LAND, PROPERTY RIGHTS AND THE NEW CONSTITUTITON

21 -23 May 1993

Edited documentation of issues discussed during a three-day conference held at Sanbonani, Eastern Transvaal from 21 to 23 May 1993 and hosted by The Community Law Centre, University of the Western Cape. The conference was sponsored by the Friedrich Ebert Foundation, the Swedish International Development Authority, and the Danish International Development Authority

Edited by: Minnie Venter
Minna Anderson

The contents of this document are intended as a summary of speeches and panel discussions at the conference. They represent the interpretations of the documentalist and do not necessarily reflect the views of the sponsors or organizers.

Typesetting and design: Stefan Coetzer
Co-operative Designs: (021) 686 8800

TABLE OF CONTENTS:

Chapter 9

SHOULD THERE BE A PROPERTY CLAUSE?

Implications of The Constitutional Protection of Property in The United States and The Commonwealth

Matthew Chaskalson

1. Property and Inequality

PROPERTY is the primary source of inequality in contemporary society. Constitutional entrenchment of property rights has invariably amounted to the constitutional entrenchment of privilege and inequality.

In our country, with its history of gross inequality and discrimination, the constitutional protection of property rights makes very little sense. The protection of existing property rights would be extremely unjust. It would give constitutional security to the distribution of land produced by colonial conquest and apartheid. It would consolidate the massive existing disparities of wealth in society in such a way as to subvert any right to equality under the constitution.

These are not just issues of morality, but also have a political significance. There is currently widespread recognition that existing patterns of land-ownership are illegitimate and so vastly unequal as to be inherently unstable.

Farmers organisations, forest companies and groups of land owners are engaged in negotiations with black land-claimants, whether removed communities, labour tenants or farm workers, to reach settlements whereby the black groups get ownership of a portion of their land. The South African Agricultural Union (SAAU,) which represents white farmers has supported the call for a land-claims court to redress grievances of the past.

A feature of the land-claims court model is that parties to a dispute attempt to reach settlement between themselves before the issue gets referred to the court. The over-arching context is that these land-owners believe that they cannot defend their property against future political intervention and arbitrary land-invasions, unless they take steps to address the gross inequalities of the past and stabilise the situation by recognising black vested rights to part of their land.

In these negotiations, African land-claimants are saying that as long as white land-owners are prepared to *share* with them, they will reciprocally recognise their land-rights. If the ANC is to endorse existing white title-deeds as legitimate property rights, the political climate, in which these pragmatic negotiations and compromises are taking place, will change and white land-owners will revert to their previous threats of eviction.

The constitutional protection of property poses a broader political problem, which has been observed by two of our judges. Thus Judge Leon has warned that the constitutional protection of property rights could lead to widespread popular disenchantment with a bill of rights[1]. Judge Didcott expresses an even graver concern:

> "What a Bill of Rights cannot afford to do here ... is to protect private property with such zeal that it entrenches privilege. A major problem which any future South African government is bound to face will be the problem of poverty, of its alleviation and of the need for the country's wealth to be shared more equitably ...
>
> 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.[2]"

2. Property, Inequality and Constitutional Conflict in India

The fears of Judge Didcott are borne out by the constitutional history of post-independence India. Nehru regarded poverty and inequality as the most important issues facing independent India. He warned in the Constituent Assembly debates, "If we cannot solve this problem soon, all our paper constitutions will become useless and purposeless[3]".

Nevertheless, in a political compromise with the conservative wing of the Congress Party, he conceded the inclusion of two property protection clauses, Articles 19(l)(f) and 31, in the Constitution. Article 19(l)(f) provided that "all citizens shall have the right ... to acquire, hold and dispose of property". It had to be read with Article 19(5), which authorised the State to impose reasonable restrictions on the right to property. Article 31 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 payable[4]."

Nehru actually piloted these two articles through the Constituent Assembly and his speech to the Assembly shows that he envisaged that the clauses would really only provide an extremely limited protection to property.

Nehru said that the State should provide compensation for petty acquisitions of property, but that large-scale social engineering schemes affecting millions of poor people could not be subordinated to the property rights of a few individual landowners. In cases of social engineering, compensation should be equitable when viewed from the perspective of society, rather than of the individual. The judiciary would not be able to question amounts of compensation unless there was gross abuse of law.

The judiciary were to prove Nehru wrong. The Indian judges treated social engineering schemes as falling clearly within the scope of their review power to protect property rights and the first twenty-five years of the Indian Constitution were dominated by a struggle between Parliament and the courts over property rights.

This period saw a sequence of judgments invalidating legislation aimed at social reform, followed by constitutional amendments to overrule the judgments[5]. In this process the Supreme Court lost most popular support and constitutional democracy under judicial review was discredited to the point where legislation was prepared to do away with the institution of independent judicial review altogether[6].

Conflict between the Court and Parliament over property rights began almost immediately in *Kameshwar Siniih vs Province of Bihar* AIR 1950 Pat 392. Article 31(4) protected legislation aimed at the abolition of the zwnindar system from the scope of Article 31(1)[7]. The Patna High Court invoked the equality clause in Article 14 to invalidate legislation providing for a graded system of compensation for land expropriated from the zamindars[8].

This reliance on equality to protect privilege provoked the passage of the First Amendment, in which Parliament expressly excluded *zamindati* abolition and State acquisition of agricultural estates from the protection of Articles 14, 19, and 31.

Nevertheless, in *State of Bihar vs Kameshwar Singh* AIR 1952 SC 252, the Supreme Court still managed to reject the constitutionality of the *Bihar Land Reforms Act*, characterising it as an act which authorised confiscation under the guise of acquisition of property.

Parliament responded by passing the Seventh Amendment to overrule this judgment. The Court then set back land reform again in *Kunhikoman vs State of Kerala* AIR 1962 SC 723 and *Krishnaswami vs State of Madras* AIR 1964 SC 1515. These cases invalidated legislation setting a ceiling on

agricultural landholdings.

The Court achieved this by giving an extremely restricted meaning to 'estate' in the First Amendment. Parliament responded by passing the Seventeenth Amendment to extend the operation of the First Amendment to all agricultural landholdings, whether or not they constituted 'estates'.

The Court's response to Parliament's repeated amendments of the Constitution to circumvent decisions on property rights was *Golak Nath vs State of Punjab* AIR 1967 1643. A majority of six to five judges in *Golak Nath* held that the fundamental rights, including the right to property, were sovereign. Not even a two-thirds majority of Parliament, exercising its power to amend the Constitution under Article 368, had the authority to infringe the fundamental rights. Thus any constitutional amendment, which purported to repeal or even to restrict a fundamental right, was invalid.

The Court conceded that it would be impossible to undo all the amendments to the Constitution that had already been passed, which fell foul of this rule of sovereignty of the fundamental rights, but it insisted that any future amendments which did not satisfy the rule would be invalidated.

While the Court and State had been fighting over the constitutionality of land reform legislation, they were also engaged in a battle over the meaning of compensation under the constitution. Nehru and the Congress Party in the Constituent Assembly had deliberately chosen not to qualify 'compensation' in the constitution with 'just' or 'adequate' and they clearly believed that in appropriate circumstances the Constitution allowed expropriation with compensation, which did not amount to market value. Once again, the courts took a different view.

In *State of West Bengal vs Bela Bannedee* AIR 1954 SC 170, the Supreme Court read into Article 31 the notion of just compensation and held that the Constitution demanded payment of compensation at market value.

The Fourth Amendment was passed to overturn this judgment. It stated explicitly that the adequacy of compensation was non-justiciable under the constitution. The Court simply ignored the obvious meaning of this Amendment. In *Vajravelu vs Special Deputy Collector* AIR 1965 SC 1017, Subha Rao CJ ruled that, although the adequacy of compensation was non-justiciable, the Court retained the power to enquire into the relevancy of the principles according to which the legislation provided for compensation.

