
LAND, PROPERTY RIGHTS AND THE NEW CONSTITUTION

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TABLE OF CONTENTS:

KEYNOTE ADDRESS: LAND AS A BIRTH RIGHT

Govan Mbeki

**LAND AND PROPERTY RIGHTS: THE DECOLONIZATION PROCESS AND
DEMOCRACY IN AFRICA - LESSONS FROM ZIMBABWE AND KENYA**

Shadrack Gutto

A PROPOSED LAND REFORM PROGRAMME FOR ZIMBABWE

Robert B. Seidman

**PROPERTY RIGHTS, RESTITUTION AND COMPENSATION
IN GERMANY AFTER 1945**

Hans-Peter Schneider

**CHALLENGES AND OBSTACLES TO RURAL DEVELOPMENT
IN SOUTH AFRICA**

Tanya Abrahamse-Lamola

**THE POLITICAL ECONOMY OF ALTERNATIVE
MODES OF COMPENSATION**

Hans P Binswanger

**COMPENSATION FOR EXPROPRIATION:
THE POLITICAL AND ECONOMIC PARAMETERS**

Aninka Claassens

PROPERTY RIGHTS - THE CANADIAN EXPERIENCE

P.E.James Prentice, Q.C.

SHOULD THERE BE A PROPERTY CLAUSE?

Matthew Chaskalson

**SOUTH AFRICAN LAND POLICY:
THE LEGACY OF HISTORY AND CURRENT OPTIONS**

Hans P. Binswanger and Klaus Deininger

SOCIAL REFORM, PROPERTY RIGHTS AND JUDICIAL REVIEW

John Murphy

PROPERTY AS A HUMAN RIGHT

Albie Sachs

RESOURCE ALLOCATION: LAND AND HUMAN RIGHTS
IN A NEW SOUTH AFRICA

Winston P Nagan

WOMEN'S PROPERTY RIGHTS UNDER CUSTOMARY LAW

Cawe Mahlati

TOWARDS A FUTURE MINERAL LAW SYSTEM
FOR SOUTH AFRICA

Patrice T Motsepe

DRAFT PROPERTY CLAUSES IN PROPOSED BILL OF RIGHTS

Kader Asmal

Chapter 13

RESOURCE ALLOCATION: LAND AND HUMAN RIGHTS IN A NEW SOUTH AFRICA

Winston P Nagan

"In fact, property is as heterogeneous as the societies within which it is found"

"As God by virtue of being the Great Artificer was the Supreme Proprietor, so man in his lesser capacity had title to his own creation ... In a grand *apologia*, society became 'a joint stock company established in the interests of the property-owners'"

"The rights of man were being converted into the immunities of corporations"

"The constitutional position of property in America ... represented the independence of the business system from political discretion"

"In all its activities and for all its necessary strength the state was to know the voice of its master"

"The separation of finance from industry created the absentee proprietor, the speculator, the investment banker ... authority divorced from responsibility ..."

"The word property has no passport to cross the frontiers of the collectivist state"

(Hamilton and Till 'Property' 6 *Encyc.Soc.Sc.* 528 (1933))

Introduction

THE land question is a special problem in the context of a larger constellation of problems concerned with the 300-year legacy of economic malfeasance, incompetence and expropriation of the economic patrimony of the mass of the people of South Africa.

The production and distribution of wealth, in whatever form or function, has meant an economy of abundance and often conspicuous consumption for the 'few' and poverty - grinding, brutal poverty for the many. If the processes of transition are to have any credible measure of legitimacy, the central issue of economic justice must be addressed, creatively, effectively and with a commitment to people 'on the ground', where the effects of the heritage of expropriation of land and labour, of hope and expectation are most directly felt.

In context of land and land reform, the rural dispossessed present a special case generated by a particular history and encompassing distinctive political problems. It is important not underestimate the powerful psychological-economic animus that stands behind the legal symbols of 'ownership', 'title', 'property' or simply 'land'.

Anthropologists have reminded us that indigenous cultures structured around tribal-communal forms of land tenure and allied elements of economic organisation, have a distinctive psycho-social view of land. Unlike the position of land in many market-driven cultures, land in tribal-communal cultures is not simply an 'aspect' of the 'group', it is the 'basis' of the group itself.

Land is in many ways more than a commodity and the spoliation of the 'group's' land is indeed more than

Land, Property Rights and the New Constitution

the appropriation of a commodity. This is a perspective shared by many of South Africa's landless agrarians.

There are many elements of the white farmers' relationship to the land that may be analogous to those cultures that have a communitarian approach to land. Thus it may be that the farmers' identification with the land is that it is also more than a commodity, it is in a psychologically distinctive way the basis of his cultural identity as a farmer, as a member of the community of so-called boers.

The symbolic relationship of the landed and the landless may hold an intensity of demand whether expressed in the security of 'titles', the right to a piece of land signifying 'ownership' in the form of documentation - a piece of paper, as are the economic efficiencies of land reform and economic equity for the role of the agricultural sector in the context of the overall priorities expected from a new economic order in a new democratic South Africa.

This new economic order must envisage a 'new deal' for the vast South African underclass. This kind of new deal must prescribe and implement a programme, not only to improve living standards, but to undo the incredible ravages that the economy of apartheid has imposed on the social organisation of basic community processes, including family structures.

It must also engineer a commitment to utilise and liberate the immense productive capacity of the nation's greatest asset - the capacity, the potentials for invention, creativity and enterprise, the self-reliance and spirit of patriotism and loyalty of all its people.

Here specific problems of land allocation, use and planning for basic economic justice must be seen in the light of the immense capacity for economic growth and restructuring, as well as the important role of the South African economy in the context of the larger southern African framework of states with foreseeable potentials expanding throughout central and east Africa. In this kind of context the right to development is not an illusory, pie-in-the-sky dream, but a definite, realisable objective for an immediate rather than distant millennium.

