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**CONSTITUTIONAL
ASSEMBLY**

**CONSTITUTIONAL
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CONSTITUTIONAL ASSEMBLY

***THEME COMMITTEE 6.3
SPECIALISED STRUCTURES
OF
GOVERNMENT***

REPORT ON BLOCKS 9-10

LAND RIGHTS

11 SEPTEMBER 1995

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6.3

SPECIALISED STRUCTURES OF THE GOVERNMENT

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. 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 of the contents of a property clause in the future Constitution¹ in the light of the consensus concerning the necessity for land reform²; and

¹ A property clause, in most constitutions, has two functions : a guarantee (of property rights) and a permissive function in respect of expropriations (which, in turn, breaks down into two components, viz the purposes for which property may be expropriated and the basis upon which compensation must be calculated.

² 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.

After the end of the Workshop, the political parties made submissions to the Theme Committee. These are included in the footnotes. The position of the political parties on the key issues is summarised in par 5 of this report.

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

The need for land reform³ and the protection of land ownership and use was generally accepted⁴. 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**

There was general agreement that land restitution should be undertaken and completed as soon as possible⁵. Three concerns were, however, raised during the Workshop.

³ The National Party supports the need for land reform, but suggests that land reform : *".. be accomplished within the parameters of the market and should be demand-driven albeit both Government and the private sector can play a facilitative role e g inter alia in planning, consultation and subsidies. The NP supports the promotion of access to land and the broadening of private property ownership through an effective and sustainable market driven process with responsible accompanying support programmes."*

⁴ 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."*

⁵ The National Party submitted : *"In order to create legal certainty, it is of absolute importance that the question of restitution of rights in land be finalised as soon as possible."*

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 protected⁶. The detailed mechanisms of the restitution process is best contained in ordinary laws, which are easy to amend when circumstances so require⁷.

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

⁶ The ANC suggested : *"It is not necessary to repeat the detail in the Interim Constitution. It is more appropriate for the constitution to create this constitutional right, establish principles and procedures whereby land rights would be restored to those who have been unjustly deprived thereof, and leave the detail to be dealt with by ordinary law."*

See also 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.

⁷ 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.

should be moved back to include dispossessions through earlier laws⁸;

2.1.2.2 much land was lost by the indigenous population through conquest and/or unjust laws before 1913⁹; the right to the restitution of such land should be as strong as the right in respect of land dispossessed after 1913¹⁰.

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 time¹¹, there could be a large number of competing claims from different groups who occupied the same land at different points in time¹²;

⁸ 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."*

⁹ The PAC submits *"that the Restitution of Land Act should at least have been made to capture the atrocities that were perpetrated by the Squatters Bill of 1912, Native Land Act, Black Administration Act and so on."*

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 were 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."*

¹⁰ The Griqua National Conference of South Africa pointed out that most of the Griqua people lost their land well before 1913.

¹¹ The Democratic Party suggested that 1913 was the beginning of legal discrimination against black South Africans in the then Union of South Africa, and suggested that for this reason, 1913 should be retained as a suitable cut-off date.

¹² 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."*

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 claims¹³;

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 process¹⁴; it would be better to address the issues of land taken through conquests and pre-1913 dispossessions through the political process of land redistribution¹⁵.

2.1.3 Wider ambit

Restitution claims are restricted to land dispossessed from people through racially based discriminatory laws. However, some

¹³ 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.

¹⁴ The ANC proposes 1913 as a cut-off date and motivates this as follows : *"The aim of the restitution provision should be to resolve outstanding claims arising out of forced removals and past confiscation of land rather than to open up claims to the entire land base of South Africa and thereby cause delays in development and uncertainty in respect of all land rights."*

¹⁵ 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."

participants raised the issue that the restriction is too limited : some dispossessions took place not through racially based discriminatory laws but through practices such as intimidation or as a result of corrupt land deals¹⁶. Claims for the restitution should also be available in such instances. Much empathy must be displayed by all institutions implementing land restitution¹⁷.

2.1.4 Land Commission

Very few submissions who were received on the role of a Land Commission to oversee land restitution (or for that matter, any of the aspects of land reform)¹⁸.

¹⁶ In order to address the problem of ambit, the ANC submits that the right to restitution should apply to people dispossessed through both laws and practices.

¹⁷ The African Christian Democratic Party pointed out : *"Forming part of the principle of forgiveness, is the principle of restitution. The ACDP identifies that a lot of hurt and anger has been generated by the land rights issue and only by addressing these in a victim orientated fashion- where the victim receives an opportunity to speak out the feelings of resentment and bitterness to a willing and empathetic audience can start all parties on the road to reconciliation and good neighbourliness."*

¹⁸ One of the few submissions was from the African Christian Democratic Party, who suggested that a single committee should deal with all aspects of South African society which require rectification :*"Once we again we reiterate that a single committee dealing with the unfortunate aspects of South African history, would prove to be more efficient and equitable in its approach, than having several committees or commissions, separately dealing with gender, human rights, land and related questions in a potentially overlapping and inefficient fashion."* The ANC submits that the detail in relation to the Land Commission should be left to ordinary legislation.

2.2 TENURE REFORM

Although the need for tenure reform was generally accepted¹⁹, a thorough analysis did not occur²⁰.

The objectives of tenure reform are the following :

- 2.2.1 to provide security of tenure in areas where this is lacking²¹ or where people's rights and interests are insecure²²;
- 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 land²³;

¹⁹ The PAC pointed out *"... that when the Europeans came to South Africa (they) found a certain kind of land ownership which was large unwritten. They introduced a system of written records wherein there was a tendency (to) obliterate the customary forms of ownership."*

²⁰ 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."*

²¹ 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."*

²² The ANC submitted : *"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."*

²³ 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."*

- 2.2.3 to accommodate a diversity of forms of tenure²⁴, chosen on the basis of knowledge of viable alternatives²⁵;
- 2.2.4 to adjudicate between conflicting rights and overlapping tenure interests in land²⁶ in a way which will provide for alternate redress for those rights which cannot be accommodated in the same land base²⁷;

²⁴ The PAC submitted *"that the Land Question has to be understood as having gone through phases of annihilation. This stems from the fact that when the Europeans came to South Africa and found a certain kind of land ownership which was largely unwritten. They introduced a system of written records wherein there was a tendency obliterate the customary forms of ownership. There was not even an attempt to draw the indigenous people in this alien system of land ownership, let alone to educate them about it. This problem is still prevalent today where people are of the view that they ought not to pay for the land in order to build houses. The establishment of squatter settlement bears testimony to this fact. The PAC submits that there has to be concerted efforts on the part of the state to try and strike a balance between customary forms of land ownership and what is called civil forms of land ownership. It is important that the distinction between the two forms of land ownership, as they are existing in South Africa today, be explained to the people including the advantages and disadvantages of each."*

²⁵ 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."*

²⁶ The African Christian Democratic Party submitted : *"We understand the dynamics of land ownership and competing claims to be of such a nature that the involved parties at a particular localised juncture are best able to resort to mediation and negotiation that a will eventually lead to an amicable and workable solution that finds an equilibrium between opposing interests. In this regard, an equity-minded facilitating body that can assist communities to solve their own problems, along the lines of mediators in labour disputes can provide assistance in advancing helpful methods of conflict resolution that will benefit the local discussions."*

²⁷ The ANC submitted that : *"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."* 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 systems²⁸.

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 clause²⁹.

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 exceptions³⁰) recognised by the participants at

²⁸ 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.

²⁹ 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.

³⁰ The Vryheidsfront submitted that : *"..... restitution should be restitution by the government of land at present belonging to the state only, and not to private individuals or juristic persons controlled by private individuals. Our motivation in this regard is that the inequities of the past as far as deprivation of ownership of land is concerned should not be replaced by new or fresh inequities to the detriment of the present owners of such land. Otherwise it would mean that bona fide purchasers or owners of land would be deprived of their ownership despite the fact that the original deprivation of the ownership of the original owners was not effected by the present owners, but by the government at the time, applying group areas legislation. In saying this we must not be taken to propose that persons who have been dispossessed of land under the apartheid regime should not be entitled to adequate and fair compensation, but merely that restitution of ownership of the land in question should not be seen as the method of redressing the wrongs of the past, but rather monetary compensation by the State."*

the Workshop.³¹ It is considered necessary to address the deprivation caused by conquest and the prohibition of black people and women in particular, from acquiring land³². Several participants referred to the possibility of a land tax to facilitate land redistribution³³. Others suggested that the land redistribution process should be demand-driven³⁴. 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 redistribution³⁵.

