WSP 054 0010 1

LAND AND PROPERTY RIGHTS CONFERENCE

Milpark Holiday Inn
27/28 February 1992

Centre for Applied Legal Studies
University of the Witwatersrand

LAND AND PROPERTY RIGHTS CONFERENCE

Milpark Holiday Inn
27/28 February 1992

Centre for Applied Legal Studies
University of the Witwatersrand

LAND AND PROPERTY RIGHTS CONFERENCE

DOSSIER OF BACKGROUND MATERIALS AND PAPERS

TABLE OF CONTENTS

		page
Programme		
List of Participants		
<u>Background Materials</u>		
South African Law Commission	Group and Human Rights Interim Report (1989): Extracts	1
South African Law Commission	Group and Human Rights Interim Report (August 1991): Article 15	9
ANC Constitutional Committee	A Bill of Rights for a New South Africa: Extracts	15
ANC Draft	New Articles on Social Rights, Land and Property for the Draft Bill of Rights	21
India	Constitution of India: Extracts	31
Germany	Basic Law of the Federal Republic of Germany: Extracts	39
United States of America	Constitution of the United States of America: Extracts	41

Papers to be Presented

Murphy, John	Insulating Land Reform from Constitutional Impugnment: an Indian Case Study	43
Bauman, Richard	Property Rights in the Canadian Constitutional Context	77
van Maanen, Gerrit	Ownership as a Constitutional Right: The German Experience with art 14 and 15 of the Constitution	111
van der Walt, Andre	The Fragmentation of Land Rights	129
Lewis, Carol	The Right to Private Property in a new Political Dispensation in South Africa	165
Thomas, Glen	The Land Question	203
Budlender, Geoff	The Right to Equitable Access to Land	207
Ed Swanson	A Land Claims Court for South Africa: Report on Work in Progress	223
Kadar Asmal	paper to follow	
Joanne Yawitch	paper to follow	
Catherine Cross	paper to follow	
Dennis Davis	paper to follow	

LAND AND PROPERTY RIGHTS CONFERENCE

CENTRE FOR APPLIED LEGAL STUDIES

Thursday 27th February and Friday 28th February 1992

Milpark Holiday Inn - Johannesburg

DAY ONE:

08H15 - 09h00	Registration and Tea
09h00 - 10h00	**PROPERTY CLAUSES AND LAND RIGHTS IN A FUTURE SOUTH AFRICAN BILL OF RIGHTS**

Chair - Aninka Claassens

Short inputs concerning the political and societal context of the debate about land and property rights.

Sheena Duncan - South African Council of Churches

Chris Hani - South African Communist Party

Albie Sachs - African National Congress

10h00 - 10h30	**Questions**
10h30 - 11h00	Tea
11h00 - 12h30	**INTERNATIONAL COMPARISONS: IMPLICATIONS FOR SOUTH AFRICA**

Chair - Bongi Njobe

India

A case study examining the relationship between the property article of the Indian constitution of 1950 and land reform legislation. The effect of limitations imposed on the Affirmative Action Clause. Litigation in this area. Mechanisms use to "free" land reform from the constraints of the property clause.

Implications and lessons for South Africa - some practical proposals.

John Murphy - UWC

Canada

Review of the Canadian debate about whether property rights should be constitutionally protected (Property Rights in relation to land).

Richard Bauman - Canadian Constitutional expert, University of Alberta, Edmonton, Canada

Germany

German attempts to socialise the ownership of land through Article 14 of the Constitution. The limitations of this approach and the implications for the South African situation.

Gerrit van Maanen - Rijks Universiteit, Limburg

12h30 - 13h00 **Questions: Points of Clarification**

13h00 - 14h00 Lunch

14h00 - 14h45 **DIFFERENTIATING FORMS OF PROPERTY?**

Chair - Edwin Cameron

Recent trends in American and German Law towards the unification of the concept of property. The implications of this trend. The case for diversification including some possible formulations in relation to land.

Andre van der Walt - UNISA

The case against differentiating forms of property at a constitutional level.

Carole Lewis - Wits

14h45 - 15h15 Tea

15h15 - 17h00 **Panel discussion with speakers from previous sessions**

Day Two

08h30 - 11h00 **PROVIDING JUSTICIABLE RIGHTS OF ACCESS TO LAND?**

Chair - Kate O'Regan

1. The current formulation of property rights in the ANC's draft bill of rights. Explanation and discussion of possible changes

Kadar Asmal - ANC Constitutional Committee

2. Compensation and Bureaucracy. Grass root land disputes and the balance of power between opposing parties

Glen Thomas - ANC Eastern Cape, and rural field worker

3. The Right to Equitable Access to Land. Can there be a justiciable right of equitable access to land driven by the landless, rather than dependant on state largess?

Geoff Budlender - Legal Resources Centre

Discussion

11h00 - 11h30 Tea

11h30 - 13h00 **TENURE AND FORMS OF OWNERSHIP**

Chair - Bahle Sibisi

1. CONTEXT

Recent government policy (expressed in the White Paper, recent bills, restoration of land negotiations) to prohibit all forms of tenure other than absolute and individual ownership. The attempt to limit black access to land and redistribution to market transfers within the system of property relations existing in the previously white 87% of South Africa

Joanne Yawitch - National Land Committee

2. THE PROBLEM POSED

Existing African concepts of land rights, systems of ownership, usage and transactions. Problems created by the disjuncture between imposed legal forms and existing practices and

	concepts. Motivation for new legal forms given (a) the vacuum created by the repeal of the Land Acts, (b) the pressure for expansion into new areas and (c) tensions in existing rural African land systems arising from population pressure and changes in the political and economic structure of society
	Catherine Cross - Natal University
	Discussion
13h00 - 14h00	Lunch
14h00 - 15h15	**OTHER STRATEGIES: WORK IN PROGRESS**
	Chair - Thandabantu Nhlapo
	1. LAND CLAIMS COURT. Review of work in progress re: criteria, procedures and mechanisms.
	Ed Swanson - CALS
	2. LAND TAX. A possible fiscal base for a Land Claims Court. The role of a land tax in the re-distribution of land
	Dennis Davis - CALS
	Discussion
15h15 - 16h45	**CLOSING DISCUSSION**
	Chair - Dullah Omar - UWC/ANC Constitutional Committee
16h45	Tea

LIST OF PARTICIPANTS

TANYA ABRAHAMSE - EDA

JOSIE ADLER - BLACK SASH

CATHI ALBERTYN - CALS

RONA ALEXANDER - OXFAM

MAURA ANDREW - GRAHAMSTOWN RURAL COMMITTEE

KADAR ASMAL - UWC/ANC CONSTITUTIONAL COMMITTEE

RICHARD BAUMAN - UNIVERSITY OF ALBERTA CANADA

DAWIE BOSCH - CRLS

GEOFF BUDLENDER - LRC

FIROZ CACHALIA - CALS

ARTHUR CHASKALSON - LRC/ANC CONSTITUTIONAL COMMITTEE

EDWIN CAMERON - CALS

ANINKA CLAASSENS - CALS

KEITH COLEMAN

CATHERINE CROSS - UNIVERSITY OF DURBAN

DENNIS DAVIS - CALS

PETER DELIUS - WITS UNIVERSITY

HELENA DOLNY - RURAL ADVICE CENTRE

ANDREW DOMANSKI - WITS UNIVERSITY

JOHN DUGARD - WITS UNIVERSITY

SHEENA DUNCAN - SACC

ERICA EMDON - EFK TUCKER

FRENE GINWALA - ANC RESEARCH DEPARTMENT

GLENDA GLOVER - BLACK SASH

DEREK HANEKOM - ANC LAND COMMITTEE

CHRIS HANI - GENERAL SECRETARY, SACP

FINK HAYSOM - CALS

MICHAEL JAKES - WITS UNIVERSITY

CARRIE KIMBLE - LRC, PRETORIA

ROSALIE KINGWILL - GRAHAMSTOWN RURAL COMMITTEE

WOLFRAM KISTNER - ECUMENICAL ADVICE OFFICE

HEINZ KLUG - WITS UNIVERSITY

I KROEZER - UNIVERSITY OF POTCHEFSTROOM

JOHN LAMOLA - SACC

LYDIA LEVIN - CALS

CAROL LEWIS - WITS UNIVERSITY

SIDNEY LUCKETT -

THAMI MAKUBATO - NLC, OFS

MAVIVI MANZINI - CALS

BENNY MONAMA - LRC, PRETORIA

DIKGANG MOSENEKE - ADVOCATE

MATHOLE MOTSEGE - ANC REGIONAL LAND COMMISSION

SAM MOYO - ZIMBABWE INSTITUTE OF DEVELOPMENT STUDIES

JOHN MURPHY - UWC

THANDABANTU NHLAPO - UCT

BULELANI NGCUKA - UWC/ANC CONSTITUTIONAL COMMITTEE

BONGI NJOBE - ANC LAND COMMISSION

DULLAH OMAR - UWC/ANC CONSTITUTIONAL COMMITTEE

KATE O'REGAN - UCT

PENNY PLOWMAN - OXFAM

CYRIL RAMAPHOSA - ANC

LAUREN RICHER - CALS

MIKE ROBERTSON - ADVOCATE

THEUNIS ROUX - MALLANIKS

ALBIE SACHS - ANC CONSTITUTIONAL COMMITTEE

SUSAN SCOTT - UNISA

IRAN SENEKAL - NLC, PE.

BAHLE SIBISI - NLC

WALTER SISULU - ANC

LEWIS SKWEYIYA - ANC CONSTITUTIONAL COMMITTEE

JANET SMAL - TRAC

HENK SMITH - LRC, CAPE TOWN

LALA STEYN - S.P.P.

ED SWANSON - CALS

LYNETTE THERON - RAU

GLEN THOMAS - NLC, BORDER

ANDRE VAN DER WALT - UNISA

GERRIT VAN MAANEN - RIJKSUNIVERSITEIT, NETHERLANDS

DEAN VAN ROOY - NLC, S.CAPE

JENNY VAN WYK - UNISA

REINHOLD VILJOEN - NATIONAL ENERGY COMMISSION

DAWIE VISSER - UCT

JOANNE YAWITCH - NLC

Centre for Applied Legal Studies
University of the Witwatersrand, Johannesburg
Republic of South Africa
WITS 2050

SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 25

PROJECT 58: GROUP AND HUMAN RIGHTS

Closing date for comment
31 August 1989

14.96 Equal and equivalent franchise for all citizens over a certain age is one of the fundamental human rights that are to be respected. In many countries this is enshrined in the bill of rights as a fundamental right: Canada, Finland, Italy, the Netherlands, Spain, Portugal, Greece, Turkey and the USA, to mention only a few.

The recognition of equal and equivalent franchise for all citizens inevitably follows from the prohibition on discrimination.

14.97 Many contributors and witnesses before the Commission stressed that this right should be recognised in this country too. Apart from the argument that it is unfair and untenable to grant the franchise only to certain persons in this country, many contributors and witnesses referred to the argument of expediency: withholding the vote from Black persons is a factor contributing to the internal unrest and the external hostility towards our country. There is no way in which this situation can be legally justified.

14.98 The Commission considers that equal and equivalent franchise for all citizens of the country over the age of eighteen years, men and women, should be recognised in the bill of rights.

14.99 In most constitutions the composition of the parliament or legislative assembly voted for is set forth. In South Africa, with its heterogeneous population, the constitutional problem is a formidable one. Some groups aspire to a one man one vote dispensation in a unitary state, while this is anathema to others. Others are in favour of power sharing, and yet others partition. The question is how the central legislative authority can be constituted to accommodate all fears and aspirations. As has already been stated, the Commission does not see the solving of this problem as part of its terms of reference.

14.100 In the bill of rights it must therefore be laid down that the constitution shall provide for the composition of the parliament or legislative assembly within which equal and equivalent franchise can be realised.

L. The right to property

14.101 Although the right to acquire and own property is accepted without question in our legal system, the Commission would be neglecting its duty if it did not refer to the searching debate on the question whether this right should be enshrined in a bill of rights. In what follows we deal with the international standpoints and local opinions.

(a) International agreements and conventions

14.102 The Universal Declaration of Human Rights, adopted in 1948 by the General Assembly of the United Nations, is not a binding legal instrument as such, but is accepted by many nations as an authoritative source of principles of international law and is accepted by the United Nations and many jurists as "the law of the United Nations".[47] In Article 17 the Declaration provides as follows:[48]

> 17(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.

14.103 Article 1 of the First Protocol of the European Convention on Human Rights, which came into operation in 1954, provides as follows:[49]

> 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.

---

47 Ian Brownlie Basic Documents in International Law 2nd edition London: Clarendon Press 1972 144.

48 Ibid 147.

49 Ibid 223.

14.104 The African Charter on Human Rights and Peoples' Rights provides as follows:[50]

> 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.

14.105 The American Convention on Human Rights, which was adopted in 1978, contains the following property clauses:[51]

> 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.
>
> 3. Usury and other forms of exploitation of man by man shall be prohibited by law.

(b) National bills of rights

14.106 Out of a total of 129 current bills of rights only 22 do not recognise the right of private ownership. Even in socialist countries is this right recognised, albeit sometimes to a limited degree. We mention only two interesting examples. First, the Constitution of the Republic of Ireland:[52]

> 1. 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

---

50 In Article 14.

51 Article 21 - text available in Thomas Buergenthal, Robert E Norris and Dinah Shelton (eds) Protecting Human Rights in the Americas Selected Problems Second revised edition Kehl: N P Engel Publishers 1986 342.

52 Article 43.

> 2° The State, accordingly, guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
>
> 2. 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
>
> 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

14.107 Secondly, we refer to Article 15 of the Constitution of the Federal Republic of Germany:

> Land, natural resources and means of production may for the purpose of socialization be transferred to public ownership or other forms of publicly controlled economy by a law which shall provide for the nature and extent of compensation. In respect of such compensation the third and fourth sentences of paragraph (3) of Article 14 shall apply mutatis mutandis.

The two sentences referred to read as follows:

> Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts.

(c) The views held by South African writers and contributors

14.108 Just under half of the persons who expressed an opinion on the content of a bill of rights advocated the inclusion of a property clause. The arguments for and against such a clause are evident from the following writers and contributors.

14.109 The Association of Chambers of Commerce, in a memorandum prepared by J A Lombard and J A du Pisanie, says the following:

> The character of the law pertaining to private ownership in the South-African common law was established in Roman times and it came down to present times with its essentials relatively unscathed. In principle, the owner of a thing, whether immovable (such as land), movable (such as a book), or immaterial (such as a man's reputation),

may treat such a thing as he likes - provided his actions do not unduly constrain or interfere with other rights in that thing or in other related things possessed by other people. While ownership is the most important recognized right in things, there are also other rights, such as the right of succession, the right of servitude and the right of pledge or mortgage.

Next to these rights in things, the common law of South Africa recognized so-called personal rights from which personal liabilities or obligations also necessarily arise. The more general and economically most important personal rights and obligations are those arising from transactions given the force of law in the form of contracts. All such contracts derive their validity from the mutual and free consent of the contracting parties, and contracts may be declared invalid if certain requirements pertaining to such free consent have not been met. Personal obligations are clearly distinguished from punishments resulting from the rules of the criminal law as such.

These legal ideas of personal rights of ownership and personal contractual claims (assets), made possible the tremendous upsurge of material output and income generation by means of private enterprise, mobility of people between occupations, industries and industrial regions that characterised the life of European communities over the past two centuries, and life in South Africa since the beginning of the present century. This system of impersonal law not only provided the necessary assurance to the enterprising person that his personal claims to the values created by his initiative and husbandry will be protected by the state in terms of the law, but also allowed the private accumulation and mobilization of the material resources that were so important to the financing of the capital-intensive production functions of the modern technological age. Thus, the joint-stock company and the laws of property and contract became the main instruments of rapid economic growth at compound rates of expansion.

The recognition of personal property rights is also regarded by philosophers of civilization as an essential element of personal freedom in general. The famous anthropologist Malinowski, maintained that "the roots of property as a legal principle which determines the physical relationships between man and his environmental setting, natural and artificial, are the very prerequisites of any ordered action in the cultural sense" (Malinowksi, 1944, p. 132-3 as quoted by Hayek, 1972, p 140).

The important idea in this connection is not that every single, competent member of society must own property to support the principle of freedom. Hayek shows that what is important is that everyone has a right to own property and that the ownership of property is sufficiently dispersed to ensure that "the individual is not dependent upon particular persons to trade or to seek employment. Freedom requires a competitive situation".

14.110 The Industrial Council for the Hairdressing Industry (Southern and Western Transvaal) considers that the right to private property should be protected, so that "... the wealth of the country is not dissipated by profligate spending".

14.111 Mr Justice Didcott of the Natal Bench holds the following view:[53]

> What a Bill of Rights cannot afford to do here, I put to you, is to protect private property with such zeal that it entrenches privilege. A major problem which any future South African Government is bound to face will be the problem of poverty, of its alleviation and of the need for the country's wealth to be shared more equitably. The pressure to tackle the problem is likely to prove irresistible. No government which ignores it has much chance of retaining popular support. Should a bill of rights obstruct the government of the day when that direction is taken, should it make the urgent task of social and economic reform impossible or difficult to undertake, we shall have on our hands a crisis of the first order, endangering the bill of rights as a whole and the survival of constitutional government itself. I am not pleading for a bill of rights which takes sides on matters of economic policy, be they capitalist or socialist sides. I am pleading for a Bill of Rights which is neutral altogether on the issue, which leaves it to the political process to choose the economic policy that should be pursued, merely ensuring that all are free to preach and propagate their own beliefs.
>
> Not only would a bill of rights which entrenched economic and social privilege be unlikely to work in the long run; in all probability one which endeavoured to do that would never get off the drawing board. I say this because such an effort could hardly be expected to capture the imagination of black leadership or to gain its confidence and backing. And I cannot see the case for a bill of rights having much prospect of success without that confidence or backing.
>
> I am far from sure of black support existing at present, on any large scale at all events, for even a bill of rights without that blemish. On previous occasions when I have taken part in discussions on the subject I have encountered amongst some blacks a noticeable lack of enthusiasm for the concept. I find this disturbing, but not in the least surprising.
>
> Hitherto, in the first place, the idea of a bill of rights has been sponsored, promoted and encouraged largely by whites. Our history provides enough examples of whites making constitutions which are then imposed on blacks for the cause of a bill of rights to be discredited were this to happen again. We dare not let it.

---

53 In van der Westhuizen and Viljoen op cit 60.

14.112 Another standpoint is that of Mr Sydney Kentridge, S C, in a lecture given in the United Kingdom.[54] In discussing certain clauses of the Freedom Charter, he says:

> The clauses about nationalisation should certainly be taken seriously. A writer who does not speak for the African National Congress but who, I believe, shares a lot of its thinking, has recently written in favour of a bill of rights in a democratic (i e in his terms a black ruled) South African state. But this is what he had to say about the right of property:
>
> > "What would be quite inappropriate for a bill of rights (in South Africa) would be a property clause which had the effect of ensuring that 87% of land and 95% of the productive capacity of the country continued to remain in the hands of the white minority. It is one thing to have 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 1000,000 hectares."
>
> I suspect that a black government of South Africa is likely to think very much on those lines although it may be influenced by the examples of Zimbabwe and Mozambique which have shown that even governments with strong socialist pretensions are compelled in the event to recognise the value of private enterprise and to seek western aid and investment.

14.113 Mr Gavin W H Relly, Chairman of the Anglo American Corporation of South Africa, strongly advocates the inclusion of a property clause. He says:[55]

> I do not believe that any Bill of Rights will serve any important long-term purpose unless it includes adequate guarantees of the right to acquire, own and dispose of property. While this will certainly be represented by Marxists as an attempt to perpetuate the status quo, it is nothing of the kind since it must simultaneously with creating protection for existing property, remove the onerous restrictions on the right of Black people to own property. It should be noted that notwithstanding the traditional socialist arguments to the contrary, the institution of private property is important for the freedom and prosperity not only of those who own property but also for those who do not own it. One of the most serious derogations from the freedom of Black people in the past has been that they were deprived of any

54 A copy of which he supplied to the Commission.

55 In a contribution to the Commission.

> alternative to seeking accommodation from a public authority with a total monopoly of the provision of housing. A propertyless individual faced with a number of landlords competing for his tenancy is freer and likely to be materially better off than if he is faced by a monopolistic public authority. Similarly, if he is faced with a number of people competing for his labour he is freer and likely to be better paid than if he is faced by a single monopolistic employer. Only the institution of private property can guarantee these rights to the propertyless individual.

14.114 Professor D M Davis of the University of Cape Town says:[56]

> Given the massive imbalance in the various groups' share in the wealth of this country and the need for major policies of redistribution and welfare, extreme caution should be exercised before recommending a property clause, which could limit a future government's ability of implementing policies of redistribution of income.

14.115 In an exceptionally comprehensive memorandum submitted by the Centre for Human Rights Studies of the Faculty of Law of the University of Pretoria the matter is put as follows:

> A question that has far-reaching socio-economic and other implications in the South African political circumstances is to what extent a bill of rights should favour or support a capitalist or socialist economic order. A charter which rigidly and steadfastly protects the right of private ownership will in effect support capitalism, or at any rate protect the position of the currently economically privileged group, the "haves", one of the reasons for this being that expropriation and socialisation will not be possible. Such a charter may therefore be regarded by the present class of underprivileged persons, the "have nots", as an instrument of power in the hands of the ruling clique, which once again raises the question of credibility. The opposite extreme would be a charter which clearly envisages a socialist society, which affords the minimum protection for the right to private property, which puts the public welfare first, and which possibly contains concrete prescriptions regarding the redistribution of wealth. Such a charter would not, however, be acceptable to many whites and others who can at present be regarded as the "haves".
>
> The tension between capitalism and socialism and the demand for a redistribution of wealth cannot be ignored. Economic inequality and the attendant social conditions are undeniably part of the current South African crisis. That many black persons at present incline to socialism and Marxism, displaying a repugnance to the system of free

56 In a memorandum submitted to the Commission.

enterprise, is understandable. Through scores of discriminatory and restrictive measures they have long been excluded from the advantages which a system of free enterprise is supposed to offer. In their eyes, therefore, such a system does not represent equality of opportunity. (Cf, for example, L Louw and F Kendall South Africa - The Solution 1986 47 et seq, 59 et seq, 93 et seq and 103 et seq). Their call for change therefore necessarily includes the demand for change in the present economic dispensation. In particular, it involves the demand that wealth be "redistributed". This need is already clear in the Freedom Charter: land must be parcelled out to those who work it, unused houses and residential facilities must be made available to "the people", and so on.

That wealth is unevenly distributed at the moment can be accepted, and likewise the fact that it is partly the result of unjust and discriminatory legislation and practices. A mere equal treatment clause would obviously not be sufficient to ensure equal opportunities after a long history of inequality. Active programmes and some or other process of "redistribution" are a necessity if a just and peaceful society is to be achieved. For lack of expertise in the economic field, this submission does not go into the numerous possibilities in connection with redistribution that have already been suggested (cf, for example, Louw and Kendall 93 et seq., 109 et seq and 173 et seq) and an attempt is made to avoid a choice between the extremes of "pure" capitalism and "pure" socialism.

6 The concept of private property as such has already become controversial in the development of human rights thought and particularly in the ideological differences within it. Here there was already a difference between the early human rights philosophers John Locke (1632-1704) and Jean-Jacques Rousseau (1712-78): Locke apparently recognised the right to own property as a basic right side by side with the right to life and the right to freedom; Rousseau did not do this and emphasised equality. (Cf, for example, J van der Westhuizen May 1982 De Rebus 204 206 and June 1982 De Rebus 263 265.) Of course, it was particularly the socialist and Marxist tendencies that were later to play a significant role.

As regards the traditional Christian concept of property, MacFarlane 93-94 writes:

> "The traditional Christian conception of property held that God had given man dominium over the earth, its fruits and its creatures to use, that God's purposes for man might be fulfilled. Private property was neither ordained by God nor required by Natural Law, but followed from the Fall from Grace and the institution of human law. Private property rights were not contrary to Natural Law, but were subject to the overriding requirements of dominium naturale that the earth and its products be used to sustain the lives of all mankind. John Locke, though often seen as the spiritual father of the inviolable and sacred rights of private property, remained firmly embedded in the older tradition. 'God the Lord and Father of all, has given no one of his Children such a Property; in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods; so that it cannot justly be denyd him, when his pressing Wants call for it. And therefore no Man could ever have a just Power over the Life of another, by Right of property in Land or Possessions.'"

MacFarlane 94 et seq discusses two theories which through the ages sought to give a rational explanation of the right to property, namely the personality theory and the labour theory. This writer deals with various other considerations and then concludes (at 101):

> "The right to property, because of its association with persons seeking to assert their power, wealth and privileges without due regard to others, needs to be subordinated to the basic requirements of those others, in particular to the requirements embodied in fundamental human rights. The rights most directly concerned are the rights to life, to liberty and security of the person, to freedom of expression and the right to freedom of association."

He then discusses (at 101 et seq) the relationship between the right to property and the right to life, to freedom and to security and to freedom of speech and freedom of association.

Many other scientific and philosophical discussions of the right to property as a possible human right have been published. (Cf, for example, the nine contributions in J Schwartländer and D Willoweit Das Recht des Menschen auf Eigentum 1983). It is not possible to go into these theories. The fact is that the right to property as a human right is theoretically controversial these days, that the right to acquire and retain property is recognised in many human rights charters, but often subject to limitations, and that the right to property is indeed an important and central given in the South African law of things at present.

The Indaba Bill of Rights (Article 7) provides for the protection of the right to own property, as well as for the state's right to expropriate under certain conditions and against compensation.

It is recommended that a bill of rights should not too concretely choose sides for or against capitalism or socialism. As stated above, points of dispute which may divide rather than unite the population should be avoided as far as possible so that the legal order can be kept as neutral, uncontroversial and acceptable as possible. On the other hand, those who draft a bill of rights should not ignore socio-economic realities and understandable expectations. A bill of rights should therefore not block the redistribution of wealth and protect the socio-economic status quo. The process of redistribution (or whatever other process of equalisation may be workable) need not, however, be prescribed in detail in such a charter.

Various possibilities can be left open, and in these both economic realities and political negotiation can be decisive. Expropriation, under certain conditions and against compensation, more or less as worded in Article 7(3) of the Indaba Bill of Rights and applied elsewhere, can be considered as a possibility. (Translation)

14.116 A Christian Protestant view is that of the Rev A J du Plessis of the Gereformeerde Kerk in Potchefstroom:[57]

> This right is closely linked to the right to life.
>
> In the Old and New Testaments the right of individuals to own property is indisputable.
>
> In the eighth commandment theft of another's property is forbidden (cf also Lev 19: 11) and in the tenth commandment the desire to obtain the property of another by unlawful means is likewise forbidden.
>
> As the earth belongs to the Lord (Ps 24) He alone is the Owner of all. But God grants possessions to people, entrusts possessions to them for their responsible stewardship and enjoyment (Eph 4: 28; Acts 5: 4; 2 Cor 9: 8; 1 Tim 6: 17, 18).
>
> Because the Lord is the Owner of all, he deprives the peoples inhabiting Canaan of the right to that land and He gives it to the tribes of Israel.
>
> In provisions such as the following the right to property (ownership thereof as well as respecting the right of others thereto) is recognised: Ex 22: 1-15 - prohibition of theft, killing of a housebreaker, damaging the property of another through negligence; Deut 19: 14 and 27: 17 - prohibition of the changing of boundaries; Deut 23: 24, 25 - permission to eat grapes and pluck ears in a neighbour's vineyard and field in case of hunger, but prohibition on taking along and using a sickle; Ex 23: 4, 5 - respect for the enemy's property. Connected with the right to property is the right to privacy. A provision in Deut 24: 10 that you may not enter your neighbour's house, even to fetch a borrowed thing, gives an illustration of this.
>
> That the right to property cannot apply without limitation is also indicated in the Bible. The capacity of one person or a group of persons to collect and increase property may fundamentally affect the other people. In the prophets monopolistic conditions which make the rich richer and the poor poorer are sharply condemned. Provisions such as those relating to the year of rest and jubilee (return of land to original owners and the release of those who have landed in prison for debt - cf Lev 25), which were meant to give the weak another chance, were clearly neglected at the time of the prophets. Once again, this protection of the weak goes hand in hand with the right to life.
>
> The right to property and the acquisition thereof can be extended to:
>
> * The right to a fair share in the resources of creation.

57 In a memorandum submitted to the Commission.

> * The right to privacy of person and dwelling. (Translation)

14.117 The Islamic Council of South Africa expresses the following standpoint in its memorandum to the Commission:

> Islam recognizes the individual's right to own property alone as well as in association with others, and accords it full protection. The legal right of ownership and the moral obligation of beneficent use and disposal have been co-ordinated and adjusted. No arbitrary seizure of property is permissible. The right to receive adequate compensation for property acquired by the State or a public authority for a public purpose has always been given effect to.
>
> Legal ownership of the individual, that is to say, the right of possession, enjoyment and transfer of property, is recognized and safeguarded in Islam. But all ownership is subject to the moral obligation that in all wealth all sections of society and even animals, have a right to share. "In their wealth they acknowledge the right of those who asked and of those who could not" (51.18). The object is to secure the widest and most beneficent distribution set by it and through moral exhortation. Wealth must remain in constant circulation among all sections and should not become the monopoly of the rich. (59.6)
>
> Islam recognized the diversity of capacities and talents which is in itself beneficent, and consequently the diversity in earnings and material rewards (4.32). It does not approve of dead-level equality in the distribution of wealth, as that would defeat the very purpose of the diversity and would amount to denying "the favour of Allah" (16.70). It is obvious that if the incentive or proportionate reward for labour, effort, skill and talent were to be removed not only would initiative and enterprise be adversely affected, but intellectual progress would also be arrested. On the other hand Islam does not leave the principle of competition and of proportionate rewards to work itself out mechanically; that too would lead to hardship and injustice and would retard the moral and spiritual development of individuals and of society as a whole.

14.118 The Pretoria Branch of Lawyers for Human Rights suggests the following property clause:

> All people shall be entitled to obtain such education and training to do such work and to earn such income as their inclinations, their skills and their talents make possible for them, and to own and occupy and use property anywhere; and no person's property shall be confiscated or expropriated without full and proper compensation being paid to him.

14.119 The Civil Rights League, in a submission to the Commission, warns against an unrestricted property clause:

> Similarly, wealthy classes and doctrinaire believers in Laissez-faire periodically seek to manipulate human rights into "property rights". This invariably means perpetuating the power of property owners over powerless consumers, tenants and employees.
>
> The consequence of this is to discredit the legitimacy alike of both a market economy and human rights. Entrenchment of "property rights" in their usual meaning, would certainly have blocked many of the State's measures to uplift "poor whites".

14.120 The Commission is of the opinion that a bill of rights is not the proper place for propagating a particular economic system. As has repeatedly been said, the basic purpose of a bill of rights is to depoliticise certain basic freedoms and aspirations of the ordinary man and woman by eliminating the infringement of basic rights. Ownership is one of the most basic aspirations of all South Africans, whether they be Whites, Coloureds, Indians or Black persons, and regardless of the group or class to which they belong. Even those who would like to see a redistribution of wealth would also like to have the right to property protected afterwards. Therefore, the problem is not the property clause, but the redistribution of existing wealth and means of production. What those who support this line of thought would apparently like to have is expropriation of assets without compensation, therefore confiscation, and for this reason a property clause would get in their way.

14.121 The Commission considers that to the vast majority of all South Africans a bill of rights without a property clause would be totally unacceptable. Our impression is that, so far as the right to property and means of production are concerned, the aspirations of all in our country will be satisfied if -

1. The right to property is guaranteed.

2. All discriminatory impediments to the acquisition, retention and ownership of property and means of production of any kind are abolished.

3. The possibility is created that the state, where necessary, will be able to expropriate property and means of production against fair compensation to be determined by the Supreme Court if it is not possible to reach agreement on the matter.

4. The objects of affirmative action are taken into account with regard to the powers of expropriation, as described above.

5. It is left to the normal political process in a democratic state to meet fluctuating economic needs on a continuous basis.

(Powers of expropriation against payment of fair compensation as determined by the Supreme Court is already part of our law by virtue of the provisions of the Expropriation Act 63 of 1975.)

M. Drittwirkung: protection against third parties

14.122 We have already noted that the purpose of a bill of rights is to provide checks and balances for legislation and the resultant executive and administrative acts which affect fundamental human rights.

14.123 However, the matter cannot be left at that, since the problem arises: what happens if the said rights are in fact infringed? As we have seen, the obvious remedy is an order which declares invalid and sets aside the infringing legislation. But what of an action for damages? And what of the case where other individuals or groups (as opposed to the state) infringe the right laid down.

14.124 This is the problem of Drittwirkung der Grundrechte, abbreviated to Drittwirkung or, in English, third party effect of fundamental rights.[58] The German term is commonly used because it is a problem that attracts the attention of German lawyers in particular since Article 25 of their

---

58 In this connection see especially Paul Sieghart The International Law of Human Rights Oxford: Clarendon Press 1983 43 et seq; Jaconelli Enacting a bill of rights Oxford: Clarendon Press 1980 9 et seq.

SOUTH AFRICAN LAW COMMISSION

PROJECT 58

GROUP AND HUMAN RIGHTS

INTERIM REPORT

August 1991

7.234 In the opinion of the Commission, no more than common law rights or freedoms are embodied in Article 14, and it is purely coincidental if they are characteristic of a capitalist structure. Moreover, the Commission knows of no economic system which has functioned successfully this century and was not based on free-market principles. Indeed, this has been proved by what has happened in Russia and Eastern Europe recently. On the other hand the Commission realises that rigid adherence to the present economic, fiscal and monetary policy may be unacceptable to a large part of the population. The article in question must therefore be capable of limitation by the legislature, such limitation to be testable, as explained, by the court against the criteria as laid down (see Article 34(1)).

7.235 Professor J Dugard of the University of the Witwatersrand also suggests that in the English text the word "intercourse" should read "enterprise". The Commission goes along with this.

10

7.236 The Durban Metropolitan Chamber of Commerce considers that there is a certain amount of overlap between Article 14 and Article 5. However, this objection falls away in view of the reformulation of Article 5.

7.237 The corresponding articles in the ANC's draft bill are 10.13 and 11.2, which read as follows:

> 10.13 In order to guarantee increasing enjoyment of the right to work, the State shall, in collaboration where appropriate with private bodies and non-governmental institutions:
>
> make technical and vocational training available to all,
>
> remove the barriers which keep large sections of the population out of technical, professional and managerial positions,
>
> and promote public and other works with a view to reducing unemployment.
>
> 11.2 All men and women and lawfully constituted bodies are entitled to the peaceful enjoyment of their possessions, including the right to acquire, own, or dispose of property

> in any part of the country without distinction based on race, colour, language, gender or creed.

7.238 As regards 10.13, it is not stated what the "barriers" are.

7.239 In these articles there is no guarantee of the fundamental right to establish commercial undertakings or to procure means of production or to offer employment. These are the cornertones of the free world, and the ANC's failure to recognise these rights is conspicuous. See, for example, Articles 16(1) and 21(1)(j) of the Namibian Bill and Article 13 of the KwaZulu Natal Bill, which do recognise and protect these rights.

7.240 The Commission proposes that Article 14 read as follows:

> Everyone has the right freely and on an equal footing to engage in economic enterprise, which right includes the capacity to establish, manage and maintain commercial undertakings, to acquire property and procure means of production and to offer or accept employment against remuneration.

[New Article 23]

(p) ARTICLE 15

7.241 Existing wording of Article 15

> The right to private property: Provided that legislation may in the public interest authorise expropriation against payment of reasonable compensation which shall in the event of a dispute be determined by a court of law.

7.242 Those who reacted to this article fall mainly into two groups. One group, including Professor L W H Ackermann of the University of Stellenbosch and Messrs Jules Browde, SC, and Barry Jammy of Lawyers for Human Rights, suggests that the article may stand in the way of future redistribution of land because it may not always be possible to pay reasonable compensation for expropriated land. On the other hand, Times Media Limited is afraid that the article sanctions the expropriation of all the land belonging to a particular group.

7.243 While realising only too well that a redistribution of land may be necessary, the Commission cannot agree with the view that compensation need not be paid for an expropriated right. That would, for example, be prejudicial to an individual whose ownership of land cannot be attributed directly or indirectly to previous discriminatory laws, or for that matter to members of a group which was in fact discriminated against. Moreover, a balanced programme of expropriation designed for redistribution of land should not be hampered by a lack of funds.

7.244 However, the Commission cannot agree with recommendations by respondents, such as the Law Society of the Transvaal and the Durban Metropolitan Chamber of Commerce, who in effect wish to see the words "for public purposes" substituted for "the public interest". Surely it is conceivable that the redistribution of land may satisfy the requirement of the public interest, but not that of public purposes.

7.245 The Cape Town Chamber of Commerce submits that the phrase "the right to private property" should read "the right to own property", adding that the article should also provide for the lessee on the basis of the maxim "hire goes before sale". It was, in fact, the intention of the Commission to include any real right concerning land under Article 15. For the sake of clarity, however, a reformulation is needed. The same applies to the right of joint ownership.

7.246 The International Freedom Foundation argues that the powers of the legislature to authorise expropriation or executive acts under expropriation legislation must be justiciable by a court of law. It is self-evident, however, that a court will be able to decide whether any particular instance of expropriation does in fact serve the public interest.

7.247 A question considered by the Commission is whether the common-law capacity of an owner to abuse his property (the jus abutendi) should not be proscribed in the bill of rights. Although there is much to be said for the idea the position is that if the right of ownership can be curtailed by legislation in the public interest, etc., the legislature can prohibit particular abuses and misuses. A general clause is therefore not necessary.

7.248 Further to what has been stated above, it goes without saying that the legislature may on the grounds of state security, the public interest and the like (see the new Article 34) curtail the right of ownership. But at the same time it is clear that the duty of the state to pay compensation in the event of expropriation should not be capable of limitation. To make this technically possible the article relating to ownership of property must therefore be divided into two parts so that the restrictive clause applies only to the first part.

7.249 The corresponding articles in the ANC's draft bill are 11.2, 11.3, 11.4, 11.5, 11.7, 11.8, 11.9, 11.10 and 11.11, which read as follows:

> 11.2 All men and women and lawfully constituted bodies are entitled to the peaceful enjoyment of their possessions, including the right to acquire, own, or dispose of property in any part of the country without distinction based on race, colour, language, gender or creed.
>
> 11.3 All natural resources below and above the surface area of the land, including the air, and all forms of potential energy or minerals in the territorial waters, the continental shelf and the exclusive economic zone of South Africa, which are not owned by any person at the time of coming into force of this Constitution, shall belong to the State.

11.4 The State shall have the right to regulate the exploitation of natural resources, grant franchises and determine royalties, subject to payment of appropriate compensation in the event of interference with any lawfully vested interest.

11.5 The State may by legislation take steps to overcome the effects of past statutory discrimination in relation to the enjoyment of property rights.

11.7 No persons or legal entities shall be deprived of their possessions except on grounds of public interest or public utility, including the achievement of the objectives of the Constitution.

11.8 Any such deprivation may be effected only by or pursuant to a law which shall provide for the nature and the extent of compensation to be paid.

11.9 Compensation shall be just, taking into account the need to establish an equitable balance between the public interest and the interest of those affected.

11.10 In the case of a dispute regarding the amount of compensation or its mode of payment, provision shall be made for recourse to a special independent tribunal, with an appeal to the courts.

11.11 The preceding provisions shall not be interpreted as in any way impeding the right of the State to adopt such measures as might be deemed necessary in any democratic society for the control, use or acquisition of property in accordance with the general interest, or to preserve the environment, or to regulate or curtail monopolies or to secure the payment of taxes or other contributions or penalties.

12

7.250 It will immediately be noted that although lip service is paid to the concept of private property, this concept is undermined rather than respected. We mention only the following unacceptable aspects:

(i) In article 11.4 the existing right of ownership in any natural resource is simply overturned, since now the state is given a full say as to the use thereof. The state may arbitrarily grant rights to such resources, and the owner will have to be content with the payment of "appropriate compensation".

(ii) As regards the payment of compensation in the case of expropriation under article 11.4, as well as the articles that follow, the draft bill is very unsatisfactory. According to article 11.8, legislation determines "the nature and the extent" of the compensation payable. The party expropriated has the right, in terms of article 11.10, to dispute only the amount of the compensation and the mode of payment, in which case the compensation is determined by a "special independent tribunal" with an appeal to the courts.

In the first place there is obviously a contradiction between articles 11.8 and 11.10. If legislation under article 11.8 has determined "the nature and the extent" of the compensation, then, to put the most favourable construction on it, the chances of a dispute about "the amount of compensation" are extremely remote, that is to say if any such chances exist at all. For instance, if legislation provided that the owner would be compensated in terms of article 11.8 "to the extent" of one tenth of the market value of the property or right expropriated, then the party expropriated would never be able to appeal against the inequity of the measure and the courts would have no testing right, for the simple reason that article 11.8 authorises, without limitation, legislation which determines "the nature and the extent" of the compensation. The only recourse that the party expropriated would have would be to dispute the amount - he would be able to dispute the market value - but once the court had decided on that, cadit quaestio.

Then again legislation under article 11.8 could also determine the "nature" of the compensation. This allows for legislation that authorises payment in natura, or by means of government stocks and debentures, instead of cash. No matter how unreasonable and unacceptable such modes of payment might be to the party expropriated, he would have no recourse to the courts, because article

11.8 in fact sanctions such legislation. [illegible] 11.10, all he would be able to do is to dispute the amount and "its mode of payment". The "its" refers to the amount of money, and not to other modes of payment.

In short, the whole question of compensation upon expropriation is manipulated in such a way as to enable the state to act arbitrarily. The ANC's bill therefore provides, in a manner which hardly disguises the aim, for nationalisation of private property without objectively testable norms for compensation.

(iii) To complete the picture there is the creation of a "special independent tribunal" in article 11.10 to determine the amount of the compensation and the mode of payment in the event of a dispute. Why such a tribunal will be necessary and by whom it will be manned is not stated. This poses the very real danger, the distinct possibility even, that the legislature will arbitrarily determine how such a tribunal is to be constituted and who will serve on it.

Add to this, as has already been said, that the legislature can determine the nature and the extent of the compensation in untestable legislation, and it becomes clear that the person expropriated is at the mercy of the legislature's whim once he is deprived of his property.

The possibility of an appeal to the courts as created in article 11.10 is, given the said circumstances, useless and misleading. According to the ANC's bill, the courts cannot test the legislation which determines the nature and the extent of the compensation. At most, they can play a rather mechanical role when it comes to determining the amount and the mode of payment in accordance with the principles laid down in the legislation.

In any case, it is not clear why, in addition to the courts, there should be a special tribunal, unless it is foreseen that expropriation will take place on so large a scale that the courts will be unable to cope with the litigation.

All of this confirms that what is intended is in fact nothing but nationalisation under the cloak of expropriation.

(iv) That the conclusion arrived at above is not unjustified is apparent, moreover, from the thinly disguised motives evident in articles 11.4, 11.5, 11.7, 11.9 and 11.11. It is clear that the expropriation aimed at here is designed to secure state control over property (article 11.4) "to overcome the effects of past statutory discrimination in relation to enjoyment of property rights" (article 11.5) and to secure "the achievement of the objectives of the Constitution" (article 11.7). The compensation must also be determined in accordance with the alleged need "to establish an equitable balance between the public interest and the interest of those affected" (article 11.9). All this is subject to the principle that all the articles aimed at the protection of the right of ownership and the payment of compensation must in no way be capable of restraining the state from adopting such measures as may be deemed necessary in a democratic society for the control, use or acquisition of property in the public interest, or for the conservation of the environment, or "to regulate or curtail monopolies", or to ensure the payment of taxes "or other contributions or penalties". (Our emphasis.)

This article makes it possible for the state to brush aside the principle of expropriation against compensation, enfeebled as it already appears to be by

the foregoing sub-articles of article 11, and to introduce naked nationalisation without compensation, without any testing right for the courts, without protection for those prejudiced. Thus, for example, the state would be able to contend under article 11.11 that it wished to acquire farms or mines or companies from certain owners, using the argument that an equitable distribution of such assets would be in the public interest. The acquisition could be arbitrarily effected under article 11.11 without payment of any compensation, because article 11.11 expressly provides that in such a case the preceding provisions of article 11 do not apply.

In addition, the state would be able to justify the above-mentioned acquisition by saying that it is necessary in order to regulate or limit monopolies. Those prejudiced would be left without recourse or remedy. Even worse, this article would make it possible for the state to exact totally unrealistic and unjustifiable "contributions" or "penalties" from such owners, and if they defaulted the state would be able to take their property. Once again there is no testing right for the courts, because article 11.11 expressly authorises such action.

7.251 Behind the provisions of article 11, and particularly article 11.11, the Commission therefore sees naked and arbitrary nationalisation of private property of whatever nature without the courts being able to protect those prejudiced in any way whatever. The Commission finds these provisions totally unacceptable and feels obliged to sound a serious warning against the introduction of such provisions in any proposed bill of rights, law or constitution.

The article proposed by the ANC compares badly with Article 16 of the Namibian Bill, which recognises private ownership of property and which, explicitly and without all sorts of hidden procedures

and chicanery, provides that in the event of expropriation fair compensation shall be paid.

7.252 The Commission proposes that the property clause read as follows:

(a) Everyone has the right individually or jointly with others to be or to become the owner of private property or to have a real right in private property or to acquire such right or to be or to become entitled to any other right.

(b) Legislation may authorise the expropriation of any property or other right in the public interest and against payment of just compensation, which in the event of a dispute shall be determined by a court of law.

[New Article 22]

(q) ARTICLES 16 AND 17

7.253 We shall consider these two articles together.

Article 16

The right to associate freely with other groups and individuals.

Article 17

The right of every person or group to disassociate himself or itself from other individuals or groups: Provided that if such disassociation constitutes discrimination on the ground of race, colour, religion, language or culture, no public or state funds shall be granted directly or indirectly to promote the interests of the person who or group which so discriminates.

7.254 A large number of respondents commented on these articles. Among them, Mr J A N Venter, Professor Johann van der

A Bill of Rights for A New South Africa

A Working Document by the
ANC CONSTITUTIONAL COMMITTEE

where appropriate with private bodies and non-governmental institutions:

make technical and vocational training available to all,

remove the barriers which keep large sections of the population out of technical, professional and managerial positions,

and promote public and other works with a view to reducing unemployment.

The Right to a Minimum Income and Welfare Rights

14. In order to guarantee the achievement of a minimum income for all, the State shall introduce a scheme of family benefits and old age pensions financed from general revenue.

15. In order to guarantee the enjoyment of basic social welfare rights, in particular unemployment benefits, compensation for injury, superannuation or retirement pensions, the State shall, in collaboration where appropriate with private bodies, establish a system of national insurance based upon contributions by employers, employees and other interested persons.

Article 11.
THE ECONOMY, LAND AND PROPERTY

1. Legislation on economic matters shall be guided by the principle of encouraging collaboration between the State and the private, co-operative and family sectors with a view to reducing inequality, promoting growth and providing goods and services for the whole population.

2. All men and women and lawfully constituted bodies are entitled to the peaceful enjoyment of their possessions, including the right to acquire, own, or dispose of property in any part of the country without distinction based on race, colour, language, gender or creed.

3. All natural resources below and above the surface area of the land, including the air, and all forms of potential energy or minerals in the territorial waters, the continental shelf and the exclusive economic zone of South Africa, which are not owned by any person at the time of coming into force of this Constitution, shall belong to the State .

4. The State shall have the right to regulate the exploitation of natural resources, grant franchises and determine royalties, subject to payment of appropriate compensation in the event of interference with any lawfully vested interest.

5. The State may by legislation take steps to overcome the effects of past statutory discrimination in relation to enjoyment of property rights.

6. There shall be no forced removals of persons or communities from their homes or land on the basis of race, colour, language, gender or creed.

7. No persons or legal entities shall be deprived of their possessions except on grounds of public interest or public utility, including the achievement of the objectives of the Constitution.

8. Any such deprivation may be effected only by or pursuant to a law which shall provide for the nature and the extent of compensation to be paid.

9. Compensation shall be just, taking into account the need to establish an equitable balance between the public interest and the interest of those affected.

10. In the case of a dispute regarding the amount of compensation or its mode of payment, provision

shall be made for recourse to a special independent tribunal, with an appeal to the courts.

11. The preceding provisions shall not be interpreted as in any way impeding the right of the State to adopt such measures as might be deemed necessary in any democratic society for the control, use or acquisition of property in accordance with the general interest, or to preserve the environment, or to regulate or curtail monopolies or to secure the payment of taxes or other contributions or penalties.

Article 13.
AFFIRMATIVE ACTION

1. Nothing in the Constitution shall prevent the enactment of legislation, or the adoption by any public or private body of special measures of a positive kind designed to procure the advancement and the opening up of opportunities, including access to education, skills, employment and land, and the general advancement in social, economic and cultural spheres, of men and women who in the past have been disadvantaged by discrimination.
2. No provision of the Bill of Rights shall be construed as derogating from or limiting in any way the general provisions of this Article.

Article 14.
POSITIVE ACTION

1. In its activities and functioning, the State shall observe the principles of non-racialism and non-sexism, and encourage the same in all public and private bodies.
2. All benefits conferred and entitlements granted by the State shall be distributed on a non-racist and a non-sexist basis.
3. The State and all public and private bodies shall be under a duty to prevent any form of incitement to racial, religious or linguistic hostility and to dismantle all structures and do away with all practices that compulsorily divide the population on grounds of race, colour, language, or creed.
4. With a view to achieving the above, the State may enact legislation to prohibit the circulation or possession of materials which incite racial, ethnic, religious, gender or linguistic hatred, which provoke violence, or which insult, degrade, defame or encourage abuse of any racial, ethnic, religious, gender or linguistic group.

5. All organs of the State at the national, regional and local levels shall pursue policies and programmes aimed at redressing the consequences of past discriminatory laws and practices, and at the creation of a genuine non-racial democracy in South Africa.

6. Such policies shall include the implementation of programmes aimed at achieving speedily the balanced structuring in non-racial form of the public service, defence and police forces and the prison service.

