PROPERTY AS ~ A HUMAN RIGHT

Albie Sachs
July 1992

SA CONSTITUTION STUDY CENTRE

PROPERTY AS A HUMAN RIGHT

There is a group in our country that strongly favour private initiative, and find themselves in constant battle with attempts by the State to regulate their activities. No-one uses materials more sparingly than they do; where others waste, they save. They are undoubtedly the most intrepid of all entrepreneurs in the land. They number over seven million. They are the shackdwellers surviving as best they can on the outskirts of the cities, the so-called squatters.

In South Africa the expropriated are becoming the expropriators. With extraordinary tenacity, landless and homeless families claim a little spot of earth as their own by erecting a shack on it. They are bulldozed and confronted with court orders, yet they never cease to assert their rights of necessity. They are moved a dozen times, and a dozen times they re-erect their lean-to's.

By their actions, the squatters set into contradiction two totally different aspects of property rights: the birthright of all human beings to a little piece of space called home, and the rights conferred by the State on holders of title not to be disturbed in their possession.

The property rights of the poor are even more significant than the property rights of the rich. They are more fragile, more easily overlooked, more ignored and more trampled upon.

In a power framework, property represents exclusivity and inequality. In a human rights context, however, property is something to which all can aspire equally and which deserves equal respect independently of quantity or value.

This has special meaning in South Africa where past property rights have been systematically violated by successive governments. Whether or not all property is theft, as Proudhon was supposed to have said, in South Africa all transactions in relation to land were based on a species of

robbery. The stealing was done not by thieves at night, but by the apartheid state during the day.

In the past few decades, three and a half million people were dispossessed of land rights because of race. Before that, millions more were deprived of land rights by discriminatory statutes, and before that many more millions were dispossessed by invasion and occupation.

A human rights approach does not necessarily seek to punish the original despoliation, nor does it automatically guarantee legal expropriation of the expropriators. Yet it does take the consequences of apartheid dispossession into account when seeking to construct a legitimate system of property rights for the future.

If property is seen as power, then legal title is everything, the only role of the state is to defend that power. If property is theft, then dispossession is all, and the only function of the state is to destroy title and restore a natural relation to things. If property is regarded as a human right, then it is something that both the possessed and the dispossessed claim.

Everyone is entitled to a spot on this earth where he or she can feel safe and be inviolate, sheltered not only from the elements but from the unwanted intrusions of other people. Each person and every family has a right to secure a space within which to sleep, eat, read and dream, a place in which to live out the intimate side of life. We are also all entitled to live in conditions of basic decency. In a country with the technological capacity of South Africa, each and every person has a right to the clean water, electricity and waste disposal that go with dignified and healthy habitation.

In South Africa we do not even attain ironical equality. Anatole France’s famous declaration that the law in its majesty protects with equal rigour the right of the rich to sleep in their castles and the poor to lie under bridges, might have been true for his country a century ago. It is not true of

South Africa today. The poor family living under a bridge would be evicted as squatters. Their home would be called a shack and bulldozed or torched. They would have no claim to receive water or electricity or sewerage facilities, even if willing to pay.

Farmworkers whose families have lived for centuries on a piece of land, whose parents were labour tenants or sharecroppers with legally registered rights, and whose grandparents were frequently given title by the Presidents of the Boer Republics, can now be evicted by any person whoÂ© happens to buy the land on which they are living. A kindly judge might insist that reasonable notice of three, six or nine months be given. A harsher one would offer them even less.

Any human rights based system of property rights would intervene in a case like this to prevent eviction. It would require that through a system of constitutional rights, legislation and adjudication by a land claims tribunal, appropriate legal forms be created to ensure that the rights of the farmworkers, with their ancient occupation and close relationship to the land, be harmonised with the rights of the new owner, with his or her title acquired by purchase.

In a country like South Africa where property ownership is based upon so much past legal injustice, there is no question that there will have to be redistribution in relation to land rights. The issue is not whether but how redistribution should take place, according to what criteria, what procedures should be used and who should make the determination, matters dealt with in the section on Affirmative Action.

The human rights approach seeks to take account of all

dimensions, involve all interested persons and establish principled means of resolving problems.

The struggles of the shack-dwellers to find a spot they can call their own, raise the fundamental question of who South

Africa belongs to, and how in the new South Africa property rights can be legitimised so that the economy can advance and turbulent conflict over land avoided. As things stand at the moment, 87 per cent of the surface area of the country belongs to whites, who form only 15 per cent of the total population. Any project for bringing democracy to the country cannot fail to address the question of opening up rights to the land.

The issue in South Africa is central and highly emotive. It raises simultaneously the question of sovereignty and the question of individual rights. It has an economic dimension, since we need food for the whole country, and a rule of law dimension, because in today's conditions, ownership of the land means in effect ownership of the people on the land.

In order to legitimise ownership and introduce true respect for property rights, a new foundation for rights to land has to be established. Our starting off point has to be that South Africa belongs to all who live in it, and that all are entitled to equitable access to the land.

Appropriate law-governed procedures, based upon common values and attempting in an equitable way to balance the interests of those who have been dispossessed with those who presently hold title, have to be adopted. Victims of forced removals have to be given their land back, and where this is impossible, some other form of restitution, reparation or acknowledgement of the injury done to them has to be made. Persons who historically have been dispossessed by discriminatory statutes have to be given access to affordable land. Everyone should be guaranteed land or other space on which to have a home and enjoy personal privacy.

There are many who argue that it would be unjust to give compensation to those who benefited from unjust dispossession. Yet from a pragmatic point of view there can be little doubt that the concept of just compensation has a major role to play in facilitating equitable adjustment of land

rights. We wish to raise productivity on the land, save the soil from degradation and prevent more blood from being spilt over ownership and use, all at the same time; money helps.

We cannot construct a nation on past dispossession, nor can we build it by using race as the criterion for introducing new forms of forced removals. We need a rights-based system, founded on common values, to establish new criteria for recognising and enforcing rights to land. We also have to find appropriate forms of permitting shared interests in the same piece of land, and loosening up the rigid categories of absolute ownership in relation to agricultural land. If concepts of time-sharing and sectional title, overturning centuries of tight property concepts, could be introduced at the behest of developers eager to make urban land more profitable, it should not be beyond the wit of a new non-racial Parliament to adopt legislation providing for more equitable and flexible access to farming land.

The present Baas-Klaas (Boss-Boy) relationship, making each white-owned farm a little white-dominated colony, has to give way to a system where persons relate to each other as equals and as South Africans. In some cases, the whites will have had a long association with the farm, will have been born there, and invested their "sweat equityâ\200\231 in the land, as will the blacks on the same piece of land. In such cases it should be possible to devise forms of title which recognise the long connection of both to the land, each retaining guaranteed inviolability of the home, yet sharing in the produce according to equitable principles. What matters is to have clear criteria based on common values, applied according to just procedures, with a revolving fund to assist in making equitable monetary compensation when competing interests cannot be reconciled.

Land, of course, if only one species of property. It is the one in which the human rights factor appears at its most powerful and its most poignant. The theme of property as a human

right, however, goes further. Many constitutions have a general provision to the effect that no property shall be confiscated by the State except in the public interest and subject to compensation. The human rights dimension in this case is weaker than in the case of so-called squatters who literally have no place on earth where they may legally live. Nevertheless, combined with the economic aspects of the matter, the question of the taking of property is an important one. The problem in South Africa is to reconcile two competing considerations:

1 Massive landlessness and rightlessness produced by apartheid.

2 No arbitrary deprivation of interest lawfully achieved.

Article 12 in the Draft Bill of Rights represents one attempt to achieve a reconciliation between these two factors. Looked at more broadly one can envisage in South Africa a three-pronged approach to property.

Firstly, personal possessions such as one's home, domestic belongings, motor car and savings would receive a very high degree of constitutional protection against any form of taking.

Secondly, commercial property would normally be immune from expropriation. Where the public interest demands, however, there could be government intervention in various forms subject to just compensation. It would be an error to saddle controversial questions such as this one with constitutional prescriptions. It is not for the Constitution to close off choice in relation to policy questions. What the Constitution does is to insist on certain basic rules of fairness. It would be wise to protect the future against any form of arbitrariness or injustice; it would be foolish to attempt to protect the future against stupidity - no-one has yet found the prescription.

Many constitutions, such as that of the Federal Republic of Germany, give a strong position to private ownership but insist that it carry with it social responsibility. This theme would have special relevance to South Africa where the trend in the past has been to allow owners to "use and abuse" property at will. Considerations both of natural conservation and human concern require that this absolute principle be softened.

Increasingly, the law recognises competing or multi-layered interest in the same thing. Questions of relationship and proportionality become ever more important. Equity and public policy take on an ever greater role even in the most market-oriented societies. The dimension of taxation often has as much significance as the technical question of ownership.

In South Africa we also have a variety of systems of ownership some of which come from Roman-Dutch law, as amended by statute, others from traditional African law. There might be advantages in containing as wide a range as possible within a single national framework of registration and administration.

Thirdly and finally, a comprehensive system of just and secure rights in land has to be established which will take account of all the key dimensions of the problem: the need to rectify the injustice of the past and give access to land to those previously denied; appropriate acknowledgement of existing title and of the intimate relationship that many owners have to the land; maintaining the food supply; avoiding further bloodshed over the land; seeing land as the country's primary resource that should be saved from abuse; and having manifestly fair procedures to achieve all of the above.

Albie Sachs
Cape Town - July 1992

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PROPOSED FORMULATION to be included in the general principles to be enshrined in the new constitution to be drafted by the Constituent Assembly.

PROPERTY RIGHTS

There shall be a legally enforceable Bill of Rights which shall ensure, amongst other things, :

universally accepted human rights and freedoms;

civil liberties including freedom of religion, speech and assembly;

equal treatment of all under the law;

social rights, including the right to education and health; workers rights;

the rights of women;

a system of just and secure property rights which will include the principle that there shall be no taking of property without just compensation as determined by a court of law. :

The constitution shall enable the implementation of measures to help address the racial and gender inequalities produced by past discrimination.

The constitution shall provide for the promotion of the improvement of the quality of life for all South Africans by enabling economic growth, human development, social justice and equal opportunities for all.

COMMENTS

This formulation is based on texts worked out by the steering committee of Group Two at Codesa, taking into account comments made by the Negotiating Forum.

If the property clause is seen merely as a sop to the whites to buy their acqiescence to universal franchise, it will be vulnerable to future attack and incapable of providing the very sense of security which it is designed to give. Any principle in the Bill of Rights should be such as to defend the fundamental rights and interests of all, not just of a section of the community. It should by its nature be manifestly fair and just.

Simply to give protection to present titleholders while ignoring the whole history of apartheid dispossession would be manifestly unfair. On the other hand, to allow for new forms of dispossession based on race - that is, to turn the Land Acts and the Group Areas Acts around against the whites â\200\224- would also be unjust. We wish to reinforce and extend rather than undermine or diminish the right of all to feel secure in their home, to enjoy their possessions and to benefit from the fruit of their labour.

Property rights only become secure if they are seen to be legitimate. Whatever some of us might have felt in the past, we are not agaonst property rights in principle. The problem is to establish a system of property rights which is not tainted by the past trampling on property rights.

The above formulation attempts to locate property rights in a broad context of human rights.

PROPERTY RIGHTS

PROPOSED FORMULATION OF GENERAL PRINCIPLES BINDING ON THE CONSTITUENT ASSEMBLY

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South Africa is so backward in terms of its official institutions, that concepts that are conservative in other countries become radical here.

The idea of good government is unassailable. It stabilises of and gives coherence to change. It is built on four i kane $ principles, each of which in turn is wmassailable:

representivity, competence, impartiality and accountability.