If the legislature had been motivated by irrelevant considerations, its legislation was unconstitutional. As the Court considered market value the only consideration relevant to the quantum of compensation, this judgment had the effect of reinstating market value as the measure of compensation demanded by the constitution.

The Court in *Vajravelu* went even further than this. Noting that the Land Acquisition Act of 1894[9] provided for compensation at market value plus 15 percent, the Court held that the availability of two different modes of calculating payment of compensation on expropriation, infringed the equality provision in Article 14 and thus any legislative provision less favourable to the landowner than the Land Acquisition Act was held to be unconstitutional.

The principles of *Vajravelu* were confirmed in *Cooper vs Union of India* AIR 1970 SC 564. This is generally referred to as the Bank Nationalisation case, because it concerned the Ghandi government's attempt to nationalise the 14 largest commercial banks in India.

The judgment of Subha Rao CJ in Golak Nath illustrates the attitude of the Court to constitutionalism and democracy during these struggles over property rights:

> "No authority created under the Constitution is supreme and all the authorities function under the supreme law of the land. The rule of law under the Constitution has a glorious content ... Having regard to the past history of our country, [the Constitution] could not implicitly believe the representatives of the people, for uncontrolled and unrestricted power might lead to an authoritarian State. It, therefore, preserves the natural rights against the State encroachment and constitutes the higher judiciary of the State as the sentinel of the said rights ...[10] "

The Hobbesian fear of the elected representatives of the people, coupled with an appeal to natural law, are

recurrent features of the Supreme Court judgments of this period. The fact that the Court chose to confront the potentially authoritarian State by protecting property rights against social reform legislation is significant. Many commentators attribute this to the hostility of privileged and conservative judges to redistribution of wealth[11].

If this is not the case, there is tremendous irony in the fact that when the authoritarian State actually did rear its head, the Court did nothing to confront it. During the Ghandi government State of Emergency from 1975 to 1977, the Court was totally compliant towards the State. The irony is compounded by the fact that even if the court had had the will to confront the State during the Emergency, it lacked the political authority to do so, primarily because it had been totally discredited by the attitude it had taken in the struggles over property rights.

To return to those struggles, soon after the Bank Nationalisation judgment, the Congress Party won two-thirds majorities in both houses, in the February 1971 elections, which were fought, in part, on a platform of social reform.

The Congress election campaign had been characterised by strong anti-judicial rhetoric and soon after the election victory, it struck back at the judges with the 24th and 25th Amendments. The 24th Amendment overrode *Golak Nath* by making the fundamental rights subject to Parliament's amending power under Article 368. The 25th Amendment was aimed at the Bank Nationalisation judgment by attempting, once more, to make the question of compensation for takings of property non-justiciable.

The constitutionality of these two amendments was raised in *Kesavananda vs State of Kerala* AIR 1973 SC 1461. The struggle between the courts and the State over property rights thus came to a head in Kesavananda, which had also to consider the broader issue of the constituent power of Parliament to amend the constitution. *Kesavananda* was heard by a full bench of 13 judges.

The outcome of the case can be summarised as follows: on the amending power of Parliament, a majority of seven judges held that Article 368 did not allow Parliament to abrogate the basic features of the constitution - the minority of six rejected the distinction between essential and non-essential features of the Constitution altogether and suggested that Article 368 extended to the entire Constitution.

However, Khanna J differed from his fellow majority judges by holding that no single fundamental right, least of all the right to property, could be considered an essential feature of the constitution. Thus the validity of the 24th and 25th amendments was upheld.

Kesavananda represented a political compromise between Court and State. The Court recognised the validity of the 24th and 25th amendments and conceded that the right to property was not a fundamental feature of the Constitution, but it retained its right to review all amendments in terms of their compatibility with the essential core of the Constitution.

The compromise, however, did not end the political confrontations. The day after judgment was handed down in *Kesavananda*, Indira Ghandi appointed AN Ray as Chief Justice. Ray's primary qualification for this job seemed to be that his judgments had consistently favoured the State.

This was not the only reason his appointment was controversial - it was a break from established convention in that he was appointed over the heads of three more senior judges, all of whom promptly resigned in protest.

By the following year, the authoritarian State about which the courts had repeatedly worried was finally rearing its head. Although the Ghandi administration continued to accuse the Court of being an enemy of 'progressive' forces in India, 'progressive' had now become a euphemism for the partisan interests of the Congress government.

The free enterprise and anti-left convictions of Sanjay Ghandi had dominated the Congress Party since the death of Mohan Kumaramangalam in May 1973, and political repression was being used by the Central Government on a scale unprecedented in post-colonial India.

By June 1975, Indira Ghandi's political survival looked unlikely. The Congress Party had been humiliated in State elections in Gujarat and she had been convicted of corrupt electoral practices by the Allahbad High Court. Pending her appeal to the

Supreme Court, she was prevented from sitting in Parliament under Indian law.

Ghandi's response to this situation was to declare a State of Emergency on 26 June 1975. Thousands of political leaders, including many of her opponents within the Congress Party, were detained and rigid press censorship was introduced. The rump Parliament retrospectively repealed the legislation under which Ghandi had been convicted. It also passed the 39th Amendment which removed the jurisdiction of the Supreme Court to deal with complaints of electoral offences against the Prime Minister and the Speaker.

The Supreme Court unanimously upheld Ghandi's appeal by relying on the repeal of the legislation[12]. It would not, however, accept the 39th Amendment, which it found to be violative of the fundamental features of the Constitution, in that it impaired free elections. This show of defiance by the Court prompted the circulation of government proposals to introduce a new Constitution, in which the institution of independent judicial review would not be recognised[13]. The Court, suitably chastised, responded with a series of executive-minded judgments in *habeas corpus* cases brought by or on behalf of emergency detainees[14].

When Ghandi lifted the Emergency and allowed elections in March 1977, her party was overwhelmingly rejected by the electorate in favour of the Janata Party. Janata was a loose coalition of anti-Ghandi forces with a platform based on a commitment to citizens' rights, the rule of law and, most significantly, the abolition of constitutional protection of property rights.

The Indian experience is of particular relevance to South Africa, because post-independent India faced problems of widespread poverty and a colonial legacy that are similar to those which the country will face under a democratic government. Nevertheless, it should be borne in mind that India is not the only country to experience major constitutional problems over the issue of property rights.

The confrontation between the US Supreme Court and President Roosevelt over the New Deal legislation provoked the most serious constitutional crisis in the United States since the US Civil War. This confrontation was essentially a confrontation over the power of the court to frustrate social welfare legislation by invoking property rights[15].

3. Constitutional Protection of Property and the Regulating State: the Arbitrary Jurisprudence of the US Supreme Court.

The New Deal constitutional crisis emphasises another problem with the right to property. It is inappropriate to the requirements of modern society where a large degree of State interference with property rights is inevitable. The laissez faire ideology upon which the constitutional protection of property is premised cannot be reconciled with 20th century reality.

The modern State exercises a regulatory function that is incompatible with an unqualified right to property. The right to property will thus pose particular difficulties for any constitutional court. Judges recognise that substantial State interference with property rights must be allowed, but they are placed under a constitutional duty to protect property.
This tension is difficult to resolve. It tends to produce Constitutional case law, characterised by a high level of arbitrariness, as the United States experience illustrates.

The protection of property in the United States Constitution is found in the 5th and 14th Amendments. The 5th Amendment provides that "No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The 14th Amendment extends the rights granted by the 5th Amendment so that they are effective as against the individual States.

The US Constitution therefore protects property in two different ways. It prohibits deprivations of property unless they take place in accordance with due process of law (the 'due process clause') and it prohibits takings of private property for public use unless just compensation is paid to the party, whose property is taken (the 'takings clause').