7. Without interfering with its independence, and with a view to ensuring that justice is manifestly seen to be done in a non-racial way and that the wisdom, experience and judicial skills of all South Africans are represented on the bench, the judiciary shall be transformed in such a way as to consist of men and women drawn from all sectors of South African society.

8. In taking steps to correct patterns or practices of discrimination, special attention shall be paid to rectifying the inequalities to which women in South Africa have been subjected, and to ensuring their full, equal, effective and dignified participation in the political, social, economic and cultural life of the nation.

9. Legislation may be enacted requiring non-governmental organisations and private bodies to conduct themselves in accordance with the above principles.

Article 16
ENFORCEMENT

General

1. The fundamental rights and freedoms contained in this Bill of Rights shall be guaranteed by the courts.
2. Provision shall be made for the establishment of a constitutional court.
3. The terms of the Bill of Rights shall be binding upon the State and organs of government at all levels, and where appropriate, on all social institutions and persons.
4. All persons who claim that rights guaranteed them by the Bill of Rights have been infringed or threatened, shall be entitled to apply to a competent court for an order for the declaration or enforcement of their rights, or for the restraining of any act which impedes or threatens such rights.
5. Any law or executive or administrative act which violates the terms of the Bill of Rights shall be invalid to the extent of such violation, save that the Court shall have the discretion in appropriate cases to put the relevant body or official to terms as to how and within what period to remedy the violation.

Human Rights Commission

6. Parliament shall have a special responsibility for ensuring that the basic social, educational, economic and welfare rights set out in this Bill of Rights are respected.
7. Parliament shall establish by legislation a Human Rights Commission to promote observance of the Bill of Rights.
8. Such Commission shall have the right to establish agencies for investigating patterns of violation of any of the terms of the Bill of Rights and for receiving complaints and bringing proceedings in court where appropriate.
9. The Commission shall monitor proposed legislation with a view to reporting to Parliament on its impact on the realisation of the rights set out in the Bill of Rights.

ANC. DRAFT. — New Land Clause

NEW ARTICLES ON SOCIAL RIGHTS, LAND AND PROPERTY FOR THE DRAFT BILL OF RIGHTS

Arising out of the discussions at the workshop at the Salt Rock Hotel, the following revised texts are proposed:

(a) The present Article 10 entitled Social, Educational, Economic and Welfare Rights should be replaced by a new Article 10 as follows

ARTICLE 10 SOCIAL, EDUCATIONAL AND WELFARE RIGHTS

(1) All men and women have the right to enjoy basic social, educational and welfare rights.

(2) Legislation shall be adopted guaranteeing, within the limits of available resources, that all men, women and children shall be able to enjoy a progressively expanding floor of minimum social, educational and welfare rights.

(3) In order to achieve such a common floor of rights for the whole country, resources may be diverted from richer to poorer areas, and timetables may be established for the phased extention of legisation and the minimum standards from area to area.

(4) Special attention shall be paid to securing freedom from hunger, reducing and where possible eliminating homelessness, unemployement and illiteracy, and to providing basic utilities, such as water and electricity, for all.

(5) Primary education shall be free and compulsory, and provision shall be made for facilitating access to secondary and tertiary education on an equal basis for all.

(6) Education shall be directed towards the development of the human personality and a sense of personal dignity, and shall aim at strengthening respect for human rights and fundamental freedoms and promoting understanding, tolerance and friendship amongst South Africans and between nations.

(7) A comprehensive national health service shall be established linking health workers, community organisations, state institutions, private medical schemes and individual medical pratitioners so as to provide hygiene education, preventative medicine and health care delivery to all.

(8) Comprehensive schemes of national insurance, funded by general revenue, contributions or such other sources as may be appropriate, shall be established to guarantee the furnishing of old-age pensions, family income benefits, superannuation payments, compensation for injury and unemployment benefits and such other welfare entitlements as citizens in a modern state may expect.

(The following section is proposed for ARTICLE 16 - ENFORCEMENT)

SOCIAL RIGHTS COMMISSION

(10) Parliament shall establish a Social Rights Commission to promote the realisation of basic social, educational and welfare rights.

(11) Such Commission shall have the right to create agencies to monitor progress being made in the materialisation of these rights, report on and make proposals for the removal of impediments to their achievements, and require the furnishing to Parliament, regional and local authorities and to the public at large of all such information as would assist in bringing about their realisation.

(12) The Courts shall enforce such social, education and welfare rights as are established by legislation, and shall pay due regard to social, educational and welfare rights when considering the interpretation of statutes, the validity of subordinate legislation and the reasonableness of administrative actions.

(13) Where justice and the achievement of the objectives of the Bill of Rights so require, the state or any private body or individual may be restrained by the Courts from doing anything which interferes with or reduces enjoyment of these rights or impedes their realisation.

PROPOSAL FOR AN ENTIRELY NEW ARTICLE ENTITLED -

ARTICLE 11 - LAND AND THE ENVIRONMENT

(1) The land, the waters and the sky and all the natural assets which they contain, are the common heritage of the people of South Africa who are equally entitled to their enjoyment and responsible for their conservation.

(2) The system of property rights in relation to land shall take into account that it is the country's primary asset, the basis of life's necessities, and a finite resource.

Rights to Land

(3) South Acrica belongs to all who live in it.

(4) Access to land or other living space is the birthright of all South Africans.

(5) No-one shall be removed from his or her home except by order of a Court, which shall take into account the existence of reasonable alternative accommodation.

(6) Legislation shall provide that the system of administration, ownership, occupation, use and transfer of land is equitable, directed at the provision of adequate housing for the whole population, promotes productive use of land and provides for stable and secure tenure,

(7) In order to address the affects of past statutory discrimination, legislation shall provide for restoration of land to people dispossessed by forced removals and for the provision of affordable land to those historically deprived of land and land rights or access to land by such statutory discrimination.

(8) The legislation shall guarantee fair procedures and be based on the principle of achieving an equitable balance between the public interest, including the above objectives, and the interests of those whose existing titles might be affected.

(9) Any redistribution of land or interest in land required to achieve the above objectives shall be subject to just compensation which shall be determined according to the principle of equitable balance between public interest and the interest of those whose existing titles might be affected.

(10) In the case of a dispute regarding the amount of the compensation or its mode of payment, provision shall be made for recourse to an independent tribunal, with an appeal to the courts.

(11) All natural resources below and above the surface area of the land, including the air, and all forms of potential energy or minerals in the territorial waters, the

continental shelf and the exclusive economic zone of South Africa, shall be vested in the State acting as trustee for all South Africans.

(12) The State shall have the right to regulate the exploitation of such natural resources, grant franchises and determine royalties subject to payment of appropriate compensation in the event of interference with any existing title, mining right or concession.

Environmental Rights [Note: this is unchanged]

(13) All men and women shall have the right to a healthy and econologically balanced environment and the duty to defend it.

(14) In order to secure this right, the State, acting through appropriate agencies and organs shall conserve, protect and improve the environment, and in particular:

(i) prevent and control pollution of the air and waters and degradation and erosion of the soil;

(ii) Have regard in local, regional and national planning to the maintenance or creation of balanced ecological and biological areas and to the prevention or minimising of harmful effects on the environment;

(iii) promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability.

(iv) ensure that long-term damage is not done to the environment by industrial or other forms of waste;

(v) maintain, create and develop natural reserves, parks and recreational areas and classity and protect other sites and landscapes so as to ensure the preservation and protection of areas of outstanding cultural, historic and natural interest.

(15) Legislation shall provide for co-operation between the State, non-governmental organisations, local communities and individuals in seeking to improve the environment and encourage ecologically sensible habits in daily life.

(16) The law shall provide for approporiate penalities and reparation in the case of any direct and serious damage caused to the environment, and permit the interdiction by any interested person or by any agency established for the purpose of protecting the environment, of any public or private activity or undertaking which manifestly and unreasonably causes or threatens to cause irreparable damage to the environment.

It is proposed that a new ARTICLE 13 be introduced to replace present ARTICLE 11 - THE ECONOMY, LAND AND PROPERTY.

ARTICLE 13 - PROPERTY AND ECONOMIC LIFE

(1) All South Africans shall have equal rights to hold property and take part in economic life.

(2) The content and limits of the right to property and inheritance, shall be determined by law.

(3) Property imposes obligations and shall serve the public good.

(4) The taking of property shall only be permissible in the public interest, and shall be effected according to a law providing for just compensation to be determined by establishing an equitable balance between the public interest and the interest of those affected.

(5) In the case of a dispute regarding the amount of compensation or its mode or payment, provision shall be made for recourse to a special independent tribunal, with an appeal to the Courts.

(6) The above provisions shall not be interpreted as in any way impeding the right of the State to adopt such measures as might be deemed necessary in a democratic society with a mixed economy for the control, use or acquisition of

property in accordance with the general interest, or to preserve the environment, or to regulate or curtail monolopies or to secure the payment of taxes or other contributions or penalities.

be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Cultural and Educational Rights

Protection of interests of minorities.

29. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Right of minorities to establish and administer educational institutions.

30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

[(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.]

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

* * *

31. [*Compulsory acquisition of property.*] *Rep. by the Constitution (Forty-fourth Amendment) Act*, 1978, *s.* 6 (*w.e.f.* 20-6-1979).

[Ins. by the Constitution (Forty-fourth Amendment) Act, 1978, s. 4 (w.e.f. 20-6-1979).

[The sub-heading "*Right to Property*" omitted by s. 5, *ibid.* (w.e.f. 20-6-1979).

[*Saving of Certain Laws*]

Saving of laws providing for acquisition of estates, etc.

[1][31A. [2][(1)] Notwithstanding anything contained in article 13, no law providing for—

(*a*) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(*b*) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(*c*) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(*d*) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(*e*) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by [article 14 or article 19]:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:]

[2][Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal

---

[1]Ins. by the Constitution (Forty-second Amendment) Act, 1976, s. 3 (w.e.f. 3-1-1977).

[2]Ins. by the Constitution (First Amendment) Act, 1951, s. 4 (with retrospective effect).

[3]Subs. by the Constitution (Fourth Amendment) Act, 1955, s. 3, for cl. (1) (with retrospective effect).

[4]Subs. by the Constitution (Forty-fourth Amendment) Act, 1978, s. 7, for "article 14, article 19 or article 31" (w.e.f. 20-6-1979).

[5]Ins. by the Constitution (Seventeenth Amendment) Act, 1964, s. 2.

CHAPTER II.—BORROWING

Borrowing by the Government of India.

292. The executive power of the Union extends to borrowing upon the security of the Consolidated Fund of India within such limits, if any, as may from time to time be fixed by Parliament by law and to the giving of guarantees within such limits, if any, as may be so fixed.

Borrowing by States.

293. (1) Subject to the provisions of this article, the executive power of a State extends to borrowing within the territory of India upon the security of the Consolidated Fund of the State within such limits, if any, as may from time to time be fixed by the Legislature of such State by law and to the giving of guarantees within such limits, if any, as may be so fixed.

(2) The Government of India may, subject to such conditions as may be laid down by or under any law made by Parliament, make loans to any State or, so long as any limits fixed under article 292 are not exceeded, give guarantees in respect of loans raised by any State, and any sums required for the purpose of making such loans shall be charged on the Consolidated Fund of India.

(3) A State may not without the consent of the Government of India raise any loan if there is still outstanding any part of a loan which has been made to the State by the Government of India or by its predecessor Government, or in respect of which a guarantee has been given by the Government of India or by its predecessor Government.

(4) A consent under clause (3) may be granted subject to such conditions, if any, as the Government of India may think fit to impose.

CHAPTER III.—PROPERTY, CONTRACTS, RIGHTS, LIABILITIES, OBLIGATIONS AND SUITS

Succession to property, assets, rights, liabilities and obligations in certain cases.

294. As from the commencement of this Constitution—

(*a*) all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such com-

mencement were vested in His Majesty for the purposes of the Government of each Governor's Province shall vest respectively in the Union and the corresponding State, and

(*b*) all rights, liabilities and obligations of the Government of the Dominion of India and of the Government of each Governor's Province, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State,

subject to any adjustment made or to be made by reason of the creation before the commencement of this Constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab.

Succession to property, assets, rights, liabilities and obligations in other cases.

295. (1) As from the commencement of this Constitution—

(*a*) all property and assets which immediately before such commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List, and

(*b*) all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities or obligations were incurred before such commencement will thereafter be purposes of the Government of India relating to any of the matters enumerated in the Union List,

subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

(2) Subject as aforesaid, the Government of each State specified in Part B of the First Schedule shall, as from the commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in clause (1).

Property accruing by escheat or lapse or as *bona vacantia*.

296. Subject as hereinafter provided, any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union:

Provided that any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in the possession or under the control of the Government of India or the Government of a State shall, according as the purposes for which it was then used or held were purposes of the Union or of a State, vest in the Union or in that State.

Explanation.—In this article, the expressions "Ruler" and "Indian State" have the same meanings as in article 363.

Things of value within territorial waters or continental shelf and resources of the exclusive economic Zone to vest in the Union.

[**297.** (1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.

(2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

(3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament.]

[Subs. by the Constitution (Fortieth Amendment) Act, 1976, s. 2, for art. 297 (w.e.f. 27-5-1976).

[298. The executive power of the Union and of each State shall extend to the carrying on by the Government of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose: Power to carry on trade, etc.

Provided that—

(*a*) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and

(*b*) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.]

299. (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor [***] of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor [***] by such persons and in such manner as he may direct or authorise. Contracts.

(2) Neither the President nor the Governor [***] shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

300. (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and Suits and proceedings.

---

[1]Subs. by the Constitution (Seventh Amendment) Act, 1956, s. 20, for art. 298.

[2]The words "or the Rajpramukh" omitted by s. 29 and Sch., *ibid.*

[3]The words "or the Rajpramukh" omitted by s. 29 and Sch., *ibid.*

PART XII.—Finance, Property, Contracts and Suits—
Arts. 300-300A.)

may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

(2) If at the commencement of this Constitution—

(*a*) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(*b*) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

[CHAPTER IV.—RIGHT TO PROPERTY

Persons not to be deprived of property save by authority of law.

300A. No person shall be deprived of his property save by authority of law.]

[Ins. by the Constitution (Forty-fourth Amendment) Act, 1978, s. 34 (w.e.f. 20-6-1979).

(3) In all other respects, this inviolability may not be encroached upon or restricted except to avert a common danger or a mortal danger to individuals, or, pursuant to a law, to prevent imminent danger to public safety and order, especially to alleviate the housing shortage, to combat the danger of epidemics or to protect endangered juveniles.

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 case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts.

Article 15 (Socialization)

Land, natural resources and means of production may for the purpose of socialization be transferred to public ownership or other forms of publicly controlled economy by a law which shall provide for the nature and extent of compensation. In respect of such compensation the third and fourth sentences of paragraph (3) of Article 14 shall apply mutatis mutandis.

Article 16 (Deprivation of citizenship, Extradition Right of asylum)

(1) No one may be deprived of his German citizenship. Loss of citizenship may arise only pursuant to a law, and against the will of the person affected only if such person does not thereby become stateless.

(2) No German may be extradited to a foreign country. Persons persecuted on political grounds shall enjoy the right of asylum.

I. Bill of Rights in the United States Constitution

First Ten Amendments

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE THIRTEEN

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United

States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE FOURTEEN

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for President and Vice-President of the United States, representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male members of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

INSULATING LAND REFORM FROM CONSTITUTIONAL IMPUGNMENT: AN INDIAN CASE STUDY.

John Murphy*

Introduction

This essay attempts a "broad spectrum" analysis of the linkage between the political and legal processes in the steps undertaken after independence to "socialise" the Indian rural economy by way of land reform. Many parallels can be drawn between the Indian experience and the current situation in South Africa. Not least, both countries share the urgency of all developing nations to achieve greater social justice through a re-distribution of wealth. As part of its quest for freedom, India too faced the formidable burden of delivering the mass of its people from poverty and ignorance. The popular demand for the elimination of vast disparities in wealth was accompanied by calls for social control over the commanding heights of the economy. Once it came to power the Congress Government embarked on a directive policy of socialization and land reform as the means of attaining political equality in the economy. The process contributes an intriguing comparative case study.

Whether or not the two countries are certain to have in common emanates from the human rights orientation of their popular democratic struggles against domination. The Constituent Assembly which drew up India's Constitution adopted a Bill of Rights incorporating first and second generation rights and leading to the transformation of the legal system from one based on the doctrine of parliamentary sovereignty to one bestowing a more extensive power of judicial review.[1] South Africa seems set to follow suit.

The foremost responsibility facing the new Indian government was to evolve a developmental policy responsive to the

---

* BA LLB, Attorney, Senior Lecturer in Law UWC.

1. The Bill of Rights is found in Part III of the Constitution. Part IV contains the Directive Principles of State Policy. Art 13 affords the remedy for protection against violation of the fundamental rights. Art 13(2) enjoins the State from making any law which takes away or abridges the rights conferred by Part III, and any law made in contravention of the prohibition shall to the extent of the contravention be void. Art 13(1) declares inconsistent laws made *before* the Constitution to be void to the extent of the inconsistency. A subject complaining of violation can move the High Courts or the Supreme Court for issue of a writ of prohibition, mandamus, certiori, habeas corpus or

rising expectations of a people, though freed from political bondage, still ground down by poverty and a scarcity of skills and resources. In his autobiographical account of Indian politics,[2] written before independence, Nehru recommended what he termed "planned development" as the rightful course for India's liberation. Planned development, essentially socialist planning, signified high levels of public ownership of basic industries and the collective control of land.

Nehru, in his time a committed socialist, took it upon himself to pilot the property clauses through the Constituent Assembly which drew up India's constitution. In his motivating speech he affirmed the government's commitment to pay compensation for petty acquisitions of property. He argued convincingly, however, that compensation for large schemes of social engineering should be fair and equitable from the point of view of society, and could not be determined on the same principles applicable to individual expropriation. In cases of social reform, legislative policy should prevail over judicial interpretation. Nothing must prevent, he argued, the view, a circumscribed right to property and a restricted power of judicial review in respect of property rights were imperative to the proper functioning of planned development and social economic reform.[3]

He remarked:

> "Eminent lawyers have told us that on a proper construction of this clause, normally speaking, the judiciary should not and does not come in. Parliament fixes either the compensation itself or the principles governing the compensation and they should not be challenged except for one reason, where it is thought that there has been a gross abuse of the law, where in fact, there has been a fraud on the Constitution."[4]

The Indian Supreme Court, as shall see, did not agree with the legal advice upon which Nehru chose to rely. In its opinion, legislative schemes of social engineering affecting property rights and the vow to bring the commanding heights of the economy under public control fell squarely within the purview of judicial review allowed by Part III of the Constitution. The judges enlarged their review power in two

---

2. **Discovery of India** Meridan Books (1956) @ 535

3. For a full account of Nehru's speech see Seervai: **Constitutional Law of India** Vol 2 Tripathi Ltd. Bombay 1984 @ 1097-8

4. Constituent Assembly Debates Vol 9 1195-6 cited by Seervai: **Constitutional Law of India** Vol 2 1097

ways. Firstly, they tried, and partially succeeded, to subject state takings of property to a test of reasonableness. Second, they assumed to themselves the right to review the quantum and manner of compensation insisting upon full indemnification for the deprived property holder. The constitutional cases which arose out of the early land reforms in India are of added interest in that they acquaint us with the order of the schemes contrived by the Indian government to accomplish a dispensation of public economic control, while operating under bills of rights constraints.

This essay examines the three topics in turn. It makes no pretence at a comprehensive analysis of the right to property in all its attributes or dimensions. The aim primarily is to uncover the workings of judicial review as it affected land reform and to discover salient points of comparison for lawyers in a democratic South Africa.

The right to property, state power and reasonableness

The eventual demise of the fundamental right to property guaranteed by Art 19(1)(f) and Art 31 of the Indian Constitution from the list of salient issues in the framers of a new constitution for South Africa, in the period between its adoption in 1950 and its removal from Part III by the 44th Amendment in 1978, it was the subject of much protracted litigation and consequent legislative amendment.

Art 19(1)(f) read:

> "All citizens shall have the right ...to acquire, hold and dispose of property..."

It has to be read with Art 19(5) which authorised restrictions upon the right. It read, in so far as it was relevant:

> "Nothing in sub-clause.....(f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clause...in the interests of the general public..."

The pertinent portion of Art 31, as originally enacted, read:

> (1) No person shall be deprived of his property save by authority of law.
>
> (2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of

or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of compensation , or specifies the principles on which the compensation is to be determined and given.

Art 19(1)(f) by positive declaration expressly granted to Indian citizens the fundamental right to acquire, hold and dispose of property and allowed for reasonable restrictions upon it. Art 31 delimited the authority of the state to take property. By the necessary implication of that delimitation of power it granted rights to the individual to keep goverment at bay. Generally it guaranteed that property would not be acquired or requisitioned for public purposes by the state save by authority of a law which provided for compensation for the property so acquired by either fixing the amount or by specifying the principles for its determination. The rights bestowed were themselves subject to exceptions in sub-clauses (4), (5) and (6), in terms whereof the sovereign power was supreme.[5]

State power to interfere in property has three categories: the power of eminent domain, the police power and the taxing power. The expressions derive from American doctrine but their descriptiveness of universal aspects of constitutional power has gained them recognition in international tribunals and in municipal systems governed by Bills of Rights such as India. Eminent domain comprises the power to take property for public purposes against payment of compensation. The police power also entails a deprivation of property but ordinarily limits rights between citizens in relation to their property. It establishes a system of internal restriction over the intercourse of citizens inter se. The eminent domain power sets out to fulfil a state obligation to the people. In exercising police power the state invades private property not on its own account for the implementation of its own public purpose but for protecting the interests of the community. The police power aims to protect and prevents people from using their own property in a way prejudicing others. In such instances there is less of a legitimate claim, if any, for compensation for the deprivation.[6]

---

5. These are discussed more fully in the ensuing text.

6. For a full discussion of the distinction between the power of eminent domain and the police power see the decision of the Indian Supreme Court, especially the minority judgement of Das J, in **State of West Bengal v Subodh Gopal Bose** [1954] SCR 587.

The property clauses of the Indian Constitution and the manner in which they were interpreted derived a great deal from American constitutional theory. Art 31(2), especially in the form it took after the 4th Amendment,[7] embodied most of the constraints upon the power of eminent domain incorporated in the 5th Amendment to the US Constitution.[8] The evolution of expropriation law has grafted four basic concepts onto US constitutional law as it affects property rights:-

i) The eminent domain power, or the power to take property for public purposes, is an inherent characteristic of sovereignty. Consequently, all private property is held subject to the takings of the State.

ii) Eminent domain can be legitimately exercised by the state only for a public use or a public purpose.

iii) The injured private owner must be paid a just or fair compensation.

iv) Deprivations of or restrictions on individual property rights should take place in accordance with the requirements of substantive and procedural due process.

In West Bengal v Subodh Gopal Bose[9], the Supreme Court was confronted with defining the parameters of eminent domain and the police power as provided for in the Indian Constitution. The debate reached its height in the contending judgements of Justice Das and Das J. The former argued there was no difference between the word "deprived" in Art 31(1) and "acquisition" or "taking possession of" in

---

7. The 4th Amendment altered Art 31(2) to read:

> "No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate."

8. The relevant part of the 5th Amendment provides:

"No person shall.....be deprived of ...property without due process of law; nor shall private property be taken for public use, without just compensation"

9. [1954] SCR 587 at 612

Art 31(2). Consequently, all deprivations were required to comply with the conditions in Art 31(1) and (2), namely, authority of law, public purpose and compensation, unless they fell within the exclusions in Art 31(5).[9A] According to Das J, the difference in language demonstrated the legislature's intention to distinguish two kinds of power in relation to the taking of property. On the one hand acquisitions and requisitions, and on the other, deprivations pursuant to a police power where compensation was not appropriate, but with legislative authority as the only pre-requisite.

Das J emphasised that the police power is not limited to the protection of public health, morals and safety. It is a broad power directed at promoting the public convenience and the greatest welfare of the state. The police power implies a social interest of wider import than the social interest of preserving individual liberty. He observed in relation to the difference between the two powers:

> "Thus the police power is exercised in the interest of the community and the power of eminent domain is exercised to implement a public purpose and in both cases there is a taking of possession of private property. There is, however, a marked distinction between the exercise of these two sovereign powers....[E]minent domain takes property for use by the public or for the benefit of the public, while the police power prevents people from so using their own property as to injure others. The fundamental principle which is held to justify the exercise of the police power is that no-one shall use his property or exercise any of his legal rights as injuriously to interfere with the like rights to property or other legal rights of others..."[10]

The primary purpose of the police power is protection or prevention. Under the eminent domain power, the State sets out to fulfil its own obligation as a participant. In the

---

9A. Art 31(5)(b)(ii) read:

> "Nothing in clause (2) shall affect...the provisions of any law which the State may hereafter make.. for the promotion of public health or the prevention of public health or the prevention of danger to life or property.."

The other provisions of Art 31(5) protected the taxing power, earlier legislation and legislation dealing with evacuee property existing as a consequence of partition.

10. **West Bengal v Subodh Gopal Bose** [1954] SCR 587 @ 664

exercise of police power the State invades private property not on its own account for the realisation of its own public purpose, but for protecting the interests of the community inter se.[11]

In American constitutional law due process is at the core of the doctrine of police powers. Any restriction or limitation on property constitutes a deprivation. And ***all*** deprivations of property are unconstitutional under the 5th Amendment to the US Constitution unless effected with due process. It is akin to the idea that restrictions on property are expected to comply with substantive and procedural reasonableness. Or as Tripathi puts it:

> "The doctrine of police powers in regard to property is, therefore, nothing more mysterious than the principle recognised under the United States Constitution that every regulation or restriction on the use or enjoyment of property, whether slight or large, will be regarded a deprivation of property, and will be permitted only if approved by the courts as reasonable or justifiable in the interests of the community. Whether a deprivation is contrary to due process or not depends not only on the nature or quantum of deprivation although such quantum will be a significant factor to be considered. Nor in the case of reasonability under Art 19 of the Constitution of India, the verdict as to compliance with due process in the United States depends on all the relevant factors including the quantum of deprivation, the public benefit achieved, the attending circumstances, the existence of alternative methods of achieving the same public benefit..."[12]

The difficulty in India was to define precisely the ambit and scope of the State's police power over and in relation to property and to draw the dividing line between it and eminent domain. And furthermore how to decide whether all, or at least which, deprivations of property had to comply with reasonability to be sustainable.

How does one determine the category into which a particular exercise of power falls? According to Das J to distinguish takings under Art 31(1) from Art 31(2) expropriations one had to look to the ultimate aim, the immediate purpose, the mode and manner of taking possession, the duration for which possession was taken and the effects of the taking on the

---

11. See generally HM Jain: The Right to Property under the Indian Constitution, Chairman's Diamond Jubilee Year @ 1001-1

12. Tripathi: Fundamental Rights: Some Insights, Tripathi, Bombay 1974, 111-113

rights of the persons dispossessed. A consideration of these factors would assist the court to decide whether a particular exercise of power was one of eminent domain or police power.

In **Dwarkadas Shrinivas v Sholapur Spinning and Weaving Co Ltd**[14] Das J held a government take over of a company about to go out of business to be a constructive act of eminent domain attracting compensation under Article 31(2). The impugned legislation had granted the government powers to appoint directors to take over the assets and management of the company. The directors elected and appointed by the shareholders stood automatically dismissed. All the properties and effects of the company passed into the hands of persons nominated by the central government. Ownership remained vested in the shareholders. In substance the company was completely deprived of the possession of its property.

Das J rejected a contention that the legislation was an exercise of police power under Article 31(1). Applying the [illegible] he noted:

i) the company had been completely denuded of the possession of its property, leaving only bare legal title;

ii) the business had been running under state management at a loss for four years; and

iii) the legislation was not meant to [illegible] but was a step limit to 'this hazardous experiment'.

He concluded that the legislation had far overstepped the reasonable limits of police power and was, in substance, nothing short of expropriation by way of the exercise of the power of eminent domain and as the law had not provided for any compensation it had to be held to offend the provisions of Art 31(2).[15] Without expressly saying so he invoked the American doctrine of constructive eminent domain.

Whether all eminent domain and police power takings had to comply with the standard of reasonableness depended on one's interpretation of Art 19. And the relationship between Art 19(1)(f) and Art 31 proved to be a much debated subject. While there was consensus that the concept of property referred to in both articles meant the same thing,[16] there

---

14. [1954] SCR 674

15. @ 730

16. Charanjit v Union AIR 1951 [illegible]

was disagreement about the nature and scope of the difference between the two articles.[17]

The early lines of thought converged in **State of Bombay v Bhanji Munji**[18] which held them to be mutually exclusive in scope and content. Art 19(1)(f) contemplated the existence of property over which rights could be exercised. Art 19(5) permitted reasonable restrictions to be imposed upon such property for so long as the citizens title in the property subsisted. Art 31 had to be construed as an exception to Art 19 in that it allowed for a person to be deprived of his or her property. When there was a substantially total deprivation of property, already held and enjoyed, one turned to Art 31 to see how far it was justified. If the deprivation was lawful under Art 31 then the rights under Art 19 were seen as extinguished, that is, the capacity to exercise the right guaranteed under Art 19 went as soon as the property was compulsorily acquired or requisitioned under Art 31(2), or there had been a police power deprivation under Art 31(1).

The argument presented no problem for as long as one accepted that Art 31 was a composite article requiring all deprivations under article 31 to be by legislative authority, for a public purpose and for compensation. Restrictions on property not amounting to substantial deprivation, on the other hand, had to be reasonable under Article 19(5). Art 19(5) applied only in the case of legislation purporting to impose *restrictions* on the use of property. These involved something less than a deprivation, acquisition or requisition in the sense that the property remained under the control of its owner. The difference between a restriction and a deprivation etc is a matter of degree; it is a quantative rather than qualitative difference. If restrictions proceeded to a limit where they amounted to a deprivation the applicability of Art 19(1)(f) is gone, and Art 31 came into play."[19] Whatever the

---

17. See the differing judgements in State of West Bengal v **Subodh Gopal Bose** [1954] SCR 587 and the other decisions mentioned by H M Jain: **The Right to Property under the Indian Constitution** Chaitanya Allahbad 1968 @ 119 et seq. In **Subodh Gopal Bose** Sastri CJ advanced a thesis that the right to property in Art 19(1)(f) was a mere abstract right. By that he meant one descriptive of the status or capacity to acquire, hold or dispose of property. It bore no relation to rights in concrete items of property. These were governed by Art 31. The thesis is hard to understand. In effect it have no weight on Art 19(1)(f).

18. [1955] SCR 777

19. **Banji Munji** @ 780-1

interference, be it deprivation or restriction, the court enjoyed some supervisory power.

The courts departed from the line of reasoning enunciated in **Banji Munji** after the 4th Amendment in 1955. First doubts about the nature of the sovereign power contained in Art 31, and the conditions of its exercise, were removed by the Amendment. After its enactment it was clear that Art 31(2) embodied the power of eminent domain i.e. the power of acquisition for public use and Art 31(1) distinctly incorporated a broad police power to carry out other deprivations, for instance confiscation and demolition, where the only jurisdictional precondition was legislative authority for the action. The earlier arguments advanced by Sastri CJ in **Subodh Gopal Bose**, holding Art 31(1) and Art 31(2) to be composite, and thereby requiring all deprivations of property to comply with the prerequisites of legislative authority, public purpose and compensation, were thus overruled by the 4th Amendment.

The applicable provisions of the amendment did two things. Firstly, Art 31(2) was re-formulated by substituting the words "compulsorily acquired or requisitioned" for the words "taken possession of or acquired". The new language had been subjected to earlier judicial interpretation and left little doubt that an element of either permanent or temporary transference of title was implied. Secondly, to place the issue beyond question, Art 31(2A) was inserted to decisively break the link between Art 31(1) and Art 31(2). Now it was [illegible] domain. Art 31(2A) read:

> "Where a law does not provide for the transfer of the ownership or right to possession of any property to the State....it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it **deprives** any person of his property."[20]

Art 31 as amended by the 4th Amendment defined state power over property as follows:-

1) The State could compulsorily acquire or requisition property only provided it did so for a public purpose.

---

20. The Amendment also incorporated an ouster clause. See fn 7 supra for the text of Art 31(2) after the 4th Amendment. See generally M P Jain: **The Right to Property under the Indian Constitution** Chaitanya Allanbad 1968 @ 77 et seq

ii) The compulsory acquisition or requisition had to be made by authority of law. A mere executive fiat would not alone suffice. Legislative action was the pre-requisite. Considering all that it expected was a statutory enabling power, the gesture, if anything, was a symbolic protection against the whim of the executive. However, the law had to be a valid law passed by a compotent legislature and not in violation of the fundamental rights.

iii) A law which ***deprived*** a person of property but *did not transfer ownership or the right to possession* of the property to either the state or a state corporation was deemed *not* to be a law for compulsory acquisition or acquisition.

iv) Only laws for compulsory acquisition or requisition had to provide for compensation either by: a) fixing the amount of compensation; or b) specifying the principles on which the compensation was to be determined and given;

As a corollary the range of compensable takings was conspicuously narrowed. Any entity ranted a police power of deprivation in cases other than transfers of title, and provided that legislation was authorized by valid legislation it could not be challenged.

This meant the court had a minimal review power over deprivations other than compulsory acquisition and requisition. Five years later the judges saw fit to augment their review power over the police power. In so do they needed to re-think their reasoning in **Banji Munji.** In **Kochunni v State of Madras**[21] the supreme court reversed its earlier view on the relationship between Art 19 and 31 and held that a law under Art 31(2) could not be sustained unless it satisfied the test of reasonableness under Art 19(5). In a word, the concepts of restrictions and deprivation were conflated into one, and the idea of mutual exclusivity was rejected.

The facts of the case are complex and involve the application of a parochial body of customary land law known as Marumakkathayam law. The determinative issue was whether a statutory interference with the land distibution under a kinship scheme invaded the right to property under Art 19(1)(f) or whether it could be regarded as a reasonable restriction in terms of Art 19(5).

Counsel for the State of Madras argued in line with the **Banji Munji**[22] decision that the right to acquire, hold or

---

21. [1960] 3 SCR 887

22. See fn 10 supra

dispose of property under Art 19(1)(f) is conditioned by the existence of property and if a property owner is deprived of that property by authority of law under Art 31(1), his fundamental right under Art 19(1)(f) disappears with it.[23]

Subba Rao J set out the history leading to the 4th Amendment and conceded it amounted to an acceptance of Das J's interpretation of Article 31 in **Subodh Gopal Bose.** However, in his view, the snapping of the link between Art 31(1) and Art 31(2) had important consequences. Art 31(1) says in a negative form that no person shall be deprived of his property save by authority of law. The limitation upon the state power to deprive is found in the word law. Art 19(5) permits the imposition of reasonable restrictions in the interests of the general public by the operation of "any existing law" or by "making any law". If the law imposes unreasonable restrictions it will be an invalid law by virtue of Art 13(2) read with Art 19(5). The 4th Amendment snapped the link between Arts 31(1) and 31(2) meaning Art 31 could no longer be considered a self-contained article dealing with the same subject matter. Hence, after the 4th Amendment, the clauses of Article 31 dealt with different subject matter, i.e. the police power and eminent domain, it was possible to regard Arts 31(1) and 31(5) as dealing with the same subject matter. Therefore, the limitation upon the state to deprive a person of his property by law is found in Art 19 which requires the restriction to be reasonable.

The requirement of reasonableness laid down in **Kochuni** opened the door to the introduction of the American doctrine of due process. The main criticism of the decision was that the subjection of article 31(1) and the police power to Art 19(5) and due process was contrary to the intention of the framers.[24] The members of the Constituent Assembly had been clear in their desire for a constrained power of judicial review. The Indian Constitution is not founded on the doctrine of judicial supremacy evolved in **Marbury v Madison.**[25] Instead it seeks a combination of the happy features of the Westminster and American systems including a greater measure of legislative sovereignty.[26] To this end it explicitly outlined the conditions precedent for the exercise of power to avoid the judiciary assuming a power to

---

23. @ 905

24. See HM Jain: **The Right to Property** 128-131 and R Dhavan: **The Supreme Court of India: A socio-legal critique of its juristic techniques.** 199

25.(1803) 1 Cranch 137

26. See Seervai's comments in this regard in Seervai: **The Constitutional Law of India** Vol 1 @ 52-57

review property deprivations predicated on vague concepts like reasonableness.

The reasonableness of a restriction is determined by reference to the formula enunciated in **State of Madras v VG Row**[27]. Firstly, no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. Relevant considerations include the nature of the right alleged to have been infringed; the underlying purpose of the restrictions imposed; the extent and urgency of the evil sought to be remedied by the restriction; the disproportion of the imposition; and the prevailing conditions at the time. In sum, the Court had assumed enormous powers to deal with legislation touching property rights. Where it had lost the power to insist on compensation and public purpose it asserted one to strike down legislation on vague criteria of unreasonableness.

In 1968 MP Jain warned the limits of the decision would not be contained to the police power. He prophesised that the elements of "fair hearing, fairness and due process would infiltrate the inner sovereign power of eminent domain in ever-widening circles."[28] In the space of a year or two his prophesy was confirmed. In the **Bank Nationalisation case**[29] Shah J observed:

> "Limitations under Art 19(5) and Art 31 are not generically different, for the law authorising the exercise of powers to take the property of an individual for a public purpose or to ensure the well being of the community, and the law authorising the imposition of reasonable restrictions under Art 19(5) are alike designed to advance the public interest."[30]

The new ground of review in cases of eminent domain can be gleaned from the following exposition:

[1950] SCR 597

28. ibid @ 130. The requirements of due process were applied to the taxing power in **Chotabhai Jethabhai Patel v Union** [1962] Supp (2) SCR 1. See Jain op cit @ 203-204.

29. **RC Cooper & Another v Union** [1970] 3 SCR 530. Unfortunately the present writer is not in possession of a transcript of the case from the official law reports. The judgement available to me is a full copy of the decisions rendered but comprise an Appendix to a book **The Bank Nationalisation Case and the Constitution** by RS Gae, published by Tripathi in Bombay in 1971. Further references to the case will be to the pages of that text.

30. @ 236

> "Property may be compulsorily acquired only for a public purpose. Where the law provides for the compulsory acquisition of property for a public purpose it may be *presumed* that the acquisition or the law relating thereto imposes a *reasonable restriction* in the interest of the general public. ..... If the acquisition is for a public purpose, substantive reasonableness of the restriction may unless otherwise established be presumed, *but enquiry into reasonableness of the procedural provisions will not be excluded*."[31]

It was thereafter open to a petitioner to adduce objective grounds to rebut the presumption of substantive reasonableness arising from a finding of public purpose. A law possessed of public purpose could still be substantively unreasonable. Moreover, expropriated owners could insist on procedural due process. For instance the failure to afford affected persons a hearing prior to the determination of the amount of compensation could be struck down as a violation of Art 19(1)(f).

By now the citizens of India enjoyed the same level of protection of their property rights as did their American counterparts under the 5th Amendment to the US Constitution. To some Art 19(1)(f) had become the "sheet-anchor" of vested interests in their opposition to progressive legislation, to others, no doubt, it represented creative judicial activism in the defence of human rights. At least in relation to

Constitution (25th Amendment) Act 1971, amongst other things, inserted Art 31(2B) to provide that Art 19(1)(f) shall not apply to any law relating to the acquisition or requisitioning of property for a public purpose.[32] The aim was to reverse Shah J's dicta in the **Bank Nationalisation** case. It succeeded. In **Kesavananda v State of Kerala**[33] the majority of a full court upheld the amendment. Consequently, reasonableness was kept out as a constitutional requirement in eminent domain takings. Presumably in a spirit of compromise Parliament was happy to let reasonableness stand as the yardstick for police power deprivations and restrictions.

---

31. **Bank Nationalisation** case @ 242

32. Art 31(2B) read:

> "Nothing in sub-clause (f) of clause (1) of article 19 shall affect any such law as is referred to in clause (2)."

33. [1973] Supp SCR 1

Compensation

In the Constituent Assembly three themes arose in the debate on the requirement of compensation. Firstly, what kinds of expropriation should attract a constitutional guarantee of compensation? Secondly, what was the appropriate measure or quantum of compensation: just, fair and equitable, or market value plus? And lastly, which organ of government would be the ultimate arbiter on the question of the adequacy of compensation, the courts or Parliament?[34]

As could be expected, those against the inclusion of a constitutional standard of just compensation for the acquistion of property argued it would make impossible any large project of social and economic reform.

Of the many arguments advanced in favour of a standard of just and adequate compensation, the need to attract investment was the most compelling. If juridical protection was not extended to private property local and foreign capital would be reluctant to invest the finance so badly needed for rapid industrialisation and economic growth. Those propagating this view saw judicial supervision as an essential limitation of the right to property. A right subject to the jurisdiction of the legislature could not claim to be fundamental. The whole object of declaring the right to be fundamental was to hold the legislature at bay.[35]

Originally, it will be recalled, in its original formulation expected the legislature to specify the amount of compensation or the principles for its determination in the expropriatory law. The expression compensation was not defined in the Constitution, nor was it qualified in part 3 by words like "just", "adequate", "full" or "fair".

The prevailing consensus at the Constituent Assembly seems to have been that the necessary implication of the legislative power to prescribe the principles of compensation, was that the word compensation did not have its ordinary meaning of 'full and fair equivalent in money (i.e. market value). Furthermore, Nehru claimed he had taken legal advice and was assured by eminent lawyers that the review power of the courts had been excluded by the language in all but the extreme cases of fraud on legislative power. The quantum of compensation and the manner of payment, he asserted, were within the exclusive domain of Parliament.[36]

---

34. Seervai: The Constitutional Law of India Vol 2 p 1076 et seq.

35. See H M Jain: The Right to Property Chp 3.

Notwithstanding the recorded intentions of the framers, the Supreme Court interpreted the expression compensation in Art 31 to mean the true value of the property and held payment of that amount to be a precondition to constitutional validity. Either the amount fixed or the amount arrived at through application of the specified principles had to result in equal value of the property taken. If the law did not actually fix the amount, then the principles on which compensation had to be determined had to be principles upon which a just equivalent could be arrived at. In **West Bengal v Bella Banerjee**[37] the court spoke in the same breath of *just equivalent* and *full indemnification*. What was exactly meant thereby and how it was computed were left open ended. Later it became apparent that market value would be the *prevalent minimum standard* and the determination of it would be calculated only by reference to principles recognised by the science of valuations, provided they were relevant and appropriate to the property subject to valuation.

Nowhere in **Bella Banerjee** is authority cited for the proposition that compensation meant just equivalent, full indemnification or true value.[38] The international law standard in cases of expropriation of alien property is of adequate compensation. The term has been used interchangably with the expression just compensation.[39] It means something less than market value. The implication is that while compensation need not amount to the full value it must bear a reasonable relation to the value of the property acquired.[40] The **Bella Banerjee** decision equates the idea of just compensation with full value. The initial error perpetuated itself throughout the 20 odd years over which the controversy endured.

The connotations of **Bella Banerjee** were disconcerting for a government committed to redistribution of wealth, especially when it felt it had taken pains to avoid them in the drafting process. Not surprisingly, as those of the 4th Amendment[41] to supersede what it had left to the necessary

---

Cf. Seervai: The Constitutional Law of India @ 1109 and H M Jain: **The Right to Property** @ 46

37. [1953] SCR 558 @ 563

38. Sastri CJ uses the expressions interchangably and unconscious of any shades of meaning.

39. G White: **Nationalisation of Foreign Property** 13-14

40. Ibid

41. For the full text of Art 31(2) after the 4th Amendment see fn 7 supra.

implication of the language of Art 31(2) with an express ouster of the court's jurisdiction. The Amendment provided that no expropriatory law could be called into question in any court on the ground that the compensation provided by it was not adequate.

One would have thought this was the end of the matter. During the period between 1955 and 1965, the court seemed reconciled to the idea that its jurisdiction on the adequacy of compensation had been ousted. After Nehru's death the judges underwent a noticeable change of spirit.

In **P V Mudaliar v Special Deputy Collector**[42] the Supreme Court ingeniously restored the doctrine of just equivalent and the justiciability of compensation. The impugned Act[43] had allowed for the acquisition of land for housing purposes on payment of less than the current market value. Counsel for the petitioner argued the law was bad because it did not provide for payment of compensation within the meaning of Art 31(2), that is, a just equivalent. The Respondent's rejoinder was predictable. In the light of the 4th Amendment the term compensation carried a different meaning than that given to it in **Bella Banerjee**, and in any event, the adequacy of the amount could not be justiciable

Subba Rao J, speaking for a unanimous court, rejected counsel for respondents' argument. In his [illegible] he used the expressions "compensation" and "principles" as they had stood in the provision before it was amended. There is a well known canon of construction that where the legislature uses a legal term which has been authoritatively interpreted by the courts, it must be assumed that if the legislature uses the expression subsequently it intends it to have the meaning given by the courts."[44] Both the expression "compensation" and "principles" in Art 31(2) had received an authorative interpretation by the Supreme Court, and therefore, it was to be presumed that Parliament had not intended to depart from the judicial construction of these terms when it used them in the 4th Amendment. From this it followed that the legislature was still obliged to provide for a just equivalent or to specify principles for its determination; otherwise the Amendment would have spoken of price", "consideration" or some such term.[45]

---

42. [1965] 1 SCR 614.

43. The Land Acquisition (Madras Amendment) Act 1961.

44. Bennion [illegible] **On Statute Law** 2nd ed p 107 [illegible]

The line of reasoning is fallacious on an elementary matter of principle. The rule of construction alluded to by Subba Rao J creates a mere presumption which is rebuttable by the necessary implication of the language and the context including, within limits, the legislative history. The propositions advanced by Subba Rao ignore the telling circumstances surrounding the Amendment's enactment. The 4th Amendment sought to remedy the mischief posed by the court's interpretation of the expression compensation. The object of the remedy appointed was to restrict the court's power to review the issue of quantum by making it non-justiciable. By ignoring the patent reality and the popular will as expressed in the amendment, Subba Rao J indulged in a kind of pedantic literalism which in the end risked bringing the constitutional process into disrepute.

The re-emergence of the just equivalent doctrine precipitated by Subba Rao's doubtful application of the presumption was followed in a number of decisions handed down at both federal and state level. Once more the courts began to insist on market value and struck down laws which did not provide for it. Of the most important was the legislation nationalising India's 14 leading commercial banks.[45] In this the government paid an excess of market value for the banks.[46]

Six years later Parliament passed the 25th Amendment which inter alia expunged the liability to pay "compensation" from Art 31 by substituting it with a legislative obligation to pay an "amount". The neutral expression implied a lesser obligation and avoided the earlier judicial pronouncements on the meaning of the word "compensation". In **Kesavananda v State of Kerala**[46A] a majority of the court found the term "amount" to mean something different to "compensation" and finally conceded its jurisdiction on the adequacy of compensation was ousted.[47]

45A. See fn 29 supra.

46. See Tripathi: **Fundamental Rights Some Insights** 1974 @ p.6. The amount actually paid for the banks was Rs874 million. Weighty evidence showed their true value to be Rs750 million.

46A. [1973] Supp SCR 1

47. After the 25th Amendment Art 31(2) read:

> "No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined with

The constitutional framework of agrarian reform

We turn now to examine the impact of the property rights and judicial review on government policies of land reform. Agriculture continues to be the largest and most sector of the Indian economy.[48] In the immediate post independence era it accounted for more than 50% of the national product and employed more than 65% of the labour force. Between 1950 and 1965 the average compound rates of growth of total agricultural output was a high 3,1%. Much of the growth, notably in food grains, was the result of additions to the area under cultivation occasioned by legislative re-adjustment of tenurial relations in agriculture[49]. Unfortunately, on the whole, growth in food production was not able to keep abreast of population growth.

[illegible] "integrated rural development" and land tenure, known as "integrated rural development", was geared towards institutional change. By Nehru's death in 1964, India's ongoing incapacity to feed its people strengthened the call for a shift to capitalist and technological oriented agriculture. The debate is [illegible]. The technologists urge for the introduction of efficient units of production. The institutionalists try to strike a balance between efficiency and equity.

Legislative reforms under Nehru were institutionalist in nature, and for the most part were aimed at land ownership patterns, tenurial relations and the creation of efficient [illegible] production.[50] Structural constraints other than low levels of technology were seen as the principal impediments to growth. These were:

(i) the uneconomic size of farms;

(ii) inequitable tenurial relations;

---

such principles and given in such manner as may be specified in such law; and no such law shall be called into question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash."

48. V N Balasubramanyam: **The Economy of India** Westview Press Colorado 1986 e 76.

49. Ibid.

50. See generally A. Agrawal: Indian Economy Vikas, New Delhi 1979 Cho 17.

iii) wide disparities in land ownership;

iv) indebtedness and the lack of access to credit and other inputs on the part of small farmers;

v) inadequate market facilities;

vi) low levels of health, literacy and education in rural areas.

The sheer scope, complexity and parochial nature of the land measures adopted by the Union and State legislatures in the Nehru period make it impossible to review the full range of developments. The aim here is merely to contextualise the constitutional issues.

A striking feature of Indian land tenure was the existence of intermediaries. Under the lengthy period of British rule the colonial administration established an owning class with the sole object of facilitating revenue collection. Large tracts of land were settled on intermediaries by executive fiat without reference to existing arrangements or the requirements of food production. In essence, the cultivator of land had to pay a portion of his output, in some instances upto 50%, to the intermediary who kept one-eleventh for himself and paid the balance to the government. Towards the end of British rule about 40% of India's land was held under this alien arrangement. Intermediaries became powerful vested interests. The system was known under different names in different regions inter alia as zamindari, jotedari, jagir and inam tenures.[51] In the result, at independence, India inherited a semi-feudal agrarian structure in which the vast majority of cultivators held minimal security as tenants, labourers or share-croppers.

As soon as Congress took power it set about redressing the inequitable system. Since agriculture under the Indian constitution falls within the preserve of State legislative competence, the central government confined its intervention to the demarcation of a constitutional framework to facilitate reform at State level. The strategy was to narrow the sweep of the textual embodiement of the right to property. Afterwards, it encouraged the States to introduce legislation dealing with the abolition of the intermediaries, rent control and security of tenure, the transfer of ownership to the cultivators, the imposition of upper ceilings on land ownership and the re-distribution of any surplus, and finally to prevent uneconomic fragmentation through the consolidation of uneconomic holdings.

