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**CONSTITUTIONAL ASSEMBLY**

**CONSTITUTIONAL COMMITTEE  
SUB-COMMITTEE**

**SUPPLEMENTARY REPORT**

**TO THE**

**DRAFT BILL OF RIGHTS**

*(As prepared by the Technical Committees of Theme Committees 4 and 6.3)*

*(Entire document embargoed until 9 October 1995)*

# MEMORANDUM

**TO** : **CC Subcommittee members**

**FROM** : **Executive Director**

**DATE** : **2 October 1995**

**SUBJECT** : **REPORT ON MEETING OF TECHNICAL COMMITTEES OF TC4 & 6.3.**

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Honourable members

1. On Friday 29 September 1995, the Technical Committees of TC4 and 6.3 met, as per the resolution of the CC meeting of 15 September 1995, in Johannesburg for purposes of considering the proposals of Theme Committees 6.3 on Land Rights.
2. The two Technical Committees have prepared a joint report, a copy of which is attached for the members' attention. The joint report should be read in conjunction with ss18 and 19 of the draft Bill of Rights ( Volume 2 of the documentation) as explained below:
  - 2.1 The formulations in paragraph 2 (pages 2-5) of the joint report supersedes the formulations in s18 of the draft Bill of Rights; and
  - 2.2 The formulations in paragraph 3 (pages 5-7) of the joint report supersedes the draft formulations in s19 of the draft Bill of Rights.

**JOINT REPORT BY MEMBERS OF THE TECHNICAL  
COMMITTEES OF THEME COMMITTEES 4 AND 6.3 ON LAND  
AND PROPERTY CLAUSES FOR THE NEW CONSTITUTION**

**1 Introduction**

The Constitutional Committee gave instructions to the Technical Advisors of Theme Committees 4 and 6.3 to meet and formulate draft clauses on land and property rights for the new Constitution.

A joint meeting was held on 29 September 1995, attended by the following technical advisors:

- 1 Prof I M Rautenbach
- 2 Ms A Claassen
- 3 Dr F Njobe
- 4 Ms S Liebenberg
- 5 Dr A Gildenhuis

The Technical Advisors formulated a clause on *property* and a clause on *housing and land*, as set out hereunder.

The Technical Advisors of Theme Committee 4 did not have an opportunity to fully consider the submissions to and the proceedings of the Workshop held on 1 and 2 August 1995 relating to land rights. Furthermore, the memo on property prepared by Theme Committee 4 does not reflect some of the latest party submissions on the subject, because it was drafted before the submissions were received.

This report attempts to reconcile overlaps between the formulations prepared by the two groups of Technical Advisors in respect of the property clause and the clause on the right to housing in the draft Bill of Rights. This report also contains formulations relating to land rights

which were prepared by the Technical Advisors to Theme Committee 6.3.

The following draft formulations of a *property clause* and a *housing and land clause* to form part of the Bill of Rights, is submitted for consideration. It supercedes previous drafts submitted separately by Theme Committees 4 and 6.3.

## 2 Property Clause : Provisional Text

(1) *Everyone<sup>1</sup> has the right to acquire<sup>2</sup>, hold, and dispose of property to the extent that its nature permits<sup>3</sup>.*

Alternatively

Omit sub-clause (1) in its entirety<sup>4</sup>;

Alternatively

*Property and the right of inheritance are guaranteed. Its content and limits may be determined by law. Property imposes duties. Its use should also serve the common good<sup>5</sup>.*

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<sup>1</sup> "Everyone" refers to both natural and juristic persons.

<sup>2</sup> The word 'acquire' is wide enough to include 'inherit'.

<sup>3</sup> It was considered necessary to restore this phrase as initially included in the Interim Constitution because of problems relating to customary tenure.

<sup>4</sup> This suggestion was made by the ANC.

<sup>5</sup> 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"*.