The US case law distinguishes between the police power and eminent domain. This distinction corresponds broadly to the distinction between deprivation and taking. The State exercises the police power when it interferes with a private person's

property rights, so as to regulate the conflicting exercise of these rights with other private parties' property rights.

An obvious example of the exercise of the police power is urban-planning legislation. Ordinarily no compensation is payable to the victim of an exercise of the police power. In the case of eminent domain, the State actually expropriates private property to use for a public purpose. Compensation is always payable to the victim of an act of eminent domain.

The problem area in the US law relates to exercises of the police power which the Supreme Court characterises as acts of constructive eminent domain or inverse condemnation, for which compensation must be paid. These are the 'takings' in which the government does not acquire property.

The first case in which the Supreme Court held that an exercise of the police power amounted to a taking of property was *Pennsylvania Coal Co. vs Mahon* 260 US 393 (1922). Here the plaintiffs sued to prevent the company from undermining their house so as to cause it to subside. The plaintiffs had bought the land from the coal company on terms, which reserved to the company the right to undermine and which indemnified the company for all damages arising out of undermining. After the purchase, in 1921 Pennsylvania passed the *Koller Act*, which prohibited the mining of coal in a manner which caused subsidence. The plaintiffs relied on the act which, they claimed, overrode the terms of their agreement. The company claimed that the act was unconstitutional, because it took their property without compensation.

The Act would appear to have been a perfectly legitimate exercise of the police power, but the court found in favour of the company. The reasoning behind the majority judgment was set out by Justice Holmes at 415:

> "The protection of private property in the 5th amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment... When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking."

The majority held that the law in question did go too far. This was because it made the mining of coal unprofitable which was equivalent to appropriating or destroying the coal. In its interpretation of the 5th and 14th amendments, the majority decision ignored the distinction between the ordinary meanings of 'deprive' and 'take'. This was noted in the dissenting judgment of Brandeis:

> "But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it."

The Supreme Court confirmed the *Pennsylvania Coal Co.* approach to the meaning of 'taking' in *Kimball Laundry Co. vs United States* 338 US 1 (1948). Here the company sued the US army for goodwill, which had been lost when the army requisitioned its laundry for use by the Quartermaster during the Second World War. In a minority judgment Justice Douglas stated that there was a clear distinction between deprivation and taking and that compensation is only payable in the case of the latter. As the US army did not acquire the goodwill, he believed that they should not have to pay for it.

The majority decision, however, rejected the rigid distinction between deprivation and taking. Since *Kimball Laundry Co*, it has been settled law in the United States, that a deprivation of property can, in special circumstances, amount to a taking, for which just compensation must be paid. The problem arises in trying to determine which circumstances are special.

In *Pennsylvania Central Transportation Co. vs New York City* 438 US 104 (1978) at 124-131, the

Supreme Court set out some of the factors, which are relevant to the question of whether a deprivation amounts to a compensable taking. These included the economic impact of the regulation and the extent to which it interferes with investment-backed expectations of the property owner.

The character of the State action is also important - physical invasion by Government is more likely to be a taking than interference arising out of public regulation of economic life for the general good. Where the interference is exercised for the 'health, safety, morals, or general welfare' of the community, a court is reluctant to demand compensation, even when the most beneficial use of the property is prohibited.

However, where there is an unduly harsh effect on the property of the applicant, particularly where its economic value is destroyed almost entirely, there is a tendency to require compensation. The court stressed that the object of this enquiry, is the effect of the interference on the property as a whole, and not on the portion of the property which is subject to the interference.

Pennsylvania Central Tranportation concerned Grand Central Station in New York City. The City had declared the station a city landmark under the *New York Landmarks Preservation Law*. This made it subject to a range of extra regulations, one of which required the approval of the Landmarks Preservation Commission for any future building on the site.

The owners wanted to develop an office building above the station, but they could not obtain permission from the Commission to do so. They argued that the *Landmarks Law* was unconstitutional in that it deprived them of their property right to develop the land on which the station was situated.

Finding that the creation of national landmarks was generally an acceptable exercise of the police power, the court dismissed their claim. In so doing, the court placed great stress on the fact that the landmark regulation did not interfere with any of the present uses of the building, which remained capable of generating a profit for its owners.

There is support for the general propositions set out in *Pennsylvania Central Transportation Co.* in the recent cases. In particular, the court has been eager to compensate property owners, whose investment-backed expectations have been destroyed by a regulating statute which destroys the value of the property.

Environmental legislation has often fallen foul of the courts on these grounds. In *Whitney Benefits* 18 CICT 394 (1990) the Claims Court awarded a mining company $60 million in compensation for coal deposits which, following the implementation of legislation prohibiting strip-mining, could no longer be profitably mined.

In *Rybachek vs United States* 33 ERC 1473 (1991), an Alaskan mine owner sued the Environmental Protection agency for $52 million in compensation, after water pollution regulations had rendered his mine unprofitable. The Claims Court upheld his claim subject to proof of damages.

Even planning legislation has been successfully challenged for its effects on the value of a property. In *First Lutheran Church vs LA County* 482 US 304 (1986) the applicants challenged the validity of a Los Angeles ordinance. After serious floods had devastated land under their jurisdiction, the LA County prohibited the construction and/or reconstruction of any building in an interim flood protection area, which included land on which the applicants ran a campground.

The applicants sued for inverse condemnation, claiming that they had been deprived of all use of the relevant land for the duration of the prohibition. Although the ordinance would seem to be an acceptable exercise of the police power, the Supreme Court characterised it as an inverse condemnation, which demanded compensation for the full duration of its existence[16].

As the Canadian Bar Association points out, these decisions tend to reduce everything to its monetary equivalent:

> "Land use can be regulated, but only if the landowner can still make money from the land. If the only way to make money from a private forest, at prevailing timber prices, is to clear-cut, government may have to choose between buying the forest or letting it be cut down, regardless of habitat destruction, soil erosion, stream degradation or the needs of

> future generations. If the only way to make money from a business is to continue to pollute, government may have to allow it to pollute or provide just compensation for lost or reduced profits.[17]"

This central principle is politically unappealing and also inconsistent with a substantial number of cases that have upheld exercises of the police power, which have totally destroyed property values and the investment backed-expectations of property owners. This is clear from the following review of earlier cases concerning the police power.

The most extraordinary case in which the court upheld an exercise of the police power, which interfered with investment-backed expectations, was *Powell vs Pennsylvania* 127 US 678 (I887).

In the late nineteenth century the legislature of Pennsylvania waged a crusade against margarine. Statutes of 1878 (*An Act to Prevent Deception in the Sale of Butter and Cheese*) and 1883 (*An Act for the Protection Dairymen and to Prevent Deception in the Sale of Butter and Cheese*) prescribed certain methods of labelling non-dairy fats. These acts were followed by an 1886 *Act for the Protection of Public Health and to Prevent Adulteration of Dairy Products and Fraud in the Sale Thereof*, which completely prohibited the manufacture or sale of margarine and other non-dairy fats.

The act made no provision for compensation to be paid to manufacturers or distributors of margarine, whose investments had been rendered valueless by the prohibition. The appellants were arrested for contravention of this statute and argued that it was unconstitutional, because of the 14th Amendment. The court disagreed. It found the statute to be a lawful exercise of the police power, which was unimpeachable for the infringement of the appellants' property rights:

> "The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that [this statute] ... will promote the public health ... If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the Legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government[18]."

The reasoning in *Powell* drew heavily on *Mugler vs Kansas* 123 US 623 (1887), a prohibition case. Prior to the 18th Amendment (which constitutionally installed prohibition in the United States) several states adopted their own prohibition statutes.
A Kansas statute of 1881 criminalised the manufacture or sale of liquor in the state. Prior to the statute, there had been no prohibition in Kansas, but the statute made no provision for compensation. The two plaintiffs were a manufacturer and seller of alcohol, who had invested substantial amounts in their operations at a time when they were perfectly lawful, and now claimed compensation.