It is the basic recommendation of this paper that the land problem of South Africa must be seen in the

light of the emerging human right to development. This is a right which affirms the vital importance of putting the land problem into a realistic socio-economic and political context.

It includes many central dimensions crucial to a realisable developmental agenda such as the link between development, literacy and basic education, or the central but critical link between development and popular participation.

In short, a human right to development, that is comprehensive, realistic and relevant must connect land reform to the empowerment of the communities involved in reform or restructuring. It must 'develop' the critical capacities in community of technical decision-making skills, stress wide profusion of decision-making competences and align popular participation in community decision to the twin ideas of responsibility and accountability.

Land-reform is not simple, but real land reform must be supported by a viable community developmental agenda if it is to sustain itself over time.

What is 'Ownership': What is 'Property'?

Before examining the juridical and political character of such ideas as 'title', 'ownership' or 'property', it may be important to give such notions a backward glance. The idea of law, title, tenures, interests, vested interests etc., are an integral part of the framework of property and income distribution and frequently through the institutions of law and legality (or legalism) will shape the control and regulation of the interests in 'things' having economic value or importance.

In the case of in Southern Rhodesia, the British-South Africa Company claimed virtually all the choice land of present-day Zimbabwe as a result of conquest by Rhodes' private army. The claim was denied by the Privy Council, but the important claims of the Black 'proprietor' were also denied on the basis that native tenures were not juridically recognisable! A whole country was allocated according to a misconception of the relationship between 'title', 'ownership', 'interest' and 'property'.

One cannot reasonably address the problem of land reform without an appreciation of the historical

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REFORM IN SOUTH AFRICA**

Land, Property Rights and the New Constitution

context. It is unnecessary to convey all the various acts of legislative, executive and administrative expropriation. However, the problem of titles to land as part of colonial acquisition is an under-studied historical episode.

Only Lindley's *Acquisition of Titles to Territories in Backward Countries* stands out and a few studies of Commonwealth and Colonial law add some scholarly weight to Lindley's pioneering work. In addition, Llewellyn and Hoebel showed in *The Law of Primitive Man*, when sharper analytical tools are developed (essentially Hohfeldian analysis) people under colonial rule clearly have tenures, titles and interests that the law of a modern state can and should honour.

The point about in Southern Rhodesia AC (1919) is that a primitive concept of ownership could validate the expropriation of the land patrimony of a whole people. Perhaps there is an historical lesson here, notwithstanding the obvious historic datum that South Africa's land problem is coloured by both the massive removals and migratory labour policies in the apartheid scheme. This wholly apart from the issue of wars of dispossession and/or legislative confiscation, or indeed the current policies of so-called privatisation - more properly - the great give-away of what is left of the national patrimony. That lesson requires us to look more carefully at the conceptual basis of received legal doctrine.

The most accurate statement of ownership is not found in law books, but in basic social psychology - in the simple proposition of 'yours' and 'mine'. In exploring the conceptual basis of vested tangible rights Holmes once indicated what he saw as the necessary function of the notion of a 'right' as a mediator, if not a conflict resolver of the expectations generated by the 'yours' and 'mine' matrix.

Without the notion of a 'right', he said, a 'dog will fight for his bone'. It needs no flight of a spirited imagination to recognise that people who 'own' legal titles to that ubiquitous resource we call 'land' fight to keep them and people who feel their patrimony has been stolen will fight for their share 'property', 'resources', 'titles' etc.

In short but simple terms - how can we devise a framework of the titles reflecting property equity to which they believe themselves entitled?

This means three things:

First, a good deal of historical understanding is necessary to appreciate the nature of the problem that confronts a new South Africa.

Second, a great deal of analytical clarity needs to be brought to bear on the words we use to label and then 'allocate' interests in the resource we call land. This clarity must uncover the nature of the interests protected by the words 'ownership' of land (and resource reform) that secures the highest measure or quantum of human dignity over the long term - a system that permits the widest level of participation in the manifold interests implicated in such terms as 'ownership', 'land', 'property', 'resources', 'wealth' etc.

Third, what is it that is wanted out of a redistribution formula that secures, in the long haul, more than simple but intensely demanded 'titles' and 'ownership' papers, but a framework of economic viability, of economic development, of economic equity that is consistent with the wise use of these resources in the common interest of all the people of South Africa.

A perusal of some of the literature emerging around South Africa's land question is still indicative of the crudeness inherent in the Roman juridical idea of 'ownership' (Carole Lewis, 'The Right to Private Property by a New Political Dispensation in South Africa', *South African Journal on Human Rights* 8 (3) 1992, 392ff). A further particular confusion in this context concerns what the definition of 'property' is and what 'form' a constitutional reference to property must take, if one is to be taken at all.

It has been said that a word is nothing but the skin of a living thought. If this is true, then terms such as 'property' and 'ownership' could have whatever meanings, 'living' meanings that wordsmiths can put into the 'skin' of these words. That is to say, property could mean ownership and ownership could mean property, and so on. Legal meanings are not, however, quite as fungible.

The Romanistic conception of ownership has a close correspondence with a psychological 'yours' and 'mine' common-sense estimation, but its history clouds rather than clarifies the nature and existent range of potential interests in property. In contrast, the notion of property more aligned to the Anglo-American tradition 'real property'

Land, Property Rights and the New Constitution

classification, is conceptually almost disinterested in 'title'- a bit weak on the 'title' - 'yours' and 'mine' aspects of property, but stronger on the expression and differentiation of interests in a resource (like land). It is perhaps for this reason that the American Restatement, following Hohfeld's dissection of the notion of a 'right', adopted the clearly un-Germanic notion that law deals not with rights and duties in the abstract, but with relationships.

