Statutory land and resource reform and private property in South Africa

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ABSTRACT

Statutory land and resource reform was introduced in the new democratic dispensation in South Africa in order to redress the injustices brought by Apartheid during the largest part of the twentieth century. This process has, however, had an effect on existing property rights which are based on a hierarchical system of rights with ownership as the pinnacle right – in terms of this system ownership has an absolute character in that it is essentially an unlimited right protecting the holder thereof. The research question that was examined in the study is to what extent legislation concerning land and resource reform – introduced by the new political dispensation in 1994 – has affected the existence of private property rights in South Africa. The research report starts with a theoretical study on the common law concept of ownership during the twentieth century and the manner in which the character of this concept was changed by a vast body of legislation and policies under the Apartheid regime. This is followed by a study of the concept of property rights under the democratic constitutional dispensation, with the focus on Section 25 of the *Constitution of the Republic of South Africa*, 1996. Although Section 25 provides a certain degree of protection to property rights, it also compels the government to develop legislation to ensure that land and resource reform takes place with the aim of redressing the injustices of the past. The next part of the study focuses on the legislation that was developed in order to fulfil this obligation and the extent to which the implementation thereof restricts existing rights to property. It was found that although statutory land reform measures have an influence on the absolute and complete character of property rights (in particular ownership), it does not threaten the existence of these rights. Legislation pertaining to resource reform, on the other hand, has a much more drastic effect on owners' rights and is indicative of a decline in private property rights with regard to natural resources.

Keywords: Land reform, resource reform, restitution, redistribution, tenure reform, common law, ownership, private property, apartheid.

TABLE OF CONTENTS

ABSTRACT **1**

LIST OF ABBREVIATIONS **5**

1. Introduction **7**

1.1 Problem statement and research question ***7***

1.2 Research methodology ***11***

2. The common law concept of ownership and private property: A theoretical discussion **12**

2.1 The traditional concept of ownership used in early South African law ***12***

2.2 The role of the traditional concept of ownership under Apartheid ***19***

3. Property in a constitutional dispensation **23**

3.1 Introduction ***23***

3.2 The dual aim of the property clause ***25***

3.2.1 The meaning of property *28*

3.2.2 Deprivation and expropriation *29*

3.2.3 The land reform provisions *32*

3.2.4 Limitations of property rights *33*

3.2.5 Conclusion *35*

3.3 Moving towards the fulfilment of the land reform objective ***36***

3.3.1 Restitution *37*

3.3.2 Redistribution 38

3.3.3 Tenure reform 39

3.3.4 Conclusion 40

4. The impact of statutory land and resource reform on landownership...... 42

4.1 Restitution of Land Rights Amendment Act 22 of 1994............ 43

4.2 Land Reform (Labour Tenants) Act 3 of 1996 45

4.3 Land Reform: Provision of Land and Assistance Act 126 of 1993 46

4.4 Transformation of Certain Rural Areas Act 94 of 1998 48

4.5 Spatial Planning and Land Use Management Act 16 of 2013..... 49

4.6 Expropriation Bill B 4B – 2015 50

4.7 Extension of Security of Tenure Act 62 of 1997 and Extension of Security of Tenure Amendment Bill of 2013......... 53

4.8 Land Tenure Security Bill of 2013........ 55

4.9 Communal Property Associations Act 28 of 1996 57

4.10 Communal Land Rights Act 11 of 2004 58

4.11 Prevention of Illegal Eviction of Unlawful Occupation of Land Act 19 of 1998........ 59

4.12 Interim Protection of Informal Land Rights Act 28 of 1996 61

4.13 Protection of Investment Act 22 of 2015........ 62

4.14 Property Valuation Act 17 of 2014 64

4.15 Infrastructure Development Act 23 of 2014 65

4.16 Regulation of Land-holdings Bill of 2016 66

4.17 Preservation and Development of Agricultural Land Bill B XX – 2016 68

4.18 Land Management Commission Bill B – 2013 69

4.19 National Water Act 36 of 1998 70

4.20 Mineral and Petroleum Resources Development Act 28 of 2002 72

5. Conclusions and Recommendations 74

5.1 Concluding remarks 74

BIBLIOGRAPHY 79

LIST OF ABBREVIATIONS

ALHPF	Agricultural Landholding Policy Framework
ANC	African National Congress
AWARD	Association for Water and Rural Development
BITs	Bilateral Investment Treaties
CLaRA	Communal Land Rights Act
CPAs	Communal Property Associations
CPAA	Communal Property Associations Act
DAFF	Department of Agriculture, Forestry and Fisheries
DFA	Development Facilitation Act
DTI	Department of Trade Industry
EB	Expropriation Bill
ESTA	Extension of Security of Tenure Act
ESTAB	Extension of Security of Tenure Amendment Bill
H CRCLLR	Harvard Civil Rights-Civil Liberties Law Review
IDA	Infrastructure Development Act
IPILRA	Interim Protection of Informal Land Rights Act
IRR	Institute of Race Relations
LCC	Land Claims Court
LMC	Land Management Commission
LMCB	Land Management Commission Bill
LRA	Land Reform (Labour Tenants) Act
LRMB	Land Rights Management Board
LRMC	Land Rights Management Committees
LTSB	Land Tenure Security Bill
MPRDA	Mineral and Petroleum Resources Development Act

NBLJ	National Black Law Journal
NEDLAC	National Economic Development and Labour Council
NWA	National Water Act
NWPR	National Water Policy Review
PDALFB	Preservation and Development of Agricultural Land Framework Bill
PER	Potchefstroom Elektroniese Regstydskrif
PIA	Protection of Investment Act
PIE	Prevention of Illegal Eviction from an Unlawful Occupation of Land Act
PLAA	Provision of Land and Assistance Act
PLAAS	Institution for Poverty Land and Agrarian Studies
PVA	Property Valuation Act
RLRA	Restitution of Land Rights Act
RLRAA	Restitution of Land Rights Amendment Act
RLHB	Regulation of Landholdings Bill
SAJHR	South African Journal in Human Rights
SAJR	South African Jewish Report
SALJ	South African Law Journal
SAPR/PL	Suid-Afrikaanse Publiek Reg/Southern African Public Law
SPLUMA	Spatial Planning and Land Use Management Act
TCRAA	Transformation of Certain Rural Areas Act
TD	Journal for Transdisciplinary Research in Southern Africa
THRHR	Tydskrif vir Hedendaagse Romein-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

1. Introduction

1.1 Problem statement and research question

Prior to the promulgation of the Constitution,[1] ownership in South Africa was perceived by most property lawyers as a fundamentally exclusive individual right. Ownership was considered an absolute right in the sense that it was regarded as the most important right within a hierarchy of rights in property.[2] This property regime was enforced through a comprehensive land recording system that provided for the registration of titles in the Deeds Registry.[3] One of the most prominent Roman-Dutch common law[4] principles that applied in property law, the *cuius est solum* principle, enforced the idea that ownership was the most absolute right that can be obtained in property – the principle determined that the ownership of land extended from the "heavens above" to the core of the earth.[5]

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1 *Constitution of the Republic of South Africa*, 1996.

2 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 8, 66, 582; Pienaar "The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas" 109; Jaichand "The right to restitution of land" para 3FB6.3; Pienaar 2006 *TSAR* 447; Van der Merwe *Sakereg* 170-171; Mostert and Badenhorst "Property and the Bill of Rights" para 3FB6.3; Pienaar 2015 *PER* 1484; Although AJ van der Walt acknowledges that the South African legal theory of ownership is based on the traditional perception that ownership is an absolute exclusive and abstract right, he does not agree with this viewpoint and states that "the myth of universality, abstract neutrality and superiority attached to this perception are dispensable". See Van der Walt 1992 *De Jure* 447, Van der Walt 1999 *Koers* 262, Van der Walt 2001 *SALJ* 27 and Van der Walt 1995 *SAPR/PL* 338-344 in this regard.

3 In terms of s 16 of the *Deeds Registries Act* 47 of 1937 ownership in land must be conveyed from one person to another by a process of publicising and recording the transfer at the Deeds Registry. This registration system provides that limited real rights to land, that restrict the exercise of the entitlements of ownership by the landowner, are the only other kind of right (with a few exceptions in s 63(1)) that is capable of being registered. Personal rights in respect of immovable property or any condition that does not restrict the exercise of a right of ownership are restrained from being registered. It is this exclusionary approach that indicates support for the notion that ownership is the most important right within a hierarchy of rights, with limited real rights following close at heel. Carey-Miller "Revision of priorities in South African land law" 50: "Ownership could only be acquired on a derivative basis by an act of registration and racial controls over land ownership were exercised through the Deeds Registries. The emphasis of the *Deeds Act* upon the concept of an absolute right of ownership, open to allocation and division in only particular prescribed ways, reflected South African common law development"; Pienaar 2006 *TSAR* 447; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 66; Mostert *et al The Principles of The Law of Property in South Africa* 47.

4 The South African Common Law was influenced to varying extents by the English as well as Roman-Dutch law depending on the specific area of inquiry. The Roman-Dutch Law was derived from two main sources namely Roman Law and Germanic Customary Law. Accordingly the principles of Roman Law are prevalent in most aspects of modern South African Private Law pertaining to property and numerous traces of Germanic Customary Law can also be identified.

5 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 93; Lewis 1985 *Acta Juridica* 244; Pienaar 1989 *THRHR* 223; Badenhorst 1994 *TSAR* 502; see also the following case law: *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 All SA 121 (A) paras 147A–B; 1996 4 SA 499 (A) para 537C; *London and South African Exploration Co v Rouliot* 1890 8 SC

Consequently, landownership was the key for access to natural resources associated with a particular piece of land.[6]

Despite this generous interpretation afforded to the notion of ownership, all South Africans were not privy to its benefits. Another important facet of the previous property dispensation was that black South Africans were precluded from owning land in the greatest part of the country, simply because they were black.[7] Today this preferential system under which rights to property and landholding was distributed is known and understood as Apartheid.[8]

Although the property dispensation under the Apartheid regime was not articulated until 1948 with the coming to power of the Nationalist Party,[9] the promulgation of the *Natives Land Act* 27 of 1913[10] was the first step towards altering the Roman-Dutch principles of equal treatment of individuals regarding property law,[11] as it restricted the rights of certain individuals (black people) in owning property.[12] This Act was created specifically

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74 para 90; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 1 SA 350 (T) para 363F–G; *Rocher v Registrar of Deeds* 1911 TPD para 311; *Acol Syndicate v Ashby* 1889 10 NLR 183; *Coronation Collieries v Malan* 1911 TPD 577 para 591: "Horizontal layers of the earth's surface cannot with us, as they can in England be separately owned."

6 Mostert *et al The principles of the law of property in South Africa* 269; Van der Schyff 2012 *New Contree* 133, 135; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 All SA 121 (A) paras 147A–B; 1996 4 SA 499 (A) paras 537 B-C; *Neebe v Registrar of Mining Rights* 1902 TS paras 65, 85; *Rocher v Registrar of Deeds* 1911 TPD 311; *Union Government (Minister of Railways and Harbours) v Marais* 1920 AD 240; *Acol Syndicate v Ashby* 1889 10 NLR 181, 183: "We know that in an out and out sale of a freehold in land without reservations, according to the maxim, all above and under the soil goes to the purchaser...".

7 Van der Walt 1999 *Koers* 262.9; Cousins "The politics of communal tenure reform: a South African case study" 2; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 586: "Black South Africans were precluded from obtaining and holding rights in land, which were protected by the acclaimed common law system of property and backed by the sophisticated and effective registration system."

8 The word "apartheid" literally means "separateness" or "the state of being apart". Apartheid was a system of racial segregation in South Africa enforced through legislation by the National Party, the governing party from 1948 to 1994. Under this property regime the rights, associations, and movements of the majority black inhabitants and other ethnic groups were curtailed, and white minority rule was maintained.

9 Pienaar *Land Reform* 100.

10 This Act was subsequently renamed the *Black Land Act* 27 of 1913.

11 Roman-Dutch law is based on the fundamental belief of equal treatment, that a "juridical norm to preserve egalitarian standards, to bind citizens equally, and to define the rights of subjects generally and not for individuals" must be perpetuated in the reading of the law. See in this regard Van der Vyver 1985 *HARV. C.R.-C.L.L. REV.* 291; Hamilton 1988 *NBLJ* 159.

12 Hamilton 1988 *NBLJ* 154: The Roman-Dutch vision of the rights of the *bona fide* property occupier or owner is absolute. Apartheid alters this Roman-Dutch Common law by preventing the occupier or owner from becoming "bona fide".

for the control of access to land with regard to black people[13] and it is often said to have provided the foundation for apartheid.[14] Further discriminatory legislation evolved, such as the *Native Trust and Land Act* 18 of 1936[15] and the *Group Areas Act* 41 of 1950,[16] which resulted in a racially skewed pattern of land holding in South Africa with a minority group of white South Africans owning the majority of the land.[17]

With the first democratic election in 1994 came a moral obligation to rectify the injustices of the past and a pressing need for land reform programmes emerged.[18] Under the rule of the *African National Congress* (hereafter the *ANC*) the 1996 Constitution was promulgated which introduced the property clause (section 25). This clause has two main objectives: a protective aim and a transformational aim. On the one hand the clause protects private property from confiscation by the state, and requires any expropriation of property to be compensated. It further requires that any interference with private property that amounts to deprivation should be authorised by law of general application and should be non-arbitrary.[19] On the other hand, it aims to restore land and resources to those people who were dispossessed of it through racially discriminatory measures and to provide people whose tenure is legally insecure as a result of racially discriminatory

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13 According to s 1 of the *Broad-Based Black Economic Empowerment Act* 53 of 2003, "black people" is a generic term which means Africans, Coloureds and Indians, unless the context indicates otherwise.

14 Hamilton 1988 *NBLJ* 154; Kloppers and Pienaar 2014 *PER* 680; Pienaar *Land Reform* 87-88: The *Natives Land Act* read with the *Native Trust and Land Act* laid the groundwork for "grand apartheid" and initiated, formally, the racially based settlement pattern and land ownership paradigm that the land reform programmes (discussed in more detail in part 3 of this study) would have to dismantle decades later.

15 This Act was subsequently renamed the *Development Trust and Land Act* 18 of 1936.

16 Through this Act separate areas for human settlement in urban areas were made compulsory and free choice of where to acquire immovable property or settle in urban areas was removed from all non-white people; Pienaar *Land Reform* 106-107; Van der Walt 1990 *De Jure* 26-27.

17 Pienaar *Land Reform* 6, 82; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 586; Chaskalson and Lewis "Property" 2; for a more detailed discussion on the *Native Lands Act*, the *Native Trust and Land Act* and the *Group Areas Act* see Kloppers and Pienaar 2014 *PER*.

18 Pienaar *Land Reform* 131-132, 168; Kloppers and Pienaar 2014 *PER* 687; Chaskalson and Lewis "Property" 28; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 591: "The mere deracialisation of the land control system was not enough. In order to address the inequality with regard to landholding and access to land, the insecurity of tenure and the restitution of land, the introduction of an all-encompassing land reform programme was the next logical step."

19 Section 25(1)-(3) of the *Constitution*; Currie and De Waal *The Bill of Rights Handbook* 532; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 522; *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 7 BCLR 702 (CC); 2002 4 SA (CC) para 49.

colonial and apartheid laws with secure tenure or comparable redress.[20] In order to achieve the transformational aim of the property clause new legislation had to be developed and pre-existing legislation abolished or amended.[21]

Examples of legislative measures undertaken by the state to protect and advance persons who were disadvantaged by apartheid laws and which have affected existing property rights with regard to both land and resources, include but are not limited to the following: the *Restitution of Land Rights Act* 22 of 1994 (hereafter the *RLRA*), that was enacted under the *Constitution of the Republic of South Africa*[22] (hereafter the *Interim Constitution*) to permit persons or communities who were dispossessed of their rights in land under past racially discriminatory laws or practices to claim restitution of those rights from the state;[23] the *Land Reform (Labour Tenants) Act* 3 of 1996 (hereafter the *LRA*) which protects the rights of labour tenants who live and grow crops or graze livestock on farms from eviction without an order from a court; the *Extension of Security of Tenure Act* 62 of 1997 (hereafter the *ESTA*) which promotes the achievement of long-term security of tenure for occupiers of land and protects these persons from unfair eviction; the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (hereafter the *PIE*) which protects unlawful occupiers by stipulating that the latter can only be evicted with due regard of the limitations and requirements imposed by the Act; the *National Water Act* 36 of 1998 (hereafter the *NWA*), which abolished private ownership of water and replaced it with use rights;[24] and the *Mineral and Petroleum Resources Development Act* 28 of 2002 (hereafter the MPRDA), which vested all unsevered mineral and petroleum resources in the state as "custodian" for all South Africans.[25]

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20 Section 25(4)-(9) of the *Constitution*; Currie and De Waal *The Bill of Rights Handbook* 532; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 522; *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 7 BCLR 702 (CC); 2002 4 SA (CC) para 49.

21 According to Chaskalson and Lewis in "Property" the disturbance of existing property relations is inevitable with the development of legislative programmes of reconstruction and reparation with regards to the injustices done in the past.

22 Act 200 of 1993 .

23 Sections 121-123 of the *Interim Constitution*.

24 Section 3 of the *NWA*.

25 Section 3(1) of the *MPRDA*; additional and more recent legislative developments that have the potential to impact on landownership are, amongst others the *Infrastructure Development Act* 23 of 2014, which allows the Presidential Infrastructure Co-ordinating Commission to expropriate land for

Unfortunately, the process of bringing about meaningful transformation through these and other legislative measures has often seriously affected existing rights in property with the result that the "absolute" character of ownership has been curbed drastically. Hence, the question that was examined in this dissertation is as follows: To what degree are existing property rights affected in order to fulfil the transformational aim of section 25 of the Constitution.

1.2 Research methodology

In order to answer the research question, it was necessary to distinguish between the concept of private ownership in terms of the Roman-Dutch common law and its changed character through the Constitution and modern day legislation regarding land and resources. In the first instance, a closer look is taken in the study at what the common law concepts of ownership and private property comprise of and the manner in which this notion of ownership was implemented for the largest part of the twentieth century – especially during Apartheid. A detailed discussion follows regarding property and property rights under the new constitutional dispensation and how these rights have been affected by the introduction of land reform programmes and legislation regarding both land and resource reform. Thereafter the focus falls on the specific statutes which have or may have an impact on rights to property with regard to land and natural resources and the extent to which these rights have been affected.[26] Finally, an opinion and certain recommendations are provided with regard to the research question concerning the impact of statutory land and resource reform on the existence of private property.

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the purpose of implementing a Strategic Integrated Project, and the *Property Valuation Act* 17 of 2014 which provides for a Valuer-General with exclusive power to value properties during expropriation, land reform or any other acquisition by the state.

26 The focus will only be on legislation which has or may have an impact on property rights. Although land laws are drafted in the light of different over-arching policy frameworks which sets the direction and vision for these laws, such policies will not be discussed in any detail in this dissertation.

2. The common law concept of ownership and private property: A theoretical discussion

2.1 The traditional concept of ownership used in early South African law

Prior to the introduction of a constitutional democracy in 1994, South African property law was dominated by the traditional private law perception of property.[27] It is relevant for this study to know what the perception of property (and in the narrow sense, ownership) was prior to this event in order to understand exactly how it has changed since then.

