**The (Constitutional) Problem of Property**

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1. Good evening. Thank you for inviting me to deliver this lecture. I see it is billed as a ‘prestige’ lecture. It is not. Last year I spoke here at an event in honour of former Chief Justice Ngcobo about security of tenure title and Professor Karin van Marle thought the topic sounded interesting enough to justify a further talk to a different audience. She also referred to my talk in a later paper she delivered and I want to refer to what she said there to show that this talk tonight is pretty ordinary stuff. This is what she said about the view I adopted:

“To identify and name the limits of this view is easy, in particular for an audience of critical legal scholars. To expose the fact that the project being tied to law and to what is legal, to a constitutional view of property and therefore always already limited, undercut by law’s closure, is not new or particularly interesting.”

1. So I am not too sure whether I should try and make my talk more interesting or whether I must assume that tonight’s audience will not be as critical as the people Professor Van Marle spoke to. I have tried, from my side, to make it a bit more interesting. I hope you do your bit too, by not being too critical.
2. But on a more serious note. I know Prof van Marle and I want to thank her and the Law Faculty for the opportunity to be here tonight. The issue of property – and I use it in the broad sense of access to all the resources of our country – is perhaps the most contested issue arising from the historic compromise of our negotiated revolution. I use the words ‘historic compromise’ and ‘negotiated revolution’ advisedly, because that is the context within which I will proceed from in my talk.[[1]](#footnote-1)
3. For others, that context is the source of the problem. In preparing for this talk I found much assistance in a recently published book, *The Promise of Land*, edited by three persons also closely connected with the Eastern Cape where I come from and live.[[2]](#footnote-2) But a page right at the start of the book worried and challenged me. It stated this:

“While the South African constitution has been hailed as one of the most progressive in the world, it merely represents the balance of forces at the time of transition. It was a compromise, not without its costs for the majority. One of the compelling questions confronting contemporary South Africa is whether fundamental land reform can in fact take place within the context of the rule of law, or whether we require a land revolution rather than just land reform. But clearly such a land revolution will not be without costs to society at large. The question relates broadly to the legitimacy of the state and the construction of a unitary imagination of the South African nation. There is no doubt that the unequal division of land along racial lines fractures the nation into opposing identities of white wealth and property and black dispossession and poverty. In this sense unequal access to land acts as a spatial barrier to a unitary imagination of the South African nation.”

1. That made me read again the by now famous “South Africa: Two Nations” speech by former President Mbeki at the opening of the debate on reconciliation and nation building in the National Assembly on 29May 1998,[[3]](#footnote-3) some 16 years ago:

“So ... we also pose the questions: What is nation-building? and Is it happening?

With regard to the first of these, our own response would be that nation-building is the construction of the reality and the sense of common nationhood which would result from the abolition of disparities in the quality of life among South Africans based on the racial, gender and geographic inequalities we all inherited from the past.

...

We therefore make bold to say that South Africa is a country of two nations.

One of these nations is white, relatively prosperous, regardless of gender or geographic dispersal. It has ready access to a developed economic, physical, educational, communication and other infrastructure. This enables it to argue that, except for the persistence of gender discrimination against women, all members of this nation have the possibility to exercise their right to equal opportunity, the development opportunities to which the Constitution ... committed our country.

The second and larger nation of South Africa is black and poor, with the worst affected being women in the rural areas, the black rural population in general and the disabled. This nation lives under conditions of a grossly underdeveloped economic, physical, educational, communication and other infrastructure. It has virtually no possibility to exercise what in reality amounts to a theoretical right to equal opportunity, with that right being equal within this black nation only to the extent that it is equally incapable of realisation.

This reality of two nations ... constitutes the material base which reinforces the notion that, indeed, we are not one nation, but two nations.

And neither are we becoming one nation. Consequently, also, the objective of national reconciliation is not being realised.

It follows as well that the longer this situation persists, in spite of the gift of hope delivered to the people by the birth of democracy, the more entrenched will be the conviction that the concept of nation-building is a mere mirage and that no basis exists, or will ever exist, to enable national reconciliation to take place.”