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FOR THE EASTERN PROVINCE HERALD
BY – ALBIE SACHS

If you speak to your cat or dog or even to your plants, you can tell them that they are safe – the ANC is not planning to nationalise them. You may go even further. If the thinking in our ranks is anything to go by, we will support a strong constitutional protection for all personal possessions: your home, your car, your savings, your pension.

It is a complete myth that the ANC is against respect for property rights. In fact, it was
not we, but successive South African Governments that violated property rights. The Land Act was introduced to make colour more important than property rights. The same with the Group Areas and so called Resettlement Acts. Our objective now is to restore respect for property rights. This can only be done by taking into account the way these rights were violated in the past. The problem is to find an equitable procedure for reconciling the claims of the dispossessed against the claims of present title holders.

We feel that is necessary to distinguish between different kinds of property. personal

possessions, land and commercial property, Bersonal possessions should have a

special form of legal protection. Land has to be dealt with with great sensitivity. We have to look to the housing dimension, land for commercial purposes and land for agriculture – each sector requires its own principles and methods of resolving disputes .

In the case of agricultural land we favour a Land Claims Tribunal to deal with disputed claims to land. In particular the tribunal should have the power to restore land to victims of recent forced removals, and to grant secure forms of land use and occupation to families that have lived for generations as tenants on land owned by others. We also see the necessity for a special body to monitor and control in a judicial way the whole process of opening up access to land to those sections of the community that have been dispossessed by conquest and statutory discrimination.
In all cases, compensation can play an important role in reconciling the interests of t he
dispossessed with those of existing title holders.

As far as factories, mines and industrial and commercial houses are concerned, the real question is not a constitutional but a political one. Even the most market-oriented countries in the world like the USA have not constitutionalised Capitalism. The market is strong because of the way it operates, not because of any constitutional provision.

We envisage a mixed economy in which the government will do the things that it is good at, namely, provide for health, education and other basic services, and the private sector will do what it is good at, that is produce goods efficiently and cheaply.

Our basic concern is that the economy grows in such a way that the basic needs of everybody are attended to. The fundamental constitutional principle must be that of equal protectiomthat isythat all spending at national, regional or local levels be done on an equal basis and not as now with gross favouritism towards the whites.

Respect for property rights cannot be gained by protecting rights acquired by means of statutory robbery. The only way to achieve secure and stable property relations in the future is to find a manifestly equitable way of dealing with the violation of property rights in the past.

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DRAFT PROPERTY CLAUSES IN PROPOSED BILL OF RIGHTS

ANC - NOVEMBER 1990 DRAFT BILL OF RIGHTS (REVISED VERSION 1992)

Article 12
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.

The system of property rights in relation to land shall take into account that it is the countryâ\200\231s primary asset, the basis of lifeâ\200\231s necessities, and a finite resource.

Rights to Land

(3)
(4)

(5)

South Africa belongs to all who live in it.

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

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.

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,

Legislation shall provide for the establishment of a tribunal for land claims which shall have the power to adjudicate upon land claims made on legal or equitable grounds, and in particular shall have:

(a) the power to order the restoration of land to people dispossessed by forced removals, or, where appropriate, to direct that compensation be paid, or other suitable acknowledgement be made, for injury done to them;

the power to award particular portions of land, or rights to land, to such claimants, where there are special circumstances arising out of use, occupation or other similar grounds, which make it equitable for such an award to be made.

Legislation shall also make provision for access to affordable land to be given as far as possible, and with due regard to financial and other resources available to the state, to those historically deprived of land and land rights, or deprived of access to land by past statutory discrimination.

All such 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.

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 principles of equitable balance between public interest and the interest of those whose existing titles might be affected.

In the case of a dispute regarding compensation, provision shall be made for recourse to an independent tribunal, with an appeal to the courts.

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 otherwise owned at the time of coming into being of this Constitution, shall be vested in the State acting as trustee of the whole nation.

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

Article 13
Property

(1)

All South Africans shall, without discrimination, have the right to undisturbed enjoyment of their personal possessions, and, individually, in association or through lawfully constituted bodies, be entitled to acquire, hold or dispose of property.

The content and limits of these rights and the rights to inheritance, shall be determined by law.

Property rights impose obligations and their exercise should not be in conflict with the public interest.

The taking of property shall only be permissible according to law and in the public interest, which shall include the achievement of the objectives of the Constitution.

Any such taking shall be subject to just compensation which shall be determined by establishing an equitable balance between the public interest and the interest of those affected.

In the case of a dispute regarding compensation, provision shall be made for recourse to a special independent tribunal, with an appeal to the Courts.

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

NOTE: This kind of clause would fit well into a section called Directives of State Policy. For present purposes we leave it here. There is much argument about whether principles governing economic life should be in a Constitution at all. If there is strong insistence on having some constitutional reference, then we would favour a balanced clause such as the above.

The above provision shall not be interpreted as impeding legislation such as might be deemed necessary in a democratic

society with a mixed economy which may be adopted with a view to providing for the regulation or control of property or for its use or acquisition by public or para-statal authorities in accordance with the general interest, or which is aimed at preserving the environment, regulating or curtailing cartels or monopolies or securing the payment of taxes or other contributions or penalties.

NOTE: Reference to a mixed economy may be unnecessarily provocative both to those who favour an extensive free market and those who wish for considerable state intervention. It is not normal to have any constitutional prescription on either issue.

This Article shall be read subject to and in harmony with the provisions of Article 12.

B) SOUTH AFRICAN LAW COMMISSION - AUGUST 1991

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.

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 become entitled to any other right.

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.

INKATHA FREEDOM PARTY - DECEMBER 1992

Private Property

Private property shall be guaranteed and protected.

Limitations on the use and enjoyment of private property may be imposed so as to satisfy social, environmental and collective needs. The right to convey oneâ\200\231s own property by contract or inheritance shall be protected subject to the reasonable exercise of the Stateâ\200\231s power of taxation.

Expropriation

The State or another entity authorised by law may expropriate property for public necessity subject to the prompt payment of a fair market value compensation.

Property of the State and the Regions

The State and the Regions may own property as private of public property. Public property shall not be alienated or encumbered and is related to the exercise of public functions or is held by the State or the Regions in the public interest. The law shall set forth the principles for the acquisition, administration and declassification of public property. The General Assembly shall publish a yearly report on the property

D)

owned by the State and the Regions indicating their current and planned use and their maintenance and carrying costs.

A CHARTER FOR SOCIAL JUSTICE (CORDER ET AL) - DECEMBER 1992

A possible property clause

(1)
(2)

E)

Everyone has the right to the enjoyment of his or her property.

No one shall be deprived of his or her rights and interests in property unless such action is taken in the public interest, in which case it shall be with due process of law and subject to the payment of appropriate compensation, which shall be determined by establishing an equitable balance between the public interest and the interest of those affected.

No law enacted within seven years of the commencement of this Constitution with the purpose of affirmatively reforming land tenure and access to land shall be declared invalid for a period of ten years after its enactment on the grounds that it is inconsistent with or takes away or abridges any of the rights conferred by this Bill of Rights nor shall any such declaration of invalidity operate retrospectively.

No one shall be removed from his or her home except in terms of an order of court.

No court shall make an order authorising the removal of a

person from his or her home unless it has taken into account the existence of appropriate alternative accommodation.

THE NATIONAL PARTY - FEBRUARY 1993

Participation in the economy

15.

Every person shall have the right freely and on an equal footing to engage in economic enterprise, including the right to establish, manage and maintain commercial undertakings, to acquire property and means of production, and to offer and accept employment against remuneration.

Private Ownership

18.

(1) Every person shall have the right, individually or with others, to acquire, possess, enjoy, use and dispose of, including disposal by way of testamentary disposition or intestate succession, any form of movable and immovable

property.

Subject to the provisions of subsection (3) no person shall be deprived of his property otherwise than under a judgement or order of a court of law.

Property may be expropriated for public purposes, subject to the payment within a reasonable time of an agreed compensation or, failing such an agreed compensation, of compensation in cash determined by a court of law according to the market value of the property.

Every person shall have the right not to be subjected to taxes on property which will have a confiscatory effect or

will make unreasonable inroads upon the enjoyment, use or value of such property.

F) DEMOCRATIC PARTY - MAY 1993

Article 9: Right to Property
Every person shall have the right, in any part of South Africa, to acquire, own, or dispose of any form of immovable and movable property, individually or in association with others;

Legislation may authorise the expropriation of property in the

public interest, subject to the proper payment of equitable compensation which, in the event of a dispute, shall be determined by an ordinary court of law.

The Law Commission and the National Party proposals also refer to taxation and other "property" rights such as pensions which, in their view, should be regulated by the Bill of Rights or the Constitution.

May 1993 Kader Asmal

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Dear Professor Sachs

INTERNATIONAL COLLOQUIUM: PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY

You are hereby cordially invited to attend an international colloquium on Property Law, which is presented at the Rijksuniversiteit Limburg in Maastricht, the Netherlands, from 28-31 August 1995. Information about the colloquium and the preliminary programme are enclosed in this invitation.

This colloquium is an opportunity for the top academics in the field of property law to come together and discuss matters of mutual importance. Participants have been selected on the basis of publications in the field of property law, and you are invited to participate in the colloquium as a speaker in a response session (please refer to the programme). Your presence and contribution will be greatly appreciated, since the organisers think that those present will benefit from your presence and your contribution to discussions.

Please complete and return the answer sheet on the following page as soon as possible to inform us of your position. We really hope that you will be able to attend the colloquium, and we are looking forward to seeing you there. If at all possible we would prefer your answer by fax in order to save time. If you are aware of property specialists who should have been invited to the colloquium, but who have not been invited, please supply their names and addresses, as well as telephone/fax numbers. If you are aware of sponsors who might be interested in sponsoring either part of this colloquium or future

activities of IPLA, please supply full particulars.

Yours sincerely,

Prof AJ van der Walt (University of South Africa)
Prof GE van Maanen (Rijksuniversiteit Limburg)
Colloquium organisers

ANSWER SHEET
INTERNATIONAL COLLOQUIUM:
PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY

Please include the following with your form, whether you are going to attend the colloquium or not, and regardless of the capacity in which you are invited:

* A brief (one page) curriculum vitae, with emphasis on your address (including phone and fax numbers), academic qualifications (when and where obtained), academic posts (including earlier posts), prizes and awards.

* A full list of your most important publications in the field of property law.

Please delete what is not applicable below:
I accept / do not accept the invitation to attend the Colloquium on 28-31 August 1995.
I accept / do not accept the invitation to act as

for the session on

I will / will not be able to take responsibility for my own costs (travel / accommodation / attendance fee). hy

I want / do not want the organisers to arrange hotel accommodation for me in Maastricht for the following nights: .....cccecerverrerrernens , single room / sharing a room.

I'am / am not interested in becoming a member of the proposed International Property Lawyersâ\200\231 Association (IPLA).

INTERNATIONAL COLLOQUIUM
PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY
PRELIMINARY PROGRAMME

DAY 1: MONDAY 28 AUGUST 1995
Arrival and registration.
DAY 2: TUESDAY 29 AUGUST 1995

MORNING SESSION: 09:00–12:30
Chair: Prof Carol M Rose
The Origins and Sources of Property Law

09:00 P1 From Medieval to Modern Property Law (Prof EJH Schrage)

09:45 P2 Property Law in the Nineteenth Century (Prof O Behrends)

10:30 R1 Response: The Origins and Sources of Property Law (Prof P Caroni)
11:00 Tea

11:30 Discussion

12:30 Lunch

AFTERNOON SESSION: 14:00–17:00
Chair: Dr R de Lange
Philosophical Justification of Property

14:00 P3 Subjectivism and the Right to Private Property (Prof C Raes)

14:45 P4 Critique of Subjectivism and its Implications for Property Law (Mr JWG van der Walt)

15:30 R2 Response: The Philosophical Justification of Property (Prof MJ Horwitz)

16:00 Discussion

EVENING SESSION: 19:30–21:00
Chair: Proff GE van Maanen, AJ van der Walt
Business meeting

Agenda:
* Launching of the International Property Lawyersâ\200\231 Association (IPLA)
* Discussion: draft constitution

DAY 3: WEDNESDAY 30 AUGUST 1995

MORNING SESSION: 09:00–12:30
Chair: Prof Susan Scott
Comparative Law Workshop

Workshop consisting of introductions following the same structure (sources, definitions and concepts, system, acquisition and transfer, protection) on property in the most important legal systems, followed by general discussion. Special attention is paid to the sources of each system, and where possible copies of the most important sources should be brought along and displayed. In the final presentation common problems and themes are highlighted.

