OLIVER & ADELAIDE TAMBO FOUNDATION

Oliver’s Dream part II

ABOUT THIS PROJECT

DOES THE CONSTITUTION STAND IN THE WAY OF RADICAL LAND REFORM?

GETTING TO THE ISSUE

The issue of property rights and redistribution of land is top of the agenda right now. It is widely accepted that two decades into our democracy extensive redistribution has been unduly delayed and has become a matter of urgency. Hot debates are raging on how this should be accomplished and on the necessity, if any, for compensation. One proposal is that the Constitution needs to be amended to remove the requirement of paying just and equitable compensation for land expropriated for redistribution. The debate has extraordinary resonance for almost all South Africans. As one of the ANC negotiators at Kempton Park who worked directly on the question of property and land redistribution, I would like to contribute certain reflections of my own to the debate.

What was our thinking when the drafting process for the Constitution began? The first set of reflections is based on my recall of the principles that were driving us at the time. In particular I would like to share the strategies on land redistribution that we developed at workshops organised by the ANC Constitutional Committee working with ANC militants, engaged academics from the University of the Western Cape and elsewhere, and land activists from different parts of the country. In doing so I will deal with how we countered conservative attempts to entrench the right to free enterprise and the principle of willing seller, willing buyer into the Constitution; why we chose 1913 as a pivotal date for a twin-track strategy to achieve comprehensive land reform;

and the role that the two-stage process of Constitution-making played in securing the text of Section 25 of the Bill of Rights, the Property Clause of the Constitution, as it now stands.

The second set of reflections will centre on taking a close look at the text of the Constitution to show how both indirectly and directly it actually deals with the question of land redistribution.

I will conclude by explaining why I believe that the realization of the full potential of the Constitution as presently worded would make radical and sustainable land redistribution eminently achievable.

MY OWN JOURNEY IN RELATION TO THE LAND QUESTION

I start with memories of a stark moment at a workshop in Lusaka in 1988 organised by the Constitutional Committee of the African National Congress (ANC) set up by Oliver Tambo to discuss Guidelines for a Democratic South Africa. The organisers included Zola Skweyiya, Penuell Maduna, Jobs Jobodwana, Kader Asmal, Bridgette Mabandla, Ted Phakane and myself. Ruth Mompati played a prominent role. It was when we came to the question of land that there suddenly seemed to be an electrical charge in the room. Everybody appeared to have an ancestral, almost bodily, but at the same time metaphysical connection to the topic – except for one person, myself. I had grown up by the sea with great attachment to the beach but very little to the land. I remember thinking wryly to myself that if we'd been fighting over the Open Beach Question I would have been aflame. For me it wasn't a matter of personal attachment to land itself, but of historical justice in its most profound form.

My mother, Ray Sachs, had worked as a typist for Moses Kotane, General Secretary of the Communist Party of South Africa. Uncle Moses, later to become my Comrade Moses, had grown up in a poor peasant family in what was then Western Transvaal. In a famous Letter from Cradock, he had said he was a native first and then a communist, shocking the comrades to their roots. He had come to communism through his experience of being subjected to national oppression. The themes of dispossession from the land and denial of the vote were inseparable to him and went on to become inseparable in my mind also. The struggle was not just about class oppression, but about national liberation with a class component. Our slogan at all meetings was Mayibuye iAfrica – 'Africa come back'. We had to give meaning to the keynote slogan of the Freedom Charter – that 'South Africa belongs to all who live in it' – black and white.

In the context of white supremacy this, like the concept of non-racialism, was revolutionary, and 156 leaders of the Congress Alliance were subjected to the Treason Trial as a result.

THE NEGOTIATIONS START

Decades later when constitutional negotiations started at the Convention for a Democratic South Africa (CODESA), the question of land had to wait its turn. The land issue then was basically the same as it is today – the hugely skewed patterns of land ownership in the country. Yet important though we all knew it was, we couldn't confront it right away. Land reform pre-supposed governmental action. But who, why, where or what would constitute government? How would it be structured, how would it be chosen, how would it exercise power, what would its powers be and how would it be accountable? Even more fundamentally, who would decide these very questions? Would it be for us ourselves sitting around the negotiating table to do so and then put the proposals to a referendum, as the then South African Government wanted? Or would it be a democratically elected Constituent Assembly representing the whole nation, as the ANC was demanding? Everything was on the table; yet nothing was on the table.

Postcolonial experiences in Africa had forced us to think long and hard. One of the harshest lessons we had learnt was that political freedom would not lead automatically to economic freedom. We had lived in countries where people who had fought bravely for freedom had gone on to use state machinery for personal accumulation and producing family wealth – and we wanted to avoid that happening in South Africa. The separate paths that had been followed in Kenya and Mozambique, for example, had primed us to be aware of how diverse the problems in relation to land could be.

Kenya had provided a most sobering example. At our protest meetings in the early 1950s in South Africa we had called for the British to release Jomo Kenyatta from jail. We had condemned the brutal repression of the Mau Mau Rebellion and supported the demand for total independence. If my memory serves me well, I had as a young advocate defended a comrade in Worcester, in the heart of the Western Cape farming area, who had been charged with speaking at a public meeting in favour of the Mau Mau.

To our great dismay, however, we had learnt later in exile that, unlike Julius Nyerere who had followed a modest personal lifestyle and adopted a socialist path in Tanzania, Kenyatta, as President of independent Kenya had gone on in ultra-capitalist style to amass a huge fortune for his family who had ended up owners of vast swathes of land acquired from the British settlers departing from the so-called 'White Highlands'. The other main beneficiaries of land grants had

not been the Mau Mau freedom fighters, but the Home Guards, or 'Askaris', who had sided with the British. And the pro-poor Vice President Odinga Odinga, who had resisted these self-aggrandising policies, had been thrown into jail.