1. Let me complete this rather bleak picture with another quote, this time from J.M.Coetzee, now living in Australia:[[4]](#footnote-4)

“Broadly speaking, he and I shared an attitude towards South Africa and our continued presence there. Our attitude was that, to put it briefly, our presence here was legal but illegitimate. We had an abstract right to be there, a birthright, but the basis of that right was fraudulent. Our presence was grounded in crime, namely colonial conquest, perpetuated by apartheid. Whatever the opposite is of native or rooted, that was what we felt ourselves to be. We thought of ourselves as sojourners, temporary residents, and to that extent without a home, without a homeland.”

1. There are disconcerting assertions in these statements that we must face. You can all see that I am white and male. I grew up on a farm in the Eastern Cape where my forbears settled in the mid-nineteenth century, after moving from the Cape where they arrived almost a century earlier, in 1771. I still have roots in the land there and within my extended family the obligations that flow from that history still cause concern and anxiety. We are not exceptional in that regard. I do not think it is an exaggeration that the question of property, past privilege and restoration is something that is present to all South Africans. And I think that it is also true that there is a divide on racial lines between those who view the issue with apprehension and perhaps even fear, and those who view it with expectation, hope and a sense of entitlement that things must change in their favour.
2. The question of what to do about existing and prospective property rights is thus probably the most contested issue arising from the historical compromise that resulted in our Constitution. The question which we must answer is whether it is possible to forge a coherent common vision under the Constitution about what purpose or value the holding of property may have for all our people. That is the topic I address tonight. I will ask questions, make some suggestions, but I do not pretend to have the answers. If you go away to think about these issues more seriously after the talk, my purpose would have been accomplished.
3. As I stated earlier the genesis of my talk here comes from the one I gave last year in honour of Justice Ngcobo. I used the undecided question in Justice Ngcobo’s judgment in *Tongoane*,[[5]](#footnote-5) namely whether the provisions of the then proposed Communal Land Rights Act (CLARA) provided legally secure tenure, or undermined it, as an introduction to the broader question: What kind of legally secure title of property does the Constitution envision for those persons who were deprived of property by colonial and apartheid dispossession? Aligned to that issue are, first, the question to what extent customary law assists in finding an answer; and, second, how does the provision of legally secure title of property to the previously dispossessed affect the legal title of property held by the privileged, those who were not discriminated against in the acquisition and holding of land and other property?
4. This is how Ngcobo CJ started the judgment in *Tongoane*:

“This case raises important constitutional questions concerning one of the most crucial pieces of legislation enacted in our country since the advent of our constitutional democracy: the Communal Land Rights Act, 2004[[6]](#footnote-6) (CLARA). This legislation is intended to meet one of the longstanding constitutional obligations of Parliament to enact legislation to provide legally secure tenure or comparable redress to people or communities whose tenure of land is legally insecure as a result of the racist policies of apartheid that were imposed under the colour of the law. The people and communities who were primarily victimised by these laws were African people.

Section 25(6) of the Constitution provides:

“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.”

This case concerns first, the procedure that must be followed in enacting this legislation; second, whether Parliament complied with its constitutional obligation to facilitate public involvement in the legislative process that culminated in the enactment of CLARA; and, third, whether the provisions of CLARA, instead of providing legally secure tenure, undermine it.”

1. We know that the Court did not get to the third question, whether the provisions of the piece of legislation before it provided legally secure tenure under the provisions of section 25(6) of the Constitution, or undermined it, and that the legislation was found unconstitutional for other reasons. But as Justice Ngcobo pointed out, providing legally secure tenure of land for those disadvantaged by our past is crucially important to our constitutional endeavour. And, as an aside, it has still not been done 20 years on in our democracy.
2. But legally secure title to property for those previously disadvantaged impacts on many levels. When I speak of ‘secure title’ I use it in the broad sense of what kind of legal protection is given to the interest at stake. Those that come first to mind are:

Black economic empowerment;

Distribution of natural resources;

Land restitution;

Secure restoration in traditional areas;

Urban housing; and

Social grants.

1. Let me ask you what your first reaction would be if asked what kinds of secure title are applicable to each of these situations. Here is my guess:

Black economic empowerment – legislation, aligned with contract and commercial law;

Natural resources – mostly the same, perhaps communal ownership or cooperatives too;

Land restitution – individual and communal ownership;

Secure restoration in traditional areas – customary law;

Urban housing – legislative intervention that may allow rental housing, individual title, or social forms of tenure.

