Journal of Law, Property, and Society

Volume 8 Article 2

March 2024

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Recommended citation: Tanveer Rashid Jeewa, *Yes, There is a Right to Property – Just Not for Everybody: An Audit of the Legitimacy of the Current South African Property System Thirty Years Down the Line*, 8 J. L. PROP. & SOC'Y 49 (2024), https://www.bit.ly/JLPS-Jeewa

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Journal of Law, Property, and Society

ISSN 2373-5856

A publication of the Association for Law, Property and Society

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Yes, There is a Right to Property—Just Not for Everybody: An Audit of the Legitimacy of the Current South African Property System Thirty Years Down the Line

Tanveer Rashid Jeewa*

It is unclear whether the South African Constitution includes a positive right to property under section 25(1). Leading property scholars have convincingly argued that the negative framing of the property clause, "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property," implies that there is no right to *property per se. Others have argued that a positive right to property exists, qualified by the transformative purpose of land reform, as per sections 25(4) to (9). Neither are true. The framing of the property clause has trapped South Africa in time. While many believe that the inclusion of land reform under the property clause undermines the harshness of the property protections—I argue that the inverse is true. Neither an actively progressive nor regressive clause, section 25 preserves existing property relations, automatically guaranteeing property rights to those who already own property. By making property ownership a trigger for the constitutional protection of property to kick in, the Constitution made a decisive break in favor of property acquired through illegitimate white domination. Simply, there might just be a right to property, but not for everybody.*

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I. Introduction

> … [W]hat one is looking for is a property regime that is *legitimate* broadly for people in urban and rural areas, for all racial groups and I daresay for all gender groups, for men and women. Once you are approaching a *system of legitimacy* then you decide the second level. Should we write this into a constitution or should we leave the ordinary law to deal with it.[1]

[1] Emphasis added. Shadrack Gutto pointed out that the first priority should be the achievement of a legitimate property regime (Transcript II, p 67). Constitutional Assembly, Report by Theme Committee 6.3, 1995 <https://www.justice.gov.za/legislation/constitution/history/REPORTS/Tc63-12095.PDF>. [hereinafter "Theme Committee 6.3"]

At the time of transition to "post"-apartheid South Africa,[2] one of the submissions on the constitutional protection of property highlighted that the first priority should be the achievement of a *legitimate* property regime.[3] Of course, the need for legitimacy vis-à-vis post-apartheid property relations was axiomatic given the crucial role that property law had played in dispossessing Black people and stripping them of ownership rights prior to 1994. As with the drafting process of the Constitution of the Republic of South Africa 1996,[4] it was important to have the buy-in of all South Africans for the new property regime so that there would be due respect for the rule of law. After all, the law as a tool for social ordering will only have an impact if it has the buy-in of its constituencies, resulting in a stable and predictable legal system.[5] This is especially evident in the case of property rights.

Property rights, although private relations in nature,[6] are enforceable against the world. Indeed, if the rest of the world did not recognize a landowner's right to possess and guard their land, there would be constant

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[2] I use the term "post"-apartheid to highlight that the legacy of apartheid (characterized by inequality, racism, white supremacy, and abject poverty) persists even though formal (legal) apartheid came to an end. See K van Marle, 'Jurisprudence, Friendship and the University as Heterogeneous Public Space' (2010) 127 SALJ 635 and J Modiri, 'The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa' (2012) 28 SAJHR 405.

[3] While the word legitimate lends itself to many definitions and meanings, I contend that Gutto was referring to the intended property regime's ability to cater for all groups, regardless of their race or gender. Legitimacy is often understood as being compliant with the laws. Under this definition of legitimacy, Gutto would be immensely wrong, given that most of the dispossessions of land under the apartheid regime were within the confines of the law. However, this is not the way I employ the word "legitimacy." Instead, I use another definition that lends itself to the word, one that is more akin to being close to "holding the quality of being reasonable" and "justifiable." More importantly, due to the fact that apartheid laws were racially discriminatory, I argue that they do not hold the quality of being reasonable or justifiable. For more, see Cambridge Dictionary, *Meaning of Legitimacy in English*, <https://dictionary.cambridge.org/dictionary/english/legitimacy>.

[4] Here onwards referred to as Constitution.

[5] K Pistor, *The Code of Capital: How the Law Creates Wealth and Equality* (Princeton University Press 2019) XI.

[6] Here, property rights refer to real rights in property. S Coyle & K Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Bloomsbury Publishing 2004) 64.

trespass and occupation on the land in the absence of coercive State power through the relentless threat of enforcement through the presence of courts, sheriffs, and police. Such constant presence and interference of the institutions of the State over each property owner would not be sustainable. Hence, it is essential for private parties to believe in a proclaimed binding interpretation of laws and rules applicable to property rights so as to respect and enforce the latter.[7] A legal regime ought to be legitimate so as to be credible.

In this Article I assess the legitimacy of the property law regime in South Africa. I argue based on, *inter alia*, the constitutional interpretation of section 25(1), that the framing of the property clause has trapped South Africa in time. Neither an actively progressive nor regressive clause, section 25 instead preserves existing property relations, guaranteeing property rights only to those who already owned property under the apartheid regime. By making property ownership a trigger for the constitutional protection of property to kick in, the property clause solidified existing property relations that arose out of apartheid and colonization. While many scholars have argued that the inclusion of land reform under the property clause undermine the harshness of the property protections—I argue that the inverse is true. By choosing to include existing property relations acquired through illegitimate white domination under the scope of constitutional protection, the Constitution made a decisive break in favor of property ownership.

I make this argument in the following ways. First, I trace the evolution of the property clause to its final form under section 25 of the final Constitution. In so doing, I demonstrate that the property clause is the ultimate site of political compromise, having left behind most legal submissions by numerous political parties to instead be influenced by negotiations behind closed doors. Second, I assess whether the South African property regime, as envisaged by section 25, has failed in achieving its goals, and whether it can be said to be legitimate based on its current state. Under this umbrella,

[7] This is arguably still better achieved through credible threat of coercive State power.

