

# The Constitutional State, the Social State and the Constitutional Property Clause

## Observations on the Translation of German Constitutional Principles into South African Law and their Treatment by the Judiciary

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Abbreviations of frequently cited South African legislation etc. are provided at their place of first citation.

## I. Introduction

South Africa's constitution<sup>1</sup> is the embodiment of a new social, political and legal order. The main virtue of the constitution is its potential to correct the injustices integrated in the South African society and the legal order inherited from the old order. Private property is one of the socio-legal institutions inherited from – and thoroughly influenced by the inherent injustice of – the old South African order. In the case of private property, the challenge to the new constitutional order is to eliminate the injustice brought about by years of apartheid, so deeply ingrained in the South African system of property law, without crippling the institution of private property as such. The inclusion of a clause protecting and regulating property in the constitution's chapter on fundamental rights,<sup>2</sup> makes this issue all the more important. Emotions are running high, especially where the principles of private property meet policies of land reform, restitution and redistribution. Because these issues are highly emotional, they are also prone to political abuse, as the example of South Africa's neighbouring country, Zimbabwe, shows.<sup>3</sup>

In an attempt to determine whether and how a new constitutional dispensation can influence the development of a more just property and land rights regime, this paper analyses the proposed influence of some of the basic constitutional principles on the treatment of private property rights by the South African courts. In particular, the basic constitutional principles of the constitutional state (or rule of law) and the social (welfare) state will be important for the present analysis. The matter will be approached from a comparative perspective, specifically with reference to the manner in which similar issues are dealt with in terms of the German

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<sup>1</sup> I.e. the (Final) Constitution of 1996, see G. Budlender, *The Constitutional Protection of Property Rights*, in: Budlender/Latsky/Roux, *Juta's New Land Law* (1998) ch. 1, 4 n. 2 for a discussion of the use of the qualifier "final". With reference to the erroneous numbering of the Final Constitution as "Act 108 of 1996", see D. van Wyk, 'n. Paar opmerkings en vrae oor die nuwe Grondwet, 1997 Tydskrif vir Hedendaagse Romeins-Hollandse Reg/Journal for Contemporary Roman Dutch Law (THRHR) 378–379. For a discussion of the certification of the constitution by the Constitutional Court, see E.F.J. Malherbe, *Die Sertifisering van die 1996 Grondwet, 1997 Tydskrif vir die Suid-Afrikaanse Reg (TSAR) 356–370*. Further reference to the Final Constitution in this paper will ignore the erroneous numbering and will simply be indicated with the abbreviation "FC" after a specific section. For the sake of consistency, reference to the Interim Constitution will be indicated with the abbreviation "IC" after a specific section.

<sup>2</sup> Sec. 25 FC.

<sup>3</sup> The Zimbabwean crisis has pushed the South African land reform programmes into the public eye. The South African situation parallels that of Zimbabwe only to a limited extent. In Zimbabwe, corrupt politicians had abused the land reform question in attempts to retain political power. Most politicians in South Africa still refrain from using this line of argument to gain political support. However, the slow pace at which land reform, redistribution and restitution is taking place could be used to ignite emotions similar to those experienced by the landless in Zimbabwe. See J. van Zyl, *Finansies & Tegniek* 5 May 2000 10–12 for a summary of different viewpoints on this issue. See also C. Mc Greal, "In Europe it's Called Ethnic Cleansing", 17 August 2001, online at <http://www.sn.apc.org/wmail/issues/010817/OTHER20.html> [21.02.2002].

Basic Law.<sup>4</sup> In this way, the inquiry also has the secondary goal of attempting to determine the extent to which constitutional principles serve as guides in a process of transnational integration of law, by establishing whether and how reception of foreign law takes place through application of more-or-less universal constitutional and legal values. In this context, the analysis of the constitutional state (or rule of law) and the social (welfare) state principles as they are applied in Germany and South Africa serve as an example of the process of transnational integration of law.

At the outset, the importance of the reception of German law pertaining to the constitutional and social state principles for the South African context is scrutinised and some terminological difficulties encountered in the course of the inquiry are discussed. In the next section, the basic theory of the interplay between the constitutional and social state principles and the constitutional protection and regulation of private property is discussed, with reference to German and South African Law. This is then applied in a critical analysis of certain aspects of three recent South African cases, namely the *Grootboom* decision,<sup>5</sup> the *Kyalami Ridge* decision,<sup>6</sup> and the case of *Joubert v Van Rensburg*.<sup>7</sup> In the final part of the discussion, some suggestions for the implementation of the framework discussed in this paper are made with reference to the South African context.

## II. A Model of Liberty and Social Duty in South African Property Law: Exploratory Observations

The following paragraphs provide a brief theoretical overview of the process of reception of foreign law to indicate specifically the importance of the German legal system for the present inquiry. Thereafter certain terminological issues are addressed.

### 1. Reception of Foreign Legal Principles

The South African constitutional property clause goes much further than its German counterpart as far as entrenching the commitment to land reform is concerned. However, an analysis of the influence of German law on the drafting of both the Interim and Final Constitutions of South Africa in general, and the prop-

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<sup>4</sup> Differences in the structure and wording of the German and South African property clauses make it difficult to apply the German theory to the South African context without circumspection. Notwithstanding the dangers of legal comparison, however, it could still be worthwhile to analyse the possible influence that the German example could have on the South African context. See *Park-Ross v Director: Office for Serious Economic Offences*, 1995 2 SA 148 (C) 160H-I.

<sup>5</sup> *Government of the Republic of South Africa and others v Grootboom and Others*, 2000 11 BCLR 1169 (CC).

<sup>6</sup> *Minister of Public Works v Kyalami Ridge Environmental Association*, 2001 7 BCLR 652 (CC).

<sup>7</sup> *Joubert and Others v Van Rensburg and Others*, 2001 1 SA 753 (WLD).

erty clauses in particular, shows that the same basic constitutional principles are operative in the process of interpreting and giving effect to the provisions of the constitutional property clauses in both jurisdictions.

### 1.1. A theoretical overview of the reception process

In law, the concept *reception* refers to the process of assimilating or adopting specific elements from a foreign legal culture. Defining *reception* as the process through which specific elements from a foreign legal culture are assimilated or adopted into a given jurisdiction presupposes the existence of at least two different legal cultures,<sup>8</sup> in which certain elements of one culture are susceptible to reception in the other, and the occurrence of an assimilation or adoption process.<sup>9</sup> Moreover, it also presupposes that the object of reception is understood in a broad sense.<sup>10</sup> As such, for present purposes, the term “reception” incorporates other terms like “import of law” or “transfer of law”.

The circumstances under which reception takes place can vary considerably from case to case. Hence, they could lead to varying practical results. In some instances, certain developments are the result of original creation and development of legal structures, even though they may resemble solutions to specific legal issues followed in other, foreign jurisdictions. Such coincidentally parallel developments do not fall within the ambit of reception of foreign law.<sup>11</sup> Reception rather occurs through assimilation or transfer of law, which represents a process by which foreign solutions to specific legal problems are applied in another context by a specific legal community.<sup>12</sup>

<sup>8</sup> The different legal cultures involved in a process of reception of foreign law need not be co-existent. F. Venter/C.F.C. Van der Walt et al., *Regnavorsing* (1990) 221. The reception of Roman Law in Europe during the Middle Ages is an example of intertemporal transplantation of law. For present purposes, however, the focus is on reception between geographically different legal cultures, which co-exist in time.

<sup>9</sup> J. Fedtke, *Die Rezeption von Verfassungsrecht* (2000) 21–31.

<sup>10</sup> Many authors attach supreme importance to the manner in which foreign law is imported into a specific legal system. This obviously influences their views on the objects of reception. See *inter alia* P. de Cruz, *Comparative Law in a Changing World* (1995) 123 et seq. in connection with “legal transplantation”; P. Häberle, *Rechtsvergleichung im Kraftfeld des Verfassungsstaates* (1992) 773; K. Zweigert/H. Kötz (transl. T. Weir), *Introduction to Comparative Law* (1998) 220 et seq. Not only single legal norms can be objects of reception, but also complex schemes of rules and principles in their entirety.

<sup>11</sup> Fedtke (note 9) 24.

<sup>12</sup> The distinction between assimilation or transfer of law is usually made on the basis of how the reception of foreign law occurred in a specific jurisdiction: If it took place voluntarily, or as a result of economic or cultural influences, the reception is described as assimilation of foreign law; whereas forceful reception as result of military defeat, or in terms of a specific treaty, is classified as transfer of foreign law. The distinction between voluntary and forced reception of law causes some authors to believe that only specific processes – that is to say those that take place voluntarily – qualify as reception. See the discussion of Fedtke, *ibid.*, 25–30 and the sources mentioned there. However, this debate cannot provide insight into the present inquiry and therefore will be ignored.

In the process of reception, one legal system functions as model upon which the solutions to specific problems in other jurisdictions are developed. The assimilation or transfer of law to the other legal system does not necessarily influence the “model system” as such. Through the adaptation of specific principles or structures to suit the needs of the “adopting” legal community, the assimilation of foreign law into that legal system is effected. The choice, alteration and development of foreign legal structures are ideally the sole prerogatives of the adopting legal system. The adopted legal structures take on a life of their own with their reception into the adopting legal system, and might eventually contain considerable deviations from the original structures.

Several factors can give rise to the reception of foreign law in a specific jurisdiction.<sup>13</sup> Of these, the need for legal-cultural progress is probably the most obvious justification for the reception of foreign law. Furthermore, one of the side effects of modernisation<sup>14</sup> and globalisation<sup>15</sup> is the gradual evening out of differences between societies as far as living conditions and political, economic and social aims are concerned.<sup>16</sup> This will obviously lead to comparison of law in different jurisdictions. There also seems to be a growing tendency towards integration of specific fields of law in different legal systems,<sup>17</sup> due to the strong similarities, from an international perspective, between the laws of different systems in these specific fields of law. However, one of the obstacles in the process of finding solutions to certain legal problems through reception of foreign law is that modernisation and globalisation have not yet managed to permeate to the social and living conditions of all states or communities. The existing disparities in socio-economic conditions of the different participants in globalisation and modernisation are strengthened by the fundamental historical and cultural differences between them.

The structure of western development policy offers some further causes for reception of foreign law. Especially since the late 1980s adherence to human rights and observance of principles like the democracy and the constitutional state are, apart from the establishment of market-friendly economies, required from developing countries applying for financial aid to the first world.<sup>18</sup> Another cause for reception is the colonial histories of states that have gained independence fairly recently. Many colonial systems chose to uphold the law of their former controlling powers (in its original form or with slight alteration) upon gaining independence.<sup>19</sup>

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<sup>13</sup> See Fedtke, *ibid.*, 31–42.

<sup>14</sup> I.e. the process of establishing modern administrative apparatus and economic structures in new independent national states because of decolonisation.

<sup>15</sup> I.e. the process of levelling private economic relations, which emanates from the establishment and operation of multinational enterprises that aim at achieving uniform markets by establishing uniform structures of production, ranges of goods for sale, and provision of services.

<sup>16</sup> Fedtke (note 9) 33.

<sup>17</sup> I.e. “Rechtsvereinheitlichung”/a natural convergence of laws. Noticeable especially in commercial law, but also in labour law, copyright law, conservation law, etc. See Fedtke, *ibid.*, 36 for an example.

<sup>18</sup> T.W. Bennett, *Human Rights and African Customary Law* (1995) 2.

<sup>19</sup> See Fedtke (note 9) 38.

In the context of property protection and regulation in the Final Constitution<sup>20</sup> of South Africa – as was also the case with its predecessor, the Interim Constitution<sup>21</sup> – legal comparison and the consequent reception of foreign law can take place on different levels. Both the legislature and judiciary can, for instance, contribute to the internalisation of foreign law. Moreover, foreign law can play an important role in the development of the law on a scientific level.<sup>22</sup> This paper focuses on the reception of the German legal model of liberty and social duty in the context of South African constitutional property law, and the implications of such a reception for the judiciary when dealing with issues of property and land reform.

## 1.2. Reception of the German model of liberty and social duty in South African constitutional property law

The drafting history of sec. 28 IC and sec. 25 FC indicate not only the extent to which the interests of different groups were taken into account, but also the extent to which reliance was placed on foreign law in adopting a new constitutional model for South Africa. It lies beyond the scope of this article to provide an in-depth analysis of the historical development of constitutional property protection in South Africa.<sup>23</sup> For present purposes, some references to the extent to which German Law was taken into account in the drafting of these provisions must suffice.

Fedtke<sup>24</sup> provides an analysis of the extent to which German constitutional law has been incorporated in South African law and indicates the influence of art. 14 GG on the eventual content and wording of the sec. 28 IC. A positive property guarantee, modelled on art. 14 I GG, was included in the chapter on Fundamental Rights of the Interim Constitution. Hence, the respective protective ambit (“Schutzbereich”) of the constitutional property clauses of Germany and South Africa were initially regarded as more or less similar. Likewise, the provisions on expropriation in sec. 28(3) IC (which was an almost<sup>25</sup> *verbatim* copy of art. 14 III GG) were separated from the provision concerning deprivation of property (which resembled art. 14 II GG). The mandate for South African land reform and restitution was framed in sec. 121 to 123 IC, outside the chapter on fundamental rights.

<sup>20</sup> Sec. 25 FC.

<sup>21</sup> Sec. 28 IC.

<sup>22</sup> See Fedtke (note 9) 43–49.

<sup>23</sup> This has been done elsewhere. See H. Mostert, South African Constitutional Property Protection between Libertarianism and Liberationism: Challenges for the Judiciary, 2000 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) 295–330 for references.

<sup>24</sup> See the discussion of Fedtke (note 9) 329–333.

<sup>25</sup> However, the wording of art. 14 III 2 GG, which is known in German law as the “Junktim-klausel” and which requires the scope and nature of compensation to be determined by ordinary legislation, was replaced in sec. 28(3) IC with a provision, which determines the scope and manner of such compensation.

Ordinary legislation<sup>26</sup> would be passed to give effect to the provisions of these sections.<sup>27</sup> Thus, sec. 28 IC, while entrenching the right to acquire, hold and dispose of rights in property, also provided for the protection of existing rights in property and for expropriation against payment of compensation. As such, it not only represents a remarkable political compromise, but also reflects the intricacies of developing law in one jurisdiction through partial reception of different legal traditions.

The constitutional property clause in the Interim Constitution played an important role in the overall importance of the new constitutional order established after 1994.<sup>28</sup> However, in the course of the second drafting process, the property clause underwent a metamorphosis.<sup>29</sup> The description of the protective ambit of the property clause was changed in that the reference to “rights in property” was replaced with mere reference to “property” which is not limited to land only.<sup>30</sup> The public-purposes requirement in the context of expropriation was expanded to “public interest” and it is confirmed that an expropriation can take place “in terms of law”.<sup>31</sup> The property clause was eventually phrased more widely, to include the objectives of access to land, provision of legally secure land tenure, land restitution and land reform.<sup>32</sup>

This second drafting process represents an advanced exercise in reception of foreign law: various foreign legal systems tended to be important role models at different stages of the drafting process. In particular, the initial orientation upon and gradual move away from art. 14 GG is noticeable: the initial working drafts of the property clause presented to the Constitutional Assembly<sup>33</sup> to some extent attempted to give way to a stronger influence from art. 14 GG as was the case in sec. 28 IC. This was, however, not completely acceptable to some of the parties involved in the second drafting process.<sup>34</sup> Moreover, the criticism levelled at sec. 28

<sup>26</sup> E.g. the Restitution of Land Rights Act 22 of 1994.

