LAND RIGHTS AND THE PROPERTY CLAUSE*

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Most people believe in property rights. They justify private property as a system which provides protection again "arbitrary interference" whether by the state or by other parties. In other words, property rights are guaranteed regardless of changes in government and people can protect their property against theft or interference by third parties. The system of private property is upheld as "embodying free contractual relations" in terms of which people have the right to buy, sell, or lease from each other and the results of their transactions are confirmed and upheld by the state and wider society. Property rights are seen as intrinsic to a "free market economy".

However, in South Africa the existing division of land which would be confirmed by the entrenchment of property rights has nothing whatsoever to do with these principles. It is built on a denial of every one of them.

THE BASIS OF CURRENT PROPERTY RIGHTS IN SOUTH AFRICA

Security against arbitrary interference and changes of government.

In the original transfer of land from black to white there was no respect for pre-existing black property relations. A contemporary observer in 1695 had this to say about the state of land holdings in the Cape:

> "This peninsula ... the Dutch occupied under the command and auspices of the great van Riebeeck, and now hold from the natives on a just title of purchase and with the sanction of law, and the settlement grows greater day by day in burgers, farms and fortunes; but what the just price was that passed between them the sellers do not know and the purchasers are adverse to stating."[5]

Once the process of conquest was complete successive white governments made property rights subservient to race. Only whites were allowed to own property, thus political factors overrode property rights.

The denial of the principle of "integrity of title" was graphically illustrated by the policy and practice of forced removals. Section 5 of the Black Administration Act of 1927 provided that the State President could order the removal of any black group, person or tribe from any area to any other area. The Act made no provision for compensation. In most cases, communities who were forcibly removed did not receive the compensation that they had been promised at the time of the removal.

Free contractual relations.

[5] Quoted in Davenport and Hunt (eds), 1974. The Right to the Land, page 11 (Cape Town, David Phillips).

The Land Act and the Group Areas Act specifically prohibited free contractual relations by denying black people the right to buy or lease land. As Sol Plaaitjie has movingly documented in "Native Life in South Africa" the most immediate hardship caused by the introduction of the 1913 land Act was not the prohibition on the right to buy land but the prohibition on existing rental arrangements between black and white. Many black people had adapted to the conquest of their land by becoming tenants on that same land or entering into share-cropping contracts with the new white owners of the land. In terms of these contracts a black family would continue to farm the land but now pay a half of the crop to the new owner. However, white farmers were not satisfied with this arrangement. They entered into it because black people refused to work on the white farms on any other basis. And so farmers lobbied parliament to further restrict the contractual options available to black people. They wanted both share-cropping and tenancy arrangements prohibited. As the MP for Ficksburg said in the debate about the introduction of the Land Act:

> "They (the government) should tell him (the black man) as the Free State told him, that it was a white man's country, that he was not going to be allowed to buy land there, or to hire land there and that if he wants to be there he must be in service"[6]

A farmer from Ficksburg explained:

> "There are certain natives who come here and absolutely refuse to be servants. They are fairly well to do, and they want a portion of the farm to sow on shares ... when the boy has his whole piece of ground to sow and be given a half of the crops, he was not a servant, but a partner - a master".[7]

In response to a plethora of such complaints the government used the Land Act of 1913 and other legislation to prohibit the legal right of black people to enter into the contractual relations of lease and of share-cropping on land in the common area of South Africa. The effect was that black people were only legally allowed to live on rural land in the white areas if they were full time wage labourers or labour tenants.

The Land Act, the Group Areas Act, and over a hundred[8] racially based land measures were repealed only in 1991. The current racial division of land in South Africa was created by these racially discriminatory laws and the massive physical restructuring that took place under the policies of homeland consolidation, the pass laws and forced removals. It has nothing whatsoever to do with the principles of property rights which are now being used to justify its maintenance. The Group Areas Act, the Land Act and the

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[6] Union Hansard 1913. debates on reading of Native Land Bill. (Quoted in Sol Plaaitjie Native Life in South Africa, Raven Press, 1982, page 45).

[7] Davenport and Hunt The Right to Land, op cit.

[8] The Abolition of Racially Based Land Measures Act of 1991 lists over a hundred racially based measures which it repealed.

Black Administration Act were designed precisely to controvert the willing buyer - willing seller mechanism, to prohibit the free contractual relations of lease and sale, and to allow for the arbitrary seizure of property with or without compensation.