Revolutionary socialist Mozambique, on the other hand, had embarked on a completely different road. Those of us who had lived and worked there had heard about and been inspired by a famous interchange between Samora Machel and his father. In the colonial period Samora's father had been expelled from a small piece of land along the Limpopo River to make way for Portuguese peasants to grow rice there. After independence the colonists returned to Portugal, and at this point Papa Machel asks his son, the President, when he can start planting there again. To his dismay, and our delight, Samora replies that FRELIMO had not been fighting for the President's father to get land, but for the nation to get food. Our joy was two-fold. Firstly, it arose out of our conviction that the beneficiaries of the revolution should not be those who were close to the president, and secondly that private ownership of the land should give way to more collectivised, socialist forms of land use. With Bulgarian help, the FRELIMO government created a huge and expensive state farm on the banks of the Limpopo. The tractors came to till the soil, which was good, but they put in too much fertilizer, which was bad. The rice grew too quickly, and they had to get volunteers from the towns to cut it. Now, if anybody asks me to come and cut rice, even though I still had two arms at the time, I would know they are in desperate straits. Although it was fantastic for me to be out in the fields with the workers cutting rice with a sickle, for the country it was a disaster. Vast sums of money went fruitlessly into the project. Our delight turned to dismay. The objective was beautiful, food for everybody; the water was there and the willingness and the capacity to introduce science were there. And given the absence of an indigenous managerial class, the temptation to place everything in state hands was understandable. But the result was calamitous. Today, not even the most left-wing people in Mozambique would deny that Samora's father should have gotten his land back, not because he was the president's father, but because he had been forced off it.

To complicate matters even more, African family farming in Kenya had eventually taken off, whereas by any criteria agriculture had lagged in Tanzania and Mozambique.

WORKSHOPS ON THE EQUITABLE ACCESS TO LAND QUESTION

Shortly after the first legal conference of the ANC in 30 years on South African soil was held at the University of Durban Westville (UDW) Sports Hall in Durban in 1991, the organisation's Negotiations Commission was set up with Cyril Ramaphosa and Frene Ginwala at its head.

This Commission answered directly to the National Executive Committee, which had the last word on all its work. In developing its ideas and texts it relied heavily on inputs from the Constitutional Committee, most of whose members had by then returned home from exile and taken up positions at the Community Law Centre [CLC] at UWC. Meanwhile the ranks of the committee had been augmented by people like Pius Langa, Dullah Omar, Bulelani Ngcuka, Fink Haysom and Essa Moosa, while Nelson Mandela had specifically asked if Arthur Chaskalson and George Bizos could attend as active participants. We worked in a frenzy, day and night, travelling all the time throughout the country, overseas. I remember joking at the time that the second most important figure in the ANC after Mandela was Rivonia Trialist Andrew Mlangeni – he was responsible for issuing all plane tickets.

We were quite a team, and some issues we could deal with purely on the basis of discussion amongst ourselves. But there were many other questions where we felt we needed to be guided by the findings of broadly based workshops. As a result the CLC and the Centre for Development Studies [CDS] at UWC began to work closely with the ANC Constitutional Committee to organise a series of workshops on key constitutional issues. All the ANC regions sent participants and many progressive social change campaigners from different parts of the world joined us. Political activists and engaged scholars from all over the country also took part. These workshops dealt with issues such as whether to have a Constitutional Court, the electoral system, the structures of regional and local government, whether social and economic rights should be enforceable as constitutional rights, and whether and how to use affirmative action. And the workshop findings were passed on to the ANC Negotiations Commission which reported on a regular basis to the NEC right up to the first democratic elections held on 27 April 1994. The topic on which we had the greatest number of workshops was that of property and land redistribution, the theme of this presentation.

Our debates were spirited and open, enriched by the participation of people throughout the country who had been actively involved in resisting forced removals. They included leaders of rural communities who had fought against eviction themselves, like ‘Mam Lyds’ [Lydia Ngwenya/Kompe] of the Transvaal Rural Action Campaign, who I am happy to learn is still active on land issues in Limpopo. Also with us were activists and lawyers who had dedicated themselves to supporting struggles against forced removals. Our backgrounds and skills varied enormously, but we all shared an understanding that historical dispossession from land and denial of rights of citizenship had gone hand in hand. I can’t remember anyone there who did not have a strong and abiding conviction that, after centuries of conquest, dispossession and racist laws, the distribution of land was grossly inequitable and needed drastic redress. The question

was what constitutional strategies should be developed to bring about the change. It was clear to us that, though we all agreed that extensive restitution and redistribution of land was necessary, the modalities had to be clearly thought through.

As I wrote in the early 1990s in the period leading up to the workshops: ‘The issue is not whether but *how* redistribution should take place, according to what criteria, what procedures should be used and who should make the determination. Any project for bringing democracy to the country cannot fail to address the question of opening up rights to the land.

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

‘As long as race is the determining factor in deciding ownership and control over land, every struggle over every square metre will be a racial struggle. Only if we truly de-racialise the terms of ownership, occupation, and use, will the question really become a question of land and cease to be a question of domination and subjugation.’ [Sachs, A. (1992) ‘Property as a Human Right’, *Advancing Human Rights in South Africa*. Cape Town: Oxford University Press.]

We ultimate emerged from the UWC-organised workshops with three strategic propositions on land.

PROPOSITION ONE: THE CONSTITUTION AS A WHOLE SHOULD BE A TRANSFORMATORY DOCUMENT

The first shared understanding was that, looked at as a whole, the Constitution should be a document that in a principled and comprehensive way recognised the need to correct the systemic and continuing injustices of the past. This meant that it should not entrench any specific economic model nor be used as a mechanism for freezing the status quo. Rather, the Constitution should leave it to the democratically elected Parliament to find the best way to achieve substantive equality for the formerly oppressed people in their daily lives. We were aware that in many countries property law was founded on the principle that ‘possession is nine-tenths of the law’. In South Africa, however, it had to be based on an acknowledgement that *dispossession* had become nine-tenths of the law.