---

51. Agrawal op cit 261-2

In the period between the 1946 elections and the promulgation of the Constitution in 1950 the process for abolishing the zamindari institutions had got underway in three States. Madras, Bihar and Uttar Pradesh had all introduced legislation to effect abolition and to vest zamindari lands exclusively in the State. Notwithstanding Nehru's assurances that the wording of the property clause excluded judicial review on all grounds except fraud on the constitution, the representatives of these states in the Assembly feared the guarantees in Art 19(1)(f) and Art 31 would be invoked by the vested interests to undermine the reform programmes already underway. Considering the comprehensive power subsequently embraced by the courts their fears were not unjustified.

At the time the property clauses were the subject of discussion in the Constituent Assembly, the Madras and the Bihar statutes had already received presidential assent. The Uttar Pradesh Bill was enrolled before the state legislature and to safeguard the reform legislation, sub-articles (4) and (6) were added to Art 31.[62] whereas clause (4) sought to protect the pending Bill, clause (6) pertained to those already enacted. The clauses provided that notwithstanding anything in the constitution, legislation pending at the commencement of the Constitution or legislation enacted not more than 18 months before the commencement could not be called into question by a court of law on the ground that it contravened Art 31(2).

---

62. Art 31(4) read:

> Where any Bill pending at the commencement of this Constitution in the legislature of a State, has after it has been passed by such legislature, been reserved for the consideration of the President and has received his assent, then notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause(2)."

Art 31(6) read:

> Any law of the State enacted not more than 18 months before the commencement of this Constitution may within 3 months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of this article or has contravened the provisions of sub-section (2) of the Government of India Act, 1935.

The eminent jurists consulted by Nehru had overlooked one important consideration. If the language of Art 31(2) excluded review, as they had advised, why then was it necessary to enact Arts 31(4) and 31(6) to protect the agrarian reform statutes from review! As could be expected this was seized upon to assert the court's power of review when in **State of West Bengal v Bella Banerjee**[53] the Supreme Court ruled it, not Parliament, was ultimate arbiter on the question of compensation.

The implications of articles 31(4) and (6) were not lost upon the representatives of the zamindaris.[54] They charged the provisions were discriminatory. Expropriatory laws passed by States after the adoption of the constitution would be justiciable whereas those pending or enacted within the 18 month period before the commencement of the constitution would not be!

The patent discrimination was nothing when compared to the iniquities of the zamindari system itself. As it turned out, the 1st and 17th Amendments eventually removed **all** of the zamindari abolition laws beyond the reach of Art 31(2). They freed the States from the obligation to pay even inadequate compensation. According to Ghouse, no state ever took full advantage of the freedom.[55] In the end the zamindari abolition cost the states Rs670 million in compensation.[56] It suggests the zamindaris had more to gain than a constitutional exemption could deprive them of.

Although many of the zamindaris were compensated for the acquisition of their interests, the constitutional framework devised to exclude the reforms from judicial scrutiny by and large stood up. It offers them a useful model for the framers of a new constitution who wish to exempt certain schemes of social engineering from compliance with the claims made by a fundamental right to property.

Within months of the inauguration of the constitution it became apparent that not even clause (4) and (6) were guaranteed to shield the intended legislation. In the Constituent Assembly, Rameshwar Singh, the Maharaja of

---

53. [1953] SCR 558

54. A M Jain: **The Right to Property under the Indian Constitution.** Chaitanya Publishing House, Allahbad 1968.@51 et seq.

55. M Ghouse: **"The right to property and planned development in India."** in Indian Constitution: Trends and Issues. Indian Law Institute, New Delhi 1978 @79-98 @95

56. Agrawal op cit 266.

Durbanga, had vociferously proclaimed his opposition to the insertion of clauses (4) and (6).[57] Shortly afterwards he challenged the validity of the Bihar Land Reforms Act 1950 in the Bihari High Court on a number of grounds. The object of the Act had been to eliminate the intermediaries by the compulsory acquisition of their rights and interests. The Act provided for compensation. The petitioner alleged it was not a just equivalent.

The Bihari High Court held the legislation to be intra vires Art 31(2) because of the protection afforded by clauses (4) and (6). However, the court found a way to grant relief to the Maharaja. It deemed the statute's enactment of a graduated scale of compensation fixed by the size of landholdings to be discriminatory and struck it down for infringement of Art 14, the equal protection clause.[58]

During the pendency of the appeal proceedings, the provisional Parliament (the Constituent Assembly) responded to the judgement with the 1st Amendment inserting Arts 31A and 31B into the scheme of Article 31.[59] Art 31A shielded state acquisitions of "estates" and the extinguishment or modification of any rights in an estate from testing on grounds of inconsistency with or abridgement of the property rights or equality clause in Part III.[60]

[illegible] was left deliberately elastic on account of the many local variations of tenurial

---

57. H M Jain op cit 53.

58. Art 14 reads:

'The State shall not deny to any person equality before the laws or the equal protection of the laws within the territory of India.'

59. The Constitution (First Amendment) Act 1951.

60. The gist of Art 31A as streamlined by the 4th Amendment reads:

> "Notwithstanding anything contained in Art 13, no law providing for ... the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights ...shall be deemed to be void on the grounds that ... any of the rights conferred by articles 14, 19 or

relations.[61] Most often, an estate holder would be the "proprietor" of the land standing in direct relation to the state for the purposes of revenue collection.[62]

Art 31B went even further. It completely ousted judicial review of land reform statutes named in the 9th Schedule including the legislation impugned by Kameshwar Singh.[63] The latitude authorized by Art 31B did not end with insulating land reform, even if that has been its primary purpose. It is pretty much a catch all clause empowering the legislature to override the fundamental rights by adding a chosen statute to the schedule by constitutional amendment.[63A]

---

61. **Atma Ram v Punjab** AIR 1959 SC 519. The original formulation of the definition of an estate in Art 31A(2)(a) went thus:

> "the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any jagir, inam or muafi or other similar grant;"

Art 31A(2)(b) defined "rights" as follows:

> "the expression "rights", in relation to an estate shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure holder or other intermediary and any rights or privileges in respect of land revenue."

62. A M Jain op cit 219.

63. Art 31B reads:

> "Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the 9th Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgement, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

63A. The 9th Schedule was inserted by the 1st Amendment Act. Amendments require a majority of each House as well as two-thirds majority of members present and voting.

On appeal the Bihari Land Reform case is reported as **Bihar v Kameshwar Singh**[64]. The appeal court sustained the constitutional validity of Article 31B. In consequence the attack under Art 14 could no longer be sustained. Not to be undone so easily, Mahajan J, speaking for the majority, hoisted his flag to the mast of legislative competence and ruled two of the key compensation provisions of the impugned legislation to be confiscatory and a colourable exercise of legislative power.[65]

The upshot of all of this was, in the words of Sasti CJ in his dissenting judgement, with "such weak arguments as overtaxed ingenuity could suggest", the Court had found a way to review the reform legislation and to undermine the object of the 1st Amendment and clauses (4) and (6) of Art 31.[66]

In as far as the **Kameshwar** case relied on the doctrine of colourable legislation, it was reversed by the 7th

---

64. [1952] 3 SCR 889. The decision must be read together with **Sankari Prasad Singh Deo v Union** [1952] SCR 89, in which the constitutionality of the 1st Amendment was directly in question. The majority of the court rejected the argument that a constitutional amendment was a law within the meaning of Art 13(2). It held that though a constitutional amendment was a law there was a clear distinction between a constituent and legislative power. Thus, amendments to the fundamental rights in Part III were not outside the scope of the constituent and amending power.

65. Art 246 read with the 7th Schedule allocates legislative power between federal and state governments. In terms thereof legislative competence is specified in detail. Laws enacted outside the sphere of a legislature's competence are invalid. The doctrine of colourable legislation touches upon the scope of the doctrine of fraud on power. The nature of the doctrine was spelt out by Mukerjee J in **Gajapati Narayan Deo v The State of Orissa** [1954] SCR 1 @ 10-11. In terms of it the court scrutinizes the law to ascertain whether the legislature has by device purported to make a law which in form appears to be within its competence but in effect and substance reaches beyond it. Transgressions of legislative power and competence are either patent, manifest or direct or they may be disguised, covert or indirect. It is to this latter genus of cases that the characterization "colourable legislation" has been applied.

66. For criticism of Mahajan's misapplication of the foreign doctrine of colourable legislation see R Dhavan: **The Supreme Court of India: A socio-legal critique of its juristic techniques** [1977] Tripathi, Bombay, 103-5; and also [illegible] at 170.

Amendment.[67] The judicial intervention, however, should also be kept in proper perspective. While it may have granted individual justice to the petitioner, at another level it secured the constitutional future of agrarian reform by upholding the validity of Article 31B. Dhavan shows that prior to 1960, if anything, the Supreme Court evinced a sympathetic attitude to the government's need to implement land reform. In the first 10 years of its existence the Supreme Court adjudicated on 11 important cases of agrarian reform. In only two of them were statutory provisions invalidated.[68] Ten years after independence the abolition of zamindari and its regional variations was complete. Many of the measures adopted had the benefit of the screen supplied by Art 31B.

Land reform did not stop at the abolition of intermediaries. Every State by the mid 1960's had enacted legislation imposing ceilings on existing holdings and future acquisitions. Ceiling legislation involves the imposition of an upper limit to the amount of land entitled to be held by individuals. The legislation followed a general pattern with permutations to take account of local conditions. It demarcated the land by delineating ceilings on permissible hectarage for self-cultivation. Land in excess of the ceiling then became available for:

i) expropriation by the state for re-leasing to tenant cultivators against payment of compensation by the State in marketable government securities or in instalments;

ii) acquisition by the State in favour of the cultivators with compensation being paid by the cultivators in affordable instalments;

iii) establishment of tenancies with rentals to be paid by a realistic and fair percentage of the produce.

Some states required uncultivated land within the self-cultivation ceiling to be made available for tenancy, with the landlord enjoying a right of resumption for self cultivation, regard being had to the requirements of due process and reasonable security of tenure.

The level of the ceiling was usually determined by reference to the peculiar topographical conditions prevailing in the region, taking account of the quality of the land and its potential use value. Exemptions were common and diversified. As a rule they were based upon criteria of efficiency or the

---

67. The Constitution (Seventh Amendment) Act 1956

68. Dhavan op cit 149. The two cases were **Kameshwar** and **Raghubir v Court of Wards** AIR 1953 SC 373.

nature of the crop produced with reference to the national need.[69] The ceiling legislation created an estimated land surplus of 5,32 million acres of which the government by 1977 had taken over 2,10 million acres. The area actually distributed at the time was 1,29 million acres, i.e. less than 25% of the surplus.[70]

Despite the land reforms of the 1950's patterns of land distribution in India stayed inequitable. In 1960-1 18% of a total number of 49 million rural households owned 62% of the total area of 324 million acres under cultivation and operated farms over 10 acres.[71] Against this the land re-distributed under the ceiling legislation was miniscule. The statistics indicate that the bulk of India's agricultural labour force continued to rent either as labourers or as tenants.

Tenancy reform was particularly necessary in the ryotwari areas because a considerable proportion of land held by ryots had been cultivated by tenants. The ryotwari system unlike the zamindari system did not involve intermediaries. Although technically the land vested in the government, as long as the ryots paid the land revenues for which they were liable they enjoyed full powers in relation to the land including the power of alienation. Most of the ryotwari land was cultivated by sub-tenants.[72]

The overall objectives of tenancy reform were threefold: to regulate rentals and fix them at reasonable levels, to provide security of tenure and to take steps where appropriate towards taking the cultivator over the land. Security of tenure was achieved under the police power in two ways. Firstly, by insisting on ejectment by due process, and secondly by restricting the amount of land an absent landlord could recall for self-cultivation.

By and large the courts were precluded from pronouncing upon the constitutionality of the provisions of the tenancy and ceiling statutes because of Arts 31A and 31B. Where the land was not acquired, the legislation impacted upon the rights and interests of the landlords by modifying or extinguishing them. In particular, the ceiling legislation modified the

---

69. For a full discussion of the ceiling legislation see Agrawal op cit 270-279 and F R Frankel: India's Political Economy 1947-1977: The Gradual Revolution. Princeton 1978 @ 192-195

70. Agrawal op cit 272.

71. V K Ramaswami: The Economy of India

72. Agrawal op cit 273.

right to cultivate the surplus and frequently the right to alienate it. Art 31A makes express reference to modification of rights and probably could have shielded the laws from attack. As it turned out most of them appear to have been added to the 9th Schedule and thereby had the benefit of Art 31B.

Despite appearing hamstrung the court did intervene in two notable respects to narrow the ambit of Art 31A.

In **Kunhikoman v State of Kerala**[73], the court held that the Kerala Agricultural Relations Act 1961 was not protected by Art 31A because, on a literal interpretation of the definition of an "estate" in Art 31A, ryotwari tenures were not included. By excluding ryotwari holdings from the protection of Art 31A, any attempt to re-distribute uncultivated surplus ryotwari lands would have to comply with the compensation requirement in Art 31(2). At about this time the Supreme Court had begun to test police power measures for reasonability and to extend its review of the quantum of compensation. And irrespective of the 4th Amendment it was insisting upon market value. In the result the ceiling and tenancy provisions were in jeopardy of being rendered practically impossible in respect of ryotwari tenures.

Parliament moved swiftly to nip this development in the bud by enacting the 17th Amendment in 1964.[74] In relation to land tenure the Amendment did three things. It expressly added ryotwari tenures to the definition of an estate in Art 31A; it inserted 44 agrarian reform measures, including the Kerala Land Reforms Act 1963, in the 9th Schedule; and finally, presumably as a concession to landlords, it added a second proviso to Art 31A whereby any state law acquiring land *within* the ceiling limit would be unconstitutional unless it provided for payment of compensation at not less than market value.

The other judicial assertion of review power fared better. In stark contrast to the literalism of the **Kunhikoman** decision, the court resorted to purposive contextualism in **Kochuni v State of Madras**[75] to narrow the spectrum of statutes covered by Art 31A. With selective reference to the the Statement of Objects of the 1st Amendment Bill Subba Rao J restrictively construed the expression "law" in the opening sentence of article 31A to mean laws for the implementation of agrarian reform. The gravamen of the

---

73. [1962] Supp 1 SCR 829.

74. Constitution (17th Amendment) Act 1964.

75. [1960] 3 SCR 887

decision was that before a statute could enjoy immunity under Art 31A it had to be shown to be one for agrarian reform and, in substance, relating to land tenures.

A literal construction of the word "law" in Art 31A to mean any law would have rendered Art 31(2) nugatory in all land acquisitions in India, because virtually all land would have fallen within the elastic definition of an estate. In the **P V Mudaliar** case[75A] the court felt an Act enacted only for the purpose of slum clearance could not relate to "an agrarian reform in its limited or wider sense" and consequently did not enjoy immunity under Art 31A.[76]

Agrarian reform was not restricted to measures facilitating agricultural production in a narrow sense. It embraced "something ancillary thereto in the interests of rural economy." Thus, in **Ranjit Singh v Punjab**[77] the court applied a wide concept of agrarian reform and upheld The East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act 1948 and related legislation providing inter alia for the distribution of surplus lands to rural authorities for the use of the general community, or for hospitals, schools, manure pits, or tanning grounds.

In real terms, as is evident from the lack of legislative response, the agrarian reform test posed little threat for the grand scheme of institutional renewal. In any event, its repercussions could have been nullified by resort to the sweeping ambit of Art 31B, provided, of course, a weighted majority could be obtained in Parliament. Seervai catalogues an impressive list of decisions handed down by the Supreme Court in which it deferred to the will of Parliament by upholding agrarian statutes ousted from its jurisdiction under Art 31B.[78]

In the ultimate analysis, the successes and failures of the process of land socialisation in India were not greatly

---

75A. fn 42 supra

76. Dhavan (op cit 162) comments wryly on Subba Rao's finding:

> "In an effort to restore the agrarian reform test he omitted to mention that some of the land was situated in rural areas and that slum clearance fell within the portion of statement of objects.....which he had not cited in **Kochunni's** case."

77. AIR 1965 332

78. Seervai: Constitutional Law of India ... Patni Bombay 1984 @ 1159

influenced by the constitutional contests between the courts and Parliament. That is not to say they bore no relevance. A framework permitting of the socialisation process had to hammered out in the Constituent Assembly. Unanticipated pitfalls were ironed out by litigation and constitutional amendment. The High Court judgement in the **Kameswhar** case prompted Parliament to secure its rural development policy against judicial meddling. Parliament succeeded in keeping the judiciary at a distance. Sadly, that alone could not guarantee the triumph of the agrarian programme itself.

The benefits which enured from the zamindari abolition were noteworthy. Even though it proved costly, and in many cases the zamindars were able to frustrate the scheme, the policy mainly worked and freed millions of cultivators from the revenue burden inflicted by the colonial power. The abolition was a significant first step resulting in some measure of re-distribution.

Governmental achievements under the ceiling, tenancy and consolidation legislation were less impressive. According to Agrawal the reforms, initially well conceived, suffered from a number of defects. Amongst others, some statutes defined the concept of "self-cultivation" so loosely that resumption by landlords was fairly easy. Many techniques of avoidance and evasion coalesced to defeat both the spirit and letter of the law. Added to this, the administrative back-up essential to implement the ceiling and tenancy measures was woefully inadequate, and in those regions where it was in place it was plagued by perennial problems of patronage, nepotism and corruption.[79]

The demise of Articles 31 and 19(1)(f)

The struggle between the Indian courts and Parliament over the boundaries of state power in relation to property was educative if not intriguing. We have seen how the legislators set out in the sure belief that their legislative sovereignty to determine compensation for state takings had been left intact. The courts soon delivered a rude awakening. Not only did they appoint themselves arbiters on the question of quantum, holding the legislature to full indemnification, but, contrary to the express wish of the framers, they went further to read in substantive and procedural reasonableness to both exercises of police power and eminent domain.

Parliament rallied with a string of amendments. Market value was eliminated as a constitutional pre-requisite to validity

---

79. Agrawal: **Indian Economy** 269 and Frankel: **India's Political Economy** 156-200.

and the requirements of due process and reasonableness were confined to police power deprivations and restrictions. And, more importantly, the power of amendment was entrenched and applied in a way making land reform possible with the aid of Articles 31A and 31B.

In **Golak Nath v Punjab**[80] the Supreme Court, in another gallant attempt to fortify property rights, held that Parliament had no power to amend fundamental rights. Considering the disastrous effect the decision would have had on many of the laws and constitutional amendments since independence, the court relied on on the so-called doctrine of prospective overruling and the doctrine of acquiesence to hold its ruling applicable only to future legislation. The case seriously threw into question the capacity of the government to implement socio-economic reform and led to a major public outcry. The complexities of the ensuing constitutional crisis are beyond the scope of this article. Suffice it to say that had the judgement been allowed to stand further additions to the 9th Schedule would no longer have been plausible. When later amendments were challenged in **Kesavanada v Kerala**[81] the judges backed down. In reconsidering its approach to the amendability of fundamental rights, the majority held that Parliament had the power to amend the fundamental rights provided it did not abrogate the basic structure of the Constitution. The right to property was not a basic feature of the Constitution and was thus dispensable.

On this basis the court sustained Article 31C which had been inserted by the 25th Amendment in 1971. Article 31C provided that notwithstanding anything contained in the Constitution, no law giving effect to the Directive Principles in Articles 39(b) and (c) could be deemed void for violating Articles 31, 19 and 14. Art 39(a) and (b) call on the State to direct its policy towards securing that the ownership and control of India's resources are so distributed as to best serve the common good and the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment. In upholding the Amendment, **Kesavananda's** case gave primacy to the socialist principles aimed at re-distribution over the fundamental rights of property and equality.[82]

80.[1967] 2 SCR 762

81. [1973] Supp SCR 1

82. Art 31C was amended by the 42nd Amendment to give primacy to **all** the directive principles over **all** the fundamental rights in Part III. It aimed to make the fundamental rights subservient to socialist policy. In **Minerva Mills Ltd v Union** [1980] 3 SCC 625, the Supreme

In 1978, following 30 years of wrangling with the Supreme Court, the Union Parliament resolved that economic justice could not be achieved whilst property rights were fundamental. The 44th Amendment 1978 deleted Arts 19(1)(f) and 31 from the list of fundamental rights in Part III. Before their repeal they were the most litigated provisions in the Constitution. In those first thirty years India's judges showed themselves more inclined to favour individual property rights than the imperatives of social reform. In the name of private property they struck down land reforms, nationalisation of motor transport and banks, government take-overs of mismanaged industries and slum clearances. As already mentioned they were least interventionist when it came to land reform. On the more weighty property issues they were less stand-offish.

Ironically, the 44th Amendment was likely to affect big business and land holders much less than it would the urban householder and the small property owner. For, after the web

---

Court declared the amendment void. It held the nature and quality of the amendment was such that it virtually tore away the heart of the basic fundamental freedoms typically formative of liberal democracy.

83. The 44th Amendment inserted Art 300A in Part XII of the Constitution making property a constitutional right as opposed to a fundamental right. Art 300A provides:

> "No person shall be deprived of his property save by authority of law."

It is important in this respect to remember that the word "law" in the Indian Constitution has been interpreted to mean a valid law, i.e. a law which is within the legislative compotence of the Legislature enacting it, and which does not violate fundamental rights or other constitutional restrictions. It may be that the Indian Supreme Court will in the future seize upon these limitations upon the power of deprivation to once more extend the net of review to set aside expropriatory legislation on grounds of being discriminatory or even unreasonable. Surely it is arguable that a statute failing to provide any compensation at all is discriminatory? Insistence upon market value seems unlikely given the legislative history, yet the door probably remains open to argue with reference to Art 246 and the Lists in the 7th Schedule that illusory or no compensation amounts to a colourable exercise of legislative power outside the realm of legislative compotence. Unfortunately limited access to Indian materials has precluded the writer from determining conclusively whether any expropriatory legislation has been struck down in India on these grounds since 1980. A superficial perusal of the texts available suggest not.

of exclusions created by Articles 31A, 31B and 31C, it was virtually only they who could invoke article 31 with any likelihood of success. The key issue touching property rights is the quantum of compensation paid to deprived property holders. By 1978 that battle had been fought and won by Parliament.

The 44th Amendment, therefore, is best understood in its political context. After 19 months of Emergency rule Mrs Ghandi and her party fell victim to the popular will and were ousted from power through the ballot box in March 1977.[84] Property rights were expunged from the Constitution afterwards in honour of a pledge in the Janata Party Manifesto. The Janata Party's ability to mobilise the populist opposition on the call to abolish the right to property is perhaps testimony to the anti-populist stigma with which the right had come to be tainted in post-independence India. Perhaps this too explains Congress's failure to reinstate it when Mrs Gandhi swept back to power with a landslide in 1980.

In conclusion, it cannot be said that the seemingly unedifying squabble around property rights in India was entirely without merit. As part of their function under fundamental constitutions the courts, within the limits of inherent structural constraints, are best placed to rule upon the distribution of government power. Moreover, in a divided society with potential for acute conflict over wealth distribution there is a very real political consideration to be taken into account. What separates a totalitarian realisation of egalitarian justice from its democratic attainment under a human rights regime is the fact that controversies related to its materialisation are resolved through the mechanisms of protection and supervision customarily associated with the rule of law or the Rechtstaat. Regardless of the outcome for the right to property or social reform in India it appears that this worthy notion was never lost sight of. Each judicial assertion of human rights principles forced the elected representatives back to the debating chamber for public deliberation of the issues. As such it stands as a valuable lesson in democracy.

---

84. For an account of Mrs Gandhi's temporary fall from power see D R Mankekar: **Decline and Fall of Indira Gandhi**, Orient New Delhi 1977.

PROPERTY RIGHTS IN THE CANADIAN CONSTITUTIONAL CONTEXT

Professor Richard W. Bauman
Faculty of Law
University of Alberta
Edmonton, Alberta
Canada
T6G 2H5

PROPERTY RIGHTS IN THE CANADIAN CONSTITUTIONAL CONTEXT

Professor Richard W. Bauman*

I. Introduction

From the perspective of a Canadian lawyer, I find it interesting that the draft Bill of Rights prepared on behalf of the African National Congress contains several clauses aimed at guaranteeing certain rights in relation to land and other forms of property.[1] By contrast, one of the remarkable features of the Canadian Charter of Rights and Freedoms[2] is that it does not include an explicit right to property among the categories of protected legal rights. This was not an oversight. Legislators and commentators debated the inclusion of property rights on repeated occasions leading up to the enactment of the Charter in 1982, but ultimately such rights were rejected.

The omission has not proved to be universally popular. The refashioning of the Canadian constitutional regime (or what is often termed the "renewal of Canada") continues today. Indeed, the process of reform appears to have reached a critical juncture, with the breakup of the country a possibility. The issues being discussed are numerous and wide-ranging. Property rights are back on the agenda. The Canadian federal government's recent proposals (28 of them in all) in a document entitled Shaping Canada's Future Together suggest an amendment to our constitution that would provide a "guarantee of a right to property".[3] Perhaps

suprisingly, this suggestion is unaccompanied by any discussion attempting to justify or elucidate this particular proposal. It remains for commentators to conjecture what might be the extent of such a right, where it might be placed in the Charter, and why this right merits constitutional protection as a fundamental value in our society. Questions about the nature of property and how it ought to be weighed against other social instruments and ideals are fraught with economic and political controversy. Yet between the date when the federal proposals were announced, September, 1991, and the present, there has been only a relatively muted discussion on property rights. There are good reasons to believe that this suggested amendment, at least, will not survive the next round of constitutional bargaining.

Why did we in Canada take this apparently anomalous step of excluding property rights from the Charter? This deletion seems unusual because many of the liberally-inspired constitutions of Western democracies include property rights as a fundamental category of protected rights.[4] The reasons underlying this public policy choice that I will suggest and explore include the following. First, Canadian legislators and lawyers remain generally uncomfortable about the range of rights that might eventually be constitutionally sheltered by the concept of "property". Second, there had been successful attempts before 1982 to protect the "enjoyment of property rights" in the Canadian constitution. The experience of that form of protection created

little pressure for entrenchment of equivalent provisions in the Charter. Third, some rights that relate to the traditional concept of property, including "life, liberty, and security of the person", were explicitly included in the Charter, and this was thought to cover many of the vital interests that an entrenched property right would otherwise protect. Fourth, several provincial governments were opposed to the specific inclusion of property rights for fear that these might curtail substantially the ability of those administrations to make legislation that was necessary to solve peculiar provincial problems. Fifth, it continues to be a matter of intense controversy whether property is such a fundamental value that it should be ranked alongside such other legal rights as the right "to be secure against unreasonable search or seizure" or the right "not to be subjected to any cruel or unusual treatment or punishment".[5]

The major portion of this paper takes up each of these enumerated reasons in turn. In Part VI, the discussion shifts to an important final reason for refusing to treat property entitlements in a bill of rights. This rationale derives from the experience of other countries in which property rights have been entrenched, especially the United States. At the time the precise contents of the Charter were debated, the U.S. precedents were in the foreground. The framers of the Charter were apparently reluctant to tread the same path as their U.S. counterparts. The last section of the paper should have particular resonance for a

South African audience, for it focusses closely on schemes for property redistribution in the U.S. that have been attacked on the basis of constitutionalized property rights.

II. What is a right to property?

Discussion of a proposed right to property, or a right to "possessions" (to use one of the terms employed in the ANC draft Bill of Rights), often neglects the polymorphous nature of the rights associated with property. These issues are not simply of semantic importance. For example, the proposal made recently to amend the Canadian Charter is frustratingly spare. There is no elaboration of how to recognize property when we encounter it, or what elements or dimensions this right could conceivably include.[6] Nor do we learn about the degree of protection envisioned in the Charter, what problems such an entrenched right would prevent, or what kinds of government action might be circumscribed by entrenching such a right. Such failures are instructive: they should call to our attention the host of unanswered questions about the scope and importance that this new legal right might attain.

First, property itself is not a single, corporeal thing. It has come to be viewed as as a congeries or "bundle" of rights that the law at a given time recognizes as belonging to persons who own, possess, or use things that are capable of having property interests attach to them.[7] Property consists in rights in or to

things that the law will enforce.[8] In some cases, the property right in question is a right to exclusive use or possession. In another case, it might be a right to the profits from a venture or compensation for its loss or conversion. Property rights can attach to real estate, to personal goods, to products of one's labour, to technology, to industrial or commercial enterprises, to trade names or brands, to original ideas, to images, even to a person's own body. A catalogue of property rights or "incidents" (the term favoured by A. M. Honoré)[9] would be open-ended. At law, such rights or incidents, in absolute or qualified form, are constantly being created. Not all legal systems recognize the same relations as forms of property rights.[10] A simply worded "right to property" in the a bill of rights would amount to an apparently unqualified constitutional protection of an indefinite number of rights to the ownership and use of an indeterminate number of tangible and intangible things. The recent proposal by the Canadian federal government is impressive for its simplicity and absoluteness. Regrettably, it does not help us understand either how property rights are created, qualified, or altered by law, or the reasons of policy for limiting the rights of property owners in the service of overall social welfare or the common good.

Second, a undelineated constitutionally protected right to property is liable to cause confusion. For example, it should not be interpreted as a constitutionally protected right to acquire or own some minimal amount of property. This is a possible, though

implausible, interpretation of a guaranteed right to property. In the Canadian context, the more likely purpose of any property right added to the Charter would be to protect those persons who already have or will obtain property against the depredations of government.[11] It would not be instrumentally useful as a legal guarantee to persons who are propertyless. To borrow the language used by Frank Michelman, property rights in a constitutional setting usually provide for a "derivative", rather than a "direct", right.[12] A constitution does not provide some kind of private entitlement that must be established and maintained in the general laws of the country. Rather, the derivative right attaches only to:

> such instances of entitlement as happen to arise, under such standing laws as do happen to provide for them, protecting these contingent but actual entitlement relations against certain kinds of governmental impairment.[13]

Third, while the debate around property rights typically is illustrated by references to the ownership of land, it is arguable that a broad range of different economic rights or advantages may be construed as a type of property that is recognized under a bill of rights. For example, any attempt by a legislature to impose a regulatory regime on an industrial or natural resource sector, such as the exploration for valuable minerals, could be construed as an interference with an enterprise's property rights. On this interpretation, an aggrieved corporation could bring a

constitutional action to have a court declare invalid the offending legislative act.[14]

III. Existing constitutional protection of property in Canada

For nearly a century after the enactment of the Constitution Act, 1867, Canadians had no explicit constitutional bulwark against the deprivation of property rights by government. There were significant legislative measures that directly or indirectly impaired the ownership or enjoyment of property. Challenges to legislation that created this effect had to be modulated through questions about whether the particular province had the relevant jurisdiction under the scheme of distribution of powers established in the Constitution Act, 1867. A few examples will serve to indicate how the constitutional issues were framed.

In the late nineteenth century, the province of British Columbia passed regulations that excluded various classes of workers, including children under 12 years of age and adult males who were Chinese, from employment in that province's mines. When the corporation that operated a colliery sought to hire workers who were immigrants from China, a shareholder of that corporation challenged the company's decision, alleging that it violated the B.C. law. The legislation, like child labour laws in the U.S. that were challenged around the same time, arguably invaded the mineowner's right to property and right

of liberty of contract. The Privy Council struck down the law in question, reasoning that the province had, through this law, encroached on the federal government's jurisdiction over "naturalization and aliens"[16]. Issues of property and contract did not need to be addressed, since no constitutional protection existed at the time that the corporate employer could invoke.

In the 1960's, in response to concerns about the consolidation of large landholdings by Hutterite colonies in Alberta, that province imposed restrictions on the maximum size of communal holdings and required prior governmental approval for additional acquisitions by colonies.[17] The plaintiffs were Hutterites who objected on constitutional grounds to this legislation. The basis on which the courts eventually settled the validity of the regulations was not, however, the fundamental value of private property. Instead, the legislation was declared valid as relating to land use, a proper use of provincial legislative power, despite its incidental effect of limiting the property rights of the Hutterites and despite the discrimination thus evidenced on the basis of religion.

A further, and very sorry, Canadian historical episode worth citing is the forced relocation and internment of Japanese-Canadians and the deprivation of their property during the Second World War. Unlike in the U.S., where in such cases as Korematsu v. U.S.[18] arguments could be raised under the equal protection clause

or other parts of the Fifth Amendment, there was in Canada no constitutional protection that could avail the individuals who suffered under this extraordinarily harsh policy.[19] Only within the past year has the Canadian government offered to establish a trust fund worth several million dollars to benefit the Japanese-Canadian victims and their families.[20] As might be expected, the potential claimants under this ex gratia scheme maintain that the amount offered is much less than what is just or fair.

It was against this background that the Canadian Bill of Rights, an ordinary statute, was enacted by the federal Parliament in 1960. It is still in effect and contains specific protection for property and for equality.[21] It provides in s. 1(a) a right to the "enjoyment of property" and the right not to be deprived of it "except by due process of law". This measure closely resembles the due process clause contained in both the Fifth and the Fourteenth amendments of the U. S. Constitution.[22]

A provision similar to s. 1(a) was not carried forward into the Charter in 1982, despite the recurrent efforts of Prime Minister Trudeau to see the entrenchment of this legal right. The matter was vigorously contested and, partly owing to the opposition of the New Democratic Party and of some provincial governments, particularly those of Saskatchewan and Prince Edward Island, the right to property was omitted from the Charter.[23] The government of Prince Edward Island was apparently worried that provincial laws

restricting foreign ownership of land in that province would be subject to constitutional attack. Prince Edward Island is notable as a recreational and tourist venue. In Saskatchewan, the primary reason to fear the entrenchment of property rights was the limit this might place on the ruling New Democrats' plans for nationalization of key industries. Even in Alberta, which has long been a bastion of free market enterprise ideology, the provincial government lined up against the proposal to include property rights in the Charter. The objection in the case of this province related to the ability of an Alberta administration to regulate the exploration, refining, and distribution of petroleum and natural gas, particularly as carried out by large multinational corporations.

Subsequent attempts to introduce an entrenched right to property, initiated by resolutions in the B.C., New Brunswick, and Ontario legislatures, as well as in the House of Commons, never succeeded in gaining the requisite support before they expired.[24] The outside date for achieving such an amendment was May, 1991. That date passed without significant public comment in the Canadian media.

The explicit protection in the Bill of Rights of a right to property remains in force today. Several features make this a relatively feeble and underemployed right.[25] First, the right provided by the Bill of Rights is not entrenched in the sense in

which legal rights contained in the Charter are entrenched: courts have been extremely reluctant to invalidate laws that infringe this right. Second, s. 1(a) of the Bill of Rights applies only to laws made by the federal Parliament and the right itself can be changed by Parliament acting alone. Third, s. 1 of the Bill of Rights refers only to "the right of the individual". This would appear to exclude as claimants all non-natural persons, such as corporations. As the first decade of litigation under the Charter has shown, the pursuit through the courts of the vindication of rights and freedoms has frequently been led by corporate claimants.[26]

There have been few cases interpreting s. 1(a). It remains unclear, for example, whether the due process exception in the Bill of Rights should be interpreted as requiring simply a fair procedure to be followed by the government, or whether it actually guarantees compensation for owners of property who have been deprived of it. Nor is it obvious that the Supreme Court, in interpreting s. 1(a), would invariably treat the right to property as subject to a "procedural", but not a "substantive", form of due process. There have been hints in this direction, but the courts have not conclusively settled whether s. 1(a) entitles them to review an impugned law only for propriety of the procedures that led up to its adoption, or whether they can judge the contents of the law against a standard of justice.[27] Issues such as this would become acutely relevant if the recent federal proposals led to the addition of a right to property in the Charter.

Property rights are also specifically protected in various provincial bills of rights. For example, the Alberta Bill of Rights, first enacted in 1972 as an ordinary statute by the province, recognizes every person's right to the enjoyment of property.[28]

Although a right to property was omitted from the Charter, this does not mean that a person's property is perennially at risk to being taken away by governmental action. The jurisdiction of each province over "property and civil rights" underpins the ability of provincial governments to expropriate private property from its owners.[29] In every Canadian jurisdiction procedural guarantees exist to ensure that the owner receives timely notice and a fair hearing before the expropriation can be carried out.[30] The owner whose land is affected is required to be notified and advised of rights provided in the expropriation statute, including the right to object to the taking and the right to obtain appraisal advice. In addition, the exercise of the power of expropriation usually is accompanied by payment of adequate compensation for the property affected.[31] The measurement of compensation in such jurisdictions as Alberta has been changed in the past two decades. Where, under the former common law rules, a basic principle of compensation was "value to the owner", the modern regime adopts the principle of "market value" plus specifically enumerated heads of compensation (including, e.g., disturbance damages).[32] The modern statutes allow for the establishment of special tribunals with the

necessary expertise to conduct hearings and assess the appropriate compensation.

Expropriation or land use regulation are among the more visible instances of an individual property-owner confronting the awesome power of the state. It should not, however, be forgotten that many of the principles developed at common law provide considerable protection of settled expectations in relation to property rights.[33] Whether the law provides protection in the form of property rules or liability rules, the point is that state action is often devoted to securing reliance interests, facilitating transfer of forms of private property, and resolving disputes over ownership and use.[34]

IV. Why does a right to property require Charter protection?

A common starting place for justifying the inclusion of property rights in the Charter is the matter of Anglo-Canadian constitutional history. The Magna Carta, signed by King John in 1215, referred specifically to restraints on the power of the monarch to usurp the property rights of his subjects. The Constitution Act, 1867 similarly presents an image of political legitimacy and stability that is built on the continuity and respectability of propertied legislators.[35] To include property rights in the Charter would only extend a time-honoured tradition.

A second source of support for entrenching property rights is the existence of similar guarantees in major international agreements, many of which Canada has signed. For example, the Universal Declaration of Human Rights includes a right not to be arbitrarily deprived of one's property.[36] The European Convention for the Protection of Human Rights and Fundamental Freedoms,[37] which served as one model for the Charter, protects property rights in Article 1.

A third, more powerful line of argument in favour of constitutionalizing property rights derives from those political and legal theorists who have treated property as a core idea of modern liberal government. According to John Locke in the seventeenth century, the foundation of political societies can be traced to the need to protect established property interests.[38] The just acquisition of property by an individual is a primary activity that Locke thinks governments must respect, even if it took place in a pre-political era. Without settled entitlements, government would be neither desirable nor possible. On this view, property rights, largely based on appropriation in a pre-market setting, become the paradigm of all legal rights in a society.[39] The Charter, as we have it today, is devoted to the ideal that individuals should be autonomous moral creatures. Their zone of personal space, involving freedom of belief and mobility, should not suffer unwarranted government intrusion. Without the protection of constitutional guarantees, individuals and their

private interests are placed at the mercy of an overweening state power that will invariably invoke the justification of a "public" use or purpose in overriding settled interests. This may be done arbitrarily or without adequate compensation. A guarantee of property rights is one means to require governments to act fairly towards its citizens.

Those who, before 1982, favoured the inclusion of a constitutionally guaranteed right to property might have assuaged their disappointment by the argument that this kind of right was implicitly contained in s. 7. From the Charter jurisprudence that has developed, it is now clear that the Supreme Court of Canada has rejected the idea that s. 7 of the Charter includes many of the economic rights traditionally associated with property.[40] This is perhaps a major reason that the debate over the need for an explicit Charter guarantee has been revitalized.

The extension of legal rights under the Charter to include the right to property can also be viewed as part of the ideological tilt that is evident in other aspects of the federal government's proposals. The economic philosophy that underlies the proposal for a more efficient, market-based economic union, with constitutional protection for business against legislative intervention, is strikingly libertarian.

V. What might be the impact of entrenching property rights?

From the perspective of those who advocate including property rights in the Charter, the main advantage to be gained is the added assurance that governments will be restrained from taking property without serious safeguards. The courts in Canada will be empowered to act as sentinels, always vigilant to descry state action that directly or indirectly diminishes or terminates the social or economic rights attached to a person's property. Courts are already practised in this area. According to some legal theorists, most common law adjudication, including the development of property doctrines, can best be analyzed as economic decision-making concerning the distribution of resources within a society.[41]

Though the federal proposals do not mention how property rights would interplay with the rest of the Charter, it should be kept in mind that those rights would likely be subject to the limitations imposed on private ownership by the presence of s. 1 in the Charter. This saving provision, which allows the government to justify a law that otherwise infringes a legal right, would permit the courts to assess whether the infringement is "demonstrably justified in a free and democratic society".[42] It is not clear whether the proposed property guarantee would also be subject to s. 33. This would permit a government to declare, for a limited period, that a law operates notwithstanding the guarantees contained in the Charter.

Adding property as a protected legal right in the Charter, in or about s. 7, could create severe interpretive difficulties in respect of, for example, aboriginal and treaty rights. The courts in Canada are still reluctant to characterize aboriginal rights as ownership of the land in question.[43] The entrenchment of property rights would create a further constitutional barrier for establishing aboriginal title. The property rights of intervening parties would be constitutionally protected against any aboriginal claim.

The opponents of a Charter property right have contended that many desirable types of legislation will be dangerously exposed to constitutional attack. In particular, they draw our attention to the interpretation of the due process clauses by the U.S. Supreme Court in one of its reactionary phases. For over a generation, the approach of the majority of that Court was to interpret the due process clauses as more than simply procedural limits on the deprivation of life, liberty, or property. Instead, the Court deployed a concept of "substantive" due process and succeeded in striking down state laws providing for minimum wages, for maximum hours of work, and for sanctions against anti-union activities.[44] These measures were characterized as state interference with the right to contract and the right to use of one's own property. This trend was not reversed until 1937.[45] From time to time, there have been alarms sounded in the U.S. that the Supreme Court could relapse into a Lochner approach.[46]

The opponents of entrenching property rights are fearful of the spectre that the Supreme Court of Canada will ultimately adopt an approach involving a review of the substantive content of legislation.[47] Among the programs and policies that might be at risk under an entrenched property right are the following:

(a) rent control legislation;

(b) minimum wage and pay equity plans;

(c) occupational health and safety regulation;

(d) matrimonial property regimes that provide for the division of property on separation or divorce;

(e) environmental controls; and

(f) natural resource management schemes.

This is an appropriate moment at which to turn to examine the situation in the U.S. where there has been a very long tradition of the courts scrutinizing government measures that interfere with property rights. The cases are legion. I have picked out a few to indicate the apparent trends in the relevant U.S. jurisprudence.

VI. The U.S. experience of entrenched property rights

A. Determining when there has been a taking

I have already mentioned the Lochner period, during which the U.S. Supreme Court invalidated many, though not all, state and federal laws involving deprivation of property, for failing to meet

the due process requirement under the Fifth and Fourteenth Amendments. These judgments had the effect of restraining "progressive and redistributive social and economic legislation throughout the early twentieth century".[48] In reaching these conservative decisions, the Court looked closely at both the ends sought by enacting the impugned legislation and also the means adopted. As shown in Lochner itself, the Court required a "real and substantial relationship" to be shown between the challenged law and its objectives. The policies on which the Court's work during this era were based have been summarized by Professor Tribe:

> In broad outline, the underlying philosophy held that the only legitimate goal of government in general, and of the police power in particular, was to protect individual rights and otherwise enhance the total public good; if they were to be upheld, governmental regulations thus had to promote "the general welfare" amd not be "purely for the promotion of private interests". As a corollary, it followed that any statute which was imposed upon individuals or corporations in order to redistribute resources and thus benefit some persons at the expense of others (for that is how redistribution was then conceived) would extend beyond the implicit boundaries of legislative authority. Such a law would thus violate natural rights of property and contract, rights lying at the very core of the private domain.[49]

This neatly sketches the background to the dominant judicial approach to issues involving the impairment of the rights of property and of liberty of contract. For over a generation, the Supreme Court was able to characterize legislation as essentially redistributive in a wide variety of cases. For example, in Pennsylvania Coal Co. v. Mahon,[50] the Court held in favour of a mining company, whose underground mining activities under a

particular parcel had been prohibited by a state law. The owner of an adjoining parcel had obtained an injunction stopping the company from mining in a way that violated the statute and damaged his property on the surface. An agreement executed between the claimant's predecessor and the mining company had permitted such subsurface activity. The Supreme Court held that the legislated denial of the mining company's underground rights amounted to an uncompensated taking.

The demise of this judicial era was brought on by significant volumes of criticism of the background economic and political philosophy. It was also hastened by the change in the economic realities of the nation. Thereafter the courts were not so prone to upset legislative measures on the ground that they interfered with the "natural" conditions of property entitlements and rights created under contract. Few cases since around 1937 have shown the Supreme Court actually striking down laws on this basis. Nevertheless, the Court has continued to insist that it is applying a due process standard which requires legislation to bear a rational relationship to a legitimate government objective.[51] The major cases in this area in recent years have concerned not due process, but the just compensation provision in the Constitution. On this topic, there is more discussion below.

A very recent decision of the U.S. Supreme Court, Lechmere, Inc. v. N.L.R.B.,[52] rendered on January 27, 1992 by Justice

Thomas, grew out of a labour dispute in which union organizers were barred from handing out leaflets in an employer's parking lot. The organizers claimed that the parking lot constituted public property. The majority of the Supreme Court held that the communication between the employees and the union organizers (who were not employees) could have taken place outside the parking lot and, therefore, the employer did not commit an unfair labour practice by barring the organizers from its property. The Fifth Amendment, though often only incidentally, continues to be pleaded in cases of this sort, where the particular property in issue is the ability of the owner to exclude unwanted persons from the owner's property.

B. Application of the "Just Compensation" Clause

It may surprise one to learn that in the immediate post-revolutionary period, the U.S. originally did not have safeguards in the Constitution against uncompensated takings of property from private parties by the government. Neither the colonial statutes nor the first state constitutions included a right to receive compensation from the government.[53] Owing particularly to James Madison's arguments for the necessity of strong protections for property rights, the just compensation clause in the Fifth Amendment was later included in the Bill of Rights. This reflected a shift in legal consciousness in the early U.S. from a republican social ideal to one associated with liberalism. Under

republicanism, individuals are conceived as honouring the virtues of self-denial and austerity in promoting the public welfare. The emerging liberal strain of American constitutionalism stressed social tensions and the benefits that would flow from unbridled self-interest.[54] Madison firmly believed that the conditions under which a government should be permitted to deprive an individual of property were exceptionally few.[55]

The "public use" and the "just compensation" requirements under the Fifth and Fourteenth Amendments have not been an exceptionally high hurdle to government action. The criterion of "public use" has been interpreted very broadly, so that courts in esssence leave it to legislatures to determine what constitutes a public use.[56] A particularly good illustration of the Supreme Court's acquiescence on this is the 1984 decision in Hawaii Housing Authority v. Midkiff.[57] The Court upheld legislation that permitted the state to condemn large tracts of land that could then be resold to those leasing the land who wished to own the property they lived on. Under the scheme, the process of redistributing title to the parcels would depend on the initiative of the tenants who wanted to purchase the fee simple. The purpose of the legislation was to dilute ownership of privately held land in Hawaii. In the 1960's, 90% of this land was owned by only 72 owners. According to the Court, this concentration of ownership inflated real estate prices and was constituted an oligopoly against the public interest. The Court of Appeals for the Ninth

Circuit found the challenged legislation to be "a naked attempt on the part of the State of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit".[58] The Supreme Court, however, found the evils of concentrated ownership to be so obviously severe that the transfer of ownership was legitimately for a "public use". As an aside, it is worth mentioning that it would be going too far to claim that the Hawaii legislation was designed to help "poor" tenants obtain ownership of the land they worked. In fact, the benefits of the scheme flowed to large corporate enterprises, including those which ran hotels in downtown Honolulu, which wanted to obtain more than a leasehold interest. Among the 72 major owners of property in Hawaii were several charitable trusts which, under the scheme, were required to convey title to the corporations.

If "public use" no longer represents a significant barrier to government action, the same cannot be said for the "just compensation" criterion. Most of the cases decided under the Fifth Amendment relating to property in the past few decades turn on whether a taking has been made and whether the owner has been compensated to the extent that the Bill of Rights requires. In large measure, the Supreme Court appears to have adopted an approach to these questions which is concerned less with the issue of the relative inviolability of property, and is concerned more with distributional questions. In Jennifer Nedelsky's account of this issue:

> The Court under Burger and Rehnquist has given weight to property rights when they compete with other constitutional rights, and it can be argued that they have protected the interests and power of the propertied at the expense of values of equality and procedural protections for the vulnerable. But they have not tried to return property to its former status as a central boundary to the power of the state (or at least they have not yet succeeded).[59]

Recent cases that may arguably indicate a shift back to the heightened protection for property rights, as traditionally conceived in a Madison sense to be inviolable boundaries, include Keystone Bituminous Coal Association v. De Benedictus,[60] the facts of which bore a striking similarity to those in Mahon, discussed above. The majority in De Benedictus found that the challenged law did not amount to the taking of something in the nature of property. In a strong dissent, Chief Justice Rehnquist, who was joined by three other justices, urged that the rights interfered with in the case were signficant enough that they were the taking of the whole of a "thing". This dissenting view can be extrapolated to the extreme position that on every occasion where legislation deprives a person of a economic right attached to the subject matter of property, it is possible that constitutional invalidity will result.[61]

The Canadian debates over the inclusion of property rights in the Charter have been heavily influenced by the judicial precedents that continue to emanate from the U.S. So long as there is an

apprehension in Canada that property rights could be used as an instrument to roll back entitlements under social welfare programmes or other legal changes that have been made to foster equality, broad sections of the Canadian public will be suspicious about the alleged necessity to add property as a protected right under the Charter. Recent commentators from the U.S., such as Professor Michelman, point out that an influential part of the Supreme Court there seems increasingly inclined to return to notions of absolute property protection against physical or notional invasions of property. Canadian critics will continue to be watchful.