³¹ 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.'*

See also the submission by the African Christian Democratic Party : *"This situation has changed quite considerably over the past years and today the government and large financial institutions are the real owners of land. Families have to buy this land from these institutions or with their financial assistance and the properties themselves are used as guarantees for the repayment of all advanced funds and interest. To add injury to insult, families in this country were actually discouraged from land ownership and some even had their land taken away and redistributed through forced resettlements. This naturally led to inequality and unbalanced land distribution and ownership amongst South Africans. A way has now to be found to redress this situation without causing any further hardship - to redistribute land from those families and institutions who have ownership of large areas of land to those families who suffered due to this inequitable situation."*

³² Refer to the submission by Dr F Njobe

³³ This was strongly motivated by the African Christian Democratic Party. Prof Franszen submitted a paper on the possibility of a land tax, but did not advocate its use as a method to achieve land reform.

³⁴ The National Party submitted that it should be undertaken *"within the parameters of the market and should be demand-driven, albeit that both Government and the private sector can play a facilitative role, e g inter alia in planning, consultation and subsidies."*

³⁵ The ANC submitted : *"Every person should be entitled to equitable access to land in order to be able to sustain himself or herself. The state should be under a duty to take steps to achieve the progressive realisation of this right."*

If a property clause is included in the Constitution, care should be taken that such clause does not inhibit the redistribution process³⁶. As will appear hereunder, most of the concerns about land redistribution relate to the possibility of a conflict with a property clause in the Constitution³⁷.

2.3.2 Positive right

Some participants proposed that the right to land³⁸, and particularly the right to the redistribution of land, should be included

³⁶ 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."*

The Vryheidsfront suggests an obligation on the Government in terms of the Constitution to protect private property.

³⁷ 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 PAC points out that *"one need not go to all the legislations that effectively drove Africans to only 13% of the land, what is disturbing is the assumption that the mere repeal of these laws would automatically lead to an equitable system of land ownership."*

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 KVV : *"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."*

³⁸ 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 right³⁹. Such a positive right should include⁴⁰ :

2.3.2.1 *equitable access to suitable and affordable land to meet basic subsistence requirements⁴¹; and*

2.3.2.2 *equitable access to resources necessary to develop the land .*

The exact formulation of such a positive right in the Constitution was not explored in detail.⁴²

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.

³⁹ The ANC submitted that a positive right to land should cover the issues of land restitutions, tenure reform and land redistribution.

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."*

⁴⁰ This formulation was proposed by the National Land Committee

⁴¹ 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."*

⁴² 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 participants⁴³ suggested that the inclusion of a separate land clause in the Constitution would provide a constitutional framework and protection for all land reform measures⁴⁴, and not only for land restitution.⁴⁵ 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 diversity⁴⁶; and
- 2.4.2.4 protection against evictions unless, amongst other factors, the availability of alternative accommodation has been considered.

⁴³ These include Heinz Klug (University of the Witwatersrand), the Land and Agricultural Policy Centre and the National Land Committee.

⁴⁴ The ANC submitted : *"The bill of rights must contain a land rights clause to provide positive rights to land. Such rights must go beyond and complement the right to restitution for past dispossession and include rights to redistribution and tenure reform."*

⁴⁵ As contained in Sections 121 to 123 of the Interim Constitution.

⁴⁶ The Democratic Party submitted that it "... believes that the right to property should be applicable to the common law and customary law as well, particularly where women are disqualified, according to certain customary norms, from acquiring or owning property."

While there was strong motivation from many participants that such positive rights would improve the power imbalance between the landless and current land holders⁴⁷, others questioned the practicality of such a proposal⁴⁸ 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 Constitution⁴⁹.

3.1 Arguments in favour

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

⁴⁷ 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.

⁴⁸ 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."*

⁴⁹ 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."*

- 3.1.1 a property clause in a Bill of Rights forms one of the pillars of a democratic order⁵⁰;
- 3.1.2 a property clause will provide security against arbitrary and/or inadequately compensated⁵¹ land grabbing by Government⁵²;
- 3.1.3 investor confidence (particularly foreign investors) will be enhanced by a property clause in the Constitution⁵³; the removal of the property clause will send negative signals to investors;
- 3.1.4 a property clause is an essential component of a free market economy⁵⁴ and will promote growth and stability⁵⁵;

⁵⁰ The Democratic Party regards the provision of a property rights clause in the Constitution as essential, and motivates it as follows : *"It is one of the pillars of a democratic order. The debate on the inclusion of a property clause should not be confused with the apartheid legal orders deprivation of certain groups' property. The fact that section 28 of the Constitution is accompanied, elsewhere in the Constitution by a land restoration provision, should be noted."*

⁵¹ 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."*

⁵² 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."*

The National Party suggests that a property clause will protect every person from *"arbitrary or capricious action by the State."*

⁵³ 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."*

⁵⁴ The National Party regards the entrenchment of property rights : *".. as fundamental to a sound economic system and investor confidence."*

⁵⁵ 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."*

- 3.1.5 the right to property is widely recognised as a human right⁵⁶ which should be protected⁵⁷; 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;⁵⁸
- 3.1.6 Although the concept of property could be controversial and ambiguous, and although it would not be easy to formulate a satisfactory property clause, these are not reasons to exclude a

⁵⁶ The Vryheidsfront submitted the following extracts from international instruments relating to property rights :

'Article 17 of the Universal Declaration of Human Rights 1948 provides :

'1 Everyone has the right to own property alone as well as in association with others.

2 No one shall be arbitrarily deprived of his property.'

(A provision similar to the latter occurs in article 5(d) of the International Convention on the Elimination of all Forms of Racial Discrimination, 1966)

The American Declaration of the Rights and Duties of Man, 1948, provides as follows in article XXIII :

'Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.'

The European Convention on Human Rights 1950 provides in Article 1 of the First Protocol as follows :

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

Article 21 of the American Convention on Human Rights, 1969, provides as follows :

'1 Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

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'

Article 14 of the African Charter on Human and People's Rights, adopted by the Organisation of African Unity in 1981, provides :

'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.'

⁵⁷ According to the submission by the Democratic Party, the "..... right to property is a universal right which is to be found in, for example, article 17 of the Universal Declaration of Human Rights : Articles XXIII and XXXVI of the American Declaration of Rights and the Duties of Man : Article 1 of the First Protocol of the European Convention of Human Rights : Article 21 of the American Convention of Human Rights : Articles 14 and 29(6) of the African Charter of Human and People's Rights".

⁵⁸ Judge Steenkamp said (Transcript, p 23) that out of 129 constitutions studied, only 22 do not protect private property.

property clause from the Constitution. The courts will interpret and give content to a property clause⁵⁹.

- 3.1.7 constitutional protection of property rights is necessary to curb squatting and to allay fears of uncontrolled illegal land invasions⁶⁰;
- 3.1.8 a constitutional right to property is a way of protecting the propertyless⁶¹
- 3.1.9 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 Constitution⁶².

⁵⁹ The Vryheidsfront relied on the view of the South African Law Commission that "... it is the task of the courts to lend content and lucidity to the concept of the right to property (Final Report on Group and Human Rights, page 149)."

⁶⁰ 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."

⁶¹ This argument is advanced by the Democratic Party, and they supported it by the following extract from the October 1994 report (at p 147) of the SA Law Commission : "A third argument in favour of the inclusion of property rights in the Bill of Rights sees a constitutional right to property as a way of protecting the propertyless. There must be a right to property to live an adequate human life. A right to property, properly conceived, would provide for those who do not own property rather than protecting the assets owned by those who currently do have property. This is the argument which seems to undermine the property clause in the ANC draft Bill of Rights."

It is also supported by the National Party which submits the following : "The property clause to be included in the charter of fundamental rights will in addition protect the rights in land of both the existing holders of rights in land as well as persons newly empowered by a balanced and responsible programme of broadening access to land."

⁶² 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.

The National Party also referred to Schedule 4 in its submission.

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 Africans⁶³. This legacy is expressed in the massive racial and gender imbalances in land holdings⁶⁴. Much of the present violence and instability in South Africa is caused by land hunger on the part of deprived communities⁶⁵, 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;

⁶³ The PAC put their view as follows : *"The PAC also supports the move to have the withdrawal of the Property Clause in the Constitution. This move is a result of unfair advantage which the few/minority have over the majority who are destitute and are still looking for land to build their houses."*

⁶⁴ 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 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"*.

⁶⁵ 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."*

- 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 violence⁶⁶, which will have a negative impact on foreign investors⁶⁷;
- 3.2.5 experience in other countries has shown that property clauses have been used to strike down or resist land reform legislation⁶⁸, often with disastrous results⁶⁹; it protects the rights of the privileged at

⁶⁶ 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."*

⁶⁷ 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.

⁶⁸ 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.

⁶⁹ 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.

the expense of those deprived and historically excluded from property⁷⁰;

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 reform⁷¹;

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 protection⁷²;

3.2.8 entrenched property rights could impede the Government's capacity to introduce "upgrading" measures to reform land tenure rights if

⁷⁰ 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.*

⁷¹ 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".

