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The Chairman
 Working Group 2
 CODESA
 World Trade Centre
 P.O.Box 307
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Dear Sir,

I saw your appeal for submissions from members of the public. I enclose a copy of a work of mine entitled *The New South Africa: Constitutional Options*. This was written between October 1989 and March 1990. It is slightly dated as regards the proposals of various political parties. Fundamental principles, however, remain unchanged.

Since writing the work I have received a grant from the HSRC to investigate the moral basis of a future South African constitution. This enabled me to meet a variety of constitutional experts throughout the country and discuss the work with them.

I also enclose a more recent work of mine on property rights in the new South Africa.

I am at present completing a piece on cities and economic development which could of great relevance to you in considering constitutional dispensations in relation to economic development. I will send you a copy in due course but it may be late for your deadline.

I would be happy to discuss these and related matters with your working group.

Yours faithfully,

Dr. David Brooks

PROPERTY RIGHTS IN THE NEW SOUTH AFRICA

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Should there be a right to private property? This is a difficult question and especially so in South Africa. Throughout the world people are deeply divided over the issue. In the special case of South Africa these ideological divisions are complicated by a unique history.

Let us first look at the arguments for and against private property independent of South Africa. The case against property is by and large egalitarian and humanitarian. The existence of private property has led to a situation where there are vast disparities in wealth. Moreover this situation is liable to perpetuate itself over the generations on the basis of an unfair lottery of birth. Those born to the rich tend, especially with the institution of inheritance, to become rich themselves; those born to the poor tend to be poor. Is this situation fair or deserved? That one was born to these parents rather than those does not seem a fair basis for the difference between poverty and prosperity. Even if one has worked for the property one possesses how far does one deserve the talents of intellect and character which have enabled one to work in that way? Property should be distributed on an equitable basis and not because of accidents of birth and endowment.

The arguments for private property fall into two groups in the first group there are arguments that it is a legitimate extension of the rights accruing to the individual. My food becomes part of me and I belong to myself. Cannot this ownership extend to the food in my mouth or the food on my plate? How far in a lifetime

devoted in part to acquisition, do my books, my pictures, my clothes, the tools of my trade become extensions of my personality? How far can the blind man's stick be seen as part of him. Secondly private property is necessary for the exercise of my fundamental human rights. How far can I exercise my right to freedom of speech without my pen or my word processor. A third argument is provided by a phrase like 'an Englishman's home is his castle'. This shows how far ownership of land can be a bulwark of liberty.

The difficulties are first how far we can take this extension of the person. There is something artificial about extending personhood beyond the body especially if this is to the disadvantage of others. The other two arguments are not unproblematic. What sort of property and what sort of title is needed for the exercise of my human rights? By what right are some rather than others buttressed in their freedom by the ownership of land.

The second type of argument expressly defends current property distribution. It is associated with Locke and Nozick.¹ Locke imagines an original position where land is freely available for all, inspired perhaps by what were then seen as the virgin territories of America. If a person were to "mix his labour" with this unowned land, clearing bush, laying out fields, etc., then the land becomes his. He then has the right to give it away, sell it or bequeath it. Now if there was an originally just acquisition and since then land has passed honestly from hand to hand and not been taken by force or fraud, then it is the absolute property of whoever it now belongs to. Moreover the distribution of land which results from fair transfers and just acquisitions is itself just. Nozick, an American philosopher following in Locke's footsteps, goes on to claim that any redistribution is only possible through a massive and intolerable interference with human freedom.

The situation in South Africa for a defender of private property is even more difficult than it is elsewhere. On the one hand the

original acquisition of land in South Africa, certainly in the case of Whites and possibly in the case of Blacks, was not by just acquisition of unowned land but by the use of force and fraud against the original inhabitants. On the other hand for many years under apartheid, and before, the laws were skewed making land acquisition considerably easier for Whites.

