
LAND, PROPERTY RIGHTS AND THE NEW CONSTITUTION

21-23 May 1993

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**DRAFT PROPERTY CLAUSES IN
PROPOSED BILL OF RIGHTS**

Kader Asmal

**A) ANC - November 1990 Draft Bill of Rights
(Revised Version 1992)**

Article 12

Land and the Environment

- (1) The land, the waters and the sky and all the natural assets which they contain, are the common heritage of the people of South Africa who are equally entitled to their enjoyment and responsible for their conservation.
- (2) The system of property rights in relation to land shall take into account that it is the country's primary asset, the basis of life's necessities and a finite resource.

Rights to Land

- (3) South Africa belongs to all who live in it.
- (4) Access to land or other living space is the birthright of all South Africans.
- (5) No-one shall be removed from his or her home except by order of a Court, which shall take into account the existence of reasonable alternative accommodation.
- (6) Legislation shall provide that the system of administration, ownership, occupation, use and transfer of land is equitable, directed at the provision of adequate housing for the whole population, promotes productive use of land and provides for stable and secure tenure.

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

- (a) the power to order the restoration of land to people dispossessed by forced removals, or, where appropriate, to direct that compensation be paid, or other suitable acknowledgement be made, for injury done to them;
- (b) the power to award particular portions of land, or rights to land, to such claimants, where there are special circumstances arising out of use, occupation, or other similar grounds, which make it equitable for such an award to be made.

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

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

(10) Any redistribution of land or interest in land required to achieve the above objectives shall be subject to just compensation, which shall be determined according to the principles of

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- equitable balance between public interest and the interest of those whose existing titles might be affected.
- (11) In the case of a dispute regarding compensation, provision shall be made for recourse to an independent tribunal, with an appeal to the courts.
- (12) All natural resources below and above the surface area of the land, including the air, and all forms of potential energy or minerals in the territorial waters, the continental shelf and the exclusive economic zone of South Africa, which are not otherwise owned at the time of coming into being of this Constitution, shall be vested in the State acting as trustee of the whole nation.
- (13) The State shall have the right to regulate the exploitation of all natural resources, grant franchises and determine royalties subject to payment of just compensation in the event of interference with any existing title, mining right, or concession.
- (5) Any such taking shall be subject to just compensation, which shall be determined by establishing an equitable balance between the public interest and the interest of those affected.
- (6) In the case of a dispute regarding compensation, provision shall be made for recourse to a special independent tribunal with an appeal to the courts.
- (7) Legislation on economic matters shall be guided by the principle of encouraging collaboration between the public, private, co-operative, communal and small-scale family sectors, with a view to reducing inequality, promoting growth, and providing goods and services for the whole population.

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

Article 13

Property

- (1) All South Africans shall, without discrimination, have the right to undisturbed enjoyment of their personal possessions, and, individually, in association or through lawfully constituted bodies, be entitled to acquire, hold, or dispose of property.
- (2) The content and limits of these rights and the rights to inheritance, shall be determined by law.
- (3) Property rights impose obligations and their exercise should not be in conflict with the public interest.
- (4) The taking of property shall only be permissible according to law and in the public interest, which shall include the achievement of the objectives of the Constitution.
- (8) The above provision shall not be interpreted as impeding legislation such as might be deemed necessary in a democratic society with a mixed economy which may be adopted with a view to providing for the regulation or control of property or for its use or acquisition by public or para-statal authorities in accordance with the general interest, or which is aimed at preserving the environment, regulating or curtailing cartels or monopolies or securing the payment of taxes or other contributions or penalties.
- NOTE: Reference to a mixed economy may be unnecessarily provocative both to those who favour an extensive free market and those who wish for considerable State intervention. It is not normal to have any constitutional prescription on either issue.
- (9) This Article shall be read subject to and in harmony with the provisions of Article 12.

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B) South African Law Commission - August 1991

7.240 The Commission proposes that Article 14 read as follows:

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

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

- (a) Everyone has the right individually or jointly with others to be, or to become the owner of private property, or to have a real right in private property, or to acquire such right, or to become entitled to any other right.
- (b) Legislation may authorise the expropriation of any property or other right in the public interest and against payment of just compensation, which in the event of a dispute shall be determined by a court of law.

C) Inkatha Freedom Party - December 1992

34. Private Property

Private property shall be guaranteed and protected. Limitations on the use and enjoyment of private property may be imposed so as to satisfy social, environmental and collective needs. The right to convey one's own property by contract or inheritance shall be protected subject to the reasonable exercise of the State's power of taxation.

35. Expropriation

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

36. Property of the State and the Regions

The State and the Regions may own property as private or public property. Public property shall not be alienated or encumbered and is related to the exercise of public functions, or is held by the State or

the Regions in the public interest. The law shall set forth the principles for the acquisition, administration, and declassification of public property. The General Assembly shall publish a yearly report on the property owned by the State and the Regions, indicating their current and planned use and their maintenance and carrying costs.

D) A Charter for Social Justice (Corder *et al*) - December 1992

A possible property clause

- (1) Everyone has the right to the enjoyment of his or her property.
- (2) No one shall be deprived of his or her rights and interests in property, unless such action is taken in the public interest, in which case it shall be with due process of law and subject to the payment of appropriate compensation, which shall be determined by establishing an equitable balance between the public interest and the interest of those affected.
- (3) No law enacted within seven years of the commencement of this Constitution with the purpose of affirmatively reforming land tenure and access to land shall be declared invalid for a period of ten years after its enactment on the grounds that it is inconsistent with or takes away or abridges any of the rights conferred by this Bill of Rights, nor shall any such declaration of invalidity operate retrospectively.
- (4) No one shall be removed from his or her home, except in terms of an order of court.
- (5) No court shall make an order authorising the removal of a person from his or her home, unless it has taken into account the existence of appropriate alternative accommodation.

E) The National Party - February 1993

Participation in the economy

15. Every person shall have the right freely and

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

compensation, which, in the event of a dispute, shall be determined by an ordinary court of law.

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

Private Ownership

18.

- (1) Every person shall have the right, individually or with others, to acquire, possess, enjoy, use and dispose of, including disposal by way of testamentary disposition or intestate succession, any form of movable and immovable property.
- (2) Subject to the provisions of subsection (3) no person shall be deprived of his property otherwise than under a judgement or order of a court of law.
- (3) Property may be expropriated for public purposes, subject to the payment within a reasonable time of an agreed compensation or, failing such an agreed compensation, of compensation in cash determined by a court of law, according to the market value of the property.
- (4) Every person shall have the right not to be subjected to taxes on property, which will have a confiscatory effect, or will make unreasonable inroads upon the enjoyment, use, or value of such property.

F) Democratic Party - May 1993

Article 9: Right to Property

- 9.1 Every person shall have the right, in any part of South Africa, to acquire, own, or dispose of any form of immovable and movable property, individually, or in association with others;
- 9.2 Legislation may authorise the expropriation of property in the public interest, subject to the proper payment of equitable