⁷² 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.

such measures are challenged by the registered owners of the land⁷³;

3.2.9 protected property rights could make it impossible for the Government to impose a ceiling on land holdings⁷⁴;

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 property⁷⁵.

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.

⁷³ 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.

⁷⁴ 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".

⁷⁵ 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 POSSIBLE OPTIONS IN RESPECT OF THE TREATMENT OF PROPERTY IN THE FUTURE CONSTITUTION

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

4.1 No property clause

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

4.2 Exclude land from the property clause

4.2.1 It was suggested that land be excluded from the property clause⁷⁶, so that the clause will apply to other forms of property only⁷⁷.

4.2.2 This is the most far reaching of the 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.

⁷⁶ 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.

⁷⁷ The property clause will then apply to forms of property such as shares in companies, intellectual property (copyright, patent and trademark rights) and to the so-called "new property" which the Vryheidsfront describes as "... *certain labour and welfare rights, rights to incorporeal property such as intellectual property, and economic concepts such as goodwill, etc.*"

4.3 Exclude land reform measures from the property clause

4.3.1 Many participants suggested that land reform measures be excluded from the property clause⁷⁸; such land reform measures will comprise land restitution, tenure reform and land redistribution⁷⁹. 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 in the past, would not be precluded by the provisions of the property clause. A precedent for this sort of clause is S33(4) of the Interim Constitution, which protects affirmative action legislation from scrutiny under the equality provisions of the Bill of Rights.

4.3.2 A similar way of achieving such 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

⁷⁸ The ANC supports the exclusion of land reform measures from the property clause. It should be noted that the effect of such an exclusion could also eliminate the requirement of just and equitable compensation in the case of expropriation.

⁷⁹ 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.'"*

clause⁸⁰. This approach goes hand in hand with the separate land clause discussed under 2.4⁸¹.

4.3.3 The property clause contains provisions which authorise expropriation for certain purposes, 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. If land reform measures are excluded from the property clause, compensation (which will not need to be just and equitable) would be governed by the statute which authorises the expropriation, as was the case before the Interim Constitution came into effect.

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

⁸⁰ 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."*

⁸¹ 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.

the property clause kicks in; this proposal is sometimes referred to as a "sunrise clause".

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 support⁸².

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 participants⁸³. 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 clause⁸⁴

4.6.1.2 If Section 28(1) is retained, consideration could be given to recording in Section 28(1) that property ownership imposes

⁸² 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.

⁸³ 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 properly, the better it will be."*

⁸⁴ 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."*
The ANC submitted *"The role of a property clause is to describe the circumstances under which property may be expropriated or regulated, rather than to restate those property rights which already exist."*

rights as well as duties, and that its use should serve the common good⁸⁵. 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"⁸⁶. Protection was originally given to "rights to property" with the intention to include people without formal rights⁸⁷. 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.

4.6.1.4

Concern was expressed that Section 28(1) guarantees the acquisition and holding of rights to property, but only protects the disposal of such rights *"to the extent that the nature of the right permits"*⁸⁸.

4.6.2

Section 28(2)

⁸⁵ The Vryheidsfront submitted : *"rights in property cannot be unlimited, and should include social obligations and duties"*.

⁸⁶ See Derek Hanekom : *"It would be better to what most constitutions protecting property do, and that is to refer simply to 'property'."*
The ANC supports this view.

⁸⁷ The National Party suggested that rights be protected : *".. for various customary usages of land such as lease agreements, traditional communal tenure, time-share schemes and usufruct. These usages inter alia can be beneficially employed to assist the disadvantaged who do not have the immediate capital to purchase their own property."*

⁸⁸ The Vryheidsfront submitted that this provision, if retained in the new Constitution, should be clarified.
The original intention of such wording was probably to protect those existing ownership systems (for example many forms of communal ownership) which place restrictions on the right to dispose of property from being affected by the property clause.

- 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 the 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 compensation⁸⁹. The distinction is very important and should be contained in clear language in Section 28(2) and/or Section 28(3)⁹⁰.
- 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.⁹¹
- 4.6.2.3 The Democratic Party suggested that any law providing for the deprivation of property, should be a law of general application, and that Section 28(2) should be amended to provide that no deprivation of any rights in property shall be permitted otherwise

⁸⁹ The ANC submits that : *".... the regulation of property or its use shall not be construed as a taking of property rights."*

⁹⁰ The Vryheidsfront finds the wording of Section 28(2) obscure in this respect.

⁹¹ 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."*

than in accordance with the provisions of a law of general application⁹².

4.6.3 Section 28(3)

4.6.3.1 Many participants⁹³ 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 expropriate⁹⁴, and that "public purposes" should be replaced by "public interest"⁹⁵. 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

⁹² The Democratic Party motivates this as follows : *"The reason for this proposed amendment is that it will prevent any arbitrary, capricious or partial enactment of a law and will oblige the legislators to apply general considerations when imposing any limitations on property rights."*

⁹³ 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."*

⁹⁴ 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."*

On the other hand, the Vryheidsfront submitted that : *"..... expropriation in the traditional sense should not be employed as an instrument in the redistribution of land, but should be confined to its traditional role, viz action for public purposes only, against payment of compensation, in circumstances that have nothing to do with redressing any wrongs or inequitable results flowing from group areas legislation under the apartheid regime"*

⁹⁵ 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.

and social interest purposes and for achieving the objects of the Constitution⁹⁶

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 expensive⁹⁷. This position is based on international precedents in terms of which just and equitable compensation has been interpreted as market value payable up front⁹⁸. 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 deferred⁹⁹. 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

⁹⁶ The ANC submitted that the property clause shall "...permit the taking of property according to law and in the public interest, which includes the achievement of the objects of the constitution and action to redress."

⁹⁷ 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."

⁹⁸ The ANC suggested that the compensation be determined on the basis that "it should establish an equitable balance between the public interest and the interests of those affected" and that "it should not be based solely on the market value of such property".

⁹⁹ 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."

compensation and the payment date remain just and equitable¹⁰⁰. A large number of participants emphasised that compensation for expropriated rights must always be just and equitable.¹⁰¹

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 doubt¹⁰². 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

¹⁰⁰ The National Party suggested that payment of compensation should in all instances be *"expeditiously made"*.

¹⁰¹ 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'.

¹⁰² The ANC suggested that, apart from market value, the only two factors which should be included are the use to which the property is being put and the history of its acquisition.

acquisition"¹⁰³. However, this provision was not generally controversial.

4.6.3.5 It was suggested that Section 28(3) should not, in itself, prescribe the factors for the determination and payment of compensation, but should rather provide that these be prescribed by laws, which laws will have to comply with certain minimum criteria concerning the determination and payment of compensation¹⁰⁴.

4.7 Many participants support the property clause in its present form, and argue that it will not obstruct land reform measures.¹⁰⁵

¹⁰³ 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.

¹⁰⁴ This suggestion was made by the National Party and also by Gildenhuys.

¹⁰⁵ 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 provided with access to security and protection. These are clearly powerful reasons for its retention."*

5 SUBMISSIONS BY POLITICAL PARTIES

5.1 DESIRABILITY OR NOT OF A PROPERTY CLAUSE

With the exception of the **Pan Africanist Congress**, the submissions from the political parties were made on the basis that there would be a property clause in the new Constitution. The **ANC** adds the major caveat that land reform measures must be exempted from the property clause.

5.2 CONTENTS OF A PROPERTY CLAUSE

5.2.1 The Right to Property

The **ANC** states that: "*The role of a property clause is to describe the circumstances under which property may be expropriated or regulated, rather than to restate those property rights which already exist.*" In other words, the clause should deal with the circumstances governing expropriation rather than contain a positive formulation of the right to property.

The **Freedom Front** submits that all property rights should be entrenched but also states that "*rights in property cannot be unlimited, and should include social obligations and duties.*" And furthermore, that because of difficulties of definition, "*the Constitution should not deal extensively with property rights.*"

The **National Party** submits that "*every person, including juristic persons, must have the right to acquire, inherit, hold and dispose of rights in property.*" It should be noted that the **National Party** submits that the right to inheritance should be added to the interim formulation. However, under the heading "*Limitation of the Right*" the **National Party** refers to "... any legislation which may regulate or

limit the right in any way", implying that the positive right to property may be limited or regulated by law.

The **Democratic Party** submits that "*.... the current clause, as with other rights-based jurisdictional systems, makes provision for routine restrictions by legislature, provided that the right as such is not vitiated.*"

Remarks: There is a difference between the **ANC** which submits that the property clause should govern the circumstances under which property can be taken and the **Freedom Front** and the **National Party** which submit that the clause should set out positive rights to property. Would the German formulation which concentrates on the social function of property constitute a possible compromise acceptable to both sides^{106?}

5.2.2 Regulation of Property

The **ANC** submits that "*The regulation of property or its use shall not be construed as a taking of property rights.*" Furthermore that the phrase "*rights in property*" should not be used.