A 'thing' cannot initiate or 'defend a law suit' (Charles Donahue Jr, 'The Future of the Concept of Property Predicted from the Past', *Property Numos* XXII, 28ff (1980)). And it is within the interstices of human imagination, in context of those relationships, that the term property is conditioned, defined, mutated and indeed in its novel forms of interest and security, resistant to the reification of antiquarian lawyers and 'jurisprudes'. The forms and interests of property will cease when human relations cease.

A slavish adherence to Romanistic modes of thinking about ownership, even when dressed up in Germanic or Continental trimmings, will serve to obscure rather than clearly express what specific forms of interest in land are protected by what forms of law and legal regulation. Such adherence will bring about the consequences or impacts of the so-called agglomerative approach to the juridical idea of ownership and about who specifically benefits when we obscure the nature and functions of property in land or any other resource.

In other words, the conceptual lens we use to depict interests in valued resources is important to a fuller and clearer estimation of the specific interests it encompasses and to the social consequences that attend the allocation of those interests to the few or the many.

The symbolic importance of ownership ideas represented in paper titles cannot be ignored for their psycho-social salience. The conceptualises of South African property law seek to confine the ownership idea to this domain and to re-invent the idea of 'property' as a paradigm of relational interests. When we know the specific interests (in land) law promotes and defends, we can more rationally plan the precise forms and effects of allocation.

The Swedes appear to have done this with remarkable dexterity. Over 90 per cent of the Swedish economy is

privately owned (according to the economist Gunnar Adler Karlsson) but the functions of property are not monopolised by the 'few' and agglomeration does not crudely encompass all existent and potential interests in resources indiscriminately.

Some interests are socialised, some are not. The aesthetic interest in property may be socialised - the ecological aspect of use may be socialised, rent control, zoning controls, marketing in terms of non-discrimination may represent partial socialisation. This may be a useful backdrop for looking at the way in which a nation's resources are mobilised in the common interest of all its people.

The questions lawyers and public policy-makers do not often ask about land, property and economic justice in South Africa -

- * What resources, in what contexts, are invoked and applied by the users of the doctrines of property?
- * Who invokes and applies the doctrines for the protection of what practices, with what effects on what values in relation to whom?
- * What property doctrines produce what effects for people on the ground?
- * By what specific practices and doctrines are the resources allocated, planned, developed and exploited in South Africa today?
- * How is public power, community coercion ... organised from locality, to city, to province, to nation, brought to bear in guiding and regulating the use of these functions?
- * What is the balance in different contexts between private volition and community control over resources?
- * How are private claims controlled and regulated in the public interest?
- * What resources does the community directly control and regulate?
- * Does the structuring and exercise of public power take adequate account of community interdependence in resources and

Land, Property Rights and the New Constitution

institutions, from locality through the metropolises, from region to nation?

- * What exactly are the national government's competences over allocation, planning, development and utilisation of resources and how are these competences integrated?
- * Behind the formal facade of authority, what is the structure of real and effective control over important decisions about how resources are allocated, planned, developed and exploited?
- * Who makes the decisions (now) about what is to be produced, for what prices, at what wages and under what employment conditions, by what technology and with what distribution of profits?
- * By what techniques is transgenerational control passed?
- * How efficient, by technical or engineering standards are the practices South Africa applies to its resources?
- * Is the present balance between community and private property the most productive that can be achieved?
- * What values do the people of South Africa demand from their resources and institutions and by what procedures can these values be translated into concrete programmes of action and specific objectives towards property doctrines and practices may be directed?
- * How, in sum, can the large-scale property transformations taking place be managed to maximise the common interest in the nation as a whole?

These questions were formulated by McDougal and Haber in 1948 in a remarkable property law text, *Property. Wealth. Land: Allocation Planning and Development*. They have been adapted to the present situation to give some perspective to the proposition that the property doctrines we inherit are devalued without the context of social or community relations, the centrality of decisional responsibility and a better

sense of a normative future for a nation's resource agenda.

Human Rights Normative Guidance

Land is a 'resource' and property a mutating 'institution. The interactions between 'resources' and 'institutions' are hopefully meant, in the best of worlds, to produce goods, services, security and wealth in the broad sense of the terms. No doubt the pattern of participation in the production and distribution of wealth will indicate what kind of culture of economic and social equity and fairness is generated. There are, of course, many important interests of a human rights character tied to the issues of land tenures: housing, food, security, water, sanitation, employment, communications, etc.

The Special Rapporteur on The New International Economic Order and The Promotion of Human Rights: Realisation of Economic, Social, and Cultural Rights has recently affirmed that land rights and agrarian reform are "central to the realisation of human rights". The Special Rapporteur also recognises that: "No question is more central to power relations within society or to issues of equality and income distribution than land" E/CN. 4/ sub.2/ 1990/19.A+U2.

The Special Rapporteur's assessment of the human rights dimension of land reform builds upon a wide variety of international instruments dealing with the human rights dimension of land reform and rights in land.

For example, the U.N. Declaration on Social Progress and Development (1969) Article 17(d) indicates the importance of appropriate supervision for the "utilisation of land for the interest of society". Article 18(b) suggests that "a democratic society includes a commitment to land reform" to achieve the objectives of "social justice and economic development".

The Vancouver Declaration on Human Settlements (1976) indicates that land is one of "the fundamental elements of human settlements" (11 General Principles) and suggests the responsibility of the State to "take necessary steps to maintain under public control the use, possession, disposal and reservation of land".

Land, Property Rights and the New Constitution

The Declaration also suggests that land is one of the "most important" resources in a State. In the Declaration's Guidelines For Action, it is stated that: "The use and tenure of both urban and rural settlements should be subject to public control" because of the limited supply of land. The guidelines suggest agrarian reform policing is part of an essential base for "integrated rural development".