This meant that, far from allowing property rights to protect the grossly unjust patterns of land ownership in terms of which 15 percent of the population owned 87 percent of the land, the Constitution had to require and facilitate redistribution.

This would require more than a robust redistributory Property Clause standing on its own. The surrounding context provided by the Constitution as a whole should supply an unmistakeable thrust that would be supportive of major land reform. The then incumbent generation of judges, legal practitioners and public officials wedded to protecting the status quo had to be left in no doubt that the new Constitution demanded that property law be looked at with fresh, dynamic and restitutionary eyes. This meant avoiding the possibility of the Property Clause being formalistically detached from our history, abstracted from a transformatory vision of the Constitution as a whole and emptied of any effective emancipatory power. The Constitution in its entirety should proclaim a loud, clear and radical rupture from a disgraceful past and beckon towards a future based on respect for the dignity of all.

PROPOSITION TWO: VICTIMS OF FORCED REMOVALS AFTER 1913 SHOULD GET THEIR LAND BACK OR ALTERNATIVE RESTITUTION

The second proposition was that victims of forced removals in the 20th Century should be provided with mechanisms to get their land back or alternative redress. I recall that we had very extensive discussions about how far back we should go in relation to restitution for forced removals. Eventually we decided that the Native Land Act of 1913 could serve as a significant strategic marker. That was the date when the full territorial weight of white supremacy throughout the Union of South Africa had been established. It had been the signal moment when the historic dispossession of the African people had been formally consolidated on a nationwide basis in terms of express racist legal title.

After 1913, and particularly after the Nationalist Party came to power in 1948, three-and-a-half-million people had been forcibly removed from their homes and land. The unofficial slogan had been : “Kaffir op jou plek, Koelie uit die land” [Kaffir in your place, Coolie out of the country.] The obliteration of District Six in Cape Town and Sophiatown in Johannesburg had become just two of hundreds of notorious episodes of relentlessly imposed racist rule. There had not been a city or dorp in the country where the pain of forced removals had not been felt.

In the urban areas this had been brought about mainly through the Group Areas Act. In rural areas it had largely been effected under section 5 of the Native Administration Act of 1927, in terms of which the racist government forcibly ‘got rid of’ what they called ‘black spots in white areas’.

Protracted campaigns to resist these removals had been particularly fierce in the 1980s. At the time when the workshops were convened it was well known precisely who the dispossessed people or communities were and what the areas of land had been from which they had been expelled. The workshops decided that the Constitution should provide that these victims of forced removals should benefit from a clear and direct right to restitution, either in terms of getting their land back or receiving some other equivalent form of redress.

PROPOSITION THREE: EXTENSIVE PROGRAMMES OF LAND REFORM TO DEAL WITH COLONIAL DISPOSSESSION BEFORE 1913

After much discussion we decided that a different strategy for re-distribution would be required in relation to the historic dispossession that had taken place in the 19th century and before. The third workshop proposition was that there should be constitutionally directed mechanisms to facilitate extensive programmes of land reform to deal with this dispossession. The extent and consequences of the dispossession over the centuries was not in dispute, nor was the need for remedial action. Our preoccupation was with how to develop a strategy that would redress the history of land usurpation in South Africa in a just, rigorous, law-based, implementable and sustainable way. Whereas direct restitution or redress would be relatively easy to accomplish in the case of dispossession that had taken place in the 20th century, a much more complicated process would be required in relation to land that had been usurped by processes of conquest and annexation in earlier centuries. It would have to be driven more by broad political and constitutional considerations and less by formal legal factors.

We were influenced to some degree by problems of an evidential nature. Where would we get dependable proof of precisely who had been dispossessed from precisely what pieces of land? The generations who had suffered the dispossession were no longer alive to testify, and oral tradition passed down through the generations could be slanted in favour of certain families. Furthermore, comprehensive title deeds identifying specific portions of land would not be available. Our main concerns were not about evidential proof, however, but substantive in nature.

We came to realise that to attempt to base land reform on who precisely had been dispossessed from what piece of land at what precise moment would be both difficult to accomplish and dangerous in consequence.

We asked ourselves: if a pre-colonial audit was attempted, how far back would it go? Would it start with the Khoisan hunter-gatherer communities who had been the first known inhabitants of much of Southern Africa? Or would it go back to the first pastoral African communities who slowly over the centuries migrated from their kingdoms in the north; or would it begin with the arrival of Jan van Riebeeck in 1652 and the slow gun-bearing penetration into the southern interior by Dutch- descended farming families? Would the audit seek to track the complex, ever-changing patterns of land occupation, use and ownership in the Eastern Cape where British colonial rule slowly advanced northwards during the 100 years of African resistance to conquest in what the British called ‘Frontier Wars’? Would it be before or after the British used divide-and-rule land grants to pit what they called the ‘loyal’ amaMfengu against the ‘rebellious’ amaXhosa?

We were aware of the rise of the Zulu kingdom as one of the great moments in South African history, with enormous implications for patterns of allegiance and control over land in what is now KwaZulu-Natal. Internal struggles took place. Battles were also fought by African communities with the Boers and the British. Where and when in relation to each piece of land would the moment or the moments be that demarcated the end of the pre-colonial era and the beginning of the colonial? Would the audit predate the widespread disruption resulting from the Mfecane that completely changed the political map of the centre of Southern Africa and led to large-scale movement and reorganisation of African communities? I remember someone raising the question of whether the boundaries of Lesotho would have to be extended to include the large portions of the Free State that had originally belonged to the Basotho nation established by King Moshoeshoe. What claims to what pieces of land would groups like freed slaves, occupants of mission lands and Griqua communities have? Treaties regarding land occupation had been regularly established between Bantu, Boer and Brit, and as regularly reneged upon as the British Empire extended its realm.