The origin of the South African ownership concept has been influenced by many different sources and developments.[28] The concept is essentially Roman-Dutch with some influence from the absolutist theories of the Pandectist movement later in the nineteenth century.[29] The definitions of ownership proposed by Bartolus de Saxoferrato and Hugo Grotius are considered to have had the most influence on the modern South African legal theory regarding this concept.[30] Bartolus gave the first formal definition of ownership in the history of Romanist property law as the "right of disposal over a corporeal thing, within the limits of the law",[31] whereas Grotius stated that:

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27 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 1; Van der Walt 1995 *SAJHR* 185: "private law [is] restricted to the 'pure' principles of the civil law tradition, as they apply between private individuals, and [has] nothing to do with government actions or politics." This is Van der Walt's characterization of the traditional view and does not represent his own view.

28 Van der Walt 1988 *De Jure* 17.

29 Feenstra *Romeinsrechtelijke Grondslagen van het Nederlands Privaatrecht* 38–41, Van der Walt and Kleyn "Duplex Dominium: The History and Significance of the Concept of Divided Ownership" 213–248 as cited in Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 95; Birks 1985 *Acta Juridica* 1; Van der Walt 1992 *SAJHR* 433; Van der Walt 1988 *De Jure* 17; Van der Walt 1992 *De Jure* 454; Pienaar 1986 *TSAR* 295, 297-303, 308; Mostert *et al The Principles of The Law of Property in South Africa* 90; Visser 1985 *Acta Juridica* 39.

30 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 91; Visser 1985 *Acta Juridica* 43; Van der Walt 1988 *De Jure* 16; Kroeze *Between Conceptualism and Constitutionalism: Private-law and constitutional perspectives on property* 22.

31 Bartolus *Commentaria* ad D. 41,2,17,1, fn 4 as cited in Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa*; Pienaar 1986 *TSAR* 301; Visser 1985 *Acta Juridica* 43; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 96; Kroeze *Between Conceptualism and Constitutionalism: Private-law and constitutional perspectives on property* 21; Van der Walt 2001 *SALJ* 271: This definition was restricted to corporeals, was intended to emphasize the distinction between *dominium* and *possessio*, and laid the foundation for the subsequent assumption that ownership was unrestricted unless a specific restriction was proved.

> Ownership is complete if someone may do with the thing whatever he pleases, provided that it is permitted in terms of law. [32]

According to this perception, ownership was the real right that potentially conferred the most complete or comprehensive control over a thing, subject to the limitations imposed by private and public law.[33] In other words, owners had the entitlement to do with their thing as they deemed fit but this right could be restricted by the objective rules of the law (such as legislation and neighbour law) and by the subjective rights of other persons (such as limited real rights and personal rights).[34] Nevertheless, in comparison with other real rights, ownership was the most complete right.[35]

In order to provide an accurate explanation of how this perception of ownership dominated legal theory and practice in South Africa for more than a century, it is necessary to consult relevant case law and the works of South African legal authors starting from the beginning of the 1900s.

The description of ownership in early South African legal textbooks resembles the description awarded to this concept by Roman-Dutch authors, such as Voet,[36] Grotius[37] and Van der Linde[38], as an absolute right.[39] Accordingly, Maasdorp[40] gave the first description of ownership in a South African textbook[41] as follows:

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32 Grotius *Inleidinge tot de Hollandsche Rechtsgeleerdheid* 2 3 10, as cited in Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa*; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 96; Visser 1985 *Acta Juridica* 40; Kroeze *Between Conceptualism and Constitutionalism: Private-law and constitutional perspectives on property* 28.

33 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 91.

34 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 91; Kroeze *Between Conceptualism and Constitutionalism: Private-law and constitutional perspectives on property* 28.

35 Mostert *et al The Principles of The Law of Property in South Africa* 92; In *Gien v Gien* 1979 (2) SA 1113 (T) para 1120 ownership was defined accordingly: "The right of ownership is the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property, do with and on his property as he pleases."

36 Voet *Commentarius ad Pandectas.*

37 Grotius *Inleidinge tot de Hollandsche Rechts-geleerdheid.*

38 Van der Linden *Regtsgeleerd, practical en koopmans handboek* (also referred to in South Africa as *The Institutes of the laws of Holland).*

39 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 88.

40 Maasdorp *The Institutes of Cape Law 3: Law of Things.*

41 Josson *Schets van het Recht van de Zuid-Afrikaanse Republiek* 1897 15, as cited by Van der Walt 1988 *De Jure* 323.

> ...the sum-total of all real rights which a person can possibly have to and over a corporeal thing, subject only to the legal maxim: *'Sic utere tuo ut alienum non laedas'* (So use your own that you do no injury to that which is other's).[42]

Maasdorp further explained that ownership includes the right of possession, the right of use and enjoyment and the right of disposition, but concluded that it is not required for all these factors to be present at the same time and in equal degree.[43] Roos and Reitz[44] extended the definition of Maasdorp by stating that ownership:

> ... is the exclusive right of disposing of a corporeal thing combined with the legal means of alienating it and the right to claim possession and enjoyment thereof. Or, to sum up according to the Roman law, it is the *ius utendi, fruendi, abutendi, alienandi et vindicandi.*[45]

Much later in 1937, Wille[46] placed ownership within the context of real rights and defined it as follows:

> ...*dominium* or ownership, which is the sum total of all the possible rights in a thing, namely the right to use it and enjoy its fruits, to alienate it, and destroy it. The absolute ownership, *dominium plenum,* of a thing, consequently confers all these rights in the thing on its owner.[47]

According to him, a real right is a thing that confers a benefit, which is indefeasible by any other person on the holder of the right, and ownership can be described as the most comprehensive real right, which are contrasted with all other real rights (limited real rights).[48]

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42 Maasdorp *The Institutes of Cape Law 3: Law of Things* 1903 31-32, as cited in Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa*; Lewis 1985 *Acta Juridica* 243; Van der Walt 1988 *De Jure* 323.

43 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 88; Lewis 1985 *Acta Juridica* 243. This definition is confirmed by Lee *An introduction to Roman-Dutch law* 111, where he states that ownership entails the rights to possess, use and enjoy, and alienate a thing.

44 Roos and Reitz *Principles of Roman-Dutch law* as cited in Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 89.

45 Roos and Reitz *Principles of Roman-Dutch* law 39 as cited in Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 89.

46 Du Bois *Wille's Principles of South African law.*

47 Du Bois *Wille's Principles of South African law* 121; Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 88.

48 Du Bois *Wille's Principles of South African law* 117; Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 88; Van der Walt 1988 *De jure* 323.

The definition given to ownership by Van der Merwe[49] is both representative and authoritative in the South African law.[50] Van der Merwe defines this concept with reference to the comprehensiveness of the owner's right, as follows:

> Om eiendom van beperkte saaklike regte te onderskei, word dit omskryf as die saaklike reg wat die mees volkome en omvangrykste heerskappy oor 'n saak verleen. 'n Eienaar kan binne die grense deur die publiek- en privaatreg gestel na geliewe met die saak handel.[51]

This definition of ownership has been repeated and used by most South African property lawyers, with minor deviations from the original.[52] The Roman-Dutch perception of ownership was also prevalent in various earlier South African judgments with regard to nuisance and neighbour law.[53] The general viewpoint shared in these cases was that owners can in principle do with their thing as they deem fit and the latter will only be liable for damages as a result of their unnatural and unfair actions towards others.

It can be, therefore, concluded that for the first half of the twentieth century the description of ownership and limited real rights used in South African law were mainly derived from Roman-Dutch law principles. This is not surprising in view of the fact that Roman-Dutch law was the predominant law used in South Africa at the time and accordingly the law applied by courts.

The influence of German Pandectists on South African law made its appearance only later in the twentieth century.[54] The *Johannesburg Municipal Council v Rand Township Registrar* case, laid the foundation for the recognition of the Pandectist notion of

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49 Van der Merwe *Sakereg* 171.

50 Kroeze *Between Conceptualism and Constitutionalism: Private-law and constitutional perspectives on property* 243; Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* 85.

51 This is translated as follows: In order to distinguish between ownership and limited real rights, ownership is described as the real right that confers the most complete and comprehensive sovereignty over a thing. An owner can, within the limits set by public and private law, act freely with regard to the thing.

52 Kroeze *Between Conceptualism and Constitutionalism: Private-law and constitutional perspectives on property* 244; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 162: "Ownership potentially confers the most complete or comprehensive control over a thing." Sonnekus and Neels *Sakereg Vonnisbundel* 249: "...verleen in beginsel aan die reghebbende die wyds moontlike bevoegdhede ten aansien van 'n saak."

53 See *Union Government v Marais* 1920 AD 240 para 246; *Levin v Vogelstruis Estates and Co* 1921 WLD para 66; *Kirsch v Pincus* 1927 TPD 199 para 206; *Leith v Port Elizabeth Museums Trustees* 1943 EDL 211 para 213; *Prinsloo v Shaw* 1938 AD 570 para 575 in this regard.

54 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 91.

ownership into South African law, where the court did not refer to the Roman-Dutch view of ownership, but rather to the absolute, exclusive and in principle unrestricted concept of ownership used by German Pandectists.[55] The court specifically referred to Savigny's definition of ownership:

> Savigny's definition may be accepted as of high authority. 'Dominium is the unrestricted and exclusive control which a person has over a thing.' In as much as the owner has full control, he also has the power to part with so much of his control as he pleases. Once the owner, however, he remains such until he has parted with all his rights of ownership over the thing.

According to Visser,[56] the perception of Pandectist's of ownership was accepted into South African property law through courts quoting and reading these views as if they counted amongst our institutional writers.[57] It is important, however, to note that the interpretation of this specific Pandectist view was, in fact, a misinterpretation. Pandectists emphasised the absoluteness of the enforceability of ownership entitlements, and not the absolute view of the concept of ownership.[58] Accordingly, almost every statement concerning the absoluteness of ownership is qualified by a statement that recognises the fact that ownership can be restricted and that the scope and content of the rights of owners exist within the limits of the law.[59] Nevertheless, the Pandectist influence led to considerable emphasis being placed on the absoluteness of ownership,[60] which became a useful interpretation of ownership– especially related to land during the Apartheid era.[61]

The recognition that ownership can be restricted, can be seen in case law. This is evident from the judgment in *Regal v African Superslate*[62] where the court held that although there is a general principle that everyone can do with their property as they like, even if it is detrimental to others, it is obvious that there exists less freedom for the unlimited

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55 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 95; Lewis 1985 *Acta Juridica* 241; Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* 86.

56 Visser 1985 *Acta Juridica* 47.

57 Visser 1985 *Acta Juridica* 47.

58 Visser 1985 *Acta Juridica* 46-48.

59 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 96.

60 Kroeze *Between Conceptualism and Constitutionalism: Private-law and constitutional perspectives on property* 29; Freedman 2001 *SAJELP* 128; Van der Walt 2001 *SALJ* 64; Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* 84.

61 Mostert *et al The Principles of The Law of Property in South Africa* 90; Kroeze *Between Conceptualism and Constitutionalism: Private-law and constitutional perspectives on property* 240.

62 *Regal v African Superslate* (Pty) Ltd 1963 1 SA 102 (A) 106.

exercise of one's right where neighbouring immovables are concerned.[63] In *Chetty v Naidoo*[64] the court held that:

> It may be difficult to define *dominium* comprehensively ... but there can be little doubt ...that one of its incidents is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property whenever found, from whomsoever holding it. It is inherent in the nature of ownership that possession should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner.[65]

In *Gien v Gien*,[66] the court declared that although the law in South Africa recognises the fact that ownership can be restricted, its point of departure is still the so-called absoluteness of ownership:[67]

> The right of ownership is the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property, do with and on his property as he pleases. This apparently unfettered freedom is, however, a half-truth. The absolute power of an owner is limited by the restrictions imposed thereupon by the law.[68]

The nature of the concept of ownership as it was used and acknowledged in South African law during these times can be summarised as the most complete right legal subjects can have in relation to an object.[69] In addition, no one can have more rights in relation to a thing, than owners and if owners were dispossessed and the property was put in the hands of a third party, ownership is retained.[70]

Ownership as a legal concept, is often described with reference to the various entitlements of ownership and certain specific characteristics thereof which purport to

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63 *Regal v Afrivcan Superslate* 106.

64 *Chetty v Naidoo* 1974 3 SA 13 (A).

65 *Chetty v Naidoo* 20: In this case the court did not give a full definition of ownership but focused only on one of its entitlements namely the right of exclusive possession; Lewis 1985 *Acta Juridica* 241.

66 *Gien v Gien* 1979 2 SA 1113 (T); Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* 87.

67 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 97; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 92; Visser 1985 *Acta Juridica* 47; Lewis 1985 *Acta Juridica* 241; Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* 87: according to Dhliwayo the definition of ownership adopted in *Gien v Gien* is the most influential in South African common law.

68 *Gien v Gien* 1120.

69 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 93; Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* 87; Van der Walt 1990 *De Jure* 37 does not agree with this description of ownership and states that it is a: "...historically misinterpreted and morally unacceptable view of ownership..."

70 This is according to the principle *nemo plus iuris a alium transferre potest quam ipse haberet;* Mostert *et al The Principles of The Law of Property in South Africa* 91.

distinguish ownership from limited real rights. A list of entitlements usually associated with ownership includes the entitlement: to use the thing (*ius utendi*); to the fruits including the income to the thing (*ius fruendi*); to consume and destroy the thing (*ius abutendi*); to possess the thing (*ius possidendi*); to dispose of the thing (*ius disponendi*); to claim the thing from any unlawful possessor (*ius vindicandi*) and to resist any unlawful invasion (*ius negandi*).[71] It is impossible to compile an exhaustive list of entitlements as the specific type of property and the governing circumstances of each situation determine which entitlements exist at a particular point.[72]

Characteristics that are generally associated with ownership are firstly, that ownership is perceived as a mother right in the sense that it confers the most comprehensive control over a thing.[73] Owners can, however, dispose of some of their entitlements, such as the use and enjoyment by granting limited real rights to others.[74] Secondly, ownership has a residuary character, which means that no matter how many entitlements owners dispose of they retain a reversionary right to these entitlements.[75] In other words, once these entitlements are extinguished owners automatically become unencumbered again.[76]

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71 Van der Linden *Koopmans Handboek* 171; *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TPD 1314 para 1319; *Chetty v Naidoo* 1974 3 SA 13 (A) para 20B–C; *Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (C) para 617I; *MEC for Local Government and Finance, KwaZulu Natal v North Central and South Central Local Councils, Durban* 1999 All SA 5 (N) para 16fj as cited in Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 93.

72 Mostert *et al The Principles of The Law of Property in South Africa* 92.

73 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 93; Van der Walt 1988 *De Jure* 20; Sonnekus and Neels *Sakereg Vonnisbundel* 249.

74 Van der Merwe *Sakereg* 175; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 94; Lewis 1985 *Acta Juridica* 257 considers this as "the characteristic...that distinguishes [ownership] from all other rights which one may have in a thing."

75 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 94; Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* 93; Lewis 1985 *Acta Juridica* 257; Van der Walt 1999 *Koers* 268.

76 *MEC for Local Government and Finance, KwaZulu Natal v North Central and South Central Local Councils, Durban* 1999 All SA 5 (N) paras 18a–b; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 94; In *New patterns of landownership: the transformation of the concept of ownership as plena in re potestas* 76, Cowen explains the idea of elasticity of ownership as follows: "Ownership is like a rubber ball in that no matter how much it might be compressed, it automatically expands again and recovers or attracts back the various subtractions, or *iura in re aliena*, once these come to an end.".

Thirdly, ownership is unlimited in duration,[77] and finally, ownership is not dependent or derived from any other right.[78]

Although these methods do not serve to define ownership, they do indicate that ownership potentially confers the most comprehensive control over a thing.[79] While the absoluteness of ownership implies that it is in principle an unrestricted right (*plena in re potestas*), this right can only be exercised within the limitations of the law and is, therefore, not absolute.[80]

2.2 The role of the traditional concept of ownership under Apartheid

The vision of South African property law as a perfectly just and equitable system was in reality affected significantly by Apartheid legislation with regard to property.[81] For the largest part of the twentieth century race played a substantial role in determining individuals' rights to acquire and dispose of property.[82] Accordingly the content of ownership and the ability to exercise it was affected by the race based policies of the time.[83]

Apartheid, as it was intended by HF Verwoerd,[84] stipulated a complete separation of race in cultural, economic, political, residential and territorial areas.[85] During this era, two distinct ownership concepts existed namely common law ownership and customary law ownership[86] – these two concepts occurred with an added racial dimension. Common law ownership was based on the strength and security of ownership and registrable limited

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77 Van der Merwe *Sakereg* 175; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 94; Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* 95.

78 Van der Merwe *Sakereg* 176 describes this as the distinguishing element of ownership; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 94.

79 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 93.

80 Mostert *et al The Principles of The Law of Property in South Africa* 90; Van der Walt 1990 *De Jure* 37.

81 Van der Walt 1990 *De Jure* 2.

82 Lewis 1985 *Acta Juridica* 261.

83 Van der Walt 1999 *Koers* 264.

84 HF Verwoerd was Prime Minister of South Africa in 1954.

85 Hamilton 1988 *NBLJ* 161.

86 Van der Walt 1990 *De Jure* 6,7: "customary tenure comprises a variety of land use rights which differ from Common Law land rights, mainly because the legal nature and content of customary land rights must be appreciated within the context of the traditional extended family relationship...According to Customary Law land is either not owned at all, or owned by a tribe or smaller social unit as a whole, while individuals obtain protected rights of occupancy, use and exploitation to certain parts of such land, within the social structure of the group in question."

real rights, whereas customary law ownership represented the insecurity of weaker use-rights that were not registrable.[87] In most cases use rights were not acknowledged as rights, but rather as entitlements based on permits. The deeds registration system in South Africa strengthened the common law notion of ownership as an absolute right – in terms of this system only real rights (ownership) and limited real rights can be registered in the deeds registry.[88] In this context, common law ownership was mainly reserved for white persons with lesser rights reserved for black persons.[89] It is in this regard that Van der Walt points out that although the primary reasons for the racially skewed pattern of landholding in South Africa were a number of political choices and the inequitable division of available land related to these choices, the hierarchical property system that put ownership at the top of a pyramid of rights also supported and even intensified a deficiency with regard to land rights of black people.[90]

The inequitable division of landholding was regulated by a vast body of statutory law concerning the extent and regulation of property law in South Africa.[91] Accordingly Hamilton acknowledges that the notion of apartheid would have been no more than a national attitude of racial preferences, that could have been eliminated or at least mitigated through the judiciary where it not for the fact that the South African government legitimised this policy through Acts of parliament.[92] The relationship of the judiciary to the legislature during this period provides a better understanding of the mechanism of Apartheid, as the courts of South Africa played an essential role in the development of the system based on unequal treatment. This can be seen in *Madrassa*

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87 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 385.

88 Pienaar "The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas" 109.

89 Pienaar *Land Reform* 6; Pienaar 2014 *TSAR* 441; the (im)possibility to acquire and exercise land use rights was ultimately determined by the (im)possibility of owning land in certain areas.