The various human rights instruments provide further normative guidance, although the definition and scope of the notion of property and entitlements is disputed to some degree. The Universal Declaration of Human Rights (UDHR) does not refer specifically to property in the form of land, but its famous provision (Article 17) holds that: "Everyone has a right to own property ..." and that "no one shall be arbitrarily deprived of his property".

The European Convention on Human Rights (1952) [Protocol] does not use the term property in terms reflective of Article 17 of the UDHR, indeed it does not specify a right to acquire property at all. It is worth quoting the relevant part of this provision:

Every natural and legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest ... The preceding provisions shall not, however, impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with general interest ...

The provision does not add up to a human right to ownership. It rather assumes possessing rights (a property interest conditioned by regulation in the public interest).

Article 21 of the American Convention on Human Rights holds that all have the "right to use and enjoyment of his property", but that this interest may be subordinated in the common interest; it also indicates that the deprivation of property entitles the person deprived to have "just compensation". The American Declaration on the Rights and Duties of Man anticipates the relationship of property to second generation human rights. Article 23 states that:

Every person has a right to own such private property as meets essential needs of decent

living and helps to maintain the dignity of the individual in his home.

The Special Rapporteur on the Regulation of Economic, Social and Cultural Rights concludes that Article 23 more than any other human rights - property provision "approaches the issue of property from the perspective of a necessary entitlement to fulfil decent living and dignity" (Supra at 46).

Article 17 of the UDHR is both controversial and ambiguous. Must this article's prescription be read in conjunction with the other provision in the UDHR, including economic, social and cultural entitlements, as well as the 'developing' human rights to development? Or must it be read disjunctively, in isolation, standing alone without the interpretative guidance of other provisions in the UDHR? And what is 'property' for the purpose of the UDHR or human rights generally?

If the right to property is read disjunctively, standing apart from the other provisions in the UDHR, the following consequence might occur. Since property has a close affinity with effective power, and is by itself an important base of power, an unqualified right to property could be seen to disparage the other rights in the UDHR.

Hence we are left with the unenviable task of holding that the definition of property in Article 17 must be read in light of all the other provisions in the UDHR - its meaning is to be derived from the relevant context - community context within which all the other enumerated rights function. Here the scope of the right will then be a variable one, subject to interpretative standards and intellectual dexterity, but guided by the overriding goal values implicit in the human dignity concept.

The trend in prescription relating to the human right to property has retreated from the bland literalism that might be used to construe this provision. The European Convention focuses on possessory interests in property. The American Convention focuses on 'use and enjoyment' interests in property. The American Declaration which is the most consistent with the evolving understanding of the so-called human right to property constrains the human right property interest to the realisation of economic, social and cultural rights, or in more contemporary terms a right to development, at least in terms of basic needs

Land, Property Rights and the New Constitution

or interest.

With regard to interests in land, while there is a near universal awareness of the centrality of land allocation to poverty, food security and allied socio-economic deprivations, there is also a recognition that the land interest is deeply intertwined with the public interest and the common interest of a nation as a whole.

Thus the prescription supports land reform, allocation, use, development and planning to ensure this vital resource is utilised with maximum efficiency, that it is preserved for generations and that the central role of land and agrarian reform in rural development is a vital element in any viable development agenda that seeks to improve the living standards of the exploited and impoverished masses, the rural underclass of the world.

As the Special Rapporteur himself wrote:

Without adequate legal tenure the threat of eviction or displacement never ceases and the possibility for all sectors to exercise individual self-determination and plan for a future are severely curtailed.

The problems of land, human rights and the plight of the urban landless cannot be ignored. A single quote from the World Commission on Environmental Development (Our Common Future) will illustrate the conflicts between emerging demands in the sphere of economic human rights and the problems of law, property and governance on the ground:

When half or more of acting work force has no chance of attaining a legal plot on which a house can be built, let alone of affording to buy or rent a house legally the balance between private land ownership rights and the public good must be quickly rethought (Supra p.47).

Land Rights and the Right to Development

Land allocation, use and planning is intimately bound up with the prospects for freezing or enhancing a community's capacity for development. Land should be looked at not as some kind of reified, abstract juridical construct, but as a fundamental and

important resource implicating an unfolding array of entitlements and interests.

General Assembly resolution 41/128 December 21, 1986 declares a Right to Development. It recognises that

development is a comprehensive economic, social, cultural and political process, which arrives at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

From this perspective, land as a resource is in effect, from a functional point of view, a base of important economic, social and political power since the wise use and deployment of its capacities and socio-cultural, as well as economic potentials are central to such issues as:

- * International security (the importance of territorial boundaries)
- * Housing and shelter - standard of living issues
- * Communications
- * Industrial uses
- * Food security
- * Environmental and eco-social values
- * Commodity interests for security, access to credit, finance, capitalisation etc.
- * Cultural identity in its many forms has a 'land' component
- * Historical preservation
- * Family security (tied to having shelter and the right to housing)

This resolution defines the right to development as

an inalienable human right by virtue of which every human person and all persons

are entitled to participate in, contribute to and enjoy economic and social development, in which all human rights and fundamental freedoms can be fully realised.

Recently President Arias of Costa Rica visited the University of Florida and addressed an audience of scholars on the twin issues of democratic transition and development in Latin America. This is how he saw the challenge of the right to development:

Human development entails the peoples opportunity to invest in the unravelling of their capabilities - in their living, health, education and food priorities. It also means for the people the exercise of freedom, the participation in public policy decisions and the enjoyment of a safe environment.

How can the resource of Latin America be allocated most efficiently toward these goals? It has been said, with good reason, that human development depends on the internal measures taken to re-define priorities in the utilisation of resources. Since this is precisely what we mean when we pledge for the re-allocation of military expenditures to human development goals.

Oscar Arias Sanchez, 'Proposals For Human Development in Latin America', *the Latin Americanist* 28 (1) 1992(3).