Does the case close now? The justifiability of private property is in itself contested. The two main assumptions needed for the Nozick-Locke justification of private property do not apply in South Africa. What basis then can there be for property rights in the New South Africa?²

It is vitally important to remember that we are in a situation where the only serious hope for the country is negotiation and compromise. This will not only be a compromise between interests but may also be a compromise between ideals. A compromise of this sort cannot come about if the participants have the automatic response that those who disagree with them must be either wicked or blind. That is an all too human response that must be suppressed. We have to realise that there are two different attitudes to property in South Africa which can both be understood in relation to the Locke-Nozick justification of property and both of which rely on truths which it is difficult to contest. On the one hand there is the undoubted truth that land holdings in South Africa are based on dispossession by force and fraud and that the system of Group Areas Laws, etc., rendered the processes of acquisition unfair. This gives rise to the perception that Whites have no right to the lands that they occupy.³ On the other hand, the idea that to mix one's labour with something is to acquire a just title to it, informs the thinking of many Whites. If South Africa had not been settled by people outside Africa it is highly likely that its economic development would be on a par with that of Liberia or Ethiopia, the only countries in Africa never to have been colonised.

Can these perspectives be reconciled? John Rawls,⁴ who argues for an egalitarian redistribution of wealth, at the same time provides a sound justification for privilege, and a criterion for determining the limits of fair and just redistribution. Rawls suggests that a society meets the standards of distributive justice if we would choose to live in that society in ignorance of our position in that society and our talents for getting ahead in society. At first guess we might choose a completely egalitarian society where everyone is equally well off. But would this be rational if complete equality is only achievable if everyone is much worse off as a result of choosing an equal outcome? What if everyone in egalitarian Albania is worse off than everyone in unequal Switzerland? Would it not be better to accept some inequality in return for a much higher standard of living? We should, to avoid risks, choose that society where the worst off are best off. Rawls' principle justifies total redistribution and complete equality only if this would be best for the poorest. If, however, the worst off can be best uplifted through inequality, than inequality is justified.

The application of this to South Africa is that if privilege means that the worse off are better than they would be otherwise then privilege should remain. Not just any privilege. There are two bars to a Rawlsian defence of apartheid. First it may be that a discriminatory system is so wrong that it cannot be justified on the grounds that it leads to material wellbeing. Secondly it seems clear that there are alternative systems which would be as good or better for the wellbeing of the worst off.

The Rawlsian position then is that if it would make the worst off better off, then there should be some redistribution. However if a massive nationalisation of corporate and private resources led to a flight of White capital and skills and a weakened economy meant that everyone remaining was worse off, then such measures might be an offence against justice as well as being foolish. It is wrong

to kill the goose which lays the golden eggs even if it has behaved viciously in the past.

But why should Whites hang on to all their ill-gotten gains? Granted, people doing higher level jobs requiring special skills and training need to be paid more if the country is to retain their services. Still the disparity between the best off and the worst off in a Rawlsian state should surely be only what is necessary to provide the best for the worst off. Whites should get the minimum required for them to stay and not be allowed to hang on to all their Group Areas spoils.

Now, first of all security of property is very important to property owners and it may well be required for Whites, especially those who could easily join the brain drain, to have the confidence to continue in South Africa. Secondly the institution of private property is *de facto* part and parcel of the modern liberal-democratic state which seems to be one of the most successful political arrangements of all time. If a particular set of institutions work well together generating prosperity in an equitable society it seems foolish to tamper with them. We do not know enough about human nature and the functioning of economies to be sure that a direct threat to property tenure will not foul up the whole system. We do know that the nationalisation of all property in Marxist states has turned out to be a disaster.

Thirdly, it may be that the benefits of private property in an economy may only be securable by giving people complete confidence in their security of tenure. This might well require constitutional endorsement in a Bill of Rights requiring full compensation for expropriation. I am not arguing that property rights are on a par with other negative human rights, and just have to be accepted along with the others willy nilly. I would argue that rights to freedom of speech, freedom from unjust imprisonment and torture, etc., stem from the need to protect the autonomy and

dignity of every human being. The right to property is different and requires a separate justification.

There are two objections to private property in South Africa; a radical objection and a moderate one. The radical objection is to the institution of property itself as in Proudhon's remark that property is theft. The reply to this is that the abolition of private property has been an economic disaster in modern industrialised states. The moderate objection accepts the institution of private property but objects to its distribution. The moderate wants there still to be private property but wants it to be in other people's hands.