90 Van der Walt 1999 *Koers* 262; Van der Walt 1990 *De Jure* 35.

91 The specific legislation which sustained the Apartheid ideology during the largest part of the twentieth century are: the *Population Registration Act* 30 of 1950; the *Black (Abolition of Passes and Co-ordination of Documents) Act* 67 of 1952; the *Black Land Act* 27 of 1913; the *Development Trust and Land Act* 19 of 1936; the *Black (Urban Areas) Consolidation Act* 25 of 1945; the *Black Authorities Act* 68 of 1951; the *Promotion of Black Self-Government Act* 46 of 1959; the *National States Citizenship Act* 26 of 1970; the *National States Constitution Act* 21 of 1971; the *Black Administration Act* 38 of 1927; the *Republic of South Africa Constitution Act* 110 of 1983; and the *Group Areas Act* 36 of 1966.

92 Hamilton 1988 *NBLJ* 160.

Anjuman Islamia v Johannesburg Municipality[93] where the court explained the policy of successive governments in the twentieth century:

> The reason for these restrictive or prohibitive provisions in regard to Asiatics, natives and coloured persons is to be sought in what has always been the clear and established policy of the Transvaal state prior to its annexation and subsequently. It is on the ground of the public health that Asiatics, native and coloured persons had special wards or locations within which to live assigned to them, and were not permitted to dwell among the European population of a town or village, except as servants of some white person.[94]

In *Minister of the Interior v Lockhat*[95] the court recognised and confirmed that the *Group Areas Act* resulted in discrimination when it held that the Act "represents a colossal social experiment" that would inevitably "cause disruption and...substantial inequalities".[96]

The racial discrimination embodied in the ideology of Apartheid consequently changed certain common law principles with regard to land law such as equal treatment regarding individuals' property rights.[97] In addition to changing common law principles, Apartheid legislation also replaced it to such extent that the common law could not develop naturally in South Africa for the most part of the twentieth century.[98] According to Lewis landownership during this period was so restricted by legislation serving social economic and political goals that it could no longer accurately be described as an absolute and unrestricted right.[99] Van der Walt points out that these laws established:

> ...the property law context within which the government policy of racial segregation function(ed). In this way the social function of the law of property...has been politicised fundamentally.[100]

It can therefore be said that Apartheid land law had a significant impact on the exercise of private property rights in South Africa.[101] During this time property rights were based on a hierarchical system that consisted of ownership as the strongest right, followed by

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93 1917 AD 718.

94 *Anjuman Islamia v Johannesburg Municipality* 729-30.

95 1961 2 SA 587 (A).

96 *Minister of the Interior v Lockhat* para 602.

97 Lewis 1985 *Acta Juridica* 261; Hamilton 1988 *NBLJ* 155; Van der Walt 1990 *De Jure* 36: "In fact the common-law principles of justice and equality have obviously been forced into retirement as far as their application with regard to *apartheid* legislation is concerned."

98 Van der Walt 1990 *De Jure* 36.

99 Lewis 1985 *Acta Juridica* 241; Pienaar supports this idea in "The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas" 109 where he states that the civil-law concept of ownership was distorted by apartheid laws and policies

100 Van der Walt 1990 *De Jure* 29.

101 Van der Walt 2015 *ASSAL*.

limited real rights such as servitudes and real security rights, after which came personal rights such as rights deriving from a contract and finally statutory use rights or permits with little or no security.[102] This very notion of common law ownership as the pinnacle right and the limitation of customary law ownership to use rights and permits, enforced and upheld the system of Apartheid land laws.

The end of Apartheid and the introduction of a new constitutional dispensation early in the nineties necessitated large scale political and social changes, including reforms of land use policy and of property law in general.[103] The next part of the study focuses on the changed character of property rights under the constitutional dispensation.

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102 Van der Walt 1999 *Koers*.

103 Van der Walt *Property and Constitution* 3.

3. Property in a constitutional dispensation

3.1 Introduction

Against the background provided above, it becomes clear that the traditional South African private-law property concept did not remain unaffected by apartheid legislation. With the commencement of a new democratic era, the changing social and political context in which property rights had to function called for a change in the social function of ownership and the creation of a new concept of property rights.[104] The question that arises is to what extent property law in South Africa has been affected by the introduction of new constitutional measures.

Prior to the introduction of the new Constitution the *ANC* and its main opposition parties, the National Party and the Democratic Party, negotiated certain constitutional matters, of which the future of property rights in South Africa was one of the main concerns.[105] On the one hand, the *ANC* wanted to ensure that the property guarantee in the final Constitution were phrased in such a manner that processes of land reform were not delayed, while on the other hand, the opposition strived for the widest possible protection of existing property rights.[106] Accordingly, the success of these negotiations depended on a continual search for balance between the often directly conflicting demands of the main parties.[107] According to FW de Klerk, who was head of the National Party during these negotiations, the balance that had to be found was:

> Between those who had much to lose and those who had much to gain; between the need for national unity and the need to preserve our rich and varied cultural and linguistic

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[104] Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 272.

[105] For a discussion on the negotiations over the protection of property rights under the *Interim Constitution* see Chaskalson 1995 *SAJHR*, Chaskalson 1994 *SAJHR*, Chaskalson and Lewis "Property" and Van der Walt *Constitutional Property Law* 31-34; Currie and De Waal *The Bill of Rights Handbook* 532; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 522; Mostert and Badenhorst "Property and the Bill of Rights" para 3FB1; Lewis 1992 *SAJHR*.

[106] Van der Walt *Property and Constitution* 3; Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 241; Mostert and Badenhorst "Property and the Bill of Rights" para 3FB1; Chaskalson and Lewis "Property" 2; Pienaar *Land Reform* 132: These negotiations continued for the period between 1990-1994. During this time the *White Paper of Land Reform* was published which repealed the foundational legislative measures of apartheid namely the *Black Land Act* and the *Development Trust and Land Act* as well as the other racially based land measures. With the *White Paper on Land Reform* a new – non-racial – approach to land were introduced.

[107] De Klerk "The evolution of property rights since 1994" 4; Van der Walt *Property and Constitution* 4.

heritage; between the concerns of minorities, and the demands of the majority; and between the need for stability and the need for change.[108]

Section 28 of the Interim Constitution was introduced as a political compromise between the different viewpoints of the parties. A compromise in terms of which the right to property was included but the extent of the protection of existing property rights was restricted.[109] The final Constitution made an attempt to reach a similar balancing goal with the new property clause (Section 25). This time, the right to property was presented in the form of a negative guarantee – nobody may be deprived of property unless certain requirements are fulfilled.[110] The property clause further aims to bring about transformation of existing patterns of private land ownership by including a commitment to the objectives of access to land, the provision of legally secure land tenure and land restitution.[111] Accordingly, the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another, First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (hereafter the *FNB Case*) held that:

(t)he purpose of section 25 has to be seen both as protecting existing property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.[112]

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108 De Klerk "The evolution of property rights since 1994" 4; Van der Walt *Property and Constitution* 4 describes this search for balance as: "a tussle between the forces of stability and change; legal certainty and transformation; vested rights and redress; common law and legislation; the old and the new legal order; the courts and the legislature; or existing law and the Constitution."

109 Currie and De Waal *The Bill of Rights Handbook* 531; Chaskalson and Lewis "Property" 3; Pienaar *Land Reform* 168-169; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 522, 592: The drafting of section 28 was mainly aimed at achieving a dual purpose, namely to protect existing property rights and simultaneously to correct historical imbalances. For that reason sections 121 to 123 of the *Interim Constitution*, which embody the prerogative for land reform, should be read with section 28 although they were placed outside the Bill of Rights.

110 Section 25(1) and (2) of the *Constitution*; Currie and De Waal *The Bill of Rights Handbook* 532; Chaskalson and Lewis "Property" 3; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 97, 591; Witbooi 2001 *SAJELP* 219.

111 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 521; s 25(5) – (9) of the *Constitution* (land reform provisions) give emphasis to the fact that the protection of property as an individual right is not absolute but subject to societal considerations; With regard to the reform centered approach in s 25, Van der Walt states the following in *Property and Constitution*: "[p]ost-apartheid property law is required to help bring about reforms that would eradicate that [inequitable] legacy as far as possible. Property law is therefore deeply involved in the constitutional project of reversing the effects and the legacy of apartheid as a broad socio-economic and political state of affairs."

112 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another, First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 50; see also *Haffejee NO v Ethekwini Municipality* 2011 12 BCLR 1225 (CC) para 31.

In order to provide an accurate explanation of the nature and extent of property rights under the Constitution, it is necessary to take a closer look at the property clause and its two contrasting objectives.

3.2 The dual aim of the property clause

In the context of this discussion with the focus on the content and scope of property within a constitutional dispensation, Section 25 is pivotal.[113] Having regard for the general approach taken in Section 25, the actual structure thereof is important. Essentially two broad, seemingly contrasting, parts emerge: the first group of provisions which include subsections (1), (2) and (3), protect existing property rights and interests while providing for state interference;[114] and the second part consisting of subsections (4) to (9) provide authority for state action to promote land reform and other related reforms.

Before taking a more in-depth look at the implications of having the land reform provisions grounded in the Constitution, the general approach to interpreting the provisions are set out first. Section 25 of the Constitution determines:

> (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;

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[113] According to Van der Walt *Constitutional Property Law* 12 ,the South African property clause is more comprehensive and complex than most similar constitutional provisions; Pienaar in *Land Reform* 174-175, states that in light of the historical manipulation of all matters linked to land and property in general and the exposition of the kinds of rights that prevailed pre-1991, the dual approach of the property clause is understandable but contributes greatly to the substantive complexity of s 25.

[114] Van der Walt describes the protection offered by s 25 as follows: "[T]he purpose of the property clause is to ensure that a just and equitable balance is struck between the interests of private property holders and the public interest in the control and regulation of 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 restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6).

With regard to interpreting the property clause and its role and function within contemporary South Africa it was recently stated by Chief Justice Mogoeng Mogoeng in *Agri South Africa v Minister for Minerals and Energy and Others* (hereafter the Agri Case)[115] that:

> The approach to be adopted in interpreting section 25, with particular reference to expropriation, is to have regard to the special role that this section has to play in facilitating the fulfilment of our country's nation-building and reconciliation responsibilities, by recognising the need to open up economic opportunities to all South Africans. This section thus sits at the heart of an inevitable tension between the interests of the wealthy and the previously disadvantaged. And that tension is likely to occupy South Africa for many years to come, in the process of undertaking the difficult task of seeking to achieve the equitable distribution of land and wealth to all.[116]

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115 2013 4 SA 1 (CC).

116 *Agri Case* para 60.

And further:

> This brings to the fore the obligation imposed by section 25 not to over-emphasise private property rights at the expense of the state's social responsibilities. It must always be remembered that our history does not permit a near-absolute status to be given to individual property rights to the detriment of the equally important duty of the state to ensure that all South Africans partake of the benefits flowing from our mineral and petroleum resources.[117]

According to this judgment, it is clear that when interpreting Section 25, it should be viewed against the background of the broad context of the South African history.[118] The property clause should also be interpreted within the narrower context provided by other provisions of the Constitution and the Bill of Rights, in particular socio-economic rights.[119] In the preamble it is indicated that in part the purpose of the Constitution is to:

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights

In line with the preamble, Section 39 of the Constitution (the interpretation clause) stipulates that all fundamental rights have to be interpreted in such a way as to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[120] All rights contained in the Bill of Rights, including Section 25, should be interpreted in terms of Section 39.[121]

To give effect to the dual nature and function of the property clause, it has to be interpreted in a way in which both the protective and transformative aspects of the clause are acknowledged and optimised.[122] Accordingly the courts follow a "purposive" interpretation approach of the Constitution.[123] The aim of this approach is to give effect

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117 *Agri Case* para 62.

118 This can also be seen in the following case law: *Agri South Africa v Minister for Minerals and Energy* 2013 ZACC 9 para 70; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 (Pty) Ltd 2012 2 SA 104 (CC) para 35; *Haffejee v eThekwini Municipality* 2011 6 SA 134 (CC) para 30; *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 33; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 15.

119 Socio-economic rights include: s 26 -the right of access to housing, and s 27 –the right of access to health care, social security, food and water.

120 Section 39(1)(a) of the *Constitution*; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 525; Pienaar *Land Reform* 180.

121 Currie and De Waal *Bill of Rights Handbook* 159-161; Pienaar *Land Reform* 180, 524; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 525.

122 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 525.

123 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 525.

to the underlying policy, object or purpose of a law when it is interpreted.[124] The courts will take guidance from fundamental constitutional values, other constitutional rights, comparative and international law and the relevant historical and social background in order to give effect to the fundamental right to property.[125]

3.2.1 The meaning of property

Section 25 does provide a definite meaning for the term "property" and states only that the latter is not limited to land.[126] Accordingly, the Constitutional Court has confirmed that there is "no comprehensive definition of constitutional property in South Africa" and that it would be "practically impossible" and "judicially unwise" to try to define this term.[127]

Although the description used for "property" does not provide a clear indication as to what types of property are subject to constitutional protection, various judgments have extended the meaning as to include corporeal movables,[128] incorporeal property[129] and personal rights, such as shares, unit trusts, private pension benefits and life insurance policies.[130] Furthermore, rights to land not amounting to ownership have also been

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124 Du Plessis *Re-Interpretation of Statutes* at 96–97, 118–119.

125 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 531; In *Victoria and Alfred Waterfront (Pty) Ltd v Police Commissioner of the Western Cape* 2004 5 BCLR 538 (C) paras 541, 543 the content of the right to ownership of immovable property was considered against the rights to life and freedom of movement. In the decision, the peculiar nature of the land, the history of denial of access to land in South Africa, the racial distribution of poverty in South Africa, and the constitutional commitment to a society based on the recognition of human rights were considered.

126 Section 25(4)(b) of the *Constitution*; Van der Walt *Constitutional Property Law* 15; Pienaar *Land Reform* 181; Mostert and Badenhorst "Property and the Bill of Rights" 3FB6.

127 *FNB case* para 51.

128 In the *FNB Case* para 51, the Constitutional Court held that ownership of a corporeal movable was a right clearly "at the heart of the constitutional concept of property both with regards to the nature of the right as well as the object of the right". This approach was later followed in *Zondi v MEC for Traditional and Local Government Affairs* 2004 5 BCLR 547 (N) paras 556D–E; 2005 3 SA 25 (N) para 34E where it was held that livestock as corporeal movables qualify as property for purposes of s 25 of the *Constitution*.

129 *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 1 SA 144 (CC); *Phumelela Gaming and Leisure Ltd v Gründlingh* 2007 6 SA 350 (CC) paras 36-42. In these cases the Constitutional Court accepted that intellectual property – trademarks in the first case, and goodwill in the second case – is protected by s 25; *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 61; *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC) para 83. In these two cases the court held that both ownership of corporeal or incorporeal property enjoys protection under s 25.

130 *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC) paras 81, 84; *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) paras 63-64. In both these cases the court included the personal rights within the term property.

regarded as property for purposes contained in Section 25. In *Nkosi v Bührmann* the Supreme Court of Appeal indicated that use rights with regard to immovable property qualify for protection even if such rights did not emanate from a contract or legislation, and are accordingly "unprotected" in terms of private law. In this case, the court dealt with the enforcement of customary burial rights upon a farmer's land.[131] In a more recent case, *Shoprite Checkers (Pty) Limited v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape*[132] it was held that grocer's wine licences allowing wine to be sold in grocery stores constitute property under section 25 of the Constitution. In the main judgment of the case, Judge Froneman stated that our conception of property must embrace constitutional entitlements beyond the original ambit of private common law in order to ensure that the property clause does not become an obstacle to transformation, but central to its achievement.

With regard to this matter De Waal et al[133] states that a right can only constitute property, if it is a vested right:

> '[P]roperty' for purposes of s 25 should therefore be seen as those resources that are generally taken to constitute a person's wealth, and that are recognised and protected by law. [A]n important qualification of the expansive interpretation of property that has been advocated here is that for a right to constitute property it must be a vested right.[134]

3.2.2 Deprivation and expropriation

In terms of Section 25, a distinction is made between "deprivation" and "expropriation".[135] In the *FNB Case* it was held that any interference with the use enjoyment or exploitation of private property is a deprivation of that property[136] while expropriation is interpreted as a more specific type of deprivation.[137]

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131 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 13.

132 2015 (6) SA 125 (CC). The matter in dispute in this case was the constitutional validity of certain provisions of the *Eastern Cape Liquor Act* relating to the abolition of these licences and whether it amounted to arbitraty deprivation of property.

133 De Waal, Currie and Erasmus *The Bill of Rights Handbook*.

134 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 385.

135 Chaskalson and Lewis "Property" 14.

136 *FNB case* para 57.

137 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 48; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another: First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 57; In *Harksen v Lane* 1998 1 SA 300 (CC); 1997 11 BCLR 1489 (CC) the court held that expropriation involves an "acquisition of rights in property" as opposed to the "deprivation of rights in property which fall, short of compulsory

The deprivation[138] provision contained in Section 25(1) has a twofold function. Firstly, it confirms that the property clause does not render property absolute and secondly, it ensures that necessary and legitimate regulatory limitations are not imposed on property rights arbitrarily.[139] This provision, therefore, confirms that property can be limited legitimately through regulatory deprivations and lays down the requirements for such limitations on property to be valid.[140] Furthermore, the provision also guides land reform measures and enables a balance between the protection of individual rights on the one hand, and the promotion and protection of social or public responsibility, on the other.[141]

Section 25(2) lays down the general provisions for the validity of expropriation.[142] It does not remove the power of the state to expropriate property but subjects it to two limitations. Firstly, an expropriation can only be carried out for a public purpose or in the public interest.[143] Although the meaning of "public interest" is generally accepted to include an expropriation by the state for the purpose of carrying out its administrative obligations, such as building a road, a bridge or a hospital,[144] defining "public interest" is not so simple. In the case where expropriation is not intended to benefit private individuals but the public at large, but effectively results in the benefit of particular individuals – such as an expropriation for purposes of redistribution as part of a land reform programme – it is in the public interest.[145] Furthermore, subsection 25(4) stipulates that the term "public interest" should be interpreted as to include "the nation's

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acquisition". For a comparison of the two interpretation theories of the *FNB case* and the *Harksen v Lane case* see Van der Walt 2004 *SALJ*; in *Du Toit v Minister of Transport* 2005 11 BCLR 1053 (CC) the court held that expropriation is a special subset of deprivation.

138 In *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty)* Ltd 2011 2 BCLR 189 (CC) the court affirmed the concept of "deprivation" as developed in *Mkontwana v Mandela Metro Municipality: Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing in the Province of Gauteng* 2005 2 BCLR 150 (CC), namely "at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."

139 Pienaar *Land Reform* 176; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 525-526.

140 Pienaar *Land Reform* 176.

141 Pienaar *Land Reform* 177.

142 Pienaar *Land Reform* 177.

143 Section 25(2)(a) of the *Constitution*; Currie and De Waal *Bill of Rights Handbook* 551.

144 *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP); *Bartsch Consult (Pty) Limited v Mayoral Committee of the Maluti-A-Phofung Municipality* 2010 ZAFSHC 11 (4 February 2010).