VII. Conclusion

This modest discussion is intended to provide some guidance on the ambit and effect of an entrenched right to property. Much more discussion is required before one can fully understand the public policy advantages and costs of enshrining property as a category of constitutional protection. As this discussion has sought to demonstrate, it is useful to investigate thoroughly the nature and range of the interests and parties that might benefit from constitutional recognition. We can be sure that rights associated with property are in constant evolution. They will reflect the contingent, particular background political morality on which legislators and judges base their work.[62] Placing property rights under the protection of a Charter or bill of rights will require

judges and lawyers to construct tests to determine when there has been a deprivation of property outside the procedural or substantive requirements that might be set down in the constitutional document. The activity of developing and applying different kinds of tests or standards has given rise to a considerable body of constitutional doctrine in the U.S.[63] It has also stimulated academic controversy whether the resulting body of doctrine is coherent or principled.[64]

Finally, it should be recognized that, at a theoretical level, constitutional entrenchment of property rights can be used to achieve contrasting purposes. Some theorists would argue that this form of constitutional protection should be used to shield the holders of entitlements against a patterned redistribution that is meant to achieve a projected form of social justice. One of the most eloquent defenders of property rights against such efforts to use the law to promote a desirable end-state pattern of property ownership is Robert Nozick.[65] He questions, for example, the legitimacy of taxation measures, which he characterizes as "on a par with forced labor".[66]

In another direction, it has been argued that the constitutional interpretation of the idea of property permits lawmakers to reconsider the justifications for and limitations on private property. Under this political and moral theory, constitutional construction of a right to property should be guided

by a triad of principles. These include the principle of efficiency and utility, the principle of desert based on labour, and the principle of justice and equality.[67] This avowedly "pluralist" theory of property would both shape, and be constrained by, any constitutional doctrine that has already emerged or that would follow from a constitutional guarantee of the right to property.

The discussion here is cautionary. There are dangers on all sides once a nation adopts a constitutional guarantee of property rights. The consequences are unpredictable, incalculable, and difficult to reverse. Proposals to entrench a right to property are an invitation to serious rethinking - from a political as well as from a legal perspective - about the role of principles and the role of courts.

NOTES

* Of the Faculty of Law, University of Alberta, Edmonton, Alberta. The text of this paper has been adapted in part from a related discussion, recently published as "Living in a Material World: Property Rights in the Charter" (1992) 3 Constitutional Forum 49.

1. African National Congress, A Bill of Rights for a New South Africa (1990), reprinted in (1991) 7 So. Afr. J. Hum. Rts. 110.

2. Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11.

3. Government of Canada, Shaping Canada's Future Together: Proposals (Ottawa: Minister of Supply and Services Canada, 1991) 3.

4. For example, a guaranteed right to property is included in s. 27 of the Model Human Rights Charter for Developing Countries, prepared by a joint committee representing the Canadian Bar Association and the Cameroon Bar Council and published in 1989.

5. Rights guaranteed by ss. 8 and 12 respectively of the Charter.

6. One possibility would be to resort to the common understanding of what ordinary people mean by "property" when they use that term. This is the theory of meaning, owed to Ludwig Wittgenstein, that frames the analysis in Bruce A. Ackerman, Private Property and the Constitution (New Haven: Yale University Press, 1977).

7. See Thomas C. Grey, "The Disintegration of Property" in NOMOS XXII: Property, ed. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1980) 69.

8. See C. B. Macpherson, "The Meaning of Property" in Property: Mainstream and Critical Positions (Toronto: University of Toronto Press, 1978) 1.

9. A. M. Honoré, "Ownership" in A. G. Guest (ed.), Oxford Essays in Jurisprudence (Oxford: Clarendon Press, 1961) 107.

10. See Jeremy Waldron, The Right to Private Property (Oxford: Clarendon Press, 1988) at 24-61 for an attempt to find an organizing idea that will permit one to generalize about the

diversity of private property rights created in different legal systems.

11. This leaves it open to debate whether various forms of what has been termed "the new property", such as welfare benefits or unemployment insurance, would qualify for protection under a Charter guarantee: see Charles A. Reich, "The New Property" (1964) 73 Yale L. J. 733, Jean McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988) 26 Alta. L. Rev. 548, and Akhil Reed Amar, "Forty Acres and a Mule: A Republican Theory of Minimal Entitlements" (1990) 13 Harv. J. L. & Pub. Pol'y 37.

12. Frank I. Michelman, "Property as a Constitutional Right" (1981) 38 Wash. & Lee L. Rev. 1097.

13. Ibid. at 1099.

14. For an example, see Rybachek v. U.S., 33 E.R.C. 1473 (1991) (U.S. Claims Court), where an Alaskan gold miner sued the federal government for financial losses incurred as a result of regulations made by the Environmental Protection Agency. This example is drawn from the Canadian Bar Association's Rebuilding a Canadian Consensus: An Analysis of the Federal Government's Proposals for a Renewed Canada (Ottawa: Canadian Bar Association, 1991).

15. See United Collieries v. Bryden, [1899] A.C. 580 (P.C.).

16. But compare Cunningham v. Tomey Homma, [1903] A.C. 151 and Quong-Wing v. The King (1914), 49 S.C.R. 440, where similarly discriminatory laws were upheld.

17. See Walter v. A.G. (Alberta), [1969] S.C.R. 383. The statute in question was the Communal Property Act, R.S.A. 1955, c. 52.

18. 323 U.S. 214 (1944).

19. See Co-operative Committee on Japanese Canadians v. Attorney-General of Canada, [1947] A.C. 87 for an instance of deportation being ordered.

20. For a broad survey of this area, see Walter Tarnopolsky, Discrimination and the Law in Canada (Toronto: Richard De Boo, 1982). Many of the earlier laws would now be rendered inoperative through the application of s. 15 of the Charter or, in the private sphere, through the application of federal or provincial human rights legislation, which forbids discriminatory practices and establishes a commission to apply the legislation.

21. R.S.C. 1985, App. III.

22. The Fifth Amendment, adopted in 1791, applies to federal laws and contains specific recognition of a right not to have private property taken for "public use" without "just compensation". The Fourteenth Amendment, adopted in 1868, extended the application of the right to property, subject to a due [illegible] made by the states.

23. For a chronology of the documents leading up to the deletion of property rights from the proposed Charter, see Roy Romanow, John Whyte, and Howard Leeson, Canada. . . Notwithstanding: The Making of the Constitution 1976-1982 (Toronto: Carswell/Methuen, 1984) 216-62.

24. Alexander Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24 Can. J. Poli. Sci. 309. The formula that needed to be satisfied was the agreement of seven of Canada's ten provinces representing at least fifty per cent of the country's population.

25. For a good discussion of the enduring relevance of the Bill of Rights in this context, see Phlip W. Augustine, "Protection of the Right to Property Under the Canadian Charter of Rights and Freedoms" (1986) 18 U. Ottawa L. Rev. 55 at 61-66.

26. The Supreme Court of Canada held in R. v. Big M Drug Mart Ltd., [1985] S.C.R. 295 that corporations had standing to launch Charter challenges where the Charter referred to "everyone" in relation to fundamental freedoms under s. 2.

27. See Curr v. The Queen, [1972] S.C.R. 889.

28. R.S.A. 1980, c. A-16, s. 1(a).

29. See Constitution Act, 1982, s. 92(13). The federal government's power of expropriation has been found in its residual power under s. 91: see Munro v. National Capital Commission, [1966] S.C.R. 663.

30. See, e.g., Expropriation Act, R.S.A. 1980, c. E-16, which reflects the substiantial modernization of the law which took place in 1974.

31. As Hogg notes, nothing in the Charter prohibits a taking by a provincial government without compensation, so long as an express legslative provides that no compensation is required: see Peter W. Hogg, Constitutional Law of Canada, 2nd ed. (Tornto: Carswell, 1985) at 746n.21.

32. See Kenneth J. Boyd, Expropriation in Canada (Aurora, Ont.: Canada Law Book, 1988).

33. Note s. 26 of the Charter, which states that the guarantee of certain rights and freedoms "shall not be construed as denying the existence of other rights and freedoms that exist in Canada".

34. See Guido Calabresi and Douglas Malamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harv. L. Rev. 1089 and Joseph William Singer, "The Reliance Interest in Property" (1988) 40 Stan. L. Rev. 611.

35. See Alvaro, supra n. 24 at 313-14.

36. U.N.G.A. Res. 217 (III), 3 U.N. G.A.O.R. Supp. (No. 13), 71 U.N. Doc. A/810 (1948).

37. 4 Nov. 1950 (in force 3 Sep. 1953), Europ. T.S. No. 5.

38. John Locke, Two Treatises of Government, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).

39. For a discussion of the questionable steps in Locke's theory, see Margaret Jane Radin, "Property and Personhood" (1982) 34 Stan. L. Rev. 957. The claim that the "consolidated property right" is paradigmatic is found in Roberto Mangabeira Unger, The Critical Legal Studies Movement (Cambridge, Mass.: Harvard University Press, 1986) at 98-99.

40. See Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288, [1985] 2 S.C.R. 486 and Irwin Toy Limited v. Quebec (Attorney General), [1989] 1 S.C.R. 927. Early Charter decisions such as New Brunswick v. Fisherman's Wharf (1982), 135 D.L.R. (3d) 307 (N.B.Q.B.), which construed the right to "security" as a property right, have been criticized by academics and repudiated by subsequent courts.

41. Richard A. Posner, Economic Analysis of Law, 3rd ed. (Boston: Little, Brown, 1986) ch. 3.

42. R. v. Oakes, [1986] 1 S.C.R. 103.

43. Guerin v. The Queen, [1984] 2 S.C.R. 335.

44. Lochner v. New York, 198 U.S. 45 (1905), Coppage v. Kansas, [illegible] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

45. West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

46. William Van Alstyne, "The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court" (1980) 43 Law & Contemp. Probs. 66.

47. For an assessment of the extent to which developed case law under the Charter supports the possiblity of substantive review, see Eric Colvin, "Section Seven of the Canadian Charter of Rights and Freedoms" (1989) 68 Can. Bar Rev. 560.

48. Laurence H. Tribe, American Constitutional Law, 2nd ed. (Mineoloa, N.Y.: Foundation Press, 1988) at 568.

49. Ibid. at 571 (footnotes omitted).

50. 260 U.S. 393 (1922).

51. For example, see PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

52. 112 S.Ct. 841 (1992).

53. See Note, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment" (1985) 94 Yale L. J. 694 and Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism (Chicago: University of Chicago Press, 1990).

54. For a richly textured account of this transition, see Gordon S. Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill: University of North Carolina Press, 1969) at 46-90.

55. See Madison's view expressed in The Federalist Papers, ed. Isaac Kramnick (Harmondsworth: Penguin Books, 1987) No. 54 at 333: "Government is instituted no less for the protection of the property than of the persons of individuals".

56. See Berman v. Parker, 348 U.S. 26 (1954).

57. 467 U.S. 229 (1984).

58. Quoted in Nedelsky, supra n. 53 at 233.

59. Ibid. at 235.

60. 107 S.Ct.1232 (1987).

61. See also Mollan v. California Coastal Commission, 107 S.Ct. 3141 (1987), a land-use regulation case, as well as other cases from the past decade analyzed in Frank I. Michelman, "Takings, 1987" (1988) 88 Colum. L. Rev. 1600.

62. For a theory of this dimension of lawmaking, especially in a constitutional context, see Ronald Dworkin, A Matter of Principle (Cambridge, Mass.: Harvard University Press, 1985) at 120-45 and Ronald Dworkin, Law's Empire (Cambridge, Mass.: Harvard University Press, 1986) at 355-99.

63. See Tribe, supra n. 48 at 567-628.

64. For contrasting views, see Richard A. Epstein, Takings: Private Power and the Power of Eminent Domain (Cambridge, Mass.: Harvard University Pres, 1985), Thomas C. Grey, "The Malthusian Constitution" (1986) U. Mia. L. Rev. 21, and Michelman, supra n. 64.

65. See Anarchy, State and Utopia (New York: Basic Books, 1974) at 167-74.

66. Ibid. at 169.

67. For a detailed portrait of this theory, and some indications how it would work in relation to typical "takings" cases, see Stephen Munzer, A Theory of Property (Cambridge: Cambridge University Press, 1990) esp. 442-69.

OWNERSHIP AS A CONSTITUTIONAL RIGHT. THE GERMAN EXPERIENCE WITH ART. 14 AND 15 OF THE CONSTITUTION.[1]

G.E. van Maanen

Mr. Dr. of Law

Professor of Private Law, University of Limburg, The Netherlands

1. Preliminary remarks

Because the concept of property is at the heart of most political theories, it is a very ideological concept. Capitalists see the institution of private property as a prerequisite of a market economy. Socialists feel that abolition of private ownership of the basic means of production is a necessary step towards a more just society. Because of this discussion the debate on the more technical-legal aspects of the property-concept is ideologically contaminated as well.
I want to put forward that it is not so much the nature of this legal-technical concept of property that is the cause of this, but the socio-economic circumstances. The real questions are: how much freedom does the industrial corporation have in treating its employees?; What is the power of the trade unions?; How is the legal protection of minimum wages?; Can the worker be dismissed without compensation? And so on.
In short, it is not, or at least not alone, the nature of the property concept which explains the type of society, but as well, or even more the content of labour law, consumer law, trade unions law!

I think even the most radical supporter of socialism has some serious doubts about the practical implications of a centralised economy. The utter failure of the economies in the former Soviet-Union and the satellite-republics such as Poland, Roumania and the DDR, is a compelling proof that a centralised, bureaucracy-economy does not work. The former communist countries lack housing, food. In addition to this, the environmental problems are enormous.[2]
The need for an explicit debate about a choice between a capitalist and a socialist model has diminished. Let's concentrate on the question of how to achieve a mid-way solution, the social-democratic solution. Characteristic of a social-democratic society is not - at least not alone - the question of legal ownership of the means of production but the (subsidiary) legislation which limits the control over these means of production and different sorts of legislation concerning certain basic social rights such as a social security system and housing facility's.
This does not mean that the question of the institution of private property is unimportant. As well as the question of how en why ownership should be protected as a constitutional right.

In this paper I will start with some philosophical ideas about the property question, and some

---

1 I would like to thank mr Jac Rinkes of the University of Limburg and dr Roel de Lange of the University of Amsterdam for there helpfull comments.

2 See K. Pleyer, The Development of Ownership in the German Democratie Republic and in Eastern Europe, in Land Reform and the Future of Landownership in South Africa (edited by A.J. van der Walt), Johannesburg 1991, p. 9-20.

general remarks on the topic of a constitutional guarantee of property. After that I will describe the German experience with such a constitutional protection of ownership. In the last part of this paper I'll try to evaluate this against the background of the proposals made in South Africa by different groups.

2. In the beginning all the World was America

Talking about ownership as a constitutional right, means talking about the basic institutions of civil society. The classic justification of property as the fundamental institution of civil society is that of John Locke in (chapter V of) his Second Treatise of Government (1689).
It is useful to give some attention to Locke's exposition of the justification of property, because it stands for a way of looking at this question which is still very persuasive. Locke's justification of property was in effect written into, or implied in, the constitutions of the first great modern capitalist nation-states.[3]

What makes his case for a natural right to appropriate an unlimited amount of property so persuasive is that it seems to be based on an equal natural right to one's own labour and to the means of labour. From those fundamental assumptions and the 'invention of money' he deduces with a strong logic the conclusion that 'men have agreed to disproportionate and unequal possession of the earth'.[4]
He reaches this conclusion although he starts with the statement that God has given the earth to the children of men, given it to mankind in common. How is it possible that he can reach the opposite conclusion?
At first we have to see that though the earth is common to all men, every men has a property in his own person. 'The labour of his body, and the work of his hands, we may say are properly his'. So whatsoever he removes out of the state of nature becomes his property. His labour added something to the fruits of nature, and so they became his private right. It is foolish to say that he should have asked all others to consent, because it would be impossible and man would have starved. So Locke concludes:
'Thus the grass my horse has bit; the turfs my servant has cut; the ore I have digg'd in any place where I have a right to them in common with others, become my property, without the assignation or consent of any body.'[5]
In this citation we can already discover some of Locke's hidden presuppositions, namely that it is a normal situation even in the state of nature that there is a master and servant relation and that it is the master in stead of the servant who acquires a property right.

Locke stresses the fact that there is a limit to the amount of things one may ingross, that is as much as one can make use of to any advantage of life before it spoils, or in regard to land, as much as a man can cultivate, and can use the product of, so much is his property.
But then came the invention of money. Locke presents this as a neutral event as something 'men agreed upon': Thus came in the use of money, some lasting thing that men might keep without spoiling, and that by mutual consent men would take in exchange for the truly useful, but perishable supports of life.

---

[3] See C.B. Macpherson, The meaning of Property, in: Property. Mainstream and critical positions. Oxford 1978, p. 13.

[4] Second Treatise, chapter V, Of property, nr. 50.

[5] Of Property, nr. 28.

So now Locke has shown that property is a natural right to appropriate an unlimited amount of things. And it is because of securing this property right that men enter into civil society. As Locke puts it:
'The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property'.[6]
The preservation of property being the end of government for which men enter into society, the supreme power cannot take from any man any part of his property without his own consent. This is why property is a fundamental right in relation to the government.
In Locke's theory every man has the same interest for entering into civil society, because every man has some property. The fact that there are gross inequalities in the amount of property is not relevant. This is why the labourer whose only property consists in his own labour, and the rich landowner are both under the obligation to obey the law, although their interests are quite different.

There is one aspect of Locke's thought that requiers some further attention. Underlying his philosophical construction of a social contract based on the need to secure a peaceful possession of one's property, there are two important presuppositions about the nature of man. in Locke's exposition.
The first is that there are in fact two kinds of people. One is industrial and rational, the other is quarrelsome and contentious.
The second presupposition is that God gave the world to mankind to be cultivated. And it is labour that puts the difference of value on every thing. Locke compares the profit from cultivating the land that a labourer has in England, with the profit the Indian receives from the land in America. In his view the labour of the Indian gives a profit a thousand times less than that of the intensive cultivation in England.[7]
So Locke's underlying idea is that the civilized way of cultivating the land as being more rational, legitimates the right of western man to take the land - which is in fact waste-land - of the Indian and make it profitable to all mankind.[8]
Locke's justification of property can serve, and did serve, not only as a justification for property and the disproportionate possession of it, but also as a justification for the colonisation of America, of Australia.

So what is the lesson to be drawn from this short survey of Locke's justification of property? The first conclusion is that it is not only the principle of the right to own some property that is justified, but that at the same time a justification is given for the unequal possession of land and other assets and that in turn implies a specific mode of production. In Locke's view this disproportionate possession is something that man 'agreed upon' before entering in civil society.

The second conclusion is that Locke has some specific ideas about the nature of men. There are industrious people who have the moral right to take more than there equal share because their way of cultivating the land give's far more profit.
So by justifying the right to property we might be justifying at the same time a specific kind of society and a specific historical situation of unequal possession of land. That means that we

---

6 Second Treatise, par. 124.

7 Of property, nr. 40 and 43.

8 It seems that Locke does not consider the relation of the Indian to the land as a form of ownership.

have to be very careful in the respect of how a property clause as a constitutional right is formulated, and what kind of society lies behind that.

2.1 Ownership a constitutional right?

From the analyses of Locke (and of those of Rousseau and Kant), it emerged that the right to own property is one of the most fundamental rights. In the works of Locke and Kant, in particular, the right of ownership and the protection of that right is equated with civil society and legal order. Without legal order there is no ownership and without ownership there is no legal order. Against this legal-political background, it is not surprising that the right to own property features as a fundamental right in several political declarations and constitutions. Article 17 of the French *Déclaration des droit de l'homme et du citoyen* (1789) reads :

'La proprieté étant un droit inviolable et sacré, nul le peut en être privé, si ce n'est lorsque la necessité publique, légalement constatée, l'exige évidemment et sous la condition d'une juste et préalable indemnité.',

which translates:

'Since ownership is an inviolable and sacred right, it cannot be taken from any person, unless public interest laid down by statute, clearly so requires, however only subject to a just indemnity to be fixed in advance'.

In the Universal Declaration of Human Rights (1948) we also find a provision on the right of ownership. Article 17 reads:[9]

'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.'

In the German Constitution there are relevant provisions as well.

Article 14 reads:

'(1) The right to property and the law of succession are guaranteed. Meaning and extension are determined by law.

(2) Property obliges. It should be used in the general interest.

(3) Expropriation is permitted only in the public interest. It is allowed only by law and against payment of just compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts.'

The Netherlands Constitution (Grondwet), in article 14, contains a provision related to the right of ownership, although it only regulates expropriation.[10] However, some legal scholars think it is possible to deduce from this negative ownership guarantee a positive constitutional right to own property.

---

[9] *(1) Das Eigentum und das Erbrecht werden gewährleisted. Inhalt und Schranken we werden durch die Gesetze bestimmt.*
(2) Eigentum verpflichtet sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.
(3) Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig. Sie darf nur durch Gesetz oder auf Grund eines Gesetzes erfolgen, das Art und Ausmaß der Entschädigung regelt. Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeinheit und der Beteiligten zu bestimmen. Wegen der Höhe der Entschädigung steht im Streitfalle der Rechtsweg vor den ordentlichen Gerichten offen.

[10] G.E. van Maanen, Eigendomsschijnbewegingen, Nijmegen 1987, p. 155.

It should be pointed out, that the concept of 'ownership' in the context of constitutional guarantees protecting property rights is much broader than the technical concept of ownership of corporeal property, which is limited to the legal power of disposition. Generally speaking, the constitutional guarantee of ownership is seen as encompassing other patrimonial rights.[11] Not only the qualified rights in immovable property, such as hereditary lease (*erfpacht*) and usufruct (*vruchtgebruik*), but also other patrimonial rights fall within the protection of the constitutional guarantee of ownership. This is clearly demonstrated, for instance, by the extensive interpretation of art. 14 of the German Constitution (*Grundgesetz*) in the judgements of the German Surpreme Court, as discussed by Rittstieg.[12]

2.2 The scope of the constitutional guarantee of ownership

For the very reason that the scope of the constitutional guarantee of ownership is interpreted so extensively in most constitutions, the question arises as to the exact content and meaning of this guarantee. Are all forms of ownership protected equally? Does ownership of intellectual property (such as copyrights) enjoy the same protection as personal ownership of corporeal goods? And, if the concept of 'ownership' is interpreted to such an extent that it encompasses also all sorts of absolute and relative rights to use a certain object, how, in consequence, will the protection of these rights be weighed against the bare ownership right of the landlord? To be able to answer these questions, we need to further define the meaning of the constitutional guarantee of ownership. What is it that makes property rights so special that they deserve constutional protection? This, in turn, urges an investigation into the philosophical foundation of this guarantee, which leads us back to the 'founding fathers' of these fundamental rights: Locke, Rousseau and Kant. Especially Locke deduces the foundation of the right of ownership, as we have seen, from the individual personal effort of the (future) owner. In Kant's view, the principal meaning of the right of ownership is the creation of a free domain where a citizen can make undisturbed use of his property.[13] These two visions have in common that the right of ownership is founded in the personal relationship between the owner and particular objects of property. Ownership is dominion aimed at personal development and, not in the last place, at realizing means of sustaining life.
Protection of ownership is, therefore, not a goal in itself, but it ultimately serves the full development of the person.

2.3 Does all property result in development of the person?

If the assumption is correct that the ultimate justification of the constitutional guarantee of the right of ownership is to be found in its being a guarantee for development in the broadest sense possible : subsistence, shelter, freedom of expression, then the question should be asked whether all forms of ownership have this function. Of course, one may disagree as to what the aim of human development is meant to be. Marx, for instance, placed a heavy emphasis on work as the means of human development. In the humanist portrayal of man, the development of talents prevails. Locke and Kant hardly refer to the question of subsistence in relation to the property question. In fact, the question of the actual socio-economic meaning of the right of ownership is left out of the discussion. It does not form part of their political theory which

---

11 See Grundgesetz-Kommentar. München 1985, Art. 14, 11 (Bryde).

12 H. Rittstieg, Eigentum als Verfassungsproblem. Darmstadt 1976.

13 Kant, Metaphysik der Sitten (1797), Rechtslehre, par. 8-21.

intends to provide a foundation for a civil society. Fichte is one of the first to comment on these deficiencies. He proposes to define the guarantee of ownership as guaranteeing the right to income for everyone, be it through allocation of a piece of land, or through an exclusive right to a specific activity.[14] Although Fichte's proposal broadens the function of the concept of ownership, as a precondition for the development of the person, to a much more comprehensive guarantee for development, he is not yet aware that the right of ownership of, in particular, the means of production, may radically change its meaning as a result of changed technological conditions.

It has been the merit of Marx to point out that, depending on the state of the relation capital/labour, ownership of the means of production can serve two disparate functions. In a situation in which almost everyone possesses his own means of production, the right of ownership is both a prerequisite and a guarantee for personal development.[15] However, after the sweeping economic changes of the nineteenth century, a different meaning of this right to own the means of production emerges. Although the control of the means of production brings great wealth to the owner, it appears that, as a result, the workers, who no longer own anything significant, are faced with large-scale poverty and dependence. Opportunities for development are no longer open to large groups of the working (or unemployed) population. Consequently, in a realistic interpretation of the constitutional guarantee of ownership the change in function of the concept of ownership can no longer be disregarded. In elaborating on Marx's analysis, Karl Renner has investigated how the classic right of ownership came to undergo this functional change, without it being explicitly expressed in the legal-technical concept of ownership.[16] His thesis is that this change in function could take place as a result of the emergence of other legal phenomena, such as the contract of employment, which caused the concept of ownership to assume its new function of surplus value title, i.e. the right to profit.

2.4 First conclusions

Which conclusions can be drawn from the foregoing with respect to the interpretation of the constitutional guarantee of ownership in Western society?

1. This guarantee is not limited to ownership in a formal-technical sense.
2. It urges a weighing of the protection of different, at times conflicting, patrimonial rights.
3. The meaning of the constitutional guarantee of ownership cannot be seen as

---

[14] J.G. Fichte, Der Geschlossene Handelsstaat. 1800, Chapter 7.

[15] See for exemple the Communist Manifesto (1848); Capital, Volume I, chapter XXXII:
'The private property of the labourer in his means of production is the foundation of petty industry, whether agricultural, manufacturing, or both; petty industry, again, is an essential condition for the development of social production and of the free individuality of the labourer himself.
Of course, this petty mode of production exists also under slavery, serfdom, and other states of dependence. But it flourishes, it lets loose its whole energy, it attains its adequate classical form, only where the labourer is the private owner of his own means of labour set in action by himself: the peasant of the land which he cultivates, the artizan of the tool which he handles as a virtuoso.'

[16] K. Renner, Die Rechtsinstitute des Privatrechts und ihre soziale Funktion, Stuttgart 1965 (first edition 1904).

separate from its politico-philosophical foundation: full development of the person.

4. With the emphasis having been placed on the guarantee of development, the question as to whether the right of ownership is in effect fulfilling this function should also be treated.

5. If it is correctly assumed that the right of ownership under certain circumstances rather impedes the development of many, then a proper interpretation of the constitutional guarantee of ownership requires that not in all cases ownership, in a formal-legal sense, should be protected. Sometimes, rather the position of the employee or tenant, qualified as a non-proprietary position, is worthy of protection.

3. The German experience

In the following I will describe the German experience with a constitutional guarantee of ownership.[17]
In Germany, laws are tested against the Constitution as is the case in most countries, and in addition the German Constitution contains a provision as we have seen, in which ownership is guaranteed.[18] It is therefore interesting to see how the guarantee of ownership has developed in German law.
A good survey of the content of the constitutional guarantee of ownership in German law is provided by Rittstieg. I will follow his argumentation and make comments where fitting.[19]

3.1 Bundesverfassungsgericht and Bundesgerichtshof

In the German legal order, a separate constitutional court, the *Bundesverfassungsgericht* , exists which can be called upon to rule on the constitutionality of certain administrative measures. In addition, the *Bundesgerichtshof* (the Supreme Federal Court [BGH]) may also involve the Constitution when assessing certain measures. The BGH consists of several chambers, called *Senat*, each covering a specific area of law. In case of important decisions that touch on more than one legal area, a decision may be made by the *Grosze Senat* (Greater Senate).[20]

---

17 Partly because the Netherlands Supreme Court (Hoge Raad) is not allowed to test laws for consistency with the Constitution, the doctrine of constitutional guarantee of ownership has remained rather underdeveloped in this country.

18 See L. Prakke, Toetsingsrecht. Deventer 1971, p. 67-76.

19 See in general W. Abendroth, Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der BRD, in Antagonistische Gesellschaft und politische Demokratie. Berlin 1972, p. 109-138.

20 See J. van der Westhuizen, The protection of human rights and a constitutional court for South Africa: some questions and ideas, with reference to the German experience, De Jure, 1991, pp. 1-22.

3.2 Ownership as a constitutional right in the German Constitution

3.2.1 Historical background

After the Second World War Germany was in ruins. Everything had to be built up from scratch. The general consensus was that the former power division, in which only a minority held the economically important positions of power, could not be restored. In 1946, not just the SPD (the Social Democrats) but also the CDU (the Christian Democrats) were of the opinion that it was impossible to restore the old proprietary relations, that the capitalist system ought to be condemned and that a form of nationalized ownership of the principal means of production should be pursued. The CDU, for instance, demanded nationalization of the mining and steel industry and a tighter control of the economy. A referendum organized by the American occupying forces on the Constitution of the federal state of Hessen, in which nationalization of large parts of the economy was prescribed, learned that 72% of the Hessian population voted in favour of socialization of the means of production. In spite of the outcome, the American occupiers prohibited its implementation, since this meant anticipating too much on the choices that a new German state ought to make in freedom. This can be explained against the background of the growing differences between the USA and the Soviet Union. The Americans wanted to establish an economy clearly based on private initiative to counter the advancement of socialism. This intervention of the American occupiers ultimately resulted in an economy that was in effect built on private initiative. Within a short period of time, aided by the Marshall Plan, this West German economy compared favourably with the poverty of former East Germany.

Also the CDU, under the leadership of Adenauer, developed a course aimed at restoring an economy based on private ownership of the means of production. In view of the dwindling consensus on the economic system, it is understandable that when drafting the Constitution of the Federal Republic of Germany, a compromise needed to be found with which both CDU and SDP were able to live. This explains why article 14 guarantees a right of ownership, whereas in article 15 the possibility for socialization of land and the means of production is explicitly left open. From the discussion which took place, it becomes evident that guarantee of ownership was not only taken to mean all that was necessary for a person's subsistence, but also the right to private enterprise. In article 15, however, as has been said, the possibility of socialization of important means of production (and land) is expressly provided. Article 15:[21]

'Land, natural resources and means of production may for the purpose of socialization be transferred to public ownership or other forms of publicly controlled economy by a law which shall provide for the nature and extent of compensation. In respect of such compensation the third and fourth sentences of paragraph (3) of Article 14 shall apply mutatis mutandis'.

In order to avoid, *inter alia*, that by a narrow interpretation of the (conservative) judges, restrictions would be imposed, a special judicial body -the *Bundesverfassungsgericht* - was charged with interpreting the Constitution. In the Weimar Republic, a restrictive interpretation of the constitutional right of ownership had been used by the Judiciary to frustrate socialist measures taken by the left-wing government in the years from 1919 to 1933. The experiences with the ordinary judiciary, who had not come out of the Nazi era unblemished either, were therefore bad.

---

[21] *"Grund und Boden, Naturschätze und Produktionsmittel können zum Zwecke der Vergesellschaftung durch ein Gesetz, das Art und Ausmaß der Entschädigung regelt, in Gemeineigentum oder in andere Formen der Gemeinwirtschaft überführt werden. Für die Entschädigung gilt Art. 14 Abs. 3 Satz 3 und 4 entsprechend."*

3.2.2 The guarantee of ownership as the foundation for civil order in German case law

In German case law, the principle on which the guarantee of ownership in article 14 of the German Constitution was founded, was never questioned. Article 14 GC did develop into the most important constitutional right. It is curious that the *Bundesgerichtshof* has ascribed a natural-law foundation to article 14GC, which it accords '*übergesetzliche* (.....) *von staatlicher Rechtssetzung unabhängige Geltung*'. An inalienable human right, in other words (BGH 10 June 1952, BGHZ 6, 270).
The judgment of 10 June 1952 was to become very important for the further development of case law on article 14 GC. It is remarkable that the BGH pays no attention to either the historical background described above or the affinity with the principle of a social state based on the supremacy of law of article 14, section 2 GC. Article 14, section 1 GC is mainly interpreted as a protection against the Legislature and the Administration. The BGH holds: '*In order to live as a person among his equals, that is to say in freedom and in responsibility for himself and not only as an object of an omnipotent administration, the individual subject of the State needs, for the sake of his freedom and dignity, to be able to claim a sphere of ownership that is strongly safeguarded.*'
The essence of this statement is that there is a logical connection between ownership, freedom and human dignity, in which ownership is a condition for the latter two. This description seems to tie in with the Kantian civil conception in which the ownership structure guaranteed by the government is a condition for freedom.

In contrast to the BGH, the *Bundesverfassungsgericht* (BVerfG) has never made the guarantee of ownership of article 14 its main issue. On no occasion (when appealed to for a ruling by a member of parliament) was a statute held by the BVerfG to be in contravention of article 14 GC. Consequently, the legislature's freedom to change certain legal institutions pertaining to the guarantee of ownership was hardly curtailed. The German Constitutional Court holds that the Constitution is neutral vis-à-vis the economic system.[22]

3.2.3 Objects of the constitutional guarantee of ownership

Rittstieg points out that as the scope of protection of the right of ownership is extended to other patrimonial rights, its protective force weakens. In order to understand the concrete notion of guarantee of ownership, we need to abandon the abstract notion of ownership and make a distinction according to object and function of ownership. The personal meaning of the right of ownership in relation to the control over goods, to it being a condition for subsistence, to social status and social power, is taken as a point of departure.

Personal property
First and foremost comes the personal use of goods and the sphere of freedom connected with it. Although the relationship person-property, as a legal relationship, is only an indirect indication that the issue here is the relationship between the owner and others (who must respect his property), the traditional expression dominion is, as a matter of fact, the best characterization of this relationship. However, since we deal with a personal relationship between owner and property, dominion should be limited to those situations in which the owner of the property himself effectively has the property in possession or in use. Ownership of houses to let and means of production therefore do not belong to this type of ownership.

---

[22] See K.-H. Seifert/D. Hömig (Hrsg.), Grundgesetz, 4th Edition, Baden-Baden, 1991, p. 151.

We must look beyond the 'sovereign' abstractness of the civil concept of ownership. In view of the changed meaning of personal ownership in the modern consumer society, one can ask oneself, incidentally, to what extent ownership today carries the meaning of a means of development, a meaning it had in the eighteenth and nineteenth century. Sometimes personal ownership, because of obligations of instalment credit, can become an impediment to personal freedom. The control by a person over property will, in some instances, turn into control over the person by the property, which, by the way, does not detract from the enormous importance of personal ownership.
Rittstieg points out that the limits of the civil concept of ownership (for instance, having absolute disposal) are often explained on the basis of personal ownership of corporeal property and, subsequently, this is used to justify private ownership of the means of production. The random disposition of personal property should only be seen as neurotic behaviour. The meaning is clear: since all persons will have control over some personal property, these arguments are appealing, even where they are used to justify functions totally different from the personal relationship with property. The constitutional protection of this type of ownership plays a very minor role in everyday legal practice. All kinds of prohibitions and requirements are regarded not as restrictions of the (personal) right of ownership, but as general restrictions of free agency. In economic trade, however, such restrictions are rather quickly regarded as contrary to the freedom of ownership. Consequently, it becomes evident that it is the economic meaning of ownership that is at issue and not in the first place the personal relationship between the owner and his property.

Private home ownership (housing rights)

Housing is a prerequisite for human development. For parts of the population home ownership is fulfilling this need. Although also in this context the unlimited freedom of the owner is given priority in most cases, this freedom of random disposition is so far removed from normal situation that for the meaning of the right to own housing accommodation it has very little significance. The right to own housing accommodation does, however, grant rights to certain persons without considering the real needs of the owner. In German case law, mainly the aspect of the capital value of the right of ownership is protected, as is reflected in expropriation law and the damages payable in case of a civil wrong committed by the State.
The landlord and tenant law which was derived from ownership implies (economic) dependence of the tenant/lessee on the the landlord/lessor, which constitutes a limitation of his freedom to that extent. In a constitutional sense, the landlord and tenant law is only protected by the 'inviolability of the home'. This (German) constitutional right however, has no horizontal application (Drittwirkung) with respect to the owner. Since the scope of protection of article 14 GC was widened to include patrimonial rights other than just the right of ownership, the landlord and tenant law also falls within that protection. This means that two property rights worthy of protection are colliding. On the basis of the politico-philosophical background of article 14 (protection of the personal relationship between the person entitled and the property), the landlord and tenant law should enjoy more protection than the (bare) ownership right of the landlord. In BGH case law, a different view is taken; the ideology of ownership of the nineteenth century pre-industrial society has been taken as the point of departure. In the judgment of 10 June 1952, the housing ordinance is seen as an infringement on the right of ownership, justified only by the emergency situation of the time. It is not the right to housing of the majority of the population that prevails, but rather the owner's right of disposition. It seems as if the judges are not aware of that fact that also the position of the tenant is protected by article 14 G.C.

Ownership of houses and land not intended for personal use.

Ownership of land and buildings that are not used by the owner leads to control over the lives of other people. The true meaning of the expression 'to dispose of as he sees fit', becomes clear when dealing with vacancy and speculation in the old inner cities. The essence of landownership is its capital value and its land rent. Rittstieg is very clear on the function and meaning of this right of ownership. It is a (functionless) privilege of a minority enriching itself at the expense of the majority, as the nobles did in the beginning of the civil age. This consequence of the right of ownership can, however, remain hidden. The right of ownership is anonymous and, furthermore, the private home owner might easily identify himself with the other owner, the one who speculates, in spite of the fact that the former may be tied to the bank hand and feet for the rest of his life. The conclusion is that, in the light of article 14 GC, two types of 'ownership' stand in opposition to one another: on the one hand the right of the lessee or grantee and on the other the owner/landlord. It is in no way conclusive, says Rittstieg, that the traditional right of civil ownership of the landlord takes precedence, that is, if one regards article 14 as the provision that first and foremost is intended to guarantee the individual disposal and use of corporeal property. In the case law of the BGH, however, the classic concept of ownership prevails.

Means of production and enterprises

As Marx and Renner did before him, Rittstieg points at the change in function of ownership of the means of production. Although this dominion is curtailed in the modern state based on the supremacy of law, it continues to be dominion. As we know, Adam Smith's justification of private ownership of the means of production was the concept of the 'invisible hand': if everyone were to pursue his self-interest, this would lead to the highest general prosperity; mostly for the class of proprietors, that is. In a true democracy things should be different. In addition, neither the environment nor the quality of life is taken into account in this view.
On the basis of the characterization of the constitutional guarantee of ownership by the German Constitutional Court (Bundesverfassungsgericht), in which it emphasized the human rights and freedom element, the means of production of the manual worker should be treated differently from those of the industrial entrepreneur. In large enterprises protection of the workers should prevail. It is, after all, the *Arbeitnehmer* (the labour-taker) who offers his labour. (It is not the employer who gives labour, but the employees who offer their labour.) As in the relation the landlord and tenant law/right of ownership of the landlord, it is rather the worker, not the entrepreneur who has a personal relationship with the property (machine).

In expropriation cases, the German Constitutional Court decided that also juristic persons may invoke the protection of article 14 GC.[23] That enterprises as such are also protected under article 14 GC, was once again acknowledged in the chimney sweep judgment of 30 April 1952 (Schornsteinfeger Urteil).[24] In this case, it was decided that the legal age limit for chimney sweeps, who up to then held a monopoly in a certain area, was in violation of article 14 GC, at least insofar as an enterprise was to be equated with ownership of goods in this respect. The judgment only applied to entrepreneurs who themselves worked in their business. Their personal input was decisive and, in addition, the working capital brought into the business played an important role. The court in this case argued in a Lockian way: the individual is entitled to all he has acquired through his own labour as his property. By so arguing, the court ignored the modern corporation in which two types of possessors of assets (and two

---

[23] Erft-Verbandurteil vom 29.7.1959, BVerfGE 10, 89, 111.

[24] BVerfGE 1, 264, 277.

types of labour) oppose one another: the owner of capital and the workers/non-owners. Locke's argumentation can no longer serve to justify the entrepreneur's ownership. The sole remaining justification is in fact a utilitarian/political justification, which leads to the question on the best economic-political system.

New property

Shortly after the new German Constitution came into effect,[25] some social security claims were brought within the scope of article 14 GC. Thus, even public property rights were sometimes included in the protection.[26] Both Fichte in 1800 and, more recently, Grosheide in the Netherlands,[27] advocated a view that approximates this development. Rittstieg points out that this approach has it limitations; what is, in effect, at issue is a weighing of fundamental social rights, that could better be discussed as a separate issue rather than in the context of guarantee of ownership. Strictly speaking, this 'new property' has nothing in common with ownership. A right to social benefits differs in essence from a corporeal property right .

Ownership and assets

Rittstieg points out that in our society appreciation is a normal phenomenon of an object of property, whereas depreciation, for instance as a result of government measures, is regarded as an infringement that should be compensated for. The value of assets as such do not enjoy the protection of article 14, as was decided by the BGH in the Knäckebrot judgement (BGHZ 45, 83, 87).

3.2.4 Ownership as legal institution

It is often stated that (private) ownership, as a legal institution, is guaranteed by the German civil legal order, even separate from the constitutional guarantee of ownership. Ownership, in this view, is inextricably linked with civil legal order (and with a certain type of economic planning). Rittstieg calls attention to the fact that this view flatly contradicts the explicit neutrality of the German Constitution (both articles 14 and 15 GC), for article 15 expressly states that land and means of production can be placed in the hands of society, which implies a breaking away from the civil institution of ownership.
Article 15 as such has never been a main issue. It's meaning lies more in its function to prevent an interpretation of article 14 contrairy to its historical purpose as a compromise. The Grundgesetz is neutral to the economic order.

3.2.5 Lessons from Germany

In the historical situation of post-war Germany a compromise was found between the two main political groups. In article 14 of the Constitution we find the guarantee of property, in article 15 the explicite acknowledgment of the possibility of socialisation of land, natural

---

[25] 23 May 1949, BgBl, S.1

[26] Rittstieg, o.c., p. 369-374

[27] F.W. Grosheide, Eigendom in de Overgang? Preadvies Calvinistische Juristen Vereniging. 1982.

resources and means of production. Both articles read together make it clear that the Constitution is neutral vis-à-vis the economic system.

Because of the wide scope of protection - not only property rights in the narrow sense but other patrimonial rights as well - the courts have to differentiate between object and function of ownership. Although the personal relationship between owner and property should be the one that is most worthy of protection, this not always the case. In German case law sometimes the landlord finds protection just because of his property right. In general we see a tendency towards a more conservative interpretation of article 14 of the Constitution.

4. SOME CONCLUSIONS AND REMARKS

4.1 Codification means mummification?

The first question that we have to ask ourselves is what will happen if we lay down the guarantee of ownership in the constitution. What will be the consequences of such an article in the bill of rights?
I do not agree with André van der Walt in his interesting article 'Towards the development of post-apartheid land law', that codification of ownership in a civil code (or in a bill of rights) means mummification.[28] Although one can agree with him that the 19th century concept of ownership as an absolute and unlimited right is outdated, it is interesting to see that despite of that old concept laid down in the French and Dutch civil code, in fact a new concept has arisen in the civil law of these countries.
If one looks at modern tenant-law one can notice that the bare ownership-right of the landlord is rather limited, and that he has several duties, such as to keep the house in good condition. As to the lease of land, one can see a development towards of a strong protection of the lessee. If the lessor sells the land, the lessee can make good his right to the land against any third person.
It is not so much the legal-technical concept of ownership laid down in the civil code that leads to the danger of an extreme capitalist interpretation, as well as the ideological myth of the concept of ownership as an absolute and purely individual right.[29] If we look through this ideological myth to the legal-technical meaning and use of the concept of ownership there is nothing that supports the idea of the danger of an conservative mummification of that concept just because it is laid down in a civil code.

4.2 Ownership as a constitutional right?

Ownership as a constitutional right however has a different meaning and significance, from the technical-legal concept as used in property law. Protection of the right of ownership, the right of property as an constitutional right leads immediately to the question of the foundation of that right. Why do we want to protect ownership as a constitutional right? Why has it the same importance as, for example, the principle of 'habeas corpus'?

A constitutional right is in the first place a right of the individual against the State. Baring that in mind the right of property as a constitutional right can be a shield against the government

---

[28] De Jure, 1990, pp. 41.

[29] See G.E. van Maanen, Eigendomsschijnbewegingen. Nijmegen 1987, p. 79-80.

by securing a free sphere in which the individual is protected (His own house, his own piece of land).
But is the same protection required for the landlord? It is not his personal freedom that is at stake, but (only) his economic interests. Of course it can be of the utmost socio-economic importance to secure this property right of the landlord. Otherwise he might not invest in new housing or whatever. But to say this is a fundamental-constitutional right is another thing. This is al the more relevant as we look to the position of the person (the lessee) who is in fact living in this house or who is dependent on the crops of the land he has rented. Isn't it true that the protection of that position is far more fundamental for the existence of that person than it is for the landlords position?
This means that in protecting the right of property as a constitutional right we have to take into account a much broader concept of property. Sometimes it means property in the legal-technical sense where as we are dealing with the owner who occupies his own premisses, sometimes it means (property) rights in re aliena, the rights of the tenant, the lessee which are protected under the constitutional right.
Seeing the question from this perspective there is no need to be afraid of mummification of a 19th century absolute concept, on the contrary, the constitutional property rights calls for a broader way of looking at the property concept. The need to pierce the legal-technical concept and to look at the social realty that lies behind it calls for differentiation between various concepts of property.[30]
Not on the constitutional level but on the level of private law we must develop a concept of ownership that reflects the needs of modern society. We have to examine the concept of ownership in relation to its social functions. This may lead to different concepts of ownership in regard to the different social function. For example the ownership of land or housing bears more restrictions than the ownership of consumer goods.[31]

4.3 Does constitutional protection of private property lead to protection of a capitalist system of production?

Although I don't believe that the choice for constitutional protection of the right to enjoy property involves the choice for a pure capitalist model for a market-economy for reasons stated above, I think that it is wise to extend this constitutional right to enjoy ones possessions by a supplementary right such as the German art. 15 GC, which clearly states that land, natural resources and means of production can be socialized, according to law and with just compensation. By making such a provision one makes explicit that the right to property does not imply a choice for a specific type of social formation.

As I stressed above the actual function of property of the means of production is to a great extend determined by other legal institutions than the concept of property itself, such as contract law and trade union law. Therefore, I believe that even more important than the

---

[30] See G.E. van Maanen, o.c., p. 150-157.

[31] In regard to land we see a recent devellopment in Dutch law, where the owner has an obligation to the State to clean-up his land, even in situations where he has no responsability at all for the pollution of his land.
Where the owner is responsible for polluting his own land, he has an obligation against the State to clean the soil. So one might say that his property right is not absolute, but it includes a responsability towards society and even to future generations.

debate over the question whether a constitutional right to private property is desirable and how it should be described, is the freedom of trade-unions and the right to strike.

4.4 Constitutional protection of property

As to the constitutional protection of property I would suggest to choose a formulation that guarantees not the abstract right of property but the material aspect of the right to enjoy ones possessions; that is the personal relation between owner and object. Article 1 of the First Protocol of the European Convention on Human Rights, provides 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 by law and by the general principles of International Law.'

It is questionable whether it is necessary to attribute this constitutional right to legal persons as well. Because if we consider it as a human right it is not evident that a legal entity should have the same position as a natural person. This doesn't mean that a legal person shouldn't be protected. Of course it should, but it is not on the same level as a human right needs protection.

I think one of the reasons why so many property clauses in different constitutions are formulated as an abstract right to own property, is that the goal of this clause is twofold. On the one hand it aims at protecting individual, personal property as a human right, but on the other hand it refers to something at the right to private enterprise. The right to own in private ownership means of production.
Therefore I think it would be wise to express this right to private enterprise in a different article. In doing so we can formulate the personal right to property as a human right for every individual to enjoy his possessions. So that we might create a better condition for the protection of property as a prerequisite for personal development. Anyhow, this is probably leas important as long as we describe the right to property, as a right to enjoy, and not as an abstract right to own.

5. Some proposals in South Africa

If we look at the proposal of the South African Law Commission from 1989 we find there a more classical, abstract formulated property clause:

The right to property is guaranteed'.

For reasons mentioned above, I'm not in favour of this kind of formulation. In the 1991 report of this Commission it reades (Art. 22a):

'Everyone has the right individually or jointly with others to be or to become the owner of private property (...)'

Again the abstract right to own private property is guaranteed. If we look at the ANC proposal of 1990 we find the following in article 11, sect. 2:

'All men and women and lawfully constituted bodies are entitled to the peaceful enjoyment of their possessions, including the right to acquire, own, or dispose of property in any part of the country without distinction based on race, colom, language, gender or creed.'

Although the latter allready explicitely follows from art. 1 of this Bill of Rights, the mixture of apartheid policy with land law makes it understandable that this is stressed once more.
As to the actual protection of property, I believe that it is well chosen to emphasize the aspect of enjoyment of possessions. The right to acquire and to own has to be read in this perspective.

In article 6 of the ANC-proposal we find an important rule, namely the right to join a trade-union and the right to strike and to form a picket-line. Such fundamental rights have more than a symbolic meaning. It is desirable that, if necessary, they could be invoked against the government. In the 1991 proposal of the South African Law Commission these rights are protected as well (art. 27a and 28h).

In art. 11 sect. 11 of the ANC Bill of Rights, we find a proposal that acknowledges that the State can take measures for control, use or acquisition of property in accordance with the general interest.

Rather important - although I don't have enough time to go into that - are the environmental rights laid down in art. 12. In sec. 2 of this article we find the right of all men and woman to a healthy and ecologically balanced environment.[32]

As stated above (under 3.2.3) when the scope of protection of the right of ownership is extended to other patrimonial rights than property in a strict sense, its protective force weakens. Therefore we need to abandon the abstract notion of ownership and make a distinction according to object and function of ownership.
As a human right we should protect the personal use and enjoyment of goods, whereas ownership of the means of production needs protection as an economic right.

6. Conclusion

1. Formulation of a property right as a personal right. This means in the ANC Bill of rights as a sub-section of art. 2. That is the right to peaceful enjoyment of possessions (as proposed in art. 11, sect. 2 of the ANC proposal, but limited to natural persons):
   'All men and women are entitled to the peaceful enjoyment of their possessions, including the right to acquire, own, or dispose of property.'

