995
  3. Land Rights
    - 3.1 Report from Technical Committee on amendments to draft workshop report
    - 3.2 Presentation of draft formulations
    - 3.3 Process towards the finalisation of the draft report
  4. Next meeting of the Subtheme Committee
  5. Any other business
  6. Closure
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HASSEN EBRAHIM  
EXECUTIVE DIRECTOR

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Enquiries Ms B Levy 245 031 ext 234 or 403 2182

**CONSTITUTIONAL ASSEMBLY**  
**SUBTHEME COMMITTEE THREE**  
**TRANSFORMATION, MONITORING AND EVALUATION**  
**OF**  
**THEME COMMITTEE SIX**  
**SPECIALISED STRUCTURES OF GOVERNMENT**  
**21 AUGUST 1995**

**Present**  
**Mbete - Kgositsile B (Chairperson)**

**Camerer S**  
**Fenyane SLE**  
**George M**  
**Louw L**  
**Mokoena LM**  
**Moorcroft EK**  
**Mompoti R**  
**Netshimbupfe MA**  
**Turok M**  
**Van Zyl ID**

**Apologies: Malan TJ, Moatshe P, Nqwemesha KW and Van Wyk A**

**Claasens A, Gildenhys A, Levy B, Njobe F 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 held on 3 August 1995 were adopted.

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### 3. Land Rights

The Technical Committee presented the draft report from the workshop on Land Rights and the Constitution (see Annexure 'A'). The following comments were made on the report:

#### 3.1 The National Party raised concerns with the following matters in the report:

##### AD Para 3.1.6

**" It is however, open to question whether the Constitutional Principles encompass protection of property rights or that property rights would constitute a universally accepted fundamental right. The Constitutional Principles contain no specific reference to property rights " .**

This paragraph needed to be moved to s3.2 which deals with arguments against the property clause.

##### AD Para 4

There is a need to include the matter of the retention of the property clause as is provided for in the Interim Constitution when examining possible options in respect of the treatment of property in the future constitution.

##### AD Para 5

This paragraph should read:

**5.1 " The consensus at the workshop was that land reform is vitally necessary and should not be impeded by constitutional obstacles. Land reform goes beyond the issue of restitution and could include redistribution and tenure reform. The Constitution should provide a framework for the above aspects of land rights."**

**5.2 " With regard to the property clause it was agreed that nothing in the Constitution should jeopardise land reform, with the proviso that security of tenure and property rights were also provided for."**

The following addition should be made with regard to options in terms

of the property clause in the Constitution:

**5.2.5 " Maintain the existing property clause as provided for in the Interim Constitution. "**

- 3.2** Kgosi Netshimbupfe maintained that one of the alternative options presented with regard to the tenure system was communal ownership. However para 4.5 suggests that all control of land should be placed in the hands of the chiefs and/or the state.
- 3.3** Ms Turok maintained that more detail needed to be reflected in the footnotes with regard to the positions of the various stakeholders.

*The meeting agreed to the following:*

*The draft Constitutional provisions be formulated by the Technical Committee, on the options presented in the report, for Parties consideration at the next meeting of the Subtheme Committee.*

*The Technical Committee make the necessary amendments to the report from the Workshop based on the above concerns. This amended report would be attached to the political report of the theme committee.*

*The deadline for Party submissions be extended to 7 September 1995 so as to afford Parties the opportunity to consider the draft formulations. The Technical Committee would incorporate the above submissions into the final report.*

**4. Programme of meetings of the Subtheme Committee**

*It was agreed that the Subtheme would meet on the following dates:*

- i) 4 September 1995 - This meeting would consider the amended report as well as the draft formulations submitted by the Technical Committee.*
- ii) 11 September 1995 - This meeting would consider the final report of the Subtheme Committee on Land Rights which would include Party submissions and preferences with regard to the draft formulations.*

**5. Any other business**

There was no further business.

**6. Closure**

The meeting rose at 16:00.

**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 0.3**

**SPECIALISED STRUCTURES OF THE GOVERNMENT  
LAND RIGHTS AND THE CONSTITUTION WORKSHOP**

**1-2 AUGUST 1995**

**REPORT BY TECHNICAL ADVISERS**

**1 IDENTIFICATION OF ISSUES**

The technical advisers have elected to identify and address issues raised during the Workshop rather than to provide a summary of the proceedings of the Workshop. The issues fall into the following two 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 reform<sup>1</sup>; and
- 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

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<sup>1</sup> 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."



use was generally accepted<sup>2</sup>. 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 protected<sup>3</sup>. The detailed mechanisms of the restitution process is best contained in ordinary laws, which are easy to amend when circumstances so require<sup>4</sup>.