I inquire whether every Black person has equitable access to land under section 25, considering arguments around the "1913 cut-off date," which excludes restitution for Black people who were dispossessed before 1913, and considering another category of Black people who never owned land at all, whom I term as being "eternally landless." Finally, I engage in a creative exercise, where I reimagine the South African property clause by contemplating the different route that the South African Constitution might have taken, and where this could have led us. There, I propose that an alternative would have been to include a "sunrise" clause, which would enforce constitutional protection of private property only once every South African has had an equitable chance to acquire property.

II. In the Beginning, There Was Only Chaos

A. "To be or not to be? That is the question."

In most constitutions, a property clause serves two functions: one that guarantees property rights and a permissive function with respect to expropriations.[8] Amongst the many constituencies that formed part of the South African constitutional assembly, there was no acquiescence on whether there should be a property clause in the final Constitution, let alone on what that clause must look like.[9] In fact, there was long-standing disagreement, prior to, and after, the enactment of section 28 of the Interim Constitution—the predecessor of the current property clause.[10] This is hardly shocking, given that property relations seemed to be at the forefront of what needed undoing in "post"-apartheid South Africa. Hence, whether and how this undoing would take place was heavily contested.

Yet, perhaps unsurprisingly, there was consensus over the need for land reform. In this case, the contention related to which provisions would allow for land reform, and most importantly, how this allowance would be

[8] AJ Van der Walt, 'The Impact of a Bill of Rights on Property Law' (1993) 8 SA Publiekreg 296.
[9] M Chaskalson, 'The Property Clause: Section 28 of the Constitution' (1994) 10 SAJHR 131.
[10] Ibid.

limited. On the one hand, the National Party (NP) who had formally introduced apartheid to South Africa in 1948, and had ruled the country since then, was insistent on guaranteeing existing property owners that their property would be safe from the predations of the new democratic government.[11] In fact, the NP believed that there should be limitations to land reform, and that it should "be accomplished *within the parameters of the market* and should be demand-driven …"[12] They believed that land reform should be further supported by the "broadening of private party ownership through an effective and sustainable market driven process with responsible accompanying support programs."[13]

On the other hand, the African National Congress (ANC), the most popular liberation movement at the time, was initially concerned about the effects of the inclusion of a constitutional protection of property on legislative reforms. Nevertheless, the narrative was not as black and white, even back then. Many other liberation parties believed that there was a need for a constitutional property clause, so as to guarantee that Black people would be capable of having rights in any property, and that these rights would not be arbitrarily taken away.[14]

In the next Part, I thus examine party submissions on the potential inclusion of a property clause and its limitations, including but not limited to the submissions from the African Christian Democratic Party (ACDP), the African National Congress (ANC), the National Party (NP), the Democratic Party (DP), the Pan Africanist Congress (PAC), and Vryheidsfront (Freedom Front),[15] so as to assess the different versions of the property clause that had been considered and ultimately rejected. The submissions, which were made after the promulgation of section 28 of the Interim Constitution, cover *inter alia*, the content of a right to property, the bearers of said right, the application of such rights—including the nature of the duty imposed on

[11] Theme Committee 6.3, supra note 1 at 2.
[12] Emphasis added. Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.

the State and private actors, and whether the right ought to be capable of limitation.

B. Arguments For and Against the Inclusion of a Property Clause

Numerous arguments were put forward in favor of a property clause, namely that a property clause would, *inter alia*:

i. provide security against arbitrary deprivation of property and inadequate compensation for expropriations;[16]
ii. enhance investor confidence as its absence would send negative signals to said investors, especially foreign investors;[17]
iii. promote the growth and stability of the free-market economy given that property constitutes an essential component thereof;[18]
iv. enshrine the importance of the widely recognized human right that is the right to property;[19]

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[16] Ibid at 15. This view was mostly advanced by the Democratic Party and the South African Agricultural Union.

[17] Ibid.

[18] Ibid. The South African Agricultural Union submitted:

> Property rights form the basis of land ownership in a democratic country which strives for free market principles. These rights are important for security and order and an absolute prerequisite to encourage investment both internally and from abroad. Investment and economic growth, in turn, are essential to alleviate structural problems in the national economy, such as employment and the provision of various social services including education, health and housing. Such rights must be applicable to property, e.g. house, car, furniture and other personal possessions. They should also cover all forms of land ownership, viz private land, communal land and even leased land.

The National Party submitted that the entrenchment of property rights were "… fundamental to a sound economic system and investor confidence." The South African Chamber of Business submitted:

> Property rights are widely recognized as an essential element for an effectively-operating economy. The Government of National Unity has committed itself to a market-driven economy—and property rights are a centerpiece of any such system. Without a guarantee on basic property rights, both economic growth, and the economic system, will be damaged.

[19] Ibid at 16. Here, the Vryheidsfront and the Democratic Party relied on Article 17 of the Universal Declaration of Human Rights 1948; Article 5(d) of the International Convention on the Elimination of all Forms of Racial Discrimination 1966; Article XXIII of the American Declaration of the Rights and Duties of Man 1948; Article 1 of the First Protocol of the

v. be open to flexible interpretation since it would be left open to interpretation by South African courts;[20]
vi. curb squatting and allay fears of "uncontrolled illegal land invasions;"[21] and,
vii. protect the propertyless.[22]

For each argument for the inclusion of a property clause, there was an equally strong argument for the exclusion of one. Those against the inclusion of the property clause believed that its inclusion would:

i. cement the "legacy of the systemic denial and prohibition of the rights to land of the majority of South Africans";[23]
ii. allow for reliance on "the free market system" which is unjustifiable given that the market was never free to begin with, due to the majority of South Africans being legally prohibited from participating in said market;[24]
iii. enable the commencement from "a constitutionally protected skewed base [which] would inhibit the Government's capacity to introduce meaningful land reform";[25]
iv. lead to a higher likelihood of resistance to land reform legislation and that the clause "protects the rights of the privileged at the

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European Convention on Human Rights 1950; Article 21 of the American Convention on Human Rights 1969 and Article 14 of the African Charter on Human and People's Rights.

[20] This was submitted by the Vryheidsfront, which relied on the South African Law Commission view that "… it is the task of the courts to lend content and lucidity to the concept of the right to property (Final Report on Group and Human Rights, page 149.)" Theme Committee 6.3, supra note 1 at 17.

[21] Ibid. The Southern Cape Agricultural Union submitted: "Due to the lack of safety and security, people are demanding rights on land and illegal grazing which is becoming unbearable. All possible measures to ensure that the rights of present and future landowners are respected and protected, should immediately be introduced."