Basically, all these queries stemmed from the issue of whether the audit could or should even attempt to privilege any particular moment or moments in the centuries during which the indigenous peoples of southern Africa ceaselessly moved from one spot to another. African communities had adapted to new circumstances and constantly changed both internal and external allegiances, with endlessly evolving patterns of alliance, subordination and domination.

The problem did not stop at determining who exactly should be classified in the historical record as having been the rightful pre-colonial owners of what could be every piece of land in South Africa. An equally severe problem would be to decide who *today* would be the rightful descendant/beneficiaries to whom restitution should be made. Would the many millions of Africans who had migrated in the colonial period from ancestral land to other parts of South Africa, be automatically excluded from the benefits of land reform?

The basic fact we were confronted with at the workshops was that African societies, like all societies, had not remained static; they had recomposed themselves in a multiplicity of ways. Marriage across ethnic or clan groupings was common. While respect for particular languages and aspects of culture had remained constant, allegiances and identities had constantly morphed beyond fixed ethnic formations. It was Dr Verwoerd who had sought to impose timeless tribalised personalities on African peoples, attempting to root their sealed-off identities in so-called ancestral homelands. The objective was to deny them the right both to achieve unity as Africans across the southern part of the continent as well as to enjoy full and equal citizenship with their compatriots of European, Asian and mixed origin in a united South Africa in which they would be the majority.

At the workshops, then, we were concerned about not allowing the land restitution process to become a vehicle that would end up reversing our age-old struggle to create a united country. We were particularly uneasy about the possibility of land claims leading to a process of ‘Bantustanising’ the whole country. Would the traditional leaders – many of whom had actively supported, and almost all of whom had benefitted from, their links with Pretoria – would they claim to be the only true descendants of the original owners of the land? Would the actual farm-worker families be left out? Would the millions of Africans who had spent their lives in the cities fighting to bring down white supremacy be excluded from any claim to access to the land? It all boiled down to a deep anxiety that if access to land was directly related to precolonial political systems, then the very ethnic divisions that the ANC had been established to overcome, would be revived. The Tambo dream of a united South Africa would implode at the exact moment of its realisation.

We concluded that the broad strategy for dealing with historic dispossession should not be based on returning particular pieces of land to particular ethnically defined descendants. Rather, the strategy should be founded on an understanding that black people as a whole and in all parts of the country had suffered from dispossession. Similarly, black people from all over the country had fought for freedom and a new constitutional order.

It followed that in principle black people throughout South Africa should be potential beneficiaries of legislatively driven land reform. Precisely how this should be accomplished was something to be left to the new democratically elected Parliament.

In our workshop discussions we canvassed many options for de-racialising the patterns of ownership. The mix of potential interventions ranged from imposing taxes on unused land, to creating large public-private or state or cooperative farms, to outright expropriation, to facilitating mixed forms of ownership. I personally favoured the development of new legal forms to catalyse the creation of varied models of joint interest between farm workers and farm owners. This would give the tillers of the land a secure legal interest that went beyond simply wages and a place in which to live. Their equity stake could expand over time to give the workers an increasing share of the equity. Technically this should be feasible. After all, with a view to maximising commercial profitability, one of the most ancient principles of South African property law, namely that the owner of land automatically owned all buildings constructed on the land, had been changed by statute to allow sectional title for multiple owners of portions of a building. I saw no reason then and see no reason today why, in the interests of facilitating the constitutional imperative of land reform the law could not be adapted to accommodate multiple concurrent and mobile interests in rural land.

We envisaged that in conditions of democracy the people working on the farms would become well-organised and have a large say in relation to their conditions of work and life as well as to their possible legal interests in the farms. One of our strongest debates was in fact whether preference of land reform should be given to the landless poor, or to African people with some capital who would be better situated to derive immediate economic benefit from the land. But these were all issues that we felt should be left to the newly elected Parliament and Government, and not be pre-determined by the drafters of the Constitution.

FROM NEGOTIATED PRINCIPLES TO THE TEXT OF THE CONSTITUTION

In another lecture in the Oliver Tambo Centenary Lecture series I deal with the six-year long battle over the production of the final Constitutional text. For now I merely highlight the fact that thousands of people died, Chris Hani was assassinated, and there were several crises and one prolonged breakdown. Nevertheless, we succeeded in establishing a process in terms of which the final Constitution, including texts dealing with land, was not negotiated by the self-appointed parties at Kempton Park at a time when all major governmental institutions, the State security

services, the public administration and the economy were still firmly in the hands of the white minority. Rather, the final Constitution would be drafted by the democratically elected representatives of the people in the Parliament established under the interim Constitution.

What we did negotiate at Kempton Park, however, were 34 Principles with which that Parliament, functioning with a new composition and mandate as the Constitutional Assembly, would have to comply. We also agreed that a newly established Constitutional Court would have to certify that the 34 Principles had indeed been duly complied with. As it turned out, I personally was to become involved in two phases of the process, first as a member of the ANC team negotiating the 34 Principles and then later as an independent judge sitting on the Constitutional Court when it decided whether the 34 Principles had been complied with.

Looking back now at the documentation of the time I am reminded of how successful the liberation movement negotiators had been in accomplishing one of its major strategic tasks, namely, ensuring that the hands of future generations would not be unduly tied in relation to the economy in general and land redistribution in particular. What did the binding 34 Principles negotiated at Kempton Park say about the economic system and rights to free enterprise? Nothing whatsoever. And what did they say directly about property and land rights? The answer again: nothing whatsoever.