09:00 W1 Property in Common-Law Systems (Prof Kevin Gray)
09:30 W2 Property in European Civil-Law Systems (Prof WJ Zwalve)
10:00 W3 Property in Customary Law (Prof T Bennett)

10:30 W4 Property in Mixed Systems (Prof R Zimmermann)

11:00 Tea

11:30 W5 Overview and Conclusions (Prof U Mattei)

12:00 Discussion

12:30

AFTERNOON SESSION: 14:00-17:00
Chair: Prof GJ Pienaar
Recent Developments in Property Law

Three consecutive demonstrations (each consisting of a brief explanation aided by a visual demonstration such as film or video, transparancies, dias, posters etc) with reg ard
to recent developments and its effect on property law, each accompanied by a number of prepared theses, followed by general discussion. In the final presentation common problems and themes are highlighted.

14:00 D1 Environment and Property Law (Prof J Spier)

14:30 D2 Housing and Residential Rights (Prof Margaret Jane Radin)
15:00 D3 Planning and Property Law (Prof Jeannie van Wyk)

15:30 i Tea

16:00 D4 Overview and Conclusions (Prof HP Westermann)

16:30 Discussion

EVENING SESSION
Evening free for dinner, excursions etc.
DAY 4: THURSDAY 31 AUGUST 1995

MORNING SESSION: 09:00-12:30
CONCURRENT SESSION I

Chair: Prof Laura S Underkuffler
Constitutional Protection of Property

09:00 P5 Comparative Analysis of Constitutional Property Rights (Prof Jennifer Nedelsky)

09:45 P6 Socio-Political Function of Constitutional Protection of Property Rights (Prof P

Badura)

11:00
11:30 Discussion
12:30

CONCURRENT SESSION II
Chair: Prof FW Grosheide
Intellectual Property and Body Rights

09:00 P7 The Protection of Software (Prof GW Mincke)

09:45 P8 Property and Body Rights (Prof NHM Roos)

10:30 R4 Response: The Protection of Incorporeal Property (Prof S Munzer)
11:00 Tea

11:30 Discussion

12:30 Lunch

AFTERNOON SESSION: 14:00-1700
Chair: Prof HJ Wieling
Property Law Now and in the Future

14:00 P9 Property Law Now: the Current State of Theory (Prof RS Schnably)
14:45 P10 The Future of Property Law (Prof J Baur)

15:30 R5 Response: Property Law Now and in the Future (Prof GR de Groot)
16:00 Tea

16:30 Discussion

EVENING SESSION: 19:30-22:00
Master of ceremonies: Prof J Cohen
Formal dinner with keynote address

20:00 K1 Keynote Address: Property Law on the Threshold of the 21st Century (Prof AM HonorÃ©)

DAY FIVE: FRIDAY 1 SEPTEMBER 1995

Departure.

FURTHER INFORMATION

The colloquium is a joint effort of the Metro Research Institute at the Rijksuniversite
it
Limburg, Maastricht, and the Property Law Research Unit at the University of South
Africa, Pretoria. The organisers are Prof GE van Maanen of the Department of Private
Law, Rijksuniversiteit Limburg and Prof AJ van der Walt of the Department of Private
Law, University of South Africa.

1 Venue

The colloquium is presented at the Rijksuniversiteit Limburg in Maastricht, the Nether-
lands. â\200\231

2 Costs

Keynote speaker (K): Travel and accommodation sponsored, no attendance fee required.
Main speakers (P): Accommodation paid, no attendance fee required. Pay own travel
costs.

Speakers (response, workshop and demonstration sessions) (R, W. D): No attendance fee
required. Pay own travel and accommodation costs.

Chairpersons (C): No attendance fee required. Pay own travel and accommodation costs.
Student guests (S): No attendance fee required. Pay own travel and accommodation costs.
Guests (G): Attendance fee Hfl 500-00 (R 1000-00, $ 300). Pay own travel and accom-
modation costs.

3 Meals, teas

All meals, teas and so forth provided for specifically in the programme are included in
the attendance costs.

4 Accommodation

Accommodation can be provided, on request, in a Maastricht hotel. Guests are
responsible for hotel fees according to the list in 2 above. Particulars of hotels etc
can be
supplied on request for guests who want to make their own arrangements.

5 Travel arrangements

Guests make their own arrangements, except for the keynote speaker, whose travel ar-
rangements will be made and paid for by the organisers.

PRELIMINARY LIST OF INVITED GUESTS
South Africa

Prof AJ van der Walt (Unisa) (Ol)

Prof Susan Scott (Unisa) (C3)

Prof Jeannie van Wyk (Unisa) (D3)

Mr JWG van der Walt (Unisa) (P4)

Prof A Sachs (Univ Cape Town) (R3)

Prof JD van der Vyver (Univ Witwatersrand)
Prof Carole Lewis (Univ Witwatersrand)
Prof CG van der Merwe (Univ Stellenbosch)
Prof D van der Merwe (RAU)

10 Prof JC Sonnekus (RAU)

11 Prof GJ Pienaar (Potchefstroom Univ) (C4)
12 Prof NJJ Olivier (Potchefstroom Univ)

13 Mr J Murphy (Univ Western Cape)

14 Prof DG Kleyn (Pretoria Univ)

15 Prof TW Bennett (Univ Cape Town) (W3)

VooNOULILA WN

Netherlands and Belgium

Prof GE van Maanen (RU Limburg) (02)
Prof R Feenstra (RU Leiden)

Prof EJH Schrage (VU Amsterdam) (P1)
Dr R de Lange (Univ Utrecht) (C2)

Prof C Raes (RU Gent) (P3) .

Prof H Ankum (GU Amsterdam)

Dr E Pool (GU Amsterdam)

Prof WJ Slagter (Erasmus Univ Rotterdam)
Dr R Zwitser (Erasmus Univ Rotterdam)
10 Prof JH Nieuwenhuis (RU Leiden)

11 Dr CJJM Stolker (RU Leiden)

12 Prof J Spier (KU Brabant) (D1)

13 Dr P Meijs (KU Brabant)

14 Prof GHA Schut (Hof van Amsterdam)
15 Prof F van Neste

16 Prof GW Mincke (RU Limburg) (P7)

17 Prof WJ Zwalve (RU Leiden) (W2)

18 Prof FW Grosheide (RU Utrecht) (C6)
19 Prof NHM Roos (RU Limburg) (P8)

20 Prof GR de Groot (RU Limburg) (R5)
21 Prof GCJJ van den Bergh (emeritus)

22 Prof EH Hondius (RU Utrecht)

23 Prof F Ost (UniversitÃ© Saint Louis Bruxelles)
24 Prof RC van Caeneghem (RU Gent)

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United States of America and Canada

Prof Margaret Jane Radin (Stanford Univ) (D2)
Prof TC Grey (Stanford Univ)

Prof MJ Horwitz (Harvard) (R2)

Prof Frank I Michelman (Harvard)

Prof JR Pennock (Swarthmore College)

Prof JW Chapman (Univ Pittsburgh)

Prof S Munzer (UCLA) (R4)

Prof Laura S Underkuffler (Duke Univ) (C5)
Prof Bruce A Ackermann (Yale)

10 Prof RC Ellickson (Yale)

11 Prof G Calabresi (Yale)

OVooNONULTAE WN â\200\224

12 Prof LC Becker (Hollins College)

13 Prof SJ Schnably (Univ Miami) (P9)

14 Prof CE Baker (Univ Pennsylvania)

15 Prof RA Epstein (Univ Chicago)

16 Prof J Waldron (UC Berkeley)

17 Prof JL Anderson (Univ Oklahoma)

18 Prof HP Monaghan (Boston Univ)

19 Prof Carol M Rose (Yale Univ) (C1)

20 Prof RW Bauman (Univ Alberta)

21 Prof Jennifer Nedelsky (Univ Toronto) (P5)
22 Prof A Brudner (Toronto Univ)

23 Prof Drucilla Cornell (Yale)

24 Prof Steven W Lawry (Wisconsin Univ)
25 Prof Howard P Venable (New York Univ)
25 Prof Patricia Williams (Columbia Univ)
27 Prof Steven Winter (Miami Univ)

28 Prof AN Yiannopoulos (Tulane Univ)

United Kingdom

Prof Kevin Gray (Univ London) (W1)
Prof AM HonorÃ© (Oxford) (K1)

Prof P Birks (Oxford)

Prof N MacCormick (Univ Edinburgh)
Prof P Stein (Cambridge)

Prof D Sugarman (Univ Lancaster)
Prof Bernard Rudden (Oxford)

NOU hh WN â\200\224

Germany

Prof R Zimmermann (Univ Regensburg) (W4)
Prof P Badura (Univ Heidelberg) (P6)

Prof D Medicus (Univ Miinchen)

Prof HP Westermann (Freie Univ Berlin) (D4)
Prof J Baur (Univ Koln) (P10)

Prof H Kiefner (Univ Minster)

Prof D Willoweit (Univ Tiibingen)

Prof J Schwardtlander (Univ Tiibingen)

Prof HJ Wieling (Univ Trier) (C7)

10 Prof O Behrends (Univ Gottingen) (P2)

11 Prof P Ch Muller-Graff (Univ Trier)

Oooo AWN â\200\224

Denmark

1 Prof O Landa

Roumania

1 Prof D Mico

Spain

1 Prof N Lopez-Calara (Univ Granada)
Switzerland

1 Prof P Caroni (Univ Bern) (R1)

Russia

1 Prof Larisa Krasavchikova (Juridical Inst Ekaterinburg)

Italy

1 Prof A Gambaro (Univ Milan)
2 Prof U Mattei (Univ Trento) (W4)
3 Prof R Toniatti

Students

Ms IJ Kroeze (Potchefstroom Univ) (S1)
Mr R Cloete (Univ Pretoria) (S2).

Ms L Mbanjwa (Unisa) (S3)

Mr L van Vliet (AIO RU Limburg) (S4)
Mr M Milo (AIO RU Limburg) (S5)

SOCIAL REFORM, PROPERTY RIGHTS AND CONSTITUTIONAL REVIEW

John Murphy : :
Dept of Public Law
University of the Western Cape

The ambiguous nature of property rights

At the height of the French revolution in 1789, the French National Assembly published the Declaration of the Rights of Man and the Citizen, the progenitor of all bills of rights. Art 2 of the Declaration declares:

> 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.

To this lofty pronouncement Jeremy Bentham derisively responded:

> Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense - nonsense upon stilts.?

Whether or not we share Benthamâ\200\231s dismissal of property rights being derived ex natura, they have hardened into a permanent feature of the constitutional landscape of a number of liberal and social democracies. Yet the statement that property is one of the rights of man is as ambiguous today as it was in 1789. The claims made by fundamental property rights could embrace one or more of three broad propositions.=

Firstly, the statement most usually is intended to make reference to the immunity from expropriation and excessive regulation enjoyed by existing rights of ownership. Property is protected to the extent that peremptory expropriation without compensation is prohibited. The immunity, as it is most commonly understood, derives from John Locke’s notion of property. Stated simply, his approach sees the interest which commands respect as the one which people have only on account of what they happen to have done or what has happened to them. In other words, the immunity granted by property rights does not imply that everyone is entitled to have or obtain property. If someone does not have or has

1 J Bentham: Anarchical Fallacies 53 cited in J Waldron: The Right to Private Property @ 16, Clarendon Press, Oxford, 1988.