It is ironic, that what would be defended by entrenching property rights in the Constitution, is in fact the legacy of apartheid and of colonialism, a legacy created by the denial of all the principles now being used to uphold property rights.

This is not an anti-property position. On the contrary, South Africa desperately needs a stable system of property rights. If we had had one in the past there would have been no Land Act, no Group Areas Act and no forced removals. However, to entrench the results of these laws on the basis of the sanctity of private property is a cynical and morally bankrupt position.

In order for property rights in South Africa to be stable and secure they must be based in a legitimate system which provides equally for the property rights of all South Africans rather than re-enforcing the racial divisions of the past.

PROPERTY RIGHTS AND LAND REFORM

To address the legacy of apartheid and thereby extend a uniform system of property rights to all South Africans the government has tried to introduce various land reform measures. However, most of these measures are vulnerable to constitutional challenge in terms of the property clause.

Land Reform (Labour Tenants) Bill

A topical example is that of the Land Reform (Labour Tenants) Bill which is currently hotly contested. The Bill provides that labour tenants should be protected from eviction from farms and have the right to acquire those portions of the farm which they habitually occupy and use. Labour tenants are people who occupy and use pieces of farming land in exchange for providing labour to the farmer, generally for free. Their situation has been compared with slavery. They have a long historical association with the land. It is not disputed that in many instances they lived on the farms before white people first arrived[9]. However, their legal rights to that land were destroyed initially by conquest, then by the Land Act and then by successive amendments to the Development Trust and Land Act.

The Bill explicitly provides that only second generation labour tenants would qualify for its protections. It provides furthermore that the labour tenants' right to acquire those portions of the land which they have always used and occupied is subject to the payment of compensation to the current owner of the land. In this regard the compensation provisions of the interim property clause apply.

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[9] Veslag van die Komitee van ondersoek in verband met die plakkersdiensbodestelsel en verwante aangeleenthede. (Nel Komitee) 1961, page 4.

Organised agriculture has repeatedly and publicly stated that, should the Bill become law, it will challenge its validity in the Constitutional Court on the basis that it conflicts with the provisions of Section 28 of the Interim Constitution. They assert that the transfer of land from white farmers to labour tenants would not be for "public purposes", as required in terms of Section 28.

Thus a measure designed to recognise and "upgrade" the vested interests in land of a class of people whose land rights were systematically destroyed, circumvented and prohibited under colonialism and apartheid, is directly threatened by the existence of the property clause. The inconsistency arises not from the principles embodied in the notion of property per se, but in the reality that what will be entrenched through such a clause is not those principles or the extension of those principles to all South Africans, but the white rights built on the systematic denial of the property rights of black people over the last hundred years.

The property clause in the Interim Constitution would jeopardise even the most basic and uncomplicated land reform measures. What follows is a discussion of ordinary and minimalist land reform measures which are jeopardised by the property clause.

Upgrading processes

Under apartheid black people were prohibited from owning land not only in the common area of South Africa, but even in the Bantustans. The policy was that the form of land rights best suited to black people was that the land should be held in trust on "their behalf". Thus most land in homeland areas was effectively "nationalised" land held in the name of the government or the South African Development Trust. The people who live on this land have no legal guarantee of security of tenure, even when they have lived on the land for generations and built houses and other improvements.

Throughout the world the response to such disjunctures has been upgrading processes, in terms of which the long-term occupation of residents is upgraded into legally secure and defendable rights. This process was begun under the Nationalist government using laws such as the Upgrading of Land Tenure Rights Act of 1991.

Under the property clause, this process can now be held to ransom by the nominal owners of the land who may protest that it contravenes their property rights. Thus municipalities which are the nominal owners of land which black people have occupied since time immemorial, have opposed such upgrading schemes as being in conflict with their property rights.

In the early part of the century black people were told they could not buy land unless it was registered in the name of either a chief or a mission. There are many tragic instances where the chief and the missionaries turned around and claimed the land as their own. Some chiefs and owners of mission land now oppose upgrading mechanisms as being in conflict with their property rights. The consequences for rural people are devastating as they find their land sold from under them by people who are the registered, if not the real, owners. Thus the property clause has the effect of thwarting

measures designed to ensure that a system of security of tenure and legitimate property rights can be extended to all South Africans.