<sup>27</sup> Note that sec. 121–123 IC and the Restitution of Land Rights Act did not, and were not intended to, deal with land redistribution. M. Chaskalson/C. Lewis, Property, in: Chaskalson/Kentridge/Klaaren et al. (eds.), *Constitutional Law* (1996) ch. 31, 2. Budlender (note 1) ch. 1, 4 points out that of all the wrongs, injuries and suffering caused by apartheid and racial discrimination, it is only the dispossession of land rights that the legislature was specifically directed to rectify in the Interim Constitution. (The consequences of other human-rights abuses are treated in the Postscript to the Constitution, dealing with “National Unity and Reconciliation”. As a result of those provisions and the Promotion of National Unity and Reconciliation Act 34 of 1995, victims of serious human-rights abuses do not have an enforceable right to compensation if amnesty is granted in respect of those abuses, even if they constituted illegal conduct.)

<sup>28</sup> A.J. van der Walt, *Constitutional Property Clauses* (1999) 324.

<sup>29</sup> Fedtke (note 9) 336–341 provides an overview of the different drafts of the final property clause that were considered in the course of 1995 and until the approval of the Final Constitution.

<sup>30</sup> Sec. 25(1) and (4) FC.

<sup>31</sup> Sec. 25(3) FC.

<sup>32</sup> Sec. 25(5)–(8) FC.

<sup>33</sup> I.e. the drafts of 9.10.1995 and 19.10.1995; as well as the second refined working draft of 9.11.1995.

<sup>34</sup> E.g. the Democratic Party’s Party Submission 25.10.1995.

IC from academic<sup>35</sup> and judicial<sup>36</sup> quarters, led the Constitutional Assembly to decide that a positive formulation of the property clause (and the resultant institutional guarantee which was translated from German legal culture into sec. 28 IC) could be difficult to reconcile with the chosen regulation and expropriation provisions of sec. 25 FC. The reservations about introducing a stronger German-oriented property clause were most probably strengthened by the “language barrier”<sup>37</sup> the availability of German literature in South Africa<sup>38</sup> and what Van der Walt refers to as “cultural and affective differences”.<sup>39</sup> The politics behind decisions to allow reception of certain foreign legal elements and to disregard others were probably as decisive as considerations of practicality. Some political factions within the constitutional assembly, who wanted to secure the strictest possible protection of property for private individuals, did not support the German model of strong property protection tempered by the possibility of state interference with private property for the sake of the public interest.<sup>40</sup> Moreover, some reservations were raised about the compatibility of the German and American models of property

<sup>35</sup> E.g. J. Murphy, *The Ambiguous Nature of Property Rights*, 1993 *Journal for Juridical Science* (JJS) 35–66; M. Chaskalson, *The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth*, 1993 *South African Journal on Human Rights* (SAJHR) 388–411; J. Murphy, *Property Rights and Judicial Restraint – A Reply to Chaskalson*, 1994 SAJHR 385–398; M. Chaskalson, *The Property Clause: Section 28 of the Constitution*, 1994 SAJHR 131–139; J. Murphy, *Interpreting the Property Clause in the Constitution Act of 1993*, 1995 SA *Publiekreg/Public Law* (SAPR/PL) 107–130; A.J. van der Walt, *Notes on the Interpretation of the Property Clause in the New Constitution*, 1994 THRHR 181–203.

<sup>36</sup> E.g. *Transkei Public Servants Association v Government of the Republic of South Africa and Others*, 1995 (9) BCLR 1235 (Tk) 1246 et seq.

<sup>37</sup> Chaskalson, 1993 SAJHR (note 35) 388 remarks that the case law of English speaking jurisdictions will exercise a dominant influence over the development of South African constitutional law because “most South African lawyers share my limitations [i.e. the ‘inability to read any international languages other than English’]”. However, the “language barrier” argument holds true only partially. The abstract and deductive reasoning processes characteristic of the Romanic legal families of the European continent have frequently been used in South African constitutional law and private law for comparison. See Murphy, 1994 SAJHR (note 35) 386. Moreover, J. de Waal, *A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights*, 1995 SAHJR 1–2 n. 1 points out that South African legal scholars are “particularly well situated to benefit from the Basic Law and the Federal Constitutional Court’s jurisprudence because so many have made use of scholarships to become familiar with the German language and legal system”. These scholarships refer *inter alia* to financial support from the DAAD and BMW, as well as the Alexander von Humboldt Foundation and the Max Planck Institutes in Germany. However, traditionally it was mainly the scholars from Afrikaans-oriented universities that maintained relations with the law faculties on the European continent, while English-speaking public-law scholars tended to turn rather to the universities of the United States, Canada and Australia. The consequent gap that has developed between Afrikaans- and English-orientated constitutional literature can only be closed with renewed (and continued) interest by both groups of scholars in the possibilities offered by both the continental and the Anglo-American systems. The value of African legal systems as sources for legal comparison should also be kept in mind.

<sup>38</sup> A.J. van der Walt, *Notes on the Interpretation of the Property Clause in the New Constitution*, 1994 THRHR 192 et seq.

<sup>39</sup> A.J. van der Walt, *The Impact of the Bill of Rights on Property Law*, 1993 SAPR/PL 305 n. 27.

<sup>40</sup> Fedtke (note 9) 342.



protection as was attempted in sec. 28 IC.<sup>41</sup> Hence, the constitutional drafters settled for a more intricate compromise of principles adopted from different legal cultures, applicable to varying extents. In this new framework, the public interest is to be taken into account in the context of expropriation, and public interest is given a broad meaning so as to include the objectives of land reform and social reconstruction.<sup>42</sup>

Even though its presence in South African constitutional property law has become subtler since the coming into force of the Final Constitution, German law provides a good example of how the fundamental values of individual freedom and social responsibility interact in the development of a unique constitutional framework for property protection. The treatment of the values of individual freedom and social responsibility in Germany through the application of basic constitutional principles like the “Rechtsstaat” and “Sozialstaat” together with the provisions of art. 14 GG have resulted in a clear-cut framework within which the interests of the individual property owner can be weighed against those of the community at large. The following section will indicate that the South African and German principles of state are largely similar.

## 2. The Constitutional State and the Social State: Terminology

The underlying principles of the new constitutional dispensation in South Africa are supposed to determine the manner in which all existing legal, political and social institutions are perceived. These principles are expounded in several constitutional provisions, of which the preamble and sec. 1 FC are probably the most obvious. The following paragraphs deal with two of these principles, namely the constitutional state (rule of law) and the social (welfare) state.

### 2.1. Rule of law / constitutional state / “Rechtsstaat”

Mention is made in sec. 1(c) FC of the “supremacy of the constitution and the rule of law”. The term rule of law is usually associated with the English model of sovereignty of parliament,<sup>43</sup> but in view of the fact that sec. 1(c) FC links the term “rule of law” with the “supremacy of the constitution”, it is submitted that sec. 1(c) FC resembles a value similar to the German concept of the “Rechts-

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<sup>41</sup> Van der Walt (note 38) 203.

<sup>42</sup> Sec. 25(2)(a) read with sec. 25(4)(a) FC.

<sup>43</sup> L. Blaau [sic], *The Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights*, 1990 South African Law Journal (SALJ) 89–90. (See in general 88–92 for a helpful exposition of the differences between the concepts Rule of Law and “Rechtsstaat” against their unique historical backgrounds.)

staat".<sup>44</sup> The latter involves that citizens can claim judicial protection of individual freedom as well as legal control of state power. It also denotes a rigid, written constitution as the highest directing normative principle.<sup>45</sup>

Attempts to define the "Rechtsstaat" in Germany usually result in either fragmentary, vague descriptions of this term, or in an unintended expansion of the concept.<sup>46</sup> Therefore, most authors refrain from defining the concept, but embark on an enumeration of the components of the formal concept<sup>47</sup> of the German "Rechtsstaat". These components include: (i) the separation of powers ("Gewaltenteilung");<sup>48</sup> (ii) the principle of legality ("Gesetzlichkeit"; "Vorrang des Gesetzes"; "Vorbehalt des Gesetzes");<sup>49</sup> (iii) the principle of legal certainty ("Rechtssicher-

<sup>44</sup> H. Mohnhaupt, *Zur Geschichte des Rechtsstaats in Deutschland: Begriff und Funktion eines schwierigen Verfassungsprinzips*, 1993/94 *Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestiensis de Rolando Eötvös Nominatae* 45 shows that the "Rechtsstaat" was developed as a counterpoint against, on the one hand, the police state (i.e. in the sense of the welfare state) and, on the other hand, against a system of despotic rule and absolutism. The meaning of the "Rechtsstaat" principle has changed drastically over the last two centuries. In the 19<sup>th</sup> century it originated from Kant's concept of the state (that freedom had to be governed by law), thus denoting the importance of legality in a legal system. After the World War II, the principle became associated with the state's commitment to the realisation of justice. In Germany this is sometimes described as the progression from the "formal" "Rechtsstaat" to the "material" "Rechtsstaat", BVerfGE 9, 137 at 146. See also De Waal (note 37) 4–5.

<sup>45</sup> K. Sobota, *Das Prinzip Rechtsstaat – Verfassungs- und verwaltungsrechtliche Aspekte* (1997) 27 et seq.; 39 et seq. The German concept of the "Rechtsstaat" originated during the first part of the 19<sup>th</sup> century as a solution to unchecked state power. Towards the end of the 19<sup>th</sup> century, almost all the constitutions of the (then still independent) German "states" contained provisions incorporating the principle of the "Rechtsstaat", although it was nowhere mentioned as such. By the time that the German Basic Law was drafted, however, the idea of the "Rechtsstaat" was well known in constitutional theory. It was also explicitly incorporated in the Basic Law. See W. Horn, *Der Rechtsstaat*, 1998 *Informationen zur politischen Bildung* (200) 2–5.

<sup>46</sup> Problems such as those mentioned by Sobota (note 45) 21–24, as well as the fact that most Western democratic governments tend to refer to their regimes as complying with the "Rechtsstaat" concept, caused Mohnhaupt (note 44) 45 to refer to its characteristic of "Janusköpfigkeit".

<sup>47</sup> L. Blaauw-Wolf/J. Wolf, *A Comparison between German and South African Limitation Provisions*, 1996 *SALJ* 268 indicate that a coherent concept of the "Rechtsstaat" has not been developed yet. In this regard a theoretical distinction is drawn between the formal "Rechtsstaat" concept, on the one hand, and the material "Rechtsstaat" concept, on the other hand. The formal concept consists of certain elements for which no uniformly accepted definition exists. The material concept is based on the idea of justice in law and in administrative decisions.

<sup>48</sup> This means that the three arms of state authority (i.e. the legislature, executive and judiciary) should not have overlapping functions. In other words, the legislature is the only body that has the power to limit fundamental rights and that the independent judiciary should protect fundamental rights (art. 80 I GG), including the right to property. Sobota (note 45) 70–77; N.G. Foster, *German Legal System* (1996) 149; Blaauw [sic] (note 43) 81. Art. 1 III, 20 III, 97 III GG points to this principle in German Law.

<sup>49</sup> This means that the representatives of the people should have adopted the legislation; that statutes find general application and that the legislature itself is bound by such legislation until it has been repealed or amended. Sobota (note 45) 77–85, 104–131; G. Robbers, *An Introduction to German Law* (1998) 60; Foster (note 48) 149; Blaauw [sic] (note 43) 81; Blaauw-Wolf/Wolf (note 47) 268. An important formal safeguard flowing from the "Rechtsstaat" principle is entrenched by the art. 19 II GG: the democratically elected legislature must authorise all limitations of funda-

heitsgrundsatz"/"Bestimmtheitsgrundsatz");<sup>50</sup> (iv) protection of legitimate expectations according to the principle of trust ("Vertrauensschutz");<sup>51</sup> and (v) the principle of proportionality<sup>52</sup> ("Verhältnismäßigkeitsgrundsatz").<sup>53</sup>

mental rights. This is relevant in terms of art. 14 I 2 GG, as the legislature is given the power to determine the scope and content of the property concept.

<sup>50</sup> This means that legal measures and legal rules must be clear and consistently applied and that state action must be sufficiently defined in order to remain predictable. Sobota (note 45) 132–139; 154–188; D. Kleyn, *The Constitutional Protection of Property: a Comparison between the German and the South African Approach*, 1996 SAPR/PL 407; Robbers (note 49) 61; Blaauw [sic] (note 43) 81; Blaauw-Wolf/Wolf (note 47) 268. Adherence to this principle is important in the context of the constitutional property clause in evaluating the effect of certain legislative measures on private property. Because of the difference in intensity of legislative measures creating regulatory interference with property and those resulting in expropriation, art. 14 GG provides for certain precautionary measures in the formulation of legislation to this effect.

<sup>51</sup> If the state has created a specific situation and a person has acted on the reasonable assumption that this situation will remain unchanged, then he or she can rely on such an assumption. This principle, together with that of legal certainty, gives rise to the general prohibition of retrospective legislation. Robbers (note 49) 61; Kleyn (note 50) 407; Foster (note 48) 150; Blaauw [sic] (note 43) 81; Blaauw-Wolf/Wolf (note 47) 269.

<sup>52</sup> Proportionality is used to determine whether the reasons advanced by the state to justify limitation of a specific fundamental freedom outweigh the values underlying the constitutional commitment to the protection of that freedom. It is employed once it is clear that the state's actions conflict with the scope of protection offered by the right, and constitutes the last stage in an enquiry into the constitutionality of a particular infringement on fundamental freedoms. Foster (note 48) 150. Proportionality is tested by having regard to the objective suitability ("Geeignetheit") of the law, action or measure; the question of its necessity ("Erforderlichkeit"); and the question of its reasonableness ("Angemessenheit"). Robbers (note 49) 61; Blaauw [sic] (note 43) 82. Objective suitability means that the restriction that is being tested against the constitutional provisions should be appropriate or suitable to achieve the objective intended. The intended aim of the legislation under discussion must be measured against the possible means to achieve it, to determine whether a rational relation exist between them. C. Degenhart, *Staatsrecht I* (1998) m.n. 278. Necessity refers to a cost-benefit analysis: the measure taken must not, in other words, be harsher than is necessary to achieve the specified goal. Degenhart, *ibid.*, m.n. 279. Reasonableness means that, in relation to the importance and meaning of the fundamental right, no less far-reaching restriction would have achieved the same result. This element is also sometimes referred to as proportionality in the narrow sense ("Verhältnismäßigkeit im engeren Sinne"). Degenhart, *ibid.*, m.n. 281. The proportional evening out of the interests of the involved parties (i.e. the proportionality in the wider sense) should not be confused with the classical investigation into the "Angemessenheit" (i.e. proportionality in the narrow sense) of a specific infringement with a concrete purpose. The proportionality in the (wider) sense of the appropriateness of the relation between the concepts of private property and social interest is rather a purpose of the wide leeway of the legislature in enacting infringing legislation than is the case with the classical determination of the proportionality of a specific infringement. M. Thormann, *Abstufungen in der Sozialbindung des Eigentums – Zur Bestimmung von Inhalt und Schranken des Eigentums nach Art. 14 Absatz 1 Satz 2 GG im Spannungsfeld von Eigentumsfreiheit und Gemeinwohl* (1996) 210.