The court dismissed their case. Justice Harlan ruled that the police power to ensure that citizens use their property in a socially acceptable fashion was the prerogative of the states. The states were entitled to regulate property in the interests of public health, morals and safety, and the courts could only intervene, if an act purporting to have been passed for one of these purposes, in fact, bore no relation to the stated purpose.

Harlan found that the 14th Amendment had no effect on the police powers of the State and that the case did not involve eminent domain, because the prohibition on certain noxious use of property was not a taking for public purposes. He found the fact that there was no prohibition at the time of the investment to be irrelevant. The supervision of public health and public morals was a governmental power "continuing in its nature... to be dealt with as the special exigencies of the moment require[19]." *Mugler* and *Powell* have been followed by a long line of US cases, which are incompatible with the *Pennsylvania Transportation Co.* principle[20]."

A separate category of inverse condemnation cases concern acts by the government which, if committed by a private person, would found an action based on nuisance. Thus in *Portsmouth Co. vs United States* 260 US 327 (1922), the Supreme Court found that the US Navy had to compensate the applicant for a taking, which was effected by the repeated firing of

naval guns across a bay over his commercial property. Public anxiety about the gunshots had led to a fall in his clientele and had rendered his business unprofitable.

Similarly, the noise created by low overflights of government aeroplanes has been found to constitute a taking. In *United States vs Causby* 328 US 256 (1946) the flights over the applicant farmer's property had made chicken farming impossible. In *Griggs vs Allenby County* 369 US 84 (1962) overflights had made ordinary occupation of land impossible.

In both cases the Supreme Court ordered that the applicants had to be compensated for the taking of their property. However, where the noise and disturbances caused by flights substantially interferes with the use and enjoyment of property owners whose land is not directly overflown, there is no need for the State to pay compensation. This much appears from *Batten vs United States* 371 US 955 (1963).

This survey of the US case law has focused only on the 'takings clause' thus far. Possibly the most controversial episode in the history of constitutional protection of property in the US concerned the 'due process clause'.

In the first four decades of this century, the Supreme Court developed the doctrine of substantive due process, in relation to property rights. This doctrine is often referred to as Lochnerism after its founding case, *Lochner vs New York* 198 US 45 (1905).

The 5th and 14th Amendments prohibit deprivations of property without due process of law. The Lochner line of cases added substantive protections to the procedural protections obviously provided by these clauses. In effect, these cases read into the requirement of due process of law the additional requirements that the aim of the law was reasonable and that there was a reasonable relationship between this aim and the means adopted in pursuit of it.

The sole arbiter of reasonableness in this context was an extremely conservative Supreme Court. Thus this period saw a wide range of industrial and social welfare legislation declared unconstitutional.

Lochner was an appeal against a conviction for contravention of a statute setting the maximum working week in the baking industry at 60 hours. The court found that the statute interfered with the liberty (in this context freedom of contract) and property of the appellant without any reasonable grounds to do so and as such did not constitute due process of law[21].

The substantive due process cases provoked the constitutional crisis over the New Deal. Lochnerist decisions invalidated important pieces of New Deal legislation. When Roosevelt was re-elected with overwhelming popular support in 1936, he decided to take on the Supreme Court.

Three months after his re-election, he presented to Congress draft legislation, which would enable him to pack the Supreme Court with six new appointees. The legislation was never enacted, but its threat had the desired effect. In *West Coast Hotel Co. vs Parrish* 300 US 379 (1937) the court, by a majority of five to four, upheld a Washington statute providing for minimum wages.

Parrish heralded the end of Lochnerism. In the next few years, the court overruled many of its previous decisions and substantive due process was never again invoked to frustrate New Deal legislation.

However, in the 1980s and 1990s there has been a re-appearance of substantive due process in some Supreme Court judgments on interference with property rights. In *Pruneyard Shopping Centre vs Robins* 447 US 74 @ 85 (1980), the court cited with approval a substantive due process *dictum* from *Nebbia vs New York* 291 US 502 (1934) at 525:

> "The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained."

In *Nollan vs California Coastal Commission* 483 US 825 (1987), the decision of the court seems to have been based on substantive due process. The Nollans applied for a permit to rebuild their beach house. The permit was granted by the Coastal Commission on condition that the Nollans allow the public a right of way across their property between two public beaches.

The court held that the regulation of beach-front development so as to allow the public a view of the sea may be a legitimate goal. Thus the commission

could have denied the permit altogether. But allowing the development subject to the right of way could not be constitutional, because the link between the interference with the property (the creation of a public right of way) and the legitimate State purpose (protecting the public's view of the sea) was too tenuous[22].

While Nollan represents a much more muted form of substantive due process than Lochnerism, it will be interesting to see how far the current conservative Supreme Court is willing to resurrect substantive due process in the protection of property rights. Some commentators have predicted a full scale retreat into Lochnerism[23].

This review of the constitutional protection of property rights in the United States highlights the arbitrariness of the US case law. The US Supreme Court, by its own admission[24], approaches property rights cases in an essentially ad-hoc fashion. There may be no viable alternative to this approach, but it produces many results that are impossible to reconcile with one another.

- The prohibition of undermining is constitutional, where the intention of the legislation is to protect the environment, but not where the intention is to protect the owners of homes that are being undermined[25].

- It is a legitimate exercise of the police power to prevent the sale or manufacture of margarine irrespective of the effect on the property of margarine producers, who have invested in factories at a time when it was perfectly legal to produce margarine, but the prohibition of anti-union contracts of employment is an unconstitutional interference with the property rights of employers[26].

- Government flights at low altitude, which substantially interfere with an applicants use and enjoyment of property, give rise to a claim for compensation, if the applicant's property is directly beneath the flight path of the planes, but if the property is not directly beneath the flight path, the government is free to cause as much interference as it desires[27].

There are numerous other inconsistencies in the case law. Some are discussed by Michelman in *Just Compensation*[28]. Others can be found simply by glancing at the cases mentioned in footnotes to this article.

The arbitrariness of the case law leaves considerable scope for judges to dispose of property cases, according to their own political prejudices. It is difficult to explain the different decisions reached in cases such as *Mugler vs Kansas* and *Lochner vs New York* in any other way. This politicisation of the judiciary in property cases aggravates the problems discussed in section 1 above; it increases the potential for property rights litigation to bring the entire process of constitutional judicial review into disrepute.

4. Temporary Takings and Arbitrary Jurisprudence

The inconsistency of the US case law has created uncertainty over which regulatory actions of the State are constitutional and which are not. The inhibiting effect this has on State planning has been compounded by the court's attitude to exercises of the police power which interfere temporarily with property rights.

The question of whether a taking had to be permanent to attract the constitutional requirement of compensation came before the Supreme Court in *Kimball Laundry Co. vs United States* 338 US 1 (1948). During World War II, the United States Army had requisitioned a private laundry for use by the Quartermaster for an annual renewable period. The court held that where there is a temporary taking by eminent domain (as opposed to regulatory taking), compensation is payable and the correct measure is the rental that could have been obtained for the property that was taken.

Kimble Laundry did not deal with the issue of whether a temporary inverse condemnation could attract compensation. This was only settled in the case of *First Lutheran Church vs LA County* 482 US 304 (1986), the facts of which have been discussed above[29].

In this case, the court held that instances of temporary inverse condemnation must be compensated for the

duration of the taking even if the State withdraws the unconstitutional measure as soon as it is declared illegitimate. In a dissenting judgment, Justice Stevens pointed out that the majority approach was politically unacceptable. It encourages authorities not to implement environmental control legislation, industrial safety statutes and other regulatory measures lest the measures turn out to be unconstitutional and the resultant retrospective compensation awards bankrupt the State.