Redistribution

The property clause in the interim constitution provides that land can be expropriated only for "public purposes". This has a narrower meaning than "in the public interest" and has been interpreted to mean that the state can expropriate land only for public purposes such as dams, roads and hospitals. While the "public interest" includes redistribution projects such as low cost housing schemes or the kinds of upgrading projects mentioned above, the Appellate Division has held that "public purposes" do not include the expropriation of land from one owner, in order to transfer it to other owners.

In terms of such judgements it would be unconstitutional for the government to expropriate unused mining land which is well suited for low cost housing development, if it planned to transfer this land to landless people. Thus the government may find itself powerless to settle disputes between land invaders and private owners by offering to make alternative settlement land available. If the government cannot expropriate land but must rely on current owners' willingness to sell, it will find itself held to ransom by exorbitant asking prices - as is already happening in the pilot land reform areas.

Zoning Laws

Municipal zoning laws as well as land use and development rights need to be amended in the process of restructuring our cities, in order to move away from apartheid planning. The present clause will make this unlawful unless compensation is paid for zoning changes which affect existing land use and development rights.

The siting of low income housing

The establishment of low income housing inevitably affects certain of the rights of people in neighbouring areas. In these cases, neighbours will allege that the state's action in establishing low income housing close to them amounts to removal of certain of their "rights in property" - and that it is therefore unconstitutional unless they are paid compensation.

Controls on "slumlords"

Measures to regulate and control slum landlords may similarly be unconstitutional. Slum landlords move into an area, make enormous short-term profits, and then pull out when the area has completely degenerated and ordinary residents and individual owners find the value of their property has crashed. Measures such as rent control, limits on the number of tenants allowed and slum clearance provisions may all be found to be infringements of the property rights of the landlords.

Restitution for forced removals

The property clause also creates certain problems in the process of restitution for forced

removals. People who were removed from their land in terms of a discriminatory law have their right to restitution enshrined in the constitution. But there are many people who were removed simply because they had no formal, defendable land rights under apartheid and they were politically powerless. An example are the people whose land was simply confiscated in terms of deals between chiefs and casino owners. They were dumped in resettlement areas and now have no means to address this injustice because the casinos, as the current landowners, are protected by the property clause. Another problem is that the restitution process goes back only to 1913. In Natal and other areas there are people who lost land before that, and who still believe the land is theirs. This has led to situations of endemic poach grazing and fence cutting by the claimants. Their actions are based not only on the justification of past dispossession, but also of current desperate land shortages and need. Because they are not covered by restitution t hey come square up against the property rights of the current owners and are condemned to the status of criminal transgressors.

A general problem with the way in which the restitution process intersects with the property clause is that restitution can take place only on payment of compensation to current owners. In other words, if the state does not have enough funds for this purpose, the present holders will retain the land, and those who were dispossessed will remain dispossessed.

The above examples are just some of the ways in which the property clause in the interim constitution will inhibit the government's capacity to introduce even minimalist land reform measures aimed at stabilising and promoting the extension of a legitimate and stable system of property rights for all South Africans. None of the measures mentioned above imply or entail that property should be arbitrarily taken from those who have it now, nor that current owners would not receive compensation. Yet all these measures would be vulnerable to constitutional challenge in terms of the present property clause.

My case is not against the value of a stable and legitimate system of property rights entrenched in law. South Africa more than many countries, needs such a system urgently. There is currently a high degree of lawlessness in land transactions, of land invasions, of warlords extorting money from ordinary people in exchange for a place to live and of deep illegitimacy in property relations. These things impact on the poor worse than they do on the rich. The problems of overcrowding and pressure on land and buildings are concentrated in low income areas. These areas degenerate and are redlined by the banks. The value of houses crash, and first time buyers find themselves with vast bonds and houses they cannot sell in neighbourhoods that are degenerating before their eyes.

A similar dynamic exists in rural areas. Those black grouping who have recently managed to acquire land rights are inundated with destitute relatives and friends petitioning them for a place to stay. The problem is exacerbated by the continuing and increasing number of people evicted from white farms, who arrive destitute and begging to be taken in.

Both urban and rural areas are vulnerable to the exploitation of warlords who establish

themselves by brute force and consolidate their power by bringing destitute people onto land in return for payment, irrespective of the fact that the land is not theirs to sell. The newcomers then owe the warlords political allegiance and support in exchange for the warlords' physical protection of their residence on the land. Such systems are becoming an endemic problem in African owned areas. The police seem powerless to intervene and protect the rights of the owners against the brute force of the warlords. What drives the system is that most landless people know they have no alternative means of acquiring land to meet their basic residential requirements. Thus they have no option but to align themselves with warlords who are fast creating an extra-legal system of property rights which operates on the principle of military conquest.