<sup>53</sup> BVerfGE 23, 127 at 133; BVerfGE 6, 389 at 439; BVerfGE 16, 194 at 201 et seq.; BVerfGE 17, 108 at 117 et seq.; BVerfGE 17, 306 at 313; BVerfGE 19, 342 at 348; BVerfGE 20, 45 at 49. The court, however, deviated from this viewpoint in a few decisions and tried to substantiate the foundation of the principle of proportionality with specific reference to certain articles or a part of the Basic Law. Against this background, the court held that the principle of proportionality is implicitly evident in fundamental rights as such, or in provisions allowing for the limitation of such rights. (BVerfGE 19, 342 at 348 et seq.; BVerfGE 27, 344 at 352.) This gave rise to the argument that the principle of proportionality arose from the essential-content guarantee. In more recent decisions, however, the

Various authors have provided analyses of the extent to which the South African version of the constitutional state resemble that of the German "Rechtsstaat."<sup>54</sup>

Separation of state powers is supported by sec. 165 FC, which established an independent and impartial judiciary. Sec. 44(4), 83 and 165(2) FC, among others, provide for the separation of powers and reinforcing the requirement that government authority is to be exercised in accordance with and subject to the Constitution.<sup>55</sup> The legality principle appears from sec. 1(c), 2 and 8(1) FC,<sup>56</sup> where the constitution is declared to be the supreme law.<sup>57</sup> Also, the limitation of a fundamental right is only allowed in accordance with "a law of general application".<sup>58</sup> The principle of legal certainty is endorsed in the special procedural constitutional guarantees that are found in the Interim and Final Constitutions.<sup>59</sup> The principle of trust is also embraced by sec. 35(3)(m) FC. From the wording of the limitation clauses<sup>60</sup> and decisions of the Constitutional Court on this matter, it is also apparent that a principle resembling that of the German "Verhältnismäßigkeitsprinzip" is endorsed.<sup>61</sup>

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court has apparently returned to its initial view that the principle of proportionality is based upon the "Rechtsstaat" concept. See BVerfGE 38, 348 at 368 and BVerfGE 59, 275 at 278. See L. Blaauw-Wolf, The "Balancing of Interests" with Reference to the Principle of Proportionality and the Doctrine of Güterabwägung – A Comparative Analysis, 1999 SAPR/PL 193 et seq. where the Federal Constitutional Court's uncertainty as to whether this principle is founded in the "Rechtsstaat" concept or whether it is implicitly evident in the fundamental rights themselves, is discussed. It is surely more acceptable, from a methodological perspective, to regard the principle of proportionality for the purposes of constitutional interpretation as part of the "Rechtsstaat" concept rather than part of the essential content of each fundamental right, as the function of the latter is not particularly clear when contemplating the reasons for the application of the proportionality principle.

<sup>54</sup> F. Venter, Aspects of the South African Constitution of 1996: An African Democratic and Social Federal Rechtsstaat?, 1997 ZaöRV 79; Kleyn (note 50) 407 n. 25; De Waal (note 37) 5; T.M. Grupp, Südafrikas neue Verfassung – Mit vergleichender Betrachtung aus deutscher und europäischer Sicht (1999) 98–99; Blaauw-Wolf (note 53) 208.

<sup>55</sup> Venter (note 54) 79.

<sup>56</sup> Kleyn (note 50) 407 n. 25.

<sup>57</sup> Further support of this element is found in sec. 237 FC, that determines that all constitutional obligations must be performed diligently and without delay. Grupp (note 54) 31–32.

<sup>58</sup> Sec. 33(1) IC and sec. 36(1) FC.

<sup>59</sup> E.g. in the Interim Constitution: sec. 22 IC (recourse to impartial judges), 25(3)(d) IC (right to be heard), 25(3)(f) IC (*nulla poena sine lege*), 25(3)(g) IC (prohibition on double jeopardy), 25(3)(b) IC (right to a speedy trial). See De Waal (note 37) 6. Also in the Final Constitution: sec. 33(3)(a) FC (recourse to impartial judges), 35(3)(i) FC (right to be heard), 35(3)(l) FC (*nulla poena sine lege*), 35(3)(m) FC (prohibition on double jeopardy), 35(3)(d) FC (right to a speedy trial).

<sup>60</sup> Sec. 33 IC; sec. 36 FC. Kleyn (note 50) 407 n. 25.

<sup>61</sup> According to Chaskalson P in the watershed decision of *S v Makwanyane*, 1995 3 SA 391 (CC), it is implicit in sec. 33(1) IC that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society "involves the weighing up of competing values, and ultimately an assessment based on proportionality". The court used the treatment of this issue in the constitutional courts of Canada, Germany and the European Court of Human Rights to show that proportionality is an essential requirement of any legitimate limitation of an entrenched right and to justify its application in the South African context, par [104] n. 130. The *Makwanyane* decision as well as *S v Zuma*, 1995 2 SA 642 (CC), however, influenced the formulation of the limitation clause in the Final Constitution and therewith also the adoption of a South African version of the proportionality principle. Blaauw-Wolf (note 53) 208. Since then, many others have followed the same

For present purposes the “South African version” of the rule of law will be referred to as the “constitutional state” principle,<sup>62</sup> as a reminder of the characteristics it shares with the German principle of the “Rechtsstaat”. The “constitutional state” principle is understood as comprising those elements that are vital to the existence of a democratic, constitutional order. These elements include, *inter alia*, the separation of state powers and adherence to principles like legality, legal certainty, trust and proportionality.<sup>63</sup>

## 2.2. “Sozialstaat”, social (welfare) state and socio-economic rights

In German constitutional law, the notion of the “Sozialstaat”<sup>64</sup> originated in response to the shortcomings of the “Rechtsstaat”. The latter presupposes that the valuable independence of the individual is protected against uncontrolled state power. However, it is incapable of addressing all social welfare issues successfully. Therefore, the “Sozialstaat” principle authorises the state to interfere in the social order.<sup>65</sup> The Basic Law mentions the “Sozialstaat” only in relation to other basic values (or “principles of state”), i.e. democracy and federalism (art. 20 I GG) and

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reasoning and used the same terminology when pronouncing on the limitation of rights. In the case of *De Lange v Smuts*, 1998 3 SA 785 (CC) par [86][88] the approach to limitation of rights propounded by Chaskalson P in the *Makwanyane* case (and pertaining to the limitation clause in the Interim Constitution) has also been endorsed with regard to the limitation clause in the Final Constitution. Further, Blaauw-Wolf (note 53) 209 et seq. shows convincingly that the proportionality principle is also implicit in the procedure for limiting rights under the Final Constitution, by classifying the requirements of a law of general application restricting the right only to a certain extent (i.e. “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,” sec. 36(1) FC), as the formal elements which must be clarified before proportionality can be determined. The requirements that the restriction should be reasonable and justifiable in an open and democratic society then resembles elements of the proportionality principle (that is to say “Geeignetheit”, “Erforderlichkeit”). The third element (“Angemessenheit”) of the proportionality principle is evident in sec. 36(1)(e) FC, which requires a consideration of whether less restrictive measures could have been invoked to achieve the objective. Based on this analysis, it can be submitted that even though the roots of the South African proportionality test are mostly sought in its Canadian counterpart, the German Basic Law remains the best comparative agent as far as the content and nature of the proportionality test in South Africa is concerned. See Van der Walt (note 28) 339–340 and n. 94.

<sup>62</sup> The term “constitutional state” evolved from the principle of the “Rechtsstaat”, which in turn originated in Germany as a solution to unchecked power.

<sup>63</sup> See in general Sobota (note 45) 70 et seq., 104 et seq.

<sup>64</sup> The bases upon which this principle had been accepted as a “principle of state” in Germany, are art. 20 I GG and art. 28 I GG. The former determines: “Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.” (Translation: “The Federal Republic of Germany shall be a democratic and social federal state.”) The latter refers to the constitutional order to which the different “Länder” (provinces) of the Federal Republic of Germany have to conform, mentioning *inter alia* the principle of the “soziale Rechtsstaat” (officially translated as “social state governed by the rule of law”).

<sup>65</sup> The controversy surrounding the classification of the “Sozialstaatsprinzip” as a constitutional value (or “principle of state”) during the first decade after the promulgation of the Basic Law has subsided after the Federal Constitutional Court has expressly recognised the existence of this principle. See BVerfGE 1, 97 at 105; BVerfGE 3, 377 at 381; BVerfGE 6, 32 at 41.

the "Rechtsstaat" (art. 28 I GG). Through judicial initiative and political discourse, the "Sozialstaat" principle was anchored into the German constitutional order. Hence, some scholars point out that the social state principle is not manifested by a single constitutional norm (like all the other principles of state), but rather through a variety of statutes and administrative policy.<sup>66</sup> Through legislative and administrative interference, the state is supposed to guarantee a dignified existence for all, to minimise the difference between rich and poor, and to control or eliminate relationships of dependence in society.<sup>67</sup> Through governmental policy and legislation, the state therefore shows support for the values<sup>68</sup> behind the "Sozialstaat" principle by attempting to provide social security,<sup>69</sup> to ensure social justice<sup>70</sup> and to raise the living standards of the community.<sup>71</sup>

Several indications in the South African constitution support the idea that the principle of the social (welfare) state<sup>72</sup> could well be applicable in the South African context.<sup>73</sup> (i) The preamble of the Final Constitution recognises, for instance, the establishment of a society based on "social justice" and the "improve-

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<sup>66</sup> See P. Kunig, *The Principle of Social Justice*, in: Karpen (ed.), *The Constitution of the Federal Republic of Germany – Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law* (1988) 188, 193.

<sup>67</sup> Kunig, *ibid.*, 189; De Waal (note 37) 8 n. 21.

<sup>68</sup> These elements of the social state principle are based on the classification found in the doctoral dissertation of Erika de Wet (1995), published as E. de Wet, *Constitutional Enforceability of Economic and Social Rights* (1996). The Federal Constitutional Court has not yet explained the content of the "Sozialstaat" principle as such, but De Wet's dissertation shows that it is possible to construct the basic substance of this principle by analysing the decisions on "socially unjust conduct" in a number of cases.

<sup>69</sup> Social security could be described as the prevention of individual and general need in society. It is aimed at preserving a community during times of crisis by supplying a comprehensive system of social insurance, by alleviating liabilities caused by general disasters and by regulating certain essential services and the prices on essential goods, or by protecting specific industries. See E. de Wet, *Can the Social State Principle in Germany Guide State Action in South Africa in the Field of Social and Economic Rights?*, 1995 SAJHR 30–49, 36–39.

<sup>70</sup> Social justice is directed particularly at the protection of socially vulnerable groups in order to prevent exploitation and unfair dominance. It ensures more equitable bargaining positions for parties in socio-economic relations, by eliminating or reducing the weaker party's dependence on and exposure to the stronger party. This can be done either by a radical levelling of all inequalities, or by systematically reconciling diverse social interests, such as those of employer/employee, husband/wife, or owner/tenant. The ultimate aim is a balance in community interests. See De Wet, *ibid.*, 39–40.

<sup>71</sup> The third element, the raising of living standards by the state, depends on the means available: in times of economic crisis the means of the state would probably be limited and the demand for higher living standards would have to make way for combating of more pressing needs. De Wet, *ibid.*, 42.

<sup>72</sup> Technically speaking, the concept of the social welfare state as it is found in English-speaking countries might differ in several regards from the German concept of the "Sozialstaat". For the sake of brevity, these differences will not be dwelled upon in this paper. Reference made to the social state will suppose a concept similar to that of the German "Sozialstaat". The official translation of the German Basic Law also employs the term "social state" when referring to the German "Sozialstaat" principle.

<sup>73</sup> L.M. du Plessis, *The Bill of Rights in the Working Draft of the New Constitution: an Evaluation of Aspects of a Constitutional Text Sui Generis*, 1996 Stellenbosch Law Review (Stell LR) 7.

ment of the quality of life of all citizens” as constitutional aims. (ii) In addition, socio-economic rights can be explicit manifestations of the social state principle. In spite of problems with the enforcement of socio-economic rights (due to lack of resources) so typical of a developing country, South Africa’s Final Constitution contains quite a comprehensive list of such rights.<sup>74</sup> Moreover, the relevant organs of state are accountable to the Human Rights Commission in that they are required to furnish the commission with information on the measures undertaken towards the realisation of fundamental rights related to housing, health care, food, water, social security, education and the environment.<sup>75</sup> (iii) It is, furthermore, apparent from governmental policy and recent legislation in South Africa that the aims underlying the social state principle are being promoted. The 1997 White Paper on Land Policy<sup>76</sup> sets out the policy of the Department of Land Affairs on land reform and the restitution and redistribution of land in South Africa. It contains several guidelines based on the elements underlying the social state principle. The legislation that emanated from the constitutional provisions for land reform, restitution and redistribution further exemplifies the state’s attempts to ensure social justice in the area of land distribution, and to raise the living standards of the community.

The increased emphasis on social and democratic rights in the Final Constitution may warrant the description of South Africa as a social democracy,<sup>77</sup> thereby acknowledging the state’s role in the regulation of the market, the provision of social welfare services and the protection of institutions and mechanisms of political democracy. Apart from abiding by the principle of the constitutional state, South Africa can therefore also be seen as “providing an enterprising and caring administration of the social market”.<sup>78</sup> This not only includes the achievement of equality, but also requires diligent reorganisation of resources.<sup>79</sup>

Against this background, one must seek to understand the protection and regulation of property in the new constitutional order in South Africa. Sec. 25 FC<sup>80</sup> pro-

<sup>74</sup> Sec. 27 FC guarantees the right to health care, food, water and social security, and provides for appropriate social assistance in specific circumstances. Furthermore, access to housing (sec. 26 FC), the right to education (sec. 29 FC) and environmental rights (sec. 24 FC) are guaranteed. In discussing the certification of the Final Constitution, A. Sachs, *Constitutional Developments in South Africa*, 1996 *New York University Journal of International Law & Politics* 702–703 referred to the objection raised that the inclusion of social and economic rights (i) would bring the court into the position of usurping the legislative function and (ii) would submerge first generation fundamental rights under such claims. After dealing with these objections, it was remarked that: “Our job was simply to ensure that all universally accepted rights were included, and that they were viewed as a platform – a minimum, and not a ceiling.” See *Certification of the Constitution of the Republic of South Africa 1996 (Second Certification case)*, 1997 2 SA 97 (CC) par [76]–[78].

<sup>75</sup> Sec. 184(3) FC.

<sup>76</sup> Department of Land Affairs White Paper on South African Land Policy (1997) online at [http://www.polity.org.za/govdocs/white\\_papers/landwp.html](http://www.polity.org.za/govdocs/white_papers/landwp.html) [16.12.1998].

<sup>77</sup> Du Plessis (note 73) 7.

<sup>78</sup> H. Corder/S. Kahanovitz/J. Murphy et al., *A Charter for Social Justice – A Contribution to the South African Bill of Rights Debate* (1992) 28.