There was one compendious provision, however, which had the potential to deal with economic activity as well as with property and land rights. It was Principle 2, which stated in broad terms that 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution…' It went on to say that due consideration had to be given to the fundamental rights contained in the interim Constitution, but it simply did not oblige the Constitutional Assembly to embrace them.

The key thing was that it was the democratically elected Parliament, with both Houses sitting together as the Constitutional Assembly, that would be drafting the final text of the Constitution. The result was as follows: an expansive, though highly qualified, general right in the interim Constitution to engage freely in economic activity negotiated at Kempton Park, was replaced by a very narrow right in the final Constitution to choose one's trade, occupation or profession. [Annexure A contains the relevant provisions dealing with economic activity in the interim Constitution and the final Constitution].

Put simply, the right to free enterprise, which would have bolstered the power those then in charge of the economy and in addition created obstacles to developing new state policies designed to ensure social justice, did not end up in the final Constitution.

The change in relation specifically to property and land law was to prove even more dramatic. [Annexure B contains the relevant provisions in the interim and the final Constitutions respectively.] To use the language that was current in our circles at the time, the balance of forces had been completely altered by the democratic elections on 27 April 1994. The Property Clause in the interim Constitution had offered strong protection of existing property rights, stating that everyone shall have the right to hold and dispose of property. At the same time it had said nothing at all about land reform. On the other hand, Section 25 of the final ConstitutIon contains no affirmative entrenched right to hold property but merely states in negative terms that no one shall be arbitrarily deprived of property. Furthermore, the great bulk of its provisions deal affirmatively with the need for restitution and land reform.

It was this discrepancy between the texts of the interim and final Constitutions that formed the basis of challenges made by conservative forces to the certification of the Constitution by the Constitutional Court in 1996. During this process the Transvaalse Landbou-Unie, the Free Market Foundation and the Gauteng Association of Chambers of Commerce and Industry objected to the provisions dealing with property on the grounds that they failed to meet the criteria of Principle 2. Though the Constitutional Court upheld a number of other objections and sent the text back to the Constitutional Assembly, it rejected these challenges to Section 25. The Court explained: ‘The first objection raises the question whether the formulation of the right to property adopted … complies with the test of “universally accepted fundamental rights”… If one looks to international conventions and foreign constitutions, one is immediately struck by the wide variety of formulations adopted to protect the right to property, as well as by the fact that significant conventions and constitutions contain no protection of property at all…
‘The second objection was that the provisions governing expropriation, and in particular for the payment of compensation, also fall short of what is universally accepted …. The argument was that the [text] should stipulate that the compensation should be calculated on the basis of market value and that expropriation should take place only where the use to which the expropriated land would be put is in the interests of a broad section of the public.’ After pointing out that many constitutions had no provisions for compensation at all, the Court went on to note that one approach adopted was to provide that the amount of compensation should seek to obtain an equitable balance between the public interest and the interests of those affected.

It concluded that 'the approach taken by the Constitutional Assembly in Section 25 could not be said to flout any universally accepted approach to the question.'

It needs to be stressed, then, that the provisions that appear in our Constitution relating to property and land redistribution were not negotiated at Kempton Park. They were the product of prolonged and intense deliberations at the democratically elected Constitutional Assembly. Since I was sitting on the Constitutional Court at the time, I had no role at all in the drafting process of the final Constitution. But I understand from those who did take part that while the text was being debated dynamic public hearings were organised by Snakes Nyoka in various parts of the country; I was told too that the terms of Section 25 were hotly contested throughout in the Constitutional Assembly and directly influenced by the views of thouisands of people literally on the ground. What seems to be clear from the wording of the text itself is that in the Constitutional Assembly, where the ANC had more than 65% of the seats, the deliberations were also heavily influenced by the above-mentioned three propositions on property and land re-distribution that had emerged from the workshops organised by UWC and the ANC Constitutional Committee.

I now turn to look at the text to see what the Constitution actually says, both indirectly and directly, about how the issue of land should be understood and dealt with.

GENERAL PROVISIONS OF THE CONSTITUTION

The Constitution opens with a forceful Preamble: 'We, the People of South Africa, recognise the injustice of our past, honour those who suffered for justice and freedom in our land, respect those who worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We therefore… adopt this Constitution… so as to heal the divisions of the past and establish a society based on… social justice.'

The Preamble is not merely an ornamental and oratorical piece that serves simply to precede and proclaim the arrival of the operational text of the Constitution. It is fully consonant with the need expressed in Proposition One above to have a constitution as a whole that would be supportive of the need for land re-distribution. It declares in ringing terms why we have a Constitution in the first place, and in the second, what the Constitution is all about. The words herald a new dawn in South Africa. The Constitutional Court has emphasised the need to interpret and apply the Constitution in a purposive way that furthers the objectives set out in the Preamble, rather than to look upon it as a purely grammatical text with a fixed literal meaning.

The transformatory intent of the Preamble is carried forward by the Founding Provisions in Chapter One. They provide for a democratic state founded on, amongst other things, 'the *achievement* of equality and the *advancement* of human rights and freedoms' (My italics). The italicised words indicate that the Constitution is forward-looking and goal-oriented. Its point of departure is that we are living in an unequal society that has to be changed to bring about equality and to advance human rights. A further foundational principle is to have democratic government to ensure accountability, responsiveness and openness, which, coupled with the duty of legislatures to facilitate public involvement in legislation, has been held by the Court to require ongoing participatory as well as representative democracy.