145 Currie and De Waal *Bill of Rights Handbook* 551; Chaskalson and Lewis "Property" 20.

commitment to land reform" and "reforms to bring about equitable access to all South Africa's natural resources". In the *Agri Case,* Chief Justice Mogoeng Mogoeng stated that:

> Section 25(4)(a) enjoins the courts to bear in mind, as they interpret section 25, that the public interest referred to in section 25(2) includes the nation's commitment to land reform and reforms to bring about equitable access to all our natural resources. We must therefore interpret section 25 with due regard to the gross inequality in relation to wealth and land distribution in the country...[146]

Secondly, an expropriation is subject to payment of compensation for the property that is taken. Such compensation should be just and equitable in its amount, timing should be addressed as well as the manner of payment.[147] It also should reflect a just and equitable balance between public interest and the interests of affected parties. Section 25(3) sets out the factors that need to be considered in order to strike this balance and the "market value" is only one of the factors that should be considered. Consequently, compensation worth less than market value can in some circumstances be just and equitable and, therefore, constitutional.[148] In the *Highland Case*, however, *the* Land Claims Court pointed out that apart from the factor in section 25(3)(d) which deals with the extent of state investment and subsidy, market value is the only one of these factors which is objectively quantifiable and is, therefore, pivotal in determining compensation:

> The equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require.[149]

In contrast to this decision the court in *Msiza v Director-General, Department of Rural Development and Land Reform,*[150] held that the market value was not the basis for the determination of compensation under section 25 of the Constitution where property or land had been acquired by the state in a compulsory fashion. In the named case a portion of a farm was awarded to one of the farm workers by the Land Claims Court and the

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146 *Agri case* para 61.

147 This formula was considered in *Former Highland Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) (hereafter the *Highland case*) where it was held that a claimant is not entitled to restitution in terms of the *Restitution of Land Rights Act*, if they received just and equitable compensation as contemplated in s 25(3) of the *Constitution* for their property.

148 Chaskalson and Lewis "Property" 23.

149 The *Highland Case* para 35.

150 2016 (5) SA 513 (LCC).

amount of just and equitable compensation to be paid for that portion was in dispute.[151] Although market value was one of the considerations to be borne in mind when determining compensation,[152] the focus was on justice and equity. In determining what was just and equitable a balance had to be struck between the interests of the private landowner and the public interest.[153] Accordingly, compensation which is below the market value could be compliant with the Constitution, if it qualified as just and equitable.

3.2.3 The land reform provisions

Section 25(5) to 25(9) deals with land reform and with other reform measures in general.[154] Section 25(5), (6) and (7) contains the constitutional basis for the three sub-programmes of the overall land reform programme.[155] Section 25(5) places a general duty on the state to take reasonable legislative and other measures within its available resources to foster conditions which promote equitable access to land for citizens.[156] In essence, this provision embodies the redistribution programme. In *Government of the Republic of South Africa v Grootboom* (hereafter the *Grootboom Case*)[157] the Constitutional Court held that the phrase "reasonable legislative and other measures" entailed the following:

> The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.[158]

Section 25(7) grants a right to restitution "to the extent provided by an Act of Parliament" of property to persons and communities dispossessed of property as a result of

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151 Section 23(1) of the *Land Reform (Labour Tenants) Act* 3 of 1996 states that an owner of affected land "shall be entitled to just and equitable compensation as prescribed by the Constitution".

152 *Msiza v Director-General, Department of Rural Development and Land Reform* paras 39 – 47.

153 *Msiza v Director-General, Department of Rural Development and Land Reform* para 65.

154 Pienaar *Land Reform* 182; Currie and De Waal *Bill of Rights Handbook* 563-565; Pienaar 2014 *TSAR* 433.

155 The three sub-programmes are redistribution, restitution and tenure reform. These sub-programmes are discussed in more detail later in this section.

156 *Agri case* para 63; Pienaar *Land Reform* 183.

157 2001 1 SA 46.

158 *Grootboom Case* para 42.

discriminatory laws and practices[159] after 1913.[160] Accordingly, the restitution programme is embodied through this provision.[161] Section 25(6) places a duty on the state to draft legislation in order to ensure the security of land tenure of persons and communities, which was legally insecure as a result of past racially discriminatory laws or practices. This subsection embodies the tenure reform programme which is discussed in more detail below.[162] Section 25(6) read with Section 25(9) imposes an obligation on the state to enact legislation in relation to land redistribution and land reform. Other legislative provisions regulate the redistribution of property other than land (resources), such as the *MPRDA* that was enacted to give effect to these transformational goals. The provisions of the *MPRDA* have a material impact on individual land ownership, community ownership and the empowerment of previously disadvantaged individuals to gain access to mineral resources.[163] These provisions are discussed in the following section.

Section 25(8) ensures that the constitutional protection of property may not impede the state's ability to effect land, water and related reform in order to achieve socio-economic equity. Nevertheless, this does not mean that where land and resource law reform entails the expropriation of property, ordinary constitutional obligations to pay compensation for such an expropriation do not apply.[164] According to this section, any departure from Section 25 should be in accordance with the requirements of Section 36(1).[165]

3.2.4 Limitations of property rights

Like all the other rights guaranteed in the Bill of Rights, the right of individuals to the constitutional protection of their property is not absolute.[166] Instead the nature, scope

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[159] Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 405: the term "practices" is much wider than "laws" and therefore section 25(7) does not require the law i.t.o which people were dispossessed to be racially discriminatory, but simply that the actions of the state be discriminatory.

[160] Pienaar *Land Reform* 184.

[161] Legislation which has been enacted to give effect to the restitution sub-programme is the *RLRA*.

[162] Examples of legislation which have been enacted to give effect to this provision are the *LRA* and the *Communal Land Rights Act* 11 of 2004. The latter was, however, declared unconstitutional by the Constitutional Court in *Tongoane v National Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC).

[163] *Agri Case* 9 paras1-3, 61, 65 and 70.

[164] Currie and De Waal *Bill of Rights Handbook*.

[165] Currie and De Waal argues that s 25(8) is redundant, neither adding to nor subtracting from the substance of the property right.

[166] Pienaar *Land Reform* 185; Currie and De Waal *Bill of Rights Handbook* 163-168, 531-565.

and extent of property rights are directly influenced by societal needs, and can be limited to achieve important public goals.[167] One such important consideration is the nation's commitment to land reform.[168]

Section 7(3) of the Constitution determines that all rights, including property rights, contained in the Bill of Rights are subject to the limitations contained or referred to in Section 36 of the Constitution. Section 36 aims to find an equitable balance between individuals and public interest and provides that the rights in the Bill of Rights may only be limited in accordance with the provisions set out in that section.[169] Furthermore= the property clause itself also contains a specific limitation provision, which implicates how Section 36 is employed with regard to property and property-related matters.[170] In the *FNB Case*, the court set out the steps that should be taken when adjudicating any challenge based on the property clause:[171] Firstly, it should be determined whether the interest, which has been affected by the operation of a particular law, qualifies as property under Section 25. If so, it should be determined whether a deprivation of that property interest has occurred. If it has, the next question is whether the deprivation is in conflict with Section 25(1), in particular the requirement of non-arbitrariness. If this much is established, it must be determined whether the deprivation is justifiable in terms of the general limitations clause of the Constitution. Thereafter it must be determined whether the deprivation amounts to an expropriation in terms of Section 25(2), and if so, whether it complies with the requirements of both Sections 25(2)(a) and (b). If the deprivation

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167 *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC).

168 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 82.

169 Section 36 reads: "(1) The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the same purpose.
(2) Except as provided in subsection (1) or in any other provision of the *Constitution*, no law may limit any right entrenched in the *Bill of Rights*."

170 Pienaar *Land Reform* 186.

171 Van der Walt 2004 *SALJ* 868.

does amount to expropriation, the final question is whether the expropriation is justifiable under Section 36.[172]

3.2.5 Conclusion

Section 25 plays a significant role in property law in South Africa, as this particular clause bears the onus of regulating the extent to which property rights should be protected and legislative measures that should be developed in order to rectify the injustices of the past. Accordingly the structure of Section 25 emphasises that reform and transformation of land and resources, are integral components of the present property regime in South Africa. Thus, one cannot put too much emphasis on property rights at the expense of the social responsibility of the state, which include the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's resources.[173] The constitutional authority for land reform requires courts to take cognisance of the social and political context within which property rights function, when cases relating to land and resource reform are adjudicated. Courts have to judge the limitation of property rights with regard to land reform, within a framework created by subsections 25(5) to 25(7) that sets out the specific forms of land reform, and the underlying principles of the Constitution.[174] Thus Section 25 cannot be interpreted as an absolute guarantee of existing individual rights.

With regard to the effect that the reform-centred approach within the Constitution and Section 25 in particular, has on property law, Van der Walt states the following:

> Post-apartheid property law is required to help bring about reforms that would eradicate that [inequitable] legacy as far as possible. Property law is therefore deeply involved in

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172 *FNB case* para 46; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 530.

173 Section 25(4) of the *Constitution*; This viewpoint was emphasized in the *Agri case* paras 60-65; Some scholars are of the opinion that land reform and the constitutional protection of property are in conflict with each other and argue that it is impossible to achieve both the goals of reform and protection simultaneously. See Carey-Miller and Pope *Land Title in South Africa* 303 and Ntzebeza "Land redistribution in South Africa: The property clause revisited" 129, in this regard. In *The interaction between property rights and land reform in the new Constitutional order in South Africa*, Erasmus states his opinion that the social role and function of property is not in conflict with the protection of existing property rights, but rather with the abstract, scientific approach to property i.t.o which ownership is an absolute, unrestricted right.

174 Cheadle and Davis *South African Constitutional Law: The Bill of Rights.*

the constitutional project of reversing the effects and the legacy of apartheid as a broad socio-economic and political state of affairs.[175]

3.3 Moving towards the fulfilment of the land reform objective

The fact that the land reform programme is secured in the Constitution places various responsibilities on the government regarding the necessary steps it has to take to achieve land reform.[176] Not only is the basic responsibility of the government to implement the land reform programme grounded in the Constitution, but the broad parameters of the various programmes are set out as well.[177] This means that adjustments and changes to land reform cannot take place outside of these parameters. According to Pienaar,[178] the property clause provides to a certain extent the "framework blueprint" for property and land reform.[179]

The South African government approached land reform in two separate phases: firstly, an initial or exploratory land reform programme that was not guided by a Bill of Rights[180] was followed and, secondly, an in-depth comprehensive land reform programme with a strong constitutional basis.[181] The latter has up to date still not been concluded.[182] The land reform programme[183] consists of three separate but interconnected sub-

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175 Van der Walt *Property and Constitution* 12.

176 Pienaar 2015 *Scriptura* 11; Pienaar 2014 *TSAR* 427,430; Pienaar 2011 *PER* 195.

177 Pienaar 2015 *Scriptura* 11.

178 Pienaar 2015 *Scriptura* 11.

179 Pienaar 2015 *Scriptura* 11.

180 Pienaar 2014 *TSAR* 438-439; The exploratory reform process was embarked upon by way of publication of the *White Paper on Land Reform* B-91 and corresponding legislation in 1991 which included the *Abolition of Racially Based Land Measures Bill* 92 of 1991, the *Upgrading of Land Tenure Rights Bill* 109 of 1991, the *Residential Environment Bill* 93 of 1991, the *Less Formal Township Establishment Bill* 94 of 1991 and the *Rural Development Bill* 126 of 1991. This phase of land reform was critical as it removed the racial crux from all land-related measures and prohibited further discrimination on the basis of colour, race, age and religion. Although it was grounded in a solid policy foundation, it was not complete and not in-depth enough. Consequently the shortcomings of the first phase of land reform demanded and resulted in a second, more comprehensive phase.

181 The commencement of this phase, although it can be identified clearly as a whole, did not occur overnight but gradually, first on the basis of the *Interim Constitution* and thereafter embedded in the final *Constitution* (discussed above). The second phase of land reform in South Africa is still ongoing and adapt when and where necessary.

182 Pienaar 2014 *TSAR* 438; Pienaar 2015 *Scriptura* 6: "When land reform was first embarked on in the pre-constitutional phase on an exploratory basis, no Bill of Rights or property clause guided or undergirded reform. Following the new constitutional dispensation, property law reform was guided by an interim property clause that did not provide for land reform specifically. In contrast, the present Constitution now provides for land reform in particular, coupled with the imperative to reform other natural resources as well."

183 Bosman 2007 "Land reform: a contextual analysis" 5; Pienaar 2014 *TSAR* 426 defines the land reform programme in South Africa as: "...the initiatives, embodied in legislative, policy and other measures,

programmes, namely restitution, redistribution and tenure reform.[184] It is necessary to give a brief analysis of each of these sub-programmes as a substantial part of the legislation pertaining to land reform – which is discussed in more detail later in the study – has been developed in order to give effect to the objectives of these sub-programmes.

3.3.1 Restitution

The restitution process is aimed at returning specific portions of land or to provide compensation to people who lost land rights in terms of racially discriminatory laws and practices during the apartheid era.[185] This sub-programme supports a rights-based approach by giving effect to Section 25(7) of the Constitution which provides persons and communities who lost their land and rights in land with a constitutional right to lodge claims.[186] Legally all restitution claims are against the state and not against past or current land owners.[187] Therefore the state provides the outline and framework within which restitution operates. The restitution process has a limited duration.[188]

The *RLRA* forms the legal basis for the restitution process by providing for priority treatments for those who lost their land after 1913 as a result of racially discriminatory legislation, and who were not fairly compensated.[189] Furthermore the Act makes provision

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constituting actions and providing for mechanisms aimed at broadening access to land and effecting redistribution, improving security of tenure and restoring land or rights in land or providing equitable redress."

184 The *White Paper on South African Land Policy* of 1997 provides for these three mechanisms for land reform.

185 Dlamini *A case study of a land reform project in Kwazulu-Natal with reference to the Nkaseni restitution land claim* 36.

186 Pienaar 2011 *PER* 194.

187 Pienaar 2011 *PER* 38; where private land is needed for restitution purposes, the land will be purchased or expropriated, against just and equitable compensation.

188 Pienaar 2014 *TSAR* 441; s 2(3) of the *RLRA* provides that restitution claims are not possible for dispossessions that took place before 19 June 1913, which is the promulgation date of the *Black Land Act* of 1913. The *White Paper on Land Policy* sets out the intended time schedules for the restitution programme – i.t.o the policy paper all land claims had to be lodged between 1 May 1995 and 31 December 1998. The publication of the *Restitution of Land Rights Amendment Act* announced a re-opening of the land claims process and extended the cut-off date to 31 December 2018. This Act was, however, declared unconstitutional in July 2016.

189 Preamble of the *RLRA* as amended by the *Land Restitution and Reform Laws Amendment Act* 63 of 1997. The preamble now reads: "Whereas the Constitution...provides for restitution of property or equitable redress to a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices; And whereas legislative measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken to promote the achievement of equality"; Pienaar 2011 *PER* 37; Dlamini *A case study of a land reform project in Kwazulu-Natal with reference to the Nkaseni restitution land claim* 36.

for the establishment of a *Land Claims Court* to adjudicate on land disputes, and the *Land Claims Commission.*[190] There are three broad categories of relief for claimants namely the restoration of the land under claim, granting of alternative land or financial compensation or any other form of equitable redress.[191] Thus the restitution of rights in land does not necessarily mean that the claimant will be granted full ownership of the land in question.[192] Although the claimant's position prior to the dispossession may be restored, the court's power to restore a right in land or to grant a right in alternative state-owned land includes the power to adjust the nature of the right previously held by the claimant.[193] Accordingly the court can determine the form of the title under which the right may be held in future.[194]

The restitution sub-programme is also connected to other goals such as alleviating poverty and promoting development and nation building.[195] Pienaar states that restitution can even result in certain "unintended consequences" such as transforming notions of property and ownership, and may ultimately pose some threats to the prevailing dominant property regimes.[196]

3.3.2 Redistribution

In line with section 25(5) of the Constitution the government is constitutionally bound to take the necessary steps in order to broaden access to land on an equitable basis, so that ultimately the skewed pattern of land ownership is altered.[197] This programme is relevant in both urban and rural contexts in that access to land has to be addressed holistically.[198] The White Paper on Land Reform formulated the main goal of this programme as to

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190 Bosman 2007 "Land reform: a contextual analysis" 5.

191 Pienaar 2011 *PER* 40; Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 392.

192 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 410.

193 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 410.

194 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 410.

195 Pienaar 2011 *PER* 37.

196 Fay and James *Rights and Wrongs* 5; Van der Walt *Margins* 1-12 as cited by Pienaar 2011 *PER* 37.

197 Pienaar 2014 *TSAR* 439; Dlamini *A case study of a land reform project in Kwazulu-Natal with reference to the Nkaseni restitution land claim* 37; Van der Walt 2001 *SALJ* 286.

198 Pienaar 2014 *TSAR* 439.

change the current unequal distribution of land and means by providing the landless with land for residential and productive purposes in order to improve their livelihoods.[199]

This is done by way of state intervention in the market process, based on the willing-buyer-willing-seller approach.[200] The government has a facilitative role to play by providing financial support where necessary, acquiring land on the willing-buyer-willing-seller principle and waiting for potential beneficiaries to approach the government to indicate their needs and demands.[201] The process of land redistribution is intended mainly for those people who did not have land before and still do not have (sufficient) land.[202] The latter includes urban and rural poor, farm workers, labour tenants and emergent farmers.[203] Extensive legislation has been promulgated to facilitate the redistribution programme. These laws function primarily within the common law structure of property rights that dominated during the Apartheid era.[204] The only difference is that the structures of racial discrimination is removed, and access to land and housing is extended to people and communities formerly excluded from it.[205]

3.3.3 Tenure reform

The land tenure reform programme is regulated by section 25(6) of the Constitution and it deals directly with the means through which land is owned.[206] The aim of this process is to strengthen and secure the land rights of people who already have land or access to land.[207] These land rights are typically insecure either as a result of the way in which they have been acquired or vested, or because of the discriminatory laws which applied to

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199 *White Paper on Land Reform* 60; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 594; Pienaar *Land Reform* 274; Dlamini *A case study of a land reform project in Kwazulu-Natal with reference to the Nkaseni restitution land claim* 37.

200 Pienaar *Land Reform* 375; Pienaar 2014 *TSAR* 439; Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 291; Dlamini *A case study of a land reform project in Kwazulu-Natal with reference to the Nkaseni restitution land claim* 37.

201 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 291; Pienaar 2014 *TSAR* 439.

202 Van der Walt 2001 *SALJ* 286.

203 *White Paper on South African Land Policy* ix; Dlamini *A case study of a land reform project in Kwazulu-Natal with reference to the Nkaseni restitution land claim* 37.

204 Van der Walt 2001 *SALJ* 286.

205 Van der Walt 2001 *SALJ* 286.

206 Cliffe 2007 *RAPE* 275; Van der Walt 2008 *STELL LR* 327; Dlamini *A case study of a land reform project in Kwazulu-Natal with reference to the Nkaseni restitution land claim* 38.