- (2) *No one may be deprived<sup>6</sup> of property except in accordance with a law of general application<sup>7</sup>.*
- (3) *Property may be expropriated in terms of a law of general application -*
- (a) for a public purpose or in the public interest<sup>8</sup>; and*
  - (b) subject to payment of compensation and a payment schedule which has been either -*
    - (i) agreed, or*
    - (ii) decided by a Court of Law to be just and equitable*
- Alternatively
- (ii) decided by a Court of Law to constitute an equitable balance between the public interest and the interests of those affected<sup>9</sup>.*
- (4) *When any Court decides either the amount or the payment schedule of compensation in terms of sub-section (3)(b)(ii), the Court must consider all relevant factors, including<sup>10</sup>, with respect to the amount of compensation -*
- (a) the current use of the property;*
  - (b) the history of its acquisition; and*

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<sup>6</sup> 'Deprivation' must be distinguished from 'expropriation': See para 4(2)(3) of section 18 (Property) of the *Theme Committee 4 Memorandum on Fundamental Rights*. The State must have the power to deprive persons of their rights in property in order to regulate matters such as health and the environment without having to pay compensation - as it is required to do in the case of expropriation.

<sup>7</sup> The insertion of the phrase 'of general application' brings this provision into line with the existing section 33(1) which only permits the limitation of rights by a law 'of general application'.

<sup>8</sup> There is a dispute as to which phrase - 'public purpose' or 'public interest' - gives the State the widest powers of expropriation. When the phrase was inserted at the Kempton Park negotiations the ANC believed that 'public purpose' gave the widest powers. Now it takes a contrary position. Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights (1994)* para 11.2(a) insist that 'public purpose' has the wider meaning. They argue: 'The phrase "in the public interest" can be understood as importing the requirement that "the public" must benefit. "Public purposes", on the other hand, refers to that which affects the whole population or particular sectors of it, for instance those dispossessed of land under apartheid. Expropriation which is to the advantage of such persons could still be "for public purposes", but since "the public" at large does not benefit from it, it could fail the public "interest" test' (at 183). This view is endorsed by the Submission of the Association of Law Societies of 12 May 1995. To avoid protracted disputes as to which phrase has the broader meaning, and to avoid an interpretation which limits the concept, it is suggested that the phrase, "... for a public purpose or in the public interest" be used.

<sup>9</sup> This formulation is suggested by the ANC and corresponds with the Constitution of the Federal Republic of Germany.

<sup>10</sup> This word stresses that the listed factors to be taken into account are not exhaustive.

(c) *its market value*<sup>11</sup>.

(5)<sup>12</sup> [The appropriate sections of the property clause<sup>13</sup>] *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*<sup>14</sup>; or

Alternatively

(5) [The appropriate sections of the property clause] *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*<sup>15</sup>.

**NOTE:** The PAC and several stakeholders submitted that there should be no property clause. The effect would be the omission of the above five sub-clauses.

(6) *Every person and community dispossessed of land after [insert decided date]<sup>16</sup> 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 that land or alternative to equitably redress, in the matter described a the law.*

Alternatively

(6) *Anyone who, or any community that, was dispossessed of land before 27 April 1994 under any law that would have been inconsistent with [the section of the*

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<sup>11</sup> The two additional factors contained in the Interim Constitution, namely the value of the investments by those affected and the interests of those affected did not received any support in the latest party submissions.

<sup>12</sup> While all the Technical Advisors agreed that this is the appropriate place to insert the provision contained in this sub-clause (5), the formulation was done by the Technical Advisors to Theme Committee 6.3.

<sup>13</sup> If it is accepted that land reform measures must be exempted from the property clause, it has to be decided to which sections of the property clause such exception ought to apply.

<sup>14</sup> This formulation corresponds with the ANC's submission.

<sup>15</sup> The Technical Advisors to Theme Committee 6.3 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.

<sup>16</sup> The question of a cut-off date must be dealt with. The ANC and NP support 1913. Some of the other parties and stake-holders reject a cut-off date.

Constitution which prohibits discrimination] *had this Bill of Rights been in effect at the time, has a right to claim restitution of that land, subject to and in accordance with section [land restitution provisions of the Constitution]*<sup>17</sup>.

- (7)<sup>18</sup> *Every person and community whose rights or interests in land are legally insecure as a result of discriminatory laws and practices shall be entitled to legally enforceable security of tenure*<sup>19</sup>.