Social grants – legislation providing for statutory entitlements.

1. If my guess was reasonably close to the mark it would seem, at first glance, that there is no great prospect of commonality or coherence arising from these different situations. But maybe we should have a second look, even on an acceptance of the initial compartmentalisation, and that may indicate that within those compartments there are significant choices available:
2. Contract law – between strict inflexible rules in the formation, execution and enforcement of contract, or allowing notions of *ubuntu* and good faith to play an equitable role;
3. Access to natural resources – from working on an adaptation of common law notions of ownership to introducing a radical transformation by introducing some form of a state custodianship model in its stead;
4. Land restitution in the commercial agricultural sector – similar to the possibilities that exist in other natural resources;
5. Secure redress in traditional areas – between traditional, communal and individualised forms of ownership in customary law;
6. Urban housing – between viewing it as impacting on individual private ownership in the sense also of a social and constitutional obligation sourced in the housing rights under section 26 of the Constitution, as against it being an obligation only on the state to provide access to housing;
7. Social grants – between viewing it merely as a statutory form of welfare relief to one of seeing it as one of many ways to empower people to enter the more formal economy.
8. What I will try and develop is a tentative suggestion that, depending on the choices we make in these apparently disparate fields, there is potential for coherence on the purpose and value of property under the Constitution.
9. The Constitution is not grounded or based on the notion that the holding of property is morally reprehensible, or on the notion that property amounts to theft.[[7]](#footnote-7) Section 25(1) provides that no one may be deprived of property unless certain preconditions are met. Sections 25(4) and (8) envisage equitable access to all our natural resources. Section 25(5) requires the state to take reasonable legislative and other measures to foster conditions which enable citizens to gain access to land on an equitable basis. Section 25(6), as we heard, envisages legally secure tenure to land. Section 25(7) explicitly provides for restitution post 1913 dispossessed property. Section 26 provides for access to housing and the protection from eviction from one’s home. Section 22 states that every citizen has the right to choose their trade, occupation or profession freely. Section 23 protects the right to fair labour practices. All these provisions accept that the holding of property has some value, and that without access to property one cannot live a dignified life which includes, at the least, the security of having a home and choosing freely what work one wants to do.
10. The Constitutional Court has held that property under section 25 may include rights other than common law property as we understood it earlier.[[8]](#footnote-8) But in any event section 9(2) of the Constitution covers the field in a similar manner:

“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

1. I will thus proceed from the general underlying premise that the Constitution accepts or recognises some value or purpose in the holding of property, but that this recognition is itself premised on the pre-condition that in order to redress our past there must be, in one form or another, an equitable redistribution of property from those who had to those who did not have. In order to examine the potential of coherence on what values the holding of property in its many diverse forms hold, I will discuss only three examples: customary or indigenous law, social grants, and expropriation of existing property. The choice is deliberate. It is estimated that close to 40% of the population in this country lives under indigenous or customary law.[[9]](#footnote-9) About 15 million people receive social grants.[[10]](#footnote-10) And expropriation is the greatest fear of white people, especially in the agricultural sector.[[11]](#footnote-11)
2. What is the kind of property that indigenous or customary law recognises? Consider these two statements:
3. “Buy land? How can you want to buy land? Don’t you know that all land is God’s, and he gave it to the chiefs only?”[[12]](#footnote-12)
4. “Regarding the concept of ownership of land in black Africa, after many years of legal artifice it is agreed that the concept is alien to African customary law. African jurisprudence recognised rights of possession determined by prior settlement and membership in given social groups, use rights contingent on social labour, and rights of social exchange underscored by implicit reversionary rights ...[T]he land was treated as a permanent part of human existence and generally taken for granted. This did not diminish its value, as is generally believed by Eurocentrics, but instead made it inestimable. Among other things, this means that far from being a physical solum, land is a social endowment that is in principle inalienable.”[[13]](#footnote-13)
5. Are these statements a correct reflection of customary law? I am not here to tell you whether it is, but this conception has certainly been challenged in our past.
6. The first statement was the response of Mr Stephen Sonjica’s father when his son expressed his desire to buy land. Mr Sonjica was one of the persons who were able, before 1913, to buy land as an individual under the laws that applied in the Cape Colony then. He disregarded his father’s advice and after getting a job in King William’s Town described his own exploits as follows:

“I cunningly opened a private bank account into which I diverted a portion of my savings...This went only until I had saved eighty pounds... [I bought] a span of oxen with yokes, gear, plough and the rest of agricultural paraphernalia... I now purchased a small farm... I cannot too strongly recommend [farming] as a profession to my fellow man... They should however adopt modern methods of profit making.”[[14]](#footnote-14)

1. The applicants in *Tongoane* also acquired registered title to their land prior to 1913. The different communities administered the land in accordance with indigenous law. They challenged the provisions of CLARA on the grounds that the statutory traditional councils constituted an unjustified intrusion or distortion of the indigenous law practised by their communities.
2. Another example is the Xhalanga district in the Eastern Cape. Their people exercised individual grazing rights and also democratically elected their leaders.[[15]](#footnote-15)
3. When one then looks at the reason why the 1913 Land Act was passed it is necessary to delve beyond the mere racism in its passing. Economics underlay the racism. The successful and productive use of their land by people like Mr Sonjica and communities like the Tongoane applicants presented a dual threat: they presented real competition to white farmers, on the one hand. On the other, the productive use of their land meant that the supply of cheap black labour to the mining industry was also threatened. If people could make a proper living on the land they owned why would they want to go and work on the mines if the wages there did not match what they could produce themselves? Farms owned and farmed by blacks who were owners of the land presented a threat to white farmers and the supply of cheap labour to the mines. That threat was removed by the 1913 Land Act.[[16]](#footnote-16) The rest is the sad history of South Africa in the twentieth century.
4. The picture of land ownership and use by black people prior to 1913 is thus not necessarily only the traditional one of land allotted to people by traditional leaders and used outside the competitive economy. It is perhaps a more nuanced one that also includes individuals and communities blending the security of common law ownership with their individual and communal need to produce goods and yes, sometimes, to make profits in that production.
5. So what is the customary law conception of property? From this brief discussion there are at least three possibilities. The first is that the true essence of customary law does not recognise ownership of property; that it is alien to customary law – that land is ‘God’s property given only to the chiefs’. The second is that customary law is quite capable of developing its own notion of property, by ‘living customary law’ of the kind that the Tongoane applicants asserted. The third is perhaps a variation of the second, namely the development of individual property of the kind Mr Sonjica enthused about, or individual grazing rights to land as recognised in the Xhalange district in the Eastern Cape.
6. Is it too fanciful to suggest that this is a picture of a ‘living’ law of indigenous people which embraces a conception of property that includes traditional, communal and individual aspects, but is not exclusively wedded to any one of them? Is ‘living’ customary law restricted to a single homogenous notion of a customary law of ownership, or is it capable of a diversity of conceptions based on people’s needs and circumstances?
7. Earlier I indicated that the Constitution accepts or recognises some value or purpose in the holding of property, but that this recognition is itself premised on the pre-condition that in order to redress our past there must be, in one form or another, an equitable redistribution of property from those who had to those who did not have.
8. I will concentrate on two different levels where restoration must take place. Once again the distinction I draw may be a contested one, but it is also, I think, a reasonably defensible one, namely that of a dual economy. On the one hand a commercialised, competitive economy, largely urban-based but including, importantly for present purposes, commercial agriculture. On the other is its poor counterpart, primarily based in the former homelands, but also in the marginalised settlements on the edge of our cities and towns. Let us call them, for the sake of convenience, respectively the “rich economy” and “the poor economy”.
9. The question one must then ask is whether the equitable restoration of property should be different in kind or extent in relation to whether it is taking place in the rich and poor economies, and what role customary law should play in each sphere.
10. There has not been much of a debate that the redistribution of property in the rich economy must be accompanied by a change from private property to communal property, or property based on traditional notions of customary law. The transfer of wealth that has taken place in terms of charters in different sectors of the economy has been largely based on conventional and existing forms of private property: land, shares etc. These transfers also generally take place within the framework of the common law of contract. But within the law of contract *ubuntu* at least has played some part.
11. In *Barkhuizen v Napier*[[17]](#footnote-17) Justice Ngcobo stated the following:

“Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of ubuntu.”