<sup>79</sup> Du Plessis (note 73) 7.

vides for the protection and regulation of property. It contains a negatively phrased property guarantee,<sup>81</sup> requirements for the deprivation<sup>82</sup> and expropriation<sup>83</sup> of property, and provisions according to which just compensation for expropriation has to be determined.<sup>84</sup> Furthermore, it provides for land reform,<sup>85</sup> the upgrading of insecure land tenure,<sup>86</sup> the restitution of land dispossessed because of past discriminatory laws or practices,<sup>87</sup> and equitable access to land.<sup>88</sup> In addition, sec. 26 FC<sup>89</sup> entrenches the right to housing, with the remarkable sec. 26(3) FC guaranteeing the right not to be evicted.

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<sup>80</sup> Sec. 25 (Property): "(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. (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 tenure which is legally secure or to comparable 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)."

<sup>81</sup> Sec. 25(1) FC.

<sup>82</sup> I.e. the requirements that deprivation must take place by a "law of general application", which does not permit "arbitrary deprivation" in sec. 25(1) FC.

<sup>83</sup> Sec. 25(2) FC.

<sup>84</sup> Sec. 25(3) FC.

<sup>85</sup> Sec. 25(8) FC.

<sup>86</sup> Sec. 25(6) FC.

<sup>87</sup> Sec. 25(7) FC.

<sup>88</sup> Sec. 25(5) FC.

<sup>89</sup> Sec. 26 (Housing): (1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.



### III. Implications and Implementation of the Integrated Model of the Constitutional and Social State

In view of the above, the implications of the constitutional and social state principles (as adopted in South Africa) for the protection and regulation of private property may be explored. The following part of this inquiry will comprise attempts at explaining the interpretation of the various provisions of sec. 25 FC against the background of the basic constitutional values of the constitutional and social state. Based on the German example, it is submitted that the interpretation of the South African constitutional property guarantee will depend on the relation between these basic constitutional principles and the function attached to the constitutional property clause.

#### 1. Relation between the Social State and Constitutional State

Following German law, the relation between the principles of the constitutional and social state may be described as an ongoing interaction, aimed at creating a balance between liberty and equality. This interaction is characterised by a relationship of challenged interdependence rather than exclusivity.<sup>90</sup> In general, the constitutional state principle acts as an objective, normative principle rather than a basis for substantiating specific claims. In other words, the constitutional state principle guarantees fundamental rights and freedoms, without yielding to the “demands” that some would like to attach to the existence of these rights and freedoms. The social state principle, on the other hand, incorporates a social welfare philosophy into constitutional law to cater for specific social demands. However, the social state principle in itself does not provide individuals with a basis for substantiating claims either.<sup>91</sup> It sets limits to the liberal aspirations of an autonomous society.

The importance of the principles of the constitutional and social state lies in the fact that no law may conflict with either of these principles and all law should be interpreted in the light thereof. Moreover, the interaction of the constitutional and social state principles means that the state is enabled to promote not only the freedom of the individual, but also his or her welfare. The constitutional and social state, therefore, reflect different sides of the same coin. Both these principles have the same centre of gravity, namely the protection of liberty, security, equality and human dignity. However, according to the principle of the constitutional state emphasis is placed primarily on liberty, whereas emphasis is placed primarily on social

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<sup>90</sup> H. Zacher, Was können wir über das Sozialstaatsprinzip wissen?, in: Stödter/Thieme (eds.), Hamburg, Deutschland, Europa – Beiträge zum deutschen und europäischen Verfassungs-, Verwaltungs- und Wirtschaftsrecht – Festschrift für Hans Peter Ipsen zum siebzigsten Geburtstag (1977) 260–261: “Ein politisch und prozeßhaft verstandener Sozialstaat steht zu Rechtsstaat und Demokratie im Verhältnis der wechselseitigen Verwiesenheit und Herausforderung, nicht aber im Verhältnis des Überwindens oder der Ausschließlichkeit.”

<sup>91</sup> De Waal (note 37) 8 n. 21.

welfare assistance in terms of the social state principle.<sup>92</sup> The principles of the constitutional state and the social welfare state are, therefore, in fragile equilibrium with each other. An unchecked policy of state intervention for the sake of the collective weal, coupled with a tendency by the legislature to over-regulate specific areas of private life, could easily give rise to a totalitarian regime.<sup>93</sup> The fundamental individual freedom inherent in a system based on the constitutional state principle would usually prevent the social welfare state from getting out of control. This is crucial, because of the tendency towards collectivism inherent in the social state principle.

In South Africa's young democracy, the greatest potential challenge to the survival of the constitutional state lies in the undercurrent of social values, which could be abused through overemphasis. For instance, a policy of communalism overshadowing individualism or, for that matter, the remedial promotion of the disadvantaged undermining the ideals of equality, could give rise to a situation in which the equilibrium between the social state and the constitutional state is destroyed.<sup>94</sup> A strict theoretical division between the principles of the constitutional state and the social state would therefore not advance the application of these principles in practice. It would furthermore undermine the inherent objectives of the constitution by playing off two different basic constitutional values against each other, instead of reconciling them.<sup>95</sup>

## 2. Integrated Application of the Constitutional and Social State Principles in an Interpretation of the Constitutional Property Clause

A constitutional property guarantee<sup>96</sup> can be a particularly good example of the need for an interaction between the principles of the constitutional and social state.<sup>97</sup> This becomes apparent once the function of a constitutional property clause in a specific context is identified. The function of protecting and regulating property in the constitutional context can be either individual (personal), or social (pub-

<sup>92</sup> De Wet (note 68) 34.

<sup>93</sup> M. Wiechers, *Grondslae van die Moderne Rechtsstaat/Foundations of the Modern Rechtsstaat*, 1998 THRHR 632: "[S]osiaalstaatlikheid, in die sin van maatskaplike en ekonomiese opheffing, [hoef] in geen opsig teen regstaatlikheid ... in te druis nie. As so 'n opheffing egter grondwetlike waarborge en prosedures verkrag en die belange van minderhede op 'n ongrondwetlike wyse aantast, bestaan daar inderdaad 'n gevaar dat regstaatlikheid bedreig kan word." (Transl.: "The notion of the social state, in the sense of socio-economic upliftment, need not contradict the notion of the constitutional state. However, if such upliftment dishonours constitutional guarantees and procedures and affects the interests of minorities in an unconstitutional manner, the notion of the constitutional state is indeed threatened.")

<sup>94</sup> See Venter (note 54) 82.

<sup>95</sup> De Wet (note 68) 34.

<sup>96</sup> E.g. sec. 28 IC; sec. 25 FC and art. 14 GG.

<sup>97</sup> Kunig (note 66) 191; De Wet (note 68) 34.

lic), or a combination of both. The individual function of property would entail that the state is supposed to enable individuals to be free to determine their economic destinies for themselves. The social function, on the other hand, acknowledges that property is an instrument for achieving social justice. The institution of property exists, in other words, because it advances the collective good, and the collective good determines the content of the property concept.

## 2.1. Property, liberty and social duty in Germany

In German constitutional property law, the individual and social functions of property are combined to strike a balance between property, liberty and social duty. The property guarantee is accordingly described as:<sup>98</sup>

“(a) a fundamental (human) right, (b) which is meant to secure, for the holder of property, (c) an area of personal liberty (d) in the patrimonial sphere, (e) to enable her to take responsibility for the free development and organisation of her own life (f) within the larger social and legal context.”

Combining the individual function of property with its social function has certain implications for the constitutional order based on the principles of the constitutional and social state. In the first instance, the right protected by art. 14 GG places a duty on the judiciary to provide effective factual protection. This duty would also include a procedure that effectively guarantees the interests of the owner or holder of the relevant property right. In this manner, effect is given to the notion of the “Rechtsstaat”.<sup>99</sup> Further, art. 14 II GG specifically represents the point where the German “Sozialstaatsprinzip” and the constitutional protection of property meet. This provision, which is described as the “social function” of property,

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<sup>98</sup> Van der Walt (note 28) 124.

<sup>99</sup> In BVerfG (1. K) 03.04.1990 (1 BvR 269/90, 1 BvR 270/90), the Federal Constitutional Court held that it is constitutional in terms of art. 14 GG (and that it does not amount to inadmissible judicial development of the law) to use the municipal “Mietspiegel” in legal practice to determine a rent increase. The “Mietspiegel” is a document compiled by or at least acknowledged by a municipality or landlord-and-tenant associations within specific municipal borders. In this document, the different “normal” rent levels for residential premises within the municipal area are published. The location, size, nature, and manner in which the accommodation is equipped are factors taken into account when determining the rent level. According to the Regulation of Rent Increase Act (“Gesetz zur Regelung der Miethöhe”), the lessor can only increase the rental up to the amount prescribed in the “Mietspiegel”. The court has also indicated that the constitutional principles involved in the notion of the “Rechtsstaat” apply when land is sold at an auction: the notion of the “Rechtsstaat” needs to be considered in deciding whether a date for the sale in execution of the debtor’s property could be postponed due to the debtor’s illness. See BVerfGE 51, 150 at 156. See also BVerfG KTS 1988, 564–565 (3. K). In this particular case, the court committed itself to the process of balancing the interests of both the creditor and the debtor, with particular reference to the protection of the debtor’s interests by par 67 of the Sale in Execution Act (“Zwangsvorsteigerungsgesetz”). In another decision (BVerfGE 62, 169–189), the First Senate of the Federal Constitutional Court had to pronounce on the banking practice of inducing official authorities in the German Democratic Republic to agree on certain non-commercial payment transactions by freezing bank accounts of German Democratic Republic citizens held in the Federal Republic of Germany. It was decided that, upon a consideration of the “Rechtsstaat” principle and art. 14 I GG, this practice was constitutional.

determines that property imposes duties and should serve the public interest. Consequently, the legislature is provided with a guideline concerning the extent to which an individual owner's rights and entitlements to property may be restricted for the sake of the public interest.<sup>100</sup> The social function of property also determines the kind of protection afforded to certain property interests. The higher the social relevance<sup>101</sup> of a specific proprietary interest, the greater the freedom of the legislature to delimit the content of (or to define the restrictions on) that proprietary interest. In other words, the application of the social function of property in terms of art. 14 II GG establishes a "scaled" protection of proprietary interests.<sup>102</sup> In landlord-tenant relations, for instance, the tenant's interest (as expounded through rent control legislation or other forms of tenant protection) is intimately connected with personal liberty, while the landlord's interest is usually of a more economic nature. The former therefore usually enjoys a higher level of protection than the latter.

The German example indicates that existing proprietary relations can sometimes cause inequality in certain individuals' chances of participation in social life. In some instances, the inequality can be so severe that "justice" would require state intervention.<sup>103</sup> A purely legalistic interpretation of property and ownership is not

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<sup>100</sup> The rent control in Germany serves as an example of the manner in which the leeway of the legislature to enact legislation restricting the right to property is influenced by the socio-economic interests involved. The Federal Constitutional Court ruled (in BVerfGE 68, 361 at 367-368) that a tenant could be protected against termination of a contract of lease that is not based on a well-founded interest of the landlord not specified in the contract. Legislation endorsing this notion was held constitutional in terms of art. 14 I 2 GG. Here the court expressly focused on the role of the social obligation of property in determining whether specific interests should be protected under the constitutional property guarantee or not. The basic point of departure was first stated in BVerfGE 37, 132 at 140-141: "As little as the property guarantee can protect use of the object of ownership that ignores the social function, can art. 14 II GG justify an excessive restriction on the private law entitlements of ownership not required by its social function." Legislation regulating the right to property therefore has to protect the owner's freedom and implement a socially just order of property. Henceforth, it must reflect a balance between the interests of all parties involved. On this basis, several lower court decisions were invalidated in 1974 by the Federal Constitutional Court for the harsh manner in which a federal rent control statute ("Wohnraumkündigungsschutzgesetz") had been applied to owners of rental units. The court decided that the disputed rent increase control legislation (i.e. legislation determining that owners of apartments could only raise the rent thereof in compliance with the average rent in a particular area and thereby could not ask more rent for an apartment than the normal rental for similar residences in the specific area) constituted a lawful restriction of the property rights of the landlord/owner of a residential unit, as the property guarantee stipulated explicitly that the property rights should be exercised in the general interest. See BVerfGE 37, 132 at 140-141.

<sup>101</sup> There are kinds of property with a very distinct social character (for instance land or industrial property), while others have less social relevance. See G.F. Schuppert, *The Right to Property*, in: Karpen (ed.), *The Constitution of the Federal Republic of Germany* (1988) 110.

<sup>102</sup> See the discussion of G. Alexander, *Constitutionalising Property: Two Experiences, Two Dilemmas*, in: McLean (ed.), *Property and the Constitution* (1999) 106 et seq.

<sup>103</sup> See BVerfGE 50, 290 ("Mitbestimmung"). In this case it had to be decided whether an act establishing parity between management and labour in a board of directors violated the constitutional property guarantee. The Federal Constitutional Court remarked that the social function of property demanded more restrictions on property than the individual or personal function would allow. In this specific case it was, however, decided that the substance and allocation of property would in any

possible in a legal system in which the constitutional and social state principles interact. In such a system, the demands of equity influence the approach to property. This means that material needs, historical changes and the social function of property rights qualify the definition and application of a constitutional property guarantee.<sup>104</sup>

## 2.2. Property, liberty and social duty in South Africa

As for the South African property clause, it has still to be determined to what extent the principles of the constitutional and social state will be realised through section 25 FC. Given the requirements for deprivation and expropriation of property and the “new” rights created by sections 25(5), (6), (7) and (8) FC, the application of the South African constitutional property clause would certainly require a consideration of the principles of the constitutional and social state and the manner in which they interact. The right to housing, entrenched in sec. 26 FC, must be considered alongside the property clause in this context.

### 2.2.1. Increase and distribution of wealth

Social and economic development implies the increase of wealth and the effective and equitable distribution of wealth within a society to enhance material, cultural, intellectual and spiritual well-being.<sup>105</sup> For proprietary relations in South Africa, this means that legal change will have to influence and promote the individual’s ability to participate in important societal changes, while simultaneously upholding the individual’s ability to determine his or her own economic destiny. However, the success of a venture like this will be determined by the ability of the courts and legislature to resolve the inherent conflict between freedom and equality and to strike a working balance between the protection of property and its regulation. Here the application of the values of the constitutional and social state to the

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event be preserved under art. 14 I GG, regardless of the extent of a restriction on property in terms of the social obligation.

<sup>104</sup> This approach reminds of that in G.F.W. Hegel, *Grundlinien der Philosophie des Rechts* (1896) transl. by Dyde, *Philosophy of Right* (1996). Although first published at the end of the nineteenth century, some of the elements presented in Hegel’s account of property law have retained contemporary relevance. Hegel’s core contention is that liberty cannot be separated from order and that an interconnection between all parts of the body politic is vital to the common good and public interest. This philosophy has often been abused to justify the opinion that national leaders should possess absolute freedom in realising what they perceive to be the world-historical mission of their nation. Hegel’s analysis nevertheless re-opens the question of which areas of social life should fall within the domain of private property rights, thus providing a starting point in answering the question concerning the ambit of private property and the extent to which it can be limited for the sake of public interest. M.G. Salter, *Hegel and the Social Dynamics of Property Law*, in: Harris (ed.), *Property Problems from Genes to Pension Funds* (1997) 257.