Alternatively

- (7) *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*<sup>20</sup>.

plus

*Where there are overlapping tenure interests in the same land, a person who cannot be accommodated in that land because of competing and stronger claims, is entitled to alternative redress as prescribed by a law.*

3 **Housing and Land Clause : Provisional Text**

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<sup>17</sup> This formulation was drafted by Technical Advisors to Theme Committee 4 without the benefit of submissions concerning restitution, and is based on section 8(3)(b) of the Interim Constitution translated into "plain language". All the Technical Advisors agreed that the first alternative formulation is an improvement in that it corrects problems and difficulties in the last. For example, it includes dispossession based not only on law but also on practices such as forced removals.

<sup>18</sup> The formulation of the tenure reform clauses is from the Technical Advisors of Theme Committee 6.3. The members of Theme Committee 4 did not consider tenure reform.

<sup>19</sup> The wording corresponds with the ANC's submission, which read as follows :  
*"Where people's rights and interests in land are insecure as a result of discriminatory laws, they should be entitled to legally enforceable security of tenure. Where there are overlapping tenure interests in the same land, there should be alternative redress for those whose rights cannot be accommodated in that land because of competing and stronger claims."*

<sup>20</sup> The technical advisers of TC 6.3 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.

(1) (a) *Everyone in need*<sup>21</sup> [whose own resources are insufficient to secure housing] *has a right to reasonable and appropriate assistance*<sup>22</sup> *from the State to secure adequate housing*<sup>23</sup>.

(b)<sup>24</sup> *Every person*<sup>25</sup> *shall be entitled to equitable access to land in order to be able to sustain himself or herself. The State has the duty to take steps to achieve the progressive realisation of this right*<sup>26</sup>.

Alternatively

(1)<sup>27</sup> *Everyone in need* [whose own resources are insufficient] *has a right to reasonable and appropriate measures by the State -*

(a) *to secure adequate housing; and*

(b) *to obtain equitable access to land.*

(2) *Everyone has the right not to be evicted from their home, or to have their home demolished -*

(a) *arbitrarily; and*

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<sup>21</sup> A "person in need" would have to be defined by the Courts, but would basically be those persons who are unable to secure housing through their own resources.

<sup>22</sup> The concept of "reasonable and appropriate assistance" is flexible, covering a combination of individual assistance rendered by public authorities, appropriate housing policies and legislation. Examples include: facilitating access by disadvantaged communities to credit; appropriate land, services, building materials and amenities; the provision of emergency housing; and special measures to ensure adequate housing for particularly vulnerable groups, eg, the disabled, street-children, single parents without employment. It also allows the state sufficient flexibility in adopting the necessary policies to realise the right to adequate housing. [See General Comment No.3 of the UN Committee on Economic, Social and Cultural Rights, UN doc. E/1991/23, paras. 3 and 4 - see also Annexure A to s19, *Adequate Housing* in the Memorandum of TC4.

<sup>23</sup> The legislature would have the main task of giving content to the concept of adequate housing in South Africa. Its content would also develop as housing standards in South Africa are raised over time. As TC4 has noted, there is already a body of international jurisprudence on the content of the right to adequate housing. Legislature would have a measure of discretion in adopting the necessary policy and legislation to give effect to this right. The courts' power of review in terms of this constitutional provision would extend to measures which are clearly unreasonable, inappropriate and misdirected.

<sup>24</sup> The Technical Advisors of TC4 did not consider this sub-clause.

<sup>25</sup> The NP, DP and FF emphasise that "person" should include a juristic person.

<sup>26</sup> This formulation comes from the ANC. The NP supports a positive duty on the State to implement the clauses relating to property in the Constitution.

<sup>27</sup> Although the Technical Advisers TC4 did not consider access to land, they agree to the combination of housing and, if accepted by the CC, access to land, in the same sub-clause.



(b) *without an order from a Court made after considering the circumstances under which such home is occupied, the duration of the occupation and the availability of suitable alternative accommodation.*

2 OCTOBER 1995