### 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 :

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<sup>2</sup> See Schadrack 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."*

<sup>3</sup> 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.

<sup>4</sup> 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.

- 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 laws<sup>5</sup>;
- 2.1.2.2 much land was lost by the indigenous population through conquest and/or unjust laws before 1913; the right to the restitution of such land should be as strong as the right in respect of land dispossessed after 1913<sup>6</sup>;
- 2.1.2.3 a significant number of laws before 1913 dispossessed black people of land rights or made it impossible for them to own land; these injustices should also be put right.

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

- 2.1.2.4 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 time<sup>7</sup>;
- 2.1.2.5 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 claims<sup>8</sup>;

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<sup>5</sup> 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."*

<sup>6</sup> The Griqua National Conference of South Africa pointed out that most of the Griqua people lost their land well before 1913.

<sup>7</sup> 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."*

<sup>8</sup> 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 partners 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."*

2.1.2.6

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 conquests and pre-1913 dispossessions through the political process of land redistribution<sup>9</sup>.

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 occur.

The objectives of tenure reform are the following :

2.2.1

to provide security of tenure in areas where this is lacking<sup>10</sup>;

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 land;

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<sup>9</sup> 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."

<sup>10</sup> 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."

- 2.2.3 to accommodate a diversity of forms of tenure on the basis of local preference<sup>11</sup>;
- 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 base<sup>12</sup>;
- 2.2.5 to ensure that the land rights of women are protected under communal or group systems<sup>13</sup>.

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 clause<sup>14</sup>.

## 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)

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<sup>11</sup> 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.

<sup>12</sup> Heinz Klug (University of the Witwatersrand) separate a simple 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."*

<sup>13</sup> Submission by East Cape Land Committee and MM Chueu

<sup>14</sup> 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."

recognised by the participants at the Workshop.<sup>15</sup> It is considered necessary to address the deprivation caused by conquest and the prohibition of black people and women in particular, from acquiring land<sup>16</sup>. 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.

If a property clause is included in the Constitution, care should be taken that such clause does not inhibit the redistribution process. As will appear hereunder, most of the concerns about land redistribution relate to the possibility of a conflict with a property clause in the Constitution<sup>17</sup>.

### 2.3.2 Positive right

Some participants proposed that the right to land, and particularly the right to the redistribution of land, should be included in the Constitution as a positive right. Such a positive right should include :

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

2.3.2.2 *equitable access to resources necessary to develop the land*<sup>18</sup>.

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<sup>15</sup> Compare the individual submissions by Jivananda, Mbatha, Mokwena and Phokubye.

<sup>16</sup> Refer to the submission by Dr F Njobe

<sup>17</sup> Some participants, however, argued that a property clause will actually assist the redistribution of law. 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."

<sup>18</sup> This formulation was proposed by the National Land Committee

The exact formulation of such a positive right in the Constitution was not explored in detail.<sup>19</sup>

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.

## 2.4 SEPARATE LAND CLAUSE

2.4.1 Several participants<sup>20</sup> suggested that the inclusion of a separate land clause in the Constitution will provide a constitutional framework and protection for all reform measures<sup>21</sup>, and not only for land restitution.<sup>22</sup> This will constitute a statement of a socio-economic rights. 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

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<sup>19</sup> 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 possible 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."*

<sup>20</sup> These include Heinz Klug (University of the Witwatersrand) and the Land and Agricultural Policy Centre.

<sup>21</sup> 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."*

<sup>22</sup> As contained in Sections 121 to 123 of the Interim Constitution.

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

While there were was strong motivation from many participants that such positive rights would improve the power imbalance between the landless and current land holders, others questioned the practicality of such a proposal<sup>23</sup> and the manner in which it can be worded in the Constitution.

### 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 Constitution.

#### 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 compensated land grabbing by Government;
- 3.1.2 investor confidence (particularly foreign investors) will be enhanced by a property clause in the Constitution; 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 stability<sup>24</sup>;

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<sup>23</sup> The South African Agricultural Union referred to a lecture by Justice Sydney Kentridge delivered to the Freedom Charter of 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."*

<sup>24</sup> 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."*

- 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 protection of property rights in their constitutions is much larger than the number of countries which give no such protection;<sup>25</sup>
- 3.1.5 constitutional protection of property rights is necessary to curb squatting and to allay fears of uncontrolled illegal land invasions;
- 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 Constitution<sup>26</sup>. [It is, however, open to question whether the Constitutional Principles encompass protection of property rights or that property rights would constitute an universally accepted fundamental right. The Constitutional Principles contain no specific reference to property rights].

## 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 legacy is expressed in the massive racial and gender imbalances in land holdings<sup>27</sup>. Much of the present violence and instability in South Africa is caused by land hunger on the part of deprived communities, and rectification

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<sup>25</sup> Judge Steenkamp said (Transcript, page 23) that out of 129 constitutions studied, only 22 do not protect private property.