In this scenario what is desperately needed is to bring back "the rule of law" so that ordinary people can acquire and protect land through legitimate and ordered means. However, the government's capacity to normalise the situation through the kinds of land reform means discussed above and thereby create a stable and shared system of property rights in South Africa is fundamentally compromised by the existence of the interim property clause.

There are people who say "forget the past". South Africa must be rebuilt on new nonracial, democratic principles, irrespective of past precedent. However, to confirm existing property rights is not to forget the past, but to entrench its legacy. A legacy of white wealth and black dispossession. The struggles of landless people, whether they are about rights to land they lost through conquest, security of tenure in rural areas, access to land in the cities, or access to grazing for their cattle, are not about the past, they are about their capacity to survive, now, and in the future.

THE ALTERNATIVE ROUTE

To argue that there should be a new dispensation which focuses on extending property rights to all South Africans rather than entrenching existing patterns of land ownership, does not imply that existing rights in land should simply be swept aside. What we need is a legal system which starts from a recognition of the various forms in which existing vested rights to rights exist. In this context there are many countries in the world where existing vested rights are adequately protected without property being entrenched at the level of the Constitution. The ordinary provisions of the law are quite adequate to ensure that property rights are maintained, protected and respected. Many highly developed countries such as Britain, Holland, Canada and New Zealand do not constitutionally entrench property rights. Instead they rely on laws, such as expropriation acts, to control the circumstances under which property may be taken from current owners.

A similar situation exists in South Africa. Peoples' land can be expropriated, but only in terms of a circumscribed legal process governed by the Expropriation Act. This legal system has always protected the interests of white people very well. The problem was that different legal systems applied to black and white people and so there were no equal protections for black South Africans. In future that type of racial discrimination would be unconstitutional in terms of the equality provisions of the Constitution. Furthermore the sections of the Constitution dealing with administrative due process

would protect owners from arbitrary state action such as that introduced by President Mugabe in Zimbabwe.

The international trend is not to entrench property rights at the level of the Constitution. Countries such as Canada, New Zealand and Sri Lanka which have recently adopted new Constitutions, decided after much political debate that it was inappropriate to give property rights constitutional protection. The reason is not that these countries are against property rights, but because the international precedents established by litigation in respect of property clauses indicate that a constitutionally entrenched right to property can deeply damage governments' capacity to introduce various forms of socially necessary legislation. Thus the sort of state action which has been held to violate a constitutionally protected right to property includes the following examples:

* Environmental legislation which affected the profitability of a mine (USA).
* Legislation regulating working conditions and the length of the working day (USA).
* Rent control legislation (Trinidad and Tobago).
* Legislation providing for the reduction of public sector wages pursuant to IMF imposed austerity measures (Guyana, Trinidad and Tobago).
* Legislation providing for the freezing of bank accounts belonging to suspects against whom a complaint has been laid of offence involving public funds (Gambia).
* Land reform legislation (India).

These international precedents and the case law on which they are based are what will direct the judgements of our Constitutional Court. Time and again the property clause is used by the rich to protect their vested rights and to challenge government measures aimed at environmental regulation and land reform.

It would be deeply ironic if South Africa were to buck the modern international trend away from entrenching property rights in the constitution. We, of all countries, have the most vastly unequal division of land and the worst history of legally based racial denial of land rights. A property clause would entrench this legacy and deeply compromise the government's capacity to introduce even the most minimalist land reform measures.

INVESTMENT AND INSTABILITY

The somewhat hackneyed position that we must constitutionally entrench property rights in order to attract foreign investment is met by the fact that many countries do not constitutionally entrench property rights. There is no argument that Canada, New Zealand, Holland and Britain are "unsafe" for investors because they lack property clauses.

In fact in a recent major study the World Bank stated that unless there is "rapid and massive redistribution of land to black and coloured groups" there will be "decades of peasant insurrection, possibly civil war, combined with capital flight and economic decline". On the basis of comparative situations in the rest of the world they warned of increasingly violent land invasions accompanied by the murder of farmers unless there

is decisive action to bring about land reform[10].