2 The argument borrows from Waldron op cit n 1 supra pp 165-24.

never had property he/she gains little from an immunity against expropriation. Only proprietors have a right against their government that their holdings should be respected.

Secondly, the statement that property is one of the rights of man, at its weakest, may constitute a claim not to be ruled out of the class of people who may own property. This, arguably, is all that is guaranteed by Article 17(1) of the Universal Declaration of Human Rights when it says:

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

The provision comprises a claim not to be excluded from the class of potential property owners in a way that say, slaves, women and black South African citizens have been excluded in the past. Additionally, it prohibits the wholesale socialization of property in a society, e.g. where all productive resources are taken into public ownership and private ownership is prohibited as in Cuba or the former USSR. Such a clause does not prohibit expropriation or restrictive regulation. It remains permissible to expropriate and restrict the use of vested property interests without attacking the idea of private property itself. At the same time, such a claim does not guarantee that everyone will actually get to be an owner. As Waldron puts it: "it does not feed the baby and it will not pay the rent".

And this brings us to the third conceivable construction of the right to property. If we accept Aristotleâ\200\231s thesis, nowadays voiced frequently by the likes of Margaret Thatcher, that the ownership of private property has a great moralizing effect on the individual owner, and that it promotes virtues like responsibility, prudence and self-reliance; it follows that the concern for the ethical development and autonomy of all that each individual should have property. In other words, the right to property translates into an argument for the right of all to enjoy a minimum adequate standard of living.

Given the persistence of this ambiguity in the jurisprudential discourse about property rights, we have to ask: What does an entrenched property right mean in a real and practical sense for social reform in South Africa? The problem does not resolve into a straightforward debate between those for and against the inclusion of property rights in the bill of rights. Once the concession is made to subject future governments to the claims and limitations of human rights even in the absence of an express property clause, or with a linguistically attenuated one, the question will remain: What is the potential reach of property rights?

Social reform and the bill of rights debate

The desire to exclude property rights, comes from a legitimate apprehension that property rights will operate to upset many desirable types of legislation aimed at achieving social stability in South Africa during the next decade. Experience in other countriess has seen laws dealing with land reform, rent control, minimum standards of employment, environmental controls and natural resource management schemes all being struck down in the name of private property.

The debate on property rights in South Africa has dwelt largely upon the problems connected with land rights and nationalisation. Less effort has been devoted to unravelling the extent to which a property clause could deliver social justice in the form of the "new propertyâ\200\235. Similarly, not much thought has been spared for the social benefits a property clause may hold out by compelling high profile adjudication of the issues presented by the need to redistribute investment through anti-trust legislation. Instead, justifiably perhaps, the debate has been haunted by apartheidâ\200\231's enduring legacy of land hunger and a virtually irrational fear of a command style of economic policy attributed to the ANC.

Generally, the ANCâ\200\231's stated wish to nationalise as a means to bring about desirable social change stresses the need for a more equitable distribution of wealth. Greater public control is seen as the response to a dysfunctional market mechanism. It aims also at political equity in trying to disperse ownership with the object of diluting the power base of apartheid capitalism. In addition, because land ownership, especially productive farm land, is concentrated in the hands of a tiny minority, the land question is a national grievance calling for immediate redress.

Many commentators have cautioned against a natural tendency of judges to interpret property rights as a conservative blocking mechanism designed to prevent government interference with the status quo. Such an approach towards wealth issues in South Africa would mean entrenching white privilege. If a future judiciary wants to make a lasting contribution to building social cohesion it should endeavour to strike a fair balance between the competing interests of social justice and individual freedom. Judges accomplish a fair balance by the application of a model of review which tests the proportionality of the means of government intervention and not one which tries to second-guess the popular legislature on the objectives of social policy. Eminent South African lawyers share this concern. Judge Didcott puts it with typical eloquence:

What a bill of rights cannot afford to do here, I put it 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 countryâ\200\231s 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 or economic reform impossible or difficult to undertake, we shall have on our hands a crisis of the first order, endangering the bill of rights itself as a whole and the survival of constitutional government itself.â\204¢

Opinions along these lines are not, as the Law Commission would have it,? justifications for nationalisation without compensation, rather they advocate a model of review structured by proportionality. The principle of proportionality seeks a fair balance between the rights of individuals on the one hand, and the attainment of reasonable social objectives on the other.

The perspective embraces a concept of property which highlights the social function of ownership. Law, if it is to fulfil its larger purpose, must act as an instrument as social progress. Government has a legitimate responsibility to determine, through legislation, the content and limits of ownership and to balance it with the promotion of social interests. Absolute property rights and ownership exist nowhere in the world today.

Drafting a property clause: Constitutional review of the issues raised by fundamental property rights.

The concern about judges applying property rights to upset social reform legislation has resulted in the debate being consumed largely by anxious deliberations about the precise wording of the property clause. To borrow from the late Judge Oliver Schreiner, there has been "excessive peering at language" .Â® The aim of the exercise, apparently, is to find the magic formula to extend or limit the judicial power,

3 J Didcott: The Practical Workings of a Bill of Rights in van der Westhuizen and Viljoen (eds) â\200\230’n Menseregtehandves vir Suid Afrika @ 60. Butterworths, Durban 1988;

4 SA Law Commission 1989 Group and Human Rights Project 58, Working Paper 25 para 14.120

5 Jaga v Donges 1950 (4) SA 653 (A) @ 664H

depending on which side of the fence one sits. Obviously the wording of the clause and its textual context will be important. My point, though, is that we ought not attach exaggerated importance to it to the extent that we are blinded to the extraâ\200\224-textual human rights setting into which the clause will be enacted.

If a new constitutional court in South Africa falls into line with the approach followed in other jurisdictions applying bills of right, usually it will be extra-textual considerations which are decisive when interpreting human rights clauses. If we are to move away from the antiquated and arid literalism of our past, it is essential that we adopt a purposive approach to interpretation. It is the purpose of the property clause which should guide its interpretation and not the mythical intent of the legislature as expressed in the language of the final version. The purpose of a property clause is to provide a medium through which struggles between individual rights and collective policies are refracted. In any event, bills of rights are not enacted into a vacuum where the philological meaning of a provision is definitive. They are inserted into a legal, political and social context with a prevailing factual position. In the realm of human rights law, that factual position implies reference to comparative jurisprudential developments elsewhere. Human rights are universal.

A simple express reference to these developments and the travaux preparatoires as aids to interpretation could be far more profitable than trying to outmaneuver the other negotiating parties in the game of statutory draftsmanship. Let us stop playing scrabble and talk rather about importing the universal jurisprudence of human rights law. Against this, though, I hasten to add, careful drafting is important. The general principles must be stated plainly and in the light of existing interpretations of key concepts. But, still, it is worth keeping in mind, such drafting can carry no guarantee of a suitable judicial attitude. More important than the language of individual clauses will be a commitment to am articulated model of constitutional review.

A model of review is essential to define the proper role of the courts in relation to the decisions taken by a freely elected legislature. The absence of a clearly enunciated model of review will make it impossible to reach reasoned decisions about the true function and purpose of a property clause. What we should be concerned with is not the language but the substantive issues underlying the principles and grounds of review applied in constitutional property cases elsewhere.

As I see it, there are a limited number of issues which can be raised to test social reform legislation under property rights. They are:

i) First, does the private interest encroached upon by a chosen scheme of reform constitute property? If the affected interest falls outside the notion of property, it will not enjoy protection under the clause, and the reform may proceed unimpeded.

ii) Second, what is the legal or constitutional nature of the interference proposed by the reform legislation? Can it be classified as an expropriation or is it merely a regulatory restriction upon the use and enjoyment of property?

1ii1) If it is an expropriation, has it complied with the constitutional pre-conditions for its valid exercise? Normally, expropriations, or eminent domain takings as they are sometimes called, have to be in the public interest, to be effected in accordance with due process and against payment of some amount of compensation.

iv) Regulatory restrictions involve something less than a total deprivation or expropriation and are effected for a different purpose. As such, they do not attract compensation. In most bills of rights, but not all, they are required to be in the public interest and in accordance with the principle of proportionality or reasonableness. Unreasonable, excessive or disproportionate restrictions on property become constructive or creeping expropriations, and therefore, attract liability for compensation.

v) Once it is determined that compensation is payable for an interference, important questions remain as to the computation of its quantum and the manner and mode of its payment.

vi) And finally, if the interference diminishing an individual’s store of property takes the form of a tax, contribution, penalty or fine, should such measures also be proportional or is a pre-condition of legislative authority sufficient?

Let us look at each of these issues and how they have been resolved in constitutional litigation in other countries.

The nature of property

The starting point is to determine what is meant by the term property. The existence of a cognisable property interest is the threshold question which can frequently determine the

outcome of the claim. Many writers argue that it is actually impossible to define private property. In a practical sense the argument suggests that property should be considered not as a simple relation between a person and a thing but as a complex bundle of relations between persons.

Property in the constitutional and human rights sense is generally not confined to corporeals. An unqualified right to property in a bill of rights opens constitutional protection to an indefinite number of incidents of ownership and use of an indeterminate number of tangible and intangible things.Â® The range includes real estate, intellectual property, goodwill, labour power, rights of action, participation in social insurance schemes and other welfare entitlements.

Baumann suggests an undelineated notion of property is liable to afford protection primarily to business against government and that many desirable types of social legislation will be dangerously exposed to constitutional attack. Some validity is added to his concern by the 5th Amendment jurisprudence of the US Supreme Court which mainly has protected the interests and power of the propertied at the expense of egalitarian values and protections for the disadvantaged.â\200\235

However, one should ask: would a narrow notion of property in the US Constitution not merely have meant review of the same issues under other clauses and leading to the same result? The expropriation of land without compensation equally violates life and liberty. An unfair tax infringes the guarantee of equal protection.

The apprehension about a wide concept of property ignores the true policy function of constitutional review. It presumes a right of fixed content exists out there somewhere: all one has to do is to discover it by a process of judicial ingenuity. A constitutional model which openly acknowledges the policy function of judicial review as one of mediation between individual economic interests and government power accepts the idea of property as including a complex and diverse spectrum of rights, claims liberties and entitlements. A broad definition of property will extend the review function to a wide range of controversies and will offer adjudication as the means of resolution. Those favouring a narrow formulation do not adequately admit the assumption of a collective or social role for property which

6 RW Baumann: Property Rights in the Canadian Constitutional Context Land and Property Rights Conference Papers,78,82 (CALS, Univ of Witswatersrand 1992)

7 RW Baumann: op cit n 9 @ 94-102

implies limitations upon property rights within the social context of their exercise and realisation. Underkuffler explains it well:

Property is not simply that which describes and protects individual autonomy; rather, it is a complex concept that includes a broad range of human liberties understood within a collective context of both support and restraint.Â®

Explicit recognition of the mediating function moves us away from a portrayal of property, and the right to it, as a factually and interpretively discoverable truth. Instead of dispensing with disputes about the social use of material resources at the threshold by holding them not to be property, it is better to candidly direct the exercise to finding the socially desirable limits of collective interference with individual economic activities. Rather than asking whether a particular interest falls within the protected range of interests deserving of the title property, we should focus more on whether a particular governmental act in relation to an economic resource is justified or not. If we accept review as a worthwhile mechanism of consensus organisation then all the better if we can apply it to a broader sweep of interests.

Moreover, the desired restraint upon judicial subjectivity lies not in attempting a linguistic limitation of the threshold question about the range of interests falling within the definitional boundaries of property. The solution is found rather in an appropriate theory of judicial deference to legislative policy.