207 Van der Walt 1999 *Koers* 281; Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 292; Dlamini *A case study of a land reform project in Kwazulu-Natal with reference to the Nkaseni restitution land claim* 38.

them in the past under the previous system of governance.[208] Accordingly the tenure reform process aims to provide either temporary or permanent security of tenure.[209] This is done through the upgrading of insecure tenure rights to full ownership,[210] the provision of statutory security for other land rights,[211] or the creation of new rights.

Therefore the tenure reform sub-programme aims to transform the law in order to improve the security of tenure and the value of previously disregarded and unprotected land rights.[212] Section 25(9) of the Constitution reinforces the obligation of the government to develop legislation that will ensure legally secure tenure for the persons referred to in Section 25(6). Accordingly various legislative measures have been established to secure the land rights and interests of labour tenants, other lawful occupiers of rural land, urban rental tenants, communal land holders and users, informal and beneficial land users and even unlawful occupiers of land.[213] Tenure reform laws hold great potential for the transformation of the existing structure of the land rights system,[214] and can have a certain effects on private property rights. Seeing that tenure reform amounts to an amendment of law concerning landholding, it also amounts to an amendment of property law.[215]

3.3.4 Conclusion

Property rights in South Africa are inherently limited in various ways – constitutional and statutory limitations are designed to address the inequality affected by Apartheid and to ultimately promote social welfare. Section 25 of the Constitution brings about transformation of existing patterns of landownership in that it contains a commitment to the objectives of access to land, provision of legally secure land tenure and land

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208 Van der Walt 1999 *Koers* 281.

209 Van der Walt 1999 *Koers* 281; Van der Walt 2008 *STELL LR* 327, points out that due to the role that evictions and forced removals played in apartheid land law, security of tenure in the post-apartheid context means security from arbitrary evictions.

210 Holders of individual and communal rights in land are upgraded to have comparable status in law to that of landowners.

211 The land tenure sub-programme extends registerable tenure rights to all landowners.

212 Van der Walt 1999 *Koers* 288.

213 Van der Walt 2008 *STELL LR* 327; Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 93.

214 Van der Walt 1999 *Koers* 288.

215 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 292.

restitution.[216] It is, however, uncertain whether the land reform programme will be able to pursue its goals of distributive justice and reconciliation without reinforcing the very problems of inequality and conflict that it seeks to overcome during the process. Numerous legislative measures have been promulgated to achieve the respective goals of redistribution, tenure reform and restitution and various other developments have recently been added to the existing framework. The impact of these legislative measures on existing property rights are discussed comprehensively in the next part of the study.

216 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 521; Van der Walt 1999 *Koers* 269.

4. The impact of statutory land and resource reform on landownership

Since the commencement of the exploratory land reform programme prior to 1994 a series of land reform legislation was promulgated to effect land reform in the three identified areas namely restitution of land, redistribution and the provision of security of tenure.[217] While some of the legislative measures predate the constitutional era, most statutes resulted from the constitutional imperative.[218]

Land reform mainly entails the limitation or restriction of existing individual property rights to land in the form of control over the use, distribution and exploitation of land. This is done for social and political reasons. This section examines the extent to which legislative measures with regard to land and resource reform limit or restricts existing rights to property.[219] It is important to note that legislative measures developed to provide effect to the three legs of the land reform programme are not limited to particular sub-programmes, but extend boundaries and interact with measures in and across sub-programmes.[220] Therefore a particular law may have relevance to more than one sub-programme.[221] Accordingly the legislation[222] discussed in this section is not grouped into specific sub-programmes. Legislation pertaining to land reform is, however, discussed first and then legislation with regard to resource reform is examined. When discussing the legislation, the focus is on the impact of each law on the rights of landowners to property and landholding. This section does not attempt to provide a comprehensive and all-encompassing background and context to the named legislation. Reference is, however, given in each case as to where to find a more detailed discussion on relevant statutes.

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217 Pienaar 2014 *TSAR* 434; Pienaar 2011 *PER* 195-196.

218 Pienaar 2014 *TSAR* 434.

219 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa.*

220 Pienaar 2014 *TSAR* 435.

221 E.g. the *Extension of Security of Tenure Act* combines elements of both the redistribution and tenure reform sub-programmes.

222 Some of these have already been adopted as Acts of Parliament while others remain in the form of Bills.

4.1 Restitution of Land Rights Amendment Act 22 of 1994[223]

The *RLRA* is integrally linked to the land reform programme – it plays a significant role in giving effect to the restitution of land rights,[224] which entails either the restoration of a right in land or equitable redress.[225] Accordingly individuals and communities that were dispossessed of land on or after 19 June 1913 as a result of racially discriminatory laws or practices can claim restitution of those rights from the state.[226] The initial cut-off date for lodging such claims was 31 December 1998.[227] The closing date was extended to 30 June 2019 when the *Restitution of Land Rights Amendment Act* (hereafter the *RLRAA*) came into force.[228] In July 2016 the *RLRAA* was declared unconstitutional in the *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* case.[229] The Constitutional Court held that any claims lodged by the date of the judgment will continue to exist but forbade the Land Claims Commission from considering, processing and settling new claims for 24 months pending Parliament's re-enactment of the amendment act or finalisation of those claims filed by 31 December 1998, whichever occurred first.[230]

In certain circumstances the restitution process under the *RLRA* has far-reaching consequences for existing landowners whose property is affected by claims. Firstly,

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[223] For a comprehensive discussion on what the *RLRA* entails, requirements for valid claims and the role players of the restitution process see Pienaar *Land Reform* 533-635.

[224] Pienaar 2014 *TSAR* 434; The *RLRA* defines a right in land, in s 1, as: "any right in land whether registered or unregistered, and may include the interest of a labour tenant, a sharecropper, a customary law interest, the interests of a beneficiary under a trust arrangement and the beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question."

[225] Equitable redress is defined broadly to include any equitable redress other than the restoration of a right in land, including a right in alternative state owned land and the payment of compensation; Pienaar *Land Reform* 534; Pienaar 2014 *TSAR* 444.

[226] Section 2(1)(a)-(d) of the *RLRA*. This is in line with section 25(7) of the *Constitution* which states that: "A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress." This includes individuals whose property was expropriated in favour of the former homelands (TBVC states) and who did not receive fair compensation.

[227] Section 2(1)(e) of the *RLRA*.

[228] Section 2(1)(e) of the *RLRAA*; according to Zuma 2016 *State of the Nation Address* almost 120 000 new land claims had been lodged by December 2015.; Moolman 2015 *Farmbiz* 47.

[229] The Constitutional Court in *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 ZACC 22 declared the *RLRAA* constitutionally invalid, on the ground that *Parliament* failed to satisfy its obligation to facilitate public involvement in accordance with section 72(1) of the *Constitution*.

[230] Pienaar 2016 *Farmbiz* 32.

property can be expropriated for purposes of the restitution programme as this falls within the ambit of the nation's commitment to land reform which is secured in Section 25(3) of the Constitution.[231] Furthermore, it can happen that the amount of compensation payable is less than market value. This is due to the market value of the property not being the only factor that is taken into account when determining just and equitable compensations.[232] Secondly, once land claims have been lodged and published in terms of Section 11 of the *RLRA*, landowners are prevented from certain conduct or actions that are usually part and parcel of being landowners.[233] Although landowners are able to contest land claims against their land, it is a troublesome and expensive process. If a satisfactory response is, however, not received from the *Commission of Litigation*, it may be the only option available.[234] Thirdly, private parties (landowners) do not have the same benefit as public bodies to institute Section 34 applications, which allows for land to be removed from the restitution process if it is in the interest of the public. Consequently landowners, have no other choice but to undergo a restitution process.[235]

Many claims that were lodged by the first cut-off date have still not been finalised, and countless new claims are yet to be addressed. It is submitted that the restitution programme under the *RLRA* limits landowners' rights whose property is affected by the claims in numerous ways as set out above. These limitations affect the character of ownership as the most complete right a legal subject could have in relation to an object, in that many of the entitlements conjoined to ownership are restricted.[236]

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[231] Section 42E of the *RLRA* also provides that land may be acquired for restitution purposes.

[232] Section 25(3) of the *Constitution* sets out the other relevant factors to be taken into account; According to Pienaar *Land Reform* 651, the constitutional guarantee will still be honoured if less than market value is offered as a relevant argument can be made out that it is still just and equitable compensation in the relevant circumstances.

[233] Moolman 2015 *Farmbiz* 1; the landowner may not — without one month's written notice to the Land Claims Commission – sell, exchange, donate, subdivide, rezone or develop claimed land. The latter may not make any improvements on the land, destroy or remove and/or allow for it to be destroyed or removed, without written consent from the Land Claims Commission. No land claimant who lived on the land on 2 December 1994 can be evicted.

[234] Pienaar *Land Reform* 652.

[235] Pienaar *Land Reform* 652; see *Minister of Defence and Another v Khosis Community at Lohatla* 2003 JOL 10409 (LCC) for an example where the court held that it was not in the public interest to grant a restitution claim with regard to the relevant land.

[236] In *Transvaal Agricultural Union v Minister of Land Affairs* 1996 12 BCLR 1573 (CC), the Constitutional Court put to rest the notion that the right to acquire, hold and dispose of rights in property would trump the right to land restitution when it said that under section 121 and 123 of the *Interim Constitution* "the existing rights of ownership do not have precedence over claims for restitution."

4.2 Land Reform (Labour Tenants) Act 3 of 1996[237]

The *LRA* is applicable to land reform in that it combines the elements of both tenure reform and land redistribution. Accordingly some of the main aims of the Act are to formalise access to land and to redistribute land to labour tenants residing on farms.[238] By way of this process the skewed pattern of land ownership affected by Apartheid is addressed.

With regard to redistribution the *LRA* provides a process whereby labour tenants can acquire full ownership or other rights in the land they occupy.[239] As a result insecure occupational interest in land is upgraded to ownership. Labour tenants will qualify for this benefit if the relevant land has been occupied or used for at least two generations.[240] Consequently land which has been formerly registered in the name of landowners is redistributed to the former labour tenants. A claim for the acquisition of ownership has to be resolved by agreement between farm owners and labour tenants. The Act makes provision for arbitration procedures if no agreement can be reached.[241] If landowners contest the status of the applicant being that of a labour tenant, either party may approach the Land Claims Court for resolution and a ruling.

The acquisition of ownership of land or other rights in the land is regarded as expropriation and this entitles farm owners to just and equitable compensation.[242] If the parties are unable to reach an agreement on the amount of compensation payable the

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237 For a broad overview of the *LRA* with regards to redistribution see Pienaar *Land Reform* 305-319, and with regard to tenure reform 432-434.

238 Pienaar *Land Reform* 306; The Act defines a labour tenant as a person: (a) who is residing or has the right to reside on a farm; (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm, including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker.

239 Cousins and Claassens "Communal land rights, democracy and traditional leaders in post-apartheid South Africa" 144.

240 Pienaar *Land Reform* 432.

241 Sections 18, 19, 22 and 36 of the *LRA*.

242 The compensation must be just and equitable and when determining the amount the court has to take certain factors into account. The factors include (a) the replacement value of such structures and improvements; (b) the value of materials which the labour tenant may remove; (c) the value of materials provided by the owner for the erection of such structures and improvements; (d) if the labour tenant was not given the opportunity to remove the crop, the value thereof; and (e) the circumstances that led to the eviction, including the conduct of the parties.

court or the arbitrator will determine the amount, the manner in which and the period within which compensation must be paid.[243] In the case where applicants fail to make the payment,[244] owners may apply to the court to have its previous order declared invalid.[245] This may have a negative impact on the rights of landowners as their land will be expropriated if the Land Claims Court finds in favour of the applicant. Furthermore the process to go to the court with the matter and again if the applicant fails to make payment, can be a lengthy and very costly process and therefore many landowners will not have the means to do so.

With regards to tenure security, it is possible for persons who qualify as labour tenants in terms of the Act to merely remain labour tenants in the full sense of the word. These people will then continue to reside on the land and use it for cropping and grazing purposes. The Act provides secure tenure in these instances by regulating eviction very strictly in terms of section 15A. An eviction order will only be granted if it is fair and equitable after taking all the relevant circumstances into account. If relevant, a compensation order may even be granted in terms of which the landowner has to compensate the labour tenants upon eviction. Again this part of the Act also poses certain restrictions on the landowner's rights as the latter may only evict a labour tenant in certain circumstances and may even be required to pay compensation to the labour tenant.

4.3 Land Reform: Provision of Land and Assistance Act 126 of 1993[246]

The *Land Reform: Provision of Land and Assistance Act* (hereafter the *PLAA*) forms part of the redistribution sub-programme by providing land and financial assistance[247] to historically disadvantaged persons and communities.[248] The designated land includes state land, or land that has been purchased or acquired by the Minister[249] for purposes

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243 Section 23 of the *LRA*.

244 Parliament will appropriate funds for the acquisition of land or rights in land by labour tenants and in terms of s 26 and 27 the Act the Minister may grant advances or subsidies to labour tenants for the acquisition of land or rights in land by labour tenants as well as the development of land occupied or to be occupied by labour tenants.

245 Section 24 of the *LRA*.

246 For a detailed discussion on the *PLAA* see Pienaar *Land Reform* 286-291.

247 Section 10 of the *PLAA* provides for financial assistance for the acquisition, development and improvement of land or to secure tenure rights.

248 Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 605.

249 Minister of Rural Development and Land Reform.

of the Act.[250] This includes private land if it has been made available by the owner thereof.[251] The designated land is developed and subdivided into parcels of land[252] and then alienated (or leased) to persons and the ownership thereof accordingly transferred to them.[253] As a result, access to land is broadened and redistribution of the original large parcel of land has occurred. This process does not have a negative impact on the rights of landowners to property as they willingly make their land available.

Apart from the fact that private landowners can make their land available for redistribution purposes, the Minister is also empowered to expropriate any land or rights in land for the purposes of the Act.[254] Before expropriation can take place landowners will be afforded a hearing[255] and compensation should be paid as prescribed by the Constitution.[256] Even though owners are afforded a hearing the process is lengthy and expensive. Furthermore, there is always a chance that the hearing will not be in favour of the owners and compensation as calculated in terms of Section 25 of the Constitution can amount to less than the market value.

The *PLAA* is still one of the main vehicles used in the redistribution process to date.[257] The fact that the Act makes provision for expropriation of rights in land indicates a limitation of the rights of landowners as the latter may have to sell their property for a purchase price less than the market value even if it is against their will. This influences the absolute character of ownership which entitles owners to do with their property as they please. With regard to the expropriation provisions the *PLAA* needs to be in alignment with the *Property Valuation Act* of 2014 and the *Expropriation Bill* of 2015 which is discussed later in this section.

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250 Section 19(1)(i) of the *PLAA*; Pienaar *Land Reform* 322-323; Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 605.

251 Section 2(1)(c) of the *PLAA*; Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 605.

252 Pienaar *Land Reform* 288: This development entails the subdivision of the designated land into smaller portions for purposes pertinent to rural areas, which include small-scale farming, residential, public community or business purposes.

253 Pienaar *Land Reform* 289: When ownership of the parcel of land is transferred the developer has to lodge the deed of transfer, made out to the relevant person who acquired ownership, on the relevant prescribed form under the *Deeds Registries Act*.

254 Section 12(1) of the *PLAA*; Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 605.

255 Section 12(2) of the *PLAA*.

256 Section 12(3) of the *PLAA*; the compensation is determinable in terms of s 25(3) of the *Constitution*.

257 Pienaar *Land Reform* 164.

4.4 Transformation of Certain Rural Areas Act 94 of 1998[258]

The *Transformation of Certain Rural Areas Act* (hereafter the *TCRAA*) forms an important part of land reform in South Africa, as it has certain implications for both the redistribution as well as the tenure reform sub-programmes.[259] In respect of redistribution, the Act provides for the transfer of land – which was held in trust for certain communities under the former *Rural Areas Act* 9 of 1987 –[260] to local municipalities or other legal entities,[261] as well as the relevant procedures to affect the transfer.[262] Thus persons and communities, who previously had informal rights to land, can, therefore, acquire formal rights to land through this process. The *TCRAA* also implicates the tenure reform sub-programme – it changes the manner in which control is exercised over land. Instead of land being held in a trust, it is transferred to the actual communities or individuals.[263] An important characteristic of the Act is that the communities get to decide how and when the transfer of land should take place.[264]

The *TCRAA* has been designed to provide content to Section 25(6) of the Constitution which gives individuals and communities the right to security of tenure. The impact it has on property rights is positive as it provides for the upgrading of insecure tenure rights to formal rights in land. Accordingly individuals whose rights have been formalised are protected against the rights of other members of the same community, individual non-community members and other communities.

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[258] For a detailed discussion on the *TCRAA* see Pienaar *Land Reform* 326-331.

[259] Van der Walt 2001 *SALJ* 304; Pienaar *Land Reform* 327.

[260] These 23 rural areas located in four provinces in South Africa. The provinces are Western Cape, Northern Cape, Eastern Cape and the Free State. The land in these rural areas is presently held in a trust for the communities by the Minister of Rural Development and Land Reform in terms of the *Rural Areas Act* of 1987 which has since been repealed. No residents in these areas hold individual title deeds for their residential plots.

[261] Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 606; Pienaar *Land Reform* 327. The legal entities can for example be the communal property associations as regulated in the *Communal Porperty Associations Act* 28 of 1996.

[262] Pienaar *Land Reform* 327; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 606.

[263] Pienaar *Land Reform* 481.

[264] Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 606; the communities must decide between three possible entities to receive the land: (a) the municipality; (b) a communal property association; and (c) an option of own choice – including trust ownership and individual title.

4.5 Spatial Planning and Land Use Management Act 16 of 2013[265]

The *Spatial Planning and Land Use Management Act* (hereafter the *SPLUMA*)[266] came into force in July 2015. The relevance of this Act to land reform lies in the fact that it was introduced with the aim of replacing the *Development Facilitation Act*[267] (hereafter the *DFA*) which provided for additional planning and development channels in respect of the redistribution sub-programme.[268] The *SPLUMA* has a much more transformational approach than the *DFA* – it places emphasis on historical redress, equitable access and inclusion.[269]

Whereas the *DFA* had a fragmented approach to land use planning and management,[270] the *SPLUMA* alternatively introduced a single, uniform management system with overarching frameworks to guide and regulate land use and development.[271] In turn, these frameworks are steered by a set of development principles, which underpin spatial planning and development.[272] For this discussion, the spatial justice principle is applicable as it aims to broaden access to land both in rural and urban contexts.[273] The underlying idea of the principle is that all future development frameworks should address the inclusion of persons and areas that were previously excluded with an emphasis on informal settlements, former homeland areas and areas characterised by poverty and deprivation.[274] Accordingly, spatial planning mechanisms, such as land use schemes, should incorporate provisions that enable redress in access to land by disadvantaged

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265 For a detailed discussion on *SPLUMA* see Pienaar *Land Reform* 296-300.
266 Published in GG 36730 of 5 August 2013.
267 67 of 1995.
268 Pienaar *Land Reform* 297; Chapters V and VI of the *DFA* were declared unconstitutional by the Constitutional Court in judgment of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC). For a comprehensive analysis of the case law scenario see Van Wyk *Planning Law* 189-193 and 563-564.
269 Pienaar *Land Reform* 300.
270 Pienaar *Land Reform* 297; in terms of this approach rural and urban developments are dealt with independently in different chapters.
271 Pienaar *Land Reform* 297; in s 3 of *SPLUMA* the following objectives are also listed: to ensure that the system of spatial planning and land use management promote social and economic inclusion; to provide for development principles and norms and standards; to provide for the sustainable and efficient use of land; to provide for cooperative government and inter-governmental relations amongst the national, provincial and local spheres of government, and to redress the imbalances of the past and to ensure that there is equity in the application of spatial development planning and land use management systems.
272 These principles are (a) spatial justice; (b) spatial sustainability; (c) efficiency; (d) spatial resilience; and (e) good administration.
273 Section 7(a) of the *SPLUMA*.
274 Pienaar *Land Reform* 297.

communities and persons.[275] Land development procedures should also include provisions that accommodate access to secure tenure and incremental upgrading of informal areas.[276]

When the rights of landowners are affected by decisions taken by a Municipal Planning Tribunal, landowners can appeal against decisions made in terms of Section 51 of *SPLUMA* by providing written notice with reasons of the appeal to a municipal manager, which will then be forwarded to the *Executive Authority* of the municipality as the appeal authority. The appeal authority may confirm, amend or reject the decision of the municipal tribunal. The potential impact of this Act is that landowners' rights can be limited if the appeal authority should confirm the decision of a municipal tribunal that impact negatively on landowners. The real impact of this Act on the rights of landowners is yet to be seen as the Act only came into force recently.