The emancipatory thrust continues with the Bill of Rights, Chapter 2. The Bill of Rights is declared to be the cornerstone of democracy in South Africa that affirms the democratic values of human dignity, equality and freedom. It precedes, governs and defines the spirit in which the Chapters that follow on Parliament, the Presidency and the Judiciary are to be understood.

Not surprisingly, given the manner in which colonialism and apartheid had mangled the lives of the people, the first right in the Bill of Rights is Equality. The right to equality is expressly stated to include 'the full and equal enjoyment of all rights and freedoms'. Direct or indirect discrimination is forbidden on an extensive list of grounds, which include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The Constitution goes on to provide expressly that: 'To promote the achievement of equality, legislative and other measures designed to protect or advance persons… disadvantaged by unfair discrimination may be taken.' This provision leaves no room for doubt. The Constitution was designed to protect rather than restrict the adoption of affirmative action measures such as those that would be taken to redress the continuing effects of past apartheid laws that had been adopted to preserve white ownership of nine-tenths of the land.

In the United States conservative judges had declared that affirmative action based on identifying beneficiaries disadvantaged on the grounds of race, violated the principles of equal protection. In drafting the South African Constitution we wished to put beyond doubt the fact that remedial action based, for example, on race, gender or disability, would indeed be constitutionally permissible.

Another transformatory element in the Bill of Rights is the duty imposed on the state to provide for the progressive realisation within its available resources of social and economic rights. These include the rights to education, health care, food, water and social security, all of which are live issues today. It also requires that the state progressively realise the right to housing and provides that no one may be evicted from their home without an order of court. It goes on to stipulate that no law may permit arbitrary evictions.

There are other pointers to the Constitution having been designed to protect and advance the rights and dignity of the vulnerable in our society rather than to preserve the privileges of the powerful. It gives protection against gender violence in the private sphere. It provides for strong rights for children. It guarantees a right to fair labour practices and protects workers' rights to strike, form unions and engage in collective bargaining. Finally, ours is probably the first constitution in the world to protect environmental rights, both for present and future generations.

Three further points need to be made. The first is that the Constitution is not self-executing. It doesn't in itself provide equality, build houses, deliver education and health services, or offer protection against violence. What it does do is to establish a clear political, social, moral and institutional framework within which these issues should be tackled. Constitutions can be negative and limit the powers of government to challenge the status quo. Alternatively, like ours, they can be emancipatory. Basing itself on the text, context and spirit of the Constitution, the Constitutional Court has made it clear that our Constitution is unequivocally committed to transformation. And as the late former Chief Justice Pius Langa pointed out at a lecture he gave at Stellenbosch University, transformation should not be confused with transition. As he explained, transition is concerned with short-term and immediate measures to deal with the past, while transformation relates to ongoing processes of social renewal of an enduring nature. Many people today feel that there is a gap between the vision that the Constitution offers and the reality of the lives they lead. But the answer is not to scrap or tamper with the Constitution. It is to implement it; not to undermine or destroy it. It is to mobilise public resources with as much integrity, thoughtfulness and public participation as possible to achieve its objectives.

The second observation to be made is that, looked at as a whole, our Constitution is significant not only for what it contains, but also for what it leaves out. Strong attempts were made by various negotiators to entrench terms like 'free economic activity' or 'open market economy' in the Constitution. We resisted those. In principle we wished to leave it to the people of South Africa through their democratically chosen representatives to decide on questions of the degree of state involvement in economic activities. More specifically, we wanted to avoid a situation

arising where something like compulsory contributions to a national health service could be struck down as being unconstitutional. And we certainly wished to ensure that national programmes of land reform would not be struck down as being in violation of entrenched open market principles. By the same token, we worked hard to avoid the principle of willing seller, willing buyer being incorporated in a clause dealing with compensation for property expropriated for land reform.

This brings me to my third comment. For the generation of Tambo and Mandela the Constitution represented the culmination of one stage of our freedom struggle and the beginning of another. In destroying the system of apartheid we saw the installation of majority rule and a democratic government respecting fundamental rights, as a crucial step towards the creation of a people-oriented society that would produce a better life for all. We had long declared that we didn't want freedom without bread, or bread without freedom. We wanted freedom and we wanted bread. (Today, I might mention, we could pick up on the slogan of the first women strikers in North America: 'We want freedom, bread and roses.')

We were aware that history had not borne out Kwame Nkrumah's confident prediction that 'enter ye the political kingdom and all else will be given unto you'. Nkrumah himself had been deposed in a military coup, and for decades afterwards, class oppression in Ghana had intensified rather than been diminished. In South Africa the Reconstruction and Development Programme was intended precisely to launch a programme of economic transformation. But that is another story. The point is that the achievement of the Constitution was not seen as the endpoint of the journey, but as the culmination of one phase and the beginning of another.

LOOKING AT SECTION 25: WHAT THE CONSTITUTION ACTUALLY SAYS IN RELATION TO PROPERTY AND LAND

It is not surprising how frequently the Property Clause is referred to in public debate. What is surprising is how few people who bring it up in argument have actually read it. It was the second longest and certainly the most contested and carefully calibrated provision in the Bill of Rights. [For the full text, see Annexure B.]

As will be seen, Proposition Two of the workshops that victims of forced removals after 1913 should get their land back or alternative restitution, features directly. And Proposition Three that extensive programmes of land reform should be undertaken to deal with colonial dispossession before 1913, is reflected in the design, structure and substance of Section 25, the Property Clause in the Bill of Rights, which I will now examine. STOP

I begin with a summary of what this section accomplishes. It requires that land reform is facilitated; that the process must be law-governed; that expropriation is clearly permitted; that there is no willing seller willing buyer requirement; that the criteria for ensuring that compensation is just and equitable may lead to payment of amounts well below market value; that the state is obliged to make restoration to victims of forced removals since 1913; and that the state is given considerable latitude in how to redress the effects of conquest and dispossession in the centuries preceding that date.