2. In addition under the heading of 'Economy, land and property' in the ANC proposal one could begin with a provision which explicitely acknowledges the principle of a market-based economy. For example something like the Law commission-proposal does in art. 23:
   'Everyone has the right freely and on an equal footing to engage in economic enterprice, which right includes the capacity to establish, manage and maintain commercial undertakings, to acquire property and procure means of productions and to offer or accept

---

[32] See on this subject A.J. van der Walt, The effect of environmental Conservation measures on the concept of land ownership, The South African Law Journal 1987, p. 469-480.

employment against remuneration.'

3. In order to prevent gross exploitation of employees and the environment, it's necessary to formulate constitutional rights to freedom of trade-union and the right to strike, as well as specific environmental rights.
I refer to the Law commission proposal articles 28, 29 and 30. In the ANC Bill of rights we find workers' rights in Article 6, and environmental rights in article 12.

4. In order to make it perfectly clear that the parlement has the right to nationalize certain sectors of the economy, by law which shall provide for a just compensation, to make a provision as the German article 15:
'Land, natural resources and means of production may for the purpose of socialization be transferred to public ownership or other forms of publicly controlled economy by a law which shall provide for the nature and extent of compensation.'[33]

This provision could be inserted in Article 11 of the ANC Bill of rights after sec. 1. As to the Law commission proposal one could think of extending article 23 with such a provision.

---

[33] See Grundgesetz-Kommentar, München 1985, art. 15 (Bryde), pp. 695-704.

THE FRAGMENTATION OF LAND RIGHTS*

AJ van der Walt
B Iur Honns (BA) LLB LLD LLM
Professor, Department of Private Law,
University of South Africa

"If the individual is to survive in a collective society, he must have protection against its ruthless pressures. There must be sanctuaries or enclaves where no majority can reach. To shelter the solitary human spirit does not merely make possible the fulfillment of individuals; it also gives society the power to change, to grow, and to regenerate, and hence to endure. These were the objects which property sought to achieve, and can no longer achieve. The challenge of the future will be to construct, for the society that is coming, institutions and laws to carry on this work. ... We must create a new property."
Charles A Reich "The new property" 1964 Yale LJ 733-787 787.

1 INTRODUCTION

This paper is about land rights[1] and their protection in a bill of rights. Quite a number of efforts to formulate a suitable clause for the protection of property in a bill of rights have been recorded over the last couple of centuries.

---

* The research upon which this paper is based has been undertaken with financial assistance from the Alexander von Humboldt-Stiftung (Bonn) and the Institute for Research Development of the Human.s Sciences Research Council (Pretoria). Opinions expressed by the author are not to be attributed to either of these institutions.

1 For this purpose land rights include, without being restricted to, ownership and real rights in land; not unlike property in Anglo-American law. The term "property" is sometimes used to refer to land rights in this wide sense.

The main impression one gets from these formulations is that property is an elusive[2]/illusive[3] concept, since most grasps at its meaning have been rewarded only with handfulls of feathers. Of course some are happy with this result - especially those who want a property clause in the bill of rights to feather their nests against the rigours of a new social order.

In a delightful recent paper[4] Kevin Gray examined the elusiveness of property in a novel way. In what he describes as "the search for the inner mystery of 'property'" Gray proposes that one should not simply snatch at this elusive concept but stalk it; try "to catch the concept by surprise by asking not 'What is property?' but rather 'What is not property?'"; by deliberately approaching the quarry from the direction which seems least probable.[5] In his use of this approach Gray wants to demonstrate that the true nature of legal institutions such as property is often only revealed when they are not taken on face value.[6] Perhaps one might venture even further than Gray and suggest that legal institutions, like human beings, are so complex that their nature should be investigated through an analysis of their shortcomings - a sort of legal psychoanalysis.

In a similar spirit Gerrit van Maanen[7] proposes that the le-

---

2 The Concise Oxford Dictionary: "elusive - escape adroitly from (...person's grasp,...inquiry, observation); avoid compliance with (law,...); escape from, baffle (the understanding)."

3 The Concise Oxford Dictionary: "illusive - deceptive."

4 K Gray "Property in thin air" 1991 Cambridge LJ 252-307.

5 Gray 1991 Cambridge LJ 252 292.

6 See Gray 1991 Cambridge LJ 252 292.

7 GE van Maanen "Balanceren op de grens van de rechtsorde" 1982 Recht en Kritiek 467-471. See further GE van Maanen "Hoe burgerlijk is ons burgerlijk recht en zijn beoefenaar?" in De dubbelzinnigheid van het recht: kritische rechtstheorie en rechtspolitiek in de jaren

gal academic should not be content to practice his craft in splendid theoretical isolation, nor should he abandon the effort altogether and immerse himself in practical struggle - he should balance upon the edge of the legal order. This challenging expression refers to the balance between theory and practice, but it also reveals something of the idea that critical legal theory should not be restricted to conventional doctrine and accepted dogma, but that it should explore and probe the limits of the law; its outer extremeties, shortcomings, imperfections and areas of no-man's land. A map that shows only the highways may be useful to those who travel only by road, but from time to time the process of social reconstruction might require us to traverse the wilderness in between, on foot.

Common to both these suggestions is the idea that conventional (conceptual) legal analysis is found lacking in one way or another - that the elusiveness of its concepts and the illusiveness of its conclusions are too often the result of the way in which it restricts itself from the outset by working strictly within the paradigm of established dogma. A really meaningful critical discussion of land rights in transformation can and should not follow the well-trodden paths of conventional legal discourse; it should find its own way, even if that involves stumbling and losing one's

---

(continued)

tachtig Ed R de Lange et al Recht en Kritiek 1985 41-46, especially at 43-44, where Van Maanen expounds upon this idea. Compare AJ van der Walt "The doctrine of subjective rights: a critical reappraisal from the fringes of property law" 1990 THRHR 316-329; AJ van der Walt "De onrechtmatige bezetting van leegstaande woningen en het eigendomsbegrip: een vergelijkende analyse van het conflict tussen de privaat eigendom van onroerend goed en dakloosheid" 1991 Recht en Kritiek 329-359, where a similar approach was followed.

way occasionally. After all, any discussion of property is reassuringly relative, as indicated by an expression used by Calabresi and Melamed,[8] who compare it with one of Monet's paintings of the cathedral at Rouen. Such a discussion, like one of the paintings, provides only one view of the cathedral. In order to understand the cathedral one must know all the paintings, not to mention the cathedral itself.

In this paper it is taken for granted that we are involved in the fundamental restructuring of society, of the legal order and of land rights; and that the answers that we are looking for will not be found within the paradigm of established conceptual reasoning. For that reason this paper proposes to stalk land rights in the manner set out by Gray, to approach it from the direction which seems the least probable, to follow Van Maanen's advice by probing its limits and extremities, and to explore its shortcomings and imperfections in search of a workable footpath along its edges; even if in the end it will provide only one view of the cathedral.

2 DEBUNKING THE TRADITIONAL OWNERSHIP PARADIGM

Traditionally a paper on the protection of property in a bill of rights would have set out by defining and analyzing ownership as the most comprehensive and important real right in land, which means that it is also the land right most worthy of protection in a bill of rights. Here it will be argued that it would be a grave mistake to approach ownership in isolation when considering the bill of rights-issue, and that any clause which proposes to protect ownership in

---

8 G Calabresi and AD Melamed "Property rules, liability rules, and inalienability: one view of the cathedral" 1972 Harvard LR 1089-1128, see especially fn 2 at 1089-1090.

isolation will succeed only in giving constitutional status and approval to the abstract perception of ownership, thereby effectively precluding any possibility of allowing property law to adapt to the changes that are taking place in society. Although land rights have been and still are dominated by the abstract concept of ownership, the basic premise of this paper is that land rights cannot be defined or described adequately in terms of the traditional abstract concept of ownership: land rights are not synonymous with or reducible to landownership.

The abstract notion of ownership has not always dominated the property paradigm. Its first tentative footprints may perhaps be traced back to Donellus (1527-1591), or to Grotius (1583-1645), whose distinction between full ownership and real rights[9] might be regarded as a prefiguration of later developments,[10] but in fact this concept of ownership was only worked out consistently by the German Pandectists of the nineteenth century.[11]

In terms of the Pandectist system of rights the whole law of

---

9 "Volle eigendom" and "gerechtigheden" respectively; see Grotius Inleidinge tot de hollandsche rechts-geleerdheid 1619-1621; ed F Dovring, HFWD Fischer and EM Meijers Leiden 1952 II.33.1.

10 R Feenstra Ius in re: het begrip zakelijk recht in historisch perspectief Leiden/Zwolle 1979 24-27 has attributed much importance to Grotius' distinction, but in "Dominium and ius in re aliena: the origins of a civil law distinction" in New perspectives in the Roman law of property: essays for Barry Nicholas ed P Birks Oxford 1989 111-122 Feenstra amended that view, and concluded that Donellus developed the same distinction at an earlier time, and more consistently.

11 See Feenstra "Dominium and iura in re aliena: the origins of a civil law distinction" in New perspectives in the Roman law of property: essays for Barry Nicholas ed P Birks Oxford 1989 111 122.

property is dominated by the abstract concept of ownership, because real rights are defined not according to their own characteristics, but in terms of what they are not, namely ownership.[12] Ownership is regarded as the most comprehensive real right, which is simultaneously the origin or source of all limited real rights. Moreover, the limited real rights are by definition nothing more than temporary and basically unnatural rights, granted to non-owners by way of a temporary suspension of some aspect of full and unrestricted ownership.[13] The content of a limited real right is determined by the various ways in which it falls short of ownership: its limited character, its temporary existence, its reducibility to enumerable entitlements, and so forth. In this system land rights other than ownership are, in fact, mere shadows without essence: they are not-ownership.

When considering the actual distribution of land and the imbalance between landowners and land users in South Africa, it becomes apparent that this paradigm cannot provide answers for the restructuring of land rights in a future social order. In terms of the traditional ownership paradigm it is

---

12 See AJ van der Walt Die ontwikkeling van houerskap LLD thesis 1985 881-889, where it is argued that both possession (in the narrow sense) and holdership are traditionally described negatively, i e in terms of what they are not, namely ownership; and that this negative approach has become problematic in modern law because both categories are protected bettter than is suggested by such a negative definition. See further JM Sontis "Strukturelle Betrachtungen zum Eigentumsbegriff" in Festschrift für Karl Larenz zum 70. Geburtstag eds G Paulus, U Diederichsen and CW Canaris München 1973 981-1002 984.

13 All this may be read in any textbook on the law of property; see e g CG Van der Merwe Sakereg 2nd ed 1989 Durban chap 5; Silberberg and Schoeman: the law of property 2nd ed 1983 by J Schoeman Durban chap IX; NJJ Olivier, GJ Pienaar and AJ van der Walt Law of property students' handbook 1989 Cape Town chap 4.

assumed that ownership is not only the most comprehensive but also the most natural and the most desirable land right, and all other land rights are regarded with a certain measure of disdain: they are temporary, limited and less valuable. However, realities regarding the availability of a limited resource such as land for an ever increasing population, coupled with people's need for access to secure land rights, dictate that greater importance should be accorded to land rights, and that they should not be evaluated purely negatively simply because they amount to less than full ownership. The abstract concept of ownership can no longer dominate the paradigm within which all land rights are formulated and evaluated.[14] The traditional perception of ownership needs to be demythologised to allow for a more realistic perception of other land rights.

Debunking the ownership paradigm does not mean that ownership should be abolished.[15] On the contrary, it means that a wider range of rights should be developed, while still leaving room for individual landownership. The difference between the traditional and a new perception of ownership lies not in the existence of ownership but in its position and

---

14 In American law the disintegration of the traditional formal concept of ownership is linked more closely to the history of the protection of property rights under the Constitution, and consequently the issues differ in some respects. However, the basic problem is still comparable. See LS Underkuffler "On property: an essay" 1990 Yale LJ 127 130-133.

15 Although there are authors who argue that private ownership of land should be abolished and replaced by a system of land rights, based upon the principle that stewardship of a finite and indispensible resource is more suitable than lordship when construing an system of rights; see LK Caldwell "Rights of ownership or rights of use? - The need for a new conceptual basis for land use policy" 1975 Environment LR 409-425, especially at 416. See further AM Honoré "Ownership" in Oxford essays in jurisprudence ed AG Guest Oxford 1961 107-147 147.

significance in the property paradigm. What needs to be debunked is the idea that ownership is the most important land right, which sets the standard to which all other land rights must conform, and against which they are (d)evaluated. Once this approach has been abolished ownership can and should remain, but other land rights can then be defined without reference to the ways in which they fall short of ownership. Instead, they should be described and analyzed with full recognition of the fact that needs for access to land differ, which implies that land rights should also differ, not from ownership, but from each other. In short, the only meaningful evaluation of land rights will be the one that reflects not their unity or coherence, but their diversity and fragmentation.

3 THE FRAGMENTATION OF LAND RIGHTS

3.1 Introduction

Dissatisfaction with the traditional unitary approach to land rights within the ownership paradigm is nothing new. In fact, a number of developments since World War II have resulted in serious challenges to traditional perceptions - so much so that some have heralded the demise of ownership,[16]

---

[16] Mostly because of what has been referred to as the erosion or the disintegration of property, caused by increasing statutory limitations on ownership and the creation of new and relatively incompatible property rights. See TC Grey "The disintegration of property" in Property (NOMOS XXII) eds JR Pennock and JW Chapman 1980 New York 69-85; LS Underkuffler "On property: an essay" 1990 Yale LJ 127 131. Others have taken pains to prove that the alleged changes that are supposed to have eroded ownership were largely illusory, and that they have not changed much at all: GCJJ van den Bergh "Schijnbewegingen. Hercodificatie en eigendomsdefinitie in historisch perspectief" 1987 Recht en Kritiek 327-341; GE van Maanen Eigendomsschijnbewegingen. Juridische, historische en

while others have felt themselves obliged to defend the unity of property law.[17]

Originally the dissatisfaction with the ownership paradigm was caused mainly by the perception[18] that post-World War II legal developments tend to erode private ownership by subjecting it to increasing statutory restrictions and limitations.[19] In some quarters this erosion of private ownership is seen as an attack on the very foundations of Western society, and the tendency of recently reformed socialist legal systems to return to a unitary concept of ownership is accordingly regarded as healthy and progressive.[20] Others regard the erosion of ownership as a wholesome and necessary development, and describe it as the socialization of property to indicate that it brings about a closer correspondence between ownership and its social context, which requires restrictions of private ownership in meeting the challenges of environmental conservation, the provision of housing, the improvement of agricultural produce, and so forth.[21] On the

---

(continued)

politiek-filosofische opmerkingen over eigendom in huidig en komend recht 1987 Nijmegen chap 8; AJ van der Walt "De onrechtmatige bezetting van leegstaande woningen en het eigendomsbegrip. Een vergelijkende analyse van het conflict tussen de privaat eigendom van onroerend goed en dakloosheid" 1991 Recht en Kritiek 329-359.

17 See A Brudner "The unity of property law" 1991 Canadian Journal of Law and Jurisprudence 3-66.

18 Which is not universally shared or agreed to; see R Derine Grenzen van het eigendomsrecht in de negentiende eeuw Antwerpen 1955. Derine argues that ownership never was an unlimited right, neither in fact nor in the eyes of jurists; and that it is not true that limitations and restrictions upon ownership have increased recently.

19 See fn 16 above.

20 See K Pleyer "The development of ownership in the German Democratic Republic and in Eastern Europe" in Land reform and the future of landownership in South Africa ed AJ van der Walt Cape Town 1991 9-20, especially the conclusion at 20.

21 See AJ van der Walt "Introduction" in Land reform and the future of landownership in South Africa ed AJ van der

whole, and despite awareness of the fact that property law is characterized by a greater diversity of rights than is reflected by accepted theory,[22] dissatisfaction with the traditional property paradigm has been restricted thematically to the conflict of interests which arises when the rights of a private individual owner have to be infringed upon or limited in order to serve some social or public interest. While dissatisfaction with the traditional unitary approach is fairly general on this point, and even though most authors profess to approach the problem by way of some sort of diversification of land rights, the solutions that are proposed seem to differ in important respects.

3.2 The "new property"

In 1964 Charles A Reich[23] pleaded for the creation of a "new property" to replace traditional property rights. He argued that traditional property rights in things have been or were being replaced in the welfare state by "state largesse",[24]

(continued)

Walt Cape Town 1991 1-7 and sources referred to there, especially at 2-4; and AJ van der Walt "The future of common law landownership" in the same volume 21-35, especially at 30-34.

22 See AJ van der Walt and DG Kleyn "Duplex dominium: the history and significance of the concept of divided ownership" in Essays on the history of law ed DP Visser Cape Town 1989 213-260 and sources cited there, especially at 213-216, 248-260. Compare AJ van der Walt "Towards the development of post-apartheid land law: an exploratory survey" 1990 De Jure 1-45, especially at 6-16, 34-41.

23 Charles A Reich "The new property" 1964 Yale LJ 733-787.

24 Including income, benefits, jobs, occupational licenses, franchises, state contracts, subsidies, access to public resources, and state services: see Reich 1964 Yale LJ 733 734-737 for an overview. This view is summarized in the statement that property increasingly takes the form of status or rights rather than goods: JL Anderson "Takings and expectations: toward a 'broader vision' of property rights" 1989 University of Kansas LR 529 549. Compare DW Large "This land is whose land? Changing concepts of land as property" 1973 Wisconsin LR 1039-1083.

consisting of a variety of "handouts" by the state in the process of the distribution of wealth, and based upon state income through increased taxation. On the other hand, Reich argued, interests acquired in these state handouts were not protected constitutionally,[25] thereby subjecting individuals with such interests to administrative whim. Consequently the shift from traditional private property to wealth based upon state largesse has eroded the private sphere of individual independence that was protected constitutionally in the traditional form of property, and therefore the new property would have to be awarded equally strong individual protection. This would, in Reich's view, require a jurisprudential extension of the traditional concept of constitutionally protected property to include the personal and contractual rights, benefits and licenses[26] constituting "state largesse."[27]

---

[25] Since these rights were not mentioned in the Constitution they were not protected by the due process-clause, which is not an independently protected constitutional right but simply an adjective that prescribes the conditions under which other constitutional rights may be taken away: W van Alstyne "Cracks in 'the new property': adjudicative due process in the administrative state" 1977 Cornell LR 445-493, especially at 451-452.

[26] In this context it is interesting to note the actual diversity of the state handouts that were to be included in the concept of property, specifically with regard to Hohfeld's analysis of concepts such as "right", "privilege", "power" and "immunity": see WN Hohfeld "Some fundamental legal conceptions as applied in judicial reasoning" 1913 Yale LJ 16-59; "Fundamental legal conceptions as applied in judicial reasoning" 1917 Yale LJ 710-770.

[27] W van Alstyne "Cracks in 'the new property': adjudicative due process in the administrative state" 1977 Cornell LR 445-493 has demonstrated that the protection afforded this new property subsequent to Reich's article has already been eroded by later jurisprudence, in which the relativity of the new property has been turned upon itself by restricting the constitutional guarantee of the new property to insistence upon due process. The argument is that the new property may perhaps be protected consti-

The creation of the new property increasingly extended and diversified the traditional concept of property to include property rights such as the right to retain a state job, workers' rights,[28] subsidies, medical benefits, a pension, state contracts, the provision of state services such as housing, and so forth. These new property rights bear no relation to either corporeal or incorporeal objects, thereby contributing to the dephysicalization of property; a process whereby property rights are increasingly divorced from the physical world of objects or things.[29] With regard to the conflict between individual property and public interests the distinction between takings and the exercise of police

---

(continued)

tutionally, but the constitution only requires that deprivations of such property take place with regard for due process of law. In effect it means that the constitution does not guarantee a university teacher's state job, whether tenured or not; it merely guarantees that the due process foreseen in his employment contract or conditions shall be followed when depriving him of that job: see 1977 Cornell LR 445 457-470 for a full discussion. Van Alstyne argues that this process has left the beneficiaries of state largesse even more vulnerable to administrative interference than before: 1977 Cornell LR 445 490.

28 The inclusion of workers' rights in the concept of property has already been mooted for the South African situation; see A Verloren van Themaat "Property rights, workers' rights and economic regulation - constitutional protection of property rights in the United States of America and the Federal Republic of Germany: possible lessons for South Africa" 1990 CILSA 53-69.

29 This process is not new. The process of dephysicalization has already been linked to developments that took place during the nineteenth century: see MJ Horwitz "The transformation in the conception of property in American law, 1780-1860" 1973 University of Chicago LR 248-290; KJ Vandevelde "The new property in the nineteenth century: the development of the modern concept of property" 1980 Buffalo LR 325-367.

power is blurred by this dephysicalization process, so that what might otherwise have been regarded as the mere limitation of a right or the revocation of a license may appear as the taking of property.[30] The subsequent confusion increased the need for a further expansion of Reich's new property, and heralded a new phase in its development.

Several attempts to overcome the conflict between individual rights and public interests have been based upon the argument that an even broader or more comprehensive approach to property was needed.[31] Anderson[32] argues that rights in the new property must be grounded in the property owner's legitimate expectations[33] about the interests that will be pro-

---

30 From the enormous literature on this subject see JL Anderson "Takings and expectations: toward a 'broader vision' of property rights" 1989 University of Kansas LR 529-562; AL Peterson "The takings clause: in search of underlying principles" Part I 1989 California LR 1299-1363, Part II 1990 California LR 53-162; CM Rose "Property rights, regulatory regimes and the new takings jurisprudence - an evolutionary approach" 1990 Tennessee LR 577-594.

31 See, apart from literature discussed below, DW Large "This land is whose land? Changing concepts of land as property" 1973 Wisconsin LR 1039-1083; JC Juergensmeyer and JB Wadley "The common lands concept: a 'commons' solution to a common environmental problem" 1974 Natural Resources Journal 361-381; C Rose "The comedy of the commons: custom, commerce and inherently public property" 1986 University of Chicago LR 711-1781; M Neiderbach "Transferable public rights: reconciling public rights and private property" 1988/89 Buffalo LR 899-928; J Naiman "Judicial balancing of uses for public property: the paramount public use doctrine" 1990 Environmental Affairs 893-920.

32 JL Anderson "Takings and expectations: toward a 'broader vision' of property rights" 1989 University of Kansas LR 529-562.

33 This concept has evidently already found its way into South African labour law, although the connection with the theory of property rights is not immediately evident. See Administrator, Transvaal and Others v Traub and Others 1989 4 SA 731 (A), and discussions of the case: GN Barrie "Legitimate expectation and the Appeal Court -

tected by law, but that these expectations must "be tempered by a public interest condition", which means that his expectations can only be reasonable and legitimate if tempered by the realization that land is a public resource, and that restrictions in the public interest must be expected.[34] In this way the property concept is extended to include the public interest-aspect.

Underkuffler's comprehensive approach[35] is a similar attempt to solve the conflict between the protection of private individual property and state interests. In this case the conflict is solved by regarding property not as a private sphere of individual liberty that is protected from invasion by the state,[36] but rather as a mediating force between the individual and the state.[37] Underkuffler proposes to construe property as such a mediating force by regarding the state context as a necessary prerequisite for the definition and exercise of individual rights. This is supposed to be done by promoting the diversification of a broad range of individual rights, liberties, powers and immunities, because in the result the concreteness of property will shift from its being tied to corporeal objects to its concrete mediating function between individual rights and government interests.[38]

(continued)

where does the concept come from?" 1991 TSAR 169-173; MP Olivier "Legitimate expectation and the protection of employment" 1991 TSAR 483-493.

34 See Anderson 1989 University of Kansas LR 529 559-562.

35 LS Underkuffler "On property: an essay" 1990 Yale LJ 127-148.

36 As it is regarded by Reich, in accordance with classic liberalist views.

37 Underkuffler 1990 Yale LJ 127 129.

38 Underkuffler 1990 Yale LJ 127 139 suggests that the diversification of property rights should follow G Calabresi and AD Melamed "Property rules, liability rules, and inalienability: one view of the cathedral" 1972 Harvard LR 1089-1128, who distinguish between enti-

The concept of the new property in American law is interesting because it seems to offer novel possibilities for the diversification and protection of a large number of rights, including social rights and workers' rights. The most distinctive characteristic of this approach is that it solves the problems that are identified in the traditional concept of property by continuously extending the concept of property. Reichs main objective was to extend the sphere of constitutionally protected individual freedom, and he solved it by extending the traditional concept of property[39] to include a number of rights, licenses, immunities and claims that have no relation to corporeal or incorporeal objects. Later authors are more concerned with solving the conflict between what has traditionally been regarded as the inviolate sphere of private individual property and public interests, and once again their approach is to extend the concept of new property to include a public interest element. In both cases

---

(continued)

tlements protected by property rules (these entitlements can be alienated only if the holder agrees to the price), entitlements protected by liability rules (these entitlements can be alienated if the price is established and paid by the state), and inalienable entitlements (which cannot be transferred at all). In effect this distinction reveals takings to be nothing but the subjection of property to liability rules.

39 The Anglo-American concept of property is, of course, wider than the Roman-Dutch concept of things, as a result of the underlying difference between the two legal families. This difference is not ignored here. The point is that both concepts have been extended through a similar (and therefore comparable) development that affected both legal families in much the same way. AJ van der Walt "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" 1988 De Jure 16-35, 306-325 at 30 has indicated that the role of ownership and property in the two legal families is, despite structural differences, similar because of their shared socio-economic basis.

the idea is that the new property-approach solves the problems of the traditional approach by extending the range of property rights, in other words through a diversification of rights.

However, what happens in fact is not a diversification of property rights, but an extension of the property concept in order to include social rights and a social interest element in it. The development and extension of the new property does not amount to a diversification of property at all; it is a continuous process of conceptual extension and subsumption, which remains firmly within the established boundaries of the traditional ownership paradigm. Instead of developing a complex and diverse spectrum of rights, claims, entitlements, licenses, liberties and interests through distinction and fragmentation the new property tends to blur and extinguish distinctions and to absorb individual rights into an increasingly wider concept of property, without ever questioning or leaving the traditional property framework. Far from being the fount of a diversified and adaptable series of land rights, the new property offers nothing but a conceptual black hole that swallows all constitutionally protected rights and interests.

3.3 The "socialization" of ownership

German property lawyers are also aware of the need to develop and strengthen land rights, and of the fact that such a development results, in one way or another, in a limitation of ownership.[40] In fact, German property law has gone a long

---

40 See especially the early exposition by P Liver "Eigentumsbegriff und Eigentumsordnung" in Privatrechtliche Beiträge: Gedenkschrift Franz Gschnitzer eds C Faistenberger and H Mayrhofer Aalen 1969 247-264.

way towards the restriction of ownership, mostly as a result of a process of "socialization" inspired by the property clause in article 14 of the German Basic Law (GG),[41] read in conjunction with § 903 of the German Civil Code (BGB).[42]

In terms of § 903 BGB the owner can use his property as he deems fit and exclude everybody else from the object, inso-far as such use is not contrary to statute or the rights of others.[43] Article 14 sub 1 GG very tersely guarantees owner-ship,[44] without defining either ownership or the scope of the guarantee. The second part of sub 1 of article 14 provi-des that the content and limits of ownership are determined by statute.[45] This qualification of the guarantee is augmen-ted by sub 2, which provides that ownership places duties upon the owner, and that it should be exercised in the pub-lic interest.[46] The entire ownership debate in German law is focused on the interpretation and mutual reconciliation of these statutory provisions, in an ongoing process inspired by the adoption of the Basic Law subsequent to World War II, and referred to as the "socialization" of ownership.

According to the second part of article 14 sub 1 GG it is the duty of the government to give substance to the concept

---

41 Grundgesetz.
42 Bürgerliches Gesetzbuch.
43 BGB § 903: "Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Ein-wirkung ausschliessen." See with regard to the historical background of this definition AJ van der Walt "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" 1988 De Jure 16-35, 306-325.
44 GG art 14 sub 1 first part: "Das Eigentum und das Erbrecht werden gewährleistet."
45 GG art 14 sub 1 part 2: "Inhalt und Schranken werden durch die Gesetze bestimmt."
46 GG art 14 sub 2: "Eigentum verpflichtet. Sein Gebrauch soll zugleich der Allgemeinheit dienen."

of ownership by defining its content and limits through legislation. This provision has been linked to article 14 sub 2 in the sense that the government has the responsibility to determine, through legislation, the content and limits of ownership in the process of promoting social interests. Examples of this process are provided by recent statutory developments in the law of landlord and tenant,[47] land-use planning[48] and environmental conservation law,[49] all areas in which legislative restrictions of private ownership have been promulgated in the course of promoting social or public interests. The legislation in question have undoubtedly had some influence upon ownership, and theoretical explanations of its effect and of the tension between the guarantee of private ownership and the promotion of social interests[50]

---

47 In this case statutory provisions are mostly concerned with providing social housing for certain social groups; improving the social position of tenants (especially in lower income groups) by increasing the security of their tenancy against landowners; and promoting effective and beneficial use of residential and office space through prohibitions against changes in the use of premises or non-use of premises. See H-G Pergande "Die Kündigung von Wohnraum und die Sozialklausel im neuen Mietrecht" 1964 NJW 1925-1936; J Sonnenschein "Die Entwicklung des Privaten Wohnraummietrechts 1986 bis 1988" 1990 NJW 17-27.

48 In this case the discussion is especially concerned with the explanation of increasing control over the use and development of land through land-use planning and building control. This includes increasing powers given to or assumed by local and central government in fulfilling their duties with regard to the provision of housing. See H Sendler "Zum Funktionswandel des Eigentums in der planenden Gesellschaft" 1975 Gewerbe-Archiv 353-361; E Nawroth "Privateigentum als Problem der Raumordnungspolitik" 1982 Die neue Ordnung 252-268.

49 In this case the debate concerns itself with explaining the effect of increasing environmental control upon private ownership. See H Soell "Die Bedeutung der Sozialpflichtigkeit des Grundeigentums bei der Landschaftspflege und dem Naturschutz" 1983 Deutsche Verwaltungsblätter 241-250.

50 The inherent tension between subs 1 and 2 of article 14 has been the cause of a huge volume of literature, see

146

have inspired a discussion that provides illuminating ideas for a debate on the fragmentation of land rights.

The first point of discussion that was raised was concerned with the relationship between the guarantee of ownership in the first part of article 14 sub 1 GG and the statutory restrictions placed upon ownership in terms of part 2 of article 14 sub 1 and article 14 sub 2 GG. The most widely accepted theory in this regard is based upon an article by Martin Wolff,[51] who set the tone for the debate by situating it squarely within the established paradigm of pandectist dogma: ownership as the right to use one's property as one sees fit is unlimited in principle, and limitations and restrictions must be regarded as exceptions, promulgated by the government in the interests of weaker citizens and for the purpose of civil order.[52] The argument behind this theory is that the nature or essence of private ownership, as expressed in the concept of ownership in § 309 BGB, is deduced from the natural freedom of the individual person, and therefore not inherently affected by varying limitations or restrictions formulated by way of exception to provide for specific needs of time and place.[53]

(continued)

most recently FL Ekey Die Verminderung von Eigentümerrechten im Spannungsfeld zwischen Art. 14 I S. 1 GG und Art. 14 I S. 2 GG 1988; A Schmitt-Kammler "Ungelöste Probleme der verfassungsrechtlichen Eigentumsdogmatik" in Festschrift der Rechtswissenschaftlichen Fakultät zur 600-Jahr-Feier der Universität zu Köln 1988 821-844; F Schoch "Die Eigentumsgarantie des Art. 14 GG" 1988 Jura 113-121.

51 M Wolff "Reichsverfassung und Eigentum" in Festschrift für Wilhelm Kahl Tübingen 1923 3ff.

52 Compare in this regard RH Weber "Eigentum als Rechtsinstitut: Beurteilungsstand und Entwicklungstendenzen" 1978 Zeitschrif für Schweizerisches Recht 161-191, especially at 170-171.

53 JM Sontis "Strukturelle Betrachtungen zum Eigentumsbegriff" in Festschrift für Karl Larentz zum 70. Geburtstag eds G Paulus, U Diederichsen and CW Canaris München 1973

Against this background a distinction was forged between the concept or essence[54] of ownership on the one hand and the practical content or substance[55] of ownership, as it is determined through legislative intervention, on the other. With regard to its form or essence ownership is regarded as a completely static formal or abstract concept,[56] while the changes and diversity that characterize the specific content of ownership in any given context are regarded as inessential, with the implication that specific limitations and restrictions upon ownership as established by statute remain temporary and contextual exceptions. Despite a number of attempts to criticize this abstract theory of ownership,[57] it

---

(continued)

981-1002, especially at 990-1002.

54 Usually referred to as "Eigentumsbegriff": see Sontis Festschrift für Karl Larentz 1973 981-1002; H Rey "Dynamisiertes Eigentum" 1977 Zeitschrift für Schweizerisches Recht 65-80, especially at 65-67.

55 Usually referred to as "Eigentumsinhalt": see Sontis Festschrift für Karl Larentz 1973 981-1002; Rey 1977 Zeitschrift für Schweizerisches Recht 65-80, especially at 65-67.

56 Which incidentally gives an indication of the influence of Begriffsjurisprudenz upon this theory. The essential aspect or form of a legal institute is located in a concept, and not in the legal reality reflected by the concept.

57 Some authors have argued in favour of a so-called "Immanenztheorie", in terms of which at least certain limitations and restrictions are supposed to be inherent or immanent to ownership. See especially A Meier-Hayoz "Vom Wesen des Eigentums" in Revolution des Technik - Evolutionen des Rechts: Festgabe für Karl Oftinger Zürich 1969 185ff. Rey 1977 Zeitschrift für Schweizerisches Recht 65-80 pleads for an alternative form of this theory, see especially 77 ff. A similar approach is followed by those arguing in favour of what is described as "Furktionseigentum", which means that ownership is inherently restricted by the function and nature of the object involved; see HM Pawlowski "Substanz- oder Funktionseigentum? Zum Eigentumsbegriff des geltenden Rechts" 1965 AcP 395-420. The Immanenztheorie has been criticized by P Liver "Eigentumsbegriff und Eigentumsordnung" in Privatrechtliche Beiträge: Gedenkschrift Franz Gschnitzer

is still the established perception in terms of which the limitations and restrictions upon ownership are evaluated. This theory vigorously preserves the unity of ownership and of property law, and actually resembles the American concept of property in the way in which it uses conceptual logic to "swallow up" all differences or changes.

Even with due regard for the fact that the German civil law concept of private ownership has been limited and restricted in the public interest in pursuance of the social duties imposed by article 14 GG the way in which these changes and restrictions are interpreted and accommodated in legal theory makes it clear that the traditional ownership paradigm still dominates property law. It would be an overstatement to say that the abstract ownership paradigm has been abolished in favour of a more diversified paradigm.[58] In fact, from the literature inspired by the property clause in the Basic Law it is clear that the traditional ownership paradigm still dominates the perception of land rights in modern German law.[59] Moreover, it is not only the effects of limi-

---

(continued)

eds C Faistenberger and H Mayrhofer Aalen 1969 247-264. See further R Riegel "Verfügungs- und Nutzungseigentum? Einige überlegungen zum Eigentumsbegriff" 1975 Bayerische Verwaltungsblätter 412 413; A Georgiades "Eigentumsbegriff und Eigentumsverhältnis" in Beiträge zur eurpäischen Rechtsgeschichte und zum geltenden Zivilrecht: Festgabe für Johannes Sontis eds F Baur, K Larenz and F Wieacker München 1977 149 150.

58 AJ van der Walt "De onrechtmatige bezetting van leegstaande woningen en het eigendomsbegrip: een vergelijkende analyse van het conflict tussen de privaat eigendom van onroerend goed en dakloosheid" 1991 Recht en Kritiek 329-359 at 339-345, 352-359 argues that the real effect of the socialization of ownership in German law does not go far enough, and that it certainly does not amount to the abolition of the abstract and absolute concept of private property.

59 See L Raiser "Funktionsteilung des Eigentums" in Beiträge zur europäischen Rechtsgeschichte und zum geltenden Zivilrecht: Festgabe für Johannes Sontis eds F Baur, K

tations of ownership that are still explained away within the established dogmatical paradigm - the perception of limited real rights (and accordingly of all land rights) also leaves the paradigmatic unity of ownership intact.[60]

A number of German voices have been raised in favour of what amounts to a functional division of ownership, mostly by way of the theory of Funktionseigentum, often coupled with a plea for the restricted guarantee of "smaller ownership".[61] The idea is that the socialization of ownership merely entails that private ownership, which was initially meant to protect the private enclave of individual freedom, should be cut back to size - it should still be protected as vigorously as ever, but only and strictly within the limits of its

---

(continued)

Larentz and F Wieacker München 1977 167-179 at 177: "Was gegen den Vorslag [in favour of a really functional fragmentation of property rights] spricht, sind nicht Gründe einer strukturellen Logik, sondern solche der rechtspolitischen Konsequenz im Privatrechtssystem. Unser Sachenrecht ist, anders als das anglo-amerikanische property law, am qualitativen Unterschied von Eigentum und beschränkten dinglichen Rechten und demgemäss an dem Prinzip orientiert, dass das Eigentum als umfassendstes Herrschaftsrecht stets über oder hinter diesen iura in re aliena steht."

60 See especially JM Sontis "Strukturelle Betrachtungen zum Eigentumsbegriff" in Festschrift für Karl Larenz zum 70. Geburtstag eds G Paulus, U Diederichsen and CW Canaris München 1973 981-1002 984, 991, 993, 1001, but especially at 1000: "Der Wert der strukturellen Betrachtung des Eigentums als eines einheitlichen, alle Sachgruppe (einschliesslich der Grundstücke) erfassenden Begriffs unterliegt in unserem westlichen Rechtskreis keinem Zweifel."

61 "Kleineres Eigentum"; see HM Pawlowski "Substanz- oder Funktionseigentum? Zum Eigentumsbegriff des geltenden Rechts" 1965 AcP 395-420 413; H Rey "Dynamisiertes Eigentum" 1977 Zeitschrift für Schweizerisches Recht 65-80 77; RH Weber "Eigentum als Rechtsinstitut: Beurteilungsstand und Entwicklungstendenzen" 1978 Zeitschrift für Schweizerisches Recht 161-191 184ff.

original scope, which was meant to serve the individual personality. Outside that enclave, in which property serves to develop the individual personality,[62] private property must always bow to social or public interests.[63]

In essense this concept of "smaller ownership" amounts to a functional division of ownership, which means that different kinds or grades of ownership are distinguished, based upon considerations relevant for the promotion of social or public interests. Examples of relevant considerations are the nature or function of the object[64] or the nature of the subject.[65] Weber[66] proposes that different forms of ownership

---

62 This perception of the function of ownership is typical of German philosophy during the modern period. It perhaps reached its culmination in the philosophy of GWF Hegel, and from there exercised considerable influence upon Pandectists such as Puchta. See D Hecker "Das Eigentum, einst Gottesgabe, heute Herrschaftsrecht" 1988 Zeitschrift für Neuere Rechtsgeschichte 179-193; AJ van der Walt "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" 1988 De Jure 16-35, 306-325 321-322.

63 See Rey 1977 Zeitschrift für Schweizerisches Recht 65-80 77; Weber 1978 Zeitschrift für Schweizerisches Recht 161-191 184ff.

64 This concept is not as strange as it seems. Roman-Dutch law has always distinguished between movables and immovables; and modern South African law distinguishes public water from all other objects purely on the basis of its social value and function: see sec 6(1) of the Water Act 54 of 1956. See further in this regard AJ van der Walt and DG Kleyn "Duplex dominium: the history and significance of the concept of divided ownership" in Essays on the history of law ed DP Visser Cape Town 1989 213-260, especially at 248-260.

65 The content and scope of ownership could vary when the owner was, for instance, a large corporation or a multinational corporation rather than a private individual. If the ownership of co-operatives differed from that of individuals (as in erstwhile socialist law) it would be an example of such a diversification.

66 Weber 1978 Zeitschrift für Schweizerisches Recht 161-191 at 185-187.

should be distinguished according to their proximity to the individual personality, which means that the state's power to create inherent limits for ownership would vary according to the social sphere in which the right is exercised,[67] the question whether the owner uses the object for himself or not,[68] and the question whether the subject is a natural or a legal person.[69] Weber's proposal amounts to a diversification of ownership. Similar proposals[70] have been criticized because they amount to the abolition of private ownership as an institution, which is guaranteed by article 14 GG.[71] How-

---

67 If it is a personal sphere, where ownership is meant to exclude others and nothing more, the right is at its strongest; if the right is exercised partly in the market sphere central control may be stronger; if the right is exercised in a strong co-operative sphere control may be considerable: Weber 1978 Zeitschrift für Schweizerisches Recht 161 186.

68 This leaves room for greater interference where property is not used to secure the individual's personal minimum existence, but (for instance) to amass wealth: Weber 1978 Zeitschrift für Schweizerisches Recht 161 187.

69 This point has been touched upon above. See Weber 1978 Zeitschrift für Schweizerisches Recht 161 187-188.

70 See Rey 1977 Zeitschrift für Schweizerisches Recht 65-80, especially at 72-74, where the distinction between Verfügungseigentum and Nutzungseigentum is discussed. What it boils down to is that the entitlement of disposal over land in built-up areas should be transferred to the local planning authority, who can then grant limited and temporal (10 years, 99 years) rights of use, in accordance with the local planning scheme, to inhabitants. Not all proposals for a diversification of ownership are equally useful; see L Raiser "Funktionsteilung des Eigentums" in Beiträge zur europäischen Rechtsgeschichte und zum geltenden Zivilrecht: Festgabe für Johannes Sontis eds F Baur, K Larentz and F Wieacker München 1977 167-179 177-179. Raiser proposes a division of ownership in the case of a sale with reservation of ownership, but points out that such a division is acceptable in view of its inherent temporariness - it falls away as soon as the condition is fulfilled. This proposal has no use in South African law as it is determined by the particularities of German land law.

71 See RH Weber "Eigentum als Rechtsinstitut: Beurteilungs-

ever, the most serious criticism against Weber's analysis is that it builds upon the perception of ownership as individual freedom, which is still very much part of the traditional ownership paradigm, and which does not succeed in progressing from the paradigmatic domination of ownership towards the development of land rights as such.

3.4 The "pluriform" concept of ownership

In Dutch law similar pleas for the establishment of what has been described as a "pluriform" concept of ownership have been heard for quite a long time. Dutch lawyers[72] have discussed the socialization of ownership since the fifties and sixties, and have identified the social transformations that have accompanied and/or necessitated this process: increasing emphasis on public law and restrictions brought about by administrative control, decreasing importance of property as against contract, and a shift in emphasis from property to labour.[73] They have also argued that this transformation re-

---

(continued)

stand und Entwicklungstendenzen" 1978 Zeitschrift für Schweizerisches Recht 161-191 174. Weber indicates that the abolition of a free land market and the institution of a state monopoly in land, the transformation of landownership into a lease, or the transformation of the landowner into a mere lessee would all amount to contraventions of the guarantee in art 14 GG. Compare F Baur "Möglichkeiten und Grenzen des Zivilrechts bei der Gewährleistung öffentlicher und sozialer Erfordernisse im Bodenrecht" 1976 AcP 97-118; P Badura "Möglichkeiten und Grenzen des Zivilrechts bei der Gewährleistung öffentlicher und sozialer Erfordernisse im Bodenrecht" 1976 AcP 119-144.

72 See J Valkhoff Een eeuw rechtsontwikkeling Amsterdam 1949; J Valkhoff Vermaatschappelijkt vermogensrecht in het nieuwe BW 1967 5-6, 8-9.

73 See WJ Slagter Juridische en economische eigendom Deventer 1968 8ff; WJ Slagter "Eigendom en privaatrecht" 1976 RM Themis 276-315; F van Neste "Eigendom morgen" 1983 Tijdschrift voor Privaatrecht 479-491.

quires a suitable development in property relations, notably in the sense of a diversification of ownership.[74]

Such a diversification of ownership means that the concept of ownership should be refined to allow for the different functions served by different objects of ownership, especially with regard to immovable property.[75] According to Van Goch the need for a more diversified concept of ownership arises because of an erosion which takes place when older civil liberties such as ownership come into conflict with newer social rights such as housing,[76] which is protected very strongly in terms of socially-minded housing legislation.[77] Van Goch[78] argues that different grades or kinds of ownership should be distinguished for different kinds of objects. The same idea is mooted by Schut,[79] who states that the differences between objects, the differences between subjects and the different functional relations between both are factors that can and should determine the different contents of ownership. Schut argues that many contradictions in the theory of ownership are caused by the pretence of uniformity that is kept up in the Dutch Civil Code.[80] A historical perspective[81] also proves that modern law is restricted by a very limited concept of ownership, whereas older

---

74 Slagter 1976 RM Themis 276 279-280.
75 GE van Maanen "Kraken als onrechtmatige daad" 1981 Recht en Kritiek 5-17; T van Goch "Naar een gedifferentieerd eigendomsbegrip" 1982 Recht en Kritiek 82-88.
76 1982 Recht en Kritiek 82 83.
77 See AJ van der Walt "De onrechtmatige bezetting van leegstaande woningen en het eigendomsbegrip: een vergelijkende analyse van het conflict tussen de privaat eigendom van onroerend goed en dakloosheid" 1991 Recht en Kritiek 329-359, especially at 334ff.
78 1982 Recht en Kritiek 82 85ff.
79 GHA Schut "Naar een meer pluriforme regeling van het eigendomsrecht" 1981 RM Themis 329-332.
80 Schut 1981 RM Themis 329 332.
81 R Feenstra "Historische aspecten van de private eigendom als rechtsinstituut" 1976 RM Themis 248-275.

versions of the common law usually acknowledged a multiple concept of ownership. Van Neste[82] considers a dual concept of ownership justified, in terms of which personal ownership is distinguished from so-called social ownership on the basis that the latter justifies more limited and exactly described competences, because of the social nature and function of the objects involved. This resembles the "smaller ownership"-idea of German law.

In all these arguments the main emphasis is on the conflict between the old individual and absolute concept of ownership and the new social order, and this conflict is seen as an expression of a fundamental need for a more "pluriform" or differentiated concept of ownership, which will accommodate a functional rule for the restriction of ownership. The rule is that private ownership finds its limits in the social, economic and ecological damage that it causes,[83] and that the distinction between different kinds of ownership is determined by the varying limits and restrictions required by the damage-potential of various objects of ownership. The diversification of ownership is, therefore, linked very closely to the social dangers and the consequent limitations of ownership.

As in the case of German law this idea of diversification of ownership does not succeed in escaping from the traditional ownership paradigm. Even though the idea of functional di-

---

82 F van Neste "Eigendom morgen" 1983 Tijdschrift voor Privaatrecht 479-491 485-486. See further GE van Maanen Eigendomsschijnbewegingen: juridische, historische en politiek-filosofische opmerkingen over eigendom in huidig en komend recht Nijmegen 1987 157, where property is divided into social property, residential property and personal property.

83 Van Goch 1982 Recht en Kritiek 82 87.

versification of ownership has positive and beneficial elements, its very approach proves that it is still restricted to the established ownership paradigm. In effect the search for a remedy is restricted to ownership, because ownership is still regarded as the most important real right.[84] Slagter[85] concludes in his analysis that ownership deserves neither more nor less respect than any other patrimonial right, but unfortunately this result is not achieved in the concept of "pluriform" ownership.

4 CONCLUSIONS

Diversity makes a legal system more adaptable and flexible. Honoré[86] has indicated that what he calls "multititular systems" differ from "unititular systems" not so much in their concept of ownership as such, but because of the place ownership takes in the system. A property system not dominated by ownership might leave room for a diversity of land rights that reflects the variety of people and the dynamic diversity of their land needs, and which is aimed at satisfying the needs of the majority in a just and fair manner.

The diversification of ownership should not be rejected out

---

84 See AJ van der Walt "De onrechtmatige bezetting van leegstaande woningen en het eigendomsbegrip: een vergelijkende analyse van het conflict tussen de privaat eigendom van onroerend goed en dakloosheid" 1991 Recht en Kritiek 329-359, especially at 344ff. An interesting perspective on this tendency of critical theory to mirror itself in the criticized dogma is offered by K Raes "De ondraaglijke rechtzinnigheid van de kritiek" in De dubbelzinnigheid van het recht: kritische rechtstheorie en rechtspolitiek in de jaren tachtig eds R de Lange et al Recht en Kritiek 1985 49-53 49.

85 1976 RM Themis 276 314.

86 AM Honoré "Ownership" in Oxford essays in jurisprudence ed AG Guest Oxford 1961 107-147 147.

of hand, despite the criticism levelled against it. The idea to reflect the social (including economic and ecological) function, importance and possible dangers of various objects in the content of rights applying to them is a good one, and can be used in the field of land rights with profit. It implies, at least, that land should be treated differently from movable property because of its enormous social importance. The nature and social function of the object and the nature and identity of the subject should, therefore, be considered when giving content to all property rights, including land rights. The resultant diversity of ownership could help to solve the problem of providing suitable and sufficient environmental and social land use control.

Up to now the diversification or fragmentation of land rights has always been considered as part of the problem concerning the limitation and restriction of private ownership in the public or social interest. The main problem in the debate concerning the new property originally was to provide strong constitutional protection for certain rights that were not traditionally regarded as property rights, but in the later developments of this theory the focus shifted to the conflict between private individual ownership and public interests in property. In both German and Dutch law the main problem was always to explain and accommodate the restriction of private individual ownership, and the diversification of ownership was always aimed at creating a system in which this aim can be realized. Essentially, therefore, the diversification of land rights has amounted to nothing more than a reflex of the debate about the relationship between individual private ownership and public interests.