But we cannot leave it simply there. Nor should we. A broad compass of activities and interests does not mean an unlimited range. Some clarity has to be found on what interests, rights and activities deserve the label "property" thereby enjoying constitutional protection. Lewis, drawing largely upon the work of Thomas C Grey, argues the notion of excludability gives a better understanding of the inner logic of property than does the traditional emphasis on the criteria of transferability and permanence. According to Grey an economic resource can be "propertised" only if it is "excludable'". He concludes:

8 L S Underkuffler: On Property: An Essay (1990) 100 Yale Law Journal 127,141

9 Carole Lewis: The Right to Private Property in a New Political Dispensation in South Africa Land and Property

Rights Conference Papers, 165 (CALS, Univ of Witswatersrand 1992); and T C Grey: The Disintegration of Property NOMOS

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.?Â®

Grey conceptualizes property with reference to the social choices around the exercise of the power to regulate that access. He defines it thus:

"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 cam lose no "property" in it either. Herein lies an important key to the "propertiness" of propertiy.*2

Lewis specifies several conclusions which follow from an acceptance of Grey's definition.*= The most important are:

1. Property is a relative concept since the notions of physical, legal and moral excludability alter from time to time and from society to society.

2. There are moral limits to property. These are of significance when dealing with limited commodities which must be preserved for the benefit of all, and of future generations.

3. 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 thought.

4. Property is assimilable within consensual theory: the divide between property law and contract law becomes blurred.

XXII: Property (1980) Yearbook of the American Society for Political and Legal Philosophy

10 Lewis op cit 178
11 Lewis op cit 181

12 Lewis op cit 181

5. Property is never absolutely private: all property has a public law character.

The nature of a democratic society and its institutions alters as it evolves. The criterion of excludability achieves flexibility by building variable temporal and moral considerations into property. In relation to bills of rights it opposes the idea of elaborating a specific or rigid definition of property because too precise an elaboration will stultify the billâ\200\231's organic growth and inhibit the development of the "mew propertyâ\200\235. A wide concept will allow the bill of rights to respond to changing social needs.

State power in relation to private property

The second issue is to define state power in relation to property. Under what circumstances may property rights be overridden or limited by state interests? Collective state power in relation to property has three dimensions: 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.

Eminent domain comprises the power to take property for public purposes against payment of compensation. By implication it contains an immunity against expropriation without compensation. The police power also entails deprivations of property but ordinarily it limits rights between citizens in relation to their property. It establishes a system of internal regulation for the intercourse of citizens with citizens. It is a broad power directed at promoting the public convenience and the greatest welfare of the state and implies a social interest of wider import than the social interest of preserving individual liberty.

Much social reform legislation is enacted under the police power. Examples of a restriction of property rights in terms of the police include rent control legislation, orders of a Land Claims Tribunal creating lesser rights in land without expropriating it, zoning regulations and restrictions imposed under legislation protecting the environment and

the demolition of a building that presents a health hazard. In such instances there is less of a legitimate claim, if any, for compensation for the deprivation.

A constitutional court overseeing the new bill of rights will have to define precisely the ambit and scope of the State's police power over property and to devise criteria for distinguishing acts of eminent domain from controls on the use of property. The practice of the Swiss Federal Court is to regard a statutory limitation on use of property as an

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act of eminent domain if the prohibition restricts the use of the property to an unusually high degree or in such a way that a single owner or a few owners are exceptionally affected and at the same time required to make a disproportionate sacrifice for the benefit of the community to the extent of receiving no compensation. Relevant considerations include:

1 the nature of the harm caused by the regulated activity and the manner of interference;

2 the magnitude or extent of the interference;
3 the purpose and character of the interference;

4 the effect of the governmental action on the economic value of government resources and enterprises;

5 the extent of the public interest being protected.â\200\235

In practical terms courts review the two powers on different grounds. While both kinds of interference have to be in accordance with due process and in the public interest, police power interventions have to be proportional whereas eminent domain takings are compensable. Disproportionate police power controls on the use of property become constructive acts of eminent domain and thereby are compensable. *4

The police power and proportionality

Interferences with property which are less than an expropriation generally have to be justified with reference to the public interest and the principle of proportionality. Before discussing exactly what this is likely to entail, I need to stress that this is not the case in all jurisdictions operating under bills of rights. In Malaysia, for instance, by virtue of the wording of the property clause, it has been held that police power deprivations need only be in accordance with a requirement of legislative authority. Put differently, if the police power taking is permitted by legislation, that alone will be sufficient. Once the courts establish the legislative authority for the interference and decide it is something less than an expropriation, they will inquire no further as to its reasonableness or proportionality.

13 See Peukert W, Protection of Ownership under Article 1 of the First Protocol to the European Convention on Human Rights (1981) 2 Human Rights Law Journal 37, 59–60 fn B6.

14 Pennsylvania Coal Co v Mahon 260 US 393 (1922)

Article 13 of the Malaysian Constitution is concise. It reads:

(1) No person shall be deprived of property save in accordance with law. (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

In Government of Malaysia v Selangor Pilot Association*Â®, the Privy Council linguistically separated the two sub-articles and held them to contemplate different kinds of power. The issue concerned an amending Act which removed pilotage licences from private pilots in Port Swettenham and required all pilots to work under the port authority. The respondent claimed the taking was unconstitutional as no compensation had been paid for loss of goodwill suffered by its members. In the view of the privy Council the use of the term "deprivation" in Article 13(1) means something different to the expression "compulsory acquisition and use of property" in Article 13(2). In the words of Viscount Dilhorne:

Deprivation may take many forms. A person may be deprived of his property by another acquiring it or using it but those are not the only ways by which he can be deprived. As a matter of drafting , it would be wrong to use the word deprived in article 13 (1) if it meant and only meant acquisition and use when those words are used in article 13(2). Great care is usually taken in the drafting of constitutions. Their Lordships agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision which leads to a deprivation also leads to compulsory acquisition or use. If in the present case the association was in consequence of the amending Act deprived of property, there was no breach of article 13 (1) for that deprivation was in accordance with a law which it was within the competence of the legislature to pass.*Â®

While accepting the licences to be property, the court felt their cancellation was not a compulsory acquisition or expropriation. To use other terminology, the deprivation was a nonâ\200\224compensable act of police power. And with narrow reference to the language of the clause the only pre-condition to constitutional validity was legislative authority. Consequently, there was no need to investigate whether the deprivation was proportional or reasonable.

1% [1977] 2 W...R. 9201

16. @ 9207Â°D-G

On a strictly literalist approach the judgement is probably correct. Moreover, had the principle of proportionality been applied overtly, the deprivation may have been found to be reasonable, and therefore, constitutional on that ground as well. But the decision must be seen in its own textual context. Unlike many bills of rights, the Malaysian constitution does not enact a general circumscription clause allowing for general limitations upon rights. The application of the principle of proportionality most often flows from a general clause subjecting the rights and freedoms in the bill of rights to such reasonable limits as can be demonstrably justified in a free and democratic society.

The Indian constitution too, like the Malaysian, did not incorporate a general limitations clause, and provided for circumscription of rights in the language of the specific clauses. Yet efforts by the legislature to narrow the grounds for reviewing the police power over property along lines similar to the Malaysian reasoning failed. The Indian judges, contrary to their Privy Council counterparts, thwarted the legislature by introducing proportionality through the back door.

Prior to its repeal in 1978 article 19(1)(f) of the Indian Constitution used to read:

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

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

"Nothing in sub-clause..... .(f) of the said clause shall effect 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..."

Article 31 also provided some protection. The material part of the article, 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.

Article 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. Article 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 government 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.

In West Bengal v Subodh Gopal Boseâ\200\235, 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 Sastri CJ and Das J. Sastri, for the majority, argued there was no difference between the word "deprived" in Art 31(1) and "acquisition" or "taking possession of" in 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 narrow exclusions in article 31(5S) which exempted measures promoting public health or preventing danger to life or property.*Â® According to Das J, on the other hand, the difference in language used in the two sub-articles 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.

Whether all eminent domain and police power takings had to comply with the standard of reasonableness depended on one's interpretation of article 19. And the relationship between article 12(1)(f) and article 31 turned out to be a much debated subject. The early lines of thought converged in

17 [1954] SCR 587 @ 619 et seq

18 Art 31(35)(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 danger to life or property.

State of Bombay v Bhanji Munji*Â® which held them to be mutually exclusive in scope and content. Article 192(1)(f) contemplated the existence of property over which rights could be exercised. Article 192(5) permitted reasonable restrictions to be imposed upon such property for so long as the citizens title in the property subsisted. Article 31 had to be construed as an exception to article 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 article 31 to see how far it was justified. If the deprivation was lawful under article 31 then the rights under Art 19 were seen as extinguished, that is, the capacity to exercise the right guaranteed under article 19 went as soon as the property was compulsorily acquired or requisitioned under article 31(2), or there had been a police power deprivation under article 31(1).

The argument presented no problem for as long as one accepted that article 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). Article 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; 1t is a quantative rather than qualitative difference. If restrictions proceeded to a limit where they amounted to a deprivation the applicability of article 19(1)(f) is gone, and article 31 came into play.Â®Â® Whatever the interference, be it deprivation or restriction, the court enjoyed some supervisory power beyond the formalistic requirement of legislative authority.

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 article 31, and the conditions of its exercise, were removed by the Amendment. After its enactment it was clear that article 31(2) embodied the power of eminent domain i.e. the power of acquisition for public use and article 31(1) distinctly incorporated a broad police power to carry out other deprivations, where the only jurisdictional precondition was legislative authority for the action. The earlier arguments advanced by Sastri CJ in Subodh Gopal Bose, holding article

19 [1955]. .8CR 777

20 Banji Munji @ 780-1

31(1) and article 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, article 31(2) was reâ\200\224formulated 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, article 31(2A) was inserted to decisively break the link between article 31(1) and article 31(2). Now it was certain not all deprivations were exercises of eminent domain. Article 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." Â®*

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. As a corollary the range of compensable takings was conspicuously narrowed. Article 31(1) granted a police power of deprivation in cases other than transfers of title, and provided the deprivation was authorised by valid legislation it could not be challenged. At this point, the Indian situation closely resembled the Malaysian position as stated in the Selangor Pilot Association case.

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 power of review over the police power. To do so they needed to re-think their reasoning in Banji Munji. In Kochunni v State of Madras== the Supreme Court reversed its earlier view on the relationship between articles 19 and 31 and ruled that a law under article 31(1) could not be sustained unless it satisfied the test of reasonableness under article 19(5). In a word, the concepts of restrictions

21 See generally HM Jain: The Right to Property under the Indian Constitution Chaityana Allahbad 1968 @ 77 et seq

22 [1960] 3 SCR 887

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 distribution under a kinship scheme invaded the right to property under article 19(1)(f) or whether it could be regarded as a reasonable restriction in terms of article 19(95).

Counsel for the State of Madras argued in line with the Banji Munji decision that the right to acquire, hold or dispose of property under article 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 article 31(1), his fundamental right under article 19(1)(f) disappears with 1t.==

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 article 31(1) and article 31(2) had important consequences. Article 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. Article 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 article 19(5). The 4th Amendment snapped the link between articles 31(1) and 31(2) meaning article 31 could no longer be considered a self-contained article dealing with the same subject matter. Since, 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 articles 31(1) and 19(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 article 19 which requires the restriction to be reasonable.