Section 25 contains nine sub-sections, each with its own relevance to land re-distribution. The first sub-section states that no one may be deprived of property except by law and that no law may permit arbitrary deprivation. Please note: there is no direct right to own property. Existing property rights are not entrenched as such. The only aspect that is entrenched is that if there is deprivation it should not be arbitrary. And the Constitutional Court has unequivocally stated that what is 'arbitrary' has to be understood in the context of the historical dispossession from land of the majority of South African people.

This means that the point of departure of the Property Clause is not that the status quo must be protected. If that had been the case, then any deprivation would have had to be justified. This would have corresponded to the position in many Western capitalist legal regimes, where property rights have been almost sacrosanct and a heavy thumb has been put on the scales in favour of protecting existing patterns of property ownership. By contrast, the Property Clause in South Africa's Constitution establishes a constitutional goal of correcting historical imbalances through re-distribution. The one over-arching limit is that deprivation to achieve this must not be done in an arbitrary way. The following sub-sections make it clear that expropriation for purposes of land reform would not be arbitrary. On the contrary, such expropriation would in fact be necessary to achieve the Constitutional goal of equitable access to land.

The second, third and fourth sub-sections cut to the chase on the question of when deprivation of property to achieve constitutional objectives takes place through expropriation. Like any other land owner, the Government can always buy land at market prices on a willing seller willing buyer basis. The need for expropriation arises when the land owner is unwilling to sell, either because s/he/it wishes to hold onto the land or because agreement cannot be reached on the price. Until the advent of our Constitution, the standard practice was that if government wished to expropriate property against the will of the owner it could only do so for a public purpose and subject to fair compensation at market value. The Constitution brought about two significant changes in expropriation law.

In the first place, it does not limit the use of expropriation to traditionally defined public purposes, such as the building of roads, hospitals, schools or airports. It adds that expropriation may take place in the public interest. It then goes on to declare that 'the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'. In other words, land reform is not held hostage to the government being able to entice willing sellers to hand over their property at market prices. The state is explicitly empowered to expropriate land from unwilling owners where the interests of land reform demand.

Secondly, the Constitution radically reworks the formula for determining the amount of compensation and the time and manner of its payment. The basic criterion is no longer simply market value. It is what is 'just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances'. These circumstances are spelt out to include: the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition, and beneficial capital improvement of the property; and the purpose of the expropriation. It is clear that market value is only one of five factors. The other four are largely calculated to reduce the amount payable. They introduce social, economic and historical imperatives that could derogate substantially from market prerogatives. It should be noted that the last factor, namely the purpose of the expropriation, is expressed in open-ended terms that could give the court considerable latitude in determining what would be 'just and equitable' in relation to a particular piece of land.

Factors which could considerably reduce the amount of compensation could well include whether the property was given free of charge by government or acquired at a knock-down price, whether the state has invested in or subsidised the land or improvements, and/or whether the property is in use or simply being held as a speculative investment. In appropriate cases the court might also, when looking at the purpose of the expropriation, consider such contextual factors as the history of ownership, occupation and use of the land. The amount, time and manner of payment by the state could furthermore be linked to specific modalities of securing equitable access to land in a particular matter. The court might intervene in ways that facilitate a progressive increase in the beneficiaries' share of equity of the land as payments are made via revenue derived from the land. The court might also creatively craft terms on which a mutually beneficial relationship could be forged between the former land owner and the new owner/s of the land on a short or long term basis. The possibilities are limitless. Yet at the end of the day, the test must

be whether, looking at the arrangement as a whole, a just and equitable balancing of the different interests has been achieved. It's about the money, but it's by no means only about the money.

The Property Clause does not stop with the question of compensation. Its last five sub-sections are all designed to empower government to promote and undertake land reform. The most direct and mandatory of these provisions is Section 25(7), which embodies the substance of the Second Proposition that emerged from the aforementioned workshops. It states that: 'a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress'. This provision has been applied in about 75 000 cases affecting individuals and communities. From reports I have read it would appear that the process has been relatively successful in urban areas, where most claims have ended up in cash payments being made. The programme has encountered more problems in rural contexts where there could be multiple overlapping and conflicting claims, a very slow process in gazetting claims and even less success in reaching final settlement. There appear also to have been significant problems relating to the history of what many regard as imposed chieftainship in the rural areas, in particular with respect to questions about the traditional leaders' control over land and people.

Other sub-sections pick up on the Third Proposition that emerged from the workshops, namely the need to develop general programmes of land reform aimed at addressing colonial dispossession before 1913. One sub-section requires the state to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. Another requires Parliament to adopt legislation to upgrade the legally insecure tenure produced by racist laws or practices so as to secure meaningful property rights. Parliament in fact is expressly required to enact the necessary legislation. As far as I am aware Parliament has not as yet done so, despite its significant potential for strengthening land rights of black people in townships and rural areas.

Finally, sub-section 8 furnishes the state with what appears to be a capacious reserve power to accomplish redistribution. It provides that nothing in the Property clause impedes the state from 'taking legislative and other measures to achieve land, water and related reform in order to redress the results of past racial discrimination'. The only qualification is that any departure from the specific provisions of the Property Clause should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

CONCLUSION

Far from being a barrier to radical land redistribution, the Constitution in fact requires and facilitates extensive and progressive programmes of land reform. It provides for constitutional and judicial control to ensure equitable access and prevent abuse. It contains no willing seller willing buyer principle, the application of which could make expropriation unaffordable.