5. The 'New Property' and Interference with a Post-Apartheid State's Control over its own Expenditure

In 1964 Charles Reich published *The New Property*[30]. Reich argued that traditional notions of property were inadequate to cover social relations created by the modern state. With the development of the welfare state ownership of physical things it was no longer as significant as it had been in the 18th and 19th centuries, and access to State largesse in the form of benefits, jobs, pensions, housing, subsidies, contracts, licenses, etc was becoming increasingly important.

Existing notions of property did not accommodate this 'new property', which was thus not accorded proper constitutional protection. Reich argued that constitutional protection of property had to accommodate the new property, if it was to keep pace with social development.

At the time of Reich's article the US Supreme Court had already recognised State employment as property within the meaning of the due process clause[31]. Over the next fifteen years it responded to Reich by extending the meaning of property to include a wide range of interests against the State.

Logan vs Zimmerman Brush Co. 455 US 422 (1981) sets out the basic test for the new expanded meaning of property within the context of the due process clause:

> "The hallmark of property... is an individual entitlement grounded in State law, which cannot be removed except 'for cause' ... Once that characteristic is found, the types of interests protected as 'property' are varied and, as often as not, intangible, relating to the whole domain of social and economic fact[32]."

This case concerned the *Illinois Fair Employment Practices Act*. The Act provided a procedure, in terms of which after the filing of complaint, the commission was obliged to convene an all party conference within 120 days. The commission failed to meet this deadline, resulting in the destruction of the plaintiff's claim. The Supreme Court ruled that the plaintiff's claim in terms of the Act was a form of property. Thus the procedural elimination of his claim was an unconstitutional deprivation of property without due process of law.

In *Bell vs Burson* 402 US 535 (1970), the applicant's driver's licence was suspended in terms of a Georgia statute, which provided for the automatic suspension of the license of any driver involved in an accident, unless s/he was insured or provided security for any claim arising out of accident.

The court ruled that the statute purported to allow an unconstitutional deprivation of property without due process: '(at 539) '. Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves State action that adjudicates important interests of the licensees.

In such cases the licenses are not to be taken away without that procedural due process required by the 14th Amendment. This is but an application of the general proposition, that relevant constitutional restraints limit State power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege'.

An expectation of tenure was treated as property in *Peru vs Sindermann* 408 US 593 (1971). Here the respondent had been employed in the Texas University system for ten years on successive one-year contracts. His current employer did not have any formal tenure system, but there was an informal practice of tenure, backed up by statements in the college teaching manual. The college chose not to renew his tenth one-year contract, without giving him a hearing. The court ruled that if the respondent could prove the informal tenure system, he would have a property interest, which was protected by 14th amendment[33].

By the early 1980s, the full range of the new property had been accorded constitutional protection in terms of the due process clause[34]. Although the US Supreme court has defined property in a more restricted fashion when dealing with takings, there is no principled basis for this differential treatment.

Other jurisdictions have taken the expansive definition of property beyond the scope of due process case law. A number of West Indian cases illustrate this point. In *Bahadur vs Attorney General* [1989] LRC (Const) 632 (CA), the Trinidad and Tobago Court of Appeal stated at 641 that "property within the meaning of S4(a) of the constitution includes tangible forms of real and personal property, but also less tangible forms such as social welfare benefits, public services and other things to which people are entitled by law and regulations".

In *Revere Jamaica Alumina Ltd vs Attomey General* (1977) 15 J.L.R. 114 at 122D-E, the Supreme Court of Jamaica accepted that a contract entered into with the government constituted property that was protected by Section 18 of the Jamaican Constitution.

The species of new property most frequently recognised by the West Indian courts is State employment. The first judgment to characterise State employment and its incidents as property was *Hay vs Thom* (1967) 10 WIR 348 (G). Here the applicant sued for a declaratory order that she was entitled to pay for an eighteen day period during which she had taken sick-leave.

The applicant had sued on her contract of employment which incorporated regulations of the Education Code. The High Court of Guyana itself introduced the constitutional issue by holding that the withholding of sick-pay was an unconstitutional interference with an "interest in or right over property".

In *Nobreiza vs AG Guyana* (1967) 10 WIR 187 (GCA) the Court of Appeal of Guyana confirmed that State employment constituted property. It found that the reduction of the salary of the applicant amounted to an unconstitutional deprivation of property. This decision was reversed by the Privy Council on the facts[35].

The judgment did not disturb the proposition that a reduction of salary of a State employee would amount to an unconstitutional interference with property. Any doubts as to the proprietary nature of State employment in Guyana were removed by two judgments of the Court of Appeal in the 1980s.

After austerity measures were introduced administratively in Guyana, a State employee, whose salary had been reduced, applied to have the reduction set aside on grounds of unconstitutionality. He succeeded in *Guyana Sugar Corporation Ltd vs Teemal* (1983) WIR 239 (GCA). Legislation was then passed allowing for retrospective reduction of salaries.

In *Attomey General vs Alli* [1989] LRC (Const) 474 (CA), the Court of Appeal ruled that this legislation was also unconstitutional. The court described the austerity measures as the seizure of wages by the State and held that they deprived civil servants of their property.

The constitutionality of austerity measures was raised, but not investigated in *Trinidad and Tobago Unified Teachers Association vs Minister of Finance and the Attorney General* 'Commonwealth Law Bulletin' October 1989 1182. Here the High Court of Trinidad recognised that the salary reductions deprived government employees of their property, but found that it was precluded from enquiring into the constitutionality of the legislation introducing the austerity measures, because this legislation had been passed by a two-thirds majority of parliament.

The austerity measures cases show that where 'new property' is protected, the State's power to control its own expenditure is made subject to the courts' constitutional scrutiny. In ordinary circumstances, this state of affairs may be desirable. If one has to protect property, it seems unfair to privilege those, who have independent access to property over those, whose primary source of property is the State.

In South Africa, however, the situation is complicated by the history of State expenditure under apartheid and in the immediate period preceding transition. The apartheid State has always structured its expenditure around the needs of white South Africans.

In the past few years, as transition approaches, there has been a headlong rush to transfer State resources into white hands before the State is made subject to democratic control. Major State assets have been

privatised and the civil service has grown top-heavy, as large numbers of white civil servants are promoted into senior high-paying positions. Alongside the promotions, numerous white civil servants have been pensioned off on extremely favourable terms.

If a new state is unable to disturb these arrangements, because of the constitutional protection of property, the Africanisation of the civil service will not be financially viable; nor will the state have the resources to redress imbalances in social services.

Moreover, the state's capacity to introduce austerity measures pursuant to economic restructuring will be impeded. There is a wide degree of consensus, both within South Africa and among international lending institutions, like the World Bank and the International Monetary Fund, that South African State expenditure needs to be cut if the country is to become competitive on international markets. If the beneficiaries of existing expenditure can invoke property rights to resist such cuts, economic restructuring is unlikely to be possible.

6. Arguments for a property right

This article argues that there are several cogent reasons why there should be no constitutional protection of property in a democratic South Africa. Against this backdrop, a number of arguments in favour of the inclusion of a constitutional right to property should be considered.

It has been argued that property should be placed in the Bill of Rights, because courts are the most appropriate institutions to deal with conflicts that will be fought over property. John Murphy articulates this view in the conclusion to his article *Insulating Land Reform from Constitutional Impugnment: an Indian Case Study*:

> " ... it cannot be said that the seemingly unedifying squabble around property rights in India was entirely without merit. As part of their function under fundamental constitutions, the courts, within the limits of inherent structural constraints, are best placed to rule upon the distribution of government power. Moreover, in a divided society with potential for acute conflict over wealth distribution there is a very real political consideration to be taken into account.
>
> What separates totalitarian realisation of egalitarian justice from its democratic attainment under a human rights regime is the fact that controversies related to its materialisation are resolved through the mechanisms of protection and supervision customarily associated with the rule of law or the Rechtstaat.
>
> Regardless of the outcome for the right to property or social reform in India it appears that this worthy notion was never lost sight of. Each judicial assertion of human rights principles forced the elected representatives back to the debating chamber for public deliberation of the issues. As such it stands as a valuable lesson in democracy[36]."