The reasonableness of a restriction under Indian constitutional law is determined by reference to the formula enunciated in State of Madras v VG Row=4. 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

23 @ 905

24 [1952] SCR 587

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 HM Jain warned the import of the decision would not be contained to the police power. He prophesied that the elements of reasonableness and due process would infiltrate the other sovereign power of eminent domain in article I1(2).== In the space of a year or two his prophesy was confirmed. In the Bank Nationalisation caseÂ®Â® Shah J remarked:

Limitations under Art 192(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 intended to advance the public interest.=7

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

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

25 HM Jain op cit n 21 @ 130. The requirements of due process were extended to the taxing power in Chotabhai Jethabhai Patel v Union [1962] Supp (2) SCR 1. See Jain op cit @ 203-204.

26 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.

27. @ 236

reasonableness of the procedural provisions will not be excluded.=%

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 article 19(1)(t).

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 article 19(1)(f) had become the ’"sheetâ\200\224-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 eminent domain, Parliament wasn’t having it. The Constitution (25th Amendment) Act 1971, amongst other things, inserted article 31(2B) to provide that article 19(1)(f) shall not apply to any law relating to the acquisition or requisitioning of property for a public purpose.=Â®% The aim was to reverse Shah J’s dicta in the Bank Nationalisation case. It succeeded. In Kesavananda v State of KeralaÂ®Â® 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.

The point to note when comparing the Malaysian and Indian experiences is this. Two equally authoritative courts faced with virtually identical wording specifically regulating the police power came ultimately to opposite conclusions on the extent of the court’s capacity of review. The Privy Council followed a literalist approach and restricted review to the narrowest of grounds. The Indian Supreme Court chose to extend its power. Although it did so on a rather precarious textual basis, with excessive regard for the linguistic

28 Bank Nationalisation case @ 242

29 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

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301273) Supp SCR 1

niceties, it plainly opted to import the human rights concept of proportionality. One does not have to look far for an explanation. The principle requiring government action to be proportional is at the very essence of human rights jurisprudence. With tacit notation of the broader human rights context, the judges of India decided to narrow the range of government action which the legislature attempted to exclude from scrutiny. In contrast, the Privy Council, with typical restraint, deferred to the legislature and left a wide sphere of government action in relation to property free from the requirement of proportionality.

Where the bill of rights provides for limitations on rights by way of a general circumscription clause, judicial review of police power interferences with property tends to proceed in a clearer fashion. The process is marked by an evident assessment of the reasonableness of policy and is less burdened by the obfuscating games of linguistic analysis. General circumscription clauses spell out a general principle for the purpose of testing the permissible limits of government action in relation to rights. Any inquiry under the circumscription clause proceeds on the basis that the impugned interference violates one of the guaranteed rights and freedoms. From this it follows that all constitutional review involves a two-stage inquiry: it has to be established first that the guaranteed right or freedom has been violated; and second, that the violation is reasonably justifiable in terms of the foundational values of a free and democratic society.

In the first phase the claimant impugning the constitutionality of the law bears the onus of showing that one of their rights guaranteed by the Charter has been infringed. The violation has to be established as a matter of law and fact. In essence, the petitioners need to demonstrate that the interest or activity sought to be protected falls within the guarantee, in our case the guarantee of private property, and the impugned measure violates that guarantee.Â®* A prima facie case ought to be sufficient, because once past the initial hurdle we get to the second stage which forms the core of the review process. Here the objectives and means of the impugned law are evaluated in order to establish that the limit on freedom is reasonable and demonstrably justified in a free and democratic society.

The onus of proving that a restriction on a guarantee is reasonable and demonstrably justified rests on the

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government.Â®Â® Two criteria must be satisfied. First, the

31 Regina v Oakes (1986) 26 DLR(4th) @ 208-224

32 Regina v Oakes @ 225

objective which the measure is designed to serve must be of sufficient importance to warrant overriding the guarantee. Before it will be characterised as sufficiently important the objective at a minimum has to relate to concerns which are pressing and substantial in a free and democratic society. For example, the problem of homelessness necessitates restrictions upon landownersâ\200\231 rights to evict tenants from their property. Secondly, once the social need is acknowledged, the body defending the intrusive measure must show the means chosen are proportional to the attainment of the objective. Important indicators of proportionality were identified in Regina v Oakes:

1 The measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. They must be rationally connected to the objective.

2 The means should impair as little as possible the right or freedom in question.

3 There must be a proportionality between the effects of the measures and the objective which has been identified as of sufficient importance. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

Because the model sees the proportionality principle as forming the crux of review, it contemplates a wider range of activities or interests as falling within the spheres of freedom guaranteed in a bill of rights. Thus the question of whether an interest can be classified as property or not is less important. Greater emphasis is placed on justification of government action and less on seeking the alleged true content of inherent freedoms as supposedly expressed in the mythical intent of the drafters.

The focus then is on balancing collective and individual interests by finding the least intrusive means of giving effect to government policies. Only laws which restrict freedom unnecessarily are constitutionally invalid. As such the model is sensitive to the tension that exists between the judiciary and other branches of government. Other than embarking on a preliminary examination of the social desirability of the legislative objective, the courts hesitate to second-guess the policy agenda of government. And when faced with testing the legitimacy of an objective, the courts as a rule observe the utmost deference towards the popular legislative will. Proportionality expects government to Justify the means it employs to effect its policy and asks whether other policy means might have

achieved the desirable objectives in a less obtrusive fashion.

On this model government limitations upon private ownership in the course of promoting social or public interests, like rent control or land use legislation, will be justifiable if they are proportional. Proportionality is conducive of good government. The virtue of the principle of proportionality is that it aims at achieving the highest degree of consensus by advancing the public interest in the best possible way. Accordingly, property rights can be construed as advancing the cause of social justice in that they are the medium for striking a fair balance between collective and personal welfare.

Eminent domain and compensation

Most people who fear constitutional property rights express reservations about the requirement of compensation. The compensation requirement, it is argued, has been applied to protect the propertied at the expense of substantive egalitarianism. Schemes for re-distributing wealth are bound to be impeded by having to compensate existing property owners who are adversely affected. To some extent the Indian experience bears this out. Accordingly, it is sometimes argued that the legislature and not the courts should be the arbiter on the question of compensation.

Article 31(2) of the Indian Constitution, it will be recalled, left it to 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 article 31 by words like "just", "adequate", "full" or "fair".

The majority of the Constituent Assembly accepted the clause on the understanding that Parliament would have final say on fixing the amount of compensation for prospective expropriations. The consensus 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 a full and fair equivalent in money (i.e. market value). Nehru himself introduced the clause and told the assembly that 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.=%

Notwithstanding the recorded intentions of the framers, in West Bengal v Bella BanerjeeÂ®* the Supreme Court interpreted the expression compensation in article 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. The connotations of Bella Banerjee were disconcerting for a government committed to re-distribution of wealth, especially when it felt it had taken pains to avoid them in the drafting process. Not suprisingly, it chose by the 4th Amendment to supersede what it had left to the necessary implication of the language of Art J1(2) mith 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 PV Mudaliar v Special Deputy CollectorÂ®Â® the Supreme Court ingeniously restored the doctrine of just equivalent and the justiciability of compensation. It did so by applying techniques of somewhat doubtful validity. Subba Rao J reasoned that when Parliament enacted the 4th Amendment it used the expressions "compensation" and "principles" as they had stood in the provision before it was amended. 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. Both the expression "compensation" and "principles" in article 31(2) had received an authoritative 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.=e

The re-emergence of the just equivalent doctrine precipitated by Subba Raoâ\200\231's doubtful application of the presumption was followed in a number of decisions handed

34 [1953] SCR 558 @ 563
35 [1965] 1 SCR. 614.

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 Indiaâ\200\231s 14 leading commercial banks.Â®7 In the end the government paid in excess of market value for the banks.=Â®

Six years later Parliament passed the 25th Amendment which inter alia expunged the liability to pay "compensation" from article 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 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.

Without question the Indian experience signals a warning: judges if they wish can hold up the social and economic policies of government. The Supreme Court’s response to the issue was unedifying. If the legislation failed to provide market value it was struck down. Rarely did they try to strike a balance. Two factors account for their obstructionist behaviour. Firstly, conservatism on the part of judges seems to have prompted them to break with Nehruâ\200\231’s style of socialism, particularly in the period immediately after his death. And secondly, a pedantic literalism in constitutional interpretation inhibited them from getting to grips with the true policy matters underlying the requirement.

But the acceptance of a compensation requirement need not have this outcome. The judges applying the European Convention on Human Rights have shown a more refined method of reasoning. The relevant part of Article 1 of Protocol 1 to the European Convention on Human Rights reads:

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.

37 See fn 29 supra.

38 See Tripathi: Fundamental Rights Some Insights 1974 @ 298. The amount actually paid for the banks was Rs874 million. Weighty evidence showed their true value to be Rs750 million.

II C1973]1 Supp SCR)

The eminent domain circumscription is located in the second sentence of the article, for it is here we find the implicit reference to a requirement of compensation. A main point of contention during the drafting of the Protocol was whether the clause should explicitly include a general principle of a duty to pay compensation for the expropriation of private property in the public interest. One of the earlier drafts had used the expression "subject to compensationâ\200\235, it was later replaced by the words "....and subject to the conditions provided for by law and by the general principles of international law".4Â® The switch was intended as a compromise in that it was thought to give greater leeway to contracting governments on the requirement of compensation for nationalisation and expropriation measures affecting their own nationals since the reference to international law implies guaranteed rights to compensation only for aliens.Â®?*

The leading case on nationalisation and property rights under the Convention â\200\224- Lithgrow and Others (1986) - concerned the duty to pay compensation and the extent of the duty.4= On 17 March 1977 the United Kingdom Parliament enacted the Aircraft and Shipbuilding Industries Act of 1977 whereby the shares of some 31 companies in the two industries passed into the ownership of two new public corporations, British Aerospace and British Shipbuilders on the "vesting days" of 29 April and 1 July 1977 respectively.

The legislation provided that
Exchange were to be valued at
six-month period ending on 28
new Labour government came to
securities were to be valued,

securities quoted on the Stock
their average price during a
February 1974 (the date the
power), whilst unquoted

by agreement or arbitration,

as if they had been quoted during the same reference period. With the Conservative party’s accession to power in 1979, the government continued to implement the nationalisation. The government compensation scheme was seen by many to be grossly disproportionate to the true value of the assets taken. The point of contention related to the valuation of unquoted shares during the reference period.

In seven cases shareholders filed complaints against the United Kingdom alleging violation of Article 1 of the First

40 W Peukert op cit n 13 @ 41-2

41 See generally White G,
Property Stevens & Sons,

Nationalisation of Foreign
London 1961

42 102 Eur. Ct. H.R. (ser. A) (1986). The analysis of the cases is drawn largely from Mendelson M, The United Kingdom Nationalisation Cases and the European Convention on Human Rights (1987) British Yearbook of International Law 33; and

Judicial Decisions - (1987) 81 The American Journal of International Law 425.

Protocol and the non-discrimination provision, Article 14 of the Convention. The applicants did not contest the government's right to nationalise property, their complaint was that the compensation they had received was grossly inadequate and discriminatory. The government had offered a total of 128 million pounds sterling for the seven companies, while the applicants claimed that the value of their companies at vesting days totaled 445 million pounds.

According to the applicants the object of the reference to international law in article 1 was to make all takings subject to the requirements of international law. In their view, all nationals of the contracting States were protected by the international standard of â\200\230prompt, adequate and effective compensationâ\200\231 (the Hull Formula), otherwise the reference to international law was redundant because aliens in any event enjoyed the protection granted by international law.

The Court, relying on the travaux preparatoires, rejected the applicantsâ\200\231 submissions. It concluded that it was

more natural to take the reference to the general principles of international law in article 1 of Protocol No 1 to mean that those principles are incorporated into that Article, but only as regards those acts to which they are normally applicable, that is to say acts of a State in relation to non-nationals.4â\204¢

The Court's finding released it from the necessity of ruling on whether the highly contested Hull Formula - prompt, adequate and effective compensation - was the applicable standard of compensation required by international law. However, this did not dispose of the argument in favour of compensation.