It would be useful to put the issue of land reform, allocation, planning, use and economic justice within the framework of the broad outlines, now emerging with coherence and insistence, of the human right to development. The obvious advantage of this suggestion is that all the particular proposals and initiatives for land reform, for rural justice and equity would then be explicitly related to a developmental agenda with definite goals and objectives to be realised by diverse, often experimental, hopefully innovative and effective strategies of intervention.

The condition of land deprivation and mis-allocation is not a function of 'perfect' market-inspired competition. It was and remains a function of State intervention. It will require determined levels of State intervention to rectify the situation.

But rectification without a developmental agenda will

render diffuse and toothless efforts to render mass economic equity on the massive scale that it requires. The human right to development lies at the heart of the claim of South Africa's landless agrarians to a dispensation that in form and in fact honours and respects their right to economic dignity.

The Constitutional Protections for Ownership and Property Interest: Some Concluding Thoughts

The question of the role of an economic dispensation, or of crucial normative guidance about that dispensation, is a vitally important part of South Africa's present constitutional debate. There are two policy questions that have persistently percolated to the surface of informed debate. Both of these issues are of legal-policy salience and are frequently discussed in terms of fundamental, constitutional salience.

First, there is the problem of the apartheid-produced regime of poverty, dispossession and landless economic privation. This condition is made immensely more complex because of the widely-held perception that the core dimensions of this problem are man-made, occasioned by the extravagant interventions of grotesque social engineering. This is often symbolised in the Verwoerdian nightmare of a social process of perfect ethnic (racial) purity that also ensures hierarchy, i.e. white supremacy, not even paternalism or any other form of control, but pure and simple dominance.

Can the founding 'persons' of the new constitutional dispensation create a constitution that does not juridicalise an economic floor, a core, minimum standard of living that at least softens the brute hard economic edge that is apartheid's bequest to the poor, the rural landless in particular?

Since fundamental rights, in general, are formulated around the basic requisites for a decent, democratic society that honours a core 'minimum' of mutual reciprocal respect, such a 'minimal' level of economic insurance may seem to be a requisite for a constitutional dispensation that has some level of correspondence with that core expectations of South Africa's masses, viz. that the constitution gives vital normative guidance about, not only political survival, but vitally, material survival, economic survival.

Land, Property Rights and the New Constitution

While there is complexity about the precise form and level of decisional intervention that is to give such a provision 'life' and 'meaning', the idea of a minimalist social charter must in this day and age be an uncontroversial thing.

The real issue to be put on the constitutional agenda is a slightly different one - an issue that is tied to the 20th century idea of progress and not the 17th century idea of 'protecting' rights in a static society. That issue is, as already indicated, the scope and importance of a right to development as a constitutional directive or prescription.

The central idea behind the conception of a human right to development is this. A tenet of the fundamental expectations of law, morality and basic community policy, is that there is:

- * a clear commitment to social progress, to the progressive enlargement of the production and distribution of all the goods, services, honours and opportunities;
- * a deep commitment to the highest level of both participation, productivity and enjoyment of the material, cultural and spiritual patrimony of the whole nation.

Thus the right to a sustainable level of material existence must be tied to the idea of progress - of development to endure.

The second issue is the status of the property holdings of existing property owners, especially in this context, land holdings and interests related to land use. These holdings, as earlier indicated, come with an unfortunate pedigree of historic dispossession, often through the use of force, frequently with the aid and comfort of 'legal' validation.

Moreover, the recent history of statal apartheid and the mass removals programme, the Group Areas Act and the urban dispossession, the most recent 'privatisation' mania, which is simply a statal give-away to the preferred class of whatever is left of a public patrimony.

These all conspire to raise a serious credibility question about the economic foundations of transition and to cloud seriously the good faith of certain negotiators, who may be accused of buying time to

complete the give-away that the privatisation agenda has set for itself.

Of course there will be land reform, and of course there will be 'taking' of 'property', because whatever the political and military foundations of 'ownership' and 'title' are, the neutral majesty of the Roman-Dutch law will confer 'title' and 'ownership' regardless of whether the property was acquired by the economic subterfuge of 'privatisation' or other transparent scheme.

Sadly, the promised billions of World Bank and E.C. dollars and marks will no doubt be used to pay either prompt, just and adequate compensation, or appropriate compensation for takings of their properties when they are non-discriminatory and for a public purpose.

The term subterfuge was used to describe the policies of privatisation. This may be too mild. The idea of 'privatisation' (the disposal of public assets) in the context of the expropriatory political economy of apartheid, a political economy still largely in place, is not simply a fraudulent act, it is an act of economic infamy. This scenario is being assayed against the demand of the beneficiaries of apartheid's economic dispossession programme that the 'property' rights of the expropriating group lie entrenched as a constitutional prescription.

Protecting property rights in a constitutional document is neither new nor novel. Protecting constitutional rights to property acquired by the policies and practise of the political economy of apartheid has no international or comparative precedent.

It should be parenthetically noted that the property rights John Locke sought to elevate to the status of natural rights were the property acquired by industry, imagination and creativity, not simply associated with acquisition by expropriation and subterfuge. Lock's apple gatherer did not get his apples by way of a group areas act.

This has raised a serious question about the 'form' of property protection that ought to be constitutionally enshrined in the new dispensation. Must the constitution protect all forms of property indiscriminately? If protections are to be limited, how are they to be limited and whose property interests are

Land, Property Rights and the New Constitution

to be preferred - those who have benefited from the apartheid scheme or those who have been its victims? To pose the issue in such stark terms is not to underrate the complexity of the problem.

Neither the landed nor the landless classes are capable of reciprocally dominating each other, hence neither is capable of imposing its agenda on the other without compromise. Certainly compromise in this kind of context has a stinky aura about it; yet the parties must either negotiate or fight. If they fight, the conceptions of a winner and a loser may be illusory. If they compromise, they are mutually selling out white supremacy and compromising on racism and apartheid.