No-one would dispute Murphy's observations about democracy and the rule of law. The question is whether the constitutional protection of property is necessary for the rule of law. The author argues that it is not. The absence of a clause in the bill of rights protecting property will not leave the state free to destroy all property rights.

State interference with property will have to be consistent with the rights to equality, dignity, security of the person and a range of other constitutional rights, which will prevent arbitrary deprivations of property[37]. In fact, the tension between property and equality can pose major problems for the rule of law in jurisdictions where property is constitutionally entrenched. This would seem to be the primary lesson of the Indian history.

The 'worthy notion' to which Murphy refers may not have been lost sight of during the conflicts over property rights in India, but these conflicts cannot be seen in isolation from the State of Emergency which succeeded them.

The Ghandi government's plan to remove the institution of constitutional review was only viable, because the Supreme Court had been totally discredited in the eyes of the public by its role in protecting property rights. Similarly, the inability of the court to protect the rule of law during the State of Emergency was a function of its institutional

weakness caused by the conflicts over property rights. Moreover, the rule of law can only be meaningful if it is respected by citizens as well as states.

The current distribution of property is generally regarded as illegitimate and existing laws, relating to property ownership and use, are widely ignored[38]. The present Government has the political will to protect existing property rights and a wide range of repressive legislation on which it can draw for this purpose; yet it is unable to contain the instability in respect of property rights.

The Government has failed to protect property rights of land-owners in the rural areas and in peri-urban plots and to stop settlement on vacant urban land. A democratic government cannot be expected to use the kinds of laws and levels of force necessary to police and to protect the existing vast inequalities. So there is every reason to believe that property rights will continue to be ignored and to be infringed in practice. This will render the rule of law meaningless on the ground, even if there is formal State adherence to the constitutional protection of property.

This may also have more sinister consequences. Unless there is a managed land reform in South Africa, land invasions will change their character and become increasingly violent. In situations where basic land needs cannot be met within the law, warlords and armed groupings emerge, who control areas of land and allow access and protection through an extortionist system of patronage.

Land rights become established through the violent conquest and defence of territory. The beginnings of this tendency are already apparent in the informal settlements outside Cape Town and in the rural areas of Natal[39].

A separate argument in favour of the inclusion of property rights in a Bill of Rights sees a constitutional right to property as a way of protecting the propertyless. There must be a right to property, so the argument goes, because all people require some property to live an adequate human life. A right to property properly conceived, would provide for those who do not own property, rather than protecting the assets owned by those who currently already have property[40].

This is an attractive argument, but there is no guarantee that a constitutional court will interpret the right to property in accordance with the argument. In fact the opposite is much more likely.

Traditional notions of the constitutional right to property are deeply entrenched. The constitutional right to property is invariably equated with the constitutional protection of existing distributions of ownership.

It appears that no jurisdiction exists in which the right to property has been re-interpreted to mean a right of all people to have enough property for human existence.

Under these circumstances it would be fool-hardy to expect South African courts to interpret the right to property in this way. The most that can be expected from the courts, in terms of developing traditional notions of property, is a recognition of the 'new property'. And as argued above, this may not be a desirable development in the immediate post-apartheid period.

The final argument in favour of a constitutional right to property is one based on political necessity: the constitutional protection of property rights is not desirable, but it is inevitable, given the current realities of political power in South Africa.

The National Party does currently hold power and it may well be that it will not consent to any constitutional arrangements which do not protect property, but the entrenchment of property rights should not be accepted without a struggle.

In the first place, the National Party argument in favour of property rights must be exposed for what it is - an argument for the protection of privilege based on apartheid.

Thus far the National Party has been able to get away with the claim that the right to property is a universally accepted human right, which is always accorded constitutional protection. This claim is false and should be exposed as such.

The trend in recent constitutions is not to protect property rights. Thus the Canadian Charter, the New Zealand Bill of Rights, and the Hong Kong Bill of Rights all remain silent on the question of property rights.

7. Considerations Relevant to the Drafting of a Property Clause.

If South Africa is forced to accept a property clause in the Constitution, particular attention must be paid to the drafting of this clause. South Africa cannot afford to repeat the mistake of Nehru and assume that future courts will place a benevolent construction on the right to property. The case law reviewed in this paper suggests some pitfalls which will have to be avoided.

In the first place the Bill of Rights will have to distinguish clearly between the expropriation of property and other forms of interference with property rights. Whatever compensation acts of expropriation may demand, the State must be completely free to regulate the use of property without incurring liability to compensate property owners who are affected by the regulation. Thus the clause cannot simply provide unqualified protection for property rights. Likewise the arbitrary United States jurisprudence of inverse condemnation and regulatory takings should be avoided.

In this regard, the Malaysian constitutional law offers some assistance. Article 13 of the Malaysian Constitution reads as follows:

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

The Malaysian Constitution thus draws a distinction between the deprivation of property which is only permissible according to law and the compulsory acquisition or use of property which additionally requires the payment of adequate compensation by the State.

The Malaysian courts have not recognised any notion of substantive due process inherent in Article 13(1). They have categorically refused to investigate the merits of any legislative enactment which effects a deprivation of property without an acquisition of property[41].

The most significant case dealing with the distinction between 'acquisition' and 'deprivation' in Article 13, is *Govt. of Malaysia vs Selangor Pilot Association* (1946) [1977] 1 MLJ 133 (PC), [1977] 2 WLR 902 (PC). Here the Privy Council upheld Malaysian legislation which prohibited anyone other than the State from providing piloting services at certain ports. The Malaysian Federal court had rejected the distinction between deprivation and acquisition. It found that the legislation had destroyed the goodwill of the respondents in its entirety. Thus they were entitled to compensation for this goodwill, although it had not been acquired by the State.

The Privy Council disagreed. It found that there had to be significance in the distinction between acquisition and deprivation in Article 13, or the legislature would have used the same word. That significance related to the issue of compensation for which provision was made in Article 13(2) but not in Article 13(1). On the facts of the present case, there was clearly deprivation of goodwill, but there was no acquisition of goodwill; so there was no need for compensation[42].

The Malaysian case law suggests a way of containing some of the problems inherent in the constitutional protection of property, but it does not deal with all of the problems. Two obvious points need to be raised on the question of compensation.

The first is that satisfactory land reform and redistribution of wealth will be impossible if the State is obliged to compensate all existing property owners at market value.

The second is that the courts are likely to demand compensation at market value, unless the Constitution makes it explicit that this is not necessary.

Care will also have to be taken to ensure that the property clause does not, in the name of 'new property', prevent a democratic state from redirecting State resources away from the current beneficiaries of the apartheid State, to cater for more pressing social needs.

These are all crucial issues. If a property clause does not reflect an awareness of the importance of these issues, it could have disastrous consequences. It will entrench existing patterns of land-ownership and wealth and will lay the foundations for an ongoing conflict between court and State.

In the process, the rule of law is likely to be

discredited. A court, that is forced by the constitution to act as the guardian of privilege built on apartheid, is unlikely to be regarded by the population as a legitimate institution and people, who are unable to obtain social justice through the courts, are likely to turn to extra-legal methods to satisfy their claims for land and other material requirements of existence.

FOOTNOTES

1. Leon, R.N., 'A Bill of Rights for South Africa: address delivered at the Annual General Meeting of Lawyers for Human Rights, Johannesburg, 23 November 1985' as cited in (1986) 8 *The South African Journal of Human Rights* 60.

2. Didcott, 'The Practical Workings of a Bill of Rights' as cited in Van der Westhuizen, J.V. and Viljoen, H.P. eds. *'n Menseregtehandves vir SuidAfrika*, Butterworth Press, Durban 1988, p.60.