Besides the oblique reference to compensation for aliens there is no other mention of a requirement of compensation in Article 1. Relying on another decision of the Court handed down during the course of the hearing,Â®4 the applicants, therefore, put to the Court an evolved model of review in which they defined the Court's role as being "to determine whether a fair balance was struck between the general interests of the community and the requirements of the individuals fundamental rights". Moving away from a literalist analysis of the text, they claimed the concept of

43 Judicial Decisions â\200\224- (1987) 81 The American Journal of International Law 425, 426.

44 Sporrong and Lonnroth case 23 September 1982, Series A, No 52 cited and discussed in Mendelson M (1987) BYIL 33, 48.

fair balance was found in the structure of Article 1 as a whole.

Taking a broad view of the interests protected by the entrenched freedom, they asserted that even in the absence of a reference to compensation, a taking without payment of an amount reasonably related to the value of the property violated the right to peaceful enjoyment of possessions. Therefore, prima facie, there was a violation which required justification along the lines of fair balance or proportionality.

The Court endorsed the model and proceeded to apply it. By reason of the government's direct knowledge of the society and its needs and resources, the Court felt it should be granted a wide margin of appreciation to determine what measures were appropriate. The aim of the legislation was legitimate, and therefore, attention had to be focused on whether the decisions regarding compensation fell outside the wide margin of appreciation.

The Court turned to the techniques of valuation to test their proportionality. The applicants identified two central elements of unfairness. They claimed that the only fair compensation standard applicable in the present case was one based on a willing buyer-willing seller standard as at the date of taking. The government had used a single retroactive reference period of six months, terminating some three and a half years before the actual date on which the shares vested in the new corporations. Backdating is used normally as a method to protect the deprived owner from falling values on the announcement of the scheme. In this case it had operated to the applicantsâ\200\231 detriment because the companies had displayed high growth during a period marked by high inflation. Secondly, the hypothetical stock exchange quotation as the method for evaluating the ungquoted shares was an inappropriate and arbitrary method since it did not make allowance for the fact that a substantial premium is customarily paid for a total acquisition of shares not on the open market.

The Court split on the issue 13:5 holding these methods to be well-recognised, and that the government was entitled to resort to them as one of the alternatives within a range of options falling within its margin of appreciation.Â®Â®

45 The minority felt the measures failed to make allowance for the changes in profitability of the companies in the long interval between the 1974 reference period and the 1977 vesting day. The interval created an unreasonable and disproportionate distortion even allowing for a wide margin of appreciation. See Mendelson M (1987) BYIL 33,62.

A standard of compensation

As we have just seen, a model of review structured by the principle of proportionality experiences minimal discomfort in reading in an obligation to compensate the victims of eminent domain in the absence of any express stipulation to that effect. Because the Court was able to skirt the question of the applicability of the Hull formula it invoked a requirement that the amount of compensation must bear a reasonable relation to the property taken. Many formulae or qualifying adjectives have been used to describe the compensation criterion in bills of rights. Some provisions speak of Just compensation. Others use expressions like appropriate, fair, reasonable or adequate. Whichever is adopted, the meaning of the qualification depends in the fianl analysis on judicial interpretation.

The expression appropriate, as interpreted in international law, I suggest, accords with the idea of proportionality. Dolzerâ\200\231 ’s doctrine of Iegitimate reliance is one of the more convincing theories supporting an international standard of appropriate compensation.?Â® The doctrine proceeds on the assumption of a basic international legal principle of bona fides. Good faith entails a treatment of a foreigner bringing his property into the host country that will not unduly frustrate the legitimate reliance he placed upon the

host state’s decision to allow the import of foreign property into its territory. Where the investment of capital has been allowed, international law expects, at the very least, good faith dealing.

The formulation also builds upon a comparative standard based on a survey of property protection in municipal legal systems. The single most important deduction to be gathered from a comparative survey is that expropriation schemes generally envisage a balancing of interests between the deprived owner and the nationalising state.

A standard of appropriate compensation based on "legitimate reliance" operates in three important ways in the international arena. In the first place, adjudicative tribunals can take account of the impact of the compensatory obligations on the economy of the expropriating government. Some consideration must be given to its needs and fiscal capabilities. Secondly, weight is given to the original reasonable expectations of the investor in deciding to invest his capital. In the modern world, "legitimate reliance" implies that an investor should place less reliance upon colonial-type arrangements than upon a human rights environment that reflects well-considered development

465 Dolzer R New Foundations of the Law of Expropriation of Alien Property (1981) AJIL 553, 581-2

strategies. Adjudicators reviewing an expropriation scheme in terms of legitimate reliance may well decline to protect forcefully an arrangement of "manifestly nondevelopmental investment", for example, if the investment involves technology inappropriate to the developmental process of the country, and also closes the capital and distribution markets to domestic competitors. And thirdly, the reliance factor may lead to varying results according to the scope and nature of the expropriatory actions.Â®â\200\235

The last point was enlarged upon by the US Court of Appeals in Banco Nacional de Cuba v Chase Manhattan Bank<Â®Â® as follows:

It may well be the consensus of nations that full compensation need not be paid in all

circumstances. ..and that requiring an expropriating state to pay "appropriate compensation' -â\200\224 even considering the lack of precise definition of that term - would come closest to reflecting what international law requires....But the adoption of an â\200\234appropriateâ\200\235 compensation requirement would not exclude the possibility that in some cases full compensation would be appropriate.

Conclusions

If constitutional review of property rights is accepted to proceed on this basis it should be possible for the main actors to reach agreement quite easily. As I have tried to show, a property clause is not necessarily incompatible with social reform. One of the important lessons of the European experience is that even where there is no reference to a duty to pay compensation, a substantial taking without it will be construed in many cases as a disproportionate imposition on an individual. On the other hand, where the courts are concerned with general takings of property, judicial determinations of quantum should yield appropriately and with prudent deference to the legislative will.

Where judges fail to defer to legislative policy in cases when they should, the only casualty, ultimately, is the process of constitutional review itself. Nowhere was this more evident than in India. There the judges embarked upon a frolic of the most dubious kind of literalist interpretation to upset interventionist legislation. In their minds there was one enquiry in cases of substantial deprivation: Was the compensation market value? If it was not, the measure was

47 Dolzer op cit n 55, 882-5

48 658 F. 2d 875 (2d Cir. 1981)

invariably stuck down. In the process they unwittingly abdicated their review function. Far better would it have been had they weighed the competing interests to find the least intrusive means of giving effect to government policies of intervention. Instead because they disagreed with the ends of the policy they refused to defer to it and upset the means without pointing to any alternatives.

With hindsight, the consequence was inevitable. By a string of unedifying constitutional amendments the review power in India was cut back to allow the social legislation to proceed unimpeded. Eventually in 1978 property rights were removed from the list of fundamental rights. In the course of events the concept of private property and the constitutional review process were brought into considerable disrepute. It is exactly this which we must avoid in South Africa. We do so by asserting a model of constitutional review structured upon the principle of proportionality.

However, we must recognise that a new government in South Africa will be required to implement an effective and speedy programme of social reform. Adjudication of each instance of reform to test its proportionality is sure to be a time-consuming business. Any concession in the direction of property rights, therefore, ought rightly to be accompanied by an agreement to establish procedures to expedite review of the property issues. Not to do so will perpetuate the perception that property rights are the principal bugbear in the undertaking to deliver social justice. If important land reforms are held up for three to four years as the issues work their way through the system, the clause will be seen as the culprit, and as a sheetâ\200\224anchor of vested interests. In the final analysis the bill of rights as a whole will suffer a major setback in legitimacy.

WOMENâ\200\231S PROPERTY RIGHTS UNDER CUSTOMARY LAW by CAWE MAHLATI

Chairperson, distinguished guests and colleagues. I have been asked by the conference secretariat to present a paper on womenâ\200\231s property rights under customary law. Womenâ\200\231s property rights under customary law can be dismissed in one sentence. "THEY HAVE NONE". One should however distinguish between the â\200\230customary lawâ\200\231 and customary practice.

One of the very few black womenâ\200\231s studies book is entitled ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE. Gloria T Hull. I have chosen this title as a point of departure in my efforts to illustrate the invisibility, marginalisation and exclusion of the African womanâ\200\231s specific experiences of discrimination in the discussion and debate about rights.

I am suggesting that the indignation against racism and the outrage against sexism, should include outrage about treatment of african women under customary law. The endeavour to create a non-racist and non-sexist South Africa should in my view liberate and free the african woman from a system of customary tutelage. Women married under customary law, are deprived of proprietary and contractual capacity and locus standi in judicio.

White, coloured and asian women have to a large extent achieved formal equality. The abolition of the marital power in 1984 for marriages of whites, coloured and asians removed a major legal impediment in regard to womenâ\200\231s contractual capacity and the exercise of the right to manage their property.

African women married under civil law followed seven years later in 1988. African women married under custom are subject to a system of perpetual tutelage. See sll1(3) of the Black

Administration act of 1927, and equivalent statutes in the homelands.

The Transkei Marriage Act, enacted by the Matanzima regime, and still in force, in the name of african custom reintroduced polygamy within civil marriages. Removed divorced womenâ\200\231s right to both custody and maintenance. Anna Julia Cooper, a 19th-century feminist often criticised Black leaders in the United States for claiming to speak for the race, but failing to speak for black women. She said and I quote "Only the Black women can say, when and where I enter ... then and there the whole Negro race enters with me. In our instance, only the rural african

woman can say when I enter there and then the whole South African society enters with me.

With reasonable certainty every South African, will soon acquire formal equality through the new constitutional dispensation. The question that begs an immediate answer is whether the african

women under custom will enjoy formal equality?

Rural women of South Africa need an unequivocal commitment from the democratic movement that, in a new constitutional dispensation, african women will be accorded the following:

1. MAJORITY STATUS

2. PARTICIPATION AT EMBIZWENI / KGOTLA

3. LAND RIGHTS, ACCESS TO LAND, MUST NOT ATTACH TO A MAN. (SINGLE OR DIVORCED OR MARRIED WOMEN SHOULD BE ALLOCATED LAND)

4. INHERITANCE RIGHTS INCLUDING CHIEFTAINSHIP

5. PARTICIPATION IN LAND CLAIMS. LACK OF FORMAL TITLE SHOULD NOT DEBAR THEM FROM LODGING CLAIMS.

6. THE RIGHT TO ALIENATE MATRIMONIAL PROPERTY WITHOUT PERMISSION BY MAN MUST BE OUTLAWED.

7. ON DIVORCE MATRIMONIAL PROPERTY MUST BE DIVIDED EQUITABLY.

These demands, based on the internationally accepted twin principles of EQUALITY and NON-DISCRIMINATION, are but a translation of the democratic movementâ\200\231s struggle for a non-racial and non-sexist South Africa. In order that freedom from racism and sexism be a reality, for african women, the constitutional formulations being negotiated need to specifically protect women.

This paper will examine how the principle of equality and non discrimination, i.e. international womenâ\200\231s rights norms, can be reconciled with customary law. I will explore the means by which this can be advanced.

Regardless of oneâ\200\231s personal view, that custom has served its purpose, the purpose of subjugation and domination, that therefore legal dualism should be thrown into and confined to the dustbin of history. The more pragmatic view is that, customary law is here with us and will be for a long long time. It therefore serves no useful purpose to wish it away. The less emotional and pragmatic approach is to formulate proposals for reform. This paper will therefore attempt to do just that, to reconcile custom with international norms of equality and non-discrimination. In conclusion I will suggest ways in which equality and non-discrimination in regards to property rights legislation can be achieved.

It is useful at this stage to set out the meaning that will be ascribed to the concept of customary law. It is now fairly well documented that, what is applied in many African countries as customary law is neither customary nor law. Martin Chanock.