¹⁰⁶ The German constitutional provisions on property reads as follows :
"German Basic Law, 1949

Article 14 (Property, Right of inheritance, Expropriation)

- (1) *Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.*
- (2) *Property imposes duties. Its use should also serve the public weal.*
- (3) *Expropriation shall be permitted only in the public weal. It may be effected only by or pursuant to a law which shall provide for the nature and extent of the compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In the case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts."*

The **Democratic Party** submits "*no deprivation of any rights in property shall be permitted otherwise than in accordance with a law of general application.*"

The **Freedom Front** suggested that the concept "*deprivation of property*" in Section 28(2) of the Interim Constitution be replaced by "*expropriation of property*" : it is not clear whether the **Freedom Front** realised that clause 28(2) was intended to refer to the regulatory function of Government ("exercise of police power"), and not to expropriation.

Remarks: The issue of regulation does not seem to be particularly contentious.

It should be possible to marry both the **ANC** and **Democratic Party** submissions in this regard.

5.2.3 Authority to expropriate

The **ANC** submits that expropriation should only be allowed if it is in the public interest.

The **National Party** submitted that expropriation should be for public purposes only.

The **Freedom Front** submits that expropriation should not be permissible for land reform.

Remarks: Would it be possible to reconcile the position of the **ANC** and the **NP** by stating that expropriation should be for public purposes or in the public interest?

5.2.4 Compensation Formula

The **ANC** submits that compensation be determined on the following basis:

- "a) it should establish an equitable balance between the public interest and the interests of those affected;*
- b) it should not be based solely on the market value of such property;*
- c) it should take into account the use to which the property is being put; and*
- d) it should take into account the history of the acquisition of the property."*

The **National Party** submits that compensation must be determined in terms of a law, which law will have to provide for :

- "(a) full compensation which shall be just and equitable;*
- (b) such compensation to be determined, in the absence of agreement, by a court of law; and*
- (c) such determination and payment of compensation to be expeditiously made and effected."*

Remarks: There does not seem to be much difference in principle between the suggested **ANC** compensation norm of "an equitable balance between the public interest and the interests of those effected" and the suggested **National Party** compensation norm of "full compensation which shall be just and equitable". The **National Party** suggested that the operative compensation statute should not be the Constitution itself, but a separate law which will have to comply with

certain norms; the **ANC** suggested that three of these norms (which are already contained in the Interim Constitution) should be entrenched in the Constitution. None of the other political parties' submissions put into question the compensation formula (including the factors to be taken into account) as contained in the Interim Constitution.

5.2.5 Exclude Land Reform Measures

The **ANC** submits that the Constitution must not impede land reform measures and proposes that a proviso *"be added to the property clause which expressly states that this section shall not apply to measures aimed at bringing about land reform for the benefit of people previously disadvantaged by unfair discrimination"*.

The **Freedom Front** rejects the exclusion of land reform measures from attack under the Constitution.

Remarks: The exact wording of the proviso may have very different effects in terms of the extent to which land reform measures are excluded from the property clause. Thus compromises may be found on the basis of the precise wording of this formulation. A formulation which puts the validity of expropriation for land reform purposes beyond constitutional attack but retains the compensation formula may be acceptable to those who are opposed to a constitutional exemption of land reform measures.

5.3 RIGHT TO LAND

The **ANC** submits that the *"bill of rights must contain a land rights clause to provide positive rights to land. Such rights must go beyond and complement the right to restitution for past dispossession and include rights to redistribution and tenure reform."*

The **National Party** *"is fully supportive of land reform. This inter alia includes tenure reform, dealing with a variety of rights in land as well as the broadening of access to land (referred to in paragraph 3.3.3 of the minutes of 3 August 1995 as "redistribution")."* It intends to make further submissions on mechanisms designed to achieve these objectives.

5.3.1 Restitution

There was general acceptance of the notion of restitution in the submissions. However, differences emerged under the following topics:

5.3.1.1 1913 Cut off date

The 1913 cut off date was supported by the **ANC** and **Democratic Party** and referred to by the **National Party**. The **Pan Africanist Congress** opposes this date as excluding people who were previously dispossessed.

5.3.1.2 **Ambit**

The **ANC** proposes a wider ambit than just people who were dispossessed in terms of discriminatory laws. It submits that discriminatory "practices" should also be taken into account. The **Freedom Front** argues for a narrower ambit. They propose that

restitution be limited to state land only. Where people were dispossessed of land which is now privately owned they should be entitled to compensation only.

5.3.1.3 **Compensation for past dispossession**

The **Pan Africanist Congress** submits that compensation *"should take into account inconvenience and retardation of economic development amongst the dispossessed"*.

5.3.1.4 **Detail**

The **ANC** proposed that while the right to restitution be in the Constitution, the detail be left to legislation. The other political parties do not seem to be opposed to this, in as much as they did not present detailed proposals on constitutional provisions relating to the Commission.

5.3.1.5 **Commission**

The **National Party** does not support the retention of a Restitution Commission under the new Constitution.

The **African Christian Democratic Party** submits that while restitution is vitally necessary, there should not be a separate land commission, but *"a single committee dealing with the unfortunate aspects of South African history"*.

Remarks: Given the lack of representations about the advisability of and specific details for establishing a Land Commission in the Constitution to deal with all aspects of land reform, the inference can

be made that this issue is best dealt with through the normal political process and by ordinary legislation.

5.3.2 Tenure Reform

The **ANC** submits that *"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."*

The **Pan Africanist Congress** submits that *"there has to be a concerted effort on the part of the state to try and strike a balance between customary forms of land ownership and what is called civil forms of land ownership"*.

The **National Party** recognises various customary usages of land such as lease agreements, traditional communal tenure, time-share schemes and usufruct.

5.3.3 Land Redistribution

The **ANC** submits that *"Every person should be entitled to equitable access to land in order to be able to sustain himself or herself. The state should be under a duty to take steps to achieve the progressive realisation of this right."*

SYNOPTIC REMARK

The broadening of constitutional provisions for land reform (beyond mere restitution) does not appear to be controversial.

6 CONCLUSION

6.1 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.

6.2 With regard to the property clause, various options were put forward :

6.2.1 omit the property clause in its entirety and provide property protection through ordinary legislation (see 4.1);

6.2.2 exclude land from the property clause (see 4.2);

6.2.3 exclude measures designed to bring about land reform from the provisions of the property clause but provide for land reform separately (see 4.3);

6.2.4 suspend the implementation of the property clause for a sufficient period to allow for land reform and equity to be achieved. ("sunrise clause") (see 4.4);

6.2.5 amend the property clause as contained in the Interim Constitution to address the concerns about its effect on land reform (see 4.6);

6.2.6 retain the property clause (Section 28) contained in the Interim Constitution in its present form (see 4.7).

12 September 1995

CONSTITUTIONAL ASSEMBLY

***THEME COMMITTEE 6.3
SPECIALISED STRUCTURES
OF
GOVERNMENT***

DRAFT FORMULATIONS

LAND RIGHTS

11 SEPTEMBER 1995

ANNEXURE

**TO THE REPORT BY THEME COMMITTEE 6.3 ON SPECIALISED STRUCTURES
OF GOVERNMENT**

**DRAFT FORMULATION OF PROVISIONS
TO BE CONSIDERED FOR INCLUSION IN THE NEW CONSTITUTION**

This Annexure contains draft formulations for provisions which could be included in the new Constitution as discussed in the Report by Theme Committee 6.3 dated 11 September 1995. The formulations are submitted for purposes of discussion only : they have not been approved or accepted by all the members of Theme Committee 6.3.

1 **SEPARATE LAND CLAUSE**

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

Redistribution

draft formulation

(1) *Every person¹ shall be entitled to equitable access to land in order to be able to sustain himself or herself².*

or alternatively

draft formulation

Every person shall be entitled to equitable ownership.

plus

¹ *The NP, DP and FF emphasise that "person" should include a juristic person*

² *This formulation comes from the ANC*

draft formulation

The State has the duty to take steps to achieve the progressive realisation of this right³.

Restitution

draft formulation

(2) Every person and community dispossessed of land after [insert decided date]⁴ 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 alternatively an equitable redress, in the manner described by a law⁵.

Tenure Reform

draft formulation

(3) Every person and community whose existing rights or interests in land are legally insecure as a result of discriminatory laws and practices shall be entitled to legally secure rights to that land or comparable redress as prescribed by a law⁶.

or alternatively

³ The formulation comes from the ANC. The NP supports a positive duty on the State to implement the clauses relating to property in the Constitution.

