

## **THE CONSTITUTIONAL MANDATE FOR SOCIAL WELFARE – SYSTEMIC DIFFERENCES AND LINKS BETWEEN PROPERTY, LAND RIGHTS AND HOUSING RIGHTS**

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### **SUMMARY**

Our purpose in this article is to argue that, as far as the constitutional promotion and protection of social welfare is concerned, there are significant theoretical and systemic differences between property, land rights and housing rights. Our argument is shaped by the fact that these three sets of rights are recognised and protected separately in the *Constitution of the Republic of South Africa, 1996*, but we argue that the theoretical differences go beyond variations between constitutions and bills of rights from different traditions and time periods. In our view, there are sound theoretical, and therefore also systemic, reasons why it is necessary to at least keep the differences between property, land rights and housing rights in mind when analysing, interpreting and applying any of these rights in a specific constitutional text. Above all, we argue that the reduction of housing rights to just another category of property rights might well reduce or even erode the special social, historical and constitutional value and meaning of housing rights.

We first consider theoretical arguments concerning the relationship between property, land rights and social welfare. In view of the theoretical analysis we proceed to consider the constitutional nature and status of property, land rights and

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housing rights in the South African context. We argue that both land rights (in the form of land redistribution and improved tenure security) and housing rights (in the form of the right of access to adequate housing) should be seen as discrete constitutional rights that stand on their own constitutional foundations and that they do not need to be protected as property rights. On the other hand, they are not fundamentally circumscribed or opposed by property rights either.

Instead, the *Constitution* requires a new, typically constitutional methodology that gives full recognition and effect to all three sets of rights, each in its proper place. Seen in this perspective, property is neither the guardian nor the enemy of social welfare. Nevertheless, the purpose of the property clause in general cannot be isolated from social welfare concerns that relate to improved access to land and housing rights, nor from the constitutional imperative to provide stronger land and housing rights. Important connections exist between these divergent constitutional imperatives that should be acknowledged to ensure the efficient realisation of social welfare concerns.

**KEYWORDS:** property law; constitutional property law; land law; land reform; restorative justice; housing law; constitutional interpretation.