The judiciary could play an important role in determining whether the just and equitable principle could be applied in a manner which would substantially reduce the costs of expropriation. I support the suggestion by my colleague, former Deputy Chief Justice Dikgang Moseneke, to have the matter of compensation tested in court. It is perhaps unfortunate that so few cases have as yet been brought to test the application in practice of the 'just and equitable' formula. One that has been hailed as a groundbreaker is the Land Claims Court ruling in July 2016 by Advocate Tembeka Ncgukaitobi in which compensation was set below market value. This decision has been celebrated for championing the progressiveness of the Constitution on land reform.

Yet while the courts could play an immediate role in establishing the broad lines on which Section 25 should be interpreted, court orders would not appear to be the best instruments for defining and structuring the institutional arrangements for making determinations and establishing modalities of payment. It is urgent that the existing expropriation legislation, which dates from the pre-Constitutional era, be replaced by a new law centred on the provisions of Section 25. This would not only reduce the costs of acquiring land for land reform. It would also lower the cost of securing land for providing housing and enforcing other social and economic rights. A new Expropriation Bill that updates the compensation requirements in line with the Constitution was recently taken through Parliament by Jeremy Cronin. Opposition was mobilised by the Institute of Race Relations and instead of signing it into law, President Jacob Zuma sent it back to Parliament on the grounds that consultation had been insufficient. The finalisation of this new legislation is clearly urgent.

Parliament could also attend to its constitutional obligation in terms of sec 25 [9] by adopting legislation to strengthen the legally insecure forms of tenure given under apartheid to black people and communities. Considerable work was done in the early years of our democracy to protect housing, burial and other rights of farmworker families on land they had long occupied.

But little has been achieved for the millions of people living on what is referred to as ‘communal land’ in the former Bantustans. Their rights to use and develop the land in a meaningful way remain extremely insecure. This insecurity perpetuates the divisions created under apartheid in which the Bantustans were seen as rural backwaters intended to supply cheap migrant labour for the farms, mines, industry and homes of the whites in the developed parts of the country. Section 25 [10] requires Parliament to take steps to upgrade the tenure rights of those who bore and continue to bear the heaviest pains of apartheid dispossession. Significant rural prosperity can never be achieved unless the rights of people living and working in the former Bantustans to own and develop the land on which they live, are adequately secured.

Finally, Parliament could also use its compendious reserve power under sec 25 [8] to fill in gaps and drive the redistribution process forward. One project that has enormous potential would be to develop forms of joint legal interest between current farmworkers and farm owners. The tillers of the land, many of whose families had been there for generations, could be given a secure legal interest in the land that went beyond protection of wages and housing rights. Financial mechanisms could be created to enable their equity stake to expand over time to become full ownership. Current owners would have incentives to help ensure that food production would be maintained. Sweat equity and legal title could be reconciled. The words of the Freedom Charter could become true: The Land Shall be Shared Amongst Those Who Work it.

Furthermore, there is nothing in the Constitution that restricts land reform to rural areas only. Vigorous, creative and sustainable public law interventions could play a major role in overcoming the spatial apartheid divisions that continue to bedevil or cities. Not only do they perpetuate social injustice; they are wasteful and inefficient and prevent the full potential human, cultural and economic richness of our urban fabric from being achieved.

Our current Parliament has in fact set up a high level advisory panel headed by former President Kgalema Motlanthe to review all the legislative steps that have been taken since 1994 to deal with social and economic conditions, including those relating to land redistribution. I understand that at a number of hearings on land conducted by the Panel, people have asked for the return of land to them as the community, ethnic or clan descendants of those who had once resided and worked as owners of the contested pieces of land. Any review of land redistribution policies today would have to pay special attention to the question of how precisely to fit in the specific claims of specific communities to specific pieces of land, with the claims of black people as a whole to have equitable access to land throughout the country.

I would not wish to anticipate any findings this Panel might make. But it appears to me that any deficiencies with land reform thus far have stemmed from failure either to use at all or to exercise effectively the full powers given under the Constitution. The Constitution as it stands provides powerful instruments to bring about comprehensive land reform. The problem so far has been one of implementation rather than of impediments created by the Constitution. Before seeking to amend the Constitution, it would be wise to utilise its redistributory powers properly and to rely on the fact that the Constitution is a living tree capable of responding creatively and with vigour to new problems. The issue of land redistribution has huge resonance for the great majority of South Africans. It is precisely for this reason that it needs to be handled in a well thought through and participatory manner. Thus, even abolishing completely the need for compensation would not resolve the question of who the beneficiaries should be in relation to any particular pieces of land. Nor would it solve the questions of how to organise farming so as to sustain and advance agricultural production. Amending technical aspects of the Constitution is one thing. Amending the Bill of Rights would be another. It would be particularly problematic if the proposed amendment in its specific South African context became entangled with the Preamble and the foundational principles of non-racialism and the rule of law.

Some are asking whether it is logical to denounce colonialism for seizing the people's land without compensation and then use the very morality we have condemned to obtain redress. They point out that Oliver Tambo's enormous moral and political strength came from the integrity of a vision that taught us not to use torture against captured enemy agents just because torture was being employed by them against us; that we should not respond to massacres of our people by using terrorism against civilians ourselves. Yet at the same time it would be grossly illogical to exclude the nefarious history of land dispossession as a highly significant factor in determining how to spread the costs involved in effecting land re-distribution. There can be no denying that a new dedicated approach to land reform is required. This can be achieved in a well-informed, principled and participatory way. A good start would be to do an honest and self-reflective audit of all the measures taken since 1994 to promote land reform. The aforementioned Panel set up by Parliament and headed by Kgalema Motlanthe holds immense promise in this respect. We need to be able to learn from past successes and past failures.

Our Constitution was created through principled national dialogue, as envisaged by Oliver Tambo. If dealt with in the same way, the Equitable Access to Land Question, perhaps the most compelling and unresolved problem of our time, has the greatest prospect of success.