⁴ The question of a cut-off date must be dealt with. The ANC and the NP support 1913. 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.

⁵ This is in accordance with the ANC's submission that "ordinary law" should "establish principles and procedures whereby land rights would be restored to those who have been unjustly deprived thereof."

⁶ 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."

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.⁷

plus

draft formulation

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 law⁸.

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 accommodation⁹.

2 EXCLUSION OF LAND FROM PROPERTY CLAUSE

A clause which excludes land from the property clause of the Constitution can take the form of 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."

⁷ 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.

⁸ The wording is as suggested by the ANC.

⁹ This is an aspect relating to housing; if that right is to be included in the Constitution, it would be better dealt with there. None of the political parties addressed it in their submissions.

3 EXCLUSION OF LAND REFORM MEASURES FROM PROPERTY CLAUSE

Possible formulations of *provisos* to be included in the property clause of the Constitution which will exclude land reform from the operation of the property clause¹⁰ 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 discrimination¹¹."*

or alternatively

draft formulation *"This section shall **not impede**¹² 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 above wordings constitute the simplest and most straightforward way of wording an exemption clause¹³. The exemption will apply, according to the above wording, to the constitutional requirement that expropriation may only take place "in the public interest" or "for public purposes", and also to the constitutional requirement that compensation must be "just and equitable".

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

¹⁰ The FF submits that "all laws, including laws relating to land reform, should be subject to the Constitution."

¹¹ This formulation corresponds with the ANC's submission

¹² 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.

¹³ The provisos reflect the consensus reached at the workshop that : "land reform is vitally necessary and must not be impeded by Constitutional obstacles". It is suggested that these provisos might allay the concerns of those proponents of the entrenchment of property rights who say that such entrenchment does not impede land reform. If it does not, then these provisos will not detrimentally affect the constitutional protection of property rights. It will, however, address the major concern raised in the workshop, namely that entrenchment of property rights does impede land reform.

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.

A possible shortcoming of the above approach is that the exemption of land is only in respect of **land reform measures**¹⁴.

4 EXEMPTION OF LAND RIGHTS FROM THE PROPERTY CLAUSE

Land rights can be exempted from the property clause by inserting the following provision in a future 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 will then be insulated from attack under the property clause. In this context, its effectiveness is closely related to the description of land rights in the Constitution. Any type of land reform measures not adequately provided for in the land rights clause would not enjoy the same "insulation" or protection from the provisions of the property clause.

¹⁴ *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.*

5 SUSPENSION OF THE PROPERTY CLAUSE

A provision which could be inserted in the property clause in order to suspend its operation for a given period, could read as follows :

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

This is one of the formulations suggested by Leon Louw of the Free market Foundation¹⁵.

6 NEW FORMULATION : SECTION 28(1)

Section 28(1) now reads as follows :

"(1) Every person¹⁶ shall have the right¹⁷ to acquire and hold rights in property; and, to the extent that the nature of the rights permits¹⁸, to dispose of such rights¹⁹"

¹⁵ 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."*

¹⁶ The NP, DP and FF submit that protection of property rights should also apply to juristic persons.

¹⁷ The FF submits *"... that the new Constitution should oblige the State to protect private property in accordance with the general tenure of the present section 28 of the Transitional Constitution."*

¹⁸ The Freedom Front submits that the restriction *"to the extent that the nature of the rights permit"*, if retained in the final Constitution, ought to be clarified.

¹⁹ The NP wants to retain the gist of the existing formulation of section 28(1) and suggests a wording to the effect that every person, including juristic persons, must have the right to acquire, inherit, hold and dispose of rights in property.

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."*²⁰

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;²¹
- 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.

7 NEW FORMULATION : SECTION 28(2)

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."*²²

²⁰ 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".

²¹ 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."

²² The NP suggests that this wording be retained.

Section 28(2) could be replaced by the following :

draft formulation *"(2) No deprivation of property shall be permitted²³ otherwise than in accordance with a law.²⁴"*

The amendment removes the term "rights in property" and replaces it with "property"²⁵.

8 NEW FORMULATION : SECTION 28(3)

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."

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 in the public interest only²⁶ and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of*

²³ The ANC suggests the addition of a specific statement to the effect that the "regulation of property or its use shall not be construed as a taking of property rights."

²⁴ The DP insists that such a law must be a "law of general application", and suggests an appropriate amendment to the section.

²⁵ The ANC supports the substitution of "rights in property" by "property".

²⁶ The NP submitted that expropriation should be permissible for "public purposes", whilst the ANC submitted "in the public interest". The above wording endeavours to combine the two submissions. The ANC furthermore submitted that the Constitution should provide that "public interest" includes "the achievement of the objects of the Constitution and action to redress."

such compensation²⁷ and within such period as may be determined by a court of law as just and equitable²⁸, 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 and its market value²⁹.

The amendments :

- remove the term "rights in property" and replace it with "property";³⁰
- add "public interest" as an additional purpose for which expropriation shall be permissible³¹;
- remove "the value of the investment in it by those affected³²", because this value will be included in the market value; and

²⁷ The NP suggested a wording that *"no law referred to in subsection (2) shall provide for the expropriation of any rights in property, unless (i) such expropriation is for public purposes only; (ii) such law provides for full compensation, which shall be just and equitable; (iii) such compensation is to be determined, in the absence of agreement, by a court of law; and (iv) such determination and payment of compensation shall be expeditiously made and effected."* The ANC submitted that compensation must be determined on the following basis : *"(a) it should establish an equitable balance between the public interest and the interests of those affected; (b) it should not be based solely on the market value of such property; (c) it should take into account the use to which the property is being put; and (d) it should take into account the history of the acquisition of the property."*

²⁸ The formulation that compensation must be "just and equitable" comes from the Interim Constitution, and is supported by the NP. The ANC suggested that compensation must be determined by *"establishing an equitable balance between the public interest and the interests of those affected."*

²⁹ The ANC suggested the wording that compensation *"should not be based solely on market value."*

³⁰ The ANC supports this amendment.

³¹ *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 Right (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."*

³² The ANC supports this removal

- 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 apply³³.

³³ *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.*

PARTY SUBMISSIONS

**AFRICAN CHRISTIAN DEMOCRATIC PARTY
PRELIMINARY SUBMISSION
TO THE CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 6.3**

LAND RIGHTS

The Bible is fully supportive of an economic system that respects private property. All land belongs to God and He gave custody thereof to the family sphere of authority - to be a blessing to a husband, his wife and their children.

This situation has changed quite considerably over the past years and today the civil government and large financial institutions are the real owners of land. Families have to buy this land from these institutions or with their financial assistance and the properties themselves are used as guarantees for the repayment of all advanced funds and interest.

To add injury to insult, families in this country were actually discouraged from land ownership and some even had their land taken away and redistributed through forced resettlements. This naturally led to inequality and unbalanced land distribution and ownership amongst South Africans.

A way has now to be found to redress this situation without causing any further hardship - to redistribute land from those families and institutions who have ownership of large areas of land to those families who suffered due to this inequitable situation.

One such avenue was explored by Dunkley in his 1990 work titled *That all may live* (A. Whyte Publishers, Roosevelt Park). Here he notes *inter alia* that the present system encourages the holding of real estate for speculative rather than productive purposes and greatly adds to a concentration of land in the hands of the few, while simultaneously having very little benefit for the larger community.

A uniform system of land-based taxation, with an annual rent on land - levied as a percentage of the valuation of a particular property - is proposed. Land that would otherwise be only a financial burden on the landowner, while producing marginal income will be brought into the market. To ensure a market-relatedness between the availability of land and its commodity value, rent will be levied on a once-off established land value imposed on all land using a simple system of computation.

On unproductive areas there will be no rent payable but it is envisaged that the current unemployment problems would be largely eradicated as this currently unproductive sector of society start developing their own land. As these become more productive, a set percentage of rent will be levied and this will benefit the larger community at national, provincial and local levels as the income from these developing areas will be equitably distributed on these three levels.

This process will undoubtedly lead to an improvement in economic conditions helped along by both the change in the taxation system and the use of formerly unproductive land by an unemployed labour force. Thus the previously marginal land will grow to have economic value.

As land becomes available, and as previously marginal land start to produce greater value than the cost of such production a percentage of that surplus will be paid to the community as rent, alleviating the need for personal income tax, value added tax and the like.

One aspect that is of considerable importance in the whole land rights debate is the need for an approach based on equity while at the same time being as localised as possible.

Since the family forms the core unit of society and since it is this sphere of authority that in effect controls land, it follows that this sector should have the final say on land in their respective local areas.