In Everfresh, the majority judgment in the Constitutional Court stated:[[18]](#footnote-18)

“Had the case been properly pleaded, a number of inter-linking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and “carries in it the ideas of humaneness, social justice and fairness” and envelopes “the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”.[[19]](#footnote-19)

1. The extent of this incremental development of the common law of contract is an ongoing process. It is also a contested question, but I venture to suggest that whatever its exact contours, the harmonisation of values of good faith and public policy in the common law of contract with the concept of *ubuntu*, through the mediation of the fundamental values of dignity, equality and freedom, is a necessary one if we aspire to a coherent common conception of the value of property under the Constitution.
2. What about restoration in the poor economy?
3. It is by now a truism that colonialism and apartheid distorted customary law to the advantage of colonial and apartheid rulers. Amongst some this implied that the dismantling of the reserves or homelands would be central to a post-apartheid South African project.[[20]](#footnote-20) Others, however, warned that the history of post-colonial independence in Africa suggested that new rulers more generally than not used the bifurcated colonial structures to enhance and establish their own undemocratic rule and that there was no guarantee that in South Africa things would necessarily be different. In 1996 Mahmood Mamdani warned:[[21]](#footnote-21)

“[T]he real import of South Africa’s transition to non-racial rule may turn out to be the fact that it will leave intact the structure of indirect rule.”

1. There has always been a link between the rich and the poor in our country. For some the exploitation of the poor by the rich is an inevitable consequence of capitalism and the history of the development of our economy since the discovery of diamonds in 1867 is certainly capable of that kind of analysis.[[22]](#footnote-22) But that is not the kind of linkage that the Constitution arouses our interest in. All economic arrangements and their impacts must be open to scrutiny for consistency with constitutional rights and values. And one of the linkages our Constitution seeks is one that will destroy the link of exploitation of the poor by the rich.
2. The example of *Ubuntu* in our contract law illustrates that the conception of private property in the rich economy needs to accommodate the fundamental constitutional values of dignity, equality and freedom for it to play a role in breaking the link between the holding of property and its potential for exploitation. It is but one illustration of the choices that need to be made in order to create some kind of commonality about the value of property under the Constitution.
3. Similar kind of choices awaits us in the poor economy. My tentative suggestion is that the best choices will be made if we are able to find commonalities or complementary possibilities of dignity, equality and freedom in the three potential conceptions of property possible in customary law, namely the traditional, the communal and the individual. If we claim that each of these hold the whole truth, to the exclusion of the others, it is unlikely that our Constitution will be served best. From the traditional perspective we may learn that the granting and holding of property is a social gift that is not ours to abuse by using it to exploit other people. The communal perspective may give us insight as to how dignity and equality may be served by joint effort. And the individual perspective may make us realise what satisfaction of dignity there is in the freedom to use one’s own initiative and means to create a life for oneself.
4. Reciprocally, the individualist orientation of the common law should be more accommodating to an acceptance of communal and socially responsible values embodied in customary law. If we do that, we may find that the value of property under the Constitution coheres under the values of dignity, equality and freedom that are present – if we look and choose carefully – in both customary and common law.
5. As a possible illustration of this let me turn to social grants. As I said, about 15m people receive social grants. Opinion on the effect of social grants is also divided, I suspect again largely on racial lines. In a recent piece Jonny Steinberg suggested that universal grants are necessary once we acknowledge that mass unemployment is permanent.[[23]](#footnote-23) I do not want to enter the debate on the economic necessity of social grants and confine myself to note that in terms of the Constitution access to social security is a fundamental right and the state is obliged to take reasonable measures to achieve the progressive realisation of each of these rights.[[24]](#footnote-24) For my purposes I want to refer to what Steinberg said about the effect of social grants. He commented on the response to his suggestion in the following manner:

“Many people replied to what I said.

Those who agreed did so with an air of resignation. Those who disagreed accused me of despair. People need to work in order to be fully human, some said.

People must be industrious and creative if they’re to thrive. Once we give them a grant instead of a job, we are condemning them to a life that is less than human.

This juxtaposition – thriving working people on one side, rotting welfare recipients on the other – is not right. It made sense many years ago in another country, when Margaret Thatcher found a language with which to diagnose Britain’s ills. It does not make sense here and now.

Welfare brings life, not idleness, to the worlds of the South African poor.