[22] Ibid. This was introduced by the Democratic Party and the Southern Cape Agricultural Union and supported by the National Party. This argument will be discussed in more details later in the article.

[23] Ibid at 18. This view was submitted by the Pan Africanist Congress, Contralessa, and supported by the National Land Committee and the Centre for Applied Legal Studies.

[24] Theme Committee 6.3, supra note 1 at 18.

[25] This submission was made by the East Cape Land Committee and the Border Rural Committee. Theme Committee 6.3, supra note 1 at 19.

expense of those deprived and historically excluded from property", as can be seen from other countries with constitutional property clauses.[26]

v. delay other ordinary and regulatory functions of the Government due to entrenched property rights;[27] and

vi. be redundant given that protection of property rights does not need to be constitutionalized to be adequate. In addition to ordinary laws protecting land and property rights, there are provisions in the Constitution, such as equality and due process clauses which would make arbitrary deprivation of property by the Government unconstitutional.[28]

These diverging views and numerous valid arguments from both sides led to an extensive portion of the Kempton Park negotiations and committee proceedings on the Interim Constitution, being dedicated to the property clause. An assessment of the different parties' submissions on the constitutional property clause dispels the myth that the debate was solely about the inclusion of said clause. Instead, it is painfully obvious that the contentions around the content of the right included lengthy discussions about the duty of the State and private actors regarding land reform, as well as whether the ability to resist an eviction as an unlawful occupier should be included under the property clause. In addition to the arguments around

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[26] This submission was made by Chaskalson, Land and Agricultural Policy Centre, Grehner, Gutto, and Claassens, with reference to the Indian, American, Zimbabwean, and Chilean experience. Theme Committee 6.3, supra note 1 at 18.

[27] This submission was exemplified by the National Land Committee, Land and Agricultural Policy Centre, Durie, Chaskalson and Claassens. Theme Committee 6.3, supra note 1 at 20.

[28] This submission was made with reference to countries such as Great Britain, Holland, Canada and New Zealand, which have stable and secure property regimes, but no constitutionally entrenched protection of property rights. Additionally, Chaskalson relied on the right to human dignity, the right to freedom and security of the person, and the right to privacy to challenge arbitrary deprivations of property. Theme Committee 6.3, supra note 1 at 20.

the inclusion of a property clause, there were other concerns around whether such a clause should be balanced against "a right to land."[29]

I flag that in addition to the Kempton Park negotiations, the ANC and the NP had been engaging in numerous bilateral negotiations that guided the constitutional principles entrenched in the Interim Constitution and consequently the final wording of numerous contentious clauses in the Bill of Rights. The bilateral negotiations took place because agreement had not yet been reached in the Negotiating Council, and such clauses—including the likes of the status of customary law in terms of the Bill of Rights and the property clause—were referred to a small ad-hoc committee of the Negotiating Council, which would include more discussants from different parties, as opposed to the bilateral negotiations.[30] Since there are no available sources of bilateral agreements, this Article can only reflect on the Kempton Park negotiations and secondhand reports of the negotiations under the leadership of the ad-hoc committee, while remaining painfully aware that engagement over the wording of both section 28 of the Interim Constitution and section 25 of the final Constitution will remain the poorer, and less transparent, for it.[31]

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[29] The idea behind the separate land clause was that "the right can be used to balance other rights in the Constitution, to test the validity of legislation, as a guide in the interpretation of legislation, and as a criterion to test the justifiability of administrative action." Proponents for a right to land suggested that "the Constitution should include the right to land as a positive right; such a positive right could include:

i. A general right of equitable access to land;
ii. Specific restitution provisions;
iii. Security of tenure in its entire diversity;
iv. Protection against evictions unless, amongst other factors, the availability of alternative accommodation has been considered."

The Democratic Party submitted that it "… believes that the right to property should be applicable to the common law and the customary law as well, particularly where women are disqualified, according to certain customary norms, from acquiring or owning property." Theme Committee 6.3, supra note 1.

[30] S Camerer, 'Property Rights and Restitution in the Constitution—A Behind the Scenes Look' (1994) DR 299.

[31] Interim Constitution of South Africa, Act 200 of 1993. For an extensive description of the negotiations over section 28 of the Interim Constitution, see M Chaskalson, 'Stumbling Towards Section 28: Negotiations Over the Protection of Property Rights in the Interim Constitution' (1995) 11 SAJHR 222.

The ad-hoc committee was chaired by the Deputy Minister of Justice, Sheila Camerer, and other members of the committee were Chief Gwadiso of the Cape traditional leaders, Penel Maduna of the ANC, Tony Leon of the Democratic Party, Halton Cheadle representing the South African Communist Party, and Godfrey Mothibe of Bophuthatswana.[32] A representative of the PAC was appointed to the committee—albeit, only for the last three weeks of its existence, upon the request of the PAC—but never attended the meeting.[33]

The debate surrounding the property clause lasted numerous weeks, with the NP and the DP arguing that the security of tenure for existing property holders must be fully guaranteed and protected in the Bill of Rights.[34] This was diametrically opposite to the ANC's submission that the right to property should be qualified by the right to restitution of land from dispossessed people. In the next Part, I consider the compromises made to come out of this deadlock. In doing so, I compare the final property clause to the different submissions that had previously been made surrounding the clause. The wording of the final property clause is far from apolitical. In fact, I demonstrate that the final property clause is the ultimate site of the political compromise that fundamentally results in the protection of white economic interests. Despite the fact that the ad-hoc committee and the bilateral negotiations took place before the drafting of the final Constitution, their outcomes heavily influenced the final property clause, as can be seen in the next Part.

C. "A product of small, smoke-filled rooms:" The Property Clause That Was … and Its High Hopes[35]

> … [T]he inclusion of a property-rights clause in South Africa's new Constitution, and the form it took, were among the hardest-fought political battles at the World Trade

[32] Mothibe withdrew from the ad-hoc committee when Bophuthatswana pulled out of the negotiations. Supra note 30.
[33] Supra note 30.
[34] Ibid.
[35] Ibid.