Politics does dirty the wings of angels and the frames of ideological purists. But a compromise is not a sell-out. Each side will seek to have the kind of compromise that will permit them to live and fight on another day, in another arena where the conditions may favour one side or the other. And it is crucial that the deal struck realistically enhance rather than foreclose the evolution of a more promising vista of economic justice.

The paper concludes by indicating what the author thinks is a more rational approach to this issue. It seems that the right to property including the right to material survival are really part of a larger issue that includes a rational use, allocation and planning of the major resource base of a community.

To protect both property and survival makes sense only if one explicitly directs the entire bill of rights and constitutional frame to a human right to development, as earlier defined in this paper. Without the normative guidance of this kind of context, property becomes blind, deaf and dumb and its connection to social justice, economic ordering and progress a random and occasional datum.

A right to property will have to be put into the new constitution, if there is to be one. This right will envision compensation for takings and possibly more. The constitution may not tell us what the standards of compensation are or must be for a taking and most of the words and symbols devised by lawyers can easily become 'market' compensation in the hands of judges whose legal outlook has historically been myopic and whose form of discourse has been austere formalism.

Clearly the standards of compensation are going to be a function of who the interpreters are and what indices they use to define the judicial role in this context.

Here it may well be useful to briefly compare the evolution of the American substantive due process doctrine because, whether one agrees with or dislikes American judicial practise, the experience explicitly poses the central question of the scope of judicial review in the economic sphere.

The 5th Amendment to the US Constitution holds *inter alia* that a person shall not be deprived of "property" without "due process of law". The 14th Amendment, which applies to the states, holds that no State shall deprive a person of property without due proven of law.

Historical experience of American Constitutional law has been a chequered one and at least in the context of reasonable social legislation found the court using anti-ideological agenda to undermine the competence of the states to legislate for rational economic development policies. The most notorious example of many - was *Lochner vs New York 198 US 45 25 Sct 539 (1905)*.

In this case New York had legislated the prohibition of employment of bakery workers for more than 10 hours per day or 60 hour per week. Here the court held regulations infringed the right to contract, a kind of property right protected by the due process clause of the 14th Amendment.

This 'free enterprise' property right as a 'natural law' property right read with the 14th amendment had far-reaching consequences for the democratic process in the U.S., as well as the economic recovery plan reflected later in President Roosevelt's New Deal policies.

In a dissent pregnant with wisdom about the rational allocations of competence between the elected branches of government and the courts, Holmes pointed out that judges are not the pinnacles of economic wisdom or competence:

This is a case decided upon an economic theory that a large part of the country does not entertain. If it were a question whether I agreed with that theory I would wish to study

Land, Property Rights and the New Constitution

it long and hard before making up my mind, but I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right to the majority to embody their opinions in law.

This restrictive theory of review came ultimately to prevail in a large number of categories of claim involving diverse forms of property interests.

However, the modern court has found certain areas sufficiently important that strict levels of constitutional supervision have been prescribed. These forms have covered property in the form of 'welfare payments', 'wages' under assault from State garnishment procedures 'household chattels' (repossession procedures).

Moreover, State laws also give added protection to the family home from creditors, if the home is held in the form of a tenancy by the entities (a kind of joint tenancy), and accompanying and exclusive use and possession decrees are quite common added protection for shelter rights. These latter rights are not constitutionally protected rights.

If there is a pressing need to constitutionally protect property rights, it must be done within the framework of the evolution of human rights standards including the evolving standards of the right to development. If there is a phobia about not including ownership and property interests in the new constitution as fundamental rights, then one would explicitly formulate such protections in terms of procedural review for special forms of property that go to the basic issues and survival of individuals and families.

No one should be deprived arbitrarily of their goods and possessions without procedural fairness, which respects the rules of natural justice. Those forms of possession or goods that may receive special or strict juridical review before they may be infringed would include 'wage', 'welfare payments', occupancy of home or shelter, right to not be excluded from educational rights, right to pensions and forms of social security.

The protection of these special forms of property must be prescribed and applied with due regard for

- * the right to development,
- * the interdependence of all other human rights provisions in the constitution, and
- * the heritage and legacy of past property and opportunity deprivations.

Finally, the standards of compensation for non-discriminatory takings (of land for example) in the public interest should be set at the standard of 'appropriate' compensation rather than at the prompt, just and adequate standard, since this concept of compensation is more historically and contextually realistic for South African conditions (*Permanent Sovereignty over Natural Resources*, U.N. Doc. AIRes/1803 (XVII) Dec 19, 1962).

APPENDIX

Draft Proposal

**CONSTITUTIONAL COMMISSION TO PROMOTE AND DEFEND
THE HUMAN RIGHT TO DEVELOPMENT**

**Winston P Nagan
Fikile Bam**

Background

The processes of transition envision the creation of a new constitution for a new South Africa. This charter of governance, whatever its precise form, will seek to provide for the peace, stability and prosperity of all the people of South Africa.

Some aspects of the proposed constitutional dispensation should prove to be technically unproblematic as constitutional prescriptions that are juridicially to be prescribed and applied. Other areas of crucial importance may prove to be technically problematic, as well as politically difficult.

The single area that fits this category of issues is the question of economic justice and tied to this issue is the issue of land, its allocation, uses and future dispensation, including its role in planning for prosperity, stability and, most importantly, economic justice. [For background, see: Nagan, W.P., *Resource Allocation: Land and Human Rights*, July 1993.]

The position of those who have been the primary victims of the political-economy of apartheid stands in sharp contrast to those who have benefited from their dispossession and expropriation. This kind of radical contrast between a vast, man-made 'state-designed underclass' and a small class of 'haves', whose class status in economic terms is a function not of the market, but of State intervention, patronage and privilege, is a prescription for escalating patterns of conflict.