4.6 Expropriation Bill B 4B – 2015

Section 25 of the Constitution embodies a duel aim of protecting property and ownership rights on the one hand while, removing or limiting such rights in certain circumstances, on the other hand. Accordingly, land and immovable property can be expropriated for land reform purposes.[277] It is, therefore, relevant to discuss the *Expropriation Bill* of 2015 (hereafter the *EB*) as it regulates the circumstances and methods under which expropriation may take place. The overall aim of the *EB* is to provide an updated Expropriation Act which is in line with constitutional imperatives.[278] The *Expropriation Act* 63 of 1975 predates the advent of the new constitutional dispensation and is therefore not consistent with the spirit and provisions of the Constitution.

The *EB* provides for expropriation for a public purpose or in the public interest, subject to just and equitable compensation.[279] Although the concept of "public purpose"[280] is well-

275 Section 7(a)(iii) of *SPLUMA*.
276 Section 7(a)(V) of *SPLUMA*.
277 Section 25(2) of the *Constitution* expressly includes public interest as one of the purposes for which property can be expropriated. This term includes the "nation's commitment to land reform".
278 This includes in particular s 9 (the equality clause), s 25 (the property clause) and s 33 (the just administrative action provision; Pienaar *Land Reform* 368.
279 Memorandum of the objects of the *EB*.
280 According to the definition in the *EB* it "...includes any purposes connected with the administration of the provisions of any law.".

established to mean expropriation for purposes, such as building public roads or dams, the same cannot be said of "public interest". The definition given to "public interest" is the same as the ambiguous explanation found thereof in Section 25(4) of the Constitution.[281] This is not a very clear definition, and the mere repetition of a constitutional provision fails to lend a greater understanding thereof, which ultimately creates uncertainty and can lead to irregularities. Fears have been raised that should the determination of the scope of "public interest" be left in the hands of the government, this definition can be devoid of any objective test that can open the way to an arbitrary deprivation of property and impact negatively on landowners' rights. [282]

The definition given to "property" is very broad as it states that property "means property as contemplated in section 25 of the Constitution". There is no comprehensive definition of constitutional property available in South Africa, and the right to constitutional protection is evaluated respectively in each case. Section 25(4)(b) merely states that property is not limited to land, which means that it can include anything from private homes, possessions, shares to intellectual property.[283] This can lead to the expropriation of a wide range of property of landowners and consequently limits the absolute character of ownership enjoyed by landowners prior to the constitutional dispensation.

Furthermore, the way in which "expropriation"[284] is defined indicates that expropriation together with the right to compensation is limited to situations where the state acquires the property.[285] This can be problematic when viewed in light of the decision in the *Agri Case* where it was held that mineral resources are not acquired by the state, but are held in custodianship for all South Africans.[286] The result of this case was that no compensation is required despite the complete deprivation of ownership entitlements. The court did,

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281 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 in order to redress the results of past racial discriminatory laws or practices

282 Steward 2016 http://www.politicsweb.co.za/opinion/consequences-of-expropriation-bill-will-be-catastr.

283 Steward 2016 http://www.politicsweb.co.za/opinion/consequences-of-expropriation-bill-will-be-catastr.

284 The *EB* defines expropriation as "the compulsory acquisition of property by an expropriating authority or an organ of state upon request to an expropriating authority".

285 This definition was added to the *EB* only after the latter had been before the portfolio committee, which means that it was never discussed at the National Economic Development and Labor Council or made available for public comment.

286 *Agri Case* para 68.

however, make it clear that its judgment applied only to the particular circumstances of the case before it.[287] According to the Full Submission on the Expropriation Bill by the *Institute of Race Relations* (hereafter *IRR*), this definition seeks to exclude any "indirect" or "regulatory" taking that can count as expropriation. These kinds of takings happen when the state does not acquire ownership itself, yet its regulations deprive owners of many of the usual benefits of ownership.[288] Consequently owners are deprived of the wide range of entitlements afforded by common law ownership.

All claims regarding the acquisition or restitution of land have up to date been managed on the basis of the "willing-buyer, willing-seller" model.[289] Unfortunately, there have been many instances where there was a lack of agreement between what the State as the buyer is willing to pay and what property owners are willing to accept as compensation.[290] This issue is, however, addressed in the *EB* that provides that the amount of compensation to be paid for expropriated property should be:

> ...just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances...[291]

The circumstances that should be taken into account, include market value and the other four factors listed in Section 25(3) of the Constitution.[292] As most of these factors are difficult to quantify in money, the relevant expropriating authority has a great deal of discretion when determining the value of properties.[293] Essentially this puts an end the "willing-buyer, willing-seller" principle.[294] As a result the expropriated owner may have to be satisfied with an amount significantly less than market value. This clearly restricts owners' rights to do with their things as they please.

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287 *Agri Case* para 78.

288 IRR 2016 http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/irr-full-submission-on-the-expropriation-bill-of-2015-b-4b-2015-2013-15-april-2016.

289 Under the *Expropriation Act* of 1975 compensation is calculated on the basis of the market value of the property, actual losses and *solatium*.

290 Bowmans date unknown http://www.bowman.co.za/News-Blog/Blog/LAND-EXPROPRIATION-DRAFT-BILL-BOUND-TO-SPARK-LIVELY-DEBATE-YETUNDE-ONAGORUWA-AND-RONEL-STRAUGHAN.

291 Section 12(1) of the *EB*.

292 Pienaar *Land Reform* 366.

293 IRR 2016 http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/irr-full-submission-on-the-expropriation-bill-of-2015-b-4b-2015-2013-15-april-2016.

294 Bisseker 2016 http://www.financialmail.co.za/features/2016/06/15/expropriation-bill-fatal-blow-or-no-big-deal; Pienaar *Land Reform* 366.

In situations where property owners refused the offer proposed by an expropriating authority, the expropriating authority should consider the objections of owners but the authority is not obliged to respond to these objections or to give reasons for rejecting them.[295] If no agreement on compensation can be reached within the requisite amount of days, the authority can serve an expropriation notice, which provides for a date of expropriation that can be very soon thereafter. The right to possess the property will automatically pass to the State on the relevant date in the notice, which could again be very soon after the transfer of ownership.[296]No court order has to be obtained before such a notice of expropriation is served.

The *EB* raises certain concerns as it contradicts the property clause and other key provisions in the Bill of Rights. It empowers expropriating authorities, after completing some simple preliminary steps, to take ownership and possession of property by serving a notice of expropriation on owners.[297] Although disputes over compensation payable should be referred to court – provided that mediation is not successful – the rights of owners to dispute the validity of expropriation are still limited. The Bill seeks to put the onus of proof in any such proceedings in the hands of the expropriated owner or holders rights.[298] It is submitted that this Bill puts numerous limitations on the existing property rights of landowners. The actual impact of the Bill can, however, only be analysed after it has been implemented.

4.7 *Extension of Security of Tenure Act* 62 of 1997 *and Extension of Security of Tenure Amendment Bill of* 2013[299]

The *ESTA* has relevance to land reform mainly in respect of the tenure reform sub-programme as it is instrumental to the promotion of tenure reform, but also indirectly to

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295 Section 7(5) of the *EB*.

296 Section 8(3)(e), (f) and 9(1), (2) of the *EB*.

297 IRR 2016 http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/irr-full-submission-on-the-expropriation-bill-of-2015-b-4b-2015-2013-15-april-2016.

298 IRR 2016 http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/irr-full-submission-on-the-expropriation-bill-of-2015-b-4b-2015-2013-15-april-2016Bill.

299 For a detailed discussion on the *ESTA* see Pienaar *Land Reform* 395-432, 436-440 and on *ESTAB* see Pienaar *Land Reform* 453-456.

the redistribution programme — it provides for the redistribution of farm land to farm workers or rural dwellers.[300]

The *ESTA* provides for certain rights and duties of occupiers and landowners.[301] This Act protects the occupants of privately owned land from arbitrary eviction and provides mechanisms for the acquisition of long-term tenure security. In terms of *ESTA* occupiers have the right to reside on and use the land and to access to such services as have been agreed upon with the owner of the land.[302] The right of residence of the occupier may be terminated on any lawful ground as long as it is just and equitable when taking the factors set out in section 8(1) of the Act into account. In cases where the right of residence of the occupier arises solely from an employment contract, this right may only be terminated if the occupier resigns from the employment or if the occupier is dismissed in accordance with the provisions of the *Labour Relations Act*.[303] According to section 8(4) an occupier's right of residence may not be terminated if the latter has resided on the land for ten years and he is older than 60 years or is unable to supply labour as a result of ill health, injury or disability. The latter does not apply in cases where the occupier has committed a material breach of the agreement between them and the owner.[304] An owner may apply for the termination of the right to occupy and then for an eviction order against the occupier, but different requirements are set for an eviction order to be valid for each category of occupiers.[305]

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300 Pienaar *Land Reform* 303.

301 AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/.

302 Balanced with the rights of the owner, the occupiers will also have the right (a) to security of tenure; (b) to receive visitors at reasonable times and for reasonable periods; (c) to receive postal and other communication; (d) to family life; (e) not to be denied or deprived of access to water, education or health services; and to visit and maintain his/her family graves.

303 66 of 1995; s 8(2) of *ESTA*.

304 Section 10(1)(a) – (c) of *ESTA*.

305 With regards to occupiers prior to 1997 an eviction order may granted if he/she resigned voluntarily from employment or if they committed a material breach of the agreement between them and the owner. In any other circumstances the court may grant an eviction order if it is satisfied that suitable alternative accommodation is available to the occupier. If there is no suitable accommodation available within nine months after termination of the right of residence, an eviction order will be granted if it is just and equitable to do so. In terms of persons who became occupiers after the said date, the court will grant termination or eviction orders if it was a material term of the consent granted to an occupier that the consent would terminate on a fixed or determinable date, and the consent did indeed terminate on such a date. Again the order is subject to being just and equitable.[305] Furthermore, if the occupier is evicted from the land, the latter is entitled to compensation for the structures he/she erected, any improvements he/she made and the standing crops he/she planted, as well as any outstanding wages.

This Act sets out a range of circumstances in which landowners may not evict occupiers from their land and consequently limits landowners' ownership rights to do with their thing as they please.

In 2013 the *Extension of Security of Tenure Amendment Bill*[306] (hereafter the *ESTAB*) was tabled in order to make *ESTA* more comprehensive.[307] In terms of *ESTAB* the definition of "dependents" is extended to include members of a family legally supported by an occupier.[308] Furthermore the Act provides for the establishment of a *Land Rights Management Board* (hereafter the *LRMB*), that is specifically involved in the mediation and arbitration on disputes regarding land rights.[309] The Land Rights Management Comittees, which report to the *LRMB*, is involved in identifying and deciding on disputes over land rights of occupiers and other parties with rights to tenure.[310] Although one will still be able to refer unresolved disputes to the courts, the additional costs brought about by heavier regulation will put pressure on owners to accept the decisions of the *LRMB*.[311] Therefore the new provisions in the *ESTAB* limits a landowner's rights even more as any land disputes would be dealt with first by the committees, then by the board and lastly by the court.

4.8 Land Tenure Security Bill of 2013[312]

The *Land Tenure Security Bill* (hereafter the *LTSB*) was drafted in light of the Land *Tenure Security Policy* of 2010, which was created with the aim of enhancing tenure security of persons residing on farms.[313] Thus the Bill forms part of the tenure security sub-programme and is applicable to the discussion on legislation pertaining to land reform.

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306 B 24 – 2015.

307 Preamble of *ESTAB*.

308 AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/ 28; the new definition includes the spouse (including common law unions), children and adopted children, grandchildren and in some cases grandparents.

309 Section 15C(1) The Board shall – [...] (d) provide for the mediation and arbitration of land rights disputes arising from that application of this Act.

310 Section (4) The Committees shall (a) identify and monitor land rights disputes observed through adequate participation of all actors whose relative rights are contested; (b) take steps to resolve a dispute referred to in paragraph (a); (c) in the event that a dispute cannot be resolved, refer such dispute to the Board.

311 AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/ 28.

312 For a detailed discussion on the main aspects of the draft *LTSB* see Pienaar *Land Reform* 442-453.

313 In terms of s 7 and 11 of the *LTSB*, persons residing on farms include lawful residents, unlawful residents and labour tenants. The implication of the definitions of "persons residing on farms" broadens the scope of the Bill compared to the breadth under *ESTA* and the *LRA*.

The Bill mainly focuses on farmland by providing protection to the same groups of people currently covered under the *ESTA* and the *LRA*. The most controversial aspect of the *LTSB* is the rights and duties set out for farm owners, persons residing on farms and farm workers.

In terms of the *LTSB*, landowners' rights are subject to any reasonable condition imposed by the Bill. These rights include owners' common law right to the exclusive use and enjoyment of his farm in whatever way he sees fit. Therefore landowners' property rights can be restricted by any reasonable condition imposed by the Bill. Furthermore substantive restrictions are imposed on landowners right's to obtain eviction orders, which makes it difficult for landowners to evict residents even when the eviction is justified.[314]

In addition the *LTSB* provides a comprehensive list of rights that people residing on farmland can exercise.[315] For example the right to reside includes the right to own livestock, graze land for livestock, the right to plant crops, build houses and homesteads, to visit and be visited, to bury members of the family on the farm, to undertake commercial farming and have access to skills, education, family life and dignity.[316] Farm residents can exercise these rights without the landowner's consent. Furthermore a person working on a farm has the right to work in compliance with the *Labour Relations Act*, to education for himself and his family and the right to family life and to dignity.[317] The list of rights of people residing on farms is unspecific — this makes it difficult to determine how these rights can be limited in order to protect the rights of farm owners. The only limitation of the rights of farm residents is that they may not cause harm to anybody or damage to any property on the farm.[318]

The potential impact of the *LTSB* is that it limits landowners' existing rights and entitlements to their property significantly, by creating extensive new rights for farm

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314 Agri SA 2011 shttp://www.politicsweb.co.za/documents/land-tenure-security-bill-agrisas-critiquee.

315 See s 15 and 16 of the *LTSB*. These rights are grouped into land rights, service rights and personal rights.

316 Section 15 of the *LTSB*; according to Agri SA 2011 shttp://www.politicsweb.co.za/documents/land-tenure-security-bill-agrisas-critiquee the rights afforded to people residing on farms is far reaching and "...renders it unworkable and unacceptable.".

317 Agri SA 2011 shttp://www.politicsweb.co.za/documents/land-tenure-security-bill-agrisas-critiquee.

318 Section 16(2) of the *LTSB*.

workers and their dependants and onerous new obligations for land owners. The Bill has not been enacted and therefore its actual impact on existing property rights cannot be commented on comprehensively.

4.9 Communal Property Associations Act 28 of 1996

The *Communal Property Associations Act* (hereafter the *CPAA*) fits into the land reform programme through the establishment of *Communal Property Associations* (hereafter the *CPAs*) which are used as the main instrument to transfer ownership in the redistribution and restitution sub-programmes with regard to collective or group landholdings.[319] The *CPA* is created by communities that form juristic persons in order to acquire, hold and manage immovable property in terms of a written constitution.[320] It is therefore a legal mechanism whereby groups of people can acquire and hold land in common – with all the rights of full private ownership.[321] Accordingly the *CPAA* forms part of the restitution and redistribution programmes by enabling the court to identify and establish *CPAs* as beneficiaries in restitution or redistribution orders.[322] This Act is also tenure related – it regulates the tenure rights of members of communal property associations.[323]

The *CPAA* has a positive effect on existing group landholdings. It upgrades the rights of people who live in communities by providing an institutional framework for the registration and functioning of a new form of juristic person to acquire, hold or control property with all the entitlements of full private ownership. The Act further provides for total freedom concerning the land hold and land use patterns within the property associations.[324] It is submitted that the common law character of ownership is being

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319 Pienaar *Land Reform* 356; Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 624; collective or group landholdings represents a kind of ownership that is not individual, but rather where a group of persons or individuals all have ownership rights in relation to property, collectively.

320 Pienaar 2006 *TSAR* 443; Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 621.

321 Cousins and Claassens "Communal land rights, democracy and traditional leaders in post-apartheid South Africa" 144; Pienaar *Land Reform* 494.

322 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 422; s 5 of the *CPAA*.

323 Pienaar *Land Reform* 494; The *Communal Property Associations Amendment Bill* of 2016 was approved by parliament in April 2016 and it is expected to further strengthen the rights of individuals living within communal areas. The main change constituted by the Bill is that it introduces an administrative process to ensure that the actions of CPA's are in line with proper governance.

324 According to Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 422: "This creates the possibility of a situation where customary land 'rights' may be exercised without compromising the security of these rights."

changed by this law – the Act makes it possible for a community to own land collectively in the common law sense, while customary law regulates the internal use and management of the land.[325] Therefore rights to land that were previously limited to use rights or permits are afforded all the same entitlements as private ownership.

4.10 Communal Land Rights Act 11 of 2004[326]

The relevance of the *Communal Land Rights Act* (hereafter the *CLaRA*) to land reform lies in the fact that it was drafted with the aim of embodying the objectives of the tenure reform sub-programme with regard to communal land.[327] The purpose of the Act is, therefore, to provide secure land tenure rights to communities and people who occupy and use land that was reserved for black occupation under the Apartheid property regime.[328] The *CLaRA* was nullified by the Constitutional Court in May 2010 despite never having been implemented.[329] It is nonetheless relevant for the discussion as it contains certain impacts on the rights to land of people in communal areas.