> Centre. These battles took place chiefly outside the main Negotiating Council chamber in rather small, smoke-filled rooms.[36]

Taking into account all of the different submissions laid out above, here lies this Article's main protagonist: the final property clause—section 25 of the South African Constitution:

> 1. No one may be deprived of property *except in terms of law of general application*, and no law may permit arbitrary deprivation of property.
> 2. Property may be expropriated only in terms of law of general application—
>   a. *for a public purpose or in the public interest*; and
>   b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
> 3. The amount of the compensation and the time and manner of payment must be *just and equitable*, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
>   a. the current use of the property;
>   b. *the history of the acquisition* and use of the property;
>   c. the *market value of the property*;
>   d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
>   e. the purpose of the expropriation.
> 4. For the purposes of this section—
>   a. 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; and
>   b. property is not limited to land.

[36] Ibid at 299.

> 5. The state must 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.
> 6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
> 7. 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.
> 8. No provision of this section may impede 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, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
> 9. Parliament must enact the legislation referred to in subsection (6).[37]

Although the ANC was initially against the inclusion of a property clause, they eventually gave in on the condition that a subclause on restitution of land was included within the clause. Yet, the negotiations went on as the ANC and the NP, along with supporters of their positions, could not agree on the sub-clause relating to expropriation of property. While the ANC wanted such expropriation to be done "in the public interest" as a form of restitution, the NP disagreed.[38] After lengthy back and forth, it was agreed that expropriation done "in the public interest" would be qualified by what was known in the ad-hoc committee as "the laundry list" of factors.[39] In the section quoted above, I italicize the various terms and conditions that were the result of lengthy debate in the ad-hoc committee.

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[37] Emphasis added based on factors whose inclusion the ANC and NP insisted on.
[38] Supra note 30.
[39] Ibid.

Above all, the aim of the NP was that existing property rights would only be susceptible to expropriation for public interest if the compensation for said expropriation was heavily qualified. Hence, the NP insisted on the inclusion of the factor of "market value" as a guiding determination for compensation for expropriation.[40] Likewise, the ANC insisted on the inclusion of the terms "the history of its acquisition."[41] The ad-hoc committee then worded the remaining factors around "the use to which the property is being put," "the value of the investments in it by those affected," and "the interests of those affected."[42] These factors translated into section 25(3)(a) to (e). Most importantly, the NP insisted on "the overrider to the effect that both the period within which compensation is to be paid and the amount of the compensation must be just and equitable." As can be seen from section 25(3), this translated into the final property clause. Lastly, modern day expropriations are still governed by apartheid-era laws, namely, the Expropriation Act 63 of 1975, but carried out within the constitutional framework laid down in sections 25(1) to (3) due to the principle of subsidiarity.

Regardless, whether one believes that the ANC or the NP "won" over the final form of the property clause, these negotiations completely ignored the legal submissions of the numerous parties on section 28. While those submissions were rich in debate and context—and more transparent—the negotiations between the few parties behind the closed door seemed to be informed of two primary interests. Indeed, it was clear that "[t]he admitted need to rectify past wrongs and to address the existing imbalances are of paramount importance but it should be done in a way *without jeopardizing the protection of private ownership*."[43] While the interests had legal implications, the compromise was overtly political. Yet, the effects of this compromise are not necessarily seen on paper but are instead witnessed in who the property clause actually serves. In the next Part, I consider two categories

[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Emphasis added. Theme Committee 6.3, supra note 1.

of people left behind by the property clause, and based on these observations, I reflect on the legitimacy of the current property regime.

III. No One Left Behind?

A. "A Constitutionally Protected Skewed Base:" The 1913 Cut-off Date

Frantz Fanon believed that "in the negotiations of independence, the first matters at issue were the economic interest: banks, monetary areas, research permits, commercial concessions, *inviolability of properties stolen from the peasants at the time of the conquest.*"[44]

Indeed, the debate around properties illegitimately acquired before 1913 has been taken off the table by section 25(7) of the Constitution. Section 25(7) 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." The clause is self-evident. On 19 June 1913, the Natives Land Act 27 of 1913 came into effect, thereby limiting African land ownership to 7 percent. Any dispossession that has occurred since the arrival of settlers in South Africa to 19 June 1913 may not be revoked. Hence, section 25(7) abolishes all aboriginal title.[45]

Numerous scholars have argued in favor of the 1913 cut-off date, claiming *inter alia* that South Africa was historically and demographically different pre-1913; that aboriginal title itself dates from a different ownership paradigm; that white settlers settled on *terra nullius*;[46] and finally, that

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[44] F Fanon, *Toward the African Revolution* (1967, New York: Grove Press/Monthly Review Press) 121.

[45] The non-recognition of aboriginal title is even more contentious given that aboriginal title is recognized by international law, which is in turn binding on South Africa. Sections 231-233 of the Constitution guide the application of international law on the South African state. For more, see Ö Ülgen, 'Developing the Doctrine of Aboriginal Title in South Africa: Source and Content' 92002) 46 JAL 131.

[50] The concept of "terra nullius" as understood by colonizers is widely problematized in critical legal studies. It is a contentious concept in the context of white settlers as in many instances land dispossession can be traced back to when settlers first came to the land. Additionally, the property regime used by indigenous peoples was vastly different from that recognized by the settlers and often land that was otherwise "owned" or occupied by

historical claims would be hard to prove and might awaken tribal feuds.[47] These factors would create practical obstacles to any restitution claim dating pre-1913 but the inclusion of a 1913 cut-off date in the Constitution sends a strong message to the South African population. While the Natives Land Act is notorious for setting out the foundation for numerous laws that actively dispossessed Black South Africans of land, using it as a cut-off date for restitutions ignores the centuries of land dispossession that preceded the Act.

Land dispossession can be traced back at the very least to the 1880s, with some clearly identifiable instances of dispossessions.[48] By the time the Natives Land Act was promulgated in 1913, the settlers' acts of dispossession and their legal regime had already annihilated the majority of African land ownership.[49] The Griqua National Conference of South Africa stated that:

> The cut-off date of the 19th June 1913, which limits claims to a certain date has bearing on Zululand, Ciskei and Transkei, as areas were [*sic*] aborigines still had reserved land. This cut-off date is thus prejudicial to those aborigine groups that were removed from their fertile land before 1913.[50]

Indeed, by 1913 there was already a strong nexus between racial capitalism and land ownership.[51] Africans were primarily being viewed as

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indigenous peoples were seen under the settlers' legal regime as terra nullius. For more, see MA Yanou, 'The 1913 Cut-Off Date for Restitution of Dispossessed Land in South Africa: A Critical Appraisal' (2006) XXXI Africa Development 177, 178.