<sup>105</sup> S. Gutto, *Property and Land Reform – Constitutional and Jurisprudential Perspectives* (1995) 26.

interpretation of the property clause could be helpful, as the following examples indicate:

First, the power relations existing in South African society need to be restructured in order to establish equality. This will require, for instance, that ownership of (or rights in) land need to be made more easily accessible. Sec. 25(5) FC provides for equitable access to land, and can address several of the inequalities existing in the South African system of landownership.<sup>106</sup> It can be used not only by the state as protection in actions aimed at promoting equitable access to land, but also by individuals in litigation aimed at compelling the state to enact legislation of this kind if it failed to do so in the first place.<sup>107</sup> An integrated application of the constitutional and social state principles would endorse this interpretation of sec. 25(5) FC. This could thus sec. 25(5) FC shield administrative actions or fiscal measures aimed at promoting equitable access to land against challenges from reactionary interest groups, or it could even become a sword in the hands of those who need access to land.<sup>108</sup>

Second, the state is compelled to promote social and economic development by promoting productivity. In order to promote productivity, it will be important to recognise individual autonomy in the use of land and business property. The state therefore would have to consider carefully the wisdom of introducing regulations hampering free enterprise. Should the matter arise for adjudication in terms of, for instance, the prohibition in sec. 25(1) FC of an "arbitrary deprivation" of property, an interpretation of sec. 25(1) FC upon the principles of the constitutional and social state could be invoked. It could mean that the courts have to ensure that the state fulfils its duty of promoting social and economic development by testing legislation purporting to regulate the exercise of proprietary rights against the rationality of the scope allowed for entrepreneurial initiatives.

When the principles of the constitutional and social state are applied to the interpretation of the South African property guarantee, the function of property in the constitutional context becomes apparent. Property rights are important in providing individuals with a sense of possessing an immediate personal stake in the public realm, a sense of belonging to a community with whom they identify.<sup>109</sup> Thus, property as a constitutional right means that individuals should be provided with

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<sup>106</sup> The unequal division of wealth between rural and urban inhabitants of South Africa can, for instance, be narrowed. This is a challenging task, as addressing regional inequalities has to be coupled with a strengthening of national cohesion, while simultaneously respecting diversity of culture and lifestyle. Another matter of particular urgency is gender inequality. This issue needs to be addressed, for instance, through programmes empowering women to become owners of land (especially in rural areas).

<sup>107</sup> This brings about problems connected with the separation of state powers. The court, for example, does not have the competence to draft the legislation. Other problems include the remedy for non-compliance. The solution in this instance would be for the court to issue nothing but a declaratory order that the state is in breach of its constitutional obligations. Budlender (note 1) ch. 1, 69–70.

<sup>108</sup> Budlender, *ibid.*, ch. 1, 70.

<sup>109</sup> Salter (note 104) 271. See also BVerfGE 24, 367.

the freedom necessary to enable them to live responsible lives.<sup>110</sup> In a liberal society supported by the constitutional state principle, the individual can acquire property according to his or her own free choice, thereby enlarging his or her sphere of freedom. However, without regulation, this process could lead to misuse of property and abuse of discretionary powers by owners. Freedom under the constitutional state should therefore not be without limits. These limits are provided by the social state principle.

### 2.2.2. Social justice, governmental policy and adjudication

A closer analysis of social justice in the interplay between governmental policy, legislation and adjudication is necessary to establish the connection of this value with the development process in South Africa, and its importance in the reversal of the unjust land regime in South Africa. The following paragraphs focus on some claims emanating from an adherence to the constitutional and social state principles and their significance for development and the establishment of a new land regime in South Africa. In particular, reference is made to three recent decisions from the South African judiciary, namely the *Grootboom* decision,<sup>111</sup> which has been handed down by the Constitutional Court upon an appeal from a decision of the Cape High Court, the *Kyalami Ridge* decision,<sup>112</sup> which was also handed down by the Constitutional Court, and the case of *Joubert v Van Rensburg*,<sup>113</sup> which was decided by the Witwatersrand Local Division of the High Court.

All three cases had to deal with a complex range of different legal issues, which renders it impossible to provide an extensive account of the decisions in the limited space available. Focus is therefore placed only on those aspects that are significant for an integrated application of the constitutional and social state principles within the context of the property clause and the issue of housing.

#### (a) Government of the Republic of South Africa and Others v Grootboom and Others<sup>114</sup>

The *Grootboom* case concerned a community of 390 adults and 510 children,<sup>115</sup> who lived in deplorable conditions in an informal squatter settlement on the outskirts of the Cape metropolitan district, while being on the municipality's waiting

<sup>110</sup> See BVerfGE 30, 292; also BGHZ 6, 276.

<sup>111</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (note 5).

<sup>112</sup> *Minister of Public Works v Kyalami Ridge Environmental Association* (note 6).

<sup>113</sup> *Joubert and Others v Van Rensburg and Others* (note 7).

<sup>114</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (note 5). Discussions of this decision are found in A.J. Van der Walt, Tentative Urgency: Sensitivity for the Paradoxes of Stability and Change in the Social Transformation Decision of the Constitutional Court, 2001 SAPR/PL 1–27; A.J. Van der Walt, Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State, 2001 SALJ 303–311.

<sup>115</sup> See *Grootboom v Oostenberg Municipality and Others*, 2000 3 BCLR 277 (C) at 281A.

list for subsidised low-cost housing. Having been in line for this low-cost housing for more than seven years, and with no signs that their situation would change soon, the community decided to seek more human living conditions by moving and resettling on what they considered to be vacant land. Ironically, this privately owned land was already earmarked for development of subsidised low-cost housing, and the owner accordingly obtained an eviction order against the squatter community. This eviction order was ignored, and a second eviction order was issued in which all the parties involved, including the municipality, were directed to identify alternative land for the permanent or temporary resettlement of the community by way of mediation. Mediation did not take place, but eventually – just before the winter rains set in – the community was forcibly evicted,<sup>116</sup> and moved temporarily to a nearby sports field, to continue living in temporary shelters.

In a subsequent action against the municipality before the Cape High Court, the community claimed temporary accommodation, in reliance upon the constitutional protection of the right to housing (sec. 26 FC) and children's right to shelter and social services (sec. 28(1)(c) FC). The Cape High Court<sup>117</sup> dismissed the claim based on the right to housing in sec. 26 FC, but granted the claim based on sec. 28(1)(c) FC.<sup>118</sup> The matter was taken on appeal to the Constitutional Court by the South African government, the premier of the Western Cape, the Cape Metropolitan Council and the municipality involved.

The Constitutional Court did not uphold the ruling of the Cape High Court regarding children's right to shelter, because of its anomalous result that people with children indirectly, through their children, would acquire a directly enforceable right to shelter; whereas others without children would have no such right, regardless of the possible merit of their own circumstances.<sup>119</sup> Instead, the court favoured a cumulative reading of all socio-economic rights in the Constitution, against the Constitution as a whole, and within the social and historical context of these rights.<sup>120</sup> The court further – in its discussion of the relevance of international law – emphasised the difficulties with determining a “minimum core obligation” on the part of the South African state with regard to access to adequate housing, and mentioned the diversity of needs and groups of people within the South African context.<sup>121</sup> However, the court held that sec. 26(1) FC, which has to be read together with sec. 26(2) FC, places at least a “negative obligation” on the state and other

<sup>116</sup> The constitutional court (par [10]) described the style of the eviction as “reminiscent of apartheid-style evictions”. The respondents were taken by surprise by the premature eviction: many were not at home while their shacks were bulldozed and burnt and their belongings destroyed.

<sup>117</sup> Per Davis J, Comrie J concurring; reported as *Grootboom v Oostenberg Municipality and Others* (note 115).

<sup>118</sup> It was argued that this section provided an unqualified right against the state to shelter for children, and that it was in the interests of the children in the community that they be accompanied by their parents, with the effect that the state was obliged to provide temporary shelter to the children in the community and their parents.

<sup>119</sup> Par [71].

<sup>120</sup> Par [24]-[25].

<sup>121</sup> Par [27]-[33].



entities and persons to abstain from impairing the right of access to adequate housing.<sup>122</sup> According to the decision, the core of this negative right, as correlative to the obligation on the state, is whether the measures taken by the state to realise the right to access to adequate housing are reasonable.<sup>123</sup>

Eventually, the case was decided on this criterion of reasonableness in sec. 26 FC. It was found that against the reasonableness criterion, the policy, legislation and programmes of the government<sup>124</sup> with regard to housing did not pass muster. The state's measures did not accommodate the needs of crisis relief with regard to housing and shelter. The court held that reasonable state housing measures would establish a coordinated and comprehensive public housing programme that allocates tasks and responsibilities between the various national, provincial and local housing authorities. It would also be directed toward the progressive realisation of the right to access to adequate housing within the state's available means.<sup>125</sup> The court acknowledged that it is primarily the task of the legislature and executive to determine the measures to be adopted for progressively realising the right to access to housing, and asserted that the judiciary is not supposed to decide whether other more desirable or favourable measures could have been adopted or whether public money could have been better spent. What the court did have to establish, when called upon to do so, was whether the measures adopted were in their conception and implementation reasonable.<sup>126</sup>

In defining reasonableness in the context of governmental housing policies, Yacob J indicates that housing problems should be considered in their social, economic and historical context. Moreover, the capacity of institutions responsible for implementing the programme should be taken into account. A "reasonable" programme would be balanced and flexible and would make appropriate provision for attention to housing crises and to short, medium and long term needs. Moreover, such a programme needs to take account of the fact that conditions do not remain static and therefore should be subject to continuous review. A programme would not be reasonable if it excluded a significant segment of society.<sup>127</sup> The Court then provides a favourable evaluation of the South African housing policy and legislation in general<sup>128</sup> and mentions that

"The programme is not haphazard but represents a systematic response to a pressing social need. It takes account of the housing shortage in South Africa by seeking to build a large number of homes for those in need of better housing."

Nevertheless, it is found<sup>129</sup> that in the *Grootboom* case the measures fail to meet the requirements of reasonableness, because they exclude a major portion of the

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<sup>122</sup> Par [34].

<sup>123</sup> Par [33].

<sup>124</sup> I.e. on national, provincial and local level.

<sup>125</sup> See par [39], [47]-[51].

<sup>126</sup> Par [41].

<sup>127</sup> Par [43].

<sup>128</sup> Par [53]-[54].

<sup>129</sup> Par [52].

community by not making any provision for housing that falls short of the definition of housing development in the Housing Act.<sup>130</sup> The state's initiatives are therefore found not to be flexible enough to include those in desperate need of housing.<sup>131</sup> Likewise, the national housing programme is held not to be reasonable, because it fails to give effect to the national government's obligation to provide access to housing to those in crisis, not only in the medium or long term, but also in the short term.<sup>132</sup>

"The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing programme. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long term objectives of the nationwide housing programme."

The court subsequently ordered the state to meet the obligation imposed upon it by sec. 26(2) FC. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.<sup>133</sup>

#### (b) Minister of Public Works v Kyalami Ridge Environmental Association<sup>134</sup>

In the *Kyalami Ridge* case, an application was brought before court by owners and residents (i.e. the Kyalami Ridge residents) of land in the vicinity of Leeuwkop, close to Johannesburg, to contest the state's attempts to provide emergency housing for victims of the floods which set in after heavy rainfall towards the end of the summer of 2000. It was contended that the government acted beyond its powers in erecting the transit camp, and that planning and building requirements had not been heeded. Accordingly, the court was requested to issue an interdict prohibiting the government to continue with their initiatives to resettle the crisis-stricken homeless people.<sup>135</sup>

In the High Court decision, much emphasis is placed on the necessity to review the government's decision to resettle the homeless on the basis that the government did not intend merely settling the homeless at Leeuwkop temporarily. Consequently, it was ordered that the decision of the administration be reviewed. Leave to appeal directly to the Constitutional Court was granted.

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<sup>130</sup> Act 107 of 1997. This act is aimed at providing permanent residential structures with secure tenure, ensuring internal and external privacy and to provide adequate protection against the elements, in a properly planned housing development with access to economic opportunities and to health, educational and social amenities. See the court's discussion at par [47]-[52], especially par [51].

<sup>131</sup> Par [66].

<sup>132</sup> Par [65].

<sup>133</sup> Par [95].

<sup>134</sup> Note 6.

<sup>135</sup> Par [8].

Before the Constitutional Court, the Kyalami Ridge residents averred that the establishment of a transit camp at Leeuwkop affected their rights and interests and that the decision to do so was an administrative decision that was neither lawful nor procedurally fair in terms of sec. 33 FC. They contended that the establishment of the transit camp was in contravention of various statutes, thus rendering the decision to establish the transit camp there unlawful and invalid. In reliance upon the provisions of the National Environmental Management Act,<sup>136</sup> the Environment Conservation Act,<sup>137</sup> and their environmental rights under sec. 24 FC, their contentions were based on the potential damage to the environment if a transit camp were to be established at Leeuwkop. They subsequently argued that there had also been a failure to comply with the provisions of the town planning scheme in force in the area in which the Leeuwkop property is situated<sup>138</sup> and they relied on breaches of the National Building Regulations and Building Standards Act<sup>139</sup> and, the Town-Planning and Townships Ordinance (Gauteng).<sup>140</sup> The Constitutional Court acknowledged that the government had to exercise its powers with regard to the provision of housing lawfully, but attempted to accommodate the government's initiatives to some extent. It argued that it was premature to stop the development for being unlawful, since the necessary requirements could still be met and permissions could still be obtained to comply with all legal controls over the development.<sup>141</sup> It made the following remark:

"If the interests of the Kyalami residents are not protected by the town planning, environmental or other legislation on which they rely, and there is no legal impediment to the government establishing a transit camp on its own ground at Leeuwkop, procedural fairness does not require the government to do more in the circumstances of this case than it has undertaken to do. ... To require more, would in effect inhibit the government from taking a decision that had to be taken urgently. It would also impede the government from using its own land for a constitutionally mandated purpose, in circumstances where legislation designed to regulate land use places no such restriction on it."<sup>142</sup>

The court only considered the ability of the government to provide housing in times of crisis without the backing of the normal statutory requirements and prescriptions, against the fact that in this particular case, the state owned the land earmarked for resettlement of the crisis-stricken community. It was reasoned that the government was entitled, as owner of the Leeuwkop premises, to develop the land like any other landowner, provided it complied with prescribed formalities.<sup>143</sup> In contrast with the *Grootboom* decision, the court in *Kyalami Ridge* is not as outspoken on the issue of the state's duty to provide housing to people in dire need of it.

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<sup>136</sup> Act 107 of 1998.

<sup>137</sup> Act 73 of 1989.

<sup>138</sup> Peri-Urban Town Planning Scheme of 1975.

<sup>139</sup> Act 103 of 1977.

<sup>140</sup> Ordinance 15 of 1986.

<sup>141</sup> Par [114].

<sup>142</sup> Par [116].

<sup>143</sup> Par [53].

Nevertheless, the *Kyalami Ridge* decision indicates that legal formalities intended to control development and land use under normal circumstances could be ignored under specific circumstances if emergency action so requires.