I know this because I have seen it happen. I have spent time, and become close to people, in the coastal villages of Pondoland in the wake of the big cash injections of the early 2000s – the pension increases, the spread of child welfare grants.

Welfare creates entrepreneurs.

People have money they didn’t before and they want to spend it where they live. And so the enterprising begin selling everything, from building materials to airtime.

Within a few years, a poor person becomes well-off and sends his kids to a good school, setting his family on a new trajectory. This happens before the eyes of the poor, for it is one of them on the up, and as they watch him, their own horizons expand.

Welfare also gives young people the means to work.”

1. Steinberg explains this by the fact that old-age pensions enable young people to become labour migrants. I am not suggesting that is always the effect of social grants. Nor does Steinberg. But what he says is what I urge us all to do when we think of what property is under the Constitution, and what value it has. He ends his piece in this way:

“I am not suggesting that we give up looking for ways to create jobs. Of course not. But once we recognise that full employment is a pipe dream, that vast sections of our country are destined to transmit joblessness to their children and their grandchildren the idea of welfare takes on new meanings. It is not something that pushes people away, making them idle and useless. On the contrary, it brings them in from the cold. It gives them some control over their destinies and thus renders them more alive, more like us.”

1. Translate that into constitutional values of dignity, freedom and equality and suddenly we look at social grants with new eyes, just as we can look at customary or indigenous law with new eyes. We can imagine welfare as an important form of property in our country under our Constitution. And we can imagine that it may become important to recognise that the holding of that kind of property involves recognition of the same or similar kind of values that holding more conventional kind of property may have.
2. And that brings me to the expropriation of property.
3. Expropriation probably generates the most heat in public discussion, but from a lawyer’s perspective not too much light. The simple reason for that is the puzzlingly persistent disregard of the contents of the Constitution. Let me read that again, to make the point:

“25(1) No one may be deprived of property except in terms of law of general application, and no law may permit deprivation of property.

(2) Property may be expropriated only in terms of law of general application-

 (a) for a public purpose or in the general interest; and

 (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agrees 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-

 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

property is not restricted to land.”

And then follows a number of provisions which places further obligations on the state to redress past insecure title to land.

1. Much of the heat, as far as I can see, is centred on something called the “willing buyer, willing seller” principle in determining compensation for expropriation. The Constitution does not lay down that standard. It includes market value as one factor amongst five that must be taken into consideration into determining just and equitable compensation.
2. I do not think it is necessary for me to belabour the point that the provisions of section 25 of the Constitution (and its general transformative thrust) is quite capable of a coherence of vision on what value property in its broadest sense may serve, based on the choices we make about how to imagine dignity, equality and freedom without being bound by past convention or tradition.
3. But to say that section 25 of the Constitution is not the real cause of the apprehension/entitlement discord does not really help to address the underlying cause of the fear of things being taken away on the one hand and the feeling of entitlement that they should be given to those that did not have them previously. We must acknowledge that the Constitution asks tough things of us, whether we are the historically advantaged or the historically disadvantaged.
4. Let me start by the historically privileged, of whom I am one. Our birthright to this country that we love is only fraudulent (in the sense of the J.M.Coetzee excerpt earlier) if we are not prepared to admit that we are advantaged and that our privilege is inevitably connected to conquest and dispossession. My family’s possession and ownership of land in the area between the Fish and Kei rivers occurred some 150 years ago because the original inhabitants were displaced and our forbears were given the legal opportunity of obtaining ownership of the land. We may want to quibble a bit and point out that this history is a bit more nuanced, because the original inhabitants, the San hunter-gatherers, were driven from that area not only by colonialists, but also by advancing Nguni-speaking pastoralists and agriculturists from the east.[[25]](#footnote-25) But that may be an argument for preference in transformative measures to the San and Khoikhoi peoples and hardly assists us. My family is not unique. The reality is that all white South Africans benefitted in some way from colonialism and apartheid before 1994. If we deny that, we risk making our birthright fraudulent.
5. But sometimes we try a different tack. We point to economic efficiency and the evidence that appears to suggest that successful societies are those that recognise and protect property rights.[[26]](#footnote-26) So we say, look, we understand that this may be bit unfair, but in the long run the economic truth is that by protecting existing property rights everybody will in the end be better off. In our country the underlying economic assumptions or validity of that kind of argument is seldom challenged on its own terms. It becomes an unarticulated argument for a normative efficiency analysis of the law.
6. The truth is, however, that the efficiency analysis of law starts off as a descriptive or positive analysis, which means that it attempts to describe an “is” situation.[[27]](#footnote-27) Roughly speaking it says that each initial assignment of rights will yield an efficient outcome to any bargaining process, regardless of the initial assignment of rights.[[28]](#footnote-28) So, interference with the initial distribution of rights will simply increase transaction costs without an increase in economic efficiency and is thus not worth the candle. Economists tend to see the law as a system for altering incentives, unlike lawyers who see the law as a set of rules and procedures for the ordering of society in a just way.[[29]](#footnote-29) The transition from positive efficiency analysis based on the initial distribution of rights (an “is” situation) to a normative argument on policy (an “ought situation) requires only the inference that efficient allocation of resources is desirable to society. This inference is easy to draw and, for most economists, easy to accept.[[30]](#footnote-30) But this jump from an ‘is’ situation based on the existing allocation of resources, to an “ought” situation, namely that it will be economically inefficient to change an existing efficient allocation of resources, begs the question.
7. Positive economics says nothing about the fairness of the initial distribution of resources. The argument from efficiency is based on the existing allocation of resources and will thus inevitably reinforce existing power relations within society. It thus begs the question whether another distribution of resources will not be as sufficient as the initial one, which on the logic of the efficiency thesis, it should be. This point is made by Professor Medema, an economics professor, in his book, *The Hesitant Hand, Taming Self-Interest in the History of Economic Ideas*:[[31]](#footnote-31)