[47] Ibid.; D Miller & A Pope, 'South African Land Reform'(2000) JAL 178.

[48] Yanou, supra note 46 at 178; H Klug, 'Historical Claims and the Right to Restitution' in J Van Zyl et al. (eds.), *Agricultural Land Reform in South Africa: Policies, Markets and Mechanisms* (OUP 1996) 394.

[49] The Pan-Africanist Congress (PAC) submitted that, "the Restitution of Land Act should at least have been made to capture the atrocities that were perpetuated by the Squatters Bill of 1912, Native Land Act, Black Administration Act and so on." To read the actual submissions, see Theme Committee 6.3, supra note 1.

[50] Theme Committee 6.3, supra note 1.

[51] Interestingly, the ANC was in agreement with the 1913 cut-off date, motivating this submission with the following reasoning: "The aim of the restitution should be to resolve outstanding claims arising out of forced removals and past confiscation of land rather than to open up claims to the entire land base of South Africa and thereby cause delays in development and uncertainty in respect of all land rights." Ibid.

objects of labor, for the purposes of white economic advancement. Already in the 1800s, most Africans no longer held any rights in the land:

> In order to have land within the colony, the non-European had to be a squatter or a member of a mission station. The single exception – a small one – was the Kat River settlement established in 1829, which provided some small farms for Hottentots along the frontier.[52]

The Great Trek, and accompanying conflicts, completely changed the landscape of South Africa.[53] White settlers established imperium over Africans through bloody conflicts, and secured land rights from the 1880s.[54] This was done through legislation such as the Native Locations Act of 1879 and the Glen Grey Act 25 of 1894, known as a "masterpiece of political strategy," as it facilitated the exercise of control over the Africans.[55] By then, "locations" had been allocated for Africans but the sizes of these locations were inadequate for the size of the African population. Consequently, most Africans were living on privately owned land of white people in exchange for free labor.[56]

As opposed to what the layperson's understanding of "squatting" may suggest, Africans had agreements with white landowners, in the form of informal tenancy agreements where they would either pay cash rental,

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[52] LC Duly, *British Land Policy at the Cape, 1795-1844,* (Duke University Press 1968) 186-87.
[53] For more regarding the Great Trek, see D van der Merwe, 'Land Tenure in South Africa: A Brief History and Some Reform Proposals" (1989) TSAR 663.
[54] Ibid. at 674.
[55] Ibid. By then, independent Boer Republics had started regulating squatting, and did so in racialized terms. Act 11 of 1887, later amended by Act 21 of 1895, allowed Black families to remain on farmland if labor was provided. The farms were not allowed to accommodate more than five Black families. The long title of the Act stated,

> As it has become necessary to combat infectious and contagious diseases, to ensure the general wellbeing of the Republic and to protect her citizens and land ownership, measures are herewith taken to prevent the squatting, residence and hoarding of natives and other coloureds in areas other than their government-designated areas: designation of locations and residential areas.

For more see JM Pienaar, 'Land Reform' (2014) Juta, 73.
[56] L Wickins, 'The Natives Land Act of 1913: A Cautionary Essay on Simple Explanations of Complex Change (1981) South African Journal of Economics 108.

share a portion of their crop, or perform labor for a certain period as payment for their right to remain on the land.[57] Other squatters occupied land of absentee landlords who were far-off investors.[58] The absentee landowners benefitted highly from African squatters given that landowners could derive income from the direct exploitation of their farms. Squatting allowed white landowners to overcome multiple challenges, such as the lack of availability of labor and non-profitability of agriculture.

With the unification of all colonies under the Union Jack in 1910, there was a concerted attempt at a single consolidated "native policy" for the Union of South Africa. This involved the promulgation of several pieces of legislation that came into effect before 1913 including the Mines and Works Act 12 of 1911 and the Native Labor Regulation Act 15 of 1911. These Acts were all enacted to ensure the white enterprise would have a constant and adequate supply of disciplined and inexpensive Black labor. At the time of the enactment of the Natives Land Act, the squatter numbers were approximately: 27,600 on private land in the Cape Province; 380,000 on private land and 57,000 on Crown land in Natal (excluding Zululand); 316,000 on private land and 65,000 on Crown land in Transvaal; and, 80,000 on private land in Orange Free State.[59] With close to a million of Black squatters, it is clear that even prior to the 1913 cut-off date, the pattern of landholding and rights in land had been significantly altered in the favor of white settlers.

While the claims for the 1913 cut-off date seem to be overtly non-racial and concerning itself more with the practicalities of land restitution, it nonetheless confirms that many people are left behind by the property clause. Even if one were to ignore the fact that land reform has been shamefully slow, section 25(7) anchors much of the illegitimate property regime forced onto Black South Africans by white settlers. It cements the very dispossessions and the consequences of segregating pieces of legislation that had been in operation since the 1600s.

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[57] Supra note 52, at 674. This points to the intricate relationship that developed between labor, influx control, and access to property.
[58] Ibid.
[59] Supra note 56 at 109 and Debates of the House of Assembly, 1913, 2273-74.

This inequality in the property regime is even more cemented when one considers the discourse around a class of Black people who have never owned land due to the enactment of racist legislation, in spite of the constitutional duty on the State to legislate laws to allow the acquisition of property under section 25(5) of the Constitution.

B. The Eternal Landless

> Most people in need [of land] do not fall inside the framework of the restitution process. They are generally the descendants of people who were dispossessed before 1913. … Many people have occupied land for a very long time, and would today be the legal owners if it were not for legal barriers.[60]

While some charitable readers may highlight that most of section 25 (sections 25(4) to (9)) focus exclusively on land reform, one cannot ignore that the protections of existing property relations under section 25(1) occur automatically. The trigger for constitutional protection of section 25(1), only requires one to be a property-right holder recognizable under section 25(1). It does not require any more effort on the part of either the property right holder or the State. Consequently, people who own property—which at the formal end of apartheid were mostly white—have a right for this property to be protected and it can only be expropriated from them under specific conditions elaborated on in the Constitution. For this expropriation to take place, numerous factors need to be met both under sections 25(1) to (3) and 36 of the Constitution, as well as the Expropriation Act 63 of 1975.