(c) *Joubert and Others v Van Rensburg and Others*<sup>144</sup>

The *Joubert* case resulted from a land invasion by about 1500 people, who erected shacks and informal structures on land that was already being developed. In attempts to limit the potential financial loss posed by the presence of the land invaders, neighbouring landowners, who were engaging in residential and commercial developments on the land, initiated resettlement of the squatters. They created a trust to purchase land for these purposes. The land eventually acquired was at that point used as a fruit farm, known as Itsoseng. Those squatters who (in terms of an agreement with the trustees) paid an amount of R1000 were then treated as "beneficiaries" in terms of the trust,<sup>145</sup> and relocated to the Itsoseng land.<sup>146</sup> As time passed, other people also moved onto the land, without the "blessing" of the trustees.

No formal attempts were made to develop a township<sup>147</sup> in accordance with either the Communal Property Associations Act<sup>148</sup> or the Development Facilita-

<sup>144</sup> Note 7.

<sup>145</sup> The trust document provided that the trustees had to administer the fund to the advantage of beneficiaries and were obliged to take possession of all the trust assets. The trustees also were provided with a wide discretion to appoint the beneficiaries of the trust.

<sup>146</sup> The trust document determined that the trust beneficiaries had no claim to the trust property and no right to deal with it.

<sup>147</sup> An overview of the features of township development in South Africa is provided in par [15.1]-[15.2] of the decision. Among others, it mentions the construction of roads to new township and the provision of adequate water supplies for reasons of public health and fire hazards by the local authority; the installation of other services such as sewerage by developers or, when a service is not supplied itemwise, the cash contribution towards the creation of parks, ambulance services, markets, street lighting, cemeteries, etc. by the community itself. An alternative method of township establishment was introduced to cater for urgent needs on a level which would be acceptable to people in need who would settle for lesser standards. The Communal Property Associations Act 28 of 1996 (hereinafter abbreviated CPA) introduced a less rigorous system of requirements for alternative methods of township establishment. This act supports a philosophy of controlled permission to a group of people for "township" development for themselves but excluding outsiders. However, the development still cannot be completely discretionary. The act controls the bona fides of the type of need that is served, including the background of the participants, but attention is given to certainty of and clarity about rights. The CPA and its schedule attends to a written exposition, *inter alia*, of the purposes for which each person may use the property and physical division; whether and to whom a member may sell rights; and how disputes are resolved. Operational effectiveness is promoted also by making the association a juristic person run by democratically elected persons with definite duties and controls but without power to simply sell the communal property. Finances are specifically attended to. The basic element of the association is protected by the creation of a statutory offence of, *inter alia*, wrongly granting another person access to the property. (S 14(1)(a) CPA.) The court then criticises the lack of attention in the act to a list of clearly discernable and acceptable minimum standards for development of such townships, but remarks that the Minister, who has a discretion in terms of sec. 2(1) CPA whether or not to allow such development, would presumably not allow it if

tion Act<sup>149</sup> on the land at Itsoseng. The occupiers shared the land informally, subject to allocation by the trustees, but without the provision of services characteristic of township development, such as water supplies, sewerage, street lighting, cemeteries, or ambulance services. No attention was given to living conditions or any other standards, and no contributions to common expenses, other than the payment of the original R1000, were requisite. As a matter of course, the severe condensation of people in the area, without any formal organisation, became a cause of frustration for the neighbouring landowners and farmers. They complained of the nuisance created by the Itsoseng community, as well as the “unwanted” occupants, who were not beneficiaries of the trust, but moved into the area in ever increasing numbers all the same.

Matters came to a head when the neighbouring farmers and landowners brought a court application<sup>150</sup> for the ejectment of the occupants, the removal of the trustees and their replacement by the Master, and the sale of the property, or in the alternative an interdict against unlawful occupation and nuisance. The claim was based on the unlawfulness of the Itsoseng community’s occupation in terms of the zoning laws of the property and the unlawfulness of the nuisance they caused.<sup>151</sup> The applicants alleged that occupation of the land in terms of the trust agreement was illegal, because of alleged mistakes in the transfer of the land to the trust and the fact that the trust contract was void. They contended further that their development initiatives in the area would be prejudiced if the situation was allowed to prevail, and that uncontrolled land invasion would be the order of the day. The respondents raised several counter-arguments, the general thrust of which was that the occupiers indeed had rights to the Itsoseng land, and that their actions could therefore not be seen as an (unlawful) “land invasion”; that they expected permission to be granted for approving the township at the settlement; and that an order for ejectment could not be granted because such an application could only be brought in terms of the Extension of Security of Tenure Act<sup>152</sup> (ESTA).

Accordingly, a number of issues had to be decided by the court. This included: (i) whether the High Court or the Land Claims Court had jurisdiction to hear the application; (ii) whether the applicants in the High Court application had standing to enforce the provisions of the Town Planning Scheme and to seek the eviction of

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the end result would be nothing better than an unserviced site likely to be marked by squalor and dirt and unhealthy conditions.

<sup>148</sup> Act 28 of 1996.

<sup>149</sup> Act 67 of 1995, hereinafter abbreviated as DFA.

<sup>150</sup> In terms of the Trust Property Control Act 57 of 1988, hereinafter abbreviated as TPCA.

<sup>151</sup> The applicants’ main arguments were directed at the provisions in the trust agreement, in attempts to have the creation of the trust declared void on account of vagueness, the trustees discharged because of an alleged forsaking of their duties in terms of the trust provisions, and the squatters evicted because of their alleged “illegal occupation” of the land in view of the proposed failed creation of the trust. It was alleged that the trustees as owners were legally obliged to act against unlawful occupation and nuisance and that, in the event of their forsaking their duties, they should be discharged.

<sup>152</sup> Act 62 of 1997, hereinafter abbreviated ESTA.

the occupants from property they did not own;<sup>153</sup> (iii) whether a trust can be registered as the lawful owner of land, whether the trust *in casu* was valid and whether, under such circumstances, the occupants had any right to remain on the land as beneficiaries of the trust;<sup>154</sup> (iv) whether the provisions of various statutes dealing with the occupation and use of land were relevant to the application and the claim for eviction, and in particular whether the occupants are protected against an eviction order by the provisions of the Extension of Security of Tenure Act. For present purposes, the court's argumentation on most of these issues is only important as far as it contributes to an understanding of the context within which the court pronounces on the question of whether sec. 25 FC embodies a positive right to property and guarantees the institution of property. Therefore, without dwelling on the reasons provided at all, the outcome of the court's decision may be summarised as follows: The occupants of the Itsoseng land were ordered to abate the nuisance they were causing and to terminate their occupation of the land.<sup>155</sup> The structures in which they were living were to be broken down and if they failed to

<sup>153</sup> The occupiers had created a "township" within the scope of sec. 1 of the Town Planning and Township Ordinance 15 of 1986 (Transvaal), but it was an unlawful township, because legal limitations imposed by this ordinance had been and were being breached. The court underscored that conditions of establishment of a township have statutory force and must be obeyed like any other law. In disobeying these conditions, the occupants frustrated balanced planning of the wider area, which had been planned in the interests of everyone; and the interests of owners of adjacent and nearby properties were prejudiced to such an extent that legal redress would be available to them. Par [16.2], [16.3.1], [16.4] and [16.4.1]. Moreover, in terms of the zoning requirements applicable to the Itsoseng land, only one dwelling could be erected on the land. ("Dwelling house" was defined as a building designed and used for one family plus any building which might be an accessory and "family" was defined as a family head with dependents.) Buildings ordinarily incidental to agriculture could also be erected, as well as housing for employees on the smallholding. The local authority had not given consent to additional occupiers, and neither did the title deed to the land provided for mass occupation. The land was, furthermore, not suitable for mass accommodation. Par [17.1.1] and [17.1.2].

<sup>154</sup> The trust contract did not provide for any beneficiary of the trust to acquire a right (real or otherwise) in or to the property. See par [8] at 767G-H. Moreover, the trustees of the trust at the time of transfer, whose names were known, and no one else, were the owners of the land. See par [11.2] and [11.3]. This ruling follows upon a range of decisions regarding the nature of the trust and its creation through consensus. See par [9.3], [9.5], [10.1.1] and [10.2], [10.4] and [10.5.1], [10.6] and [10.7.1], [10.8]. As the particularities of these issues are not relevant to the present discussion, they are ignored. Suffice it to say that the court held that both an order declaring the trust contract void and an order discharging the trustees would only destroy the contractual tie. The trustees would remain owners until their real rights were transferred and could accordingly, as owners, continue in their occupation of the property. Also, if the trustees were replaced, the new trustees would probably come from the group of beneficiaries and have similar views to the existing trustees. The removal of the trustees would bring the applicants no real relief and was accordingly not appropriate relief. See par [24.2] and [24.3.1]. Furthermore, an order to the trust to sell the property would be directed only against those respondents who were also trustees. The order would only be against the owners, whereas the beneficiaries would stay put and the applicants would still require other relief. See par [24.3.2.1].

<sup>155</sup> The court stated that it would be appropriate to grant an interdict against the nuisance created by the occupiers, but this would entail that the joint unlawful occupation had to be ceased, and the squatters evicted, par [18.2], [20.2.3] and [20.3]. It also confirmed that an order could be obtained against the local authority, as argued by the respondents, but also stated that this was not the only available remedy, par [21.4]. The court also refrained from postponing the application for an interdict

leave the land, they were to be ejected by the sheriff. Flemming DJP considered the constitutionality of the Extension of Security of Tenure Act in detail and concluded that its provisions are inconsistent with the constitution.

The court's treatment of the constitutionality of the Extension of Security of Tenure Act in view of the provisions of sec. 25 FC is essential in determining the extent to which the judiciary is prepared to adhere to a model of integrated application of the constitutional and social state principles. Therefore, the focus here will be only on this particular part of the decision. In brief, the objective of the Extension of Security of Tenure Act is to provide security of tenure for farm labourers who do not benefit from the protection of the Land Reform (Labour Tenants) Act,<sup>156</sup> because they do not qualify as labour tenants. As such, the act focuses on "occupiers" of land, and applies to rural areas, nation wide.<sup>157</sup> The act is aimed at preventing unfair evictions and creating alternative ways of acquiring independent land rights. Its preamble states that many South Africans presently do not have security of tenure of their homes and land and are consequently vulnerable to unfair eviction. It also acknowledges that these evictions have led and will continue to lead to great hardship, conflict and social instability. It thus shows the desirability of promoting the achievement of long-term security of tenure for occupiers of land and the extension of rights of occupiers through legislative measures, without losing sight of the rights, duties and legitimate interests of landowners.<sup>158</sup>

In the *Joubert* decision, the court considered itself to have the duty to pronounce on the constitutional validity of the Extension of Security of Tenure Act.<sup>159</sup> It

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against unlawful use of land, as that would have amounted to adopting a view that unlawful behaviour was temporarily in order, which could not be tolerated, par [22].

<sup>156</sup> Act 3 of 1996, hereinafter abbreviated as LTA.

<sup>157</sup> Sec. 2 ESTA. The provisions of the act do not apply in a township established, approved, proclaimed or otherwise recognised in terms of any law. The act is, however, applicable to land within a township (of any kind) that has been designated for agricultural purposes and any land within a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997 (the date on which the bill was first published) only if the person concerned was an occupier immediately prior to the establishment, approval, proclamation or recognition (s 2(1) ESTA). This would give some protection to persons residing on land in towns used for agricultural purposes and the land is then rezoned, for whatever reason, resulting in the land not falling within the general ambit of sec. 2 ESTA, as a whole, except with regard to the particular occupiers. This specific group would still have protection from eviction. However, because the land has been rezoned, occupiers that take occupation after the rezoning would not fall under the scope of the act and cannot benefit from the protective measures. The act therefore in essence applies to rural areas only and not to urban areas. In *Karabo v Kok*, 1998 4 SA 1014 (LCC) 1019B, it was found that the section does not relate to agricultural land only. In this case, the property was in fact used for industrial purposes in that a quarry and brickwork were operated from the farm. The conclusive considerations were apparently the rural, farming nature of the land. See J.M. Pienaar, "Land Reform", in: P. Badenhorst/J.M. Pienaar et al., *The Law of Property* forthcoming (2002) 22 (draft in possession of author); D.L. Carey Miller/A. Pope, *Land Title in South Africa* (2000) 493-495.

<sup>158</sup> Pienaar, *ibid.*, 21.

<sup>159</sup> It was held that, in the light of the presumption in sec. 2(1) ESTA, the property in question was "land" to which the Extension of Security of Tenure Act applied. The Extension of Security of Tenure Act excluded the jurisdiction of the High Court. Because the statute interfered with the jurisdiction of the High Court, which has original jurisdiction and is not dependent upon parliamentary

therefore ventured an analysis of sec. 25 FC, in order to determine the setting of the Extension of Security of Tenure Act in the constitutional context.<sup>160</sup> The reference to “property” in sec. 25 FC was interpreted as follows:<sup>161</sup>

“Use of the word ‘property’ encompasses the situation where there is a tie between a person and a thing. It refers to a specific type of tie. It refers to the tie which is commonly called ownership, which systematically is described as a fullest real right in an object and which causes the thing to be the ‘property’ of a person.”

The court continues with a “plain reading” of sec. 25 FC, and finds that it had targeted deprivation of property as the topic which it governed, not just the deprivation of a right “in” a thing.<sup>162</sup> Accordingly, the court finds after some deliberation that sec. 25 FC provides a wider protection against interference with property. Both ownership and possession of things (as well as all rights or interests which could be described by the layman as property, including rights to patents, inventions or software source codes) are included in the protective ambit of the constitutional property clause under the requirement that a law authorising attachment must be within the limits of fairness of procedure, duration and effect.<sup>163</sup> In its analysis of sec. 25 FC, the court does not go much beyond the finding that the constitutional property clause

“was made wide enough to extend beyond ‘things’ only. It may perhaps even apply to contractual rights to delivery or rights to possession ... but one can say with confidence that it covers all those rights to interests which a layman would happily describe as ‘my property’...”

Practically no attention is given to the second leg of the constitutional property inquiry, which concerns the limitation of the protection granted by sec. 25 FC. Admittedly, an attempt is made to explain the meaning of a “deprivation” of property rights.<sup>164</sup> However, this explanation is rather superficial and flouts instead of supports the judge’s attempts to make out a convincing case for the reasons why the Extension of Security of Tenure Act is supposedly<sup>165</sup> invalid for being unconstitutional.

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creations, and because the statute altered the existing law, the statute only went as far as interference was clearly indicated. It did not preclude the High Court from interpreting the act, par [29.1] and [29.3].

<sup>160</sup> Par [30].

<sup>161</sup> Par [31.1].

<sup>162</sup> Par [31.2].

<sup>163</sup> Par [31.4.1] and [3.5].

<sup>164</sup> “[T]he thief is legally unable to destroy the legal nexus between owner and thing. Yet he does ‘deprive’ the owner or possessor of property. Destroying the legal right (ownership) partially or fully is not the only manner of depriving a person of property. It takes place if another person is given a right which overrides the real right (ownership) or its resultant competencies. A person is deprived of property if the thing which is in his possession or ownership is destroyed. A person is deprived of property by taking the thing out of his hands or the hands of his agent or by barring access to the thing.” Par [31.6].