<sup>26</sup> 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.'"*

<sup>27</sup> 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.



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 Africa; the absence of such dispensation is likely to lead to increased land invasions and violence, which will have a negative impact on foreign investors;
- 3.2.5 experience in other countries has shown that property clauses have been used to strike down land reform legislation<sup>28</sup>, often with disastrous results; it protects the rights of the privileged at the expense of those deprived and historically excluded from property;
- 3.2.6 the interpretation of the property clause could give rise to prolific litigation, with consequent expense and delays in the area of land reform;

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<sup>28</sup> This point was made by Chaskalson, LAPC, Greshner, Gutto and Claassens. The Indian, United States and Chilean experience was cited in their papers.

- 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 protection<sup>29</sup>;
- 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 land<sup>30</sup>;
- 3.2.9 protected property rights could make it impossible for the Government to impose a ceiling on land holdings;
- 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 property<sup>31</sup>.

#### 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

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<sup>29</sup> This was exemplified by the National Land Committee, Land & Agricultural Policy Centre, Greshner, 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".

<sup>30</sup> 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.

<sup>31</sup> 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."

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

#### 4.2 Exclude land

It was suggested that land be excluded from the property clause, so that the clause will apply to other forms of property only<sup>32</sup>.

#### 4.3 Exclude land reform measures

4.3.1 Many participants suggested that land reform measures be excluded from the property clause; such land reform measures will comprise land restitution, tenure reform and land redistribution<sup>33</sup>. 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 Another similar way of achieving this result 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 clause. This approach goes hand in hand with the separate

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<sup>32</sup> 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.

<sup>33</sup> 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.'"*

land clause discussed under 2.4<sup>34</sup>. A suggested formulation in this regard was: "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".<sup>35</sup>

#### 4.4 Suspension of implementation

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"<sup>36</sup>.

#### 4.5 State control of land

A few participants suggested that control of all land should be put into the hands of chiefs and/or the State<sup>37</sup>. This suggestion received little support<sup>38</sup>.

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<sup>34</sup> 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.

<sup>35</sup> Proposed by LAPC

<sup>36</sup> Two possible formulations put forward by Leon Louw of the Free Market Foundation were as follows:  
*"The provisions of subsection (3) shall not, for a period of five years, be interpreted so as to preclude bona 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 five years, protect the property rights of persons or groups or categories of persons who benefited from unfair discrimination prior to this Constitution."*

<sup>37</sup> See, for example, the submission by Contralesa : *"We reiterate that the land belong to the traditional leaders and their communities jointly. In fact the right to land is a right that is shared by traditional leaders and their communities and cannot be divided. The individual land tenure system is foreign to us and cannot work in our communities."*

<sup>38</sup> See the discussion of this option in the submissions by Prof Gutto and Dr Njobe

#### 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 participants<sup>39</sup>. 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 clause<sup>40</sup>

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"<sup>41</sup>. Protection was originally given to "rights to property" with the intention to include people without formal rights. The effect 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.

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<sup>39</sup> 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 soon it is dealt with properly, the better it will be."*

<sup>40</sup> 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."*

<sup>41</sup> See Derek Hanekom : *"It would be better to what most constitutions protecting property do, and that is to refer simply to 'property'."*

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.<sup>42</sup>

4.6.3           **Section 28(3)**

4.6.3.1           Many participants 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 expropriate<sup>43</sup>, and that "public purposes" should be

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<sup>42</sup> 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.*"

<sup>43</sup> 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. Sapoa'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."*

replaced by "public interest"<sup>44</sup>. 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 expensive<sup>45</sup>. 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 Government bonds), and that payment thereof may be deferred<sup>46</sup>. 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.<sup>47</sup>

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<sup>44</sup> 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.

<sup>45</sup> 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.* "

<sup>46</sup> 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.* "

<sup>47</sup> See, for example, Gordon Hibbert (SAPDA) (transcript on page 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].

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 must be taken of the "history of the acquisition"<sup>48</sup>.

## 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 goes beyond the issue of restitution and must include redistribution and tenure reform. All the above aspects of land rights have to be addressed in the Constitution.

5.2 With regard to the property clause it was agreed that nothing in the Constitution should jeopardise land reform. In this regard 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);

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<sup>48</sup> The South African Agricultural Union quoted from comments by the Chief Judge on behalf of the judiciary 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?"*



- 5.2.3           exclude measures designed to bring about land reform from the provisions of the property clause (see 4.2 and 4.3);
- 5.2.4           suspend the implementation of the property clause for a given period ("sunrise clause") (see 4.4).

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