In this presentation, I adopt a view of customary law which has been influenced by recent accounts of the intention between African custom and colonial rule. These accounts describe the shift from custom to customary law which took place most prominently in the sphere of family law.

In most of Africa the process consistently involved an alliance

between the colonial administration, traditional leaders. The latter, as traditional holders of power over strategic resources, namely land, cattle women and children saw this power dwindling, they sought to regain it by manipulating custom.

The colonial administration, for its part either misunderstood the nature of african institutions or held the view of African society which saw women as rightless entities, under the authority of men. This is not surprising, as this view of the female coincided with their own patriarchal notions of woman as having lesser rights and capacities than man and fulfilling a primarily domestic role. The colonialistâ\200\231s inability to comprehend Africaâ\200\231s institutions was compounded by their bigotry, that saw Africa as backward and uncivilised.

Whatever their different motivations, these forces between them promoted in name of tradition, the emergence of vernacular law (Robert J Gordon). In place of custom, that is dynamic, there emerged rigid â\200\230customary lawsâ\200\231. Since then, urbanisation, influx control, commissioners courts, chiefâ\200\231s courts and the continued creation of â\200\230customary lawâ\200\231 through the medium of apartheid courts have all impinged on customary law.

No attempt to analyse the position of women in African customary law from the standpoint of human rights norms is immune from charges that the whole process is inspired by western values and therefore it is at best irrelevant and at worst traitorous. In this connection it is often argued that the whole notion of human rights is foreign to Africa and an inappropriate standard to judge political and social rights on the continent.

The relativism argument holds that standards vary among different cultures and that what may violate human rights in one society may be lawful in another. Another way of stating the argument is that even if there were agreement as to existence of the core of substantive human rights norms, the meaning varies from culture to culture. Therefore human rights practices that appear to be contrary to international norms are justified on the ground that they are required by local cultural traditions.

This argument can be rejected on several grounds, two of which will suffice here. In the first place, human rights discourse is pre-eminently a moral discourse, and must be conducted in terms of universality if it is to avoid self-contradiction. The relativism that would set different standards, against the existence of transboundary moral standards adopts an implausible position, one which holds that in moral matters we can pass judgement on others and made exceptions in our own favour.

There is nothing for example, in the nature of a Third World woman that makes her less eligible for the enjoyment of human rights (though she may, of course, consensually waive her rights) than a woman in a Western democracy. F Teson.

To argue that, if a particular society has always had authoritarian practices it is morally defensible that it continue

to have them is to accept an extreme form of moral legal positivism of dubious validity.

Secondly, and much more practically, the idea that human rights is a Western construct with limited applicability to the african reality is ignorant and misleading, for the simple reason that traditional African society recognised human rights norms of many types, some of which coincide squarely with the modern international ones.

For example the right to life appeared to have been much wider in scope in traditional african culture, it included not only a prohibition against killing, but also an obligation to assist in providing means of subsistence to needy members of the community. To argue therefore that a rights-based critique of customary practice is foreign, is to ignore our history and evidential facts.

African legal practice also regarded imprisonment as an extreme denial of human rights, this is the reason Africa had no prisons before colonialism. We have however accepted imprisonment and have not expunged the practice. Prisons built during the colonial era are in full use all over Africa. If we accept this restriction on human rights, surely we can therefore accept the extension of human rights to women. To use therefore the argument of foreigness to deny women human rights is to apply double standards.

On 21 October 1986 the African Charter on Human and Peoples Rights came into force with the attainment of 31 ratifications from among 50 member states of the Organisation of African Unity. The Charter is important as an attempt to provide rethinking on human rights in an African context and it constitutes the first body of norms that cannot be attacked as foreign.

The Charter has obvious relevance in a new South Africa. Art 18 (3) calls upon the states to ensure "the elimination of every form of discrimination against women" so does the ANCâ\200\231s proposed Bill of Rights Art 7 "Men and women shall enjoy equal rights in all areas of public and private life, including employment, education and within the family". Further the charter places a duty on the same states to be "conscious of the values of African civilisation. The ANC has Contralesaâ\200\231s wishes and demands to contend with. Given the foregoing there is potential conflict in the Charter and in the demands that are placed on the ANC.

What follows is a proposal for a pragmatic resolution of this contradiction in regard at least to the womenâ\200\231s property rights.

Under customary law a woman does not have a right to â\200\230ownâ\200\231 land, but a man does. Prima facie, then, the customary law is discriminatory and offends against international womenâ\200\231s rights norms with regard to ownership of land.

However, recent research has revealed that colonial administrators transformed transgenerational, familial land

rights into individual, male land rights. This has happened in many customary rights and usually resulted in specific rights for women being transformed into overall rights of control by men. Therefore it be argued that the so-called male-only individual right to â\200\230ownâ\200\231 land never existed under customary law in three ways.

First, the concept of ownership in the western legal sense of a right to exclusive use, control and the possibility of alienation is not consistent with customary concepts of rights in land. In customary law, other extended family members might have limited rights to a familyâ\200\231s land or its produce. Land was controlled by complex rules of the larger family unit, and there was no alienation of land.

Second, rights in land did not exclusively belong to men. Women also had rights in land, although these were generally different from menâ\200\231s rights. Okoth-Ogendo of Kenya classifies menâ\200\231s rights as rights of control and womenâ\200\231s rights as rights of access. However in neither case did the rights amount to ownership in the western legal sense which implies exclusivity and a right to alienate.

Thirdly, rights to land were not individual, in that they derived from the larger family unit, and as with almost all decisions in a customary set-up, consultation was required.

Therefore, when we â\200\230deconstructâ\200\231 the â\200\230customaryâ\200\231 rule t
hat a
woman cannot own land, we may also find that a man cannot â\200\230ownâ\200\231 land either, in the western legal sense, and that women did have certain well-defined rights in land.

We see, then, that rather than applying international womenâ\200\231s rights norms to the current â\200\230constructedâ\200\231 customary law, it is important to first â\200\230deconstructâ\200\231 these rules, to establish the real customary law.

We might end up protecting womenâ\200\231s rights not by striking down customary law, but by reconstructing it and ensuring that this re-constructed customary law is that which is actually applied at the level of state courts, traditional/Chiefâ\200\231s courts and if possible at the level of state courts, traditional/Chiefâ\200\231s courts and if possible at the level of the family.

Similarly, customary law has, through historical processes, been ossified into rigid rules, not unlike the rules and regulations of imported, western legal systems. For instance, courts in South Africa apply the â\200\230customaryâ\200\231 rule that a woman cannot inherit the estate of her deceased husband.

Yet research currently being conducted by Women and Law in Southern Africa reveals that women are, under living customs followed in the rural areas, are being appointed by the extended family as the heir to their husbands deceased estates.

Whether this has always been the case or whether this is a

response to new socio-economic circumstances, the current custom differs from the customary law as applied by the courts.

Similarly, in Botswana, although the â\200\230customary lawâ\200\231 prescribes that a woman must be represented in court by a man, and therefore a woman and a man do not have â\200\230equalâ\200\231 rights to approach the court, recent WLSA research has shown that the â\200\230customâ\200\231 is changing, presumably in response to changing socio-economic circumstances, and that chiefs now allow a woman to approach the court on her own.

These two examples illustrate a second point about customary law. It should reflect current practice and outlaw outmoded custom. The means by which we could achieve this is first, by codification of customary law, discarding practices that were imposed by colonialism and establishing a mechanism whereby the application of custom is not dependent on the whims of a particular chief.

Customs therefore change with circumstances. Oppressive customs have always been fought by victims. There is a great historical event that illustrates this point. The story of Cirha and Tshawe. The first chief of the Xhosa was Cirha. Tshawe was just an ordinary commoner. One day, the Xhosa went out and caught a bluebuck. Cirha, the chief, became very excited "Hlomla" he commanded, asking for the portion that was due to him as chief.

"NO", said Tshawe. "This is only a small buck. I will not give it to you." They fought until Tshawe, who was supported by the people, became chief in Cirha place. The chief was entitled to his share of only a large animal. Cirha insistence on his share when the animal was small was seen as greedy and dictatorial, and according to xhosa political thought, Cirha demand was unjust. Even the descendants of Cirha today agree that Tshawe was right to resist Cirha unjust demands.

This democratic element in Xhosa political thought can be shown not only from the story of Circa and Tshawe, but from several historical events. People supported Chiefs of low birth against senior but greedy relatives. People responded to the rule of unjust chiefs in many ways. Councillors often toured homesteads, whipping up opposition to exploitative decisions.

Sometimes whole communities packed their belongings, abandoning unpopular Chiefs. Nggika (1795-1829) was in this vein. Nggika seduced the wife of his old uncle Ndlambe. He also thought up different ways to acquire and dispossess his people of cattle, such as changes in inheritance laws. His people deserted him and flocked to the popular Ndlambe. Ndlambe attacked him and he was defeated in 1807 at the battle of Amalinde.

Ndlambe would definitely have become chief. Democracy would have triumphed. The people would have gotten a popular leader. But

cunning Nggika had a secret weapon. He called in the colonial administrators to assist him and through them he became chief. His descendants today are still chiefs. I am certain that in the

Zulu, Sotho, Venda, Shangaan histories there are similar stories as there are in the French revolution and demands enshrined in the Magna Carta. .

The creation of democratic structures of local government and, the position of chiefs and headmen, and therefore, customary law must be decided. In Zimbabwe chiefs were replaced by an elected structure of local government, and by state appointed judicial officials. The new Primary courts also administered a substantially changed customary law. I would argue that in South Africa we should follow suit.

South Africa should follow suit for the simple reason that in my view a large segment of the Chiefs in power today are illegitimate, therefore there would need to be largescale purging to rid the chieftainship of the charge of illegitimacy.

Secondly, not only are the chiefs largely illegitimate, even, the customary law they have been administering is also invented. They therefore are not depositories of our customs. To retain them as rulers in the name of custom, or identity, in my view would frustrate the establishment of democracy in a post apartheid South Africa.

The establishment of a non-sexist South Africa would also be frustrated. The unequal treatment of South Africaâ\200\231s citizenâ\200\231s would be entrenched, whereby the urban or non-african rural South African would be exempt from rule by the chiefs.

To conclude, the issues raised by this paper are interrelated and lend themselves to resolution by constitutional dispensation. A property rights clause, should guarantee private property rights. Limitations should however be imposed, in order that social, environmental, collective needs should be satisfied. Reparations should also be made by a future government in regard to the dispossession that has occurred in our recent history.

Title to land should be extended to women in regard to communal land.

In rural communities, the whole of the tribal structure should be replaced by democratic structures and local government, and the state should, in consultation with elected councils appoint judicial officers. All South Africans whether in urban, areas or in rural areas should have an option to demand that indigenous law should be applied.

A post apartheid legal system should be reformed to introduce indigenous law. Indigenous law stresses group rather than individual liability and uses this as a basis for restitutive compensatory justice rather than individual punitive justice.

Indigenous legal practice also stresses informal jurisdiction and community policing. There is much to recommend such procedures and indeed many industrialised countries are beginning to

incorporate them into their systems. Thank You.

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ANC DRAFT PROPERTY CLAUSE

No property shall be compulsorily acquired by the state save in accordance with statute.

Any law proyiging Jor i the compulsory acquisition of property by the state shall provide for > Compensation which shall take into account the â\200\234public interest available public resources. the circumstances of the prior acquisition and use of the property as well as thÃ© interests of the party or parties affected by the acquisition.

Any statute providing for such acquisition shall establish mechanisms and tribunals to determine the manner and amount of compensation but shall not exclude the right of the courts to hear an appeal against any amount so awarded.

These provisions shall not in any way impair the rights of the state to enforce such laws as it deems necessary for the regulation or control in the public interest of the use of property.