Given the vast scale of racial inequality in land rights and the resultant problems of landlessness, rightlessness and overcrowding, many South Africans have no option but to break the law in order to establish their homes. The problem of squatter settlements and land invasions are endemic in our country. These means of acquiring land have obtained a degree of legitimacy and acceptance because everyone knows that no viable alternatives exist for "squatters", and that their plight was created by decades of racially discriminatory property laws. Thus there is a reluctance (which started in the last years of National Party government) to use force to evict squatters. In this way all property becomes inherently vulnerable, not so much to "arbitrary government takings", as to "arbitrary squatter settlements". The previous government with the Illegal Squatting Act and the police at its disposal was unable to contain this instability. Nor were they able to protect the property rights and lives of land owners in the rural areas and peri-urban plots, or to stop settlements on vacant urban land. It is unlikely that the present majority government will take more decisive action in this regard than its predecessor.

In the context of situations of instability, land invasions and counter claims by black people, farmers' organisations, forest companies, and groups of land owners began to negotiate settlements with black land claimants from the early 1990's. In some instances the claimants were people who had been forcibly removed from land, in others they were labour tenants or long term farm workers claiming security of tenure. The result of many of these negotiations was that the current owners conferred ownership of portions of their land on the claimants.

The overarching context of these negotiations was that land owners believed that they could not defend their property rights against future political intervention and arbitrary land invasions unless they took steps to address the gross inequalities of the past and stabilised the situation by recognising black vested rights to parts of their land. In these negotiations African land claimants have repeatedly said that as long as white land owners are prepared to "share" with them, they will reciprocally recognise their rights.

However, since the introduction of the interim property clause there has been a hardening of attitudes with various owners saying that there is no longer any need to follow this path. If the final constitution confirms that the existing patterns of land ownership deserve special constitutional protection it will contribute to this hardening of attitudes and intractability by current owners. This will have serious consequences in undermining the pragmatic negotiations based on sharing which had begun to emerge from the early 1990's. These negotiations attempted to share the costs of redressing past injustices between all the stake holders involved, those being current owners, the dispossessed and the state.

Now many owners have retreated to the position that the state must intervene to solve

[10] Hans O. Binswanger and Klaus Deininger, South African Land Policy: The Legacy of History and Current Options. World Bank. February 1993, page 28.

the problems of instability by buying up the land of those farmers willing to sell, and settling land claimants on these farms. However, some remain committed to negotiated solutions. These people recognise that neither the property clause, nor the government can save them from the instability created by past injustice and massive inequality. They see lasting stability as being based on reciprocal terms and shared vested interests in a legitimate system of property rights. For them the costs of conferring land rights on black people who have deeply based claims, whether of history, long term occupation or simply need is a relatively "cheap" way of securing lasting stability in their local neighbourhoods.

But this pragmatism is undermined by the property clause which takes away all incentive to follow this course. Instead landowners are encouraged to sit pretty and wait for the government to come and solve the problem of endemic instability caused by their massive and exclusive land holdings. They have been given the constitutional assurance that they need never "share".

But by refusing to negotiate shared solutions they hasten the day when violent instability threatens their land holdings much more fundamentally than the alternative route of ordered land reform within a stable legislative environment.

RECOMMENDATIONS

On the basis that the effect of the property clause will be to entrench the vastly unequal division of land created under colonialism and apartheid, I submit that the property clause in the Interim Constitution should be deleted in its entirety and that there should be no similar provision in the final Constitution.

However, if it is considered necessary that property rights be enshrined in the Constitution, then it is necessary to define property rights in a manner which provides for abiding and secure rules and practices, rather than attempting to entrench the unstable results of the previous abrogation of property rights. In this regard I propose as a possible compromise position that whatever property clause is adopted should be subject to the following proviso:

> Property rights acquired in terms of, or under laws which were in contravention of universally accepted human rights standards, shall not enjoy this protection.

Another possible compromise position would be to insulate land reform from constitutional challenge. Land reform is urgently necessary in order to ensure a legitimate system of property rights which applies equally and on a non-racial basis to all South Africans. As already discussed the existence of a property clause will severely jeopardise the government's capacity to introduce meaningful land reform. This has been the case not only in South Africa but in other countries, notably India. In the interests of stability, insulation of land reform would have to be for a limited period and in respect of circumscribed interests. An insulation clause drafted on this principle could read as follows:

Notwithstanding anything contained in this Constitution, no law enacted within 5 years of the commencement of this Constitution with the purpose of reforming land tenure and access to land shall be held void on the grounds that it is inconsistent with or takes away or abridges any of the rights conferred by this Constitution.