<sup>165</sup> After a lengthy consideration of the constitutionality of the Extension of Security of Tenure Act, Flemming DJP considered it unnecessary to formally declare the Extension of Security of Tenure Act invalid, as the Extension of Security of Tenure Act was not directly involved in the application,



In the subsequent analysis of the provisions of the Extension of Security of Tenure Act, the court indicated that the Act protected legal occupants by virtue of consent or otherwise. It is then remarked that this protection was unnecessary because South African common law provides adequate protection against ejection of such occupants. The court then concludes that the real statutory intent of the Extension of Security of Tenure Act is to protect the unlawful occupant, and to protect the lawful occupant against some terminations of the right to occupy. It then expresses the view that the Extension of Security of Tenure Act is bent on taking the side of unlawful occupants of land, for instance because it elevates legally invalid consent to a level where it was to be regarded as valid. In respect of lawful occupiers, the Extension of Security of Tenure Act aims to extend rights that would run out or had ended under the principles of law into long-term security of tenure.<sup>166</sup> To show the gravity of this interference with property, the judge remarks:<sup>167</sup>

“By the stroke of a pen a right is created which overrides ownership and all other lawful rights.”

An attempt is then made to test this intervention against sec. 25 FC. In the ensuing discussion, the court mentions the requirements for termination of rights of residence: In terms of the Extension of Security of Tenure Act, a right of residence could be terminated on “any lawful ground”. However, according to the judgment, this provision is inadequate, because any lawful ground of termination is made subject to the severe qualification that the right of residence can only be brought to an end if there is, alongside a lawful ground to do so, also something which renders the termination “just and equitable”. It is held that the Extension of Security of Tenure Act provides no guideline as to what a “just and equitable” termination would entail, which means that it must depend on the presiding individual’s personal make-up, life experience and views about socio-political matters. According to the court, this measure amounted to “an unguided missile”.<sup>168</sup>

The court then furnishes further examples of how the Extension of Security of Tenure Act forces fairness in favour of the land occupant without giving any “special attention to what is fair to the owner”. According to the court, the Extension of Security Act requires that certain factors weigh in on the equation even if “on normal logic they would not affect fairness”. Besides, the court remarked, the interests of landowners were also disregarded by the additional requirements of the requisite notice period to the local authority and the availability of suitable alterna-

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par [43.6], [44.1] and [44.2]. In a subsequent decision of the Constitutional Court dealing with an application for leave to appeal directly to the Constitutional Court, this ruling was severely criticised in view of the provisions of sec. 172(1) FC, which require a court to declare that “any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency” when deciding a constitutional matter within its jurisdiction. See par [9]-[10] *Mkangeli and Others v Joubert and Others*, (still unreported) Case CCT 61/00.

<sup>166</sup> Par [35.1], [35.2], [35.4] and [35.5].

<sup>167</sup> Par [35.5].

<sup>168</sup> Par [36.4] and [37.1.2].

tive accommodation. According to the court, the effect of these requirements was that, unless the local authority or someone else provided the funds and was willing to take the occupant off the owner's hands, the owner of the land chosen by the occupant paid the price in the interests of society out of his personal pocket.<sup>169</sup>

Upon this argumentation, the court concludes that, although sec. 25(1) FC does not permit the "arbitrary deprivation of property", the Extension of Security of Tenure Act protected occupation which was unlawful and arbitrarily taken, thereby permitting the arbitrary deprivation of property. According to the court, the Extension of Security of Tenure Act furthermore is not a "law of general application" as required by sec. 25(1) FC and sec. 36(1) FC, because it burdened only agricultural property.<sup>170</sup> Accordingly, the Extension of Security of Tenure Act as a whole is found to be unconstitutional, because it permitted the "arbitrary deprivation" of property, while not being a statute of "general application".

The High Court's approach to the application of the arbitrariness requirement of sec. 25(1) FC was correctly criticised in the subsequent Constitutional Court decision dealing with leave for appeal directly to the Constitutional Court.<sup>171</sup> Indeed, the constitutionality of the Extension of Security of Tenure Act was not raised as an issue on the papers and no argument had been addressed to the court on this issue. The Constitutional Court deals with this problem as follows:

"If the constitutionality of the legislation was not relevant to his judgment the learned judge ought not to have considered that issue; if it was relevant he ought to have taken steps to have had the Minister responsible for the administration of the Tenure Act joined as a party to the proceedings. He ought then to have heard argument from the parties on that issue, and if he found the Act to be inconsistent with the Constitution, he ought to have made a declaration to that effect as required by section 172(1) of the Constitution."

It remains to be seen what the Constitutional Court and/or the Supreme Court of Appeal will make of the material issues raised by the decision of Fleming DJP in the court of first instance.

### 2.2.3. Evaluation of the judicial approach

The cases of *Grootboom*, *Kyalami Ridge* and *Joubert* exemplify the problems that could arise with the constitutional protection and regulation of property within the context of social justice and development (e.g. raising of living standards) in general, and the issue of housing in particular. Provision of land to the homeless gave rise to all these decisions, although the circumstances leading up to the eventual decisions of the different courts vary considerably. Moreover, the issues were phrased and dealt with in different terms in each of these decisions.

In *Grootboom*, the court had to base its decision on the right to access to adequate housing (sec. 26 FC), coupled with *inter alia* the Housing Act. In *Joubert*,

<sup>169</sup> Par [37.1] and [37.3.1].

<sup>170</sup> Par [39.3.4], [39.4] and [42.1].

<sup>171</sup> Cf note 165 above.

the protection afforded to land occupants under the Extension of Security of Tenure Act in relation to the constitutional property guarantee (sec. 25 FC) was under scrutiny. In *Kyalami Ridge*, it was procedural fairness and just administrative action that needed to be considered in the context of the right to housing. The question that arises from these decisions is what the general basis of the courts' approach to land occupations like these is supposed to be. In other words, can land occupants be allowed to frustrate the overall effort of development, to "jump the housing queue" or to hold the process ransom by their unilateral action merely because of their dire need for housing and access to land?

In order to answer this question, a more detailed analysis of case law and legislation on the issue of land occupation is necessary.<sup>172</sup> However, the different legislative measures governing issues of eviction and ejection of land occupants in South Africa are too extensive and too complex to be dealt with in this inquiry. The scope of this inquiry allows only a reference to the detailed exposition of Van der Walt,<sup>173</sup> where it is indicated that, in most decisions pertaining to evictions of both lawful and unlawful occupants,

"responses to [questions about the priority of common law or statutory law, practical issues of jurisdiction and onus of proof] are shaped by deep-level intuitions and assumptions about stability and transformation, a sphere where policy considerations usually demand that the land-reform laws should be the point of departure to promote the reformist agenda of the legislature".

Van der Walt indicates that these questions "go to the root of constitutionalism and democratic transformation". It is in this context that the integrated-application model of the constitutional and social state principles could – and should – become important for the judiciary.

The application of the social and constitutional state principles – even though it would mostly take place subconsciously – have a definitive influence on the focus areas of the courts' decisions. This becomes clearer if the *Grootboom*, *Kyalami Ridge* and *Joubert* decisions are analysed more closely:

The *Joubert* case represents an example of the attempts that can be invoked to use mechanisms and structures of private property law to side-step the effects of the broader land reform programme. The original creators of the trust invoked or-

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<sup>172</sup> Sec. 26(3) FC evictions from and demolitions of homes without a court order; the Rental Housing Act 50 of 1999 protects the occupation rights of (lawful) occupiers of (rural and urban) residential property; the Land Reform (Labour Tenants) Act 3 of 1996 protects (lawful) occupiers of agricultural (rural) land; the Extension of Security of Tenure Act 62 of 1997 protects the occupation rights of persons who (lawfully) occupy (rural) land with consent of the landowner; the Restitution of Land Rights Act 22 of 1994 protects (lawful and unlawful) occupiers of (urban and rural) land who have instituted a restitution claim; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 regulates eviction of unlawful occupiers (from urban and rural land); and the Interim Protection of Informal Land Rights Act 31 of 1996 protects (lawful) occupiers of (rural and urban) land in terms of informal land rights. Cf the discussion by A.J. Van der Walt, *Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A model to evaluate South African Land Reform Legislation* forthcoming 2002, TSAR.

<sup>173</sup> Van der Walt, *ibid.*

dinary private law mechanisms to deal with what they regarded as “the squatter problem” threatening their business interests: instead of resorting to the measures available in terms of administrative and legislative control, they decided rather to keep the state out of the matter and to acquire alternative land on which to resettle the squatters. This measure could have been laudable, and could even have exemplified the employment of individual liberty with regard to private property in a fashion indicating an awareness of social duty on the level of private parties *inter se*. But a closer look at the situation shows, as Fleming DJP also recognises,<sup>174</sup> that “the problem’ ...[is] merely move[d] to another address”; merely dumped, so to speak, on the doorstep of someone else. As such, it exemplifies anything but an individual awareness of and responsibility towards the resolution of a socio-economic problem existing alongside any political orientation.

In *Joubert*, the court correctly observes that attacking the validity of the private law measures will not solve the problem. The eviction is ordered on the finding that the occupation *inter alia* creates a public nuisance, which goes beyond the boundaries of behaviour that must be tolerated. An intricate, anomalous argument is then advanced to conclude that, in spite of the Extension of Security of Tenure Act, occupation of Itsoseng by the “squatters” is unlawful and should not be tolerated.

Most importantly, however, the court never questions the sanctity of individual property rights. Instead, the latter is confirmed in very strong terms. This is significant in view of the fact that the court here had the opportunity to determine its own role in enforcing liberty and social duty with regard to property within the realm of private law. The question that the court could have considered more carefully, is whether the development of an informal settlement on the Itsoseng land, once it was purchased by the trust, and the conduct of the trustees in providing the beneficiaries with plots for occupation, could have been regarded as the socially responsible exercise of individual freedom in the context of ownership under the Constitution. One would expect socially responsible conduct by the landowners such as those in the *Joubert* case to comprise more formal involvement in the eventual development of the settlement and the provision of services, with a view to limiting the burden placed on neighbouring owners by a condensation of people like in the case of Itsoseng, as far as possible. Most importantly, though, the court should not allow itself or the parties calling upon its judgment to abuse the structures of private property law in order to evade the implications of land control measures anchored in public law.

The *Joubert* decision is disappointing in many regards. In the context of proposed arbitrariness of the Extension of Security of Tenure Act, the court fails to consider that the arbitrary deprivation requirement in sec. 25(1) FC is aimed at the legislative provision permitting the deprivation, not necessarily at the deprivation itself. The fact that the court raised the issue of arbitrariness indicates

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<sup>174</sup> Par [3.2].

to what extent it is necessary to develop an interpretation of the constitutional property clause based on an integrated application model of the constitutional and social state principles. In *S v Makwanyane*,<sup>175</sup> Ackermann J provides an explanation of arbitrariness viewed against the historical background and social structure of South Africa:<sup>176</sup>

“We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law.”

Ackermann J explains that arbitrariness, by its very nature, is dissonant with these core concepts of the new South African constitutional order. He remarks:<sup>177</sup>

“Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution. Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons.”

Arbitrary action or decision-making is thus incapable of providing a rational explanation as to why similarly placed persons are treated in substantially different ways. This will inevitably lead to unequal treatment. In general, therefore, it can be said that the requirement of non-arbitrariness harks back to the principle of the constitutional state,<sup>178</sup> and that arbitrariness is inconsistent with values that underlie an open and democratic society based on freedom and equality.<sup>179</sup>

In several recent decisions, the South African courts were faced with the interpretation of the term “arbitrary”, although it was not always in connection with interference with property. From these decisions, one can deduce a number of criteria determining the arbitrariness of certain legislative or administrative actions: First, arbitrariness will be indicated by the lack of (express or implied) criteria governing the exercise of the deprivation.<sup>180</sup> If legislation would, for instance, lack specific provisions permitting deprivation, it could be arbitrary.<sup>181</sup> Second, the depri-

<sup>175</sup> Note 61.

<sup>176</sup> Par [156].

<sup>177</sup> Par [156].

<sup>178</sup> This was clearly stated in *New National Party of South Africa v Government of the Republic of South Africa and Others*, 1999 3 SA 191 (CC): “Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution.” Par [24].

<sup>179</sup> *S v Lawrence*; *S v Negal*; *S v Solberg*, 1997 4 SA 1176 (CC) par [33].

<sup>180</sup> Stated simply, as was done in the case of *Woolworths (Pty) Ltd v Whitehead (Women’s Legal Centre Trust Intervening)*, 2000 3 SA 529 (LAC) par [128] this would mean that the word arbitrary denotes “the absence of reason, or, at the very least, the absence of a justifiable reason”. In this case it was employed in terms of item 2(1)(a) of Schedule 7 to the Labour Relations Act 66 of 1995. Ironically, in this case, it was found that the pregnancy of the respondent, coupled with the wish of the appellant to establish continuity within the ranks of its employees, was a justifiable reason for refusing to offer her a contract of permanent employment and instead offering her a temporary position terminating exactly when her confinement would start.

<sup>181</sup> The case of *Dawood v Minister of Home Affairs*, 2000 3 SA 936 (CC), in which it had to be decided whether sec. 25(9)(b) of the Aliens Control Act 96 of 1991 was in conflict with the Final

vation should be justifiable. This means that a rational connection must exist between means and ends.<sup>182</sup> Although the terminology of the courts might be confusing in this regard, the rationality review must not be mistaken for a disguised form of the proportionality test. The latter comes into play only in the context of limitations of fundamental rights, whereas rationality review (or low-level scrutiny) is employed to determine the legitimacy of the state's purpose in employing certain legislative or administrative measures. Third, a deprivation would be arbitrary if it is not preceded by a proper hearing or other procedural safeguards.<sup>183</sup> In this un-

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Constitution, illustrates this point. The applicants were spouses, one of whom was South African and the other a foreigner who sought an immigration permit to settle in South Africa. Sec. 25(9)(b) of the Aliens Control Act provided that an immigration permit could be granted to the spouse of a South African citizen who was in South Africa at the time only if that spouse was in possession of a valid temporary residence permit. Accordingly, if the foreign spouse did not have such a permit, he or she would either have to separate until the application for the permit was processed, or the South African spouse would have to leave the country. After having found that the right to family life (which is not expressly included in the South African bill of rights) forms an integral part of the right to human dignity (par [36]-[37]), O'Regan J held that, even though the purpose of sec. 25(9)(b) of the Aliens Control Act might be to grant a privilege to foreign spouses, its effect is uncertain in any specific case because of the discretionary powers contained in sec. 26(3) and (6) of the same act. The latter provisions render the grant of an immigration permit subject to the grant of a valid temporary permit. However, the statutory provisions contemplate the possible refusal of a temporary permit, but contain no indication of the considerations that would be relevant to such refusal. Accordingly, it was held that the failure to identify the criteria relevant to the exercise of the discretionary powers contained in sec. 26(3) and (6) of the Alien Control Act introduces an "element of arbitrariness" to their exercise that is inconsistent with the constitutional protection of the right to marry and establish a family (par [58]). From the example of the *Dawood* case, it can be inferred that the provision against arbitrariness in the context of sec. 25(1) FC would mean that the interference of property must be based on a law that provides the standards for the exercise of discretion as to the deprivation of property. This could be issued in the form of a number of criteria, which should be met in order to give effect to the deprivation.