The diversification of land rights has been restricted by

the ownership paradigm. Concern about the conflict between private individual ownership and social interests is itself part of the classic liberal perception that private ownership is an enclave of personal liberty that is protected against unwanted state intervention. This paradigm with its perception of private individual ownership should be debunked, and a discussion of land rights should not be predetermined by the concomitant liberalist perception of ownership. In the words of Slagter, ownership should be awarded neither less nor more importance than any other land right.[87]

If ownership is awarded more importance than other land rights the result is that new land rights look like existing ones, as is demonstrated by new land rights that were developed in South Africa over the last few decades. Sectional title ownership, property-timesharing interests in sectional title schemes and ownership of airspace units have been developed to satisfy new needs of the legal community. When they are compared to other new land rights such as those acquired in a shareblock scheme or in a retirement scheme it becomes clear that these new land rights have been developed within the ownership paradigm: ownership in the common law tradition was the ideal or muster according to which all these rights were developed. Considering that fact it should not surprise that these new land rights provide mainly for those who benefit from the ownership model, while those who can never aspire to it derive no benefit from these developments. In fact, these rights were developed for and have tended to provide for the needs of the rich and affluent, and not for the needs of the poor or the homeless.[88] Howe-

---

87 WJ Slagter "Eigendom en privaatrecht" 1976 RM Themis 276-315 314.

88 See AJ van der Walt "The future of common law landownership" in Land reform and the future of landownership in South Africa ed AJ van der Walt Cape Town 1991 21-35,

ver, the fact that it was possible to develop these rights at all show that a similar input of energy and creativity should produce new land rights of another kind, aimed at serving the needs of those who simply want access to land, basic services and security of tenure.

For this purpose the approach followed by Rey[89] is attractive. According to him the traditional unified concept of ownership is static because it is supposed to be timeless, universal and abstract. In place of this concept Rey envisages a dynamic ownership[90] that changes and develops to reflect the circumstances and needs that it must serve. Callies[91] follows a similar approach when he describes ownership not as a concept, nor even as an institution, but as a process that works itself out in dialogue.[92] That means moving away from the paradigm in terms of which ownership is perceived as a concept and not as a reality, towards land rights that are not regarded as a set of immutable concepts held together by an infallible logic which can prescribe, through its structural demands, what justice is in a particular case. The circumstances and needs of a legal community change, and their legal institutions should change accordingly without being held back by the conceptual or logical tyranny of the system of terms in which they are described

---

(continued)

especially at 25-28.

89 H Rey "Dynamisiertes Eigentum" 1977 Zeitschrift für Schweizerisches Recht 65-80 70-71.

90 One assumes that he speaks of a dynamic ownership ("dynamisiertes Eigentum") and not of a dynamic concept of ownership because he wants to move away from the conceptual logic ("Begriffsjurisprudenz") of other authors.

91 RP Callies "Eigentum als Institution: Aspekte zur Theorie des Institutions" in Rechtstheorie: Anzätse zu einem kritischen Rechstverständnis ed A Kaufmann Karlsruhe 1971 119-124 121.

92 Callies Rechtstheorie 1971 119 121: "Eigentum als dialogischer Prozess".

or discussed.

Recent experience provide an excellent example of the way in which land rights can be established in a process of social dialogue. In the past the dogmatical and systematical content of concepts such as "ownership" and "unlawful occupant" would have been considered sufficient reason to simply evict squatters like those at Zevenfontein from the occupied premises, and hardly any lawyer would have found it legally wrong to do so.[93] Now, in the new spirit that seems to be establishing itself, the squatters, the owners of private land in the vicinity and government institutions find themselves engaged in a process of dialogue, consultation and negotiations in which the land rights of all three groups are established in a dynamic process of social and political dialogue that will determine not simply where and how inhabitants of the informal settlement may exercise their right to shelter, but also how the land rights of adjacent private landowners and the police powers of governmental institutions are affected in the process. There seems to be no good reason why the rights of agricultural workers and of residential lessees could not be given positive content in a similar process. In developing the land rights dialogue the input of a land court should not be underestimated, because such a court can provide unique opportunities for creative legal dialogue through the resolution of conflicting land claims.

Establishing diverse land rights through socio-political dialogue means that unilateral legislative engineering of

---

93 See AJ van der Walt "De onrechtmatige bezetting van leegstaande woningen en het eigendomsbegrip: een vergelijkende analyse van het conflict tussen de privaat eigendom van onroerend goed en dakloosheid" 1991 Recht en Kritiek 329-359, especially at 354ff.

property rights is unacceptable. It should be kept in mind that a diversification of land rights is required by the diversity of the people and the diversity of their land needs, which means that existing examples of divergent customary land use should be retained rather than extinguished. This means that the legislative abolition of common law land rights and pressure towards the simplification and unification of all land rights in the traditional common law mould is unacceptable and unwise.[94] Customary land use patterns have shown extraordinary resilience in improving or securing the lot of their holders under the strictures of apartheid, and instead of abolishing them legislation should be aimed at improving and securing their value for those who need and want land rights of that kind. Old and nearly forgotton common law land rights such as the partiarian lease could be revived in a similar fashion to provide an important agricultural land right.

Customary law can also provide examples of institutions that can be adapted for modern needs. The idea of common lands and the right not to be excluded from them is one example of such a right that fits in very well with recent developments in property law. Traditionally private individual ownership was regarded as the right to exclude others from what was owned,[95] but in view of the new property-theory the right

---

94 See AJ van der Walt "Towards the development of post-apartheid land law: an exploratory survey" 1990 De Jure 1-45, especially at 12-15; AJ van der Walt "The future of common law landownership" in Land reform and the future of landownership in South Africa ed AJ van der Walt Cape Town 1991 21-35, especially at 22-25; CRM Dlamini "Landownership and customary law reform" in Land reform and the future of landownership in South Africa ed AJ van der Walt Cape Town 1991 37-44.

95 See C Rose "The comedy of the commons: custom, commerce and inherently public property" 1986 University of Chicago LR 711-781.

not to be excluded from the common wealth of society (including not only public property and facilities but also the resources of public wealth, such as labour opportunities, medical aid, social benefits and pensions) has become increasingly important. Even if the new property-theory is rejected the possible applications of this idea with regard to public or common resources deserves investigation.[96] The idea of a right to share in the public wealth and resources of the country is particularly attractive with regard to land, especially if land is regarded as a social resource that is necessary in order to provide shelter and the means of subsistence.

As far as the protection of land rights is concerned, a variety of protective measures can and should be used. The main object of the fragmentation of land rights must be to provide the greatest possible number of people with the widest possible chance of access to land, and similarly the protection of land rights must be aimed at giving them the required security of tenure. Where necessary ad hoc legislation should be introduced to provide suitable security of tenure, but the natural resilience and tendencies of existing land rights should not be underestimated, and wherever possible these rights should be allowed to develop on their own, also with regard to the security they provide. With regard to protective legislation European experience with the development of social legislation, especially regarding the law of landlord and tenant and the law regarding the non-use of scarce residential property might be followed.

---

96 See in this regard JC Juergensmeyer and JB Wadley "The common lands concept: a 'commons' solution to a common environmental problem" 1974 Natural Resources Journal 361-381 361, 376-377, 381.

It is difficult to see how a bill of rights can provide for the protection of rights that are described with reference to their diversity as a matter of principle. The protection that a bill of rights offers has always been conceived in a cynical spirit[97] as the protection of an inviolate individual sphere of liberty against an overzealous and interventionist government. Instead the protection of a widely fragmented series of land rights should derive in large measure from the very diversity and fragmentation of the rights themselves, as long as they all provide sufficient and suitable security of tenure. In a plea for the abolition of landownership and the entrenchment of rational land use rights Caldwell[98] has argued that the same effect may be reached by retaining the desired security of tenure in another way, such as legislation.

In view of these considerations the only justification for a provision concerning land rights in a bill of rights might be that the relevant clause could provide general security of tenure to all land rights without doing so in terms of the traditional ownership paradigm. A traditional clause protecting ownership as the one and only sacred and inviolable right cannot be acceptable from the point of view of those who really want to see a better and more just distribution of land rights, because such a clause will inevitably codify and protect the status quo. However, from the point of view of the landless and the holders of "lesser'" land rights some sort of property clause that will provide them with greater and secure land rights is necessary, because they need all the protection of their land rights they can get.[99] The best option then seems to be a property clause that provides, in wide terminology, for the protection not of ownership but of all land rights.

In the words of Charles Reich we in South Africa are also faced with the task of creating a new property, but we

should do so only after freeing ourselves of the traditional paradigm in which ownership was regarded as the queen of all property rights. In this perspective it seems as if Gray has offered us good advice when saying that we would be wise to approach the traditional concept of ownership on tiptoe and from an unexpected direction; not so much to catch it as to avoid it.

---

97 The cynicism which is typical of the liberalist perception of the relationship between state and individual. See in this regard P Ippel "Melakonieke meditatie" in De dubbelzinnigheid van het recht: kritische rechtstheorie en rechtspolitiek in de jaren tachtig eds R de Lange et al Recht en Kritiek 1985 38-41.

98 LK Caldwell "Rights of ownership or rights of use? - The need for a new conceptual basis for land use policy" 1975 Environment LR 409-425 419.

99 See in this regard T de Roos "De taaiheid van het recht en de noodzaak van de kritiek" in De dubbelzinnigheid van het recht: kritische rechtstheorie en rechtspolitiek in de jaren tachtig eds R de Lange et al Recht en Kritiek 1985 1-3 2.

THE RIGHT TO PRIVATE PROPERTY IN A NEW POLITICAL DISPENSATION IN SOUTH AFRICA

CAROLE LEWIS*

INTRODUCTION

In the last decade of the twentieth century the notion of the right to private property has become one of considerable importance in South Africa. We are faced at present with the critical decision whether to enshrine such a right in a future constitution. The overwhelming weight of academic opinion seems to be in favour of a provision in a bill of rights guaranteeing to citizens the right to property, although there is considerable debate as to what that right should embrace.

The draft bill of rights prepared by the South African Law Commission provides, in article 22, for the right to private property, that is, 'to be or to become the owner of private property or to have a real right in private property or to acquire such right or to be or to become entitled to any other right' subject to the proviso that legislation may authorize expropriation in the public interest against payment of just compensation.[1]

---

* BA LLB LLM (Witwatersrand), Professor of Law, University of the Witwatersrand, Johannesburg. Much of the research for this paper was done at the Institute of Advanced Legal Studies, London, a visit to which was made possible by grants from the Andrew Mellon Foundation and the Anderson Capelli Fund.

I thank Edwin Cameron and David Dyzenhaus for the very helpful comments and criticisms made on drafts of the paper. The responsibility for its defects remains entirely mine. I am indebted also to David Dyzenhaus for drawing my attention to the work of Jeremy Waldron, and for persuading me to embark on the enterprise of working on the issues traversed in the paper.

1 See the commission's interim report, Project 58: 'Group and Human Rights' August 1991 at 365.

The commission had concluded in its earlier report[2] that the right to property ought to be included in a bill of rights because: '[T]o the vast majority of all South Africans a bill of rights without a property clause would be totally unacceptable. Our impression is that, so far as the right to property and means of production are concerned, the aspirations of all in our country will be satisfied if -

1 The right to property is guaranteed.

2 All discriminatory impediments to the acquisition, retention and ownership of property and means of production of any kind are abolished.

3 The possibility is created that the state, where necessary, will be able to expropriate property and means of production against fair compensation to be determined by the Supreme Court if it is not possible to reach agreement on the matter.

4 The objects of affirmative action are taken into account with regard to the powers of expropriation ....

5 It is left to the normal political process in a democratic state to meet fluctuating economic needs on a continuous basis.'

As far as the commission was concerned, the real issue facing us is not whether there should be rights to property at all, but the redistribution of existing wealth and means of production.

The African National Congress (ANC) working draft of a bill of rights prepared by the ANC Constitutional Committee provides, in article 11, that:

---

2 See Working Paper 25: Project 58: 'Group and Human Rights' (1989) at 464-5.

'2 All men and women and lawfully constituted bodies are entitled to the peaceful enjoyment of their possessions, including the right to acquire, own, or dispose of property in any part of the country without distinction based on race, colour, language, gender or creed.'[3]

The article sets out in some detail the circumstances in which expropriation will be constitutional, and makes provision for a programme of redistribution of resources.[4]

Furthermore, a right to property has been included in the Namibian Bill of Rights, which forms Chapter 3 of the Namibian Constitution. Article 16 provides:[5]

(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeathe their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire such property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.'

On the other hand, there are people who are opposed to the inclusion of a right to property in a future constitution. Among them is Professor Andre van der Walt[6] who maintains that the

---

3 Reproduced in (1991) 7 SAJHR 110.

4 Idem at 119. Note the criticisms of these provisions by the South African Law Commission in its interim report at 359-65, particularly the view (at 364) that the ANC's draft provision allows for 'naked nationalisation without compensation'.

5 Extracts from the constitution are reproduced in (1990) 6 SAJHR 89: The right to property is set out at 94.

6 See 'Towards the development of post-apartheid land law: an exploratory survey' 1990 De Jure 1 at 43 and 'Developments that may change the institution of private ownership so as to meet the needs of a non-racial society in South Africa' (1990) 1 Stellenbosch Law Review 26 at 47.

inclusion of a property clause will enshrine a 'capitalist-liberalist concept of ownership', protected against social, economic and environmental criticism: and that it will 'stifle all beneficial and progressive development in the theory and practice of ownership'. 'The constitutional protection of ownership in a classic bill of rights will, in fact, be a major stumbling block in the way of progress towards a new land law that is characterized by social justice.'

Professor Derek van der Merwe[7] also has difficulty with the possibility of the mummification of the concept of ownership should the right be constitutionally enshrined. He argues that the right to private ownership of land[8] should not be guaranteed in a bill of rights, since its inclusion would jeopardize the 'continued recognition of communal tenure', with concomitant loss of the social advantages attaching to such an institution. Property rights evolve over time in response to social and economic needs - a historical truth that would not, he maintains, be reflected in the enshrinement of the right to property.

The issue is, of course, not only academic. It is critical to everyone in South Africa - to those who are presently property holders and who fear dispossession through a programme of nationalization under a post-apartheid government, and to those who have been deprived of property through decades of apartheid rule.

---

7 See 'Land tenure in South Africa: a brief history and some reform proposals' 1989 TSAR 663 at 692.

8 Note that Van der Merwe's reservations are confined to the ownership of land.

It is clear that the notions of property and of what is meant by a right to property are seen very differently by the various writers, the members of the commissions who have drafted the working documents intended to form the basis of our future constitution, and by the people of South Africa whose future will be so greatly affected by the approach ultimately adopted in the new constitution.

The purpose of this paper is to examine a number of different issues which may throw some light on the debate whether the right to property should be embodied in a new constitution, and on the form that constitutional embodiment should take. Critical to my argument will be the distinction between the concept of property, on the one hand, and the various conceptions of it on the other. The core of my thesis is that we should, following the reasoning of eminent thinkers such as Dworkin and Rawls,[9] distinguish between the idea, or concept, of property, and different conceptions, or constructions, of its content. Conceptions of property differ from society to society, and from time to time. They are intimately connected with prevailing theories of political morality and economic dispensations. I shall thus argue that the right to property as a concept should be included in a bill of rights, but that no concrete conception should be detailed, in order to avoid the possibility of hampering the natural evolution of the content of

---

9 See John Rawls A Theory of Justice (1972) pages 5ff and Ronald Dworkin Taking Rights Seriously (1979) pages 103, 134-6. In drawing the distinction I have relied on Jeremy Waldron The Right to Private Property (1988), especially at 52.

the right, and to allow for the important development of new forms of the object of the right.

I will not deal with the theoretical problems of constitutional interpretation[10], but will be concerned with the recognition and protection of legitimate property rights. To achieve such recognition, and to ensure protection, it is essential to have clarity on the meaning of the term 'property'; on the objects of property rights, and, in particular, forms of wealth other than land; on whether such objects must be material (corporeal), and if not, on the criteria for determining what constitutes property. These issues will be addressed first. I shall then examine the meaning of 'a right to property'; justifications of the right to private property; the distribution of property and finally, how the right to property should be constitutionally protected.

It should be noted that the discussion will, in a sense, take place in an economic vacuum, since I make no suggestions as to the economic dispensation under which the right to property should exist, although obviously the economic and social system under which a property system operates will determine many of its characteristics.

WHAT IS PROPERTY?

In the debates about a property clause in a bill of rights there has been a concentration on the question of the right to

---

10 See in this regard Albie Sachs 'Towards a Bill of Rights in a Democratic South Africa' (1990) 6 SAJHR 1 and D H M Brooks 'Albie Sachs on Human Rights in South Africa' (1990) 6 SAJHR 25.

land, and in particular, the redistribution of land as an agricultural resource. This is not surprising in view of the systematic deprivation of the majority of South Africans of the right to own, and indeed to live and work on land, throughout the country over most of the twentieth century, and particularly in the last four decades of apartheid government.[11] The redistribution of land to black South Africans is a pressing issue, and it has received considerable, and most certainly deserved, attention.[12] But it must not be forgotten that there are many other important sources of wealth, and that these, too, at least in the view of some, may well constitute property.[13] They must thus be taken into account when one is considering the justifications for private property, its distribution, and its protection in a bill of rights.

We must thus examine both the meaning of the term 'property' and different forms of property, for as the English economic historian R H Tawney said:[14]

---

11 See Christina Murray and Catherine O'Regan (eds) No Place to Rest: Forced Removals and the Law in South Africa (1990).

12 See the bibliography in A J van der Walt (ed) Land Reform and the Future of Landownership in South Africa (1991) at ix, and the contributions in that volume.

13 See in this regard the view expressed over fifty years ago by Francis S Philbrick in 'Changing Conceptions of Property in Law' (1938) 86 University of Pennsylvania Law Review 691 at 692: 'As a matter of fact, the total value under our law today of proprietary rights which have no material object is probably enormously greater than the value of such rights in all land and tangible chattels. This modern incorporeal property includes, particularly, promissory notes, bills of exchange, patent rights, and shares of corporate stock.'

14 'Property and Creative Work' in C B MacPherson (ed) Property: Mainstream and Critical Positions 135 at 136.

> 'It is idle ... to present a case for or against private property without specifying the particular forms of property to which reference is made, and the journalist who says that "private property is the foundation of civilization" agrees with Proudhon, who said it was theft, in this respect at least that, without further definition, the words of both are meaningless.'

What is meant by 'Property'?

In South African jurisprudence there seems to be little difficulty in ascribing a meaning to the word 'property', provided that we know the context in which it is used. On its own, the word generally designates the object of a right - in lay circles, it denotes, more often than not, immovable property - land and the structures attaching to land. To lawyers, it denotes both movable and immovable things. 'Property law', on the other hand, denotes to lawyers, and to others if they put their minds to it, the body of rules governing rights, real rights, (in particular, ownership and possession) in things. The equivalent words in Afrikaans, 'sake' (things), and 'sakereg', (the law of things) are even clearer, provided that one understands what a thing is.[15]

In Anglo-American jurisprudence, however, there is much debate over the meaning of the term 'property', and as to its coherence as a legal concept. South African law, rooted in Roman and Roman-Dutch structures, has made a clear distinction between rights and the objects of those rights. When referring, then, to property, lawyers apparently have no doubt that they are

---

15 See the discussion below on the definition of a thing, and on the inclusion of incorporeals in the category of things.

concerned with both rights and things. And this would be true, too, of Continental civil systems with their roots also embedded firmly in Roman principle. Anglo-American law has taken a different path, however.[16]

C B MacPherson, for example, has argued[17] that the use of the term to designate things, or to designate exclusive individual rights to private property, is inappropriate. Property, he maintains, is a right, not a thing, and we must distinguish between different kinds of property, namely common property, private property and state property.[18] 'As soon as any society,' says MacPherson[19], 'by custom or convention or law, makes a distinction between property and mere physical possession it has in effect defined property as a right. ...

---

16 The point is made, in relation to land, by D L Carey Miller in a review of a number of works, South African and English, on the law of property: see 'Systems of Property; Worlds Apart: A Miscellany of Works' 1985 Acta Juridica 369. He states: 'The South African law of immovable property is relatively structured and certainly reflects the prominence of principle which Roman-Dutch law inherited from Roman law. On the other hand, English real property has as its foundation element the social system of feudalism - not a specifically legal control but an institution so powerful that it dictated the course of the law.'

17 C B MacPherson (ed) Property: Mainstream and Critical Positions (1978) at 1ff.

18 Again, following Roman and Roman-Dutch law, we distinguish between property in which individuals can have private rights (res in patrimonio) and things in which they cannot (res extra patrimonium) - a category including things to which every person in the state has a right (res communes) and things which are owned by the state, but to which all citizens have access (res publicae). For a comprehensive discussion of the history of the classification of things, and the current status of South African law in this regard, see J D van der Vyver 'The Etatisation of Public Property' in D P Visser (ed) Essays on the History of Law'.

19 Op cit at 3.

Property is a claim that will be enforced by society or the state, by custom or convention or law.'

Jeremy Waldron, however, makes clear the distinction between rights and objects, stating:[20]

> 'The concept of property is the concept of a system of rules governing access to and control of material resources. Something is to be regarded as a material resource if it is a material object capable of satisfying some human need or want. In all times and places with which we are familiar, material resources are scarce relative to the human demands that are made on them. (Some, of course, are scarcer than others.) Scarcity, as philosophers from Hume to Rawls have pointed out, is a presupposition of all sensible talk about property. If this assumption were ever to fail (as Marx believed it some day would) then the traditional problem of the nature and justification of rival types of property system would probably disappear.'[21]

On the other hand, Thomas C Grey takes the view that the manifold use of the term property is an indication that property no longer exists as a meaningful legal concept.[22] He discusses several senses of 'property' to support his thesis that property is no longer a coherent category in legal thinking. The Law of Property is, for law teachers and students, the body of law concerned with the use of land, of real estate. Lawyers and economists, by contrast, identify property rights with rights in

---

20 Jeremy Waldron The Right to Private Property (1988) 31. Extensive reference will be made to this work when considering the justifications for private property. See also Waldron 'What is Private Property?' (1985) 5 Oxford Journal of Legal Studies 313, a condensed version of which forms Chapter 2 of his book.

21 I shall consider the question whether objects must be material - perceptible - in order to qualify as things in which there can be real rights later in this section. Waldron assumes that an abundance of things would reduce or eradicate conflict over what constitutes property. The opposite might in fact be the case.

22 'The Disintegration of Property' in NOMOS XXII: Property (1980 Yearbook of the American Society for Political and Legal Philosophy) (eds J Roland Pennock and John W Chapman) 69.

rem as distinguished from rights in personam. (Grey argues, however, that the distinction does not 'fit closely with popular notions of property', and points to the existence of what South African lawyers would refer to as 'personality rights', such as the rights to bodily integrity and security, which he maintains would constitute property rights on this account.[23] Many theorists would counter that personality rights are of a different ilk altogether, and that there is no blurring of the distinction between real rights in things, on the one hand, and rights of personality on the other.[24]

A third meaning of 'property' arises from the purposive account of it given by some economists who include among property rights all the entitlements whose purpose is to 'advance allocative efficiency by allowing individuals to reap the benefits and requiring them to bear the costs generated by their activities'.[25] Such an account would also include personality rights, but would include welfare and social security entitlements. A fourth, and contrasting, meaning would, on the basis that the purpose of private property is to protect security and independence, include what Charles Reich called the 'new property' - public law entitlements to welfare and social security.[26]

---

23 Idem at 71.

24 See as to the difference W A Joubert 'Die Realiteit van die Subjektiewe Reg en die Betekenis van 'n Realistiese Begrip Daarvan vir die Privaatreg' (1958) 21 THRHR 12-15, 98-115; J D van der Vyver 'The Doctrine of Private-Law Rights' in S A Strauss (ed) Huldigingsbundel vir W A Joubert (1988) 201 at 227ff.

25 Grey op cit at 71.

26 See Charles A Reich 'The New Property' (1964) 73 Yale Law Journal 733. Reich's views will be elaborated on later in this

Yet another view is possible on an interpretation of the provisions of the American constitution prohibiting expropriation ('taking for a public purpose') without compensation: the property that can be taken, says Grey,[27] has been 'reified' into 'things' or 'pieces of property'. Thus a deprivation of the right to use airspace has not been regarded as a 'taking' because it is not 'sufficiently thing-like to be subject to the just compensation requirement'.[28]

A sixth usage distinguishes between property and liability rules according to the nature of the sanctions imposed on violation. Property rules are enforced by injunction (interdict) or criminal sanctions, whereas liability rules are enforced by the award of money damages. But, as Grey points out, this conception differs widely from common usage, since ownership, for example, is protected by both property and liability rules.[29]

Grey concludes that 'discourse about property has fragmented into a set of discontinuous usages' and that consequently we can do without the term property at all.[30] For whereas once the conception of property as the 'sole and despotic dominion which one man claims and exercises over the external things of the world'[31] mirrored economic reality, and

---

27 Op cit at 72.

28 Grey cites Penn Central Transportation Co v New York City 438 US 565 (1975) as authority. And see the discussion by Kevin Gray in 'Property in Thin Air' (1991) 50 Cambridge Law Journal 252, discussed below.

29 Op cit at 72.

30 Idem at 72-3.

31 Sir William Blackstone Commentaries on the Laws of England 11 ed (1791) vol II, page 2.

served an important ideological function - the attack on feudalism by the rising bourgeoisie who conceived of property not as a web of relations among persons, but as control of a piece of the material world by an individual - now the concept has disintegrated.[32] Grey's explanation of the collapse of the idea of property is that it is intrinsic to the development of a free-market economy into an industrial phase: it is a result of the decline of capitalism.

The dissolution of the traditional conception of property, argues Grey,[33] has eroded the 'moral basis of capitalism'. It has broken the connection between thing-ownership and the 'legal entitlements that make up the framework of the capitalist organization of the economy'. Thus the intuitions behind the moral arguments for thing-ownership cannot be transferred to the institutions of a capitalist economy. Grey does not advance traditional Marxism, for, as he points out, 'private property need not be abolished by revolution if it tends to dissolve with the development of mature capitalism'.[34] He concludes that the substitution of the conception of property as a bundle of rights for that of thing-ownership has deprived property of its status as an important category in legal and political theory.[35] And, Roger Cotterrell, in a discussion of Grey's thesis, concludes with him, at least in the context of American legal theory,

---

32 Grey op cit at 73-6.

33 Idem at 76ff.

34 Idem at 79.

35 Idem at 81.

that: 'Property is "dead" as a result of having been worked to death in indiscriminate legal application'.[36]

Grey's analysis is useful in showing the variety of meanings ascribable to 'property'. But his conclusion that 'property' is dead is not simply a linguistic claim: it is an argument that changes in the economic base have rendered talk about property inappropriate, an argument that has not met with general approbation.[37] Jeremy Waldron[38] attacks the view that an institution has no real significance if many meanings can be attributed to it. This view, he argues, is based on the premiss that particulars can be classified under a general term only if they have certain common features. But, following Hart,[39] he argues that conceptual definition is complicated, and the 'idea that it always involves the precise specification of necessary and sufficient conditions must be regarded as naive and outdated. A term that cannot be given a watertight definition in analytic jurisprudence may nevertheless be useful and important for social and political theory; we must not assume in advance that the imprecision or indeterminacy which characterises the legal

---

36 'The Law of Property and Legal Theory' in W Twining (ed) Legal Theory and Common Law (1986) 81 at 87.

37 Stephen Munzer A Theory of Property (1990) at 31-5 calls it 'thought-provoking but unsound', and J Roland Pennock 'Thoughts on the Right to Private Property' in NOMOS XXII: Property 171 at 173ff, dismissing Grey's argument summarily, claims that private property continues to play a valuable and prominent role in modern society. While the concept of property and its justification are inevitably linked, I prefer to deal with the arguments in justification separately, and confine myself here to the concept.

38 The Right to Private Property (1988) 30-1.

39 H L A Hart 'Definition and Theory in Jurisprudence' (1954) 70 Law Quarterly Review 21-47.

technician is fatal to the concept in every context in which it is deployed.'

Waldron's thesis, which I adopt, is that private property is a concept of which there are many different conceptions: thus in each society the different incidents of an institution, like ownership, will amount to a 'concrete conception of this abstract concept'.[40] Waldron does not, therefore, accept the Grey conclusion. Nor does Munzer, who states that it is sound to think of property both as things and as relations among persons with respect to things, provided that the context in which the term is used is made clear.[41]

What are the objects of property rights?

We must then assume that the manifold uses of the term property have not killed it as a category in legal theory. What then are the objects of property rights? What constitutes a thing? Although there may be some difficulty in reaching agreement about a definition of a thing, there is general agreement that tangible, or perceptible, objects of some value fall into the category of things. For some, economic value, which is largely a function of scarcity, is essential to confer the legal status of 'thingness' on an object.[42] For others, sentimental value, or usefulness to persons, is sufficient.[43] A more contentious issue is the inclusion of incorporeals in the category of things. Can a right, such as a share in a company, or a personal right arising from contract or delict, be the object of another right, such as ownership?

Certainly in Roman-Dutch law, incorporeals were traditionally regarded as things, and South African case law (and even statutes, such as the Deeds Registries Act 47 of 1937) has had no difficulty in regarding rights as objects of other rights.[44] Some jurists regard the principle that one can have rights in rights as theoretically unsound,[45] but their views have not yet been accepted by the courts, and it is unlikely that a principle so firmly entrenched in our common and statute law could be easily undone. Nor do there appear to be any ideological objections to the construction. This is not the appropriate place in which to analyse the debate on the desirability of recognizing real rights in personal rights. The

---

40 Op cit at 31. The distinction between the concept and the conception of property is based on the arguments of Dworkin and Rawls: see note 9 above.

41 Op cit, note 37, at 17.

42 See the quotation from Waldron, above, in relation to the nature of a system of property rules.

43 See generally C G van der Merwe Sakereg (2ed) (1989) 20ff; C G van der Merwe The Law of Things (1987) 10ff; Silberberg and Schoeman The Law of Property 2ed (1983) 10ff.

44 The principal area in which this issue has arisen is in determining whether a cession in securitatem debiti can be construed as a pledge of an incorporeal. The Appellate Division accepted this construction in National Bank of South Africa Ltd v Cohen's Trustee 1911 AD 235, and, after considerable academic debate, has reaffirmed it in a number of cases, most recently, Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Ltd 1990 (4) SA 938 (A). See, in this regard, Susan Scott The Law of Cession 2 ed (1991).

45 See W A Joubert 'Die Realiteit van die Subjektiewe Reg en die Betekenis van 'n Realistiese Begrip Daarvan vir die Privaatreg' (1958) 21 THRHR 12-15, 98-115; J D van der Vyver 'The Doctrine of Private-Law Rights' in S A Strauss (ed) Huldigingsbundel vir W A Joubert (1988) 201. See contra D J Devine 'The Object of a Real Right' 1965/1966 Acta Juridica 113 and Carole Lewis (1984) SAIJ 591.

issue that I do wish to address, and which I think is crucial at present, is the extent to which rights which have evolved in the twentieth century, as a result of the advent of the welfare state, or as a result of modern technology, are 'property rights'.[46]

Foremost among the writers who have argued that the 'new rights' spawned by twentieth century economic development and embodied in modern legal categories, are an important aspect of wealth, and thus constitute property, is Charles Reich. He coined the term 'the new property'. In a seminal article,[47] Reich suggested that to the extent that the state (in America) consumption, and to the extent that social welfare and security have become a predominant part of modern life, rights against

46 Earlier I referred to Waldron's definition of property as embracing only material resources. His treatment of the right to property is based on the assumption that the objects of property rights are corporeal. See The Right to Private Property at 33-7. This approach does not stem from a failure to recognize that in the modern world wealth no longer consists in the control and possession of physical objects. Indeed, he states that wealth 'is a matter of less tangible considerations - stocks, shares, funds and options - complicated economic relations which cannot be reduced to the ownership of things'. But Waldron does not ask 'What things do modern men own which are definitive of their wealth?', in which case one would have to 'conjure up incorporeal things to correspond to the complex legal relations that in fact define their economic position'. Instead he argues that a man's wealth is constituted by his 'property relations'. A person's shares, the funds he lays claim to, options, goodwill and so on, 'together define his position so far as access to and control of material resources is concerned'. This view, he maintains, more accurately reflects the complexity of modern life than does the 'rival' view that incorporeals are to be treated on a par with land and other physical objects.

47 'The New Property' (1964) 73 Yale Law Journal 733. It is one of the most influential articles published: see Fred S Shapiro 'The Most-Cited Articles from the Yale Law Journal' (1991) 100 (5) Yale Law Journal 1449.

arbitrary administrative action should be given the same constitutional protection as are rights to other forms of property. Reich makes the point about government participation in the economy strikingly:[48]

> 'One of the most important developments in the United States during the past decade has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licences. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale.
>
> The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth - forms which are held as private property. Social insurance substitutes for savings; a government contract replaces a businessman's customers and goodwill. The wealth of more and more Americans depends upon a relationship to government. Increasingly, Americans live on government largess - allocated by government on its own terms, and held by recipients subject to conditions which express "the public interest".
>
> The growth of government largess, accompanied by a distinctive system of law, is having profound consequences. It affects the underpinnings of individualism and independence. It influences the workings of the Bill of Rights. It has an impact on the power of private interests, in their relation to each other and to government. It is helping to create a new society.'

Reich showed that the existing conceptual framework failed to offer adequate protection against arbitrary action - cancellation or seizure of government largesse - by government. Part of the problem he describes, however, arises from the constitutional context in which the American legal system

48 Op cit at 733. See also, on the 'new property', Ronald Sackville 'Property, Rights and Social Security' (1978) University of New South Wales Law Journal 246 (Sackville argues that the notion of a property right is inappropriate to social security claims, although he does argue for an 'entitlement' to social security) and Kenneth J Vandevelde 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Property' (1980) 29 Buffalo Law Review 325.

operates. And, as pointed out by Cotterrell,[49] in the English context (and certainly also in European and other countries in which there is no bill of rights) the matter is different, because 'the constitutional significance of the property label is largely absent'.

Reich's concern with the lack of constitutional protection for 'the new property' is of crucial importance in the framing of a new constitution - especially one embodying a guarantee of the right to property - for South Africa. It is critical to achieve clarity on the meaning of property and on what is included in the notion of the right to property in order to ensure protection against arbitrary governmental action in respect of all forms of legitimate property-holding.[50]

To what rights, then, should we attach the label of property? The dephysicalisation of things makes it essential to find workable criteria to determine the objects of property rights. What is it that has made courts in the United States decide that the right to use the postal service, the right of an employee to free access to employment, the right to a tax exemption, the right to membership in a stock exchange, the right to the use of a church pew and so on, are rights of property which cannot be removed without due process of law?[51]

---

49 Op cit, note 36, at 87.

50 The legitimacy of private property rights will be considered in the next section.

51 See Vandevelde op cit, note 48, at 358-9. The Fifth Amendment to the United States Constitution provides that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation. See the discussion of the right to property below.

What criteria make most jurisdictions regard business goodwill, trade secrets and trademarks, copyright and franchises as things?

Cotterrell maintains that the 'thing-ownership' conception of property has become of little significance in Anglo-American thought largely because of the Hohfeldian analysis of rights, which he regards as having made 'fundamental changes in the nature of doctrine or its interpretation'.[52]

The Hohfeld analysis has been accepted as compelling by Anglo-American jurists. In brief outline it is this. There are eight fundamental legal relations which form the constituent elements of property. Each of these relations is defined relative to its opposite and to its correlative. The following table sets out the the fundamental relations, which are found in the columns 'Elements' and 'Correlatives'.

Elements	Correlatives	Opposites
Claim-right	Duty	No-Right
Privilege (Liberty)	No-Right	Duty

---

52 Ibid. Wesley Newcomb Hohfeld's analysis of rights is to be found in 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16 and in 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal. I shall discuss Hohfeld's analysis, and its importance in thinking about property, below.
Cotterrell refers (at 87) to Wolfgang Friedman's comment, in Law in a Changing Society 2 ed (1972) 117, that 'as has always been inherent in the common-law concept of property, and as is increasingly recognized in the civilian legal systems, property is not confined to the control of "things", but extended to the whole field of legitimate economic interests and expectations' as being 'in sharp contrast to the agitated discussion in much of the American literature'.

Power	Liability	Disability (No-Power)
Immunity	Disability	Liability

Any legal relationship, Hohfeld claimed, can be expressed as the sum of a combination of the eight fundamental elements. Thus ownership would be a set of rights, privileges, powers and immunities, and a non-owner would have, relative to the owner, a set of no-rights, duties, disabilities and liabilities.[53]

The notion of an opposite involves external rather than internal negation. This can be illustrated by taking the element of a privilege: a privilege is a liberty or freedom; its correlative is the absence of a right on another's part to interfere with the privilege; its opposite is the external negation of the liberty or freedom. For example, if A owes B R100, we would say that B has a claim-right against A and that A has a duty towards B: the opposite would be that B has no right. The absence of a duty - the opposite of a claim-right - is a privilege. Thus the opposite of the privilege in this example would be that A has a privilege to pay R100 to B.[54]

Hohfeld's conception of property as a bundle of legal relations has so far been accepted in American jurisprudence

53 Further on Hohfeld's analysis of ownership, and on the distinction between real and personal rights, see Fundamental Legal Conceptions (1923) 72, and also Albert Kocourek Jural Relations 2 ed (1928) and A M Honore 'Rights of Exclusion and Immunities Against Divesting' (1960) 34 Tulane Law Review 453. See too Carole Lewis 'Real Rights in Land: A New Look at an Old Subject' (1987) 104 SALJ 599 at 609-12.

54 This example is taken from Munzer op cit at 18-19.

that in the American Law Institute's Restatement of Property[55] 'property' itself is not defined: instead the four constituent elements and their correlatives are defined.

But the essential difficulty with this approach, though analytically and logically sound, is that it is not functional because almost all legal relations can fall into the category of property.[56] Thus the determination of actual cases - the decision as to the kind of remedy to invoke for breach of a right, and to determine the identity of duty-holders - is made difficult unless some means of limiting the conception of property rights is found. Vandevelde[57] maintains that the way in which American courts determined whether an interest was property was by looking to policy rather than logic. Munzer argues[58] that by 'conjoining' Hohfeld's analysis with that of Tony Honore's analysis of ownership[59] one will be able to give more specific content to the notion of property, and thus be better able to identify an interest - a right - as a thing.[60]

55 (1936) §§ 1-4.

56 See J D van der Vyver's criticism in 'The Doctrine of Private Law Rights' above, note 39, at 207-8.

57 Op cit at 363-7.

58 A Theory of Property at 22-8

59 A M Honoré 'Ownership' in A G Guest (ed) Oxford Essays in Jurisprudence (1961) 107.

60 See also Lawrence C Becker Property Rights: Philosophic Foundations (1977) 18ff. Becker places considerable reliance on Honore's analysis. And Jeremy Waldron The Right to Private Property 48ff also accepts the Honore analysis of ownership, stating that Honore's work is valuable, although he differs as to minor details. Waldron makes the point, however, that one must distinguish between the concept of a right such as ownership, and various conceptions of it, in part in order to ensure variability from one legal system to another. The distinction between an abstract concept, on the one hand, and various conceptions of it on the other, is drawn from John Rawls A Theory of Justice (1972) pages 5-11, and Ronald Dworkin Taking Rights Seriously (1979) 103, 134-6.

In brief, Honoré attempts to specify the standard ingredients of the right of ownership, that is, the incidents of ownership that are common in the conception of the right in Western legal systems. These are the rights to possess, use, manage and receive income from the thing; the powers to transfer, waive and abandon; the liberties to consume or destroy; the duty not to use harmfully; the liability for execution, and, finally and most importantly, residuarity.[61] A person who has all or most of these incidents in respect of a thing will be regarded as the owner. It should be noted that in this context, the term 'property' is used synonymously with 'ownership', although it is not doubted that rights of possession, and various other real rights are also rights of property.[62]

Munzer explains his conception of property as follows:[63]

> 'The idea of property - or, if you prefer, the sophisticated or legal conception of property - involves a constellation of Hohfeldian elements, correlatives, and opposites; a specification of standard incidents of ownership and other related but less powerful interests; and a catalog of "things" that are the subjects of these incidents. Hohfeld's conceptions are normative modalities. In the more specific form of Honoré's incidents, these are the relations that constitute property. Metaphorically, they are the "sticks" in the bundle called property. Notice, however, that property also includes less powerful collections of incidents that do not rise to the level of ownership. For example, an easement involves primarily a claim-right and a privilege to use the land of another and secondarily a power to compel enforcement of that claim-right and privilege. It would be usual to classify an easement as property or a property-interest, even though it does not amount to ownership. ... Notice, too, that the idea of property will remain open-ended until one lists the kinds of "things" open to ownership. In a legal system, it will be mainly a descriptive task to compile the list. In political theory, it will be a normative problem to show what things should be open to ownership. The reference to ownable things is a link between the sophisticated and popular conceptions of property. Notice, finally, that even with a list of ownable things, the idea of property is indeterminate at the margin. No litmus test can separate rights of property from, say, those of contract in all cases.'

Despite the fact that Munzer downplays the importance of a 'litmus test', a distinguishing criterion should, in my view, be as powerful as possible in order to facilitate the protection of legitimate property interests. The search for it must not be abandoned simply because [illegible]

A provocative contribution to the search has been made by Kevin Gray,[64] who suggests a test of 'exclusion' - the ability, sanctioned by legal and moral considerations, to keep a right or physical object for oneself, to the exclusion of others - as the essence of property. Gray begins his discussion of the nature of property thus:

> 'Proudhon got it all wrong. Property is not theft - it is fraud. Few other legal notions operate such gross or systematic deception. Before long I will have sold you a piece of thin air and you will have called it property. But the ultimate fact about property is that it does not really exist: it is mere illusion. It is a vacant concept - oddly enough rather like thin air.
>
> With private property, as with many illusions, we are easily beguiled into the error of fantastic projection upon the beautiful, artless creature that we think we see. We are seduced into believing [illegible] have found an objective reality which embodies our intuitions and needs. But then, just as the desired object comes finally within reach, just as the notion of property seems reassuringly three-dimensional, the phantom figure dances away through our fingers and dissolves into a formless void.'

---

61 Note that Honoré does not himself explicitly use the Hohfeldian terminology.

62 See Grey's elaboration on the meanings of 'property' above.

63 Op cit at 23-4.

64 'Property in Thin Air' (1991) 50 Cambridge Law Journal 252.

The starting-point of Gray's analysis is a discussion of airspace as property. He distinguishes between the upper stratum which he describes as free for use and exploitation by all mankind (hence falling into the Roman category of res communes), and the lower stratum which can be 'propertised'. Contrast this stance with the South African law, where we distinguish between air and airspace, the former being the property of all, and the latter falling into private ownership in accordance with the maxim 'cuius est solum eius est usque ad caelum (frequently rendered as coelum, which itself means airspace) et ad inferos.[65] Gray refers to a number of English and American authorities which have dismissed this principle as overstated.[66] In South African law, however, it has always been taken seriously,[67] and no court has ever doubted the principle that the owner of land owns the airspace above it - though not the air circulating in it - right up to the very heavens, but subject, of course, to physical limitations, and to limitations imposed by statutes such as the Aviation Act 74 of 1962.

The distinction made by Gray, however, is a clue to the critera leading to the decision to exclude a resource from the private property regime, (as in Anglo-American law, where the upper-stratum of airspace falls outside the 'commons') and conversely to the view that a 'bundle of rights' can be property. It leads one to ask: '[W]herein lies the "property" character of the rights in the bundle? What constitutes the "propertiness" of "property"?'[68]

Pivotal to Gray's analysis of what should be regarded as property is the Australian case Victoria Park Racing and Recreation Grounds Co Ltd v Taylor,[69] described by Gray as holding 'an uncanny fascination for anyone who confesses an interest in the legal phenomenon of property'.[70] The plaintiff owned a racecourse, to which it admitted members of the public on payment of a fee. Taylor owned a house opposite the racecourse. He erected a raised platform on his land, from which he commanded an excellent view of the races and of the various boards displaying information pertinent to the races. He could also hear announcements made about races in progress. This advantage was such that Taylor decided to share it with his fellow citizens. He arranged with a broadcasting corporation, (also a defendant) that a commentator would broadcast live radio reports of races in progress from his platform. The result was that punters who would normally have gone to the racecourse to view and bet on the outcome of the races, preferred to place their bets off-course, and to listen to a commentary on the races in the comfort of their homes.

The plaintiff lost much business as a result of the defendants' enterprise, and sued for an injunction on the basis

---

65 The maxim comes not from the Roman texts, though it undoubtedly reflects the Roman law, but from the gloss of Accursius of Bologna - Glossa Ordinaria on the Corpus Iuris (Digest VIII.2.1).

66 Op cit at 253-4.

67 One of the earliest confirmations of the 'heaven to hell' rule, as it has been called by American jurists, is in London and SA Exploration Co v Rouliot (1890) 8 SC 74.

68 Gray op cit at 259.

69 (1937) 58 Commonwealth Law Reports 479.

70 Op cit at 264.

of nuisance and breach of copyright. The action failed. In the High Court of Australia the majority of the court found that the defendants had not committed any wrong. It was not the duty of the court, held Latham CJ, to erect fences that the plaintiff had failed to erect. And broadcasting information from the plaintiff's boards did not constitute a breach of copyright. Two other judges gave strong supporting judgments. Two dissenting judges, Rich and Evatt JJ, concluded, however, that the defendants had committed a wrong in that the right of view was not absolute, and could not be exercized without regard to its hazardous effects. The defendants were thus liable, on the minority view, under the law of nuisance.

Nowhere in the various judgments is there an explicit discussion of the nature of the plaintiff's right. The judgments centered on the law of nuisance. Gray argues, however, that the central, though unspoken, issue was whether the defendants had taken from the plaintiff anything that might be regarded as property - as something which the plaintiff had created and was entitled to exploit exclusively for itself. The majority and the minority were split, in this regard, says Gray, by 'fundamentally differing views of the phenomenon of "property"'.[71] The minority judges considered that there had been a misappropriation. The defendants had reaped where they had not sown. The majority, on the other hand, found that the plaintiff had not been deprived of any vested legal entitlement. There could not, in their view, be any right - property - in a spectacle.[72]

Gray concludes:[73]

> 'The enduring significance of Victoria Park Racing is that in this decision we are offered a rare opportunity to learn something of the tacit rules which govern the propertisation of resources.
> Unpropertised resources remain in the commons, available for use and exploitation by all. The primordial principle which emerges from the majority judgments ... is that a resource can be propertised only if it is - to use another ugly but effective word [the first being 'propertised'] - "excludable". A resource is "excludable' only if it is feasible for a legal person to exercise regulatory control over the access of strangers to the various benefits inherent in the resource.'

Resources may be physically non-excludable, such as the beam of light from a lighthouse. But there are other reasons for non-excludability - legal and moral reasons. Victoria Park Racing illustrates a case where the resource was, for physical (and legal) reasons, non-excludable. 'No one' says Gray,[74] 'can claim "property" in a resource in relation to which it is physically unrealistic to control, consistently over prolonged periods, the access of strangers'.[75]

---

71 Op cit at 267.

72 It is arguable that in South African law the defendants' conduct would be actionable under the Lex Aquilia as a form of unlawful competition. It would not have amounted to a breach of privacy, since the plaintiff was not a natural person. See David McQuoid-Mason The Law of Privacy in South Africa (1977) at 215.

73 Idem at 268.

74 Idem at 270.

75 See contra D F Libling 'The Concept of Property: Property in Intangibles' (1978) 94 Law Quarterly Review 103 at 110. Libling argues that the commercial exploitation of the spectacle in Victoria Park Racing did give rise to a proprietary right. He contrasts the decision with that of the United States Supreme Court in International News Service v Associated press 63 l ed 211 (1918), in which the court granted an injunction restraining the defendant, a company which gathered news and sold it to subscribers, from selling news gathered by the plaintiff. The remedy was granted, according to Libling at 105, because of

Legal 'non-excludability' arises, according to Gray,[76] from the provisions of the law, from contractual stipulation and from certain intellectual property regimes. In South Africa, for example, air and running water, as res communes, are non-excludable by virtue of the common law.

Contractual stipulation, on Gray's account, is negative in the sense that a resource will be non-excludable where a person neglects to use the relevant legal protection available to him to propertise the resource. Contract provides a common means of controlling the access of strangers to a thing. 'To omit to ringfence a resource appropriately by contract is simply to fail to propertise that resource ...' says Gray.[77] The plaintiff in Victoria Park Racing could, in principle, have protected itself by concluding an appropriate contract with Taylor. But contractual protection is not always possible, and in any event, avails only against the limited number of people with whom one has contracted. Gray acknowledges the very limited ambit of contract as a protective device.[78]

Non-excludability of intellectual property arises in the same way as contractual non-excludability - from a failure to take advantage of the protection offered by the legal system. The failure to register a trademark or a patent will render the resource non-excludable.

Moral non-excludability arises from public morality - from the mores which promote 'integrative social existence' rather than from 'any normative judgment about individual human conduct'.[79]

> 'The notion of moral non-excludability derives from the fact that there are certain resources which are simply perceived to be so central or intrinsic to constructive human co-existence that it would be severely anti-social that these resources should be removed from the commons. To propertise resources of such social vitality is contra bonos mores: the resources in question are non-excludable because it is widely recognized that undesirable or intolerable consequences would flow from allowing any one person or group of persons to control access to the benefits which they confer. Following such appropriation, there would not, in Locke's well-known phrase, be "enough, and as good left in common for others". Consequently the courts, by differentiating between excludable and non-excludable resources, engage constantly in a range of latent policy decisions which shape the contours of the property concept. In setting the moral limits of "property", the courts effectively recognise that there is some serial ranking of legally protected values and interests: claims of "property" may sometimes be overridden by the need to attain or further more highly rated social goals. ... [I]t is no accident that the goals to which "property" defers often relate to fundamental human freedoms. It is in the definition of moral non-excludables that the law of property most closely approaches the law of human rights.'[80]

Victoria Park Racing, Gray argues, is a prime example of the need for certain values - those promoting free speech and communication - to predominate over others - the commercial

---

v 'Our Dogs' Publishing Co Ltd [1917] 2 KB 125 (CA), a case which also amounts to an obstacle to a 'general principle of property in intangibles' (at 105). The resource found not to be exclusive in this case was the right to take photographs at a dog show. Such a right was not, held Horridge J, a right of property. See the discussion in Gray op cit at 271-3. Gray argues that the 'spectacle of the dog show failed the test of excludability'.