“The theorem [referring to the Coase Theorem that underlies the economic analysis of law] says that the structure of legal rules does not matter, in an allocation sense. A moment’s thought reveals that, if this were actually true in reality, the entire “economic analysis of law” enterprise would never have left the ground. The economic analysis of law takes as its mission the analysis of the efficiency properties of alternative legal rules – historical, actual, and potential. If any legal rule will generate an efficient and invariant allocation of resources, these studies would have all the import of one purporting to show, by reference to extensive empirical analysis, that the sun rises in the morning. Likewise, the advocacy of particular legal rules based on their efficiency properties would be nonsensical.”

1. Economic analysis based on existing distribution of resources cannot resolve the issue of what a just transformation in relation to the allocation of resources should be. We must acknowledge that too.
2. But the Constitution also asks tough things of those who were and are not on the historically advantaged side of the divide in our society. The Constitution takes the liberation struggle’s claim that it fought for non-racialism and non-sexism very seriously. It says that that our Country is a democratic state founded not only on human dignity, the achievement of equality and the advancement of human rights and freedoms, but also on non-racialism and non‑sexism. So the tough thing for the historically disadvantaged is to acknowledge that the final goal of our Constitution is not simply to take all the things from the previously advantaged and give it to the previously disadvantaged, but to do so in order eventually to achieve a non-racial and non‑sexist society where all live lives of dignity, equality and freedom. So the problem is that the immediate practical transformation of the wrongs of the past can hardly be approached without race being an important, perhaps most important, aspect in that immediate effort. But can it be a lasting approach? I do not think so. Our Constitution is not a jealous God that visits the sins of those who were wrongly privileged in the past on their children and grandchildren. Justice does not lie in revenge on the innocent.
3. I have suggested tonight that if we dare to think about the value of property outside the confines of our respective restrictive boxes, we might just find that there is room to agree that the holding of property gives us all the opportunity of living a life of dignity beyond mere existence. We may come to see that it gives us the springboard to take part productively in economic life. And our past may be able to teach us that exclusivity in the holding of property leads to the exploitation of others and that it is therefore vitally necessary not only to extend the possibility of the holding of property to everyone, but to realise that the exploitative use of property does nothing for the dignity, freedom and equality of self and others and thus can lay no claim to protection under the Constitution.
4. I think it is possible and worthwhile to strive for that, otherwise I would not be doing what I do for a living.

Thank you.