3. Quoted by Khanna J in *Kesavananda vs State of Kerala* AIR 1973 SC 1461 at 1880.

4. Austin, *The Indian Constitution: Cornerstone of a Nation*". Oxford University Press, Oxford, 1974; Seervai, H.M., *Constitutional Law of India* Vol 2, Tripathi, Bombay, 1984, p.1097; Ghouse, M. 'The Right to Property and Planned Development in India" as cited in Dhavan, R. and Jacob, A. (eds.), *Indian Constitution: Trends and Issues*, Tripathi, Bombay, 1978, p.80; Murphy, J., 'Insulating land reform from constitutional impugnment: an Indian case study', as cited in 8 *South African Journal on Human Rights* 362, 1992, p.363.

5. There was no attempt to conceal this conflict. Thus the string of constitutional amendments passed by Parliament would each usually be prefaced by a statement of objects and reasons in which the offending Supreme Court judgment that was the object of the amendment would be named.

6. The following account of this process is taken from Ghouse supra pp. 79-98, Murphy supra pp. 362-388 and Rudolph, L.I. and Rudolph, S.H., *In Pursuit of Lakshmi: the Political Economy of the Indian State*, University of Chicago Press, Chicago, 1987.

7. The *zamindars* were intermediaries between the colonial authorities and the Indian population, who had been granted massive landholdings by the authorities in return for supervising the collection of tax from the people occupying the granted land.

8. The *Bihar Land Reforms Act* provided that compensation was to be paid on a sliding scale - the greater the extent of the land-holding expropriated, the smaller the amount of compensation per acre.

9. This was a piece of colonial legislation designed to protect the property of English settlers in India from expropriation by the colonial government.

10. *Golak Nath vs State of Punjab* AIR 1967 SC at 1 655, SS 1 5.

11. See for example Ghouse, M. and Dhavan, R., *The Supreme Court: a Socio-Legal Critique of its Juristic Techniques*, Tripathi, Bombay, 1977.

12. *Indira Gandhi vs Rao Narain* AIR 1975 SC 2292.

13. For a full discussion of these proposals and the effect they had on the Court see Baxi, U., *The Indian Supreme Court and Politics*, Eastern, Lucknow, 1980.

14. The most significant of these was the *Habeas Corpus* case, *Jabalour vs Shivkant Shukla* 1976 AIR 1380. Khanna J delivered a dissenting judgment in this case, publication of which was banned by the emergency censorship authorities.

15. Many of the anti-New Deal judgments were decided in of the 'interstate commerce clause' rather than the 5th or 14th amendments which deal directly with property rights. For example *Schechter Poultry Corporation vs United States* 295 US 495 (1935) and *Carter vs Carter Coal Co.* 298 US 238 (1936). Nevertheless, even these judgments reflect a

judicial preoccupation with property rights and laissez faire as much as they reflect judicial notions of federalism.

16. In other cases, the court has dismissed claims, because the plaintiffs remained able to make a profit out of their property, notwithstanding the regulatory interference about which they complained.

In *Aoins vs Tiburon* 447 US 255 (1980), the plaintiffs owned undeveloped land on a ridge overlooking San Fransisco Bay. Subsequent to their purchase, a Tiburon ordinance was passed preventing building on the land without planning permission and setting density limits, which allowed them to build a maximum of only five homes.

This caused the value of the plaintiffs' property to drop substantially and they sued for compensation. The court held that fluctuations in value, caused by planning schemes are not recoverable, where the plaintiffs' property retains any meaningful economic value. In this case the plaintiffs could still obtain permission to build five homes, so their property remained economically viable and their claim was dismissed.

Keystone Bituminous Coal Association vs De Benedictis 480 US 470 (1987) was a latter day *Pennsylvania Coal Company* case. It concerned a new Pennsylvania statute prohibiting undermining of public areas and land used for housing, without compensating the coal mine owners for the deprivation of the right to surface support, which they still owned. The court ruled that the statute was constitutionally valid. It distinguished the case from *Pennsylvania Coal* on the ground that the Coal Association had not proved that the essential value of the affected property was destroyed or substantially impaired.

17. *Rebuilding a Canadian Consensus: Analysis of the Federal Government's Proposals for a Renewed Canada.*

18. *Powell vs Pennsylvania* 127 US 678 (1887) at 686.

19. *Mugler vs Kansas* 123 US 623 (1887) at 668-9.

20. In *Murphy vs California* 225 US 623 (1911), a prohibition on billiards halls was held to be constitutional even though the plaintiff hotelier had invested substantially in billiards halls prior to the prohibition and received no compensation.

In *Reenman vs Little Rock* 237 US 171 (1914) the court reached the same conclusion on similar facts. Here the plaintiff had invested in livery stables prior to a Little Rock ordinance, which banned the operation of a livery stable within the city.

In *Hadachek vs Sebastian* 239 US 394 (1915), the plaintiff had invested in clay-bearing land for brick-making. Some time after he had purchased the property, an ordinance was passed prohibiting the manufacture of bricks within the city. The value of his land as a residential site was $60 000, as a brickyard it had been $800 000. He was not given any compensation under the ordinance, but the Supreme Court upheld its constitutionality.

Similarly in *Pierce Oil Co. vs Hope* 248 US 498 (1914), the plaintiff company was not given relief by the court. The company owned a petrol station, which it had purchased at a time when the land on which the station was situated fell outside the city limits.

Subsequently, the city limits were extended and the company found itself subject to an ordinance, which prohibited the presence of any oil and petrol tanks within 300 yards of residential area. There was no other profitable location to which the company could have moved its petrol station. The ordinance did not provide compensation for plaintiffs in the position of the company, but the Supreme Court upheld it as an acceptable exercise of the police power.

Walls vs Midland Carbon Co. 254 US 300 (1920) concerned a prohibition on the use of natural gas for any purpose other than domestic and industrial heating. The plaintiff was a company that had been using natural gas for the manufacture of carbon black for printing ink. Prior to the prohibition, the plaintiff company had invested substantially in a plant which was now rendered useless, but the statute made no provision for compensation. The Supreme Court upheld the statute as a legitimate exercise of the police power, because it was necessary for conservation.

In *Euclid vs Ambler Realty Co.* 272 US 365 (1926) the court, recognised municipal planning ordinances as an acceptable exercise of the regulatory power even when the plaintiff's land, which was made subject to the plan and zoned for residential use, would have had four times the value as an industrial site.

In *Goldblatt vs Hempstead* 369 US 590 (1962), the court upheld an ordinance prohibiting excavation beneath the water table, even though it did not compensate the plaintiff quarry owner, who was deprived of a beneficial use which had been exercised for more than thirty years.

Miller vs Schoene 276 US 272 (1928) concerned the destruction of domestic cedar trees to prevent a cedar rust epidemic from spreading to surrounding apple orchards. Although the plaintiff's healthy trees had been destroyed, the court found that this was not a taking for which compensation was payable, but an exercise of the police power which could be effected without compensation.

At the outbreak of World War II, the US Army destroyed Caltex oil terminals in the Philippines to prevent them from falling into Japanese hands after the Philippines were evacuated. Caltex was given no compensation by the army. After the war Caltex sued for compensation.

In *United States vs Caltex Inc* 344 US 149 (1952), the Supreme Court rejected their claim and characterised the destruction of the terminals as a non-compensable exercise of the police power.

Another case arising out of World War II, and producing a similar result, was *United States vs Central Eureka Mining Co.* 357 US 155 (1958). A government war order had closed the plaintiff's gold mine without providing any compensation. The court found that the order was constitutional under the circumstances. These were that there was a crucial wartime need for strategic metals (particularly copper) and there was a shortage of skilled miners. The closure of non-essential mines was competent under the police power, because it had been designed to free miners to assist the war effort in copper mines.

21. Lochner was followed by *Adair vs United States* 208 US 161 (1908) and *Cooper vs Kansas* 236 US 1 (1915), which invalidated statutes preventing anti-union discrimination by employers on the grounds that these statutes deprived employers of liberty and property without due process of law.