To avoid a conflict it is important that some normative directions are given this problem in the new constitutional dispensation and that the constitution itself establishes a mechanism to secure, defend and advance the interests of the 'have-nots' to a fair share of the national patrimony.

The issue of normative guidance about economic justice for the 'have-nots' and the creation of a mechanism to promote those interests, are vital expectations that the vast majority of South Africa's economically depressed people hold for the new dispensation. Stated bluntly, South Africa's economically dispossessed people want a new deal and a constitutional scheme that will give them a new deal.

A constitution that does not creatively, honestly and effectively address the issue of economic justice will lack credibility and legitimacy, and will undermine the central authority base of a new constitution, i.e. the expectations of the people themselves.

We believe that the question of the 'protection' of property in the constitution must be seen, not only from the perspective of the 'haves', but also the 'have-nots'. Their legitimate expectations must also be constitutionally recognised and given the imprimatur of basic law.

In order to achieve this reconciliation of interests, we submit that the issue of protecting the property of the 'haves',

Land, Property Rights and the New Constitution

entrenching the entitlements of the 'have-nots' to a minimal level of material and economic survival, that the issue of land reform, rational allocation, defensible economic equity regarding land titles and allied interests, be squarely put into the context of a South African economic and social process that is forward-looking, dynamic and capable of abundance for all, rather than a static South Africa, bent on 'survival', crippling social and economic progress at the altar of a post-apartheid neo-feudalism. This means a definite commitment to the idea of progress. Allied and intrinsic to the idea of progress is its modern institutional form, the human right to development.

The widely-quoted definition of the emerging international right to development links the comprehensive view of human rights to development so that development becomes a key condition for the realisation of the comprehensive human rights agenda:

- * The realisation of the potentialities of the human person in harmony with the community should be seen as the central purpose of development.
- * The human person should be seen as the subject not the object of the development process.
- * Respect for human rights is fundamental to development.
- * The human person must be able to participate fully in shaping his or her own reality.
- * [A] degree of individual and collective self-reliance must be an integral part of the process.

[Report of Secretary General, UN Commission on Human Rights, Question of the Realisation in All Countries, UN Doc E/CN 4/1334/1979.]

The Secretary General has indicated that the conceptual basis of the right to development arises from the following interdependent conditions:

- * The international duty of solidarity;
- * The moral duty of reparation for colonial and neo-colonial exploitation;
- * Increased moral and economic interdependence;
- * World peace.

Each of these four propositions can be applied to the context of South Africa, and serve as a partial justification of a distinctively South African human right to development that must be given constitutional stature.

The second issue is not the issue of constitutional 'prescription'. This may be the unproblematic part. This latter problematic issue is the mechanism of constitutional 'application'. There is frequent misconception that unless a constitutional prescription is juridically enforceable, it is a mere hortatory statement bereft of juridical efficacy. In fact, constitutions deal with complex allocations of decisional competences of which the role of the courts is important, but not exclusive.

Implementing a right to development (a right which would encompass juridical, administrative, as well as legislative and executive decision functions) will obviously need a flexible decision-making apparatus that can play a role in promotion and agitation for the realisation of the right to development through both governmental organs, the organs of economic organisation, as well as the civil society. We therefore propose that the new constitution envision the inclusion of a the Human Right to Development.

Land, Property Rights and the New Constitution

Commission on Right to Development as a Human Right

Functions/Objectives

This Commission will serve as the monitor of all development initiatives and shall evaluate these to determine whether they advance or inhibit economic justice for the South African underclass.

It shall endeavour to promote and defend economic justice under the rule of law, conceived as the guarantor of human rights standards for all.

It shall give special consideration to the issues of material survival, in particular how the nation can move from material survival to improved living standards, opportunities for mass participation, broad based, rational access to land, security of land tenures from predatory expropriators from either the private or public domain.

Its major purpose shall be to energise the productive capacity of the people and resources of South Africa, to ensure maximum levels of popular participation in the economy of the nation, to ensure optimal levels of accountability as well as responsibility, and to cultivate decision-making capacities and competences in people on the ground to ensure their long-term participation in the material progress of the nation as a whole.

As a general goal, the Commission must promote and defend the highest levels of participation and enjoyment in the production and distribution of all the economically relevant goods, services, honours and rewards of a modern progressive society.

Research, Information, Public Opinion

From time to time the Commission will provide technical assistance to allied organisations to facilitate data-gathering, storage, retrieval, appraisal and overall evaluation in terms of established professional standards.

The Commission will also undertake to publish and distribute its reports, data and evaluations to all politically concerned bodies (legislative, cabinet, international agencies and lenders, etc). In short, it shall organise where appropriate:

- * Training investigators and research personnel;
- * Acquisition, storage, appraisal, retrieval, distribution of data;
- * Production of reports, newsletters, testimonies, petitions, and use of data to mobilise:
 - i) peoples' groups to take action;
 - ii) officials to honour civic responsibility;
 - iii) secure international support and co-operation; iv) to reach out to national and regional media.
- * Co-ordinate research work with professional groups and associations in the region in keeping with national and international Codes of Ethical Corporate and Trade Union Conduct to secure involvement in enhancement of economic justice, peace and protection of human rights and rule of law.

Advocacy

The Commission shall use its information and data base, as well as its technical appreciation of the legal rights of

Land, Property Rights and the New Constitution

the 'have-nots', to serve as a watchdog of economic abuse by governmental and non-governmental organisations.

The Commission shall take individual cases as well as the cases of groups whose basic economic rights are threatened.

The Commission shall send units of enquiry to investigate these and other problems and

The Commission shall mobilise its membership and public opinion to defend the economic human rights and security of all peoples and individuals in the nation.

The Commission may invoke the right to petition national and international agencies of decision to assist in the protection of basic economic rights.