Being a firm believer in the principle that most power resides with the South African families at local level and them to a secondary and diminishing extent with the regional and national levels of civil government, the ACDP adheres to a system that addresses land rights issues in a bottom-to-top approach. We understand the dynamics of land ownership and competing claims to be of such a nature that the involved parties at a particular localised juncture are best able to resort to mediation and negotiation that will eventually lead to an amicable and workable solution that finds an equilibrium between opposing interests. In this regard, an equity-minded facilitating body that can assist communities to solve their own problems, along the lines of mediators in labour disputes can provide assistance in advancing helpful methods of conflict resolution that will benefit the local discussions. Once again we reiterate that a single committee dealing with the unfortunate aspects of South African history, would prove to be more efficient and equitable in its approach, than having several committee's or commissions, separately dealing with gender, human rights, land and related questions in a potentially overlapping and inefficient fashion.

Forming part of the principle of forgiveness, is the principle of restitution. The ACDP identifies that a lot of hurt and anger has been generated by the land rights issue and only by addressing these in a victim orientated fashion - where the victim receives an opportunity to speak out the feelings of resentment and bitterness to a willing and empathetic audience can start all parties on the road to reconciliation and good neighbourliness.

It must be clearly stated that two rights can not make a right and thus the twin principles of negotiation and reconciliation must be firmly established in the minds of those who facilitate this process.

Land, because of its enduring nature and capability of being passed on from one generation to another, has the potential to perpetuate discord in the future. This is a vital link in the process of reconciliation and any hasty decisions aimed at a factual or actual redress of post injustices, without dealing with the effects of this sad section of South African history, could prove a very costly and deeply

regretted mistake. In order to build a truly prosperous new nation, the process of communication to build trust among all citizens is vital.

22 August 1995
[LAND.WPS]

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7 September 1995

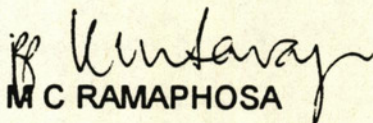
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Dear Mr Ebrahim

PRELIMINARY SUBMISSION TO THEME COMMITTEE 6.3

Please find enclosed our preliminary submission on Land to Theme Committee 6.3.

Yours sincerely


M C RAMAPHOSA

Secretary-General

THEME COMMITTEE 6.3

PRELIMINARY ANC SUBMISSION ON LAND RIGHTS

The ANC believes that land reform is a pre-condition for a legitimate, just and secure regime of property rights. The constitution must both empower land reform and ensure that it is not impeded by the provisions of the property clause. The ANC accordingly submit that:

1. Positive rights to land be included in the bill of rights, and
2. Land reform be excluded from the provisions of the property clause.

1. POSITIVE RIGHTS TO LAND

The bill of rights must contain a land rights clause to provide positive rights to land. Such rights must go beyond and complement the right to restitution for past dispossession and include rights to redistribution and tenure reform. The rights to land must address the following issues:

1.1 Restitution

Any person who was dispossessed of land by discriminatory laws or practices should be entitled to restitution of that land or alternative and equitable redress. The ANC proposes 1913 as a cut-off date for all land restitution claims. The aim of the restitution provision should be to resolve outstanding claims arising out of forced removals and past confiscation of land rather than to open up claims to the entire land base of South Africa and thereby cause delays in development and uncertainty in respect of all land rights.

It is not necessary to repeat the detail in the Interim Constitution. It is more appropriate for the constitution to create this constitutional right, establish principles and procedures whereby land rights would be restored to those who have been unjustly deprived thereof, and leave the detail to be dealt with by ordinary law.

1.2 Tenure Reform

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.

1.3 Redistribution

Every person should be entitled to equitable access to land in order to be able to sustain himself or herself. The state should be under a duty to take steps to achieve the progressive realisation of this right.

2. **EXCLUDING LAND REFORM MEASURES FROM THE PROPERTY CLAUSE**

In addition to providing for positive rights to land the constitution must not impede land reform measures. For this reason the ANC proposes the exclusion of land reform measures from the property clause. In this regard it is proposed that a proviso be added to the property clause which expressly states that this section shall not apply to measures aimed at bringing about land reform for the benefit of people previously disadvantaged by unfair discrimination.

3. **OTHER ASPECTS OF A PROPERTY CLAUSE**

In order to address other difficulties caused by a property clause in respect of the regulation of land and the quantum of compensation payable for the expropriation of land, the following submissions in respect of the wording of a property clause are made:

3.1 The role of a property clause is to describe the circumstances under which property may be expropriated or regulated, rather than to restate those property rights which already exist. Accordingly, such a clause should:

3.1.1 permit the taking of property according to law and in the public interest, which includes the achievement of the objects of the constitution and action to redress.

3.1.2 state that any taking must be subject to compensation to be determined on the following basis:

- a) it should establish an equitable balance between the public interest and the interests of those affected;
- b) it should not be based solely on the market value of such property;
- c) it should take into account the use to which the property is being put; and
- d) it should take into account the history of the acquisition of the property.

3.1.3 state that the regulation of property or its use shall not be construed as a taking of property rights. The currently used phrase "rights in property" will make regulation difficult or expensive and the word "property" should be used in its place.

DEMOCRATIC PARTY

SUBMISSION ON: LAND RIGHTS AND THE CONSTITUTION

1. Cut-off date:

The Democratic Party subscribes to a cut-off date, and would favour 1913 as being a suitable date because inter alia this was the beginning of legal discrimination against black South Africans in the then Union of South Africa.

2. The desirability or not of a property clause in the future constitution:

The Democratic Party has dealt extensively with this question in Theme Committee 4. We repeat our arguments in this submission.

2.1 Content of the Right

Section 28 of the Constitution provides:

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

The Democratic Party regards the provision of a property rights clause in the constitution as essential. It is one of the pillars of a democratic order. The debate on the inclusion of a property rights clause should not be confused with the apartheid legal orders deprivation of certain groups' ability to acquire property, or indeed their wrongful dispossession of property. The fact that section 28 of the Constitution is accompanied, elsewhere in the Constitution by a land restoration provision, should be noted. All discriminatory impediments to the acquisition, retention, ownership of property and means of production of any kind are explicitly outlawed by other provisions in the Bill, such as the equality clause.

The right to property is a universal fundamental right which is to be found in, for example, article 17 of the Universal Declaration of Human Rights: Articles XX111 and XXXV1 of the American Declaration of Rights and the Duties of Man: Article 1 of the First Protocol of the European Convention of Human Rights: Article 21 of the American Convention of Human Rights: Articles 14 and 29(6) of the African Charter on Human and Peoples' Rights.

We also believe the argument advanced by the SA Law Commission (October 1994) at 147, is persuasive. It states:-

"A third argument in favour of the inclusion of property rights in the Bill of Rights sees a constitutional right to property as a way of protecting the propertyless. There must be a right to property to live an adequate human life. A right to property, properly conceived, would provide for those who do not own property rather than protecting the assets owned by those who currently do have property. This is the argument which seems to undermine the property clause in the ANC draft Bill of Rights."

There is also nothing in the property clause in the Bill of Rights, per se, which protects the concept in absolutely inalienable terms. The current clause, as with other rights-based jurisdictional systems, makes provision for routine restrictions by the legislature, provided that the right as such is not vitiated.

The fundamental amendment which the Democratic Party would propose to the existing property clauses (section 21) is in respect of section 28(2) which we believe should be amended to read:-

"No deprivation of any rights and property shall be permitted otherwise than in accordance with the law of general application."

The reason for this proposed amendment is that it will prevent any arbitrary, capricious or partial enactment of a law and will oblige the legislators to apply general considerations when imposing any limitations on property rights.

2.2 Application of the Right

The Democratic Party believes that the right to property should be applicable to the common law and customary law as well, particularly where women are disqualified, according to certain customary norms, from acquiring or owning property.

2.3 Bearers of the Right

Both natural and juristic persons should enjoy property rights because properties are often acquired by corporate entities, such as closed corporations, companies or other juristic persons.

2.4 Limitations of the Right

The property right is limited by the provisions of section 28(3) which limitation is supported, as well as by the overall limitation clause (section 33).



**National Party
Nasionale Party**

*Federal Council
Federale Raad*

07 September 1995

Mr Hassen Ebrahim
The Executive Director
Constitutional Assembly
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Adderley Street
CAPE TOWN

Dear Mr Ebrahim

Enclosed please find the National Party proposal for Theme Committee 6.3 regarding Property Rights, Land Restitution and Tenure Reform.

Kind Regards

E. F. van Zyl
PP I F VAN ZYL MP

NATIONAL PARTY PRELIMINARY SUBMISSION
THEME COMMITTEE 6.3

Property Rights, Land Restitution and Tenure Reform

1. Property rights

The National Party supports the inclusion of a clause in the Constitution protecting property rights. A copy of the NP's submission in this regard is attached.