The same reasoning was applied by the court in *Adkins vs Children's Hospital* 261 US 525 (1922) and *Morehead vs New York* 298 US 587 (1936). These cases concerned statutes prescribing minimum wages.

Price-regulating statutes were similarly invalidated for failing to pass the test of substantive due process. The Tennessee law fixing a retail petrol price was invalidated in *Williams vs Standard Oil* 278 US 235 (1929). New Jersey was prevented from regulating employment agency charges in *Ribnik vs McBride* 277 US 350(1928) and New York was prohibited from fixing the fees of theatre ticket brokers in *Tyson vs Banton* 273 US 41 8 (1 927).

Likewise, a federal act to regulate production, distribution and marketing in the struggling coal industry was declared unconstitutional by the court in *Carter vs Carter Coal Co.* 298 US 238 (1936). In

Wolff Packaging Co. vs Court of Industrial Relations 262 US 522 (1923), the court found that industrial legislation in Kansas, which established an industrial court to regulate labour relations, deprived employers of property without due process of law and in *Railroad Retirement Board vs Alton Railroad Co.* 295 US 330 (1935) the court ruled that compulsory pension legislation for interstate carriers did not pass the due process test.

22. This case would seem to have serious implications for private sector low-cost housing developments driven by planning incentives on the Canadian model.

23. See for example van Alstyne, W., 'The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: the First Decade of the Burger Court' as cited in *Law and Contemporary Problems*, 1980, Vol. 43, No 3, pp.66-82.

24. See *Penn Central Transportation Co. vs New York City* 438 US 104 (1978) at 124.

25. Compare *Pennsylvania Coal Company vs Mahon* 260 US 393 (1922) and *Keystone Bituminous Coal vs De Benedictis* 480 US 470 (1987).

26. Compare *Powell vs Pennsylvania* 127 US 678 (1888) with *Adair vs United States* 208 US 161 (1908) and *Cooper vs Kansas* 263 US 1 (1915).

27. Compare *United States vs Causby* 328 US 256 (1946) and *Grinds vs Allenby County* 369 US 84 (1962), *Batten vs United States* 371 US 955 (1963).

28. (1967) 80 *Harvard Law Review I* 1 65 at 11 71-2.

29. See section 3 above.

30. (1964) 73 *Yale Law Journal* 773.

31. See *Slochower vs Board of Education* 350 US 551 (1956) This was later confirmed in *Connell vs Hiaoinbotham* 403 US 207 (1971), *Bishop vs Wood* 426 US 341 (1976), and *Arnett vs Kennedy* 416 US 134, 166 (1975).

32. at 430.

33. The reasoning in *Perry vs Sindermann* is reflected in *Board of Regents vs Roth* 408 US 564 at 577 (1971):

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose for the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."

Roth was another university employment case in which judgment was handed down on the same day as in *Perry vs Sindermann*. Like Sindermann, Roth had been employed by a University on a one-year contract, which was discontinued without his being heard; unlike Sindermann, Roth could not allege that his employers had any system of tenure, whether formal or informal. As his contract had made it clear that his job might not be renewed at the end of the year, the court found that Roth had no property interest that could found a claim based on the due process clause.

34. In *Goss vs Lopez* 419 US 565, 573-4 (1975), the Supreme Court held that a high school education was a property interest protected by the due process clause. Thus the expulsion of an Ohio school pupil without a hearing was held to be unconstitutional.

Mathews vs Eldridge 424 US 319 (1976) involved an applicant who had been taken off medical benefits after an assessment that he was no longer disabled. Prior to the assessment he had been asked to fill out a questionnaire, but he was never granted a

full evidentiary hearing. The court held that medical benefits are property within the meaning of the 5th amendment, and that the hearing which he received did not amount to due process. So he was entitled to relief.

Prior to *Mathews vs Eldridge*, *Goldbera vs Kelly* 397 US 261-2 (1970) had held that welfare benefits amounted to property within the meaning of the due process clause.

The right to continued service by a public utility company was recognised as property in *Memphis Light, Gas and Water vs Craft* 436 US 1 (1977). Here the company disconnected the applicants electricity supply after they refused to pay accounts in respect of which there was a *bona fide* dispute. The court found this action to be unconstitutional as the deprivation of property without due process.

Other interests which have been held to constitute property, in terms of the due process clause, include a prisoner's good time credits (*Wolff vs McDonnell* 418 US 539, 558 (1974)) and a horse trainer's license (*Barry vs Barchi* 443 US 55 (1979)).

35. *Attorney General for Guyana vs Nobrega* [1969] 3 All E.R. 1 04 (PC).

36. Murphy, J., 'Insulating Land Reform from Constitutional Impugnment: an Indian Case Study' as cited in 8 *South African Journal of Human Rights* 362, 1992, pp.387-8.

37. See Corder, H. et al., *A Charter for Social Justice: a Contribution to the South African Bill of Rights Debate* Cape Town, 1992, p.60 and Nedelsky, *Reconceiving Rights as Relationship* p.19.

38. See for example Budlender, G., 'The Right to Equitable Access to Land' as cited in *South African Journal of Human Rights*, 295, 1992.

39. See Cross, C., 'An Alternate Legality: the Property Rights Question in Relation to South African Land Reform' as cited in 8 *South African Journal of Human Rights*, 305, 1992 and Cole, J., *Crossroads*, Johannesburg.

40. See Lewis, C., 'The Right to Private Property in a New Political Dispensation in South Africa' as cited in 8 *South African Journal of Human Rights*, 389, 1992.

41. In *Comptroller-General of Inland Revenue vs NP* [1973] 1 MLJ 165 (HC) at 166C-F, the High Court held that "(s)ave in accordance with law" referred only to "the will of the Legislature enacted in due form" and that "Article 13(1) of our Federal Constitution is intended as a limitation upon the Executive as in England, and not upon the Legislature."

This was stressed again in *Phillip Hoalim vs State Commissioner Penang* [1974] 2 MLJ 1 00 and in *Armugam Pillai vs Govt. Malaysia* [1975] 2 MLJ 29 in which the court stated:

"Whenever a competent Legislature enacts a law in the exercise of any of its Legislative powers, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking Article 13(1) of the Constitution."

42. The Privy Council had occasion to re-emphasise the difference between deprivation and acquisition in the Mauritian case of *Societe United Docks vs Govt. of Mauritius* [1985] LRC (Const) 801 (PC).

Here the legislation in question provided for the construction of a bulk-sugar terminal by a statutory corporation. To protect the corporation, the legislation prohibited all other persons from participating in the storing or loading of sugar at a harbour in Mauritius. Companies which had been engaged in this business sued for the constitutional violation of their property rights.

Following *Selangor Pilots*, the Privy Council held that Section 8 of the Mauritian Constitution (which deals with acquisition of property by the State) was not in point, because there was no compulsory acquisition

or taking possession of the business of the companies; the business just ceased to exist once the bulk terminal was constructed. However, Section 3(c) of the Constitution could assist the companies.

The difference between Section 3(c) and Article 13(1) of the Malaysian Constitution was that the former prohibited all deprivations of property without compensation while the latter allowed deprivations of property 'in accordance with law'. Thus the legislation, which deprived the companies of their business without compensation, violated Section 3(c). In the event, the companies still lost their case because they were unable to prove their damages.

The Gibraltar Supreme Court interpreted 'acquisition' to require a permanent quality in *Chapman vs Becerra* (No 2) (979) Gib. LR 21 (SC). Rent control legislation in Gibraltar prevented a landlord from evicting a tenant unless it was reasonable to do so and the tenant was in default or the landlord needed the premises for the accommodation of his family. Because the landlord's right to recover the premise was only postponed indefinitely, and not removed altogether, the court found that there was no acquisition of property.