The Commission shall also seek to create institutions of dispute resolution of impeccable integrity to petition authorities and to offer services to resolve disputes by good offices, mediation, conciliation, arbitration and *ad hoc* adjudication where appropriate.

The Institute shall make conflict resolution by peaceful modalities of intervention a major emphasis of its work, and shall seek to provide its good offices to all levels of community organisation across and within group and national lines.

The Commission shall have an arm of litigation advocacy to protect community and individual tenures of the underclass, as well as make litigation to establish lawful land and economic entitlements, and to dis-establish those that are not.

The Commission shall actively lobby the State and other organs on behalf of the dispossessed for the promotion of progressive legislation and for the defence of progressive legislation, already prescribed as law.

The Commission shall have the power to contribute to administrative rule-making processes affecting its mandate, and shall serve as a watchdog for economic justice and equity for all.

Public Education

The Commission shall sponsor awareness of economic justice in the comprehensive human rights agenda initiatives designed to educate the public, the professors, the institutions of governance and the private sector at all levels.

The Commission shall seek to provide curricula for economic human rights education in the schools, universities, professional institutes and associations.

The Commission shall encourage the generation of human rights (sensitive) codes of ethical conduct for both public and private associations, affected within the public interest in economic matters.

In particular, the Commission shall seek to popularise the instruments of human rights economic equity as part of the civic culture, through multiple channels of communication (publication, radio, television, sports, culture, etc.). Since the relationship of inter-group conflict to individual and group human rights is especially important, special emphasis will be given to pluralistic values, cultural diversity, and respect for minority rights as integral to the human rights ethics.

Land, Property Rights and the New Constitution

Rights of Women and Children

Economic privation creates special problems in development for women and children. Extreme poverty makes them specific targets of victimisation and physical or psychological destruction.

The Commission shall give special consideration to the economic victimisation of women and children.

The Commission shall give special concern for the strategies and techniques of intervention to rehabilitate and reconstruct the well-being, dignity and respect for women and children in the nation.

The strategies of intervention shall include, within the framework of economic development, allied components of an integrated programme that includes:

- * medical and psychological services,
- * legal and administrative counselling,
- * educational and cultural activities to enhance the dignity, respect, and basic human rights of women in all spheres;
- * finally, the juridical advance of women's rights to full equality in all spheres of social and political life.

Organisational Structure

The foregoing outline of functions and objectives have as a major purpose the promotion and defence of the human right to development in the context of culture, peace, and human dignity. The structure of the organisation as outlined below is meant to secure as effectively as possible the goals of the Commission.

Members of the Commission (number, representativeness, how put in place, tenure, etc.)

The organisation shall comprise commissioners whose national, social or political affiliations reflect all concerned communities.

The Commission shall, when fully formed, comprise 24 individuals whose standing, reputation for integrity, judgement and experience in promoting economic justice development, peace and human rights are exemplary.

The initial Commission may comprise less than 24 members, but not less than 8 members. This is necessary in order to get the Institute functioning. These eight members, who will constitute the inaugural Commission, shall be appointed by the [to be determined]. Commission members will self-select their successors until such time as proper elections are held for Commission positions. These selections will occur with the advice and consent of the *ad hoc* working group.

When the Commission is a properly function entity, Commission members will be elected for an initial five-year term and be subject to re-election for one further five-year term.

The Commission shall elect a chairperson by a majority vote. The Commission shall also elect a treasurer and a Commission secretary. The Commission shall have five standing functional committees and may create as many sub-committees, task forces, and *ad hoc* groups as is necessary to perform its functions. The five functional standing committees shall be:

1. The International Affairs and Liaison Committee;
2. The National and Regional Programmes and Liaison Committee;

Land, Property Rights and the New Constitution

3. The Administration and Finance Committee;
4. The Membership Service Committee;
5. The Committee on Publications, Public Opinion and Media Relations;
6. The Committee on Legislation;
7. The Committee on Litigation, Advocacy and Conflict Resolution; and
8. An ombudsman (office) to protect the 'have-nots' from rampant exploitation and abuse.

National Secretariat

The National Secretariat shall comprise of an Executive Director, a Deputy Executive Director and Associate Directors for each national regional, or other such geographic entity as determined by the Executive Director.

The Executive Director shall be appointed by the Commission and shall be responsible for the day-to-day management of the Institute. The terms of employment of the Executive Director shall be determined by the Commission.

The Executive Director shall be charged with all decisions concerning the administration of the Institute. It is envisioned that wherever the permanent home of the National Secretariat is located, the Secretariat will establish such offices throughout the nation to adequately serve the needs of all economic justice. The establishment of strong regional offices of the Secretariat shall serve the functions of raising expectations of peace and human rights at the grass-roots level and shall also serve to decentralise important functions of the centre to secure maximal involvement of the regions in the work of the Commission.

Membership and Volunteers

The Commission shall have the competence to establish a membership base open to all peoples who fall within its mandate. Membership is restricted to those persons who have never been implicated in doing or advocating the commission of crimes against the peace, universal war crimes, crimes against humanity, or human rights transgressions.

Adults may apply for membership and as a consequence of membership shall be eligible to stand for election to the Commission. It is anticipated that there will be a membership fee for membership within the organisation. Individuals may be exempt from membership fees if they are *bona fide* students, disabled, aged, or their personal circumstances make it economically difficult to pay membership fees. High school students may become associate members who can participate in the activities of the Commission, but who will not be eligible to vote until they attain the age of majority and meet other criteria of working members.

International Advisory Council

An International Advisory Council shall be established to provide technical assistance and advice, to facilitate linkages with regional and international organisations concerned with international development and international peace, food security, and human rights as well as important NGOs and interest groups with special expertise and interests in areas that fall within the scope of the Commission's objectives and goals.

Land, Property Rights and the New Constitution

The Council will comprise prominent international figures of established expertise, integrity and concern for international peace, social progress, food security and respect for human rights and fundamental freedoms.