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[60] See Derek Hanekom's submission located in Theme Committee 6.3, supra note 1 at 5. Indeed, not all dispossessions will fall under the framework of the restitution process, even if the dispossession happened after 1913. This is because, some dispossessions did not take place through racially discriminatory laws but instead, through practices such as intimidation, or as a result of corrupt land deals. To address this, the ANC had submitted that the right to restitution should apply to people dispossessed through both laws and practices—which was adopted under section 25(7). Section 25(7) states, "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."

The decision to automatically protect property rights acquired under colonization and apartheid, should be examined against the background of the material conditions of most Black people in South Africa in 1994 and their ongoing struggle to break into the private property market ever since. The infamous Natives Land Act, along with numerous other discriminatory pieces of legislation, had left most Black people dispossessed from their land by 1994. By then, approximately "17 000 statutory measures had been issued to segregate and control land division, with 14 different land control systems…"[61]

Consequently, the number of Black landowners was significantly lower, than the number of white owners. In fact, "with 80 percent of the population living on 17 percent of the land by the time apartheid came to an end, land became a scarce resource, and the use of land by one person subtracted from the amount of land available to others."[62] Hence, despite the abolition of discriminatory legislation regarding land use and ownership post-1994, access to land itself was scarce and landownership was strictly through the operations of the free market. In other words, Black people's chances of being landowners were dependent on their ability to break into the private property market.

Leaving the dispossessed to the whims of the cruel free market is deeply ironic, given that their earning ability had already been marginalized. Disadvantaged groups often have little opportunity to escape the poverty trap despite desperately wanting, and working towards, a better lifestyle.[63] An enduring example of how increasingly hard it is for Black South Africans to get out of poverty is as follows. Black people who grew up during apartheid were specifically afforded "Bantu Education" as Hendrik Verwoerd, the Minister of Native Affairs in 1950 and Prime Minister in 1958, believed that

[61] WJ Du Plessis, 'African Indigenous Land Rights in a Private Ownership Paradigm' (2011) 14(7) Potchefstroom Electronic Law Journal 44.
[62] Ibid.
[63] K Browne, 'An Introduction to Sociology' (2005) Polity 70.

"Black people should be subjugated through education to enforce the apartheid ideology."[64] Most importantly,

> while the implementation of Bantu Education was mainly ideological, it was also economic, designed to restructure the conditions of social reproduction of the black working-class, simultaneously *creating the conditions for stabilizing the black, urban under-class of semi-skilled laborers and seeking to prevent black political militancy among urban youth*.[65]

The quality of education "offered" to Black people was purposefully diminished to ensure that they would remain subservient to the ruling class of white people under apartheid. Such education, as well as the apartheid regime itself, led to most Black people doing manual labor and earning low wages.

The formal end of apartheid did not miraculously encourage businesses to start hiring Black people into secure and decently paid jobs.[66] Many of them remained in the same line of work, ones that did not allow them to earn enough to break into the private property market. Black people who have never owned land, and thus had not been actively dispossessed of it, are not catered for under redistribution and restitution programs. Instead, they are supposed to be catered for under section 25(5) of the Constitution, which provides that, "The state must 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."

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[64] BS Ndimande, 'Pedagogy of Poverty: School Choice and Inequalities in Post-Apartheid South Africa' (2016) Global Education Review 3.

[65] (Emphasis added.) B Fleisch, 'State formation and the origins of Bantu Education' in P Kallaway (ed), *The History of Education Under Apartheid 1948–1994: The Doors of Learning and Culture Shall be Opened* (Maskew Miller Longman 2002) 39 and BS Ndimande, 'From Bantu Education to the Fight for Socially Just Education' (2013) 46(1) Equity & Excellence in Education 20.

[66] Browne supra note 63. Additionally, government policies fail to adequately tackle unemployment or improve the living standards of those qualifying for social benefits. These policies also fail to provide adequate opportunities and incentives to get off said social benefits.

Through this provision, Black people are at the mercy of the State to gain any access to meaningful landownership, while those who have accumulated property under apartheid can rely on the Constitution to defend their property rights. The latter is automatic, while the former requires a resourceful and willing State to put into place legislation and measures to facilitate access to land. Perhaps, by requiring a resourceful and willing State to provide access to land for Black people, the property clause worked exactly in the way that the NP wanted it to. Recall the NP's submissions on land reform states that it should, "… be accomplished *within the parameters of the market* and should be demand-driven …,"[67] and that it should occur through the "broadening of private party ownership through an effective and sustainable market driven process with responsible accompanying support programs."[68] Once again, it is up to Black people to break into the private property market by climbing the social ladder.

Often, popular rhetoric blames the landlessness of Black people on a "culture of poverty," suggesting that "it is the characteristics of the poor themselves, their values and culture, that cause poverty and social exclusion."[69] According to this logic, given that Black people no longer operate under racist legal restrictions regulating the purchase of property, they should be able to break into the property market. This theory completely ignores the "cycle of deprivation" that Black people have been subject to while growing up under apartheid,[70] and endure to this day inter-generationally. It is said that, "[p]overty is cumulative, … one aspect of poverty can lead to further poverty."[71] For example, poor people often have to pay more for credit; given that banks often will not lend them money as they consider them a poor risk.[72] Hence, they have no choice but to obtain loans

[67] Theme Committee 6.3, supra note 1 at 2.
[68] Ibid.
[69] Browne supra note 63 at 74. Here, we can replace "poor" with "Black people" as South Africa is deep within late-stage racial capitalism.
[70] Browne supra note 63.
[71] Ibid.
[72] Ibid.

from "loan sharks" at exorbitant rates.[73] Poor people also tend to eat cheaper food, which can be unhealthy and causes illness.[74] It is hard to escape of the poverty trap, especially in the most unequal country in the world.[75]

All in all, the "new South Africa" unfortunately reeks of the old South Africa. The historic compromise seems to only have traded-off the economic interests of Black people. Indeed, the "miracle settlement" left property relations almost untouched, and this strikes to the very core of the South African property clause.[76] The property clause, in its natural element, protects whiteness and white property interests. Section 25 inherently and automatically protects property rights obtained under colonization and apartheid, and yet requires the Black individual to compete in the market to secure her rights to land. This, despite the fact that many submissions around the inclusion of the property clause heeded this very same warning. It is thus hard to make a *legal* argument for or against the property clause and its intentions when, quite simply, the property clause was the ultimate site of political compromise. Yet, the critiques of the property clause have been waged by lawyers or legal scholars, giving it some semblance of legal credence instead of tackling it for what it truly is—*politics*.