In 2009 many of the key provisions in *CLaRA* were declared unconstitutional and invalid by the *North Gauteng High Court* in the *Tongoane and Others v Minister of Agriculture and Land Affairs*[330] case (hereafter the *Tongoane Case*). The Constitutional Court upheld this decision.[331] The main disputes regarding *CLaRA* can be categorised in procedural and substantive matters. The procedural matters entailed that Parliament followed an incorrect process in passing the Act because it did not involve provincial legislatures as it should have done in deliberations that affect customary law. The substantive matters broadly dealt with three main aspects, namely the role and functions of traditional councils acting as land administration committees; discrimination between black and white property owners; and tenure security of women.[332] As the court found that the first problem rendered *CLaRA* unconstitutional, it did not address the second problem.[333] The

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325 Erasmus *The interaction between property rights and land reform in the new Constitutional order in South Africa* 424.
326 For a detailed dis discussion on the *CLaRA* see Pienaar *Land Reform* 467-477.
327 Pienaar *Land Reform* 467.
328 Pienaar *Land Reform* 467.
329 *Tongoane v National Minister for Agriculture and Land Affairs* 2010 8 BCLR 741 (CC).
330 *Tongoane v National Minister for Agriculture and Land Affairs* 2010 8 BCLR 838 (GNP).
331 *Tongoane v National Minister for Agriculture and Land Affairs* 2010 8 BCLR 741 (CC).
332 Pienaar *Land Reform* 473.
333 Weinberg 2015 *PLAAS* 14.

court avoided the substantive issues raised by the applicants which made it clear that the people in the *Kalkfontein* area wanted to manage their land independently of the traditional council in their jurisdiction, because the council was derived from a tribal authority imposed on them under Apartheid.[334]

The result of the decision is that people in communal areas still do not have tenure security and their rights to land are now being regulated by the *Interim Protection of Informal Land Rights Act*.[335] The latter provides temporary protection for *de facto* occupation until new and more comprehensive legislation has been developed to make these rights permanent.[336] The Constitutional Court accordingly ordered Parliament to enact legislation that will ensure secure tenure for people and communities in communal areas as obligated by Section 25 of the Constitution. According to Mostert, the decision reached by the Constitutional Court is undoubtedly correct, but it is unfortunate because it:

> ...came after almost a decade of consultation, several attempts at drafting the law, five years of non-implementation after enactment and a drawn-out litigation process that must have cost the taxpayer millions, without changing the lives of even a single dweller of rural, communal land.[337]

CLaRA undermined the security of land tenure of many rural people by cutting all the layers of decision-making around land issues except chiefly power. This Act did not, however, have any effect on the content or scope of existing property rights and ownership.

4.11 Prevention of Illegal Eviction of Unlawful Occupation of Land Act 19 of 1998[338]

Although its aim is not to secure tenure rights, *PIE*[339] is applicable to the land reform programme due to its impact often leading to secure tenure of individuals – even if it is

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[334] Pienaar *Land Reform* 474.
[335] 31 of 1996; this Act is discussed in more detail in 4.12.
[336] Tembisa 2013 *Research Unit: Parliament of the Republic of South Africa* 11.
[337] Mostert 2014 *PER* 761.
[338] For a detailed analysis of the *PIE Act* see Pienaar *Land Reform* 688-699.
[339] The *PIE* repealed the *Prevention of Illegal Squatting Act* 52 of 1951. The need to repeal the *Prevention of Illegal Squatting Act* became evident with the introduction of the final *Constitution* embodying s 26 which states that: 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.

just for the time being.[340] The *PIE* was introduced to balance the property rights of owners and the rights of occupants with regard to housing access,[341] by providing procedures for the eviction of unlawful occupants.[342] In terms of this Act, substantive and procedural issues come into play when determining whether eviction orders are granted or refused. In the case where procedural requirements have been met, eviction orders are granted.[343] The court can, however, also refuse eviction orders on the basis that these orders are not just and equitable in the circumstances – even when all the requirements have been met.[344] Factors that are specifically taken into account when deciding on the issuing of an eviction order are the interest of children, disabled people, the elderly and female-headed families.[345] Consequently, the result can be that occupiers – though unlawful – are allowed to occupy the housing. In such a case, the tenure of occupiers has been secured with regard to their current accommodation though no secure tenure as such has been vested. As a result, the rights of owners are limited as there is nothing they can do to evict unlawful occupiers from their property. This is in contrast with the traditional concept of ownership, which provides that owners can do with their thing as they please. It is only applicable when unlawful occupiers are removed from shelters, houses, dwellings or buildings used for residential purposes.[346]

In the event of evictions from trade, industrial or business premises the common law *rei vindicatio* culminating from an eviction order would suffice. In this case owners have to prove that they are the owner or person in charge of the relevant property, that the property exists and is identifiable and that the person who stands to be evicted is an unlawful occupier.[347]

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340 Pienaar *Land Reform* 482.

341 Preamble of *PIE*; See also *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

342 In terms of s 1 of *PIE* an unlawful occupier is a person who occupies land or a building without the express or tacit consent of the owner or person in charge or without another right in law to occupy.

343 The Act sets out certain requirements depending on whether the eviction application has been lodged by private parties (s 4); by an organ of state (s 6); or whether it is an urgent eviction application (s 5); Pienaar *Land Reform* 482.

344 *City of Johannesburg v Changing Tides* 74 (Pty) Ltd 2012 6 SA 294 (SCA); *Mahogany Ridge 2 Property Owners Association v Unlawful Occupiers of Lot 13113 Pinetown* 2013 2 All SA 236 (KZD); *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newtown Urban Village* (GSJ) 2013 1 SA 583 (GSJ).

345 Section 4(7) and 6(7) of *PIE*.

346 Pienaar *Land Reform* 700.

347 Pienaar *Land Reform* 700; Van der Walt and Pienaar *Introduction to the Law of Property* 144-147; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 224-227.

According to Pienaar the paradigm within which eviction presently occurs has changed dramatically from the pre-constitutional approach, as unlawful occupiers are now the bearers of constitutional rights that are linked to interrelated procedural and substantive protections.[348]

4.12 Interim Protection of Informal Land Rights Act 28 of 1996

Even though the *Interim Protection of Informal Land Rights Act* (hereafter the *IPILRA*) does not constitute land reform to take place directly, it is relevant for the discussion of land reform legislation – it forms part of tenure reform in the form of a holding measure that makes provision for the protection of certain rights, interests and entitlements throughout the sub-programme.[349] This means that although these rights have not gone through a formal procedure to be recognised legally, in principle they are deemed to be legally enforceable.[350] The *IPILRA* was introduced as temporary protection until the tenure reform sub-programme was completed and the rights identified in the Act[351] upgraded or secured fully.[352] It has, however, been extended annually since.

The protection guaranteed by the Act entails that persons may not be deprived of their rights without the permission of holders of the rights, and the selling of land is subject to any such informal rights with the result that successors in title are bound by the latter.[353] Furthermore, Section 2(3) of the Act provides that land rights held communally may be deprived in accordance with the customs of the particular community only.[354]

In terms of *IPILRA,* informal land rights, which are hardly ever reflected in deeds registries, are elevated to resemble real rights and have similar protection.[355] The impact of the Act on informal land rights is positive as it serves as a protective measure for these

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348 Pienaar *Land Reform* 700.
349 Pienaar *Land Reform* 491; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 665.
350 Pienaar *Land Reform* 491.
351 Section 1(1)(iii) of *IPILRA.*
352 Cousins and Claassens "Communal land rights, democracy and traditional leaders in post-apartheid South Africa" 144.
353 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property* 665; s 2 of the *IPILRA.*
354 Pienaar *Land Reform* 493.
355 Pienaar *Land Reform* 493.

rights. The *IPLIRA* does not affect the existing property rights of landowners, such as ownership, in any way.

4.13 *Protection of Investment Act* 22 of 2015

The promulgation of the *Protection of Investment Act* (hereafter the *PIA*)[356] is not directly connected to the land reform initiative, but is nevertheless relevant for the discussion as this Act prevents existing *Bilateral Investment Treaties* (hereafter *BIT's*) from deterring land reform. This Act was introduced to provide a framework for the protection of investments in South Africa, both foreign and domestic, and in line with the Constitution.[357]

In the immediate post-apartheid era South Africa entered into several *BIT's* that offered extensive protection to foreign investors and their investments.[358] In terms of these treaties expropriation may only take place for a public purpose, under due process of law, and on a non-discriminatory basis.[359] The *BIT's* also provided for "prompt, adequate and effective compensation" in the case where expropriation takes place,[360] which allowed investors to claim the full market value of the property they had lost during expropriation. Furthermore, the *BIT's* provided for any disputes to be decided by international arbitrators instead of domestic courts, which guarantees investors the adjudication of their disputes independently.[361] The extensive protection provided by the *BIT's* raised certain concerns that the latter thwarted the ability of the South African government to redress the negative economic and social impacts of apartheid through legislation.[362] Consequently, the existing *BIT's* of the country were reviewed by the *Department of Trade and Industry* (hereafter *DTI*) and it was decided not to renew South Africa's *BIT's* with several key

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356 The *PIA* will only come into operation on a date still to be determined.
357 Bosman 2016 *Stellenbosch Economic Working Papers* 14.
358 Snider 2016 *Thomson Reuters* 1; Bosman 2016 *Stellenbosch Economic Working Papers* 12.
359 IRR 2016 http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/irr-full-submission-on-the-expropriation-bill-of-2015-b-4b-2015-2013-15-april-2016.
360 IRR 2016 http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/irr-full-submission-on-the-expropriation-bill-of-2015-b-4b-2015-2013-15-april-2016.
361 IRR 2016 http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/irr-full-submission-on-the-expropriation-bill-of-2015-b-4b-2015-2013-15-april-2016.
362 Snider 2016 *Thomson Reuters* 1; Bosman 2016 Stellenbosch Economic Working Papers 13.

European trade and investment partners.[363] The *PIA* was introduced to replace the *BIT's*.[364]

The *PIA* does not provide foreign investors with the protection typically included in *BIT's* such as the obligation to provide prompt, adequate and effective compensation for expropriations.[365] Instead the rights of foreign investors on expropriation will be governed by the *Expropriation Bill* of 2015 when signed into law. Furthermore, the Act does not guarantee investors "fair and equitable" treatment when investing in South Africa,[366] and the security guaranteed to foreign investors is subject to the "available resources and capacity" of the state.[367]

Section 13 regulates dispute resolutions – if disputes arise concerning actions taken by South Africa that have an effect on investments, relevant investors can request the *DTI* to facilitate the resolution of disputes through mediation.[368] Investors can also approach a competent court, an independent tribunal or a statutory body within South Africa with regard to dispute resolution relating to an investment.[369]

Although it is too early to determine the long-term effect the *PIA* will have on the South African investment industry, it is clear that this Act places significant restrictions on foreign ownership in the country. Domestic legislation cannot guarantee the same assurance given to investors by *BIT's*. This could deter foreign investors from becoming involved in an investment arrangement, where circumstances could change without their input or without their protest being considered. The *PIA* does not affect the existing private property rights of South African citizens, and therefore has no influence on the strong, absolute character of ownership.

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363 These partners include: Austria, Belgium, Denmark, France, Germany, Netherlands, Spain, Switzerland and the United Kingdom.Snider 2016 Thomson Reuters 1; Various runoff periods apply to the termination of these *BIT's*, which provide ongoing protections for existing investments from these countries for periods of 10 to 20 years; Bosman 2016 *Stellenbosch Economic Working Papers* 7.

364 Bosman 2016 *Stellenbosch Economic Working Papers* 14.

365 Snider 2016 *Thomson Reuters* 2; Bosman 2016 *Stellenbosch Economic Working Papers* 17.

366 Snider 2016 *Thomson Reuters* 1; IRR 2016 http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/irr-full-submission-on-the-expropriation-bill-of-2015-b-4b-2015-2013-15-april-20163.

367 Section 9 of the *PIA*.

368 Section 13(1) of the *PIA*.

369 Section 13(4) of the *PIA*.

4.14 Property Valuation Act 17 of 2014[370]

With regard to the land reform programme, it is important to discuss the *Property Valuation Act* (hereafter the *PVA*) as this Act regulates the valuation of land that is acquired and reallocated in terms of the redistribution sub-programme. The *PVA* focuses in particular on the establishment of the office of the Valuer-General who values property that has been identified for the purposes of land reform and the review of valuations.[371] In terms of the Act the Valuer-General is afforded the sole power to value property which is needed for land reform.[372] "Property" includes all properties that have been identified for the purpose of expropriation or land reform,[373] and any other properties that are acquired or disposed of by any state department, organ of state or municipality for any purpose excluding land reform.[374] The valuation role of the Valuer-General extends, therefore, beyond land reform matters.[375]

According to the definition in the *PVA*, the value given to identify properties should reflect an equitable balance between public interest and the interest of those affected by the acquisition and all relevant circumstances, including the factors set out in Section 25(3) of the Constitution.[376] This indicates that the process of determining compensation for expropriation is not confined to the market value of identified properties, as the current use of properties, the history of their acquisition and use, the extent of a direct state subsidy in the acquisition of properties or capital improvement and the purpose of the expropriation should also be taken into account.[377] It constitutes a clear shift away from the willing-buyer-willing-seller principle, which implies an agreement between the State and landowners on the price to be paid for claimed land.[378]

In the case where owners of property do not agree to the value proposed by the Office of the Valuer-General, they can lodge an application for review, which is referred to the

370 For a detailed discussion on the *Property Valuation Bill* of 2013 see Pienaar *Land Reform* 361-365.
371 Section 2(b)-(c) of the *PVA*; Pienaar *Land Reform* 362.
372 The Valuer-General is a state official appointed by the Minister of Rural Development and Land Reform.
373 Section 12(a) of the *PVA*.
374 Pienaar *Land Reform* 364.
375 Pienaar *Land Reform* 364.
376 Pienaar *Land Reform* 363.
377 Pienaar *Land Reform* 363.
378 Jeffery 2013 *Without Prejudice* 6; Pienaar *Land Reform* 362.

chairperson of the review committee.[379] A decision made by the review committee is final and binding on the parties and subject only to the review by a court of law.[380] As a result, this can have a very negative impact on rights of property owners as there is no need to negotiate and to agree on a price with landowners.[381] Owners are forced to accept the decision of the review committee or otherwise submit to a lengthy and expensive litigation process.[382] This Act restricts the wide and unrestricted character of ownership that affords landowners the right to do with their things as they please.

4.15 Infrastructure Development Act 23 of 2014

The *Infrastructure Development Act* (hereafter the *IDA*) does not have a direct connotation with the land reform programme, as the overall objective of the Act is to facilitate and co-ordinate public infrastructure development. It does, however, allow expropriation of land to take place for the purpose of implementing strategic integrated projects if these projects are for a public purpose or in the interest of the public. The public interest includes the nation's commitment to land reform. Thus the *IDA* is relevant for this discussion as it makes provision for expropriation to take place for land reform purposes.

In terms of Section 5 of the *IDA*, the Presidential Infrastructure Co-ordinating Commission can expropriate land for the purpose of implementing a strategic integrated project.[383] Strategic integrated projects bring together a number of catalytic projects that make up the National Infrastructure Plan. The circumstances under which property can be expropriated are also set out in Section 5. The fact that property can be expropriated for the purpose of a strategic integrated project limits landowners exclusive rights to use and enjoy their property as afforded to them in terms of the common law concept of ownership.

Furthermore, the extent to which this Act subjects to the *Expropriation Act* of 1975 is determined by the status given to the latter. If this *Act* should be revoked and replaced

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379 Jeffery 2013 *Without Prejudice* 6.
380 Jeffery 2013 *Without Prejudice* 6.
381 Du Plessis 2015 *PER* 1747.
382 Du Plessis 2015 *PER* 1747.
383 In 2012, a National Infrastructure Plan with 18 identified Strategic Integrated Projects was developed and adopted by Cabinet and the Presidential Infrastructure Coordinating Commission.

by the latest *Expropriation Bill*, for instance, the determining effect of the *Expropriation Act* will be nullified.[384]

According to the report on private ownership in South Africa by AfriBusiness, the *IDA* can be used in a disadvantaged way in terms of existing property rights, if it were to be coupled with redistribution sub-programme.[385] This can lead to expropriation of property being made increasingly easier as many of the strategic integrated projects fall within the ambit of redistribution purposes which forms part of the nation's commitment to land reform. Up to date, the Act has, however, not had any negative impacts on existing property rights of owners.

4.16 *Regulation of Land-holdings Bill of* 2016

In South Africa, the approach to regulating landholding has to date been an open unlimited market, which means that land transactions are not linked to citizenship or land ceilings.[386] In order to ensure that sufficient land[387] is available for the redistribution sub-programme, the current approach may have to be altered to become a more restricted or regulated market approach.[388] Accordingly the *Agricultural Landholding Policy Framework* and later the *Regulation of Land-holdings Bill* (hereafter the *RLHB*) were introduced with the main aim of limiting agricultural landholdings in South Africa to give effect to efficient redistribution of land for land reform purposes.[389] The Bill applies to agricultural land and not to residential property.[390]

In terms of the proposed *RLHB* land ownership by foreign nationals[391] in South Africa is prohibited and foreign nationals are confined to leaseholds of 30-50 years. Consequently

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384 AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/.

385 AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/.

386 Pienaar *Land Reform* 370.

387 In this context "sufficient land" is determined with reference to its size, location and price.

388 Pienaar *Land Reform* 370.

389 Gopal 2016 http://www.bdlive.co.za/opinion/2016/04/01/ownership-limits-will-not-reform-land; in his State of the Nation Address 2016, President Jacob Zuma referred to this Bill as the way forward for land reform in South Africa.

390 Malhake 2015 http://www.moneyweb.co.za/news/industry/regulation-land-holdings-bill-moving-fast-become-law-minister/.

391 Foreign nationals shall include all non-citizens of South Africa and foreign juristic persons, being juristic persons whose dominant shareholders are under foreign control.

foreign nationals will not be able to acquire agricultural land in South Africa any more.[392] The Bill, however, does not operate retrospectively — foreign nationals who already own land in South Africa will not be affected. Furthermore the proposed *RLHB* also seeks to impose a ceiling on the amount of land which can be held by any single natural or juristic person in South Africa.[393] The proposed limit on land ownership is 12000 hectares and if individuals own land exceeding this limit, the government will buy[394] the surplus land and redistribute it.[395]

The necessity to implement the Bill was set out by the Minister of Rural Development and Agriculture, Gugile Nkwinti as follows:

> You have people who have land and want to protect their holding and there are people who don't have land and want it. The role of government is to mediate between the groups.

Uncertainty exits with regards to certain aspects of the Bill such as whether or not the state will buy the land that exceeds the allowable limit at market related prices or simply expropriate it, and whether the compulsory disclosures will be constitutional.[396] The effect of the Bill can only be properly evaluated once it has come into force and the combined impact of the Bill and other laws pertaining to property and land reform can be assessed. For example, when land is purchased by the State for redistribution, from owners who own more than 12000 hectares, the price of such land may be determined by the Office of the Valuer-General, established by the *PVA*. If the valuation amounts to less than market value, the landowner can still be compelled to sell, and consequently the scope of the entitlements afforded to him in terms of the common law concept of ownership is restricted.

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392 Residential, commercial and industrial property will still be available to foreign nationals for purchase and ownership.

393 The regulating of land holdings will be done through a land commission that controls a legal framework for compulsory land holding disclosures that requires all landowners to declare their race, nationality, gender, how much land they own and what it is used for.

394 Minister Gugile Knwiniti stated in 2015 that compensation will be paid on the basis of a "just and equitable principle".