2. Land restitution

Sections 121 to 123 of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the Constitution") (contained in chapter eight thereof) deal with the restitution of land rights. These sections provide *inter alia* for the establishment of a Commission on restitution of Land Rights to investigate and deal with claims arising from the dispossession of rights in land effected under the object of a law which would have been inconsistent with the prohibition of racial discrimination in the Constitution.

3. Commission on Restitution of Land Rights

The Commission on Restitution of Land Rights ("the Commission" created under the Restitution of Land Rights Act, Act 22 of 1994 ("the Act"), was appointed on 1 May 1995 to exercise its powers and perform its duties. In terms of section 2(1)(b) of the Act, claims for restitution of land rights shall be lodged within three years after the commencement of activities by the Commission. This implies that claims may be lodged until 1 May 1998. The Commission will presumably then continue in operation until it has completed its work under the statute which constituted it.

4. Necessity for the retention of the Commission under the new Constitution

The Commission was established to address the position of persons previously dispossessed of rights in land effected under a law which would have been inconsistent with the prohibition of racial discrimination in the Constitution. In order to create legal certainty, it is of absolute importance that the question of the restitution of rights in land be finalized as soon as possible.

5. Land reform

The National Party is fully supportive of land reform. This *inter alia* includes tenure reform dealing with a variety of rights in land as well as the broadening of access to land (*referred to in paragraph 3.3.3 of the Minutes of 3 August 1995 as "redistribution"*). The latter should be accomplished within the parameters of the market and should be demand-driven albeit that both Government and the private sector can play a facilitative role e.g. *inter alia* in planning, consultation and subsidies. The NP supports the promotion of access to land and the broadening of private property ownership through an effective and sustainable market driven process with responsible accompanying support programmes. The property clause to be included in the charter of fundamental rights will in addition protect the rights in land of both the existing holders of rights in land as well as persons newly empowered by a balanced and responsible programme of broadening access to land. The NP therefore intends to make further submissions on mechanisms designed to achieve these objectives. It should however be noted that the Constitution contains sufficient enabling provisions to accommodate legislation and other mechanisms to provide for a land reform policy and action to implement this, as is borne out by the pilot programmes already being implemented in terms of that policy and the ordinary legislation of Parliament.

6. Constitutional Principles

Regard should be had to Constitutional Principle II contained in Schedule 4 of the Constitution.

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM 14: SOCIO-ECONOMIC RIGHTS

14.1 RIGHTS IN PROPERTY

1 Content of the right

Section 28 of the Constitution 1993 provides for the entrenchment of rights in property including their acquisition, tenure and disposal by every person. It also prohibits deprivation of these rights otherwise than in accordance with a law and provides for expropriation of rights in property for public purposes only and subject to the payment of agreed or just and equitable compensation determined by a court of law.

While the NP in the interests of a settlement accepted the full text and wording of Section 28(3) at the World Trade Centre, subsequent developments have shown that many of the additional factors set out in that section have proved to be controversial and can lead to legal uncertainty. Furthermore, legislation contemplated in Section 121 to 123 of the Constitution 1993 has been enacted during 1994 catering for most, if not all, of these concerns.

Accordingly the NP proposes that Section 28(3) should be redrafted and updated as follows:

"28(3) No law referred to in subsection (2) shall provide for expropriation of any rights in property unless:

- (i) Such expropriation is for public purposes only;

- (ii) such law provides for full compensation which shall be just and equitable;
- (iii) such compensation is to be determined, in the absence of agreement, by a court of law; and
- (vi) such determination and payment of compensation shall be expeditiously made and effected

The NP believes that rights in property must be entrenched in the new text and regards this as fundamental to a sound economic system and investor confidence. The NP believes that every person, including juristic persons, must have the right to acquire, inherit, hold and dispose of rights in property. This is in line with international declarations and Bills of Rights in other countries (Sec Art 17 of the U N Declaration 1948; Art 14 of the African Charter 1981 of OAU).

Sacob also subscribes to this view - see their submission to the C.A. on 4 April 1995 at pages 16 - 17 as do the submissions of the Council of Southern African Bankers on 17 February 1995 at page 11 and the Chamber of Mines on 31 March 1995 at page 14.

While rights in property must be fully protected against arbitrary or capricious action by the State, the NP nevertheless also recognises that every person or community dispossessed of rights in land before 27 April 1994 under any law inconsistent with Section 8(2) of the Constitution 1993, is entitled to claim restitution subject to and in accordance with Sections 121 to 123 of the Constitution and the subsequent legislation passed by Parliament.

Thus the NP's view is that there must be an even handed approach by the State which must recognise the vested interests of owners of rights in

property and the claims of those dispossessed of property, particularly land, since 1913 under racially based laws.

2 Application of the rights

2.1 Nature of the duty imposed on the State

Primarily the rights apply against the State including all organs of State at every level of government and therefore impose a positive duty on the State. The position has already been further regulated by legislation. The holder of rights in property is also protected by other legislation and the common law against the illegal action of other persons.

2.2 Common law and customary law

The rights should be applied to common law and to customary law (provided the term "rights in property" is retained). The NP supports respect for various customary usages of land such as lease agreements, traditional communal tenure, time-share schemes and usufruct. These usages inter alia can be beneficially employed to assist the disadvantaged who do not have the immediate capital to purchase their own property.

2.3 Actors other than the State

The right applies vertically against the State. The relationship between the holder of the right and other persons is regulated by statute and common law.

2.4 Bearers of the right

Every person, including a juristic person, is the bearer of this right.

2.5 Limitation of the right

The State is under a duty to respect every person's rights in property. Accordingly any legislation which may regulate or limit the right in any way must always be subject to the criteria laid down in the general limitations clause.

The Wording

Sections 28(1) and 28(2) should be retained with the addition in Section 28(1) of the word "inherit" after the word "acquire". Section 28(3) should be amended as set out in paragraph 1 of this submission.



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THEME COMMITTEE 6 LAND RIGHT

The PAC submits that the Land Question has to be understood as having gone through phases of annihilation. This stems from the fact that when the Europeans came to South Africa and found a certain kind of land ownership which was largely unwritten. They introduced a system of written records wherein there was a tendency obliterate the customary forms of ownership.

There was not even an attempt to draw the indigenous people in this alien system of land ownership, let alone to educate them about it. This problem is still prevalent today where people are of the view that they ought not to pay for the land in order to build houses. The establishment of squatter settlement bears testimony to this fact. The PAC submits that there has to be a concerted effort on the part of the state to try and strike a balance between customary forms of land ownership and what is called civil forms of land ownership. It is important that the distinction between the two forms of land ownership, as they are existing in South Africa today, be explained to the people including the advantages and disadvantages of each.

The PAC also acknowledges the fact that some Organisations have joined in the struggle for land in South Africa. The PAC also support the move to have the withdrawal of the Property Clause in the Constitution. This move is as a result of unfair advantage which the few / minority have over the majority who are destitute and are still looking for land to build their houses.

One need not go to all the legislations that effectively drove Africans to only 13% of the land, what is disturbing is the assumption that the mere repeal of these laws would automatically lead to an equitable system of land ownership.

(land right contd.)

Given the above the PAC tends to reject some provisions of the Restitution of Land Act (let alone the fact that it is concerned with a period when land was already taken by the white colonialists). The PAC submits that the Restitution of Land Act should at least have been made to capture the atrocities that were perpetuated by the Squatters Bill of 1912, Native Land Act, Black Administration Act and so on. It is not the question of giving land back to the dispossessed and compensating where that land is not available of equal importance is that compensation should take into account inconvenience and retardation of economic development amongst the dispossessed.

Mr M. Z. DYANI (MP)

25 August 1995



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FREEDOM FRONT

THEME COMMITTEE 6 (SPECIALISED STRUCTURES OF GOVERNMENT)

SUBMISSIONS ON COMMISSION ON RESTITUTION OF LAND RIGHTS

1) Combination of two proposals

The Freedom Front attaches to this document a submission made to Theme Committee 4 (FUNDAMENTAL RIGHTS), entitled 'Socio-economic Rights: Rights to Property'. The latter deals with property generally, but also contains a reference to restitution of land rights. This document (submitted to Theme Committee 4), should be regarded as incorporated in the present submission, and is for that reason attached hereto.

2) General agreement of Freedom Front with other proposals

The Freedom Front supports generally submissions in respect of land rights already made to Theme Committee 6 by various interest groups, such as the South African Agricultural Union and the East Cape Agricultural Union. In the context of these submissions the Freedom Front submits that the certain principles, in particular, should be embodied in the new Constitution. Some of these principles are referred to in the next paragraph.