IV. The Legitimacy of the Current Property Regime

The lens most often employed by those scholars reflecting on the property clause is that of transformative constitutionalism, or otherwise transformative property theory—a school of thought that finds its origins in the former.[77] By "transformative constitutionalism," Karl Klare understood,

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[73] Ibid.
[74] Ibid.
[75] The World Bank has deemed South Africa to be the most unequal country in the world. For more, see ICTJ "Country in the World: Report" (2022-10-03) <https://www.ictj.org/node/35024>.
[76] NC Gibson, 'The Pitfalls of South Africa's 'Liberation'' (2001) 23(3) New Political Science 371 and NC Gibson, 'Upright and Free: Fanon in South Africa, from Biko to the Shack Dwellers' Movement (Abahlali baseMjondolo)' (2008) 14(6) Social Identities 683.
[77] See for example T Coggin, 'There is No Right to Property: Clarifying the Purpose of the Property Clause' (2021) 11 Constitutional Court Review 1; J Dugard, 'Unpacking Section

> a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.[78]

Klare does not pretend that transformative constitutionalism is a neutral concept. He candidly admits transformative constitutionalism intends to "carry a positive valence, to connote a social good."[79] This intention to do good is precisely where the problem lies; not in the fact that transformative constitutionalism seeks to connote positivity, but rather, that those who use it as a "critical lens" tend to leave behind the critique. While transformative constitutionalism remains an important tool, as a critical lens, it becomes a pointless and circular exercise. Transformative constitutionalism already identifies the constitutional project, and its relevant ambitions, as positive and thus, the outcome is predetermined. Such is not what Klare intended. Klare's preliminary exercise was to assess whether the South African Constitution could indeed be termed transformative; and whether the South African constitutional project was one of transformative constitutionalism. Klare weighed the relevant clauses and adjudication methods against what he deemed to be transformative constitutionalism and found it to be the case.

However, using transformative constitutionalism as a lens of critique no longer carries the candidness of admitting that it is not a neutral concept. Nor does it seek to weigh the property clause to assess whether it has transformative potential. Instead, the assessor seems to assume that the property clause *ought to* have transformative potential, given that the Constitution

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25: Is South Africa's Property Clause an Obstacle or Engine for Socio-Economic Transformation' (2008) Constitutional Court Review 158; AJ Van der Walt, *Property and Constitution* (Pretoria University Law Press (PULP) 2012).

[78] K Klare, 'Legal Culture and transformative constitutionalism' (1998) 14(1) SAJHR 146.

[79] Ibid.

itself claims to be transformative and that the Constitutional Court has endorsed transformative adjudication techniques.

Yet, it is trite that it is not enough to claim to be good. One also ought to do good. For instance, it has been argued that the purpose of section 25 is a transformative one, due to the fact that it also incorporates land reform,[80] and that "in general, the courts and especially the Constitutional Court have pursued substantively transformative interpretations of the legal frameworks governing restitution."[81] Be that as it may, for every judgment where a South African court has pursued "transformative interpretations of the legal frameworks governing restitution," I could probably find two or more cases where courts have reinforced the sanctity of ownership of property rights per section 25(1) to (3) of the Constitution against other constitutional rights.[82] How can one claim that the property clause has a transformative purpose simply because it foresees land reform, when that same property clause also entrenches property rights secured under racist regimes?

It is even more preposterous to claim that the property clause has a transformative purpose, when one takes into consideration the history of its drafting.[83] For although restitution claims extend to land ill-gotten as of 1913, the Constitution still guarantees those property rights until challenged for restitution. In simple words, any property right acquired under the nefarious Natives Land Act 27 of 1913 and under any racist law thereafter, is still guaranteed under sections 25(1) to (3) of the Constitution, until

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[80] Sections 25(4) to (9) guide land reform. For more, see Coggin supra note 77. This argument will be fleshed out more later in the paper.

[81] Dugard supra note 77.

[82] In fact, as I will demonstrate later in this article, the right to not be arbitrarily deprived of property is often prioritized over the right to dignity and housing. See for example, *Grobler v Phillips and Others* [2022] ZACC 32; 2023 (1) SA 321 (CC).

[83] Perhaps, a more generous interpretation of transformative constitutionalism would argue that the material conditions and the current South African legal culture does not allow for section 25(1) to reach its transformative potential.

such time as a legitimate restitution claim is successful against it—which has proven to be quite hard in practice.[84] As John Pilger astutely notes,

> Whenever the ANC's fine, liberal constitution is invoked, there is seldom mention of the fact that it guarantees the existing property rights of white farmers, whose disproportionate control of the land has its roots in the Land Act of 1913 which established captive labor force and apartheid in all but name.[85]

It is disingenuous to claim that the purpose of the property clause can be found from generous interpretations of parts of it, while ignoring the stricter interpretations of the other parts. However, despite my own critiques of the property clause, and my contentions regarding its existence as proof of the political compromise, to many, section 25 in its current form is the only form that can be imagined. I thus offer a different conception of section 25 in the next Part.

V. The Property Clause that South Africa Deserved—A Project of Re-Imagination

> Legal systems that never unravel themselves but just continue weaving the cloth of the law denser and denser will eventually suffocate.[86]

It is twenty-eight years since the enactment of the constitutional property clause. The property rights acquired before 1994 are now deeply entrenched, in part due to section 25(1). Sadly, the more time passes from the original acquisition of the property, the more the history of the acquisition of the property—one of the decisive factors for the compensation of expropriation—can be contested. This plausibly leads to the property right being respected and enforced for the sake of certainty and stability, which are

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[84] JM Pienaar, 'Restitutionary Road: Reflecting on Good Governance and The Role of the Land Claims Court' (2011) 14(3) PELJ 35.