395 Dingley Marshall 2015 http://www.dingleymarshall.co.za/foreign-land-ownership-in-south-africa-the-regulation-of-land-holding-bill/; Malhake 2015 http://www.moneyweb.co.za/news/industry/regulation-land-holdings-bill-moving-fast-become-law-minister/; Gobal 2016 http://www.bdlive.co.za/opinion/2016/04/01/ownership-limits-will-not-reform-land.

396 STBB 2016 http://www.stbb.co.za/blog/land-reform-in-south-africa/.

4.17 Preservation and Development of Agricultural Land Bill B XX – 2016

The relevance of the *Preservation and Development of Agricultural Land Bill* (hereafter *PDALB*)[397] to land reform becomes clear when the potential implications of the Bill are examined. In terms of the Bill, expropriation of agricultural land is justified under certain circumstances where it is for a public purpose or in the interest of the public. Section 25(4)(a) of the Constitution clearly states that "public interest" includes the "nation's commitment to land reform". Should this Act, therefore, be coupled with the redistribution programme, it will have a definite land reform objective. The *PDALFB* will replace the *Subdivision of Agricultural Land Act* 70 of 1970 should it be signed into law.[398]

In terms of Section 2 of the *PDLAB* the State should act as the preserver of agricultural land in South Africa and should implement the *PDLAB* "in partnership with the people" to achieve the "progressive realisation" of the rights contained in the Constitution.[399] This is an improvement on the previous draft that vested all the agricultural land of the country in the state as custodian thereof for the benefit of the people.

The Bill furthermore requires farmers to actively use and develop agricultural land to its optimal potential, with due regard to the farming enterprise concerned.[400] Failure to do so may result in expropriation at a lower price than would be paid for similar land in the same geographical area which is used optimally for agricultural purposes.[401] There is, however no objective criteria for determining what the optimal agricultural potential of agricultural land may be.[402] This can have a negative impact on the rights of landowners as their land may be expropriated for the sole reason that it is not used to its full potential, and furthermore no objective criteria is set out to decide on this matter.

The *PDALFB* affords the Minister of Agriculture, Forestry and Fisheries the power to expropriate agricultural land if it is required for agricultural production for a public purpose or in the public interest. It is clear that the *PDALFB* will reduce the normal

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397 The latest version of this Bill was published for public comment in Gov No 984, GG40247 of 2 September 2016.

398 Section 62 of the *PDLAB.*

399 The previous draft of the Bill vested all agricultural land in the Department of Agriculture, Forestry and Fisheries as custodian thereof for the benefit of all the people of South Africa.

400 Section 54 of the *PDALB.*

401 Section 54(3) of the *PDALB.*

402 Section 26 of the *PDALB.*

competencies of ownership with regards to agricultural land should it be signed into law. A comprehensive analysis on the impact of the Bill on existing private property rights will, however, only become possible once it has come into operation.

4.18 *Land Management Commission Bill B* – 2013

The particular relevance of the *Land Management Commission Bill* (hereafter *LMCB*) to the land reform programme can be seen in its overall objective to establish a *Land Management Commission* (hereafter the *LMC*). The establishment of the *LMC* was suggested in the *Green Paper on Land Reform* in 2011.[403] The *LMC* has the responsibilities of maintaining a government data base of all land, registered or unregistered, in the name of a state department, and to decide on ownership where disputes over existing title deeds exist.[404] Section 11 provides for the *LMC* to decide on these disputes despite the stipulations of the *Deeds Registries Act*.[405] The latter's decision will, however, be subject to confirmation by the *Land Claims Court*.[406]

The concerns that have been raised[407] with regards to the *LMCB* are whether there might be a conflict of interests: It can be expected that the *LMC*, which is a state organ, will represent the interest of the state when deciding on title deeds.[408] According to the property report by AfriBusiness, private landowners should be concerned about the possibility that their interest will be overlooked in disputes where their title deeds overlap with the deed held by the state.[409] Even though landowners will have recourse to the courts for amendments to the decision of the *LMC*, the litigation process is very lengthy and expensive. This could discourage owners to take the matter to court even if they have been disadvantaged.[410] Although the Bill has the potential to limit landowners' existing property rights by giving an organ of state the sole discretion to decide on

403 Erlank 2014 *PER* 615; Pienaar *Land Reform* 247.
404 AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/.
405 *Deeds Registries Act* 47 of 1937; AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/.
406 AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/.
407 AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/.
408 AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/.
409 AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/.
410 AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/.

disputes over title deeds, its full impact cannot be determined as the Bill is yet to come into operation.

4.19 National Water Act 36 of 1998

Section 25(8) of the Constitution states clearly that the protection of property rights may not 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. The *NWA* forms an important part of the land and resource reform objective that is grounded in the property clause – it introduced a new dispensation for water rights in South Africa.[411] The fundamental aim of the new water regime is to reform the past discriminatory laws and practices which prevented equal access to water and to use of water.[412]

Prior to the *NWA* the *Water Act* 54 of 1956 regulated water rights in South Africa. Under the *Water Act* a distinction was drawn between public water and private water.[413] Private rights existed with regard to water that occurred naturally on one piece of land.[414] Consequently, landowners were owners of all water on or under the surface of their land.[415] With regard to public water in rivers or streams, riparian owners could make use of the water by way of a permit system, and downstream landowners could acquire a reasonable share in surplus water. Lastly servitude holders could acquire a right to use water on or from the servient land. During this time access to water was linked to land access.[416] Due to the fact that access to land was based on a preferential system with white people at the top, access to water was consequently also mostly preserved for white people.

With the introduction of the *NWA* the distinction between private and public water was abolished and no person can claim ownership of any water where ever it may arise or be found.[417] Private ownership of water was replaced with use rights,[418] as water is now

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411 Department of Water Affairs and Forestry *Guide to the National Water Act* 3; Van der Schyff 2003 *PER* 1.

412 Tewari 2009 *Water SA* 702.

413 Section 1 of the *Water Act*; Van der Schyff 2003 *PER* 23; Tewari 2009 *Water SA* 701; under this regime river water resources were considered public, whereas groundwater was regarded as private.

414 Van der Walt 2004 *SAPR/PL* 687.

415 Van der Schyff 2003 *PER* 23; Van der Schyff and Viljoen 2008 *TD* 340.

416 Van der Schyff and Viljoen 2008 *TD* 339-340.

417 Norman Brauteseth and Associates 2012 http://www.nbalaw.co.za/News/categoryid/563/id/7964.

418 SARCPLS 2014 http://www.sarcpl.sun.ac.za/2014/06/is-there-a-property-crisis-in-south-africa/.

regarded as a "national asset" with the state as the trustee or custodian thereof.[419] Accordingly Section 3(1) provides:

> As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.

This provision indicates the biggest paradigm shift away from the previous water dispensation. The state is not only the custodian of the water of South Africa but also the entity responsible for regulating access to water. Thus any person (including a juristic person) who wants access to and use of water can do so only in accordance with the Act.[420] Hence the introduction of the *NWA*, removed all water in South Africa from private ownership and made it subject to public regulation. The implementation of the *NWA* results in a decline of private property rights with regard to water as ownership of water has literally been abolished.

In 2013 the *Minister of Water and Environmental Affairs* brought about a revision of the current water policy, so that existing water policy documents as well as legislation can be amended.[421] The so-called *National Water Policy Review*[422] (hereafter the *NWPR*) proposes certain amendments to water rights,[423] such as applying a "use it or lose it" principle to existing authorisations and water use rights; [424] prohibiting the trade of water rights between authorised water users;[425] and applying the principles of social and economic equality to the allocation as well as re-allocation of water rights.[426] This may imply a

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419 AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/ 28; Van der Walt 2004 *SAPR/PL* 687.

420 Mostert *et al The Principles of The Law of Property in South Africa* 288.

421 The relevant documents are: 1) *White Paper on Water Supply and Sanitation* of 1994; *White paper on National Water Policy for South Africa* of 1997; and *Strategic Framework for Water Services* (of 2003. See also the *NWPR*.

422 Gen Not 888 in GG 36798 of 30 August 2013.

423 Section 2 of the *NWPR*.

424 In terms s 2.1 any authorized water use, including existing lawful use which is not utilised for a period specified by the Minister, should be reallocated to the public trust management by the Minister as custodian of the nation's water resources in order to address social and economic equity.

425 In terms of s 2.2 there shall be no temporary or permanent trading between authorized water users and a holder of an entitlement to use water which is no longer utilised will be obligated to surrender such use to the public trust.

426 In terms of s 2.3 equity will be the primary consideration when deciding on the reallocation of water, and priority should be afforded to black women and men that include Africans, Coloureds and Indians who were citizens of South Africa and were disenfranchised prior to 1994 and accordingly had unfair constrained water access.

systematic deprivation of water use rights and should the revised water policy be implemented the use of water will be regarded as a privilege controlled by the state.[427] The potential impact of the implementation of the *NWPR* will bring about a further decline in private ownership of water rights. The actual impact of the policy and amendments to legislation in terms of the policy can, however, only be determined if it comes into operation.

4.20 Mineral and Petroleum Resources Development Act 28 of 2002[428]

Section 25 of the Constitution makes provision for land and related reform in order to redress the injustices of the past. This includes the reform of natural resources to ensure equitable access for all South Africans to the country's natural resources. Accordingly the introduction of the *MPRDA* is relevant for the discussion on legislation pertaining to resource reform as this Act reaffirms the government's commitment to reform in order to bring about equitable access to South Africa's mineral and petroleum resources.[429]

The *MPRDA* brought about considerable transformation with regards to the position of South African mineral law— it repealed the system of private mineral rights[430] and introduced a new order of state-controlled mineral and petroleum rights.[431] Accordingly the Minerals Act was repealed, as well as the common law, as far as the latter is not consistent with the *MPRDA*.[432] The most important part of the Act for this discussion is Section 3(1) which states that:

> Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof.

With this provision a new concept, namely the concept of public trusteeship, is introduced into the South African law. The idea of state custodianship can be found in various laws pertaining to natural resources and the environment such as the *NWA* and the *National*

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427 AfriBusiness date unknown http://afrisake.co.za/property-rights-reports/.

428 For a detailed analysis of the *MPRDA* see Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act* 28 of 2002.

429 Preamble of the *MPRDA*.

430 This system was regulated by the *Minerals Act* of 1991 which acknowledged mineral rights as independent rights to be dealt with in the private sector. Under this system ownership of mineral rights vested in the landowner.

431 Van der Vyver 2012 *De Jure* 125; Van den Berg 2009 *STELL LR* 139, 239; Van Niekerk and Mostert 2010 *STELL LR* 158; Pienaar and Mostert *Silberberg and Schoeman's: The Law of Property*.

432 Van Niekerk and Mostert 2012 *STELL LR* 158.

Environmental Management Act 107 of 1998. In terms of section 3 the applicable Minister has the sole prerogative and obligation to decide who may be granted the rights to prospect and mine minerals.[433] This regulating authority afforded to the Minister by the provisions of the Act limits landowners' property rights significantly as the discretion on who may be afforded prospecting and mining rights lies in the hands of one person. The *MPRDA* is silent about ownership of minerals and petroleum once it has been extracted, whether lawfully or not.[434] The Act states nothing contrary to the common law position and therefor it is assumed that the latter will prevail, vesting ownership of the minerals or petroleum upon extraction in the holders of prospecting rights, mining permits, mining rights, exploration rights or production rights.[435]

The MPRDA restricts the rights of landowners in that all the rights that landowners had with regard to unsevered minerals in their property, were transferred to the state. Accordingly the only way landowners' rights are protected against potential prospectors and miners are through the procedural regulations set out by the MPRDA. The fact that private ownership of mineral resources was abolished with the introduction of this Act is indicative of a decline in private property rights with regard to the natural resources of the country.

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433 Section 3(2)(a) of the *MPRDA*.

434 Mostert *et al The Principles of The Law of Property in South Africa* 273.

435 Mostert *et al The Principles of The Law of Property in South Africa* 273; Dale et al *South African Mineral and Petroleum Law* 122.

5. Conclusions and Recommendations

5.1 Concluding remarks

Statutory land and resource reform was introduced in the new democratic dispensation in South Africa in order to redress the injustices brought by apartheid during the largest part of the twentieth century. This process has, however, had a certain effect on existing property rights which was, and one can say, still is based on a hierarchical system of rights with ownership as the pinnacle right. The hierarchical system of property rights was introduced in South African law through Roman-Dutch law as well as the Pandectist movement later on.[436] According to this system ownership is at the top of a pyramid of rights and has an absolute character in that it is basically an unlimited right protecting the holder thereof.[437]

Unfortunately the tragic event of Apartheid in South Africa unnoticeably affected the existing property regime until it appeared to have developed into a racially skewed pattern of land holding in the country with the minority group of white people owning the majority of the land.[438] The commencement of a new political dispensation early in the nineties brought along significant debates between the newly elected ruling party and its opposition with regards to the question as to what must be done to reverse the injustices affected by Apartheid. In particular, this question raised a lot of uncertainty regarding property rights in South Africa.[439] The reason for this may be that the whole system of Apartheid was largely created and sustained by way of distributing and implementing property rights inappropriately. Finally an agreement was reached to include a property clause in the final Constitution. Although this clause does not provide a positive guarantee to property, it does ensure protection of a person's right to property to a certain extent. Along with providing some degree of protection, section 25 also obliges the government to develop legislation in order to ensure that land and resource reform takes place with the aim of redressing the wrong that was done under the Apartheid system.[440] In fulfilling

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436 See 2.1 above.
437 See 2.1 above.
438 See 2.2 above.
439 See 3.1 above.
440 See 3.2 above.

this obligation the government introduced the land reform programme under three main sub-programmes namely redistribution, restitution and tenure reform.[441] Under each of these sub-programmes various legislative Acts have been enacted to give effect to their respective goals. It is with regard to this legislation that the question arises as to what extent the implementation thereof is curbing the existing rights to property of people who – not in all cases but mostly – are not at the receiving end of the land and resource reform programme.

After examining the impact the identified legislation has had or may have on existing property rights it is submitted that although these laws do influence the character and role of existing property rights within the property regime currently prevailing in South Africa they do not pose a threat to the existence of these rights. It seems as if a ruckus has been made in South Africa in respect of recently developed legislation pertaining to land reform which includes the proposed *Expropriation Bill*, *Extension of Security of Tenure Amended Bill*, *Regulation of Land-holdings Bill*, *Preservation and Protection of Agricultural Land Bill*, *Property Valuation Act*, and *Infrastructure Development Act*.[442] After examining the named statutes it becomes clear why so many concerns have been raised. In theory many of these Bills and Acts have the aim of achieving the redistribution or security of tenure objectives of the land reform programme at the expense of property owners' rights to their property. Particular aspects that can be used as examples are the expropriation of property which becomes increasingly easier to implement and enforce,[443] as well as the compensation amount which is being steered away from the willing-buyer-willing-seller principle to a situation where the Valuer-General (appointed by the government) has the sole discretion to value property for the purposes of expropriation. It is important to keep in mind that although the potential impact of some of these laws can be detrimental to property rights, the effective impact thereof will only be determined by the interpretation applied and the willingness to enforce it. Therefore it is recommended that further research be done on the effect of these laws at a later stage

441 See 3.3 above.

442 The named legislation forms a significant part of the reason why I decided to embark on this study in the first place; See 4.6, 4.7, 4.14, 4.16 and 4.17 in this regard.

443 See 4.6, 4.14, 4.15 4.17 in this regard.

when the implementation thereof has had an actual impact on the rights of property owners.

With regards to the *Protection of Investment Act*, this Act does not in particular affect the existing property rights of South Africans, but rather of foreign property holders in South Africa. It was not implemented to directly give effect to the land reform programme, but instead to prevent existing *BIT's* from dettering land reform from happening.[444] The impact of this Act is not of great importance as it does not influence existing property rights of South African property holders and is not an actual land or resource reform law.

With the commencement of the new democratic era certain land reform measures were put into place immediately in order to turn around the property regime that brought about the skewed pattern of holding in South Africa. Legislation that was developed to address land and resource reform issues earlier in the newfound constitutional dispensation include the *Land Reform (Labour Tenants) Act*, *Transformation of Certain Rural Areas Act*, *Communal Property Association Act*, *Communal Land Rights Act*, *Prevention of Illegal Eviction of Unlawful Occupation of Land Act*, and the *Interim Protection of Informal Rights Act*.[445] These legislative measures have undeniably had an impact on existing property rights. In certain instances the effect has been positive, such as with the *Communal Property Associations Act* which enables groups of people to acquire and hold land in common with all the rights of private ownership.[446] This constitutes an upgrading of the rights of people living in communal areas. In other cases it limits landowners' rights to property, especially within the traditional view of ownership as an absolute right which may only be restricted in certain circumstances. An example of such a situation is the *Prevention of Illegal Eviction of Unlawful Occupation of Land Act* where property owners – even if they did comply with all the procedural requirements – are not granted an order to evict an unlawful occupier from their property on the grounds that the unlawful occupier may not have anywhere else to go. In terms of the common law concept of ownership landowners have the power to do with their thing as they please even if the occupier will be disadvantaged when evicted from the land. It is submitted that although

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[444] See 4.13 above.

[445] See 4.2, 4.4, 4.9, 4.10, 4.11 and 4.12 in this regard.

[446] See 4.9 above.

the role and character of the concept of ownership is being influenced by these land reform laws, the existence of private property rights is not threatened.

Legislation pertaining to resource reform has, in my view, had the most significant impact on private property rights in South Africa. The *National Water Act*, for instance, abolished the notion of ownership of water and replaced it with use rights.[447] In addition, the *Minerals and Petroleum Resources Development Act* abolished the concept of ownership of minerals which vested in landowners in terms of the *Minerals Act*, and introduced the notion of state custodianship of all the mineral and petroleum resources of the country for the benefit of all the people.[448] Hence, the development encapsulated in these Acts in respect of the ownership of the country's water and mineral resources, indicates a decline of private property with regard to natural resources.

The question underlying this study is whether statutory land and resource reform in South Africa impacts on private property rights, and if indeed, the extent to which this effect threatens the existence of these rights. The method used to examine the research question was to analyse the role and content of property rights during the twentieth century and the influence the Apartheid system had on these rights. This was followed by an investigation of the changed position of ownership and the right to property under the constitutional dispensation and in particular in terms of the property clause. The next part of the study focused on the laws pertaining to land or resource reform in South Africa respectively. This part formed the gist of the study as it explored the actual or potential impact of statutory land and resource reform on private property rights. The conclusion is made that although the strong character of ownership as it was perceived in terms of the common law and applied prior to the change in the constitutional dispensation has been influenced by statutory land reform, the existence of private property rights is not threatened by these laws. It is too early to do a comprehensive and accurate investigation on recently promulgated laws, or laws which are still in the form of Bills, as the impact thereof are yet to be seen in practice. It is further concluded that the largest impact on private property rights in South Africa, results from the development of statutory resource reform – the country's water as well as mineral and petroleum resources have been

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[447] See 4.19 above.

[448] See 4.20 above.

placed in the hands of the state as custodian thereof for the benefit of the people. This indicates a decline in private property rights with regard to the country's natural resources. Hence, the impact of statutory land reform up to date does not pose a threat to the existence of private property rights. Statutory resource reform, on the other hand, points toward a decline in the existence of these rights.

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