I wish to say two things to the moderate objector. First of all one of the strongest sources of the redistributive urge is a sense of injustice. This sense of injustice is well founded in South Africa. Unjust legislation has steered wealth into White hands. Whites have been unjustly enriched by apartheid. Part of the process has been the way apartheid laws have abrogated normal property rights in the case of black spot removals, etc. The appropriate remedy for unjust enrichment is compensation.⁵ I suggest that there be a one-off, once and for all compensatory New South Africa Tax. Whites, identifiable by the means needed to give their vote the power of veto over the new constitution, should be assessed for their total asset value. They should then be taxed 10% of that payable over ten years.⁶ The money raised in this way should go into an independent fund dedicated to bettering the lot of those who have been of that payable over ten years disadvantaged by apartheid. A one-off measure like this should wipe the slate clean and allow everyone to go into the future freed from guilt and recrimination.

The second thing to be said to the redistributor is that it is one thing to want wealth to be redistributed, it is another thing to want control over the redistribution process. It is not clear that governments are the best redistributive agencies. It is also

important that redistribution should not be seen as punishment. The achievement of a negotiated new constitution will be a victory for those oppressed by apartheid. Victors are well advised to be magnanimous. It is salutary to compare what happened after the first World War and what happened after the second World War. After the first World War the allied powers, opposed by Smuts, who remembered British magnanimity after the Boer War, and Keynes, who foresaw a political and economic disaster, demanded massive and punitive reparations from Germany. The result was the fall of the German Republic, the rise of Hitler and World War II. After World War II the allies with the Marshall Plan economically reconstructed Germany and Japan. The result has been an economically successful and peaceable Germany and Japan firmly allied with their former enemies.

In fact it seems that it is not redistribution South Africa wants so much as economic development and upliftment. Sheer redistribution, stripping Whites of all their wealth and sharing it amongst the rest of the country would not provide nearly enough to make a significant difference to even the poorest amongst us.

It is important to note several things about redistribution and economic development.

1. Economical development is not the province of politicians, businessmen, general intellectuals or even classical or Marxist economists. It is the preserve of a distinct discipline, Development Economics. Any standard textbook on development economics⁷ will show how economic doctrines developed in the First or Second (Eastern Bloc) world just do not apply in the Third World.
2. Compensatory measures, such as the tax I suggest or affirmative action, should be one-off or last only for a fixed period, if they are to be truly reparatory and not constitute a form of reverse apartheid.

3. Too simplistic an approach to redistribution, treating it as a zero-sum game whose aim is to soak the rich is likely to be counter-productive.⁸ It is likely that successful redistributive measures will have to be remarkably modest to avoid problems like capital flight.
4. The private sector or an independent agency might be a better agent for carrying out work in economic development than the state. There would certainly be gains in efficiency and the currently touted Nedbank-Old Mutual development plan is a remarkable example of the private sector taking the initiative in developmental work for the good of the country as a whole.
5. Measures can be taken which, while leaving the institution of private property intact and constitutionally guaranteed, still lead to more property ending up in the hands of the dispossessed -
 - (a) there is a great deal of unused land belonging to the state;
 - (b) a change in the financing of loans to farmers is being planned and it could have far reaching effects. The state should not subsidise inefficiency in agriculture or elsewhere. If inefficient farmers have to sell up on a large scale as a result of the withdrawal of effective subsidization this would lead to a sharp fall in the price of agricultural land making it easier to acquire;
 - (c) a commission should be set up to investigate past black spot removals and forced expropriations. It should have the power to determine the best use for the land, to restore communities to their former land with a firm title and to adequately compensate the current or former owners or occupiers.

6. It is widely believed that property ownership has a stabilizing effect upon people and society. There was a time when it was seriously defensible to argue for destabilization rendering the country ungovernable. That time is now past. We need a permanent end to the current violence. Enlarging the extent of property ownership could have an effect upon this.

In the light of these general principles I would like to comment on the recently proposed Nationalist constitutional guidelines and on the idea that there should be a two-tier property system in the New South Africa.