76 Op cit at 273ff.

77 Idem at 274.

78 Ibid, n22.

79 Gray op cit at 280.

80 Ibid at 280-1. The reference to Locke is to Two Treatises of Government 2 critical ed by p Laslett (1967), The Second Treatise s 27. See as to the meaning of 'enough, and as good left in common for others', Waldron The Right to Private

interest of the plaintiff. It is fundamental to social interaction, according to Gray, following the reasoning of the majority of the court, that no person should own words or numerals: 'The communicative potency of the raw elements of language and numbers cannot be allowed to be hijacked by some private exercise of eminent domain.'[81]

The omission of resources from the embrace of property on moral grounds is often a result of deferring to certain fundamental human rights, such as freedom of speech, assembly and belief. Property rights are thus, on Gray's analysis, prima facie rights which may be overridden by other moral concerns.[82]

Gray discusses, in particular, linguistic exclusion - illustrated by the case of Davis v Commonwealth of Australia[83] - and territorial exclusion - illustrated by Gerhardy v Brown.[84] This case is of particular interest in South Africa, where we have become used to the exclusion of people from land on the ground of colour. Although territorial exclusion is no longer compelled by legislation,[85] it will no doubt be attempted through private enterprise in the future. The case, and Gray's discussion of it, are instructive on the issues of private discrimination in the use of land, and affirmative action in the redistribution of land.

---

81 Gray op cit at 283.

82 Ibid.

83 (1988) 166 Commonwealth Law Reports 79.

84 (1985) 159 Commonwealth Law Reports 70.

85 See the Abolition of Racially Based Land Measures Act 108 of 1991.

Gerhardy v Brown concerned legislation which set aside a vast tract of land in southern Australia for the Pitjantjatjara people. The object of the legislation was to restore to these people their traditional relationship with the land, and to fortify their spiritual, cultural and social identity. All Pitjantjatjara people were guaranteed rights of access to the land, but other people were not permitted to enter it without special permission. An aboriginal who was not a Pitjantjatjara was charged with the offence of entering upon the land without permission. The question before the court was whether the legislation, by granting differential rights of access, was an unlawful form of racial discrimination.

The majority of the court accepted that the legislation did detract from the rights of freedom of movement and residence, but decided that, because it was a special measure designed to protect the special interests of the Pitjantjatjara, it was enforceable. Gray maintains that the court, 'in delineating the limits of "property", ... significantly emphasised the need to promote those moral or political standards which enrich life and constructive social interaction within a community of equals'.[86] He argues, further, that the issues arising in Gerhardy illustrate how the incidents of private ownership must be subject to constraints imposed by prevailing public morality, and that 'all property rights have a distinct public law character'.[87]

---

86 Op cit at 289.

87 Ibid at 290. See also his discussion of cases illustrating this proposition in other jurisdictions at 290-2.

The core of Gray's thesis is that the notion of excludability gives us a better understanding of 'the inner mystery of "property"' than does the traditional emphasis on the criteria of transferability and permanence.[88] His definition of property is thus:[89]

> '"Property" is the power-relation constituted by the state's endorsement of private claims to regulate the access of strangers to the benefits of particular resources. If, in respect of a given claimant and a given resource, the exercise of such regulatory control is physically impracticable or legally abortive or morally or socially undesirable, we say that such a claimant can assert no "property" in that resource and for that matter can lose no "property" in it either, Herein lies an important key to the "propertiness" of property.'

A number of conclusions would follow if Gray's definition were accepted.[90] First, property is a relative concept since the notions of physical, legal and, especially, moral excludability will alter from time to time, and from society to society. Second, there are moral limits to property. These are of great significance, especially when dealing with land as a limited commodity which must be preserved for the benefit of all, and of future generations. Third, property is a term with a very wide ambit if it is conceived as control over access: if it is not a thing, but a power-relationship, then the range of resources in which property can be claimed is greater than is traditionally

---

88 Op cit at 292. He refers to the definition of property given by Lord Wilberforce in National Provincial Bank Ltd v Ainsworth [1965] AC 1175 at 1247-8: for a right to be admitted as property, it must be 'definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability'.

89 Idem at 294.

90 See his discussion op cit at 295-307.

thought. Fourth, property need not be defined in terms of proprietary consequences, that is, by determining whether a right is transferable or enforceable against a particular person. Instead, the attribution of property status is determined by reference to the criterion of excludability. Fifth, property is assimilable within consensual theory: the divide between property law and contract law becomes less significant. '[T]he notion of "property" readily collapses back into contract or, more broadly, into a number of arrangements based on assent.'[91] Sixth, as we have seen, property is never absolutely private: all property has a public law character.

The seventh conclusion is that property is the 'gateway to access'. Property law is, on this construction, concerned essentially with claims of access to social goods. This view is compatible with that of C B MacPherson[92] that property should not be regarded as a right to exclude others from a resource, but rather as the right not to be excluded. Thus construed, property is the right to equal access to the means of labour and the means of life. Gray sees the MacPherson thesis as holding that the role of property is to stop the more powerful members of society from 'propertising all the goods of life'.

Finally, Gray concludes,[93] property is a 'category of illusory reference', a 'conceptual mirage', which despite being

---

91 Op cit at 303.

92 See Property: Critical and Mainstream Positions (1978) 199ff and 'Capitalism and the Changing Concept of Property' in E Kamenka and R S Neale (eds) Feudalism, Capitalism and Beyond (1975) 116ff.

93 Op cit at 305-7.

'deeply embedded [as a concept] in the human psyche', is of no substance save in so far as it constrained by the notion of excludability.

Gray's thesis is, in my view, of considerable significance and assistance in determining whether a right is a right of property. The criterion of excludability on physical, legal and moral grounds is extremely attractive because of its flexibility and adaptability: it allows for many different conceptions of the concept of property - conceptions that will differ from time to time and society to society. Moreover, the test of excludability is not only functional and practicable: it allows for considerations of morality to prevail, considerations that have been absent in many instances under the South African legal system. The relativity of Gray's concept of property also illustrates how important it is not to elaborate on known or traditional forms of property in any provision in a bill of rights, since such elaboration could well stultify the development of the law, and, as importantly, hamper the protection of new forms of property.[94]

The concept of excludability demarcates the categories of resources in which one can assert private rights. It does not, however, justify the holding of any particular individual, and it does not make any case for a right to private property. It is to these issues that I now wish to turn.

---

94 See the discussion in the introduction to this paper of the objections to incorporating a right to property in a new constitution on the ground that enshrinement would mummify development.

IS THE RIGHT TO PRIVATE PROPERTY POLITICALLY AND MORALLY JUSTIFIABLE?

In the previous section we were concerned with what constitutes property, and saw that it is commonly regarded as a bundle of rights of a particular character. We saw, also, that a right can be the object of property, although this contention is not universally accepted. The specific real rights - rights of property - thus far discussed are not to be confused with 'the right to property' - that is, the notion of a general right to property vested in all people subject to a particular legal system.

What, in principle, do the constitutions (and draft constitutions and bills of rights) mean when they refer to a right to property? Indeed, do the provisions guaranteeing to citizens the right to own land, or movables, (or even the new rights of property discussed above) mean anything at all? And if they are given a specific content, can the right guaranteed or protected be justified on moral, ethical, social or economic grounds? It is with these issues that we must now grapple, for, as Kenneth R Minogue has said:[95]

> 'The problem of property, as it occurs in contemporary political theory, is a problem of justification. At the level of political polemic, socialist writers have attacked the right of private property, whereas liberals and others defended it. But at a philosophical level, the same

---

95 'The Concept of Property and its Contemporary Significance' NOMOS XXII: Property 3. The reference to Rawls in the quotation is to A Theory of Justice (1982), which will be discussed very briefly below.

> fundamental question: How ought property to be distributed in a just society? has been no less insistent, and the great success of John Rawls in focusing political philosophy around the concept of justice has, in a sense, put the normative issues raised by property at the very centre of political philosophy.'

What is the Right to Private Property?

Before turning to justificatory theories, however, let us examine what is meant by 'a right to property'.

In the French Declaration of the Rights of Man and the Citizen, published in 1789, the National Assembly asserted:[96]

> 'The end in view of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.'

Jeremy Bentham, the English utilitarian philosopher, reacted to this assertion by calling it 'rhetorical nonsense, - nonsense upon stilts'.[97] More specifically, in relation to property, he argued:

> 'For as to proprietary rights - without a subject ... in relation to which they can be exercised - they will hardly be of much value, they will hardly be worth taking care of with so much solemnity.... Unfortunately, in most matters of property, what is every man's right is no man's right; so that the effect of this part of the oracle ... would be, not to establish property, but to extinguish it - and this is one of the rights declared to be imprescriptible!'[98]

Waldron, acknowledging that Bentham's response is 'excessive', points out that his hyperbole does illustrate the

---

96 In art 2. The wording is taken from Waldron The Right to Private Property 16.

97 See 'Anarchical Fallacies' in Waldron (ed) Nonsense Upon Stilts: Bentham Burke and Marx, on the Rights of Man (1987) 26, and Waldron op cit 16.

98 Ibid at 53.

ambiguity of 'right to property'. The phrase, says Waldron, conceals a variety of different claims which can be divided into four different, broad categories.[99]

The first category includes claims to immunity against expropriation - claims which are made explicit in some constitutions, notably that of the United States of America, the Fifth Amendment to which provides that 'No person ... shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation'.[100] A claim of this kind is dependent on other claims about the right to property, however, and is certainly not the sole claim made by any provision in a constitution. As Waldron states, the claim merely 'adds a particular immunity to what is otherwise a pre-existing bundle of property rights'.[101]

The second broad category embraces claims and theories concerning 'natural' property rights. In essence, on such a theory, a right of property stems from the fact that a person who first gains control of an object, and labours on it, creates a relationship with it such that, from a moral point of view, it would be wrong to take it away from her. The Lockean theory of a

---

99 Op cit at 16-24.

100 There are many such provisions, and the draft bill of rights produced by the South African Law Commission, and the Namibian constitution, follow suit. See the discussion above. For an overview of constitutional provisions, and also of the many justifications of the right to property, particularly those of the Greek philosophers, and British and European moralists, see J D van der Vyver 'Ownership in Constitutional and International Law' 1985 Acta Juridica 119.

101 Op cit at 18.

right to property arising from one's labour would fall into this class. Such rights are natural in the sense that the force of them can be recognized as valid, quite apart from the provisions of the prevailing legal system, and also in the sense that the relationship from which the rights, and corresponding duties, stem, are rooted in human nature.

The third possible claim is that of eligibility to hold property. This claim is embodied in Art 17 of the Universal Declaration of Human Rights: 'Everyone has the right to own property alone as well as in the association of others'. It is a right not to be excluded from the class of property-owners, but no more than that. Such a claim does not guarantee that anyone will become an owner.[102]

The fourth claim embodied in the concept of a right to property is that of a general right to have private property. Such a claim is often premissed on the view that ownership of property provides a moral education for the owner - it promotes responsibility, self-reliance, freedom and control over at least some resources. It is with this claim, and with the notion of property as a natural right, that most of the writings on the justification of property are concerned.

The Justifications of Private Property

It is impossible in this paper to deal adequately with the many justificatory theories advanced over the centuries, nor with the many arguments, particularly the socialist ones, against it. I shall concentrate, instead, (albeit briefly, and without being able to do full justice to their scholarship) on the work of two modern theorists, Jeremy Waldron and Stephen Munzer, who themselves have considered the work of other philosophers and jurists at length and who illuminate the issues about which there is intense debate.[103]

As a background to what follows, however, I shall sketch briefly, and in rudimentary terms, the traditional theories advanced in favour of the institution of private property, and the difficulties associated with the justifications. One of the oldest justifications is based on the right of the discoverer of property to take control of it, and to dispose of it. The right of the first occupier is indeed recognised in Roman, Roman-Dutch and South African law, but only in respect of those things that are unowned, a category of little significance today, and not much since first civilizations began. As the American jurist Morris Cohen said:[104]

---

102 This is certainly the meaning of the 'right to property' in the draft bill of rights prepared by the South African Law Commission; that the right means only an eligibility to acquire property is made explicit in the Interim Report on Group and Human Rights (August 1991): see article 22 discussed at the beginning of this paper.

103 See Waldron The Right to Private Property (1988) and Munzer A Theory of Property (1990). The books are both lengthy and tightly argued. They contain much scholarly and critical analysis. I cannot, in this paper, discuss the arguments in any depth, nor will I refer to all of them. I hope that by referring to some, and highlighting others, I shall encourage readers to study the work of Waldron and of Munzer themselves.
C B MacPherson (ed) Property: Mainstream and Critical Positions (1978) contains a number of extracts from the leading works on property, as well as the editor's comments, and is very useful as a source of the writings of philosophers, political theorists and jurists. See also NOMOS XXII: Property (note 22) which contains a number of leading papers on the right to property.

104 'Property and Sovereignty' in C B MacPherson op cit, note

> 'Few accumulations of great wealth were ever simply found. Rather were they acquired by the labour of many, by conquest, by business manipulation, and by other means. It is obvious that today at any rate few economic goods can be acquired by discovery and first occupancy.'

And even if we concede that the first occupier may retain control over a thing, this does not mean that she should be able to use it arbitrarily, or dispose of it in any way she deems fit. The theory of occupancy does not account for acquisition by transfer or by inheritance.

The labour theory holds that every one is entitled to the produce of her labour. The difficulties inherent in this justification are obvious: very few things are produced by the labour of one person alone; the theory does not take account of need on the part of others, and, like the occupancy theory, does not account for inheritance and transfer. But labour as a justification for private property holding cannot be discounted altogether, and, as we will see, is often considered as a factor to be taken into account in mixed justificatory theories.

Some philosophers have tried to deduce the right to property from the individual's right to act as a free person, for the ability to be free is dependent on the opportunities made possible by private property. The inherent flaw in this theory is that, while it accounts for rights in personal items, even in land held for private occupation, it does not justify private property in resources required by the public. One of the chief exponents of the personality justification of property was Hegel, whose arguments are traversed in detail by Waldron, and will be referred to below.

The economic theory in favour of private property claims that maximum productivity is promoted by it: the person who makes the greatest profit is the person who has the greatest power to foresee demand. Cohen asserts[105] (and recent events in Eastern Europe, and the collapse of the Soviet Union appear to bear him out, although the debate has not been conclusively finished) that the history of agriculture and industry show that there is a strong prima facie case for the view that greater productivity prevails under individual ownership. Again, however, there are flaws in the approach. Many things, including land, are not increased in number by making them private property. There are inherent sources of waste in a regime of private enterprise, for as Cohen points out, the success of the 'economically fittest' is likely to result in the failures of those less fit - which results in loss to the community.[106] And, most importantly, private property in industry may be argued to sacrifice the interests of society to commercial profit.

Utilitarian theories have also played an important role. These maintain that the total, or average, happiness of society will be greater if resources, particularly the means of production, are owned and controlled by individuals (an argument closely allied with the economic argument sketched above). Waldron[107] maintains that Aristotle's views on property are utilitarian, in that he considers that social disharmony will be avoided if each person has his own land on which to work, and

---

105 Op cit at 165-6.
106 Ibid at 166.
107 Op cit at 6-7.

more will be produced when each person applies himself to what is his own property. Aristotle none the less argued in favour of the communal uses of resources: he differed from Plato, however, in maintaining that the sharing of wealth should be the result of virtue rather than legal compulsion.[108]

The principal difficulties with utilitarian arguments are that they take human interests and desires as given, assuming that the fulfilment of a desire has a positive value and that they are quantifiable. Further, the arguments take no heed of the problem of distribution. Waldron argues[109] that a utilitarian who is concerned to maximize the happiness or satisfaction in a community is incapable of taking into account the deprivation or poverty of a few. Thus equality and justice, on a pure utilitarian theory, are not important considerations.

Waldron takes an entirely different approach to the question whether the right to property can be justified.[110] His is a rights-based approach.[111] Waldron's definition of a rights-based argument is 'one showing that an individual interest considered in itself is sufficiently important from a moral point of view to justify holding people to be under a duty to promote it'.[112] His aim is to consider what individual interests are served by the existence of private property (as opposed to some other form of property regime, such as a socialist or communist regime), and whether these interests are so important from a moral perspective that they justify their enforcement and protection by government.

In determining the meaning of 'interest', Waldron distinguishes between preferences and objectively determined interests which a person might prefer not to have promoted. As with rights, there are different conceptions of the concept, and he prefers to leave open the question of the particular conception of interest which is envisaged in a particular theory of rights.[113]

To achieve his aim, Waldron analyses two lines of rights-based argument: the one is associated with Locke and the libertarian philosopher Robert Nozick; the other with Hegel. Waldron suggests that both approaches hold that individuals have an interest in owning things which is sufficiently important to command respect and to restrain governmental action. The Hegelian line argues that this is a basic human interest which everyone has, while on the Lockean approach, the interest is one which people have only because of what they have done, or have acquired from someone else. The Lockean right to property is a

---

108 Aristotle The Politics trans Sir Ernest Barker (1946) 1262.

109 Op cit at 12-13, and 73-4.

110 Note that Waldron uses the term 'right' in the Hohfeldian sense of a claim-right, rather than a privilege: op cit at 79-80.

111 He draws heavily on Ronald Dworkin's work Taking Rights Seriously (1979), although the theory of rights on which he bases his approach is also developed by Neil MacCormick and Joseph Raz: Neil MacCormick Legal Right and Social Democracy: Essays in Legal and Political Philosophy (1982); Joseph Raz Studies in Philosophy (1982) and 'Right-Based Moralities' in Waldron (ed) Theories of Rights (1984). He relies also on John Rawls's theory of justice: see A Theory of Justice (1971). Waldron uses also the terminology of H L A Hart in distinguishing between special and general rights: 'Are There Any Natural Rights?' in Waldron (ed) Theories of Rights (1984).

112 Op cit at 3.

113 Op cit at 87-8.

'special right', whereas the Hegelian right is 'general'. A special right is one arising from a transaction between individuals, or from a particular relationship, and the corresponding obligation is limited to the other party to the transaction or relationship. A general right, on the other hand, is a moral right which avails against everyone in the sense that it is protected against interference by others.

Waldron argues that the core of John Locke's theory of property [114] is a special-right-based argument for private property. His central thesis is that by labouring on material resources in a state of nature, a person acquires an interest in them which is important enough, from a moral point of view, to support the principle that other people, and governments, have a duty not to deprive him of the resources without his consent. But people generally have no right to acquire such an interest. On the Lockean approach, there is no general right to appropriate, or to be given the opportunity to do so. However, Locke acknowledged a general right to subsistence where an individual could not appropriate resources for himself. The right to subsistence, together with special rights arising from appropriation, would lead, argued Locke, to a prosperous society, albeit an unequal one.

Locke's arguments in justification of an entitlement over a resource created by mixing one's labour with it were that private appropriation was the only way to meet human needs; and

---

114 Espoused in his Two Treatises of Government (see note 80 above) and analysed by Waldron in considerable depth: op cit at 137-252.

that the mixing of one's labour in itself gives rise to entitlement. Waldron points out that the latter argument is incoherent, and that the former is not true. Locke's justification of the institution of private property thus fails.[115]

In order to demonstrate that no special-right of property can succeed, Waldron also looks at the theory of historical entitlement exemplified by the writing of Robert Nozick.[116] Waldron claims the following for Nozick's thesis (a thesis which amounts to no more than the 'bare bones of a theory'[117]). Nobody has any right to hold resources as private property unless rights have been acquired by particular people over particular resources by particular actions or transactions. A system of positive law would determine which actions or transactions were able to give rise to rights of use and control. Nozick concedes no other rights, not even one to subsistence. Nor does he attempt any moral, social or economic justification for the right of property that arises in this way.

---

115 C B MacPherson has a different perception of Locke's approach. He maintains (Property: Mainstream and Critical Positions at 17) that Locke was the first to make a case for the right to an unlimited amount of property as a natural right. Indeed, the justification for government itself was that it was necessary to protect unlimited property. MacPherson said: 'What made the case for unlimited property so persuasive was that it seemed to be based simply on an equal natural right to one's own labour and to the means of labour, a right which is ethically pretty acceptable.' See also Alan Ryan Property and Political Theory (1984) 14ff.

116 Anarchy, State, and Utopia (1974).

117 Waldron op cit at 254. Nozick was attempting to do no more than outline a general theory, and Waldron regards this approach as ideal for his demonstration that any special-right-based argument in favour of private property is untenable, since one is not distracted by detail.

Waldron argues that a theory which makes no allowance for subsistence, and protects only those rights acquired in accordance with 'a principle of justice' is not tenable.

Justice will be achieved, on the Nozick account, if a distribution is made only to those who are entitled to hold. The specification of just procedures is to be found in an inductive definition of 'entitlement': a person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding; one who acquires from him in accordance with the principle of justice in transfer is entitled to the holding. No one is entitled to a holding except through repeated applications of these steps. Nozick does not elaborate on what amounts to justice in acquisition. And original acquisition is, as we have seen, no longer of any practical significance. Thus the principle of justice in acquisition is, although crucial to any theory of historical entitlement, elusive. Waldron asks:[118]

> 'What were conditions like when resources were first taken into ownership? How well developed was moral consciousness? Were those to whom the principle was supposed to apply capable of implementing it properly? Could it conceivably have been a principle which they held and abided by explicitly? Or in any way? If we turn from ancient to modern capabilities, how can we make sense now of principles whose only direct application was hundreds or perhaps thousands of years ago? If we cannot, does that not deprive such a principle of any right to be regarded as the generating basis of a system of entitlements that is to continue to constrain us today?'

The theory of historical entitlement must thus also fail.

Would a general-right-based argument fare any better? A general justification of private property (right-based or otherwise) is, according to Waldron, 'one which shows why private ownership is important, ie why it is important in general that individuals should have rights of this sort. It does not base this account on the importance of the particular relations which particular individuals might enter into with particular things.'[119] A general theory of private property allows us to say what is important about private property systems without having to refer to specific individuals or things. It also does not presuppose any particular economic or political dispensation.

Waldron asserts that many of the general justifications of private property are based on, or closely connected with, the rights of freedom and liberty. Arguments of this nature take different forms, such as the argument that the liberties associated with private property (the liberty to make decisions about the use of a resource without being constrained by, or interfering with others, the liberty to take refuge in a private place, freedom to alienate one's property and so on) are important for people in general; or the argument that such liberties are important for establishing oneself as a free person. Freedom, in this context, is not simply negative - the absence of impediments to action - it is positive in the sense that it is a moral status attained through one's own efforts, or with the help of others. Waldron sketches several arguments for private property based on the notion of positive liberty.[120]

---

118 Op cit at 259.

119 Idem at 284.

120 Idem at 300-18.

Private property offers security and independence. A free person must have sufficient economic security not to have to depend on others. It allows for self-assertion and recognition - a free person must be able to assert himself as free and independent. A natural resource has no purpose unless given one by an individual: by investing a natural resource with a purpose, an individual becomes aware of the importance of will and rationality. The freedom of self-assertion justifies the claim that everyone should be eligible to hold private property.

Freedom from coercion, and autonomy, are also promoted by private property, in the sense that 'being a free man positively requires some degree of material security, since without it one would never have the opportunity to exercise the reflection, restraint and control that constitutes an autonomous life'.[121] But Waldron concedes that at most this is an argument for the provision of pressing material needs. When combined with the need for moral, political and economic independence, however, this freedom generates a strong argument for a 'property-owning democracy in which material security is guaranteed to all on the basis of resources or sources of income that they <u>own</u>'.[122]

The argument that private property supports freedom and moral duty is a complex one. In crude terms, it is that the restriction of an owner's activities amounts to a restriction on liberty. In the context of land ownership, one would argue that the morally worthy actions of cultivating land and taming

---

121 Idem at 306.

122 Idem at 307.

natural resources should not be limited. But the right to use one's resources would have to be limited by the constraint of reasonableness in order to avoid the metamorphosis of the liberty to licence.

The most powerful argument for private property based on positive liberty is that it promotes stability, discipline and responsibility in the exercise of free will. Subsistence depends on the management of resources, and thus control over resources will teach foresight and prudence. Similarly, it will enhance productivity in that it allows individuals to work productively on their own resources, and on their own initiative. (This is not an argument in support of a special-right to property, merely an indication of the relationship between property and responsibility.)

These are but some of the aspects of positive liberty that favour the institution of property. The question that must be faced, however, is whether they are sufficiently compelling to justify private property. There are many who would argue that positive liberty could be promoted equally well by a system of collective or common property. But as Waldron points out,[123] the purpose of a right-based argument is to justify a system of private property of a general type, and not existing systems of Western capitalist societies.

The particular general-right-based argument justifying private property analysed by Waldron is that of Hegel,[124]

---

123 Op cit at 320.

124 G W F Hegel <u>The Philosophy of Right</u> trans by T M Knox (1967).

although, as Waldron observes,[125] Hegel was not purporting to provide such a justification, nor is his argument, without interpolation, clearly right-based. Waldron's analysis of Hegel's views on property (in very broad terms) is that property is needed by everyone for the development of freedom and personality. People cannot be free unless their basic physical needs are met. These needs can be satisfied by possession rather than ownership, and so they are insufficient in themselves to justify property. But the development of personality does require private property in order to sustain and develop the qualities that define an individual's status.

Ethical development involves a transition from the inner subjective world of the individual to the external objective world. The world of material objects is the appropriate realm for the initial excursion of free will to take place. In appropriating the natural resources of the world people display their natural superiority over nature. Through owning and controlling property, an individual can embody his will in external objects, thus transcending the subjectivity of his existence. Property is thus essential to human development, and poverty of great concern. Poverty is not, however, a problem to which Hegel offers a solution.

The principal difficulty with any argument for private property based upon liberty or freedom is encountered in the famous Proudhon strategy. In answer to the argument that

---

125 Op cit at 341ff.

property ensures the inviolability of the person, Proudhon said:[126]

> '[I]f the liberty of man is sacred, it is equally sacred in all individuals; ... if it needs property for its objective action, that is, for its life, the appropriation of material is equally necessary for all .... I will only prove, by all the arguments [by which the right of property is justified] the principle of equality which kills it.... Every argument which has been invented in behalf of property, <u>whatever it may be</u>, always and of necessity leads to equality; that is to the negation of property.'

It is difficult to counter such a strategy. If property is required for the exercise and protection of one person's liberty, then it is required equally for all others' liberty. For one without property, the existence of a general right to it is useless. Waldron says:[127]

> 'Though arguments based on a general right to liberty may be used by those who have private property to rebut attempts to expropriate them or to take the resources that they own into collective ownership, consistency requires that the same arguments be deployed with equal fervour on behalf of those who have no private property to rebut attempts to perpetuate their propertylessness or to perpetuate the situation in which they have to rely either on collective provision or on the goodwill of property-owners for their material well-being. In each case the moral concern is the same: people need private property for the development and exercise of their liberty; that is why it is wrong to take all of a person's private property away from him, and that is why it is wrong that some individuals should have had no private property at all.'

If one accepts that everyone has a right to property (in the sense that there must in fact be property for all) then the Proudhon scepticism is somewhat diminished. However, the issue

---

126 Pierre-Joseph Proudhon <u>What is Property?</u> trans Benjamin R Tucker (1970) 39-40, 65-6. The reference is taken from Waldron op cit 323.

127 Op cit at 329.

of distribution then becomes crucial, as does the question of equality, which Proudhon considered necessary. Is it sufficient that each person has enough to ensure her liberty, or must surplus resources be redistributed in order to achieve equality? The answer to this will of course depend on the economic system adopted by a particular society. I shall return to the question of equality when dealing with the thesis of Stephen Munzer.

Waldron argues that it is not enough to give all people in a society the opportunity to have property. If opportunity were all that was meant by the right to property, then it would be a strange and 'assymmetrical' right - one that would allow for radical inequality, such that wealth would be concentrated in the hands of a few, and the bulk of society would have no chance of a decent life.[128] This issue is central to the problems facing the framers of the South African constitution. The proposed bill of rights does nothing other than address eligibility to acquire property, and protect those who already have it. If the right to property is based on the positive liberty of the individual, then the majority of people in the country will be deprived not only of shelter and the resources necessary to lead a decent life, but also of that liberty. 'Freedom requires private property, and freedom for all requires private property for all. Nothing less will do.'[129]

Apart from the difficulty of implementing a general right to property, there are notional obstacles in its path. One very

---

128 Op cit at 390.

129 Waldron op cit at 413.

real difficulty is that the principle of justice requiring property for all would be frustrated by the very exercise of the right of property itself. If property were distributed in order to ensure liberty, or ethical development, the exercise of the property holder's freedom to dispose of the property would defeat the achievement of the liberty allowed for by property.[130]

The second major problem was given expression by Karl Marx:[131] it is inherent in the notion of private property that there be inequality. The distribution of the means of production will inevitably lead to the concentration of private property rights in the hands of a few.

Waldron does not offer a solution to these problems (although he does show how different conceptions of property might address them to some extent), nor does he adopt any particular justification of private property, save in so far as he insists upon provision in any system for meeting basic needs. His use of certain analytical apparatus in considering the justificatory theories advanced by others is, however, illuminating, particularly in demonstrating that the right to positive freedom requires property for all.

Munzer, on the other hand, does propose a solution to the problems of private property. His theory is pluralist in that it

---

130 See Nozick Anarchy, State, and Utopia (1974) at 163. Waldron (at 423) refers to this difficulty as 'the challenge from the right'.

131 Waldron refers here to Marx and Engels The Communist Manifesto ed C J Arthur (1967). This is the 'challenge from the left'.

'contains several irreducible principles that sometimes conflict: when conflicts occur, priority rules can resolve some, but not all, conflicts'.[132] The basic principles upon which the theory rests are utility and efficiency, justice and equality, and a principle of desert based on labour. In broad terms, the theory is based on the argument that a satisfactory theory of property should include a principle recognizing the factors affecting peoples' happiness, welfare and preference satisfaction: a principle allowing for the achievement of the maximum utility and efficiency in the use, possession and transfer of resources: a principle ensuring justice in the distribution of resources by providing the minimum required for anyone to lead a fully human life in society, and reducing inequality between people: and, although of least importance, a principle of desert for one's actions. His theory results in a justification of some private property limited by 'sensible government regulation'.[133]

The principle of utility and efficiency assumes that people have equal moral worth. It is not utilitarian in that it does not regard utility (whatever that may be - pleasure, happiness, welfare and so on) as the sole standard of right and wrong. Rather, the principle has two parts: the first, a version of utility, requires the maximization of utility in the use and possession of resources.[134] The second part, the aspect of efficiency, requires maximizing the welfare of all in so far as use, possession and transfer are concerned.

Utility requires preference-satisfaction, a preference being 'a state or disposition to put one thing before others in one's estimation'.[135] The importance of preference-satisfaction rests on the assumption of the equal moral worth of people: what people prefer matters to them, and thus the preferences of each count equally with the preferences of others.

Efficiency is required to avoid interpersonal comparisons of utility. It, too, is based upon the assumption of equal moral worth, but, in the combined principle, efficiency is the 'junior partner', in that if it is possible to rank alternatives in terms of both utility and efficiency, the ranking provided by utility should take precedence.[136] The combination of the principles of utility and efficiency is made possible because the aim of each is individual preference-satisfaction.

The combined principle justifies both private and public property. In regard to public property (that is, where the right-holder is the state, or a city or community), on the basis of certain empirical assumptions as to people's preferences, the principle of utility and efficiency would justify property needed for military protection from attack, facilities for

---

132 A Theory of Property at 3. I wish to repeat, at this stage, that I cannot do full justice to the closely argued and scholarly work of the author, and am hoping merely to draw it to the attention of others.

133 Op cit at 7.

134 Munzer intends to include in the ambit of the entitlements that should be maximized all the ingredients of ownership adumbrated by Honore. See the discussion above, and Munzer op cit at 202.

135 Op cit at 196.

136 Idem at 202.

education and recreation, and the stockpiling of resources in the eventuality of natural disaster or of social and economic upheaval.

The justification of private property on the combined principle also requires that assumptions be made as to preferences. The more important assumptions are that people prefer to have intimate articles 'as a basis for personality', and the means (such as control and privacy) to develop certain character traits.[137]

The principle of utility and efficiency is important in the distribution of private property. It does not favour a strictly equal distribution. Again, assumptions must be made in order to achieve even a modest egalitarianism. These include a 'diminishing marginal utility of money and other material goods to satisfy preferences'; second, 'wide differences in wealth produce preference-dissatisfaction in those who are least well-off'; third, 'if inequalities of wealth involve unequal ownership of productive resources, and if this unequal ownership spawns alienation, exploitation, severe problems of production, or large differences in economic power, then intense preference-dissatisfaction results'; and fourth, increased satisfaction would result if certain existing preferences were rationally changed.[138]

Munzer argues further that the combined principle of utility and efficiency throws light on government takings of

---

137 Idem at 209ff.

138 Idem at 213-4.

private property: since the principles support some private property at least, there will be preference-dissatisfaction if property is expropriated without the payment of fair compensation. Equally, programmes of redistribution can be guided by the combined principle. One must bear in mind, however, that Munzer's theory is pluralist, and the principle of utility and efficiency may be subordinated to the principle of justice and equality in programmes of redistribution. For although existing preferences can be changed, and may yield to rational argument, some people are highly resistant to changes in the existing order, even though their preferences are morally unacceptable. A good illustration of this proposition is the existing landownership distribution in South Africa: it is morally untenable that a very small minority of the people should at present own a very large percentage of land in the country. Yet the landowners are, generally, preference-satisfied with the status quo, and will no doubt be highly resistant to the notion of change in land distribution. Similarly, the principle of utility and efficiency might justify an expropriation without the payment of compensation (for example, where private property is badly needed for community purposes, but there is no funding accessible for the payment of compensation), but respect for property rights and the dictates of morality require that no person be deprived arbitrarily and without fair compensation. Another principle must thus be invoked to determine the right to property in such cases.

The principle of justice and equality, which is central to Munzer's thesis, must thus qualify the principle of utility and efficiency. It is as follows:[139]

> 'The principle maintains that unequal property holdings are justifiable if (1) everyone has a minimum amount of property and (2) the inequalities do not undermine a fully human life in society. This principle is a standard of justice in that it regulates morally how benefits and burdens are to be shared among persons. It is also a standard of equality in that it requires showing, in the event that persons are treated differently, why different treatment is morally proper.'

The principle is based upon the equal moral worth of persons. Equal worth is determined not by equal counting, as is the case on utilitarian theories, but on the basis that people have rights not to have their interests traded for general utility.

And whereas the principle of utility and efficiency is premissed on the notion of preferences, the principle of justice and equality is premissed on basic needs and capabilities. A basic need is 'something that is urgently required for some essential end': and a basic capability is 'some power to act or function that is necessary for self-respect and healthy self-esteem'.[140]

Another difference between the two principles is structural. Whereas the second requirement of the principle of utility and efficiency is subordinate to the first, in the principle of justice and equality only the first part constitutes a requirement. The second aspect constrains the first. Munzer refers to the first aspect - that everyone should have the minimum property - as the 'floor thesis', and the second - that inequalities must not be too great - as the 'gap thesis'.[141] The constraint is not a ceiling - it does not limit what the wealthiest may have - but rather constrains inequalities of wealth which might be possible on the principle of utility and efficiency, or of labour and desert.

How does Munzer justify inequality in property holding when he proceeds from the assumption that all people have equal moral worth? He argues that if one wishes to achieve equal utility for all, property would be only one of the factors affecting preference-satisfaction - others include personality, health and friendships. People have vastly different talents and needs.[142] And while an equal distribution might in theory be possible if one started with a clean slate, consumption and alienation would soon result in inequality. He also draws from the argument of Dworkin[143] that equal moral worth requires not that people be treated equally, but that they be treated as equals.

---

139 Idem at 227.

140 Idem at 228.

141 Idem at 229.

142 See Kenneth R Minogue 'The Concept of Property and its Significance' NOMOS XXII: Property 3 at 14, where, in discussing the impossibility of equality because of differences in personal attributes, he states: 'What one person can do with two acres and a cow, or even a chicken in the pot, is vastly different from what others can do. Beyond these obvious considerations lies a horizonless space of problems arising from the active deployment of personal properties in the game of life. ... Only one bold thinker has ever faced up to these problems in a serious way - the novelist Kurt Vonnegut. In a short story called "Harrison Bergeron", [Welcome to the Monkey House (1968)] he has envisaged a society in which an official called the Handicapper-General put small noisy devices into the heads of intelligent men so as to reduce their wits to an average level, and he forces graceful ballerinas to wear lead-ballasted shoes so that their gracefulness does not exceed that of the clumsy of the world.'

143 Taking Rights Seriously at 227.

In formulating a theory of reasonably equal treatment, Munzer relies heavily, although differing in important respects, on the work of John Rawls.[144] Rawls' approach is that the correct principles of justice are those that would be chosen by rational, self-interested parties in the 'original position'. In this position, the parties are deprived of knowledge of their own desires, status, talents and the level of development in their society. While behind the 'veil of ignorance', they are unable to tailor principles to their own advantage, since they do not know what their interests are; but they are familiar with the facts about human society, the principles of economics and the social sciences. They also know of and want the 'primary goods' of any society - rights and liberties, powers and opportunities, income, wealth and self-respect. They do not, however, know their own conception of 'good'.

Rawls argues that the parties in the primary position will choose the following principles to govern their society:[145]

> 'First Principle
> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
> Second Principle
> Social and economic inequalities are to be arranged so that they are both:
> (a) to the greatest benefit of the least advantaged,[the difference principle] consistent with the just savings principle, and
> (b) attached to offices and positions open to all under conditions of fair equality of opportunity.'

These principles are subject to two priority rules: the first principle has primacy - liberty cannot be restricted for social or economic advantages, only for the sake of liberty. Secondly, fair equality of opportunity takes priority over the difference principle. These basic principles would be implemented, and elaborated upon, in legislation when the veil of ignorance is lowered, and finally dropped.

The distribution of property is governed by two principles. The first principle of justice covers some property, since it applies to basic liberties which include 'freedom of the person along with the right to hold (personal) property'.[146] Munzer questions whether Rawls intends that all people should have an equal right to property, or that all should have equal quantities. He suggests that the latter interpretation is implausible.[147] The meaning of 'personal' property is also not clear, although elsewhere Rawls has indicated that the means of production are not classed as basic property.[148]

Property other than personal property is governed by the 'difference principle'. The difference principle distributes 'lifetime expectations with respect to social and economic advantages and the material bases of self-respect'.[149] The principle permits inequalities only if they advance the position of the least well-off.

Rawls' principles of justice are intended to be implemented in the design of legal and social institutions, and

---

144 A Theory of Justice (1972). See Munzer op cit at 233ff.

145 Rawls op cit at 302.

146 Idem at 61.

147 Munzer op cit at 235.

148 Munzer refers to Rawls 'A Kantian Conception of Equality' in Virginia Held (ed) Property, Profits and Economic Justice (1980) 198 at 203.

149 Munzer op cit at 235-6.

not in the distribution to particular individuals. Nor do they require continual redistribution. The essence of Rawls' view of property, maintains Munzer, is that it favours

> 'a much more nearly equal distribution than prevails in most countries. It is possible, though unlikely, that the principle of equal basic liberties requires strictly equal holdings of a few kinds of property. For other kinds, the difference principle requires a substantial narrowing of inequalities. The guiding idea is not merely to ensure a threshold amount of property. It is to reduce the gap between the life prospects of the least well-off and everyone else.'[150]

Among the difficulties Munzer has with Rawls' principles are the inadequacy of the account in explaining the meaning of personal property, and the problem of resolving conflicts in accordance with criteria based on the amount of liberty affected. More importantly, he has considerable difficulty with a theory that appears to allow substantial inequality in holdings.[151]

The value of Rawl's theory, Munzer argues, lies in the 'light that it sheds on achieving a minimum'.[152] As we have seen, Munzer also argues for a minimum - that which is necessary

---

150 Idem at 237.

151 See Munzer's criticisms of Rawls op cit at 237ff.

152 Idem at 241. And see the comment of John W Chapman in 'Justice, Freedom, and Property' NOMOS XXII: Property 289 at 295: 'Elsewhere I have compared Rawls's theory of justice to a Gothic cathedral. If you look at it from the sides, or from the front or the back, it is a vast and imposing pile of analysis and argument. But from the air its plan stands out starkly. Our sense of justice calls us to correct and to compensate for the accidents and contingencies of life, for these are undeserved and hence arbitrary from a moral point of view. ... [C]ool, prudential reason itself dictates that we arrange our affairs to maximize the long-term prospects of the least-advantaged, given the constraints of equal freedom and fair equality of opportunity.'

for a decent human life in society (the floor thesis). Such a life depends on meeting certain basic human needs, such as food, clothing, shelter and health care - concrete exemplifications of Rawls' 'primary goods'. These needs are central to self-respect, and thus are different from preferences. Munzer acknowledges the problems inherent in specifying the minimum amount of property for meeting basic needs on a cross-cultural basis. It is impossible, he observes, to set a 'universal minimum'.[153] He suggests, therefore, that one could specify the minimum for a particular society using both objective elements, such as the amount required for subsistence, and relative elements - 'the average amount needed for acceptable self-respect given the cultural and material circumstances of the society'.[154]

The floor thesis (the first part of Munzer's combined principle of justice and equality) justifies both public and private property (as does the principle of utility and efficiency, but with a different emphasis). It stresses the requirement of publically-owned education and health facilities, as well as resources for natural and economic disasters. The floor thesis also, of course, justifies the private ownership of the things that make a life decent.

The gap thesis (the second aspect of the combined principle) constrains inequalities in wealth, and is necessary to prevent inequality undermining the fully human life in society - a life in which one has control, privacy and

---

153 Idem at 243.

154 Idem at 244.

individuality, and the opportunity to develop one's personality. The conditions which prevent the attainment of the fully human life are the inability to have 'meaningful work for an appropriate wage because of alienating or exploitative circumstances or large differences in economic power in the labor market'.[155] Large inequalities in wealth interfere with control, privacy and individuality, and thus undermine the fully human life, and the notion of equal worth, for many. The gap thesis starts from the concept of equal moral worth and moves to a constraint on the extent of inequalities in property holdings: it does not require equal treatment for all. It is rooted in the notion that 'wide inequalities rest on no differences in moral merit and are instead an affront to equal moral worth'.[156]

Because the narrowing of inequalities requires considerable government intervention in the form of welfare distribution, the gap thesis justifies a greater degree of public property than does the floor thesis on its own, or the combined principle of utility and efficiency. But it also justifies the holding of a greater amount of private property - in order to reduce inequality - than do the other principles.

The principle of justice and equality qualifies the principle of utility and efficiency: it takes precedence over it in general, since the requirements for a fully human life generally take precedence over maximizing preference-satisfaction. Munzer maintains, however, that conflicts between

155 Idem at 247.
156 Idem at 249.

the two principles should be rare since preferences for the prerequisites of a fully human life will normally rank high in an individual's 'preference ordering'.[157]

The third aspect of Munzer's pluralist theory is the labour-desert principle, which allows for the notion of entitlement. It rests on the idea that persons are, because of their actions, responsible for certain changes in the world and deserve something - some reward - for their efforts. The principle is thus based on moral merit rather than worth. The traditional labour-desert theory, according to which a person should become the owner of that with which he has mixed his labour, or of that which he has produced by his own efforts, rests on a number of assumptions as to background conditions (such as people living in an original state of nature), the physical and psychological effects of labouring, and the normative features of the effects of labour (for example, that the products of labour are good). Munzer argues that the theory is unrealistic because it rests on unrealistic assumptions, and because it takes no account of transfer or scarcity of resources.[158] He suggests instead a 'revised' labour-desert principle which holds that there is a qualified justification for private property rights arising from an individual's work.

The qualifications arise from the rights of others, limitations on the process of acquisition (in that only morally defensible modes of acquisition are recognized), changes in

157 Idem at 253.
158 Idem at 256ff. See also the arguments against the Lockean-type theory sketched above.

situation after acquisition (where continued holding would transgress a moral restriction), restrictions on transfer and scarcity of resources.[159] The qualifications bear not on desert, but on what the labourer is entitled to. Entitlement is further restricted because the principle is subordinate to the other two principles constituting the theory, and thus of less significance. It does, however, fulfil an important role in ensuring that desert is recognized.

These, then, are the three principles which, in Munzer's view, justify and limit public and private property. It is inevitable that in such a pluralist theory there must be conflicts between the principles themselves - conflicts such that in a given case, one of the principles would justify the holding of property and the other or others would hold that private property in the circumstances was indefensible.[160] Indeed, because of the possibility of unpredictable conflicts and unacceptable resolution, a pluralist theory of justification may be considered indefensible.

To meet these difficulties, Munzer proposes a number of principles which reduce the problem of conflict. As we have seen, he holds that the principle of justice and equality qualifies the principle of utility and efficiency, and both these principles take precedence over the labour-desert

---

159 Idem at 284.

160 See the criticisms levelled at a pluralist theory by Richard E Flathman 'On the Alleged Impossibility of an Unqualified Disjustificatory Theory of Property Rights' NOMOS XXII: Property 221. Flathman's objections are aimed at Lawrence Becker's theory espoused in Property Rights (1977). See also Becker 'The Moral Basis of Property Rights' NOMOS XXII: Property 187.

principle. And again, as we have seen, he argues that the principles very often justify the same sorts of property in the same situations. Indeed in some cases they complement each other. Thus, for example, where a certain type of property is necessary for a fully human life in society, but uncertain on persons' preferences on the matter, the principle of utility and efficiency will not help in determining whether such property is justifiable: but the minimum-property aspect of the principle of justice and equality will support the holding of that property.[161]

Priority rules would, in many cases, resolve genuine conflicts. In less abstract terms, Munzer argues:[162]

> 'If the property in question is important for the development of personality in the sense of moral and political personhood, then it is tied to equal worth in the Kantian sense, and the principle of justice and equality prevails. Next, if the property is the fruit of work covered by the revised labor theory, then it is tied to the potentially unequal merit of persons, and the principle of desert based on labor prevails. Lastly, if the property is important for the economic functioning of an organization, then the property is linked to equal worth in the sense of equal counting of preferences of equal strength, and the principle of utility and efficiency prevails.'

Munzer maintains that if there are irresolvable conflicts they would not constitute a serious objection unless an 'otherwise equally attractive theory of property that is conflict-free' were offered in its place, or unless the theory were shown to be logically inconsistent.[163]

---

161 Munzer op cit 297-8.

162 Idem at 303. He admits that these rules need refinement, being rules of thumb rather than rules which specify lexical precedence.

163 Idem at 304.

The advantages of the theory, he claims, are that it takes account of, and gives coherence to, a set of moral judgments - the intuitions about property that strike one as correct - a set of moral principles - utility, efficiency, justice, equality and desert based on labour - and a set of background theories - the accounts of persons and property in a wide context.

The crucial issues facing South Africans now are the justification of private property, and its redistribution under a new constitutional and economic dispensation. How would Munzer's theory of property help in determining these issues? He maintains that the theory is to be applied in stages and in the light of appropriate empirical evidence. He cites as an example the case of a 'social planner' who is charged with the task of determining an income policy for a society.[164] In applying the pluralist theory the planner need follow no particular order, but one that suggests itself is this: first, she must establish whether the floor thesis of the principle of justice and equality has been satisfied, and ensure that everyone achieves the minimum. If the minimum is secured, but the gap thesis unsatisfied, then inequalities must be narrowed. If the labour-desert principle applies because a person has made a product or provided a service, then the planner must ensure that compensation is commensurate with the work done. If these principles are inapplicable, or have been met, then the planner should implement the principle of utility and efficiency. And finally, if any conflict does arise, then it should be resolved

---

164 Idem at 312.

by appealing to the various arguments for the different principles.

Munzer does not rest content with the theory in abstraction, for, as he explains in his conclusion: 'A theory of property should not be an intellectual plaything but an instrument for reforming institutions of property.'[165] He thus attempts to show its working in a number of different applications - to business corporations, to gratuitous transfers, to a moral and political theory of takings and to takings and the constitution. I cannot deal with all of these, or any adequately. But a brief look at his approach to gratuitous transfers will suffice to show the workings of the theory.

By gratuitous transfer, Munzer means a transfer made without obligation on the part of the transferor, but not necessarily one that is unmerited. Essentially, these are either gifts made inter vivos or inheritances. He demonstrates that in Britain and the United States pronounced inequalities of wealth exist, caused in considerable measure by gifts and inheritances.[166] (This would presumably be the case also in South Africa, although probably to a lesser degree.) Other factors leading to pronounced inequalities are savings from income, entrepeneurial skills, and, in South Africa, the implementation of apartheid and the concomitant deprivation of opportunity, coupled with exploitation of labour and general failure to pay wages commensurate with work.

---

165 Idem at 469.

166 Idem at 380ff.

The application of Munzer's theory would require a 'steeply progressive tax' on gratuitous transfers. Such a tax would not, of course, 'cure all the ills of unequal property holdings',[167] since other factors such as worker control over production and the promotion of human values are as important as redistribution of material resources. But it would go a considerable way toward narrowing inequalities and their attendant ills.

How does the pluralist theory of property operate to justify the restriction and taxation of gratuitous transfers? Munzer starts with the labour-desert principle. Although it may be argued that a person who deserves property rights because of her labour should be entitled to do as she pleases with them, including divesting herself of them by transfer or by bequeathing them on her death, Munzer's qualified theory restricts unfettered transfers. And even if the labourer herself has the right to transfer, this does not entail that the transferee should have the same right. The principle of utility and efficiency supports the reduction in inequality of wealth. Wide differences in wealth produce preference-dissatisfaction, including resentment, hopelessness and social malaise. A more equal distribution would produce increased preference-satisfaction provided that existing preferences were rationally changed. The principle of justice and equality also calls for the reduction of inequalities of wealth. The principle requires the minimum property for a fully human life - a minimum that

---

167 Idem at 381.

will vary from one society to another. The principle also requires, as we have seen, the reduction of the gap in wealth between members of a society. Restriction of, or taxation on, gratuitous transfers would enure to the achievement of the principle, and thus lead to a situation where inequality would not be able to 'wound self-esteem, create justified moral resentment, distort the legal and political process, and reinforce myths offensive to equal moral worth'.[168]

Munzer does not argue for the abolition of gratuitous transfers, only for their restriction so as to avoid contraventions of two of the component principles of his theory. For it would be contrary to the notion of liberty (on which the principle of justice and equality is premissed) to restrict freedom of gift and testation altogether: and contrary to utility and efficiency to limit gratuitous transfers in such a way as to destroy natural ties of human affection. He therefore suggests a detailed system of inheritance different from the one currently in force in the United States, and a complex system of taxation.