1. The features of our Constitution as a historical compromise and a negotiated revolution have been recognised in the jurisprudence of the Constitutional Court. [↑](#footnote-ref-1)
2. Hendricks et al (eds)*The Promise of Land* (Jacana Media, Johannesburg 2013) at 36. [↑](#footnote-ref-2)
3. Thabo Mbeki, *Reconciliation And Nation Building, s*peech at the opening of the debate in The National Assembly, Cape Town, 29 May 1998, in Thabo Mbeki, *Africa – The Time Has Come*, Tafelberg/Mafube 1998. [↑](#footnote-ref-3)
4. Coetzee, JM *Summertime: Scenes from Provincial Life* (Harvill Secker, London 2009). [↑](#footnote-ref-4)
5. *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214 (CC) ; 2010 (8) BCLR 741 (CC) (*Tongoane*). [↑](#footnote-ref-5)
6. Act 11 of 2004. [↑](#footnote-ref-6)
7. Proudhon, P *What is Property?: An Inquiry into the Principle of Right and of Government*, (Humboldt Publishing Company,1840) and Guérin, D (ed)(trans Sharkey) *No Gods, No Masters: An Anthology of Anarchism*,(AK Press, 2005) 55-6. [↑](#footnote-ref-7)
8. *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) BCLR 170 (CC); 2013 (2) SA 1 (CC) [↑](#footnote-ref-8)
9. *Tongoane* above n **Error! Bookmark not defined.**. [↑](#footnote-ref-9)
10. *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC) at para 1. [↑](#footnote-ref-10)
11. *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC). [↑](#footnote-ref-11)
12. Bundy, C *The Rise and Fall of the South African Peasantry* (Berkeley, 1979) 94. [↑](#footnote-ref-12)
13. Mafeje, *The Agrarian Question, Access to Land and Peasant Responses in Sub-Saharan Africa*, 2003, quoted in Hendricks et al above n **Error! Bookmark not defined.**, 251. [↑](#footnote-ref-13)
14. Bundy, above n 11. [↑](#footnote-ref-14)
15. Ntsebeza, *The More Things Change, The More they Remain the Same: Rural Land Tenure and Democracy in the Former Bantustans,* in Hendricks et al above n 1, at 57 and 65-7. [↑](#footnote-ref-15)
16. Compare Bundy above n 11, and Innes *Anglo American and the Rise of Modern South Africa* (Raven Press, Johannesburg 1984) [↑](#footnote-ref-16)
17. *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 51. [↑](#footnote-ref-17)
18. *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 51. [↑](#footnote-ref-18)
19. The minority judgment was even more emphatic at para 23:

“The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.” [↑](#footnote-ref-19)
20. Ntsebeza above n 14. [↑](#footnote-ref-20)
21. Mamdani, M *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism,* (Princeton University Press, 1996) also quoted in Hendricks et al above n 1 at 54. [↑](#footnote-ref-21)
22. Innes, above n 15. [↑](#footnote-ref-22)
23. Steinberg, J “Grants encourage liberation, not dependence” *Business Day, BDLive*, 23 August 2013 (accessed at http://www.bdlive.co.za/opinion/columnists/2013/08/23/grants-encourage-liberation-not-dependence) [↑](#footnote-ref-23)
24. Section 27 of the Constitution reads in relevant part:

“(1) Everyone has the right to have access to -

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. [↑](#footnote-ref-24)
25. Thompson, *A History of South Africa*, 4th ed, Jonathan Ball Publishres, 2014, at 28-9. [↑](#footnote-ref-25)
26. S. Landes *The Wealth and Poverty of Nations, Why Some are so Rich and Some So Poor* (W.W. Norton & Company, 1998 New York). D. Acemoglu & J Robinson *The Origins of Power, Prosperity and Poverty: Why Nations Fail* (Crown Publishers, 2012 New York). [↑](#footnote-ref-26)
27. Compare S.G. Medema *The Hesitant Hand: Taming Self-Interest in the History of Economic Ideas* (Princeton University Press, 2009 New Jersey) at 186. [↑](#footnote-ref-27)
28. See Medema n 27 above at 176. [↑](#footnote-ref-28)
29. N. Mercuro and S.G. Medema *Economics* *and the Law: From Posner to Post-Modernism and Beyond,* 2nd ed (Princeton University Press, 2006 New Jersey) at 43 and 47. [↑](#footnote-ref-29)
30. Mercuro and Medema n 29 above at 47. [↑](#footnote-ref-30)
31. *The Hesitant Hand* note 27 above at 184. [↑](#footnote-ref-31)