The Nationalist constitutional guidelines are a significant departure from previous Nationalist Party thinking and should be taken seriously. Race plays no part in the constitution which is as it should be and the Nationalist Party should be commended for this. Secondly, the proposed Upper House constitutes a significant counter-balance to the lower house. That there should be checks to the will of the majority and that South Africa should be governed in the spirit of co-operation rather than a winner-take-all basis is something I am prepared to defend.⁹ However that this counter-balancing is done by effectively giving a second vote to property owners is less than satisfactory. This is not indefensible. Many constitutions allow property owners to have a special say especially in local government. He who pays the piper has some right to-call the tune. Moreover, while there is universal condemnation of apartheid with its statutory racial discrimination, there is less objection to a class dominated society. As we have seen there are those who are prepared to defend grossly inegalitarian distributions of property provided those property holdings were appropriately acquired. Where the proposals fail is that present property holdings are skewed in favour of Whites as a result of apartheid. No-one should have a special say because they have benefitted from the injustices of apartheid. Moreover such a

system would increase resentment against the institution of property and current distributions of property.

The idea of a two-tier system of property, one man one house it has been nicknamed, is also misguided. First of all insofar as there are advantages to an economy based on private property, private property should not be diluted. There is an element of the punitive in the scheme. Outrage at people living a life-style including second holiday homes while many are homeless might well have motivated the proposal. But what proportion of the wealth of the country is tied up in holiday homes? The holiday home is probably not a significant economic phenomenon. To jeopardise an institution such as private property whose attraction lies in security of tenure out of pique rather than sound economic policy would be very foolish. Moreover there are sound economic reasons for not shackling industry and commerce with the provision that a company should hold only one piece of land. But if a company may justifiably own more than one piece of ground why not an individual? Why should someone be penalised for putting his life's savings into a number of properties and collecting the rent rather than into the shares of an exploitative company? Moreover the scheme seems likely to be unenforceable. Those who can afford more than one property are only too likely to be able to circumvent a two-tier property system. Holding companies, nominee owners, putting property in the names of extended family members and all the devices used to circumvent the Group Areas Act are likely to come into play.

In response to criticisms of a right to private property especially in South Africa I have argued on a Rawlsian basis that it should be retained for the benefit of those who are worst off in society. I acknowledge a need to compensate for past injustices but do not believe either in wholesale redistribution or that property holdings should be used to constitutionally entrench past privileges.

A B S T R A C T

The right to private property is contested especially in South Africa. Some believe that there should be no such thing as private property others that property is in the wrong hands and should be redistributed. I argue that while there is a need to compensate for past injustices the institution of private property should be retained in full but not used to constitutionally entrench past privileges.

1 Locke *Two Treatises of Government* (1690) Book 2 ch 5; Nozick *Anarchy, State, and Utopia* (1974) ch 7

2 This may be too swift a conclusion. The situation of someone who has made money through the use of his talents in the service of the community and purchased a house in a white area is not that of a thief. He did not take part in the original misappropriation nor did he set up the skewed rules - though he may bear some responsibility for them.

3 But if the test of who deserves the land is original occupancy it should perhaps be given to the few remaining Kho-San whose displacement from their original occupancy of the whole of South Africa was not entirely peaceable.

4 Rawls, *A Theory of Justice* (1972).

5 I argue for this in Brooks 'On Living in an Unjust Society' (1989), *Journal of Applied Philosophy* 6, 31-42.

6 I choose 10% as a figure that will hurt but be affordable. It is impossible to determine who should pay whom individually and to calculate the exact amount at stake in each case. To that extent this is a symbolic reparation. Still, I believe that such a symbolic gesture could do good in its own right apart from its being necessary for reconciliation. Suggestions that up to a third of a person's total wealth should be taxed would be crippling and in all likelihood counter-productive.

7 Eg. Todaro, *Economic Development in the Third World* (1981).

8 See eg. Moll Natrass and Loots, *Redistribution: How can it work in South Africa* (1991).

9 I do so in Brooks, *The New South Africa : Constitutional Options*, unpublished.