[85] F Fanon and N Gibson (eds.), *Living Fanon: Global Perspectives* (Springer 2016) 179 quoting J Pilger, 'Hidden Agendas' (1999) New PR 604.

[86] Van der Walt paraphrasing Bernard Schlink in van der Walt, supra note 77 at 153 (for the original German text, see B Schlink *Die Heimkehr* (2006) 260).

deemed to be the holy grail of most legal systems. South Africa's property regime is thus not unravelling itself; it is weaving the cloth of the law denser and denser.

Much like the travelers on a sinking boat, many of us legal scholars have taken our pails of legal wisdom and transformative constitutionalism and attempted to remove the drowning waters of failure from our boat. However, we are not removing the water fast enough, and the holes are getting bigger. It is time to change directions and admit that the pails are no match for the ferocious and indefatigable water. The property clause is working in the way it was supposed to. It is protecting white property interests above all other considerations of the eternal landlessness of Black people—ironically, in the same ways most parties who were against its inclusion had predicted.

Those who had predicted this impending doom had also explored that the inclusion or exclusion were not the only two options. Some other political parties, namely the Pan Africanist Congress, believed that there was a way to have a constitutional property clause, and still make sure that we have an equitable and legitimate property regime.[87] The difference lied in a "sunrise clause."[88] The idea was rather simple and yet, altogether revolutionary. The suggestion was that the implementation of the property clause would be suspended until such time as the government has achieved a "meaningful scale of land reform and thereby to level the playing fields in relation to representative land ownership, before the property clause kicks in."[89]

Such a clause would have allowed for land reform uninhibited by section 25(1) and regulated by equality and due process clauses. Until such time as land reform had not been meaningfully achieved, the constitutional property clause would not kick in. Hence, constitutional protection of property would only be afforded to all property rights once securing those rights has been made accessible to all in South Africa, and not only to an elite few

[87] Theme Committee 6.3, supra note 1 at 24.
[88] Ibid.
[89] Ibid.

who have obtained property rights under a racist regime. To those who would be offended by the lack of constitutional protection of their property rights, their property rights would still be governed by existing legislation and common law—as is most often the case in countries without constitutional protection of property.[90] Additionally, as mentioned before, due process equality clauses as well as the right to just administrative action would ensure that all actions taken against existing property rights would be in adherence to the Constitution.

I am aware of the counterargument that section 25(1) is not often relied on in litigation to have such an impact as I describe above. Yet, I argue that on a normative basis, the entrenchment of such property rights as those gotten pre-1994, in contrast to the lack of facilitation of access to land for the Black population, sends a strong message to the South African constituency. Furthermore, even when section 25(1) is not explicitly invoked, it is often property rights, especially ownership, that trumps other right involved. For instance, when it comes to unlawful occupation, although occupiers have a right not to be arbitrarily evicted from their home without a court order under section 26(3), and a right to access to adequate housing under sections 26(1) and (2), there is almost always an eviction order granted—despite the length of occupation and the need to facilitate access to land. Although the eviction order may sometimes be delayed until such time where it can be carried out humanely, and in light with the right to human dignity, it is granted nevertheless.[91]

Van der Walt had previously argued that such cases should not be adjudicated in the way that holds ownership and property rights as sacrosanct.[92] Instead, other rights such as the right to human dignity, equality,

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[90] Countries such as Great Britain, Netherlands, Canada, and New Zealand have stable and secure systems of property rights despite not entrenching property rights in their constitutions, or altogether not having constitutions.

[91] See for example, *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) and *Grobler v Phillips and Others* 2023 (1) SA 321 (CC).

[92] AJ Van der Walt, 'The Modest Systemic Status of Property Rights' (2014) JLPS 15.

or even the right to life, should be balanced against the right to not be arbitrarily deprived of property, and even trump the latter where is appropriate. However, despite the sensibility and constitutional feasibility of Van der Walt's argument, this type of adjudication is almost never seen in courts—potentially because of the very normative message I have raised before. The current jurisprudence surrounding property rights is much more "rights protective and less race-conscious."[93] Even when the courts allow occupation to be ongoing at the expense of the property owner, it is usually on the condition that the occupiers be rehoused and that the owner be paid constitutional damages.[94]

Be that as it may, had the sunrise clause been implemented, section 26 would naturally override common law protections of the right to ownership where appropriate. The need for occupiers to obtain housing given South Africa's egregious history, coupled with their constitutional rights to housing, equality, and human dignity would organically trump the common law position. Or better yet, the relevant common law rules would need to be developed to give effect to the spirit, purport and values of the Bill of Rights, as per section 39(2).[95] This would have ensured that people who are landless would at least have access to land somewhat facilitated. Instead, we are left with a strong property clause entrenching existing property rights which have been secured under the apartheid regime. The only dents that can be made to this strong clause, are dependent on a willing and resourceful State—a flaw that was easily foreseeable.

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[93] AA Akbar, 'Toward a Radical Imagination of Law' (2018) 93 NYU LRev 438.

[94] See for example *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) ; *Grobler v Phillips and Others* 2023 (1) SA 321 (CC); *Pitje v Shibambo and Others* 2016 (4) BCLR 460 (CC); and, *Malan v City of Cape Town* 2014 (6) SA 315 (CC).

[95] It is mandatory for the Constitutional Court to mero motu raise the development of the common law where it is deemed unconstitutional. For more, see *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

VI. In the End, There Remained Chaos

What we are seeing currently in the country is not rigor mortis of a dying apartheid regime. On the contrary, it is the cementing of illegitimate property relations that were set up during apartheid. By providing these property relations with *de facto* constitutional protection, and subsequently making previously disadvantaged population's access to land be dependent on a willing and resourceful State, section 25 has afforded constitutional protection of property to only a certain category of people. We need to unravel the illegitimate legal system that is the South African property regime.

Sadly, there is no demiurge to fix the land crisis. As of 2018, the white population, which forms 8% of the South African population, owns 72% of privately owned land. Black Africans, who form 80.5 % of the population, own 4% of the land. The numbers speak for themselves, and they speak of failure. Nevertheless, this failure does not need to be lasting. It is a sign that we ought to take a step back and reconsider our wins and losses and go back to the drawing board. A political compromise will not take us to the promised land of equality.