

Property rights debate rages on

THE hotly disputed property rights clause in the bill of rights for South Africa's interim constitution is in its tenth draft. It is expected that the property rights clause and other outstanding issues of World Trade Centre negotiations will be completed by the second week of November.

Objections to the seventh draft clause from the National Land Committee (NLC), to which AFRA is affiliated, included that:

- it would be disastrous to constitutionally entrench existing property rights as this would entrench the racially discriminatory results of apartheid land laws and policies and colonial conquest. If South Africa had had constitutional protection for property rights during the last century, forced removal and the racial prohibition of rights to own and lease land could never have taken place. Now that

these have resulted in the dispossession of the majority of South Africans and the white ownership of 80% of South Africa's land, the situation is to be set in stone by a constitutional entrenchment of property rights.

- there was unequal treatment of past (black) and present (white) property rights in the proposed clause. On the

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In August 1993, hundreds of representatives from rural communities in South Africa went to the World Trade Centre to protest against the draft property rights clause. Despite assurances from negotiators, the new draft has not addressed their concerns.

one hand, the proposed property clause guaranteed existing property rights and tied expropriation of property to at least market value compensation. On the other hand, the proposed property rights clause made restoration of land to victims of apartheid policies and laws conditional on feasibility.

The new draft has done little to address these concerns. It has:

- broadened property rights to include rights in property
- added that there should be expeditious payment of compensation when rights in property are expropriated in the public interest
- made compensation at market value more explicit and unambiguous

Lawyers, who have been working with the NLC, have warned that the tenth draft clause makes the constitutional right to restoration of land much weaker. If included in the bill of rights, they say, rather than such a bill marking the end of apartheid, it would entrench apartheid's results. And it would not be surprising if many South Africans rejected it.

The provision guaranteeing the right to compensation for expropriation of rights in property will oblige the state to pay compensation if even part of an owner's property rights is taken away. Practically, this would entitle owners to claim compensation if:

- they are prevented from using their property in a way which endangers the environment
- changes in municipal zoning laws, land use and development rights affect

existing land use and development rights of owners

- low income housing is established near to existing residential areas
- the state tries to implement rent control.

The clause stipulating that compensation for expropriation in the public interest should be made expeditiously has traditionally meant that such payment should be made before or simultaneous with expropriation.

Although the judicial interpretation of the phrase "expeditious payment of compensation" has varied, if strictly interpreted, it would mean that deferred compensation is unconstitutional.

In formulating the nature of compensation which should be paid a list of factors which was included in the seventh draft property clause has been dropped.

In the current draft, it is said that compensation should be "just and equitable".

In other countries "just" has been consistently interpreted to mean market value. "Equitable" has been interpreted to mean compensation above market value.

In a leading international case between the Libyan Oil Company and the Libyan government, the word "equitable" was interpreted to mean that the company should be paid the market value of its assets and compensation for future loss of profit.

Although market value compensation would be appropriate in some cases of expropriation, the results of the present formulation of the clause would enrich people who already got

favourable treatment from the state, undermine the constitutional promise of land restoration and make significant land reform impossible.

Ultimately, it could undermine all property rights and place the constitution itself at risk because it attempts to entrench the existing vast inequality in South Africa.

Restoration of land to victims apartheid will depend on whether or not the state is able to effect expeditious and just and equitable compensation to current landowners. If the state cannot, the present owners will retain their land and those who were dispossessed will remain so.

Realistically, there will not be sufficient funds for any substantial land reform, the lawyers argue.

They also point out that a constitutional guarantee that existing holders of property rights will retain these unless the state can meet huge compensation claims, undermines current pragmatic negotiations taking place now.

These are taking place in the context of present owners wanting to stabilise their ownership, recognise the validity of counter-claims on their land and to seek ways of arriving at solutions which involve some sharing of the loss suffered by dispossessed communities.

There are negotiations between farmers and forcibly removed communities, companies are negotiating with long-term labour tenants about how to divide land and share its use and conservation bodies are accepting and recognising pre-existing land rights in conservation reserves.