Both Waldron and Munzer offer rational justifications for the institution of private property, and indeed for the argument that all members of a society should have not only an entitlement to property, but an enforceable right to it. Although Waldron does not offer any solution to the problem of providing property for all, it is essential to his arguments - and, I consider, incontestable - that all people must have some

---

168 Idem at 398.

property in order to be free. This notion is also central to Munzer's theory, and he does make a most useful contribution in suggesting means of achieving property for all.

SHOULD THE RIGHT TO PROPERTY BE ENSHRINED IN A NEW SOUTH AFRICAN CONSTITUTION?

The analysis has shown that the right to property, in the sense of a general human right, is essential. Express constitutional protection is thus as important as it is for the right to liberty.

It will no doubt be argued that it is absurd to talk about the inclusion of a right to property (in the sense of an enforceable claim-right) in a constitution when such a right would be unenforceable by the courts. The gist of such an argument is that because of the scarcity of resources, no citizen can compel the state (which guarantees the right) to provide property and thus fulfil its obligation to the citizen: the obligation is practically impossible to fulfil. The objection to a claim-right of this nature is exemplified in the arguments raised against the inclusion of rights to housing, education and health-care - the so-called economic, or second generation rights - in a bill of rights.[169]

One answer to this argument is given by Budlender.[170] He suggests that a right to housing should be viewed in the same

---

169 See, for example, A du Toit 'The need and prospects for human rights' in A South African Bill of Rights Civil Rights League (1989) 50-1.

170 G Budlender 'Towards a Right to Housing' in A J van der Walt (ed) Land Reform and the Future of Landownership in South Africa (1991) 45 at 46ff.

light as the right of freedom of speech - it is a negative right in that the state does not guarantee that all persons will have effective freedom of speech: but the right imposes on the legislator an obligation not to pass laws which remove the freedom. So too with the right to housing (or the right to property in general), the legislator should not be permitted to enact laws which have the effect of making people homeless, or propertyless. The right to property would be respected by the imposition of limitations on the powers of the legislature. Of course this is not enough. We should work towards a situation where all people in the state do have the property needed to live a fully human life, and to achieve that, we will have to adopt the types of solution advocated by Munzer.

Concerns expressed about the mummification of the right to property by its inclusion in a constitution are, in my view, taken care of by the distinction between the concept and the conception of property. For so long as the right to property is protected, there is room for the conception of it to develop and change to meet the different needs of society from time to time.[171]

Recognition of the crucial distinction between concept and conception also entails the conclusion that specific forms of property should not be referred to in the provision in the bill of rights recognizing and protecting the right to property. The inclusion of a general right to property as a basic human right, without elaboration on the forms that property may take, will

---

171 See the concerns expressed by Andre van der Walt and Derek van der Merwe op cit note 1 above.

ensure that conceptions can change when technology and social and economic dispensations change. Important sources of wealth not hitherto regarded as 'property' and the 'new property' spawned by welfarism would then also receive the protection required. And if Gray's notion of excludability on physical, legal and moral grounds were used as the criterion for determining what constitutes property, then problems of interpretation would be minimized.

I recognize the concern of those who fear that the enshrinement of the right to property in a bill of rights will protect the haves: that a court faced with an argument in favour of preserving the status quo may well be hidebound by traditional notions of what property is, and of whose rights should be protected. But one must not lose sight of the other side of the coin - if everyone has a right to property, and if the concept of property is interpreted broadly, as Gray suggests it should be, then conservative jurisprudence cannot prevail. Squatters, labour tenants and those who lay claim to land on the basis of a historical right are examples of people who might be regarded as having property rights warranting protection.

The formulation of the right to property in the new South African constitution remains to be determined by negotiation. Justice will be done, in my view, if it is made clear that all people have the right to property, not only the opportunity to acquire it: and if the holding of property is protected against arbitrary governmental taking.[172]

---

172 See in this regard David Dyzenhaus 'Democracy, Rights and

---

against "arbitrary deprivation" which could be interpreted as requiring that those in risk of being deprived are given a genuine hearing.' And, similarly, J Roland Pennock 'Thoughts on the Right to Private Property' in NOMOS XXII: Property 171 at 181.

THE LAND QUESTION

Glen Thomas

February 1992

Introduction:

> Land is almost the only physical asset of the black rural economy: it presently contributes much less than it could to subsistence, and very little to development. (Towards Freehold, Juta, 1988).

These words concisely capture the state of helplessness and hopelessness in which African rural communities find themselves: those who have some piece of land that they can call "theirs" cannot make a living from it, even to feed their families; development is out of question - not to mention the millions of landless and homeless rural people who were victims of uprooting by apartheid laws and policies.

I need not go into the history that led to this condition, except to say there has been a rape of our land through a sytematic process that destroyed the social fabric of the indigenous population: productive forces including innumerable human lives, flourishing social systems, material and spiritual cultures, self-confidence of the African people and their way of life were all destroyed. Nothing was left but ruins. The African people's basic form of productive property - the land - was seized by white colonialists.

For this reason it is undoubtedly true that the land question in South Africa is a social, political and economic issue charged with emotion and therefore we need to guard against artificial, hasty policy decisions and legislation on land. The land question is a time-bomb whose explosion will definitely leave everyone scarred for life if we are not careful and sensitive enough in its detonation. In resolving the land question two issues have to be addressed. On one hand, the alienation of land from the indigenous people of South Africa has been and still is a national grievance and to achieve a relatively peaceful negotiated settlement this grievance needs to be urgently addressed. On the other hand, the intransigence of the privileged white landowners resulting from their entrenched ownership of most of the land: their pride does not allow them to admit that the land has to be restored to its rightful owners - they perceive this as an admission of guilt and a sign of weakness and defeat. Thus land has become a pivot of power - state power.

The South African land system and political control

The South African land question has become one of social relations in respect to control and use of land and access to the accruing benefits. After physically dispossessing land from the African people, the white minority has been able to set into operation an institutionalised control of land through the political system. This resulted in the land system becoming a pillar of the wider socio economic and political system and therefore an instrument of control of the majority - today a white minority is exercising political power over a black majority by virtue of its monopoly control of land.

Because of this combination of the land system and political control the black majority has no easy way to change the system. Only conflict and/or an acute shift in the power structure can bring about the necessary

ndamental change. To avoid violent conflict, the only option that remains
r South Africa is a land system that will address the legacy of socio
onomic deprivation created by the colonial system including apartheid,
at is, giving control and use of land and access to the benefits that
rue to the majority not a white minority. On this, I believe, delicately
nges the success of the negotiation process.

e institutional context of property and land rights:

ichever political party comes into power in a future South Africa will
ve to confront the mammoth task of providing land and shelter for the
llions who have been left landless and homeless by the vicious apartheid
stem. Therefore during this period of negotiations careful consideration
s to be given to the important issue of property and land rights.

the heart of the land reform debate in South Africa is land tenure - how
ople organise themselves with respect to land - because it determines the
les of the game as to who controls land, who can use it, who can pass it
whom, what taxes one can pay on the benefit/income that arises from it
d who has access to accruing benefits. This implies that in an
stitutional sense land is land tenure, that is, land is meaningless
thout giving attention to the social regime that controls it. In the
uth African context the questions of who this social regime is and whose
terests they serve become central to the resolution of the land question:
there is a necessity for tenure reform it must be such that no group of
ople benefits at the expense of others, as is the case presently.

nce, as stated earlier, the white minority has been able to set into
eration an institutionalised control of land through the political
stem, of major interest with respect to property and land rights in a
ture South Africa is how to deal with the present socio-political
rangements indicating what individuals may or may not do, what they can
xpect others to do or not to do and what they can expect the State to do
not to do on their behalf. For example, should the current legal title
the basis on which an individual or community call upon the the coercive
ower of the State to defend their interest - in this case land? What about
alues held by the majority such as birthright, inheritance, interests
sed on occupation and productive use of the land? Will the interests
th respect to land that the majority of the population have be protected
the state?

iews of black rural communities on property and land rights

he salient common viewpoint emerging from interviews, discussions and
rkshops with not less than 10 rural communities in the Border region
articularly in response to the government's land reform of 1991 is that

We believe that the land question can only be properly addressed by a
just and democratic government. De Klerk has not even tried to consult
us about the kind of land system that we want. De Klerk must realise
our extreme land hunger and be prepared to address that.... We demand
that a clear progyramme of affirmative action must be worked out, not
only to address the wrongs of the past but also to build a fair and

just land dispensation. Such a system can come about through a proper consultative process with representative leaders.

For me this statement is not only addressed to the present government. A future government will have to deal with the issues raised here: a [illegible] process [illegible] a new land system and a clear programme of affirmative action not only addressing the legacy of apartheid but developing a fair and just land reform which will satisfy people's extreme land hunger. Also important to note is the hope that a democratically elected government is the only one that can properly address these issues.

Although there is no conclusive agreement among the communities on acquisition of land they view with suspicion the sale and purchase of land as well as to privately own land. On this question their thinking is informed by their bitter experience of losing their land to white farmers through failure to keep up with certain requirements in the title deeds and debt. Some communities in missionary settlements recently lost their land when the church sold the land without consulting the community. They do not see why land for settlement should be acquired by purchase on the open market since they would be compelled to compete with people who have access to finance. A land market will therefore deprive them of access to land. They also contend that this may lead to social divisions and conflict between the haves and have-nots (who inevitably will be in the majority). In some communities this is already taking place. The landless are dependent on the whims of the landowners. Patronage and exploitation have become the order of the day.

All these views are not based on any economic or political theory or ideology but they have organically developed through concrete situations experienced on the ground. For these communities land serves more than economic needs it means social security. Land is seen as a national and natural resource whose value cannot be determined only on economic terms. The argument being that the value of land is not completely created by man.

Concluding remarks

For me all these issues are a challenge to all parties and organisations engaged in the process of negotiations. In a future South Africa a new constitution and a Bill of Rights must give powers to the State to institute a Land Reform Act which will open avenues to address them. Looking at the ANC Working Document on a Bill of Rights, an attempt has been made to address some of these issues. However, my feeling is that the issue of land rights needs further attention particularly on the question of acquisition and ownership of land. I think, we should not fall into the trap of entrenching the existing forms of ownership without thoroughly examining of what consequence will this be to the millions of landless and homeless people. Worldwide it has been proved that half measures in the institution of land reform have proved a disaster. We therefore have two choices to let things remain as they are or to radically change the excessively skewed ownership of land and wealth in South Africa.

THE RIGHT TO EQUITABLE ACCESS TO LAND

Geoff Budlender

At the heart of the debate over property rights is a conflict over limited resources. As Michael MacNeil has pointed out,

> 'There is an internal tension between the rights to property and the rights of individuals to a fair share of the resources which guarantee the necessities of life.'[1]

It is important that we acknowledge the existence of this conflict. The question then becomes how and by whom this conflict is to be resolved. If we fail to acknowledge the existence of the conflict, it will be resolved by the law and the courts in favour of the holders of existing property rights.

Land claims: The South African Tradition

The first method of resolving conflicts over land is through what one might call the traditional South African land claims process. It works something like this:

> On 10 December we wrote to the State President that we were going to re-occupy our land. On 17 and 18 December an advance party re-occupied the land.
>
> The person who bought the portion of land which we re-occupied is Mr Olivier. We went to his house on the neighbouring farm to tell him that we are back. We found that he was away on holiday in Durban.

> On the Wednesday we went to the police station to see the Station Commander. He was not there. On Thursday we went back to the police station. This time we found the station commander there. I told him that we had moved back onto the land, and that he should arrest me. He said that he had to wait for the owner to lay a charge. I gave him a copy of the letter we had written to the State President. He said that he wanted to see the other correspondence referred to in that letter. I said that I did not have it with me, and that in any event this was not relevant to his department - his job was just to arrest us.

So far, this land claim has had a fair amount of success. Community members were arrested and brought before court. A hitherto obscure community received some press publicity. The ANC has taken an active interest in the matter, at a national level. The government has shown an interest in the community's correspondence which was previously lacking. In short, the community is becoming a player whose claims have to be taken seriously.

People in the rural areas understand this process. At a recent meeting of representatives of communities seeking restoration of their land, those present agreed that the only effective way to claim the land is to occupy it.[2]

You can see the same process taking place in the cities. It is repeatedly said that while philosophically there might be such a concept as a right to land, it has no basis in reality: no-one can assert that the government has a duty to make land available to <u>him</u> or <u>her</u>. However, it seems that the Zevenfontein community have succeeded in establishing precisely that right. The government has accepted that it can not move that community until it makes suitable alternative land available <u>to them</u>. In other words, it has accepted that the members of the Zevenfontein community have a right to

suitable land on which they can build their homes - or to put it differently, that the government is under a duty to make suitable land available to them.

How did the Zevenfontein community achieve this right? What they demonstrated is that the most effective way for the homeless to make a land claim and establish a right is to group together and erect their homes on a piece of vacant land. It seems that once you reach a certain critical mass, you become a player, and you can effectively establish a right. If you are a very small group, your homes may simply be bulldozed without anyone in authority taking you very seriously. But if you can reach a critical mass - perhaps a hundred families - the authorities may accept that you can not be removed until a suitable piece of alternative land has been made available to you.

Of course, this is a high-cost process for the society at large, and a high-risk process for the people involved. The conflict can take on a physical dimension, and make solutions more difficult. For the people concerned, they have to place their lives and property on the line. The strategy can only work where the authorities are either genuinely concerned about the situation of the homeless, or concerned about possible adverse publicity as a result of demolitions. If both of these concerns are lacking, the result is likely to be ruthless destruction.

From the point of view of the landless and homeless, this model - the land occupation model - is the only functioning land claims process in South Africa today. As we look forward, we must surely want something better for our country.

However, it is important that in moving forward we do not lose sight of a fundamental lesson from the story of land occupations. The lesson is that one of the legacies we will carry forward from apartheid South Africa into a democratic South Africa is a history and experience of a particular form of struggle. The experience of the struggle for trade unions, for non-racial local government, and for land and housing is an experience of political change from the bottom up. One of the ironies of the years of apartheid and repression is that they stimulated a rich and fundamentally democratic tradition that people matter, and can act to change their lives. It is critically important that any new system should empower people rather than disempowering them. If this does not happen, we may witness the even greater irony of a democratic government effectively destroying democratic grassroots-based politics.

It is often said that a bill of rights can affect government action in three sorts of ways: it can prohibit, authorise or mandate particular sorts of government conduct. What is often overlooked is the effect of a bill of rights upon the citizens. A bill of rights can empower citizens. It can do this both by guaranteeing their right to free political action, and also by giving them the tools which they can use, the levers they can apply, to express their demands and press their claims. As I look at possible methods of creating an effective remedy for the landless and the homeless, this will be a recurring theme.

The administrative process and affirmative action

The second possible process for resolving land disputes is through the current legal model, which is the bureaucratic process. Statutes and

regulations provide the parameters of policy and grant broad powers, and the decisions are made by a government department. It is the failure of this model which has led to the increasing adoption of land occupation.

One can try to give a favourable 'tilt' to the bureaucratic process through affirmative action clauses in the constitution. These clauses can load the process in favour of claimants, in order to attempt to achieve results which will often favour the homeless and landless.

But even within a context of constitutionally mandated affirmative action, the fundamental problems of the bureaucratic model remain: access to the decision-making process and accountability.

The bureaucratic process classically takes place behind closed doors. The people affected may or may not be 'consulted', with more or less effectiveness, but this is usually the end of their involvement. What they tell any official is relayed to another official, all the way up the chain until it reaches the decision-maker. By then it has been interpreted and re-interpreted by any number of people, each of whom may have put his or her own 'spin' on the report. By the time they reach the decision-maker, the views of those affected are likely to have been greatly diluted, and may also have been distorted.

The people affected can try to exercise more direct influence by lobbying. The problem with lobbying is that it is often very difficult to find out who is actually going to make the decision, and what factors will really carry weight.

I found my own experience at Weiler's Farm very revealing in this regard. Weiler's Farm was an informal settlement of 10 000 people, on land south of Johannesburg owned by the Provincial Administration. A decision was to be made whether the land would be developed as a permanent residential area. The community was determined to remain on the land. We had long meetings to discuss how to press the community demand for the declaration of a permanent area. A fundamental problem was that we did not know who the real decision-maker was. The legal power to declare Weiler's Farm a residential area vested in the Minister of Constitutional Development and Planning.[3] We doubted whether he would really make the decision. The Provincial Administration was a more likely actor - but was it the Administrator himself, one of the two relevant Members of the Executive Committee (and if so, which one?), or senior officials (and if so, which ones?). The Joint Management Centre was a very active player - but how did one reach this invisible body, and where was the locus of power within it? And what about the local (white) Members of Parliament? Each of these players, of course, had a different constituency and different concerns. Knowing who was the decision-maker was relevant not only to whom we tried to reach, but also to how we did it.

We never succeeded in identifying the real target, and as a result our efforts were very dispersed. In the end, an unfavourable decision was made. To this day, I do not know who really made it.

Will it be different in a democratic South Africa?

We all hope and expect that the process would work differently and better under a democratic government. However, there is no structural reason to suppose that the homeless and landless will be able to make effective

claims. All bureaucratic systems develop some inertia. To the extent that the new system acquires any momentum, there is no structural reason to assume that the landless and the homeless would be able to give it the appropriate direction. Five-yearly parliamentary elections, with a strong party system, are unlikely to give the homeless and landless effective control or influence over the administrative process. By definition, the homeless and landless tend to be marginalised, and to have least access.

A further fundamental problem of the classical bureaucratic process is that it is one which contains supplicants on the one hand, and dispensers of largesse on the other. The homeless come to the government with a plea for assistance - and the government, in its wisdom, makes its decisions. In other words, we are not talking of entitlement - we are simply talking of a more rather than a less benevolent administration. To have to rely on requests for government largesse is ultimately disempowering. It leaves the dispossessed with only two possible forms of action: to plead with the government for relief, or to resort to land occupation.

Property rights for the property-less

And so the central issue emerges. Yes, of course we need property rights. Property should be a right. But most of the property rights debate centres on the right of those who hold property, to retain it. What is missing is a serious discussion of the right of the property-less to what they need for a decent life - because that, too, should be understood as a property right.

Property-holders assert that they have an entitlement to retain what they have, and that the state is under a duty to protect that entitlement. The

property-less assert that they have an entitlement to the basic necessities of life, and that the state is under a duty to make that entitlement effective.

This raises squarely the question of social and economic rights. There is now ample international experience to demonstrate that social and economic rights can be much more than aspirational statements of policy. While they are usually not as directly enforceable as the classic civil and political rights, they can confer real benefits on citizens and impose real duties on governments. Political enforcement mechanisms are possible. In the courts, social and economic rights can be used to stop parliament passing laws which undermine them; to guide the interpretation of the law; and to provide criteria for testing the validity of administrative decisions.[4] I will return later to this question of property rights for the property-less.

Assuming a framework of affirmative action and some form of property rights for the property-less, what is the best mechanism for enforcing this?

The role of the courts

The lawyer's first thought is to try to judicialise the process. While the initial claim may be through the bureaucratic process, the courts will deal with abuse and non-responsiveness. There are various techniques for achieving this.

For example, the law can require officials to give reasons for their decisions. That makes future decisions more predictable, and creates space for the possibility of judicial review of administrative decisions. One can go further and authorise the courts to review an administrative decision on the grounds

that it was unfair or unreasonable. Social and economic rights in the constitution would require the state to follow certain policies with regard to land. As I have suggested, the court can then use these criteria to interpret the relevant legislation, and to test the validity of administrative decisions. The strongest version of this model is the creation of a specialised Land Court within the regular court hierarchy.

This route has its problems. For a start, our courts generally deal with disputes of right rather than disputes of interest, to borrow a distinction from the field of industrial relations. If you put them in a situation where there are competing legal rights, which raise a dispute about the relative social value of those rights, they are likely to find themselves in difficulty. How does one balance the legitimate interest of the Bloubosrand property-owners in retaining the value of their investment, with the legitimate interest of the Zevenfontein community in obtaining secure and permanent homes? There are often multiple parties, and multiple competing interests. As Lon Fuller has written, lawyers do not engage very successfully in what he calls 'polycentric' tasks.[5]

Another way of expressing this is to say that the courts are uncomfortable when they have to deal with policy issues. It must immediately be said that the courts deal with policy issues far more frequently than they are usually willing to acknowledge.[6] However, the courts are uncomfortable in that role when the policy question raises issues of substantial public interest. Judges are also not well equipped to deal with those issues, particularly in a changing society. You do not have to believe that the judges are simply the representatives of the ruling class, to believe that by their background and experience judges will inevitably lean towards protecting familiar vested rights.[7] Further, I doubt whether the courts are a suitable institution to

decide what are really disputes about conflicting priorities in the use of the society's resources. Surely this is precisely the function of the political process. Of course the courts will from time to time become involved in these sorts of issues, and have to do the best they can. But to place them at centre stage does seem inappropriate.

There are other problems, too. Court procedures are so technical that parties cannot effectively represent themselves, and access to the courts is expensive. A further problem is that the nature of the disputes will sometimes be such that they cannot be resolved on a once-and-for-all basis. They may have to be determined in stages. Whether a particular development is appropriate may depend on whether the developer takes particular steps, and does so effectively. In other words, some ongoing judicial supervision may be necessary. The courts in the USA have sometimes undertaken this role, particularly in desegregation cases, and the Supreme Court of India has also done so. It is not a role with which our courts are familiar.

A Land and Housing Tribunal

A possible option is the creation of a specialised tribunal to deal with land claims and related issues. The membership of the tribunal could include people with legal and other technical training, and also people with some form of political accountability. It could be more representative than the courts. It could have open public hearings, and relatively informal procedures which would open up access to lay people.[8] It would have to operate within statutorily determined policy guidelines, which would set out

the various factors which ought to be taken into account. The constitution would provide overarching policy directives which would guide the tribunal.

Once this had been done, one could introduce judicial protection against arbitrariness. The proceedings of the tribunal would be subject to judicial review like those of other administrative bodies. Administrative law reforms could further open up the process, promote open decision-making, and guard against arbitrariness and corruption.

All of these factors suggest reasons why a Land Tribunal could be a useful mechanism for resolving conflicts over land and housing. However, there is an even more fundamental reason: given an appropriate legal framework, the Tribunal would be a mechanism which the homeless and landless could trigger, and a lever which they could apply in order to have their needs dealt with. In other words, it would no longer be a matter of writing a letter to the government and hoping for a response of substance instead of the usual dilatory answers. The landless and homeless could trigger the mechanism, requiring an important arm of government to hear their claims and respond to them. It would thus be an empowering rather than a disempowering arm of the government. My proposal is therefore twofold:

1 The bill of rights should contain a provision (either as a 'directive principle' or in the main body of the bill) placing the government under a duty to take appropriate steps to make suitable land and housing available to the landless and homeless; and

2 The constitution should place the government under a duty to create a tribunal, with the appropriate powers and resources, to deal with claims to land and housing.

Taken together, these mechanisms would create a right to equitable access to land, whether it was formulated as a right on the part of the landless and homeless or a duty on the part of the state. A constitutional package of this sort would place the landless and homeless in the position where they could make a claim of right rather than a petition for largesse, in an open and accountable forum.

Can competing property rights be balanced?

However, one large question remains: is it possible to create an effective right to equitable access to land, in a South African constitution which also guarantees the vested rights of property-holders? For as MacNeil points out,

> '... it is not only the rights of persons to exclude others from the use or benefit of a thing which should be protected. Equally, there should be a right not to be excluded by others from the use or benefit of some things.'[9]

The question is whether any true and fair balance can be achieved between the rights to property of those who have it and those who need it.

The constitution which is now being negotiated will not be written for England in the time of John Stuart Mill. It is being written for South Africa in the latter stages of the twentieth century, and the twenty-first century. We should note the deep irony of this situation. The present pattern of property relations is the result of generations of laws and practices which would not have survived for a minute in a bill of rights society. The

beneficiaries of systematic human rights abuses now seek to create and rely on a bill of rights to protect what they have acquired.

In the present historical context, property rights for the property-less are likely to be overwhelmed by a competing constitutional right for the property-holders. Three points illustrate this:

1 The rights of the property-holders are the status quo, which courts will inevitably tend to protect. In a contest between those who seek to retain what they have, and those who seek to overturn the existing order, vested rights will consistently tend to dominate over change. I suspect that all courts, in all societies, tend to be deferential towards vested rights and resistant to radical change.[10]

2 As Richard Baumann points out in his paper for this conference,[11] even modest programmes of social and economic restructuring, falling far short of expropriation or nationalisation, can be vulnerable to constitutional attack on the basis that they interfere with property rights. The role of the US Supreme Court in the New Deal period is particularly sobering.

3 Perhaps most fundamentally, the protection of property rights through 'just compensation' provisions can make any process of redistribution simply too expensive for any South African government.

This last point seems to present the greatest difficulties. The difficulties seem to me to arise from differing conceptions of rights. On the one hand, we would probably all have some difficulty in arguing that a home-owner who has given reasonable value for his or her property - or to make it even

more difficult, his or her home - should be deprived of that property for substantially less than the market value. Viewed purely as a matter of individual rights, the case for a property clause is strong. The benefit which that individual received from generations of apartheid is very diffuse and very difficult to quantify, and a punitive taking becomes difficult to justify. On the other hand, how does one balance those many existing individual rights against the legitimate needs of a whole community?

If full compensation is not economically possible, the question is really this: where should the burden fall? If there are not enough resources to go around, who is to go short? A property clause linked to compensation at value tends to the result that the burden will fall on the property-less. If there is a shortage of resources, they are the people who will go short. We know that in South Africa there will be a shortage of resources.

CONCLUSION

Claims to land come down in the end to decisions about land use and availability, and about how the society's resources are to be applied. The questions raised by land claims are thus highly political - not in the party-political sense, but in the more fundamental sense that, in Laswell's famous phrase, they are about who gets what, when and how. The decisions are usually made in the administrative system, by officials of local, regional and national government.

It is possible to use constitutional and other legal mechanisms to empower the landless and homeless, to place real duties on the state and create rights for the landless, and to open up the decision-making process so that it

becomes accountable. I have suggested some ways in which this might be done.

However, we have to face the reality that the unqualified constitutional protection of existing property rights, particularly where this is coupled to a just compensation clause, will disable any attempt at substantial redistribution, and undermine the new rights created for the homeless and the landless.

The only way to achieve a true balance between to the rights of property-holders and property-less is to weaken existing property rights, as a matter of deliberate policy. Whether that should and could be done is a question not of constitutional principle, but of political power and priorities.

While some principles of human rights may be timeless and universal, others are very time- and locality-bound. Nothing illustrates this as clearly as the debate over property rights in South Africa. In the construction of a constitution for a democratic South Africa, account will have to be taken of certain inescapable facts. The scale of landlessness and homelessness in our country is enormous. The expectations under a new government will be high. If the property structure of the constitution does not respond adequately to those needs and expectations, people will find themselves compelled to revert to the traditional South African land claims process - land occupation.

Geoff Budlender
28 February 1992

FOOTNOTES

1. Michael MacNeil 'Property in the Welfare State' Vol 7 No 3 Dalhousie Law Journal (1983) 343-382 at 344.

2. They also agreed that you must not tell your lawyer of your plans, because the lawyer is bound to advise you against this illegal action.

3. Sec 33, Act 4 of 1984.

4. Geoff Budlender 'Towards a Right to Housing' in AJ van der Walt (ed) Land Reform and the Future of Landownership in South Africa (Juta, 1991) 45-52.

5. See Dennis Davis in Civil Rights League A South African Bill of Rights (1988) p 16.

6. On this subject see M M Corbett 'Aspects of the Role of Policy in the Evolution of our Common Law' South African Law Journal Vol 104 part 1 p 52.

7. See JAG Griffiths The Politics of the Judiciary for a penetrating account of the conservative function served by the judiciary in Britain over an extended period.

8. In saying this, I have not lost sight of the tendency of lawyers to make supposedly informal procedures highly technical. The Industrial Court was intended to be an administrative tribunal which was less formal than the courts, and to open up access to lay people. However, it was not long before the lawyers (with the able assistance of members of the Court) had made the procedures much more technical than those followed in the courts. Perhaps those drafting a statute creating a land tribunal could learn from this experience.

9. MacNeil op cit 354

10. I believe that this is the true explanation of the resistance of South African courts in the 1950's to the radical policies of apartheid.

11. Richard Baumann Property Rights in the Canadian Constitutional Context 4, 17-21

A LAND CLAIMS COURT FOR SOUTH AFRICA

Report on Work in Progress

Edward Swanson
Centre For Applied Legal Studies
University of the Witwatersrand
28 February 1992

I. Introduction

Good afternoon. I have been asked to present to this conference a paper on the work of a group of lawyers and land experts who have been exploring the idea of a land claims court. By way of introduction, I am a lawyer from the United States working at the Centre for Applied Legal Studies. Over the past several months, I have been assisting a group of lawyers, land experts, and field workers -- many of whom are here today -- who have been looking into the idea of establishing a land claims court in South Africa. The group includes representatives from the Legal Resources Centre, the University of Cape Town, the University of the Western Cape, the University of the Witwatersrand, the Surplus People's Project, the Institute for Rural Legal Studies, Mallinick Ress & Richman, and the Centre for Applied Legal Studies, among others. I appear today as the rapporteur from that group, and this paper is an attempt to present, in broad terms, some of the ideas that the group has been discussing.

The group came together several months ago in response to growing interest in the idea of a land claims court. The notion of establishing some land claims process was originally raised a few years ago as a way of giving legal recognition to the claims that blacks had to land. Black claims to land, by definition, have had to be outside the legal system. However, field work showed that, despite the fact that such claims could not be based in documents such as title deeds or lease agreements, they repeatedly referred to certain basic principles and values. These principles, including length of occupation, birthright, and secure tenure preserved through due process and contractual obligations, were often closely related to established legal concepts, but were themselves trumped and restricted by apartheid land law. It was in this context

that the concept was developed of a court which would give recognition to the terms of black claims. The court would apply non-racial criteria to determine the strength of the various claims to land, and, when appropriate, award restitution of land to persons who had been forcibly removed as a result of apartheid policies. When the government decided last year to abolish the racial land laws but not to take steps to redress the effects that those laws had had, new impetus was given to the idea of creating a land claims court. In that context, the group decided to investigate whether such a court would be feasible, and if so, what form it should take.

The purpose of my presentation today is to share with you some of the ideas that have come out of this group's work on a land claims court. I will begin by explaining the model that the group has devised for handling land claims. I will then discuss what the group believes some of the broader implications of establishing such a court might be. Before I do, however, I want to stress that the work of this group is still very much in progress. The ideas I am presenting are intended to encourage debate around the issue of a land claims court, and not to outline a program of action for the establishment of the court.

II. Land Claims Court Model

Perhaps the easiest way to explain how the group is currently thinking of the land claims process is to follow a sample claim through the court. This will give you a sense of the structure as a whole, and from there we can take a look at some of the specific issues that have arisen.

The process would be initiated by persons or groups who believed that they had a claim which should be heard before a land claims court. The party would go

first to a land claims commission, a body separate from but closely linked to the court. The commission would make a preliminary review of the claim to determine whether it fell broadly within the parameters established for the land claims process -- in other words, whether the party had standing to bring the claim.

To make the determination of standing, the commission would look at the claim to see if it met certain entry criteria. In the case of claimants who were asserting they had been forcibly removed, the commission would ask first whether the claimants had occupied the land they were claiming for a substantial period of time before they were removed. Second, the commission would determine whether they had been forcibly removed or ejected as a result of apartheid laws or policies. This would include not only removals carried out under explicit apartheid laws, but also evictions of persons who were vulnerable because by law they could not obtain title. Finally, the commission would determine whether the claimant had suffered a loss as a result of the removal or eviction, or if instead there had been full, effective and appropriate compensation provided.

Claimants who had not been removed but who were trying to obtain secure tenure to their land could also have standing in certain situations. First, the commission would have to find that the claimants were currently on land that they had occupied for a substantial period of time but in which they did not have secure tenure. Second, the person or body that owned the land would have to be opposing the claimant's desire for an upgrade of tenure.

If, after going through this process, the commission found that a claimant did not have standing, the claimant would be allowed to appeal that decision immediately to the land claims court. Only when the court itself determined that a person's claim

did not fall within the parameters of the land claims process would that claim be excluded.

When the commission or court found that a claimant did have standing, the commission would take immediate steps to ensure that the condition of the land being claimed was not dramatically altered as a result of being under claim. Research by Roger Plant into land reform programs in Africa, Asia and Latin America has shown that one of the biggest threats to land claims programs is unilateral action taken by farmers when their land comes under claim. To prevent the present possessors of land from selling the land, destroying or removing property, or evicting tenants on the land, the commission would need to take an immediate inventory of the conditions of the land. The more difficult question is what to do about pre-emptory actions taken by present possessors before a claim is lodged against their land, and we are currently looking into legal precedents that might allow such actions to be reversed.

Once the property under question has been secured, the commission would attempt to notify all persons who potentially could have a claim to that piece of land. Rigorous and comprehensive notice procedures would be essential. Since, in the interest of finality, all claims to a specific piece of land would have to be heard at the same time and no claims would be heard after a ruling is made, all potential claimants must be notified as soon as possible so that their claim is not lost. Effective notification procedures would also be important when dealing with group claims so that the commission and court could be certain that the parties they are dealing with are the bona fide representatives of the group's interests.

The commission would then begin to research the claims that the parties had to the land. The commission staff would assist the parties in investigating their claims,

researching their historical links to the land and the facts surrounding their removal and resettlement. It would also explore various options for resolving the dispute. Throughout this initial process, the commission would encourage the parties to reach a negotiated solution. Various incentives could be built into the process to encourage negotiation; for example, costs would be covered by the court if the parties were able to reach an agreement amongst themselves that the court could approve.

After the commission had completed its review of the claims, it would prepare a report for the land claims court. The report would summarize the commission's findings and would include its recommendation of how the claim should be settled.

On receiving the commission's report, the land claims court itself would take one of several steps. If the parties had reached a negotiated settlement, the court could simply review the commission's report on that settlement and, if it was acceptable, issue a consent judgment. If there remained a dispute between the parties, the court could refer the matter to a body of mediators attached to the court for further negotiation. Alternately, if the commission indicated that the parties had already engaged in a good deal of negotiations, the court could move directly into hearing the claim.

If the claim had to be adjudicated, parties would present evidence either supplementing or contesting the commission's findings. When the evidence was complete, the court would then decide which party had the strongest claim to the land and what award should be made, if any.

The group has come up with five quite broad criteria for the court to consider in making its decision on a claim. In drawing up these criteria, we looked at some of the basic principles underlying Western and African notions of property and we

attempted to select criteria that embodied values common to both systems. Our intention was that by relying on such shared values, the court would be able to make decisions that resonated with both white and black conceptions of rights to the land.

One factor the court would consider would be the length of time of physical occupation. This criterion could work in favour of both a black community that had been on the land for generations before being forcibly removed and a white farmer who is currently on land that he has been living on for years. Absentee farmers or persons who had been only transitory occupants of land would be disadvantaged.

Another, related criterion would be birthright. This criterion would recognize that persons who had been born on the land and used it as a permanent residence should be favoured in deciding who should now own the land. Again, this criterion could favour both black claimants and white occupiers.

A third criterion would be investment, broadly defined. Under this category, a white farmer could introduce evidence concerning the amount of money he paid for a farm and the financial resources he had invested in the property. A black farmer could introduce similar evidence, or evidence of the physical labour he invested in working on the property.

A fourth criterion would be loss. This could include the financial loss experienced by people who were removed from their land without adequate compensation. It could also include the loss experienced by a community that was given a sufficient amount of money to buy land, but was unable to purchase land because of racial land laws. Or similarly the loss experienced by a community that was given land of similar financial value, but which it could not use because of the substantial capital investment that was necessary to farm that land. Loss could also

include the emotional pain and suffering experienced by persons who were forcibly removed. And loss would also, of course, include the loss that the present possessor of the land would experience if the court decided to award his or her land to the claimant. In determining the significance of the loss, the court would consider the impact that the loss had or would have on the quality of life of the party considered. In other words, in determining whether to award a white farmer's land to a black community, the court would take into consideration whether this was the farmer's only land or if he owned several other farms as well.

The final criterion, and the most sweeping of the lot, we have called "social benefit." While the other four criteria are concerned with the rights and experiences of the specific parties before the court, the "social benefit" category brings into the court's decision-making the interests of the public as a whole. Under this criterion, a white farmer could argue that society would benefit most from his continued cultivation of a particularly fertile piece of land. Similarly, a black community could argue that the public's interest would best be served by giving the land to a larger number of people who would then have a place to live and land necessary to provide themselves with sustenance. "Social benefit" would also be the category under which the environmental effects of the various possible outcomes of the dispute would have to be considered. In other words, all aspects of the decision that go beyond individualized justice and involve questions of policy and public interest would be raised under this category.

What is most notably lacking from this list is title, but that does not necessarily mean that title-holders will be disadvantaged. As I said, we have chosen criteria which represent elements of Western as well as African conceptions of property, and thus

a title holder will have a claim that sounds in many of these categories. However, it is one of the underlying precepts of a land claims process that in some cases title is not the strongest claim to the land. Where title was obtained through theft, where title-holders have neglected their property, where certain persons were prohibited from obtaining title because of their race, there may be a claim to the land that is far more valid than legal title. In order to give such claims a chance to prevail, we believe that, at the decision-making stage, the court must set title to one side and let the two claims compete on equal footing to determine which is the stronger.

In making its decision, the court would act as a court of equity. It would balance the various factors, not giving priority to any particular one, to determine what award would be the most just and reasonable. This approach to judicial decision-making obviously leaves the court with a great deal of discretion. However, given the enormous range of claims that will come before the court and the infinite variety of factual situations it may encounter, the group decided that it would be unwise to define in advance precisely how the court would weigh a claim. Nevertheless, the group felt that there must be a commitment, built into the process, to restoring land to persons who had been forcibly removed. Challenging title and taking land away from present possessors will be very difficult tasks, and unless there is a firm commitment to restitution of land wherever it is both just and practicable, the court may simply be engaged in a process of confirming the title of present possessors. Therefore, the court must be instructed to keep in mind when analyzing the strengths of the various claims to land that its purpose and reason for being is to provide restitution to people removed or evicted as a result of apartheid laws or policies.

The court would have the power to make a broad range of awards to a claim.

It could award the contested land, in whole or in part, to any of the claimants. It could award compensation from the state. It could provide funding to purchase neighbouring land from a willing seller if the parties reached a compromise that required the acquisition of such land. And it could provide compensation to persons who were dispossessed as a result of an award made by the court. However, the group is still debating whether the court should have the power to order that certain land that is not part of the claim be expropriated to settle that claim.

After the court announced its decision, parties would be entitled to request a review. In cases where the land claims court had exceeded its jurisdiction or had acted with gross unreasonableness, the reviewing court -- most likely an appellate division court -- would have the power to reverse the court's decision. Expedited review would obviously be essential given the impact that disputed ownership of land will have on investment in that property, but the group is undecided on the best way to ensure speedy review.

In very broad terms, that is the procedure we have been discussing for handling a land claim. To give a more complete picture, there are some non-procedural matters we have been working on that I should also mention.

The first is the question of funding. The group is envisioning that claimants would have five years in which to file claims, and that the court would exist for another five years or so as it addressed all the claims that had come before it. Therefore, there will need to be at least ten years of funding to cover both the costs of running the court and the financial compensation that the court will be awarding. We have discussed several mechanisms to raise the necessary funds, including state set-asides and various forms of a land tax. However, much work still needs to be done in this

area, and we are looking forward to Professor Davis' talk this afternoon for guidance.

Another crucial matter is the question of a historical cut-off point. The government has opposed the creation of a land claims process on the grounds that it would lead to an unbounded process of historical regression and that every piece of land would be the subject of multiple and overlapping claims. While we acknowledge the government's concern about a land claims procedure that would hear claims dating back to the arrival of Jan van Riebeeck, we feel that that is not a reason to abandon the land claims process altogether. Rather, it points out the need for some historical cut-off date before which claims of removal and dispossession will not be heard. We have discussed several possible dates which would relate to the processes of forced removal and dispossession while at the same time placing a manageable limit on the number of claims, and discussions have focused increasingly on 1948 and 1913. The first would symbolize the beginning of the strategy of grand apartheid, the policy that the court is intended in some small measure to reverse. 1913 would be relevant as it was the year in which the Black Land Act was enacted, the act that created the black reserves and made black ownership outside the reserves illegal, and that laid the foundation for the removal and eviction policies which were to follow. Either date would be acceptable from a practical standpoint, as neither date is so distant as to raise insurmountable problems of proof of prior occupation or of overlapping claims to the same piece of property.

Finally, there is the extremely important matter of who will sit on the commission and the court and how they will be appointed. The group believes that the commission should be made up of representatives from various interest groups involved in land issues, including persons with expertise in environmental issues. They

would be appointed by the State and would be people with an active interest in land and sufficient skills to research and report on the claims that came before the commission.

The members of the court would also be appointed by the State. The court would be chaired by a Supreme Court judge and would have four other members with voting power equal to the chair; two selected from a list put together by representatives of land claimants, and two from a list drawn up by groups representing the interests of current possessors. Whether one circuit court or several regional courts would be required is a question that is still being debated.

III. Conclusions

That, then, is the model of a land claims process as the group has conceived of it so far. As I mentioned in the beginning, the model is put forward to encourage discussion of a land claims court and not as a blueprint for action. Much more work will be required by this group and by others before we can consider putting these ideas to the land claimants themselves and, later, to the wider political process.

Nevertheless, the group believes that the work that it has done so far points to two important conclusions. First, we feel it has shown that it is possible to design a workable land claims court. Our work on this subject has persuaded us that the legal and practical obstacles to creating a land claims court can be overcome, and that the result would be a court that would be able to provide relief to some of this country's most urgent and burning land claims. There are still many questions to be answered about how this court would work -- some quite specific questions that will require detailed legal research, other much broader questions that can only be answered

through the political process. But our discussions have indicated that with sufficient work and commitment answers can be found to both types of questions.

Our second conclusion, however, is more ambiguous. As you may have noticed from my description of the land claims process, the model that we have developed focuses only on a fairly narrow band in the spectrum of claims to land. It was not our intention to create a court with such a narrow focus; in fact, when we began this process, we attempted to take into account all groups that might have a claim to land. The categories of persons we considered included rural and urban persons who were forcibly removed from their land as a result of apartheid laws and policies; labour tenants -- including those who are still on the farms and those who have been recently evicted; landless persons whose claims to land are based solely on need and not on any connection to a specific piece of property; persons who currently occupy land to which they have no legal title; and persons who have a historical claim to land that is based on occupation of the land by predecessors many decades or even centuries ago, in other words claims of original occupation.

In attempting to design a realistic land claims court, however, we found that we were repeatedly forced to limit the types of claims that could be heard before the court. Each step towards making the court more viable resulted in fewer claimants being able to bring claims.

To explain how this dynamic worked, let me briefly describe what happened as we attempted to fit the claims of various groups into the structure of the land claims court.

The first category of claimants that had to be excluded was those whose claims were based exclusively on need. Our group found that the landless or land poor who

did not have any claim to a specific piece of land -- in other words the vast majority of those claiming land in South Africa -- should have their claims heard in a forum other than the land claims court. First, their sheer numbers would soon overwhelm any judicial structure. To give each of the literally millions of claimants a meaningful hearing would be logistically impossible. And second, this type of claim would simply not be appropriate for a judicial system. Courts work best when they are handling disputes between specific parties. They are much less well equipped to decide questions of national policy, especially questions involving how the government should spend its resources. The claims of the landless fall into this latter category. The claimants are not asking for a specific piece of land now held by someone else; rather, they are asking for redistribution of land on a national scale. That is a question that a court has neither the perspective nor the power to answer. Claims based solely on need, therefore, should be handled not by the land claims court but by the political process.

For related reasons, claimants who were already on land but whose occupation rights were insecure because they did not have some form of secure tenure would also not be appropriate for a land claims court. For the majority of these claimants, there is no conflict with another party; they are on government-owned land and simply need some way to upgrade their rights of occupation. Thus their needs would best be addressed by an administrative process rather than the more cumbersome judicial process, and so pragmatism dictated that these claimants too should be referred elsewhere. Of course, where there was conflict concerning the upgrading of tenure, the land claims court might in fact be an appropriate forum.

Finally, we found that the claims of persons removed under the Group Areas

Act might also be problematic for the land claims court. I should point out that most of us who have been working on the land claims court are more familiar with rural African land claims than with disputes and claims arising out of Group Areas Act removals, but our understanding is that, in most cases, persons removed under Group Areas would not be claiming back the specific plot from which they had been removed, but would instead be looking for some form of compensation. And even for those who were seeking to reacquire their former plot, where there has been substantial subsequent development of the land, as would usually the case in urban removals, the most they would be able to get would be financial compensation. Restitution of land, for rural and urban claimants alike, is unlikely to take place where there has been substantial investment in the property after the claimant was removed. Therefore, we assumed Group Areas claims would usually not involve disputes between the person removed and the person currently on the land. Rather, they would be claims against the state for some form of compensation. However, we do not have sufficient familiarity with the terms of the claims of persons removed under Group Areas to put forward any solutions with confidence. Perhaps what is needed is not an adjudicative procedure, but either an administrative process, possibly as part of the land claims court itself, to which persons could bring their claims for compensation or a political process to create some form of affirmative action remedy.

The one group of claimants whose claims could be handled appropriately and effectively by a land claims court were those persons who had been removed from land in rural areas as a result of apartheid laws or policies. These people would be claiming land now held by someone else -- either a private party, the State, or a farmer leasing the land from the State -- who would not want to relinquish rights to that land.

There would, therefore, be a dispute between identified parties, which is precisely the type of situation the court should be handling. Furthermore, these persons are often claiming land that is still being used for agriculture and that has not been substantially transformed by capital investment. It would thus be possible in many situations to restore them to land that is in much the same condition as when they were removed from it, without either depriving the current possessor of his investments in the property or unjustly enriching the claimants by giving them the use of those investments.

Additionally, the number of claims would presumably be not so large as to overwhelm a land claims court. It is, of course, impossible to predict how many persons and groups who had been forcibly removed from rural areas would bring claims. However, based on the group's knowledge of the situation of rural forced removals, we believe that, even if labour tenants were included, the number would not be so large as to render the court unworkable.

The result of our discussions, therefore, was a highly particularized land claims court which would respond to the needs of only a small segment of the total population claiming land. There are obvious advantages to this process -- the court could function as a court and not a policy-making body, and in doing so could provide meaningful restitution to persons who were unjustly removed from their land.

There are equally obvious dangers. Unless other processes were developed simultaneously to address the needs of the landless, of those with insecure tenure, of Group Areas claimants and others, the land claims court process would soon collapse. Without any other avenue for relief, claimants of all kinds would come to the land

claims court. The court would then have two options. It could either hear all the claims, with the inevitable result that the court would be so overwhelmed that it could provide relief to no one. Or it could refuse to hear claims from anyone but victims of rural forced removals. If the rejected claimants had nowhere else to turn, the land claims process would soon be seen, quite accurately, as illegitimate. By providing land or compensation to a select group of claimants while the claims of millions of others were ignored, the court would essentially be providing arbitrary and incomplete justice. It is hard to imagine that such a court would last very long.

There are other dangers with creating a court that will hear only the claims of persons forcibly removed from rural areas. These claims are the vanguard of the land claims movement. Not only are the claimants well-organized and highly visible, but the issue of "black spot" removals has become a symbol of the worst abuses of apartheid land law. If the only land claims process that was developed was one that addressed these claims alone, the result would be to separate the vanguard from the rest of the land claims movement. The effect could be not just to deprive the movement of its most eloquent and widely-recognized members. It could also give rise to the perception that, because the "black spot" issue was being addressed, the real question of land claims was being handled. If this were the case, and the impetus for dealing with the vast majority of persons with claims was lost, creating the land claims court could actually result in doing far more harm than good.

Therefore, our group has concluded that if the land claims court process as we have envisioned it is to survive, it must be introduced simultaneous with or subsequent to processes which will address the other claims. There must be an administrative procedure for handling the claims of persons who need greater security of tenure.

There must be a procedure to provide compensation, either on an individual or a community basis, to persons removed under the Group Areas Act. And most importantly, there must be a meaningful land reform in place to address the needs of the landless, for unless the issue of land distribution is tackled by the political process, the land claims court will most certainly fail.

Each of these programs will have its own parameters and procedures. However, the goal would be to have these separate processes closely linked and sharing the same basic principles. As we have found in our work on the land claims court questions, the effort to define one process will naturally assist in defining others. For example, the concept that occupation of land for a substantial period of time gives rise to certain rights to that land applies not only to claimants removed under the land acts, but also to Group Areas claimants and those requesting more secure tenure to their land. And all of the procedures will share a basic vision, the vision of normalizing land ownership in this country, of undoing apartheid's legacy of linking land ownership to race, and of creating a system of land rights which reflects the reality of people's connections to the land.

Implementing such a sweeping land rights program will require substantial political will. But the temptation to enact parts of the program rather than the whole must be resisted. A partial solution to the land question is likely to arouse far more tension and bitterness than it relieves.

Before I close, I would like to touch upon some of the issues raised in connection with the inclusion of the right to property in a bill of rights. As some speakers have indicated, the constitutional protection of the right to property could mean that full compensation would have to be paid for any land expropriated in a land

reform program. This would obviously place a significant financial obstacle in the way of a land claims court whose primary remedy would be the restitution of land. It would also, of course, limit the effectiveness of a land redistribution program, and as I have said, the success of such a program is vital to the success of the land claims court.

Another effect that the constitutional protection of property could have on the court would be to give constitutional strength to existing title. The purpose of the land claims court would be to determine property rights, which in some cases will mean rejecting rights based simply on title. This corrective mechanism could be severely undermined if current occupants of land could resort to the constitution in defending their title. A property clause could also give new legitimacy to existing title, and the argument that title in many cases represents the legacy of apartheid could be rebutted by the argument that title and the right to continued ownership of property constitutes a basic human right. Whether the inclusion of the right to property in a bill of rights would in fact have these effects is a matter of debate, but we feel that this debate should take place before property is entrenched in the Constitution.

In conclusion, our work on the land claims court has led us to the realization that the court is a workable approach to land claims, but is, by itself, not only an incomplete approach, but a dangerous one. This is our preliminary conclusion, and we would greatly appreciate your comments and reactions to it. In particular, we would like you to consider whether an approach to land claims in which different types of claims must be addressed by separate processes holds more promise than it does dangers.