<sup>182</sup> In the cases of *S v Lawrence*; *S v Negal*; *S v Solberg*, 1997 4 SA 1176 (CC) and *Prinsloo v Van der Linde*, 1997 3 SA 1012 (CC) this requirement was explained as meaning that in the respective contexts of limitation on the right to engage in economic activity (sec. 26 FC) and the right to equality (sec. 8 IC) non-compliance with this requirement, according to the court, would be arbitrary and "incompatible with ... a society [based on freedom and equality]" (1997 4 SA 1176 (CC) par [40]). This requirement for non-arbitrariness was repeated in *New National Party of South Africa v Government of the Republic of South Africa and Others*, 1999 3 SA 191 (CC) par [24] where the effective exercise of the right to vote was at stake. The two-stage process through which (non-)arbitrariness was determined in this case is interesting for present purposes: first, it was determined whether a "facial analysis of the provisions in issue, in relation to the Constitution, has been shown to lack rationality"; whereafter the circumstances existing at the date of the adoption of the statute at stake were taken into account to determine whether it was capricious or arbitrary (par [25]-[30]). The inquiry into the arbitrariness of legislative action is, thus, in essence an objective one. See also *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*, 2000 2 SA 674 (CC) par [86].

<sup>183</sup> Procedural fairness in the context of a non-arbitrary deprivation of property would have to be determined on a case-by-case basis. The circumstances of a specific case would thus determine whether stricter or more lenient rules of procedure need to be applied in order to eliminate arbitrariness from the process of interference. In this regard, it can be argued that application of a principle or legal requirement on a case-by-case basis would naturally bring about a differentiation of approach from one case to the other, which could render the process of decision-making unjust. In the case of

derstanding of arbitrariness, there is ample room for the application of an integrated model of the constitutional and social state principles. The first and third requirements in particular call for an application of the various elements of the constitutional state as mentioned above, whereas the requirement of justifiability necessitates a sensitivity for the socio-economic conditions prevalent in South Africa, even from an objective point of view.

Fleming DJP's decision that the Extension of Security of Tenure Act has an arbitrary effect in that it forces fairness in favour of the land occupants loses sight of the legitimate state purpose in the enactment of land reform legislation. Within the broader land reform programme, of which the Extension of Security of Tenure Act is a part, the state's most important goal is to transform the unjust system of land-holding and land control inherited from the apartheid regime. The judge's finding that the act is unconstitutional disregards the legislature's objectives. Ironically, in this case the occupants were on the land with the consent of the landowners, and hence the proposed arbitrariness and lack of general application, which is ascribed to the Extension of Security of Tenure Act, makes even less sense in the specific circumstances. The decision acknowledges that sec. 25(5)-(8) FC was intended to keep the way clear for land reform, but the judge then remarks that

“allowing people to stay on another's property wherever they chose and simply because they so chose, at the expense of lawful rights, is clearly not land reform”.

The concern about uncontrolled land invasions is evident in this statement, but what happened in the *Joubert* case should much rather raise concerns about the abuse of private rights to evade the state's policies on land control. In effect, a very basic principle of ownership should have informed the decision: owners of private land should be allowed to do as they please on and with their land, but only as far as the limitations of public and private law, and reasonableness, permit. Similarly,

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*Pretoria City Council v Walker* this objection was treated with the statement (par [140]) that “[a]ny form of systematic deviation from the principle of equal and impartial application of the law ... might well have to be expressed in a law of general application which would be justiciable according to the criteria of reasonableness and justifiability as set out in sec. 33 [of the Interim Constitution].” This case arose from the differentiated manners in which tariffs for the actual consumption of water and electricity in different areas within the territory of the Pretoria City Council were determined. The respondent objected to the enforcement of a debt owed by him to the city council, on the grounds that the flat rate for water and electricity charges in the former municipal areas of Mamelodi and Atteridgeville was lower than the metered rate charged to the respondent and other persons in the former municipal area of Pretoria and that this meant that the latter were subsidising the former; that the differentiation in the tariffs continued even after meters had been installed on some properties in Mamelodi and Atteridgeville; that only residents of old Pretoria had been singled out for legal action to recover arrears whilst a policy of non-enforcement was followed in respect of Mamelodi and Atteridgeville; and that the imposition of differential rates was, *inter alia*, inconsistent with sec. 8(2) IC. The court found that the respondent had to settle the debt owed to the council. For present purposes, the reasoning of the court in making this finding is not as important as the court's recognition of the fact that the selective institution of legal proceedings by the city council amounted to a breach of the constitutional right not to be unfairly discriminated against (par [81]). One could assume that, in the context of sec. 25(1) FC, the procedural safeguards in the context of ensuring non-arbitrariness would include, for instance, avoiding the selective application of certain legislative measures that could constitute an interference with property.

the state should be allowed to interfere in private property relations, but only to an extent that may be reasonably tolerated by individual owners and holders of rights. The integrated application of the constitutional and social state principles can be employed to determine whether the private individual and the state's conduct in either situation would be reasonable.

The situation in the *Joubert* case varies in many respects from the case of *Kyalami Ridge*. For one, the element of crisis or emergency in the resettlement of the occupants plays an integral part of the *Kyalami Ridge* decision, whereas it is absent in the case of *Joubert*. Further, the landowners on whose initiative the resettlement occurred in the *Joubert* case were private individuals, whereas it was the state who owned Leeuwkop in the context of *Kyalami Ridge*. Finally, and in relation to the previous point, the responsibility for township development so clearly reflected from the *Kyalami Ridge* decision is absent in the account of the establishment of the informal settlement in the *Joubert* case. These differences might explain the rigid stance taken by the High Court in the *Joubert* case, when the decision is compared with the *Kyalami Ridge* judgment, but this does not excuse the High Court. Here the reasoning of the court in *Grootboom* becomes important:

The *Grootboom* decision deals much more openly than the *Joubert* decision with the efficacy of the South African government's policies of land reform, specifically where these involve access to adequate housing, and the diversity of needs of different groups of people. In the *Grootboom* decision, the Constitutional Court explicitly refrains from prescribing to the government what their policies should be.<sup>184</sup> As in the *Joubert* decision, the court decidedly denounces the practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to the land invaders. It indicates that the state could quite reasonably decide, when faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions.<sup>185</sup>

The court's decision in *Grootboom* is ambivalent in many respects, and open to varying interpretations. Depending on the interpretation taken, it is possible to assume varying degrees of adherence to principles like the constitutional and social state. This may be illustrated with reference to an important question that arises from the decision: Where should the line be drawn between people and communities qualifying for crisis housing, and those who do not?<sup>186</sup> A problem linked to this issue is that the imposition of a duty to redesign the housing policy to provide for crisis relief, means that the available funds for the provision of ordinary subsidised housing are reduced. This could increase the number of people and communities that would resort to claiming crisis relief.

From the government's perspective, some crises are admittedly more easily discernible than others. People who lost their houses because of natural disasters,<sup>187</sup>

<sup>184</sup> Par [41], [66].

<sup>185</sup> Par [92].

<sup>186</sup> See Van der Walt (note 114) 1–27.

<sup>187</sup> E.g. flooding or fire.



or because of the state's own actions,<sup>188</sup> would probably almost always qualify for crisis relief. However, many South Africans live in the same kind of deplorable conditions with which the *Grootboom* community had to put up before their land invasion that gave rise to the subsequent court actions. Yacoob J recognises<sup>189</sup> that the plight of communities like these are so grave, that it is not surprising that they are tempted to take the law into their own hands to escape these conditions.

Depending on how the court's decision is construed, and how the ambivalence in it is treated, varying degrees of influence of the constitutional and social state principles can be deduced. Van der Walt<sup>190</sup> explains that it is possible to interpret the decision conservatively and restrictively, in the sense that the court's ruling lays down the principle of how to understand the government's duty with regard to housing policy and programmes, but does not make any finding with regard to any specific claimant of the right, including the *Grootboom* community:

"Consequently, actual application of this principle and enforcement of the right to emergency housing in terms of section 26 FC is postponed to another day and, although the decision creates the impression that a far less restrictive version of rationality review was applied in this case, rationality review was actually just postponed to later decisions, where it can be applied on the merits of a specific claim for assistance in terms of the revised housing policy."

The court could perhaps afford to make this decision,<sup>191</sup> because temporary relief had already been obtained by the *Grootboom* community in the urgent application to the Constitutional Court, which forced the government to act on the order of the High Court to provide the community with temporary relief in the form of water, sanitation and financial assistance to improve their homes.<sup>192</sup> According to such an interpretation, however, the questions pertaining to the drawing of the line between those who qualify for this right and those who do not, are left undecided. The consequences of the court's decision on the state's abilities to deliver on promises of housing, would therefore be very difficult, if not impossible, to determine.

Another interpretation, and perhaps one illustrating the possible effect of an integrated application of the constitutional and social state principles better, is that the *Grootboom* decision provides new possible interpretations of the notion of reasonableness in the context of the state's responsibility to give effect to rights to social welfare and security. In the words of Van der Walt,<sup>193</sup>

"[The *Grootboom* decision] raises the ... possibility of taking the position of the weakest and most vulnerable members of the community into account when deciding whether the

<sup>188</sup> E.g. through forced removals.

<sup>189</sup> Par [2].

<sup>190</sup> Van der Walt (note 114) 310–311.

<sup>191</sup> Par [90]–[92].

<sup>192</sup> Cf *Grootboom v Oostenberg Municipality and Others* (note 115). Ironically, the Constitutional Court in their reticence effectively deprived the *Grootboom* community of the relief they obtained in the Cape High Court, even though the government's housing policy and the eviction action were held to be inadequate.

<sup>193</sup> Van der Walt (note 114).

delivery measures and policies of the government are reasonable and therefore constitutionally adequate and, in effect, when deciding what land reform and land rights are all about.”

According to this interpretation of the *Grootboom* decision, the right to access to adequate housing in sec. 26 FC would allow certain members of society – the poorest of the poor and the weakest and most vulnerable – to “jump the queue” for low-cost housing, because their circumstances are so lamentable that the government cannot reasonably expect them to wait their turn. If this is what the *Grootboom* decision intended, it would exemplify the manner in which the social state principle – in its manifestation as the right to access to housing – can be invoked to temper the notion of individual liberty underlying the constitutional state principle, and which might as such be used to justify “the exclusionary logic of common law property rights and entitlements”.<sup>194</sup> At this point reference can be made again to the treatment of the Extension of Security of Tenure Act in the *Joubert* decision, and its complete disregard for the elements of liberty and social duty encompassed by the integrated application of the constitutional and social state principles. Land reform measures such as the Extension of Security of Tenure Act are not aimed at constricting individual freedom, but rather at giving effect to the social ideals of the new constitutional democracy in South Africa, and to make individual freedom in the context of landownership more easily achievable by a larger number of South Africans.

It remains to be seen how the reasonableness criterion formulated by the court in the *Grootboom* decision will actually be applied and the right to crisis housing in terms of sec. 26 FC will be enforced. It is hoped that, in the context of social justice and development, the most important legacy of the *Grootboom* decision will be its apparent recognition that the conditions of the poorest and weakest members of society must be taken into account in determining the propriety and reasonableness of the state’s measures in attaining rights to social welfare and security. This has important implications for the establishment of a new land regime in South Africa, and will be important especially in establishing the social and constitutional democracy at the heart of the South African constitution.

One could therefore perhaps assume, in spite of its vagueness on these important issues, that the *Grootboom* decision has opened up opportunities for the establishment of a more just social order in the sense of raising the living standards of the South African society, and adherence to the elements of the constitutional state. However, the *Joubert* and *Kyalami Ridge* decisions indicate that it is not at all certain how the deck of cards will be dealt in future. What is needed is a more decisive stance by the Constitutional Court on matters going to the heart of constitutionalism and social welfare, so as not to leave any room for decisions like those of Fleming DJP in the *Joubert* case, in which the issues are confused. It calls for a clearer, although not less careful, balance between ideas and concepts like private owner-

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<sup>194</sup> Phrase used by Van der Walt, *ibid.*

ship, social reconstruction and judicial protection of individual freedom, especially in a country like South Africa.

## IV. Conclusion

The state has to foster the ideals of governance through legality, the promotion and protection of fundamental rights and the constitutional and social state principles. This is important for the formulation and implementation of policies on social and economic development, and for the establishment of social justice. It can be done either through legislative regulation, or through providing the necessary infrastructure, or both. In doing so, the words of Chaskalson P in *Soobramoney v Minister of Health, KwaZulu-Natal*<sup>195</sup> should be kept in mind:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”

From an analysis of liberty, social duty and property in both German and South African law, it appears that the extent to which the state assumes responsibility for providing in the socio-economic needs of individuals, influences the importance attached to private ownership in the society:

The German example of property protection is certainly an appropriate model for the social reconstruction programmes, the reform and distribution of access to land and land rights, as well as the affirmative action and reconstruction programmes related to housing and agricultural development envisaged in South Africa.<sup>196</sup> Even though the constitutional drafters in South Africa settled for a more complex compromise of different foreign legal cultures, the German model is still important in the South African context. Under the new constitutional order, the legal system will be confronted with the question as to which of the constitutional principles should enjoy precedence in situations where both are at stake and compete with each other.

The German example indicates that the state on the one hand can play an important stabilising role in a society through provision of social security, licences and permits. However, South Africa still has one of the worst records in the world in terms of income equality and social indicators like health, education, safe water and fertility.<sup>197</sup> The inclusion of socio-economic rights in the bill of rights repre-

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<sup>195</sup> *Soobramoney v Minister of Health, KwaZulu-Natal*, 1998 1 SA 765 CC par [8].

<sup>196</sup> Van der Walt (note 39) 315.

sents a strong commitment to overcome this legacy and to put the principle of the social state into motion.<sup>198</sup>

On the other hand, ownership of (or secure rights in) land is a stabilising element that in the end requires less commitment from the state and entails probably as much advantage for the state when it comes to development and individual responsibility within a given society. At present, the indications of the state's ability to deliver on the promises of providing social security, ensuring social justice and raising living standards, are rather disappointing. One could, therefore, assume that individuals will have to fend for themselves at least until the economic tide has taken a turn for the better in South Africa. This should be reason enough to support an interpretation of the constitutional property clause and the housing guarantee that would also provide individuals with the autonomy to determine their own economic destiny, along with the responsibility to partake in social change.

For South Africa, the significance of the German experience with property, liberty and social duty lies in the balancing of individual autonomy and the public good pertaining to private property. It indicates that in a democracy supported by constitutional principles like the constitutional and social state, proprietary relations must always be characterised by an interaction between liberty and social duty.<sup>199</sup> Translating this principle into the South African context is a challenge well worth embracing.

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<sup>197</sup> See J.M. Pienaar/A. Muller, *The Impact of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act 19 of 1998 on Homelessness and Unlawful Occupation within the Present Statutory Framework*, 1999 *Stell LR* 373.

<sup>198</sup> In this sense, the South African constitution goes even further than the German Basic Law, by extensive coverage of socio-economic rights in the chapter on fundamental rights. In Germany the "Sozialstaatsprinzip" is the constitutional anchor for the socio-economic rights, which by far does not enjoy the same constitutional coverage as in South Africa and are mostly not explicitly mentioned in the Basic Law as such. In other words, socio-economic rights are effected in Germany on the level of ordinary legislation.

<sup>199</sup> O. Kimminich, *Die Eigentumsgarantie im Prozeß der Wiedervereinigung* (1990) 24.