3) Specific proposals by the Freedom Front

The Freedom Front makes the following specific proposals:

- (i) That all property rights (including rights relating to immovable property) should be entrenched in the chapter on Fundamental Rights in the new Constitution.
- (ii) That expropriation in the traditional sense should not be employed as an instrument in the redistribution of land, but should be confined to its traditional role, viz action

for public purposes only, against payment of compensation, in circumstances that have nothing to do with redressing any wrongs or inequitable results flowing from group areas legislation under the apartheid regime. (It is, indeed, in this context that the transitional Constitution in section 121(4) provides that the provisions of section 121 (Claims relating to land rights) shall not apply to any rights in land expropriated under the Expropriation Act, 1975 or certain other related statutory provisions).

- (iii) That provisions of the new Constitution relating to the redistribution of land should, inter alia, be an improvement on the present provisions (sections 121 to 123) in so far as such restitution should be restitution by the government of land at present belonging to the state only, and not to private individuals or juristic persons controlled by private individuals.

Our motivation in this regard is that the inequities of the past as far as deprivation of ownership of land is concerned should not be replaced by new or fresh inequities to the detriment of the present owners of such land. Otherwise it would mean that bona fide purchasers or owners of land would be deprived of their ownership despite the fact that the original deprivation of the ownership of the original owners was not effected by the present owners, but by the government at the time, applying group areas legislation. In saying this we must not be taken to propose that persons who have been dispossessed of land under the apartheid regime should not be entitled to adequate and fair compensation, but merely that restitution of ownership of the land in question should not be seen as the method of redressing the wrongs of the past, but rather monetary compensation by the state.

Our proposal is in accordance with the position in private law where, in many instances, the bona fide purchaser of property is protected from dispossession of such property by some other person also claiming title to such property, neither of them being at fault. We believe, therefore, that restitution of property at present possessed by the state should be allowed, but not property at present possessed by private individuals. If, however, any redistribution of land at present belonging to private individuals should take place, then it should occur at no less than the current market value of the property concerned.

4) Alternative Freedom Front proposal

In the event of our submission above not being implemented, the Freedom Front proposes, in the alternative, that the new Constitution should contain provisions substantially in agreement with the present provisions of sections 121-123, read with a section reflecting the basic provisions of the present section

28 (but subject to criticism by the Freedom Front in respect of the concept of 'deprivation' in section 28(2), which is contained in the document annexed to this submission, and referred to in the introductory paragraph above). In this regard we also wish to associate ourselves, in general, with the contents of a paper submitted by dr Antonie Gildenhuys to a workshop arranged by Theme Committee 6, held at Cape Town on 1 and 2 August 1995. In particular we wish to stress his exposition of the right to own property as a basic human right, but that rights in property cannot be unlimited, and should include social obligations and duties.

5) Laws relating to land reform to be subject to constitutional challenge for invalidity

In conclusion the Freedom Front wishes to state that it rejects proposals that laws relating to land reform should not be subject to constitutional challenge. Such a view would in our opinion be contrary to the wording and spirit of the Constitution in so far as the Constitution is the supreme law of the land, the provisions of which override all other laws. The Constitution should protect private property, and all laws conflicting with the Constitution, including laws relating to land reform, should be subject to the Constitution.



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THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON RIGHTS TO PROPERTY

1. Content of the right

Differing definitions render formulation of a satisfactory property clause virtually impossible

Property as a concept is very wide, as is pointed out by the South African Law Commission in its Final Report on Group and Human Rights (Project 58, October 1994, at p 145).

Sometimes bills of rights containing references to property rights refer expressly to traditional concepts of immovable and movable property (e.g. article 16 of the Namibian Constitution), but the concept has been extended to cover also the rights constituting the so-called 'new property', i.e. certain labour and welfare rights, rights to incorporeal property such as intellectual property, and economic concepts such as goodwill, etc. In some instances property as such is not guaranteed, but the peaceful enjoyment of one's property is. All these and other factors make it extremely difficult to formulate a general property clause that will be acceptable to most interest groups.

It is often argued that an entrenched bill of rights should not contain a property clause, as property is a controversial and ambiguous concept. For instance, the Canadian Constitution of 1982 does not contain an express guarantee of property rights, inter alia because of uncertainty about the scope of rights that would be included in the category of property in the Canadian Charter of Rights and Freedoms. Some Constitutions safeguarding fundamental rights (including property rights) are themselves not entrenched, eg the Dutch Constitution. Naturally this reduces the degree of protection of the rights concerned.

The South African Law Commission has adopted the view that it is the task of the courts to lend content and lucidity to the concept of the right to property (Final Report on Group and Human Rights, page 149). The Freedom Front agrees with this view. The

Constitution should, accordingly, in our view not deal extensively with property rights.

In order to assess to what extent property rights fall under 'universally accepted fundamental rights' within the meaning of Constitutional Principle II, it is necessary to refer to some international conventions.

International instruments relating to property rights

Article 17 of the Universal Declaration of Human Rights 1948 provides:

- '1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property'.

(A provision similar to the latter occurs in article 5(d) of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966).

The American Declaration of the Rights and Duties of Man, 1948, provides as follows in article XXIII:

'Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home'.

The European Convention on Human Rights 1950 provides in Article 1 of the First Protocol as follows:

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

Article 21 of the American Convention on Human Rights, 1969, provides as follows:

- '1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

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'.

Article 14 of the African Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity in 1981, provides:

'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'.

The Freedom Front submits that the qualifications of the right to property in the above-mentioned instruments are so general and vague that it is virtually impossible to draw up a concise or comprehensive formulation of property rights in international law. Moreover, the references to laws (not part of the constitution of the state) providing for qualifications of property rights in the general interest detracts from the entrenchment of such property rights in the bill of rights.

The position in South Africa at present

The 'property clause' (section 28)

In South Africa one of the arguments raised against a property clause is that it may frustrate attempts at land reform, housing reform, affirmative action with regard to land rights, etc. Moreover, property clauses are often interpreted widely, with the result that a large number of commercial and social rights are regarded as property. This complicates matters. Nevertheless, such a clause was introduced into the transitional Constitution.

Many of the proposals advanced during constitutional negotiations in South Africa included a property clause consisting of a guarantee clause as well as an expropriation clause. These two aspects are reflected in section 28 of the transitional Constitution and are briefly dealt with here.

Section 28 of the transitional Constitution reads:

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

(Section 28(3) provides for the expropriation of any rights in property and the limitations upon such expropriation.)

Section 28(1) does not treat the acquisition, holding and disposal of rights in property in the same manner. The former two are guaranteed without any qualifications, but the right to dispose of property is protected only to the extent that 'the nature of the right permits'. This provision, if retained in the new Constitution, should be clarified.

Section 28(2) has obscured the proper interpretation of section 28 as a whole, in so far as it refers to 'deprivation' of any rights in property as opposed to 'expropriation' in section 28(3). The traditional and customary meaning of 'expropriation' is that this type of divesting of rights is accompanied by some form of compensation. However, the word 'deprivation' implies that the divesting of rights in terms of section 28(2) is not accompanied by the payment of compensation, unless the law providing for such deprivation also guarantees compensation.

The restitution of land rights (sections 121 to 123)

The transitional Constitution makes elaborate provision for the restitution of land rights in sections 121 to 123. The implementation of these provisions has already been effected by the passing by Parliament of the necessary legislation in terms of section 121(1). Sections 121, 122 and 123 of the Constitution introduced a type of 'affirmative action' in respect of rights in land in respect of which persons or communities have been dispossessed.

By virtue of the provisions of section 8(3)(b) of the transitional Constitution the restitution of land rights is regarded as restitution of fundamental rights under the equality clause (section 8). The effect is the incorporation by reference of sections 121 to 123 into the chapter on fundamental rights (chapter 3), giving these sections the same strong legal protection applicable to all other fundamental rights dealt with in chapter 3.

2. Application of the right

2.1 Nature of the duty imposed on the state

The new Constitution should oblige the state to protect private property in accordance with the general tenor of the present section 28 of the transitional constitution, subject to the amendment of section 28(2) proposed above (the word 'deprivation' to be deleted and the word 'expropriation' to be substituted for it in section 28(2)). The vague generalities of the international instruments referred to above should be discarded.

2.2 Application of the right to common law and customary law

Where there is a conflict between the property clause in the chapter on fundamental rights and common law or customary law the

former will prevail. The latter two systems of law could, however, be supplementary to the provisions of the Constitution in this regard.

2.3 Should the right impose a constitutional duty on actors other than the state?

As a general rule, 'No', but a qualification will have to be made in cases where actors other than the state have powers of expropriation, e.g. certain statutory bodies.

2.4 Who should be bearers of this right?

Natural persons and fictitious persons capable of acquiring rights in property should be bearers of this right, but not unlawful immigrants.

2.5 Should the right be capable of limitation by the legislature?

Any limitation of this right should be confined to limitation in accordance with the general limitation clause and (possibly) the clause governing a state of emergency.
